Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis

DG HEALTH AND CONSUMER PROTECTION

Analytical Report on the Green Paper on the Review of the Consumer Aquis submitted by the Consumer Policy Evaluation Consortium

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1 EXECUTIVE SUMMARY

1.1 Introduction

Following the presentation of the Green Paper on the Review of the Consumer Acquis COM (2006) 744 final of 8 February 2007, the European Commission launched a wide-ranging public debate aiming to gather the opinions of interested parties. In this Green Paper the Commission put forward ideas for debate regarding the strengthening of consumer protection across the European Union through harmonisation of existing legislations. This report is part of the 'Preparatory work for the Impact Assessment on the Review of the Consumer Acquis'.

The consultation launched by the Commission attracted a very high number of responses from a wide range of stakeholders (307), which signals the importance of the subject treated. The contributors can be broadly categorised in six different groups of stakeholders:

- academics;
- consumer groups (including ECCs, consumer representatives and associations);
- business sector (including businesses, business representatives and associations, chambers of commerce and industry);
- public authorities (EU Member States, EFTA/EEA members, EU bodies, regional and local authorities);
- legal practitioners; and
- others (including social partners and individuals).

The full list of contributions is given in the Annex 1 to this report.

Overall, the Green Paper has been welcomed positively and only a minority had a rather negative view on the changes suggested by the Commission. Of all stakeholder groups, the academics were the ones having the most negative view on the Review/Green Paper, followed by the business sector.

Stakeholders from all the Member States are represented in the contributions. With the exception of Poland, there is a fairly equal representation in terms of the population in the EU with the large Member States such as the UK, France, Germany and Italy having the highest share of contributions.

The business sector comprised the highest number of contributions (150). It was followed by the consumer groups (second highest number of contributions with 53 responses), public authorities (39) and academics (32), and finally less than 33 contributions for both legal practitioners and others. Furthermore, the business sector is represented in 15 of the 27 countries whereas consumer groups, which have in total fewer contributions than the business sector, are represented in 20 countries. All except two Member State government bodies' contributions are included in the analysis[1]. Additionally, one EFTA/EEA country submitted a

[1] No contribution was received from Denmark and the Netherlands. For two Member States, two different government departments submitted a response: UK (Government and Office for Fair Trading) and Germany (Federal Government, Justice department and Baden-Württemberg Ministry). However, when reference is made to

response.[2] Therefore the total number of contributions from the EU Member States and EFTA/EEA members combined is 26. In terms of EU bodies, the contributions of the European Parliament and the Economic and Social Committee are also included in the analysis.

It is important to stress that although not all of the comments made by specific representatives could be cited in this summary document, all contributions sent to the Commission have been read and analysed and will be taken into consideration when preparing a legislative proposal.

1.2 General overview of the contributors' approach to the different options proposed in the Green Paper

It is important to bear in mind that the business sector is represented by half of the total contributions received and that this stakeholder group is therefore over represented compared to the other stakeholder groups.

From the analysis of the contributions it is clear that some questions have raised an obvious, overall consensus. These are: the general legislative approach (A.1), the scope of the horizontal instrument (A.2), the definition of consumer and professional (B.1), the list of unfair terms (D.2), the scope of the unfairness test (D.3), the cooling-off period (F.1), the modalities for withdrawal (F.2), the passing of the risk (I.2) and the conformity of second hands goods (J.3).

Other questions however raised more controversy, such as for example: the general right to damages (G.2), the order in which remedies may be invoked (K.1) and the transferability of the commercial guarantee (M.2). The general analysis furthermore shows that some questions have almost equal percentages of contributors across all possible options such as for example the costs to be imposed on the consumer in the event of withdrawal (F.3).

Although the above statistical conclusions give a relevant and adequate first general overview they also contain some caveats. It is important to note that even though some questions seem to have a clear majority for a specific option, the further analysis of contributions by type of stakeholder reveals that opinions on the matter were indeed quite diverse. An example of such a question is G.2 on the general right to damages. Furthermore, even though the contributors choose a particular option, it was sometimes the case that they put some conditions to that specific option.

Besides the general overview of most favoured option per Green Paper question, it is also important to look at whether the majority of contributors favour EU action or rather status quo. For 19 of the 23 questions the majority of contributors are in favour of EU action rather than maintaining the current situation. Even though the previously mentioned figures show that there is not always consensus on which EU action to pursue, there is a strong message that the current Consumer Acquis has to change and that EU action is favoured. For two issues however, contributors rather maintain the status quo than taking EU action. These are: scope of the application of EU rules on unfair terms (D1) and scope of the unfairness test (D3). On the other hand, for two issues, contributors are evenly split between favouring EU action and maintaining the status quo, for example for contractual remedies available to consumers and burden of proof that defects existed already at the time of delivery.

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the Member State government responses only the UK Government and the German Federal Government is referred to.

[2] Norway.

1.3 Key Issues raised by contributors

1.3.1 Common issues raised across stakeholder groups

Limitation of the review to eight directives: A high number of contributors did not understand why the content of the review was restricted to the eight directives mentioned in the Green Paper. In their opinion, excluding other important consumer directives from the scope of the review would have negative implications both for consumers and for businesses.

National issues with regard to consumer protection legislation: Several public authorities indicated that, although there are indeed a number of inconsistencies and gaps in EC consumer protection legislation, their countries have already dealt with these issues at national legislation level.

The issue of small businesses: The lack of uniformity in contract rules across the EU is a serious constraint on cross-border trading for small businesses, especially given that they do not have easy access to detailed advice on international transactions and are therefore stepping into the unknown.

Country of origin versus country of destination principle – Rome I: The majority of the contributors mentioned the potential inconsistencies between the Review of the Consumer Acquis and the upcoming implementation of Rome I.

Timing of the Review of the Consumer Acquis: A considerable number of contributors made it clear that they find it to premature to discuss the options proposed, as they first would like to see the results of the work being undertaken in the Common Frame of Reference exercise.

Level of consumer protection: The business sector considered that due caution should be taken when aiming at a too high level of consumer protection in some of the options for it may incur extra costs that would then be reflected in the final price paid by the consumer.

Legislative changes versus other actions needed: Quite a few contributors stressed that the Commission should underpin its suggested legislative changes with more evidence in terms of problems currently encountered in the consumer protection legislation and an assessment of the potential impact of the legislative changes suggested.

Concept of "consumer": Various contributors, especially within the group of academics, argued that the Commission might have portrayed consumers as "weak" and in need of protection in all circumstances, whereas they believed that consumers must be seen as independent, opinionated and able to make the right decisions.

1.3.2 Other issues discussed by specific stakeholder groups

Even though the majority of businesses supported a mixed approach to the review (75%), some stakeholders in the business sector pointed out that the horizontal nature of the review was not justified, for example difficulties encountered in a given sector or industry should not legitimise a complete and transversal redirection of the Acquis which could impact on sectors where no such problems exist.

Consumer groups:

- The introduction of new legislation is not what consumers expect in order to increase their protection. The correct implementation and reinforcement of the existing legislation and tools would be a more sensible first step to take in that direction.

- There has been a wide call, throughout all answers, for more effective systems for collective redress.
- A number of respondents have called for the specific protection of children under 12 years. Publicity aimed at this group should be banned.
- The need for more information is a common concern of all consumer groups. Consumers should have the right to receive all the information they need to make a conscious, well-informed choice.

Legal practitioners and public authorities:

- Both stakeholder groups have argued for more alternative dispute resolution ("ADR") mechanisms and for better systems for collective redress.
- Legal practitioners pointed out that a distinction between B2C and B2B transactions may not always be appropriate.
- Legal practitioners regretted that the Green paper did not discuss after-sales services, as they considered it a very important factor in increasing consumer confidence in cross-border trading.
- Public authorities argued for more consumer education and dissemination of information on consumers' rights.
- Legal practitioners criticised the rather restrictive formulation of the questions and the limited options proposed.

Academics:

- Most contributors in this group called for more effective and available/affordable methods of redress.
- The encroachment on freedom of contract has also been mentioned.

1.3.3 *Factors of a practical nature being an obstacle to cross-border trade and consumption*

One of the main common issues expressed by the contributors was that factors such as language barriers, cultural differences, distance from the seller, personal preferences and concerns about the delivery of goods are the most important factors preventing European consumers from shopping cross-border.

It was further argued that, on the business side, many companies do not engage in cross-border trade because of the high transportation and delivery costs, market research expenses and their competitive position in other countries.

The current proposals of the Commission have raised two main issues:

- The additional burden that some options would create for businesses for the sake of increased consumer protection, such as, for example, the requirement to provide more information in the contract; and
- The Commission's intention to develop additional legislation which might overlap with existing national and community regulations, while it would be more suitable to first, concentrate on improving the enforcement of the existing legislative measures.

Two main alternative proposals have emerged from the responses:

- The development of more Alternative Dispute Resolution (ADR); and

- A more effective implementation and enforcement at the national level of existing rules and regulations, as well as the strengthening of market surveillance.

1.3.4 Wider consumer problems being an obstacle to cross-border trade and consumption

Contributors were overall concerned about the lack of redress possibilities for consumers, as well as the difficulty of accessing information on redress. A number of suggestions have been made by the contributors, these include:

- improving the information provided to consumers about their rights as well as improving the availability of such information;
- increasing investments in consumer advocacy, "consumer policy R&D", academic infrastructure, education in law and economics, professional associations and consumer groups who can contribute to disseminate consumer but also competition principles;
- reinforcement of existing initiatives such as the Consumer Protection Co-operation Regulation will hopefully lead to effective cooperation;
- Collective redress have also been mentioned as a potential form of redress for people in areas such as package travel;
- a joint consultation of the consumers' representatives and professionals' representatives would allow for a better understanding of their respective interests and facilitate the search for balanced solutions; and
- a reinforced co-operation between Member States on enforcement of consumer protection rules.

1.4 Detailed analysis of the contributions per Green Paper question

General legislative approach

A.1 In your opinion, which is the best approach to the review of the consumer legislation?

With a majority of 75% it is obvious that the mixed approach was the most favoured option and this across the different stakeholder groups. Practically none of the contributors preferred the status quo. However, it might be worth noting that there were still 20% of those belonging to the business sector and 17% of the legal practitioners that favoured the vertical approach. The large majority of Member States (23) supported the mixed approach.

In its Resolution on the Green Paper[3], the EP highlighted that this mixed horizontal instrument should be regularly reviewed and its effectiveness and impact evaluated with a view to a revision if necessary. The EP expressed its preference for the adoption of a mixed or combined approach, i.e. a horizontal instrument with the primary goal of ensuring the coherence of the existing legislation and enabling loopholes to be closed by grouping together, in consistent law, cross-cutting issues common to all the directives; it considers that specific questions which are outside the scope of the horizontal instrument should continue to be considered separately in the sectoral directives. They are opposed to the review of the Consumer Acquis being used to extend the legislative content of the existing sectoral directives or to introduce additional directives.

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

Scope of a horizontal instrument

A.2 What should be the scope of a possible horizontal instrument?

The majority of the contributors (81%) across all types of stakeholders seemed to be in favour of a horizontal instrument that would apply to all contracts whether the transactions are of a domestic or of a cross-border nature (option 1).

The majority of Member States (20) were in favour of option 1. One Member State supported option 3 (apply to distance contracts only whether they are concluded cross-border or domestically) and four Member States chose ‘other option’.

Degree of harmonisation

A.3 What should be the level of harmonisation of the revised directives/the new instrument?

Although overall, the largest group of contributors favoured targeted full harmonisation (33%), it is important to note that full harmonisation was favoured by 29% of the contributors and minimum harmonisation by 24%. Therefore, the majority (i.e. 62%) favoured full or targeted full harmonisation. Minimum harmonisation, targeted full harmonisation and full harmonisation are by far the three favourite options with only 13% of contributors who suggested alternative options. The 28th regime was chosen by only one contributor.

While the largest group within the business sector indicated preferring full harmonisation (42%) (almost 80% of the business sector favoured full or targeted full harmonisation), the largest group within the consumer groups favoured the minimum harmonisation approach (31%). For both consumer groups and the business sector the second largest group of contributors favoured targeted full harmonisation (29% and 37% respectively). The group of academics, legal practitioners and public authorities favoured minimum harmonisation. However, an equally large proportion of contributors within the group of legal practitioners and public authorities respectively favoured targeted full harmonisation (i.e. 39%) and other options (i.e. 26%). Five out of seven contributors of the “others” group favoured the minimum harmonisation approach.

Regarding Member States’ contributions, targeted full harmonisation was the option supported by the largest group (12). Five Member States supported option 3 “full harmonisation”, whereas four supported option 1 “minimum harmonisation”. ”. Four Member States supported ‘other option’.

According to the European Economic and Social Committee (EESC) harmonisation of consumer legislation across the EU must take, as a guiding principle, the adoption of the best and highest level of consumer protection to be found in the Member States. Any "horizontal instrument" should be based on the highest standards while necessary "vertical integration" would concentrate on clarifying technical issues.

The EP suggested that the horizontal instrument with cross-cutting policy areas, which should help to increase the coherence of terminology and remove loopholes and inconsistencies, should start from the principle of full targeted harmonisation;

The EP further suggested that sectoral tools that are being reviewed should be based on the principle of minimum harmonisation, combined with the principle of mutual recognition where

the coordinated area is concerned. However, this does not exclude full targeted harmonisation where this proves necessary in the interests of consumers and professionals

The EP emphasised that harmonisation must not lead to a decline in the level of consumer protection as achieved under certain national laws, but should lead to a comparable level of consumer protection in all Member States.

Harmonisation variant

It is important to look at the combinations of the degree of harmonisation and harmonisation variant chosen (i.e. mutual recognition or country of origin). With regard to those who favoured minimum harmonisation (24% of total contributions), 35% opted for minimum harmonisation with no variant attached to it. This was closely followed by the group choosing minimum harmonisation and “other option” (30%). A high proportion of the latter explained being in favour of the country of destination principle rather than the country of origin and thus in accordance with Rome I. Minimum harmonisation and mutual recognition or country of origin principle (option 2 in the Green Paper) was favoured by 13%, minimum harmonisation and mutual recognition by 12% and minimum harmonisation and country of origin principle by 10%.

Regarding Member States’ contributions, five Member States supported mutual recognition (combined with targeted full harmonisation). Only one Member State opted for the country of origin principle. The majority opted for “other option” (13) or no variant (6). The most frequently cited other option was the country of destination principle.

The EP pointed out that as the law stands at present as regards the non-coordinated areas, the applicable law is determined by the rules of international private law, in particular the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (Rome I); in this regard it will be important, during the current discussions, to avoid divergences between this Convention and specific Community legal acts.

Horizontal issues

Definition of “consumer” and “professional”

B.1 How should the notion of consumer and professional be defined?

Alignment to existing definitions in the Acquis (option 1) is clearly the favourite option for action (63%) across stakeholder groups with the exception of academics which chose a widening of the definitions (option 2) (63%). It is worth noting however that between 9% and 25% of most stakeholders’ responses have opted for other options.

The majority of Member States (17) supported option 1. Only three Member States and one EFTA/EEA member opted for option 2. Five Member States opted for another option.

Consumer acting through an intermediary

B.2 Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?

Maintaining the status quo (option 1) was preferred by 45%, but this group is closely followed by the group who chose “the choice of including situations where one party acts through a

professional intermediary” (option 2) (43%) and thus represents a significant percentage nonetheless.

It may be worth noting that for this question there is a stark contrast between the business sector – within which 68% of contributors opted for a status quo – and the consumer groups – within which 74% of contributors chose “the choice of including situations where one party acts through a professional intermediary”.

A large number of Member States (13) supported Option 1. Seven Member States opted for Option 2. Five Member States and one EFTA/EEA member opted for another option.

The concept of good faith and fair dealing in the Consumer Acquis

C. Should the horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?

The status quo (option 2) was preferred to the other options with 38%, but was closely followed by the option “general clause” (option 3) for which 32% of the contributors were in favour. Moreover, it is worth noting that there seems to be a significant split between certain stakeholder groups such as legal practitioners, public authorities and “others” – which had the same percentages, respectively 29%, 39% and 43%, for both the status quo and the general clause. Academics also had a significant proportion opting for “other options”. Finally, it is worth noting that around half of the contributors choose either option 1 or 3, and thus indicating to be in favour of a general clause.

The Member States are divided into two main groups, those supporting option 2 (9 Member States and one EFTA/EEA member) and others supporting Option 3 (9). Only four Member States supported option 1 (horizontal instrument would provide that professionals are expected to act in good faith). Three Member States opted for another option.

The scope of application of the EU rules on unfair terms

D.1 To what extent should the discipline of unfair contract terms also cover individually negotiated terms?

The status quo has a small majority of preferences with 51% only followed by “expansion of scope” (option 1) with 40%. It is also important to note that consumer groups and the business sector disagreed on the issue: while consumer groups opted for an expansion of the scope with 85%, the business sector preferred the status quo (option 3) with the same majority.

Regarding Member States contributions, the majority supported option 1 (14). Eight countries (including one EFTA/EEA member) supported the status quo, whereas only four opted for option 2 (list of terms annexed to be made applicable to individually negotiated terms).

List of unfair terms

D.2 What should be the status of any list of unfair contract terms to be included in a horizontal instrument?

49% of the contributors preferred a combination of options 2 and 3 (some terms would be banned and a rebuttable presumption of unfairness would apply to others). Only the

contributors from the business sector seemed to be split between the status quo (option 1) (44%), the black list (option 3) (28%) and the combination of 2 and 3 (19%).

A clear majority of Member States supported option 4 (16). Only three Member States and one EFTA/EEA member supported option 1 and three Member States opted for option 3. None of the Member States opted for option 2 (grey list). Three Member States chose for another option.

Scope of the unfairness test

D.3 Should the scope of the unfairness test of the directive on unfair terms be extended?

The status quo (option 2) was clearly the preferred option with 68%. The business sector and consumer groups have once more opposing views on the matter with respectively 97% for the status quo and 60% for the extension of the scope (option 1). Furthermore, it might be worth noting that the group “others” is evenly split (50%) between maintaining the status quo and extension of the scope.

The contributions of Member States were almost evenly split between being in favour of the status quo (12) and supporting option 1 (11). The EFTA/EEA member also favoured option 1 - extension of the unfairness test. Two Member States favoured another option.

Information requirements

E What contractual effects should be given to the failure to comply with information requirements in the consumer acquis?

“Different remedies for breaching different groups of information requirements” (option 2) was the preferred option for 39% of the contributors. The status quo (option 3) was the second preferred option for 30%. Consumer groups, academics and public authorities seemed to prefer option 2 whereas only a minority of contributors from the business sector and legal practitioners chose this option – with most of the contributors opting for the status quo for the business sector (52%) and the extension of the cooling-off period (option 1) for the legal practitioners (38%). It might be worth noting that the “other” category was evenly split between the three options.

The majority of Member States also supported option 2 (17). Only five countries opted for the status quo and only one country opted for option 1. Three Member States opted for another option.

The Commission requested to also analyse if the contributors indicated in their answer whether they were in favour or against a common core of pre-contractual information. Only 12% of contributors made reference to this issue. Of these the overall majority was in favour.

Right of withdrawal

The cooling-off periods

F.1 Should the length of the cooling-off periods be harmonised across the consumer acquis?

One cooling-off period for all cases is the preferred option for the majority of respondents (57%). All stakeholder groups have 44% or more of their respondents choosing this option. It may be worth noting that 22% of contributors in the business sector opted for the status quo.

The majority of Member States (18) as well as one EFTA/EEA member were in favour of option 1. Four Member States supported option 2 and only one Member State supported option 3. Two Member States opted for another option.

The modalities of exercising the right of withdrawal

<u>F.2 How should the right of withdrawal be exercised?</u>

One uniform procedure (option 2) has the clear majority with 71% leaving no doubt that this is the preferred option. Consumer groups however, have also chosen option 3 “withdraw from the contract by any means” as another possible alternative with a percentage of 22%. Most of those who chose option 1 (status quo) have gone as far as suggesting that a standard form given at the moment of the purchase should be used to exercise the right of withdrawal.

The majority of Member States as well as an EFTA/EEA member also supported option 2 (15). Four Member States were in favour of option 3. Only two Member States opted for the status quo whereas five Member States opted for another option.

The contractual effects of withdrawal

<u>F.3 Which costs should be imposed on consumers in the event of withdrawal?</u>

Both the option “Status quo” (option 3) and the option “consumers bearing no costs” (option 1) were the preferred option (29%). It has to be stated though that options 1 and 2 (consumers would face same costs irrespective of the type of contract) combined, which relate to common rules on costs, is favoured by a little more than 50% of the contributors.

This question seemed to have divided the stakeholder groups amongst them rather than between them, thus making it very difficult to identify one answer as the most viable option. Except for the consumer groups, all other stakeholders seemed to have their opinions divided between the different options. “Other options” has been opted by academics, the business sector and “others” with a 20% to 29% share of their contributors, thus justifying the mixed feelings amongst stakeholders caused by this question. Additionally, it might be worth noting that academics seemed to be equally split between all options.

Regarding Member States’ and EFTA/EEA member’s contributions, option 1 was chosen by the largest group of Member States (10). However six countries supported Option 3 and six supported option 2. Four countries opted for another option.

General contractual remedies

<u>G.1 Should the horizontal instrument provide for general contractual remedies available to consumers?</u>

The status quo (option 1) was the favoured option with 50% of the contributions followed closely by “general contractual remedies” (option 2) with 42% of the contributions.

The business sector and consumer groups once more had contrasting views: the former opted for “status quo” (81%) and the latter preferred “general contractual remedies” (78%). Legal

practitioners (53%) and public authorities (48%), although demonstrating a choice for the "general contractual remedies", also had a relatively significant number of respondents that opted for a status quo – respectively 33% and 39%.

Regarding Member States' and EFTA/EEA member's contributions, they were almost equally split between option 1 and option 2 (receiving respectively the support of 10 countries and 12 Member States). Four Member States favoured another option.

General rights to damage

G.2 Should the horizontal instrument grant consumers a general right to damages for breach of contract?

The preferred option was "status quo" (option 1) (46%) with the second preferred option "general right to damages covering both economic damages and moral losses" (option 4) only being chosen by 23% of the contributors.

The majority of the business sector opted for maintaining the status quo with 73% of contributions in favour of this option. Academics and consumer groups both opted for the option "general right to damages covering both economic damages and moral losses" with respectively 56% and 55% of responses in favour. However, it is worth noting that both groups also opted for "general right to damages leaving the choice of damages to be used to Member States" (option3) with respectively 22% and 21%. Legal practitioners and the group of 'others' did not seem to have a clear preference for any of the options. Therefore, there does not seem to be a clear agreement among the stakeholder groups on one specific option except for the business sector.

Member States' and EFTA/EEA member's contributions were divided between the different options, with 10 countries supporting the status quo, six Member States supporting option 3 and three supporting option 4. Only two Member States supported option 2 whereas five were in favour of another option.

Types of contract to be covered

H.1 Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?

A combination of options 2 (extension to additional types of contracts under which goods are supplied to consumers) and 3 (extension to additional types of contracts under which digital content services are provided to consumers) was preferred by half of the contributors (50%).

For a large group of the business sector this was however not the case: the majority opted for the status quo (option 1).

The question on covering additional types of contracts under the consumer sales rules has raised a lot of debate. On the one hand, consumer groups, academics, legal practitioners, public authorities and "others" have all chosen the following option: the types of contracts covered by the consumer sales rules should also include contracts under which goods are supplied to consumers, as well as contracts under which digital content services are provided to consumers (option 4).

The business sector however, which comprises a significant number of digital service providers, has criticised the inclusion of the digital content services with 59% choosing the

status quo versus 20% for option 4 and 11% for inclusion of only goods supplied to the consumer (option 3).

Member States' and EFTA/EEA member's contributions revealed a large support for option 4 (15 countries). Six countries supported option 3. Only two Member States supported the status quo whereas Option 2 was only supported by one Member State. Two Member States supported another option.

Second-hand goods sold at public auctions

H.2 Should the rules on consumer sales apply to second-hand goods sold at public auctions?

The application of the rules of consumer sales to second-hand goods sold at public auctions (option 1) was the preferred answer with 47%. However it is important to note that the choice of not extending to second-hand goods (option 2) was favoured by 44% of the contributors. It is therefore worth to have a closer look at the answers.

Favourable answers to this question are split almost evenly: three stakeholder groups – academics, consumer groups and public authorities – were in favour of applying the same rules to second-hand goods sold at public auctions with percentages ranging from 54% to 69%; two stakeholder groups – business sector and legal practitioners – have opted for the option "no inclusion of the second-hands sold at public auctions" with respectively 61% and 53%. While this choice reflects a majority of academics, consumer groups and business sector, other stakeholders are more divided: legal practitioners, public authorities and "others" chose option 1 with percentages ranging from 40% to 57% and option 2 with percentages ranging from 34% to 53%. Once more consumer groups (59%) and business sector (62%) were having contrasting views.

Member States' and EFTA/EEA member's contributions revealed that the largest group supported option 1 (14). However, ten Member States opted for option 2 whereas two Member States supported another option.

General obligations of a seller - delivery and conformity of goods

I.1 How should 'delivery' be defined?

The definition of delivery as material delivery of goods with parties that can agree (option 3) was the preferred option with 27%, but this was closely followed by the option "material delivery of good" (option 1) with 25% of contributions. Except for the consumer groups (51%) who opted for "materially delivery of goods" with a majority, all other stakeholders seemed to have quite diverse views on the matter. Consumer groups and public authorities opted for the "material delivery of goods" with respectively 51% and 35%, while the business sector and "others" chose the status quo (option 4) with respectively 32% and 50%. Academics were split evenly between "the material delivery of goods" and "parties can agree" while the legal practitioners showed a clear preference for "parties can agree". This indicates that there was not really a preferred option in this case. However, even though there is no clear preferred option, almost 70% are in favour of adopting EU rules on the definition of delivery, i.e. options 1 to 3.

Regarding Member States' and EFTA/EEA member's contributions, option 1 received the support of the largest group (10 Member States). Six countries opted for the status quo and four Member States supported option 3. Only one Member State opted for option 2 whereas five Member States opted for another option.

The passing of risk in consumer sales

I.2 How should the passing of the risk in consumer sales be regulated?

The passing of the risk regulated at community level (option 1) was the most favoured option with 65%. Percentages for this option ranged from 51% to 100% (for the academics). The business sector mostly opted for the regulation at community level with 51%; however, 43% of contributors within the business sector chose for maintenance of the status quo (option 2), which indicates that there is not a clear consensus among this group.

The majority of Member States (16) supported option 1. Only seven countries opted for the status quo. Three Member States supported another option.

Conformity of goods

Extension of time limits

J.1 Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?

The extension of the time limits (option 2) was the most favoured option with 55%. There was a significant opposition between consumer groups and academics on the one hand and business sector on the other hand. While the former two opted for an extension of the time limits with respectively 81% and 83%, the latter chose to maintain the status quo (option 1) with 72%. Except for the business sector, all other stakeholders opted for an extension with percentages ranging from 73% to 83%, and there was no major split among groups since they all had a majority that had opted for the same option.

Regarding Member States' and EFTA/EEA member's contributions, a large majority (19) supported option 2. Only four countries supported the status quo. Three Member States supported another option.

Recurring defects

J.2 Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?

The extension of the guarantee in case of recurring defects (option 2) was the preferred option with 57%. It might be worth noting that the group choosing the option to maintain the status quo (option 1) closely followed with 37%.

Once more, there is a major contrast between consumer groups – which chose for the extension of the guarantee (93%) – and the business sector – which opted for maintaining the status quo (77%). The percentages for the other options for each of the two stakeholders being very low, it is clear that the two strongly disagreed on the matter. All other stakeholders opted for the extension of the guarantee with a majority within their group and percentages ranging from 60% to 93%.

A majority of Member States (19) opted for an extension of the guarantee. Only four countries supported the status quo whereas three Member States supported another option.

Second-hand goods

J.3 Should specific rules exist for second-hand goods?

"Specific rules for the conformity of second-hand goods" (option 2) is clearly the preferred option with 62% of the contributors who opted for this option. Academics seemed to be divided between both options given by the Green Paper since 44% of the groups' contributors opted for option 1 (no derogation for second hand goods) and 44% opted for option 2. It is also worth noting that while consumer groups have clearly chosen "specific rules to apply" with 56%, there are nevertheless 37% of the contributors that chose "no derogation". While the majority of the business sector have opted for option "specific rules" (64%), there is also a relatively high number that opted for "other options" (20%), therefore confirming that this issue has most likely raised relevant concerns.

A majority of Member States (18) supported option 2. Only three Member States and one EFTA/EEA member opted for option 1. Four Member States opted for another option.

Burden of proof

J.4 Who should bear the burden to prove that the defects existed already at the time of delivery?

The status quo (option 1) was the most favoured option with 50%, but it is important to note that the burden of proof being put on the professional (option 2) was favoured by 42% of the contributors. This might call for a further analysis of the answers given to this question. This question has also raised a lot of contrast between business sector and consumer groups. Consumer groups, and to a certain extent academics, have mostly opted for the professional to bear the burden of proof – option 2 (84%) – while the business sector opted for a status quo – option 1 (82%). All stakeholders, except for the business sector and legal practitioners, opted

for the professional to bear the burden of proof, while the latter opted for a status quo to be maintained. Public authorities seemed to be almost evenly divided between the two options – 43% for option 1 versus 48% for option 2 – thus revealing a difficulty in choosing one preferred option.

Member States' and EFTA/EEA member's contributions reveal a slightly larger number of countries in favour of option 2 (13), with an almost equal number supporting option 1 (11). Two Member States opted for another option.

Remedies

The order in which remedies should be invoked

K.1 Should the consumer be free to choose any of the available remedies?

The status quo (option 1) for the order for remedies to be invoked was the preferred option (49%). The business sector and consumer groups had once more contrasting views: while the former opted for maintaining the status quo with 83%, the latter opted for "choice of available remedies" (option 2) with 61%. The fact that only 11% of consumer groups opted for status quo and 1% of the business sector opted for "choice of available remedies" shows quite clearly that the two groups strongly disagreed on the matter. It might be worth noting that legal practitioners, public authorities and "others" seem to be divided in their choice with percentages for option 1 ranging from 40% to 43% and percentages for option 2 ranging from 40% to 57% thus almost marking an even division between both options across stakeholders.

Member States' and EFTA/EEA member's contributions were almost equally divided between options 1 and 2 (10 Member States and one EFTA/EEA member and 10 Member States respectively). Two Member States supported option 3. Three Member States favoured for another option.

Notification of lack of conformity

K.2 Should consumers have to notify the seller of the lack of conformity?

Overall, "the duty to notify the lack of conformity" (option 1) was the favoured option (56%). Consumer groups and the business sector had contrasting views: the former opted for "Elimination of notification within a certain period" (option 3) with 56% and the latter for "duty to notify" with 82%. The contrast however was not as significant as in other questions since there were 29% of consumer associations which opted for the option "duty to notify". Only academics and consumer groups had a majority choosing the elimination of notification within a certain period.

Regarding Member States' and EFTA/EEA member's contributions, the duty to notify was the option favoured by the largest group (12 Member States). Eight Member States supported option 3 and only one Member State supported option 2. Four Member States and one EFTA/EEA member favoured another option.

Direct producers' liability for non-conformity

L. Should the horizontal instrument introduce direct liability of producers for non-conformity?

Introduction of direct liability (option 2) was the preferred option for the majority of the contributors (51%), albeit closely followed by the status quo (option 1) (41%). Consumer groups and the business sector had contrasting views: the former opted for the introduction of direct liability with 91% and the latter opted for maintaining the status quo with 66%. It is worth noting however that public authorities and "others" seemed to have diverging opinions on the matter, public authorities opting for maintaining the status quo with 40% and "others" being evenly divided (50%) between the two.

The majority of Member States (13) supported direct liability. Eight Member States plus one EFTA/EEA member supported the status quo. Four Member States supported another option.

Consumer goods guarantees (commercial guarantees)

Content of the commercial guarantee

M.1 Should a horizontal instrument provide for a default content of a commercial guarantee?

Maintaining the status quo (option1) was the favoured option (47%), but this was very closely followed by the option "default rules" (option 2) which was chosen by 46% of the contributors.

Consumer groups and the business sector had contrasting views on this issue: while the former preferred the introduction of default rules with 80%, the latter opted for maintaining the status quo with 85%. It might be worth noting that legal practitioners (36% in favour of maintaining the status quo and 50% in favour of introducing default rules) and the other groups (with an even division of 50% for the two options) did not have a clear preference for one of the two options.

Regarding Member States' and EFTA/EEA member's contributions, the majority of the Member States (15) as well as one EFTA/EEA member supported option 2, whereas eight Member States supported the status quo. Two Member States supported another option.

The transferability of the commercial guarantee

M.2 Should a horizontal instrument regulate the transferability of the commercial guarantee?

The automatic transfer of the commercial guarantee (option 2) was the preferred option for 43% of the contributors. Consumer groups and the business sector had contrasting views on this issue: the former opted for the automatic transfer of the commercial guarantee (82%) and the latter preferred to maintain the status quo (option 1) (62%).

As for Member States' and EFTA/EEA member's contributions, twelve Member States supported option 2, four Member States and one EFTA/EEA member supported the status quo and five opted for option 3. Three Member States favoured another option.

Commercial guarantees for specific parts

M.3 Should the horizontal instrument regulate commercial guarantees limited to a specific part?

The option "Information obligation and a guarantee covering the entire contract unless specified otherwise" (option 3) was the preferred option for 44% of the contributors. Nevertheless this percentage of contributors is closely followed by those who chose to maintain the status quo (option 1) (37%).

Consumer groups and the business sector had contrasting views: the former opted for "Information obligation and a guarantee covering the entire contract unless specified otherwise" (72%) and the latter opted for maintaining the status quo (68%).

The majority of Member States (13) as well as one EFTA/EEA member supported option 3. Five Member States supported the status quo and four opted for option 2. Three Member States supported another option.

2 INTRODUCTION

2.1 Introduction

This Report is part of the 'Preparatory work for the impact assessment on the Review of the Consumer Acquis'. The work is undertaken by the Consumer Policy Evaluation Consortium (CPEC), with one of the Consortium partners, GHK, leading the assignment on behalf of DG Health and Consumer Protection (DG SANCO).

This report presents an analysis of the contributions to the public consultation, launched by the European Commission with the Green Paper on the Review of the Consumer Acquis COM (2006) 744 final of 8 February 2007. To date (6 September 2007), 307 contributions to the Green Paper have been received, summarised and analysed[4].

The consultation launched by the Commission attracted a very high number of responses from a wide range of stakeholders, which signals the importance of the topic. The contributors can be broadly categorised in six different groups of stakeholders:

- academics;
- consumer groups (including ECCs, consumer representatives and associations);
- business sector (including businesses, business representatives and associations, chambers of commerce and industry);
- public authorities (EU Member States, EFTA/EEA members, EU bodies[5], regional and local authorities);
- legal practitioners; and
- others (including social partners and individuals)

The full list of contributions is given in the Annex 1 to this report.

This Analysis Report follows the structure of the Green Paper. For this reason, the contributions are summarised under the following headings:

1. General legislative approach
2. Scope of a horizontal instrument
3. Degree of harmonisation
4. Horizontal issues
5. Specific rules applicable to Consumer Sales

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[4] In total 311 responses have been received by the Commission of which 4 responses were not valid.

[5] Two EU bodies are represented: the European Parliament and the Economic and Social Committee.

6. Other issues

It is important to note that the contributions were of variable quality and the pertinence of the responses to the questions asked in the Commission's public consultation document was mixed.

There was also a high variety in terms of length and content of the contributions: whereas some of the contributions followed exactly the structure of the Green Paper and only indicated which option was preferred, other contributors explained in length why a certain option was chosen. Some did not follow the Green Paper structure at all. In addition, a number of contributors have not answered all questions, reflecting most likely their relative interest in particular questions. Overall, 52 responses contained more than 20 pages of text (with some responses counting more than 100 pages), 93 responses were of a medium length counting between 10 and 20 pages and 162 responses can be categorised as short, counting less than 10 pages.

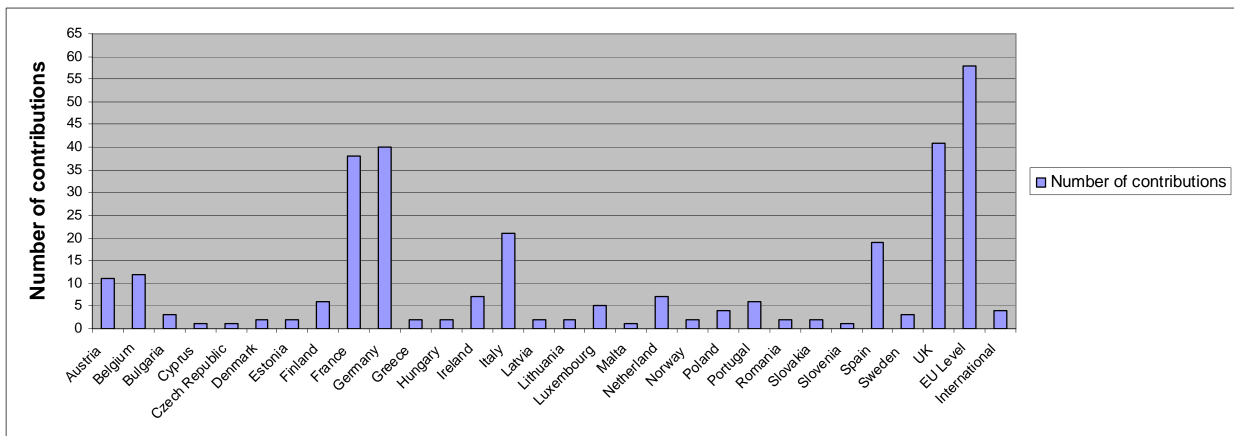
With regard to the languages in which the contributions were submitted, 88 non-English contributions were summarised and recorded in English by GHK, whereas 62 English translations were provided to GHK by the Commission translation services.

2.2 Member States' and stakeholders' representation in the contributions

It is important to present the total number of contributions received per country and per stakeholder group in order to ensure that the outcomes of the analysis are being interpreted accordingly, taking into account how far each country and/or stakeholder is sufficiently represented.

2.2.1 Member States' representation

Graph 2.1: Number of contributions per country



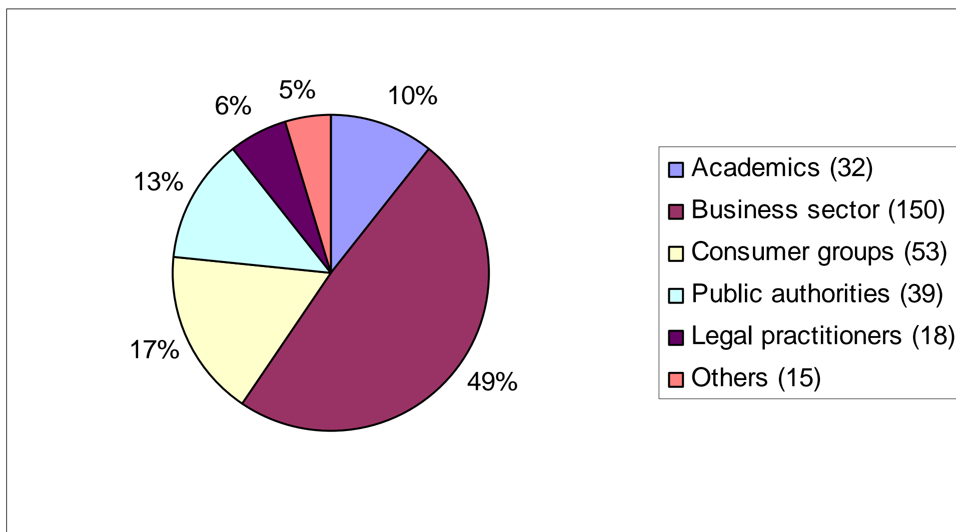
All Member States are represented in the contributions. With the exception of Poland, there is a fairly equal representation in terms of the population in the EU with the large Member States such as the UK, France, Germany and Italy having the highest share of contributions.

There was high variety in the number of responses per country: from 58 responses at the EU level[6], closely followed by the UK, Germany and France at national level, to only 1 response from countries such as Cyprus, the Czech Republic, Slovenia and Estonia. The New Member States have overall submitted fewer contributions than the old Member States.

Organisations and businesses covering countries outside the EU have also contributed to this public consultation such as Norway (EFTA/EEA member).

2.2.2 Stakeholders' representation

Graph 2.2: Number of contributions per stakeholder group and stakeholder percentage of total contributions



As shown in the above graph, almost half of the contributions came from the business sector whereas the other half represented all the remaining stakeholder groups together: consumer groups (17%), public authorities (13%), academics (10%) and legal practitioners (6%). The group "Others" represents 5% of the total number of contributions and consisted mainly of individual responses[7].

The stakeholder groups, represented by contributions for each country, are presented in Graph 1.3 below.

Graph 2.3: Stakeholder group representation per country

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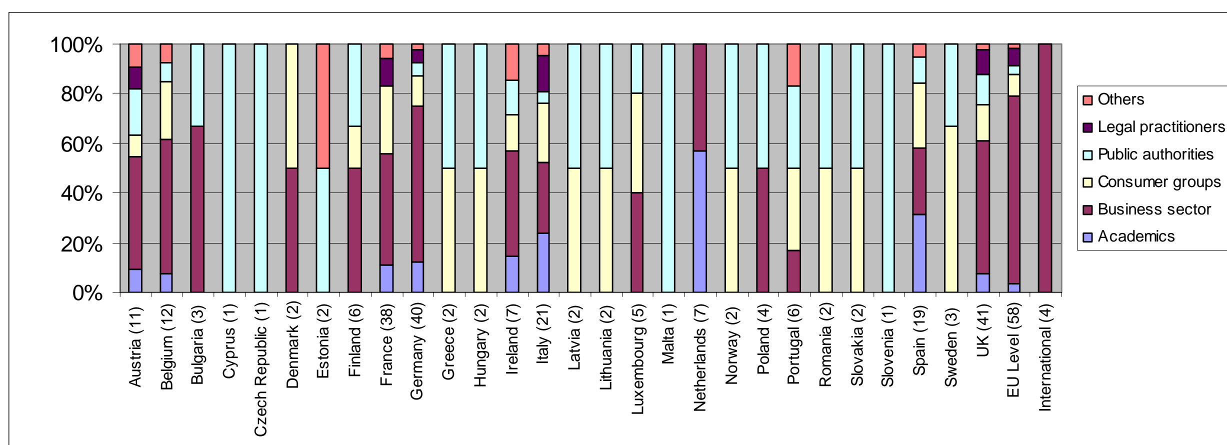
[6] These represent bodies, businesses, associations, groupings, representations, etc. at EU level rather than one specific country.

[7] A very low number of contributions have been received from ECCs (3) and social partners (3). Given that the ECCs participated to the survey as part of this assignment and that their opinions therefore have been included in the Final Report, their contributions to the Green Paper consultation have been included in the consumer groups. The contributions received by the social partners have been included in the group "other".



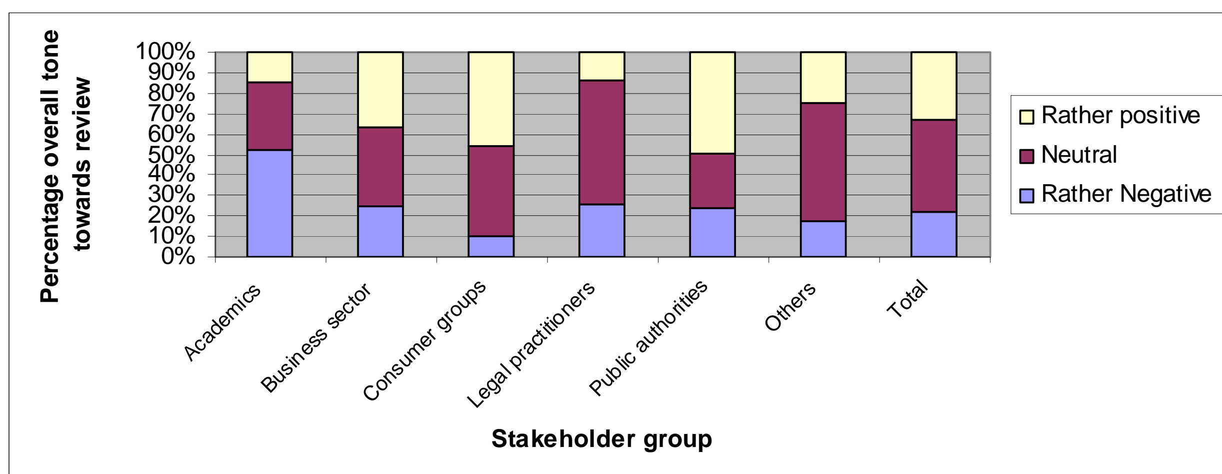
For those countries from which more than 10 contributions were submitted, several stakeholder groups are represented. Countries from which only a low number of contributions were sent tend to be mostly represented by public authorities and consumer groups. The business sector is represented in 15 of the 27 countries whereas consumer groups, which have in total fewer contributions than the business sector, are represented in 20 countries. All except two Member State government bodies' contributions are included in the analysis[8]. Additionally, Norway, an EFT/EEA member submitted a response. In terms of EU bodies, the contributions of the European Parliament and the Economic and Social Committee are also included in the analysis.

2.3 Overall opinion on the Green Paper/Review of the Consumer Acquis

Quite a number of contributors expressed their overall view on the Commission's initiative to review the current Consumer Acquis. Similarly, a number of respondents also provided an assessment as to the effectiveness of the Green Paper in order to achieve a successful and efficient review of the current Consumer Acquis.

[8] No contribution was received from Denmark and the Netherlands. For two Member States, two different government departments submitted a response: UK (Government and Office for Fair Trading) and Germany (Federal Government, Justice department and Baden-Württemberg Ministry). However, when reference is made to the Member State government responses only the UK Government and the German Federal Government is referred to.

Graph 2.4: Overall tone of contributors to the Review of the Consumer Acquis/Green Paper



Overall, the majority of the contributions had a neutral or positive tone towards the Review/Green Paper and only a minority had a rather negative view on the changes suggested by the Commission. Of all stakeholder groups, the academics were the ones having the most negative view on the Review/Green Paper, followed by the business sector. Within the business sector group, however, a slightly higher proportion of respondents adopted a rather positive tone towards the Review/Green Paper. Most positive towards the Review are the consumer groups and the public authorities. However, a slightly higher proportion of public authorities had a rather negative tone compared to the consumer groups where only 10% were rather negative.

2.4 Structure of the report

The remainder of the Report contains the following sections:

- Section 2: General overview of the contributors' approach to the different options proposed in the Green Paper
- Section 3: Common issues raised by the contributors
- Section 4: Detailed analysis of the contributions per Green Paper question
- Section 5: Other issues raised by the contributors

Furthermore, Annex I provides the list of all the contributors by country and by stakeholder group and Annex II presents the overview table of the stakeholders' distribution of opinions across the Green Paper options.

3 GENERAL OVERVIEW OF THE CONTRIBUTORS' APPROACH TO THE DIFFERENT OPTIONS PROPOSED IN THE GREEN PAPER

This section gives a general overview of the different options chosen by the contributors across all stakeholder groups per Green Paper question.

It is important to bear in mind that the business sector is represented by half of the total contributions received and that this stakeholder group is therefore over represented compared to the other stakeholder groups.

Section 5 presents the different options chosen per stakeholder group and gives therefore a clearer picture on what has been chosen by which group for each specific question.

Table 3.1 below presents the options chosen per Green Paper question. For each question, the figure in brackets presents the total number of answers received, whereas for each option within each question the total percentage of contributors choosing this option is presented.

Table 3.1: General overview of the contributions per Green Paper question[9]

A.1 General legislative approach (258)		**A.3 Degree of harmonisation (250)**	
A.1.1 Vertical	14%	A.3.1 Minimum	24%
A.1.2 Mixed	**75%**	A.3.2 Targeted Full	**33%**
A.1.3 Status quo	2%	A.3.3 Full	29%
Other option	9%	A.3.4 28th Regime	0.4%
		Other options	13%
A.2 Scope of horizontal instrument (241)		**Harmonisation variant (230)**	
A.2.1 Apply to all consumer contracts	**81%**	A.3.6 Mutual recognition	31%
A.2.2 Only to cross-border contracts	5%	A.3.7 Country of Origin	6%
A.2.3 Only to distance contracts	3%	A.3.8 No variant	30%
Other option	10%	Other options	**34%**

[9] The Steering Group requested to also analyse the contributions with regard to contributors' opinion on a potential revision of the Injunctions Directive and their opinion on the issue of collective redress. The opinions expressed with regard to these two issues, which were not addressed in the Green Paper, were very low. Only 9% addressed the issue of a potential revision of the Injunctions Directive. All of them were in favour. With regard to collective redress, 18% of the total contributions mentioned this issue of which 17% was in favour of collective redress.

B.1 Definition of consumer and professional (251)		**C. Good faith and fair dealing in the CA (241)**	
B.1.1 Alignment	**63%**	C.1 Act in good faith	17%
B.1.2 Notion widened	21%	C.1.2 Status quo	**38%**
Other options	16%	C.1.3 General Clause	32%
		Other option	13%
B.2 Consumer acting through intermediary (221)			
B.2.1 Status quo	**45%**		
B.2.2 Through professional intermediary	43%		
Other option	12%		

D.1 Scope application of EU rules on unfair terms (230)		**E. Information requirements (230)**	
D.1.1 Expansion of scope	40%	E.1 Extension cooling-off period	15%
D.1.2 List of annexed terms	5%	E.2 Different remedies	**39%**
D.1.3 Status quo	**51%**	E.3 Status quo	30%
Other options	4%	Other options	16%
D.2 List of unfair terms (230)		**Indication of common pre-contractual information (168)**	
D.2.1 Status quo	26%	In favour	11%
D.2.2 Grey list	2%	Against	1%
D.2.3 Black list	16%	No indication given	**88%**
D.2.4 Combination	**49%**		
Other option	7%		
D.3 Scope of unfairness test (228)			
D.3.1 Extension	25%		
D.3.2 Status quo	**68%**		
Other option	7%		

F. Right of withdrawal		**G.1 Contractual remedies (223)**	
F.1 Cooling of period (237)		G.1.1 Status quo	**50%**
F.1.1 One cooling-off	**57%**	G.1.2 General contractual remedies	42%
F.1.2 Two categories	14%	Other options	8%
F.1.3 Status quo	13%		
Other options	16%		
F.2 Modalities (228)		**G.2 General rights of damage (217)**	
F.2.1 Status quo	9%	G.1.1 Status quo	**46%**
F.2.2 One uniform procedure	**71%**	G.1.2 General rights + full choice MS	6%
F.2.3 any means	8%	G.1.3 General right + choice MS	13%
Other options	11%	G.1.4 General + economic + moral	23%

		Other options	12%
F.3 Contractual effects (225)			
F.3.1 No costs	**29%**		
F.3.2 Same all	24%		
F.3.3 Status quo	**29%**		
Other options	18%		

H.1 Types of contracts to be covered (210)		**I.1 Definition of delivery (200)**	
H.1.1 Status quo	27%	I.1.1 Material delivery of goods	25%
H.1.2 Extension to goods	1%	I.1.2 Goods consumer's disposal	17%
H.1.3 Extension to digital content	11%	I.1.3 Parties can agree	**27%**
H.1.4 Combination	**50%**	I.1.4 Status quo	20%
Other options	10%	Other options	11%
H.2 Second hand goods sold on public auctions (182)		**I.2 Passing of the risk (193)**	
H.2.1 Yes	**47%**	I.2.1 Community Level	**65%**
H.2.2 No	44%	I.2.2 Status quo	27%
Other options	9%	Other options	8%

J.1 Extension of time limits (197)		**K.1 Order for remedies to be invokes (201)**	
J.1.1 Status quo	37%	K.1.1 Status quo	**49%**
J.1.2 Yes	**55%**	K.1.2 Choice	31%
Other options	8%	K1.3 Specific order	10%
		Other options	9%
J.2 Recurring defects (195)		**K.2 Notification lack of conformity (197)**	
J.2.1 Status quo	37%	K.2.1 Duty to notify	**56%**
J.2.2 Extension	**57%**	K.2.2 Only in certain circumstances	2%
Other options	6%	K.2.3 Elimination of within a certain period	29%
		Other option	13%
J.3 Conformity 2nd hand goods (179)		**L. Direct producer's liability (206)**	
J.3.1 No derogation for 2nd hand goods	25%	L.1 Status quo	41%
J.3.2 Specific rules	**62%**	L.2 Direct liability	**51%**
Other options	13%	Other options	8%
J.4 Burden of Proof (197)			
J.4.1 Status quo	**50%**		
J.4.2 Professional	42%		
Other options	8%		

M1 Content of commercial guarantee (196)	
M.1.1 Status quo	**47%**
M.1.2 Default rules	46%
Other options	7%
M.2 Transferability of commercial guarantee (187)	
M.2.1 Status Quo	33%
M.2.2 Automatically transferred	**43%**
M.2.3 Default rule	19%
Other option	5%
M.3 Commercial guarantee for specific parts (178)	
M.3.1 Status quo	37%
M.3.2 Only information obligation	12%
M.3.3 Information obligation + cover entire contract	**44%**
Other option	7%

From the above table it is clear that there are some questions that raised a clear, overall consensus. These include: the general legislative approach (A.1), the scope of the horizontal instrument (A.2), the definition of consumer and professional (B.1), the list of unfair terms (D.2), the scope of the unfairness test (D.3), the cooling-off period (F.1), the modalities for withdrawal (F.2), the passing of the risk (I.2) and the conformity of second hands goods (J.3).

Other questions however raised more controversy, for example the general rights to damages (G.2), the order for remedies to be invoked (K.1) and the transferability of the commercial guarantee (M.2). From the tables above it is evident that some questions have almost equal percentages of contributions across all answers such as for example the costs to be imposed on the consumer in the event of withdrawal (F.3).

Although the above statistical conclusions give a relevant and adequate first general overview they also contain some caveats. It is important to note that even though some questions seem to have a clear majority for a specific option, the further analysis of contributions by type of stakeholder reveals that opinions on the matter were indeed quite diverse. An example of such a question is G.2 on the general rights to damages. Furthermore, even though the contributors choose a particular option, it was sometimes the case that they put some conditions to a specific option. These conditions are further elaborated for each question in section 5.

Besides the general overview of the most favoured option per Green Paper question, it was also important to look at whether the majority of contributors favour EU action or rather status quo. Table 3.2 below presents the percentages per question of those in favour or against EU action (i.e. status quo).

Table 3.2: General overview of per Green Paper question[10] on percentages in favour of EU action or status quo

A.1 General legislative approach (258)	
In favour of EU action	**98%**
Status quo	2%

B.2 Consumer acting through intermediary (221)		**C. Good faith and fair dealing in the CA (241)**	
In favour EU action	**55%**	In favour EU action	**62%**
Status quo	45%	Status quo	38%

D.1 Scope application of EU rules on unfair terms (230)		**E. Information requirements (230)**	
In favour EU action	49%	In favour EU action	**70%**
Status quo	**51%**	Status quo	30%
D.2 List of unfair terms (230)		**D.3 Scope of unfairness test (228)**	
In favour EU action	**74%**	In favour EU action	32%
Status quo	26%	Status quo	**68%**

F. Right of withdrawal		**G.1 Contractual remedies (223)**	
F.1 Cooling of period (237)			
In favour EU action	**87%**	In favour EU action	50%
Status quo	13%	Status quo	50%
F.2 Modalities (228)		**G.2 General rights of damage (217)**	
In favour EU action	**91%**	In favour EU action	**54%**
Status quo	9%	Status quo	46%
F.3 Contractual effects (225)			
In favour EU action	**71%**		
Status quo	29%		

[10] Only the Green Paper questions which had as one of the options “status quo” are included.

H.1 Types of contracts to be covered (210)		**I.1 Definition of delivery (200)**	
In favour EU action	**73%**	In favour EU action	**80%**
Status quo	27%	Status quo	20%
		I.2 Passing of the risk (193)	
		In favour EU action	**73%**
		Status quo	27%

J.1 Extension of time limits (197)		**K.1 Order for remedies to be invokes (201)**	
In favour EU action	**63**%	In favour EU action	**51%**
Status quo	37**%**	Status quo	49%
J.2 Recurring defects (195)		**J.4 Burden of proof (197)**	
In favour EU action	**63**%	In favour EU action	**50%**
Status quo	37**%**	Status quo	50%
L. Direct producer's liability (206)			
In favour EU action	**59%**		
Status quo	41**%**		

M1 Content of commercial guarantee (196)	
In favour EU action	**53%**
Status quo	47%
M.2 Transferability of commercial guarantee (187)	
In favour EU action	**67**%
Status quo	33**%**
M.3 Commercial guarantee for specific parts (178)	
In favour EU action	**63**%
Status quo	37%

Table 3.2 above shows that for 19 of the 23 questions the majority of contributors are in favour of EU action[11] rather than maintaining the current situation. Even though the figures in table 3.1

[11] Contributors who suggested other options than those presented by the Green Paper are included in this category since the overall majority of the other options suggested call for EU action and change, rather than status quo.

show that there is not always consensus on which EU action to pursue, there is a strong message that the current Consumer Acquis has to change and that EU action is favoured.

For two issues however, contributors would rather maintain the status quo than take EU action. These are: scope of the application of EU rules on unfair terms (D1)[12] and scope of the unfairness test (D3). On the other hand, for two issues, contributors are evenly split between favouring EU action and maintaining the status quo, i.e. for contractual remedies and burden of proof.

[12] It has to be noted though that 51% are in favour of maintaining the status quo and 49% are in favour of EU action.

4 KEY ISSUES RAISED BY THE CONTRIBUTORS

4.1 Introduction

The contributors were given the opportunity to express their general concerns and comments on the issues addressed by the Green Paper. These are presented as “common issues raised” in sub section 4.2.

Furthermore, the last question (i.e. question N) in the Green Paper gave an opportunity for contributors to mention any other issues they would like to raise in light of the Review of the Consumer Acquis. Their comments to this question have been summarised according to stakeholder group and are presented in sub section 4.3.

Several stakeholders argued that it was not the legislation in its current form, or certainly not the legislation alone, which formed an obstacle to cross-border trade. In order to find out from the different stakeholder groups what they perceived to be the most important obstacles to cross-border trade and consumption, the cross-border issues of a more practical nature and the wider consumer issues mentioned in the contributions have also been identified. The contributors’ views on these issues are presented in sub sections 4.4 “cross-border factors of a practical nature” and 4.5 “wider consumer problems”.

4.2 Common issues raised by the contributors

This sub section highlights the general concerns and criticism expressed across stakeholder groups with regard to the content of the Green Paper and the approach to be taken for the Review of the Consumer Acquis. They concern the following:

Limitation of the review to eight directives

A high number of contributors did not understand why the content of the review was restricted to the eight directives mentioned in the Green Paper, while other directives, for example the E-commerce and Consumer Credit directives have been excluded. In this respect, some contributors urged the Commission to initiate processes aimed at including these other Directives which are very important to Community consumers. In their opinion, excluding such important consumer directives from the scope of the review would have negative implications both for consumers and for businesses. A consumer organisation argued that all consumer directives should be included and this should comprise also the Financial Services Directive. Furthermore, several contributors were concerned that the current revision of the Acquis seemed to overlap with or impact national law in other subject areas (e.g. civil law).

The European Economic and Social Committee (EESC) considers that the revision of the Consumer Acquis should cover, in the future, at least the 22 directives set out on the list drawn up by the Commission in May 2003.

National issues with regard to consumer protection legislation

Several public authorities indicated that, although there are indeed a number of inconsistencies and gaps in EC consumer protection legislation, their countries have already dealt with these issues at national legislation level. They made it clear that the review should not entail

fundamental changes requiring these Member States to drastically revise their own consumer protection legislation, which is very time-consuming and costly.

The issue of small businesses

Small businesses commented that they are only in a slightly better position than a consumer when buying goods and services. This was also argued by a consumer organisation. The lack of uniformity in contract rules across the EU is a serious constraint on cross-border trading for small businesses, especially given that they do not have easy access to detailed advice on international transactions and are therefore stepping into the unknown.

Country of origin versus country of destination principle – Rome I

The majority of the contributors mentioned the potential inconsistencies between the Review of the Consumer Acquis and the upcoming implementation of Rome I. The Rome I Regulation provides for the application of the country of consumer's residence principle in the event of a dispute; however, if the review of the Consumer Acquis would apply the country of origin principle, this would be in clear conflict with the provisions of Rome I. As the contributor argued, "by proposing the country of origin principle as an option, the Commission is implying that the effects of Article 5 (consumer contracts) of the proposed Rome I Regulation could be set aside again when the consumer Directives have been reviewed.

Timing of the Review of the Consumer Acquis

A considerable number of contributors made it clear that they find it to premature to discuss the options proposed, as they first would like to see the results of the work being undertaken in the Common Frame of Reference exercise. They fear that there will be overlap in structure and subject matter between both projects.

Level of consumer protection

The business sector considered that due caution should be taken when aiming at too high a level of consumer protection in some of the options. This would entail higher costs for businesses in order to comply with stricter regulations, which would be reflected in higher costs for consumers and ultimately end up being disadvantageous for stimulating cross-border shopping. Alternatively, many contributors advocated for maintaining a certain degree of self-regulation.

Legislative changes versus other actions needed

Quite a few contributors stressed that the Commission should underpin its suggested legislative changes with more evidence. This should be presented in terms of problems currently encountered in the consumer protection legislation and an assessment of the potential impact of the legislative changes suggested. Furthermore, numerous contributors across stakeholder groups pointed out that other issues such as language barriers, practical issues, enforcement, etc. are more important obstacles to cross-border trade and shopping than the current legislation. It was argued by several contributors that instead of creating a new layer of regulations, the quality and implementation of the existing legislation should be improved. Furthermore, these contributors were sceptical about the stimulating effect of framework rules on cross-border consumer transactions. They argued that consumers know little about their rights within or outside their own jurisdiction. They estimated the costs of a vertical approach to be lower than the costs of the horizontal approach. A horizontal approach

with framework directives might, in their opinion, require further legislation and implementation on the side of the Member States, while a systematic assessment of existing laws could be carried out at lower costs both at EU and Member State levels.

The European Parliament (EP) further commented that Member states should reinforce cooperation between their national authorities responsible for the application of consumer law and to promote judicial or extrajudicial remedies enabling consumers to enforce their rights at European level.

Concept of "consumer"

Various contributors, especially within the group of academics, argued that the Commission might have portrayed consumers as "weak" and in need of protection in all circumstances, whereas they believed that consumers must be seen as independent, opinionated and able to make the right decisions.

4.3 Other issues discussed by stakeholder group

4.3.1 Other issues expressed by the business sector

Most of the comments expressed by the business sector are already presented in sub section 4.2. Additionally some businesses pointed out that the horizontal nature of the review was not justified, for example difficulties encountered in a given sector or industry should not legitimise a complete and transversal redirection of the Acquis which could impact on sectors where no such problems exist.

4.3.2 Other issues expressed by consumer groups

The contributions made to question N "other issues" by the consumer groups included the following comments:

- Consumer groups, similar to the business sector, often argue that the introduction of new legislation is not what consumers expect in order to increase their protection. The correct implementation and reinforcement of the existing legislation and tools would be a more sensible first step to take in that direction. Many contributors have referred to the need for more Alternative Dispute Resolution (ADR) mechanisms as well as easier access to such mechanisms by consumers. Cheaper access to courts and justice. Reinforcement of the ECC-Net has also been advocated.
- There has been a wide call, throughout all answers, for more effective systems for collective redress. This call came from both the business sector and consumer groups.
- A number of respondents have called for the specific protection of children under 12. Publicity aimed at this group should be banned.
- The need for more information is a common concern of all consumer groups. Consumers should have the right to receive all the information they need to make a conscious, well-informed choice. Some contributors have argued that the consumer should always receive a written contract – or have the right to ask for it if they wish – so that they can read it carefully and compare it if necessary with contracts proposed by other sellers. Others have also suggested that information about consumer rights should be disseminated in schools.

4.3.3 *Common issues and divergences between the business sector and consumer groups*

This sub section presents the common issues raised by the business sector and the consumer groups as well as their main divergences.

The restriction of the exercise to only eight directives has been criticised by a great majority of the contributors in both groups. While the Commission presents the eight directives as a ‘package’, many do not understand this concept. In fact, the majority of the stakeholders are of the opinion that most directives affect one another: revising only eight could lead to clashes, overlaps and eventually, in the long-term, the need to also review the other legislative instruments. Special reference has been made to the exclusion of the e-commerce directive, when it is clear that the latter deals with a new and growing concept that cannot and should not be addressed by the Distance Selling Directive alone. The business sector – amongst which a significant number of digital service providers – has argued that the nature of the service is simply too specific to be part of any other Directive than the e-commerce one.

There is disagreement between the business sector and the consumer groups on information obligations. While the business sector have repeatedly mentioned that information obligations can be a burden for businesses, consumer groups argue that consumer need to have more information in order to make well-informed choices.

4.3.4 *Other issues expressed by legal practitioners and public authorities*

The contributions made to question N “other issues” by legal practitioners and public authorities included the following comments:

- Both stakeholder groups have argued for more ADR mechanisms and for better systems for collective redress. The review could have included considerations on such tools.
- Legal practitioners pointed out that the clear distinction between B2C and B2B transactions may not always be appropriate. There are instances where small firms or organisations – such as NGOs – find themselves in a weak position when operating B2B transactions. In these cases it may be appropriate to protect them like consumers under B2C transactions.
- Legal practitioners regretted that the Green paper did not discuss after-sales services, as they considered it a very important factor in increasing consumer confidence in cross-border trading.
- Public authorities argued for more consumer education and dissemination of information on consumers’ rights.
- Legal practitioners criticised the rather restrictive formulation of the questions and the limited options proposed.

4.3.5 *Other issues expressed by academics*

The contributions made to question N “other issues” by academics included the following comments:

- Most contributors called for more effective and available/affordable methods of redress
- The encroachment on freedom of contract has also been mentioned

4.4 Factors of a practical nature being an obstacle to cross-border trade and consumption

One of the main common issues expressed by the contributors and presented in sub section 4.2 was that factors such as language barriers, cultural differences, distance from the seller,

personal preferences and concerns about the delivery of goods are the most important factors preventing European consumers from shopping cross-border. These issues are essentially related to the lack of knowledge of the 'common' consumer on legislation and selling 'traditions' of the foreign market. In their opinion, legal harmonisation is not likely to have a significant positive impact on these issues.

It was further argued that, on the business side, many companies do not engage in cross-border trade because of the high transportation and delivery costs, market research expenses and their competitive position in other countries.

The current proposals of the Commission have raised two main issues:

- The additional burden that some options would create for businesses for the sake of increased consumer protection, such as, for example, the requirement to provide more information in the contract. It has also been argued that consumers actually rarely read the contracts. More costumer services – which can be very costly for small entrepreneurs - and extra insurances to protect themselves in the event of a dispute, can hinder cross-border trade. Businesses either decide not to trade because of these high costs or increase the costs of their products, thus making them less appealing for consumers abroad;
- The Commission's intention to develop additional legislation which might overlap with existing national and community regulations, while it would be more suitable to first, concentrate on improving the enforcement of the existing legislative measures.

Two main alternative proposals have emerged from the responses:

- The development of more Alternative Dispute Resolution (ADR) mechanisms in order to improve the settlement of disputes and to avoid, where possible, more expensive legal procedures;
- A more effective implementation and enforcement at the national level of existing rules and regulations, as well as the strengthening of market surveillance;

4.5 Wider consumer problems being an obstacle to cross-border trade and consumption

Respondents were overall very concerned about the lack of redress possibilities for consumers, as well as the difficulty of accessing information on redress. A number of suggestions have been made by the contributors, these include:

- improving the information provided to consumers about their rights as well as improving the availability of such information;
- increasing investments in consumer advocacy, "consumer policy R&D", academic infrastructure, education in law and economics, professional associations and consumer groups who can contribute to disseminate consumer but also competition principles. It has been argued that the wider economic and social context of consumer protection should be assessed as well as consumer behaviour patterns before any revision of the Acquis is undertaken;
- reinforcement of existing initiatives such as the Consumer Protection Co-operation Regulation will hopefully lead to effective cooperation. The European Consumer Centres (ECCs) – in fact have gone so far as to propose that the ECCs themselves should have a conflict resolution mechanism in place, which would be easier to access and cheaper for consumers. The European Enforcement Order, as well as the recently adopted European Order for Payment and the future European Small Claims Regime have

equally been mentioned as examples of the various mechanisms that already exist to protect consumers. Many stakeholders consider that it would be advisable to begin by reinforcing these systems before changing legislation or adding new legislative instruments;

- Collective redress has also been mentioned as a potential form of redress for people in situations such as package travel. The contributors argued that the collective redress remedy should offer a democratic, effective and equitable means to obtain justice and that the procedure should be based on the model applied in Quebec which comprises five key stages[13];
- a joint consultation of the consumers' representatives and professionals' representatives would allow for a better understanding of their respective interests and facilitate the search for balanced solutions; and
- a reinforced co-operation between Member States on enforcement of consumer protection rules.

[13] These five stages are all controlled by the judge: (i) at the initial stage, the judge rules on the admissibility of the action, and designates a representative of the group. This stage is essential, because it eliminates improper and capricious suits against a business; (ii) the members of the group are notified through an assistance fund, as ordered by the judge; (iii) the basic procedure, obviously under the control and direction of the judge, includes the possibility of coming to settlement with the professionals/operators, who are also under review by the judge, who acts as guarantor of the interests of both parties; (iv) the notification of the members of the group following the judge's ruling is handled by the assistance fund; (v) the distribution and apportionment of the sums awarded among the members of the group is handled by a third party (insurance agent, accountant, association, lawyer representing the group…) at the discretion of the court, so as not to burden the court system. Two scenarios have to be provided for: (a) When the elements of the case enable the judge to establish the total sum due from the defendant by way of damages, he orders the defendant to pay this amount to the person in charge of redistribution and, as far as possible, fixes the amount to be paid to each of the members of the group. The person in charge of redistribution pays this amount to the members of the group who apply to him and produce the proofs required by the judge; (b) When the judge cannot determine the total sum due from the defendant by way of damages, the person in charge of redistribution determines the amount of individual damages to be paid to each member of the group applying to him in respect of the proofs they produce.

5 DETAILED ANALYSIS OF THE CONTRIBUTIONS PER GREEN PAPER QUESTION

5.1 Introduction

This section presents in detail the options per question favoured by each stakeholder group. Firstly, the overall quantitative results are presented with graphs[14]. Secondly, the comments made by the contributors per question are summarised and subdivided in general comments (where available) and comments given by option favoured as well as by stakeholder group where possible. Additional suggestions and alternative options[15], where formulated by the contributors, are presented for each question included in the Green Paper.

Annex 2 present a tabular overview of the results per stakeholder group.

5.2 Contributions to the specific questions raised in the Green Paper public consultation

5.2.1 General legislative approach

The first question raised in the Green Paper was:

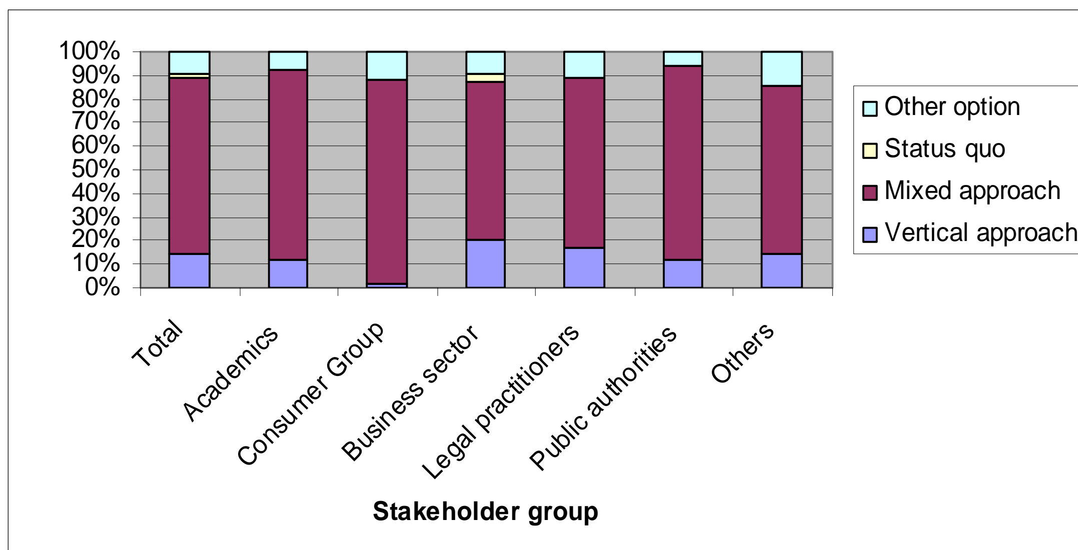
Question A1 "In your opinion, which is the best approach to the review of the consumer legislation?"

Actions proposed by the Commission in the Green Paper
Option 1: A vertical approach consisting of the revision of the individual directives
Option 2: A mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary
Option 3: Status quo: no revision

[14] For each question a graph presents the total distribution of options chosen as well as the options favoured by stakeholder group and by country where relevant.

[15] In addition to the options suggested by the Green Paper contributors suggested sometimes other options which were recorded as such.

Graph 5.1: Contributions on general legislative approach per stakeholder group



With a majority of 75% it is obvious that the mixed approached is the most favoured option and this was across all the different stakeholder groups. Practically none of the contributors preferred the status quo.

However, it might be worth noting that there were still 20% of those belonging to the business sector and 17% of the legal practitioners that favoured the vertical approach.

The majority of Member States supported option 2 (23). Only one Member State was in favour of a vertical approach. One Member State chose ‘other option’ and one EEA/EFTA country did not respond.

Key issues raised by the contributors on the suggested options

General comments included:

- Principles of proportionality and subsidiarity have been mentioned by a high number of contributors.
- The new horizontal instrument should only regulate those issues that are already covered by the existing directives to be reviewed. Other supplementary general rules (such as f.e. general contractual remedies) should be reviewed separately.
- Linked to the above, it was expressed that the Commission should be more specific on which subject areas are to be included in a potential horizontal instrument. Furthermore, there is a lack of detail about the provisions of the current directives which would be maintained in the vertical instruments.

- Some contributors wanted evidence of the workability and the effectiveness of a framework instrument implementing a horizontal approach before such an option can be approved.

Comments expressed by contributors who were in favour of option 1 included:

- Some contributors found the idea of a general consumer contracts directive in the form of a horizontal approach, somewhat premature given the discrepancies which currently exist between Member States. Moreover, some companies believed that consumer rights can be guaranteed more effectively through a sector-based approach, respecting specific requirements per sector and constraints.
- Several contributors opposed the introduction of a horizontal instrument because there was too little content to regulate (i.e. it would not be enough to base a horizontal instrument on only the few vertical directives mentioned). In their view, the examples given by the Commission do not justify the creation of such an instrument (definition of consumer and professional, period of the right of withdrawal and how to exercise it). Notions of “good faith” are related to Civil Law and not to Consumer Protection Law.
- The horizontal approach would introduce additional regulation and therefore would be in contradiction with the aim to simplify legislation.
- Consideration has to be given to the fact that work with a horizontal approach is already under way within the scope of the Common Frame of Reference (CFR) (this will include rules for B2B and C2C areas which would have to be consistent with the B2C area).
- Adapting current legislation to ever-changing technological and economical developments should receive priority over consolidation of existing legislation.
- There is not enough evidence to state that the current fragmentation of rules in certain areas creates significant obstacles to trade or a fundamental lack of confidence for consumers.
- Business sector contributors argued that the proposed horizontal instrument is seen as an indirect attempt to develop some kind of European contract law for which there is no legal basis in the Treaty.
- It was expressed that "better lawmaking" is not related to the number of instruments but to the legal systematics and the regulatory content.

Comments expressed by contributors who were in favour of option 2 included:

- Whether a mixed approach merits a firm support will depend on its content and on the degree of harmonisation. More important than that, is to identify what is currently missing from the scope of the Acquis to achieve a high level of consumer protection, in particular in response to perceived obstacles to cross-border trade and new technology developments A horizontal instrument would offer the possibility to bundle important consumer rights and communicate them to the consumer effectively. A simplification of certain rules may then make it easier for consumers to be aware of the (minimum) set of rights they have. The lack of consumer awareness about their rights is indeed a continuing problem.
- Several Member States’ public authorities and consumer groups have expressed that they are in favour of a mixed approach provided that this entails a high level of consumer protection. If this cannot be achieved than they believed, it is better to keep minimum standards than to choose full harmonisation.

- Having general horizontal principles to protect consumers' interests, backed up by codes of practice for specific issues, seems a good solution for contributors from the business sector.
- According to some public authorities as much as possible of consumer protection rules should be built into the horizontal instrument, with sectoral exceptions and additions kept to the minimum necessary. The horizontal instrument should regulate the following issues: consistent definitions of 'consumers', 'professionals' and other terms; types of contracts covered by the Consumer Acquis; rights to have challenged (and set aside) unfair contract terms; rights to repair and replacement of goods which do not confirm to specification; rights consumers have when there is a failure to perform the contract; remedies that can be accessed where there has been a failure to perform; what information consumers are entitled to under which types of contract (e.g. under distance-selling); under what circumstances rights of withdrawal and cancellation periods are available; when cancellation periods can be extended; when compensation or damages can be accessed.
- Contributors argued that it must be ensured that the so-called horizontal instrument does not lead to specific problems being treated as one and the same. It is essential to apply vertical measures where different sectors with different marketing methods demand different regulations. A business stakeholder suggested, for instance, that a mixed approach could provide a "toolbox" of basic principles and notions that would apply to each of the sector specific directives.
- Expressed by several businesses: A horizontal instrument, if meant to apply across the sectors, would have a limited scope to only few items (e.g. the notion of consumer, the modalities for exercising the right of withdrawal) that can be considered a common denominator to all the Consumer Acquis, including in that case also financial services. It is further expressed by several stakeholder groups that the addition of new provisions that have not been part of the eight directives as well as the introduction of too detailed provisions should be avoided. Fewer respondents choose the following topics for horizontal instrument: the definitions of consumer and professional, the modalities to exercise the right of withdrawal, the provisions on the unfair contract terms, those on guarantees and finally the provisions on the information requirements from the professional to the consumer.
- Even though the horizontal approach was favoured, some contributors expressed that attention should be given to the possible spill-over effects of the horizontal measure on the fields not covered by the Review, including the specific rules for consumer legislation in regulated markets (telecommunications, energy, transport and financial services).
- A few contributors were in favour of a regulation for the horizontal instrument rather than a directive. If the Acquis would continue to be based around directives, it could be questioned whether a horizontal directive would be of great benefit to consumers and businesses.
- In its Resolution on the Green Paper[16], the EP highlighted that this mixed horizontal instrument should be regularly reviewed and its effectiveness and impact evaluated with a view to a revision if necessary. The EP expressed its preference for the adoption of a mixed or combined approach, i.e. a horizontal instrument with the primary goal of ensuring the coherence of the existing legislation and enabling loopholes to be closed

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

by grouping together, in consistent law, cross-cutting issues common to all the directives; it considers that specific questions which are outside the scope of the horizontal instrument should continue to be considered separately in the sectoral directives. They are opposed to the review of the Consumer Acquis being used to extend the legislative content of the existing sectoral directives or to introduce additional directives.

- They also suggested that definitions of 'written format' and 'sustainable data support' be included in the horizontal instrument.

Comments expressed by contributors who were in favour of option 3 included:

- Some contributors expressed concerns about the fact that a revision of the directives might entail a further extension of the legislation on consumer protection which in their view would contradict the principle of subsidiarity. Furthermore, they believe this would increase costs for the industry and place restrictions on the freedom the conclude contracts.

Alternative options suggested by the contributors

Consumer groups

Consumer groups' comments are centred on the following issues:

- The horizontal instrument should be in line with the planned Rome I Regulation and the Common Frame of Reference (CFR.)
- Integrating any new legislative proposals closely with the Unfair Commercial Practices Directive (UCPD) is important.

Business sector

Reservations expressed by the business sector often show the desire to limiting the scope of a horizontal instrument. Contributors believe that:

- any horizontal instrument would have to be limited to key notions of consumer protection such as common definitions and pre-contractual information requirements; and
- revision should only focus on alignment of definitions (such as "consumer" or "professional") and not to extend the scope of the Consumer Acquis.

Some contributors expressed concern that a detailed and comprehensive horizontal instrument would not be adequate enough to take into account the diverse activities and products in the markets, entailing a strong risk of product standardisation.

The financial sector in particular were concerned by the possibility that the introduction of a horizontal instrument would supersede specific financial services legislation (vertical instruments such as MiFID and the UCITS Directive, which regulate the activities of asset managers and fund managers and distributors), imposing additional burdens and possibly interfering with the basic principles of operation and management of funds activities (e.g. the UCITS Directive and MiFID already regulate the provision of information requirements).

Some were opposed to the development of a common European contract law and to any regulation of general civil law matters in a horizontal directive.

Legal practitioners

Contributions focused around the following points:

- a framework instrument of a horizontal nature is unnecessary in light of the "toolbox" that will be produced by the CFR Project;
- there is no need for overarching provisions on "good faith" and "fair dealing" in light of the provisions of the UCPD and other existing Directives; and
- opposition to the creation of a separate contractual law which would only applicable to consumer contracts.

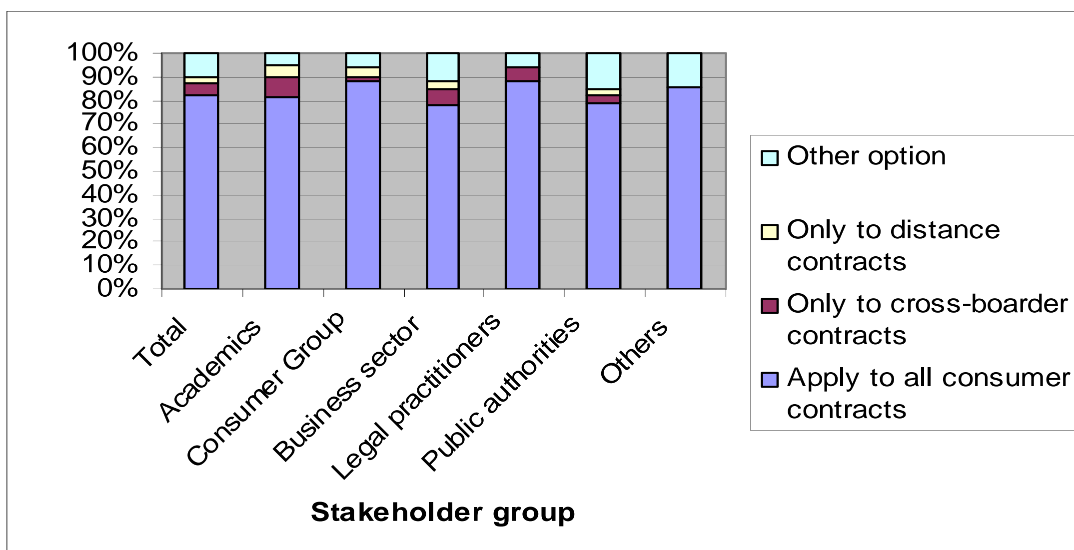
5.2.2 *Scope of a horizontal instrument*

The Green Paper also addressed the issue of the scope of a potential instrument by formulating the following question and options for action:

Question A2 "What should be the scope of a possible horizontal instrument?"

Actions proposed by the Commission in the Green Paper
Option 1: It would apply to all consumer contracts whether concern domestic or cross-border transactions
Option 2: It would apply to cross-border contracts only
Option 3: It would apply to distance contracts only whether they are concluded cross-border or domestically

Graph 5.2: Contributions on scope of a horizontal instrument per stakeholder group



The majority of the contributors (81%) across all types of stakeholders seemed to be in favour of a horizontal instrument that would apply to all contracts whether the transactions are of a domestic or of a cross-border nature.

The majority of Member States (20) were in favour of option 1. One Member States supported option 3 and four opted for 'other options'. One EFTA/EEA country did not respond to this question.

Key issues raised by the contributors on the suggested options

General comments included:

- It was expressed by several contributors that from the wording in the Green Paper, it was not exactly clear what was meant by an instrument applicable for "all" consumer contracts. It was assumed that this referred to the (eight) directives subject to the review and not consumer contracts in general.

Comments expressed by contributors who were in favour of option 1 include:

- It is already difficult for consumers to understand one legal order; it would become entirely impossible if parallel systems existed. For the sake of legal certainty there should be no differing rules for cross-border or distance selling contracts in comparison to all other consumer contracts. A horizontal instrument that only applies to cross-border cases would be inconsistent with the principle of destination and would lead to a fragmentation of laws for the consumer and thereby entail a counterproductive accentuation of borders instead of fostering the internal market.
- According a Member State, option 2 would be unacceptable as it would introduce a dual legal regime, which would result in an administrative burden and the poorer legal certainty of enterprises and consumers. Option 3 might be considered to be a 'minimalist' approach that is not very ambitious.
- It is important to not differentiate the national laws according to the main subject matter of contracts. To impose different rules to national transactions and cross-border transactions would complicate legislation and would be contradictory to the objective to simplify the Community legislation. Other contributors added that this solution would be also a source of costs for the companies which should offer different contracts according to the consumer targeted.
- This option would assure professionals that their transactions are governed by a single set of rules. Not only would this provide legal certainty; it would also simplify the management of business processes, thus reducing costs and avoiding competitive distortions.
- The EP emphasised that this option would avoid introducing a further element of complexity by imposing on the consumer different judicial regimes according to the nature of the transaction.

Comments expressed by contributors who were in favour of option 2 included:

- This option would have the least effect in terms of Member States' freedom to act as they choose.

Comments expressed by contributors who were in favour of option 3 included:

- Option 3 could result useful in what concerns stimulating cross border commerce by the means of e-commerce, reducing some of the uncertainty resulting from option 2 and its real impact on consumer's protection level would be more predictable than in option 1 (if option 1, as it is suggested, refers to all consumption contracts).

Alternative options suggested by the contributors

Public authorities

One Member State was of the opinion that the horizontal instrument should not have any originary and/or direct scope of application at all. The rules in the horizontal instrument should apply only if they are referred to in a sector-specific Directive. The question would be answered with the rule in the referring Directive. With this, European legislators would decide on a case-by-case basis how far the reach of the horizontal instrument should be.

Consumer groups

In order to reduce inconsistencies in European consumer law effectively, it was suggested that the scope of the proposed instrument should be extended.

Business sector

A contribution from the financial sector remarked that consumer protection instruments through professional law shall be recognised. Irrespective of which law applies on a contract between a tax adviser and a consumer abroad, a tax adviser is bound by German professional law. Consequently, consumers in other Member States benefit from this additional protection. Such instruments help to attain additional consumer protection effects which cannot be reached by the proposed measures for improved consumer protection through civil law.

5.2.3 Degree of harmonisation[17]

Degree of harmonisation

A very important question for the Review of the Consumer Acquis concerns the degree of harmonisation of future consumer protection legislation. The current rules in the Directives allow Member States to adopt stricter national rules through the use of minimum clauses. The Commission is of the opinion that the fragmentation of rules, as a consequence of the use of minimum clauses, creates obstacles for both consumers and businesses to engage in cross-border transactions. Therefore the Commission raised the following question:

Question A3 “What should be the level of harmonisation of the revised directives/the new instrument?”

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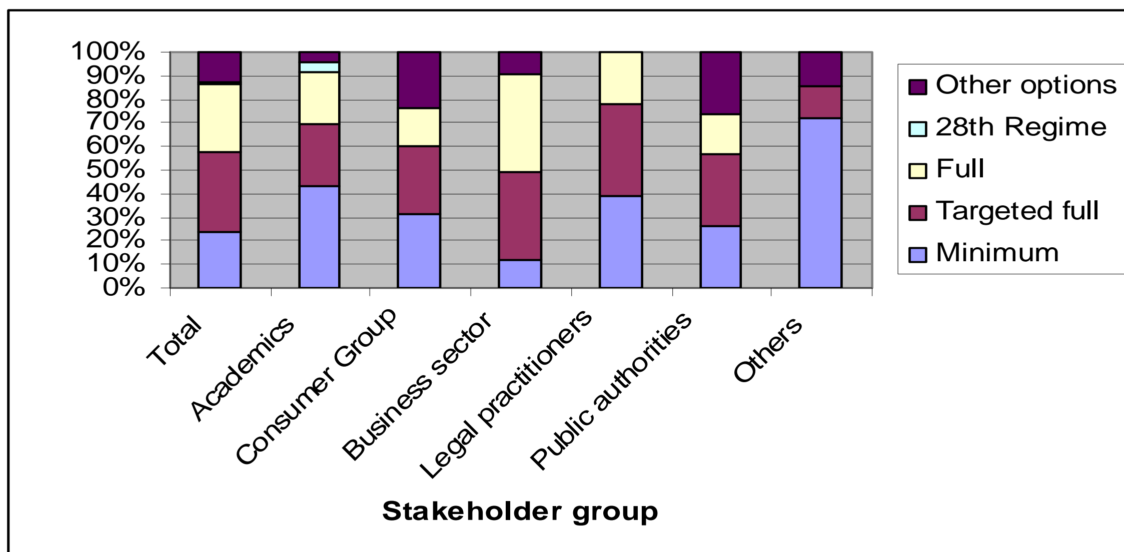
[17] The contributions with regard to this question in the Green Paper were recorded slightly different from the options given in the Green Paper on request of the Steering Group. The contributions were recorded as follows: option 1 “Revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause” was recorded as “level of harmonisation=targeted full harmonisation” and “harmonisation variant=mutual recognition clause”; option 2 ”Revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle” was recorded as “level of harmonisation=minimum harmonisation” and “harmonisation variant=mutual recognition of country of origin principle”. Furthermore, contributors in favour of full harmonisation or the 28th Regime were recorded accordingly.

<u>Actions proposed by the Commission in the Green Paper</u>

Option 1: Revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause

Option 2: Revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle

Graph 5.3: Contributions per stakeholder group on degree of harmonisation



Although overall, the largest group of contributors favoured targeted full harmonisation (33%), it is important to note that full harmonisation was favoured by 29% of the contributors and minimum harmonisation by 24%. Therefore, the majority (i.e. 62%) favoured full or targeted full harmonisation. Minimum harmonisation, targeted full harmonisation and full harmonisation are by far the three favourite options with only 13% of contributors who suggested alternative options. The 28th regime was chosen by only one contributor.

While the largest group within the business sector indicated preferring full harmonisation (42%) (almost 80% of the business sector favoured full or targeted full harmonisation), the largest group within the consumer groups favoured the minimum harmonisation approach (31%). Businesses preferred full harmonisation, especially if the principle of the consumer's country of residence would be applied (acceptance of the draft EU Rome I instrument) – so they will not have to deal with 27 different legal frameworks. Consumers mentioned preferring minimum harmonisation since this approach allows Member States to go beyond the minimum standards. It has to be stated though that for both stakeholder groups the opinions were divided within the group itself. For both consumer groups and the business sector the second largest group of contributors favoured targeted full harmonisation (29% and 37% respectively). The group of academics, legal practitioners and public authorities favoured minimum harmonisation. However, an equally large proportion of contributors within the group of legal practitioners and public authorities respectively favoured targeted full harmonisation (i.e. 39%)

and other options (i.e. 26%). Five out of seven contributors of the “others” group favoured the minimum harmonisation approach.

Regarding Member States contributions, targeted full harmonisation was the option supported by the largest group (12). Five Member States supported option 3 “full harmonisation” whereas four Member States supported option 1 “minimum harmonisation”. Four Member States opted for ‘other options’ and one EFTA/EEA country did not respond.

Harmonisation variant

In addition to the degree of harmonisation, the contributors were requested to express their opinion on some of the suggested variants (these were: no variant, mutual recognition, country of origin principle, other option). It is important to look at the combinations of the degree of harmonisation and variant chosen. With regard to those who favoured minimum harmonisation (24% of total contributions), 35% opted for minimum harmonisation with no variant attached to it. This was closely followed by the group choosing minimum harmonisation and “other option” (30%). A high proportion of the latter explained being in favour of the country of destination principle rather than the country of origin and thus in accordance with Rome I. Minimum harmonisation and mutual recognition or country of origin principle (option 2 in the Green Paper) was favoured by 13%, minimum harmonisation and mutual recognition by 12% and minimum harmonisation and country of origin principle by 10%.

With regard to those who favoured targeted full harmonisation overall (33% and thus the favoured approach across all stakeholder groups and countries), the majority (52%) expressed being in favour of targeted full harmonisation and mutual recognition as a variant (option 1 in the Green Paper). 21% favoured targeted full harmonisation and another option for the variant and this group was closely followed by those who preferred targeted full harmonisation with no variant (20%). Only 7% indicated being in favour of targeted full harmonisation and the country of origin principle.

Regarding Member States’ contributions, five Member States supported mutual recognition (combined with targeted full harmonisation). Only one Member State opted for the country of origin principle.

The majority opted for “other option” (13) or no variant (6). The most frequently cited other option was the country of destination principle. Five Member States supported mutual recognition and only one Member State chose the country of origin principle. One EEA/EFTA country did not reply.

Key issues raised by the contributors on the suggested options

General comments included:

- It was expressed by numerous contributors that the degree of harmonisation in case a full harmonisation approach would be adopted, needs to be discussed in detail. It is feared, especially by contributors who represent a country where they claim that the level of consumer protection is currently high, that full harmonisation might lead to a decrease of the current high consumer protection standards in some Member States.
- Some contributors were of the opinion that the degree of harmonisation should be decided separately from the choice between a vertical or horizontal approach. What matters, according to these contributors, is the quality of the final product regardless of the instrument used.

- Some Member States suggested a framework instrument fully harmonising definitions and general principles (excluding consumer sale), whilst retaining minimum harmonisation in the sectoral Directives.
- One Member State supported a harmonisation targeted at issues where there are substantial differences which affect the functioning of the internal market and which would meet the consumer needs. Two Member States proposed full harmonisation only of certain technical issues such as cooling-off periods.
- Several contributors, even though they would favour targeted or even full harmonisation, made clear that it is not only the level of harmonisation but also the implementation and application of the consumer legislation (including public enforcement, alternative dispute resolution mechanisms, and small claims procedures arbitration and court action) which will make the difference.
- Contributions from the electronic sector and small businesses associations remarked that the use of minimal clauses in conjunction with the Rome Convention (and current proposal for an EU Rome Regulation) introduce great legal uncertainty into the distance selling market, acting as a significant disincentive to offering services across the European Union and encouraging restriction of services to domestic consumers only. It would considerably increase the costs of drafting contracts because distance sellers would have to provide 27 different general terms and conditions for sales in EU Member States.
- A number of public authorities' contributions advocated the combination of minimum harmonisation with the country of destination principle using, in cases where a uniform rule would confer great advantage, the full harmonisation principle.
- According to the EESC harmonisation of consumer legislation across the EU must take, as a guiding principle, the adoption of the best and highest level of consumer protection to be found in the Member States. Any "horizontal instrument" should be based on the highest standards while necessary "vertical integration" would concentrate on clarifying technical issues.
- The EP emphasised that harmonisation must not lead to a decline in the level of consumer protection as achieved under certain national laws, but should lead to a comparable level of consumer protection in all Member States.
- The EP also highlighted that it is essential to have a clear overall vision of how the various legal and regulatory regimes affecting consumer and commercial law activities at EU level interact and function together, especially the relationship between any instrument produced by the Review and those dealing with conflict-of-law rules (Rome I and Rome II) and others based on the country-of-origin principle (e.g. the E-commerce Directive);

A large number of contributions from consumer groups highlighted the following point: the range of options set out both in the Green Paper does not cover the full series of options. One crucial option seems to be omitted: minimum harmonisation in combination with the country of destination, respectively conflict of law rules, which has always been the approach adopted in consumer protection directives until recently.

One consumer group advocated minimal harmonisation coupled with the principle of the application of the law of the consumer's country of residence (the consumer supposedly being the weaker party to the contract). Application of a mutual recognition or internal market clause

would lead to a re-fragmentation of consumers' rights and would not promote consumer confidence in the internal market.

Comments expressed by contributors who were in favour of minimum harmonisation included:

- It was believed by a number of contributors, especially by public authorities, that minimum harmonisation would allow for flexibility in case the circumstances change; especially as these changes/new developments can sometimes take place only at national level. Also, it was discussed that all policy makers adopt legislative measures in order to achieve certain goals. However, they do not have perfect measures in order to achieve certain goals. Therefore, if Member States remain relatively autonomous in shaping their policies, like under the minimum harmonisation approach, they can continue experimenting with a variety of legislative solutions and thereby produce more innovation and progress in lawmaking than if the sole legislative competence rests with the EC.
- Quite a few contributors expressed the issue of the subsidiarity principle. Furthermore, they were of the opinion that as long as European private law is characterised by significant divergences, it must be left up to each Member State to determine the requirements in terms of consumer protection according to its own legal tradition and legal system and, if necessary, to even go beyond the European guidelines. They believed that full harmonisation only makes sense for self-contained questions of law that have little bearing on the rest of the domestic contract law.
- From the point of view of several consumer groups, it was expressed that full harmonisation would not be viable when it comes to consumers, given their vulnerability and the constant challenges and changes of the market.
- A business stakeholder stated that harmonisation at the highest level would result in reducing or eliminating both intra-brand as inter-brand competition, as competitors try to differentiate by offering different levels of support and services.

Comments expressed by contributors who were in favour of full harmonisation or targeted full harmonisation included:

- It was expressed by several contributors of the business sector that full harmonisation would make it possible for companies to offer their products or services under similar conditions in all Member States and for consumers to buy them under circumstances they are familiar with. The current minimum harmonisation approach makes it unattractive, according to especially SMEs which do not have resources for internal legal advice, to operate cross-border.
- A number of contributors from the business sector welcomed full harmonisation under very strict conditions and only in certain restricted areas where this would be absolutely essential in order to remove obstacles to the internal market. Such a "targeted" full harmonisation would require the identification of certain areas of regulation, such as the cooling-off period, which could be revised with the objective of achieving full harmonisation.
- One Member State supported an approach that proposes full harmonisation where there is a clear barrier to trade or evidence that a regulatory difference is leading to a reduction in consumer confidence. The justification for full harmonisation must demonstrate that the harmonisation of detailed laws will lead to predictable rules for business, and greater confidence in consumers.

- One Member State suggested that the best choice would be to combine full and minimum harmonisation. Full harmonisation could be used in areas where it is possible, i.e. such areas where the national laws are already approximated. Minimum harmonisation should be applied in areas where the national laws are still divergent, and intervention into the national legal system on the basis of full harmonisation, with its sometimes very drastic effects, would be too far-reaching.
- The EP welcomed the Commission's proposal for a horizontal instrument and acknowledged the possible advantages of a basic 'consumer rights' directive; it suggested that the horizontal instrument with cross-cutting policy areas, which should help to increase the coherence of terminology and remove loopholes and inconsistencies, should start from the principle of full targeted harmonisation;
- The EP further suggested that sectoral tools that are being reviewed should be based on the principle of minimum harmonisation, combined with the principle of mutual recognition where the coordinated area is concerned; notes, however, that this does not exclude full targeted harmonisation where this proves necessary in the interests of consumers and professionals;
- The EP also pointed out that as the law stands at present as regards the non-coordinated areas, the applicable law is determined by the rules of international private law, in particular the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (Rome I); in this regard it will be important, during the current discussions, to avoid divergences between this Convention and specific Community legal acts;
- Finally the EP recommended the inclusion, in the sectoral instruments, of an internal market clause to allow consumers to benefit fully from the internal market.

Some contributors were in favour of full harmonisation, only with the condition that the protection afforded means a “high level” of protection. Maximum harmonisation cannot be accepted where this is likely to lead to diminished protection for consumers.

It was noted that the Unfair Commercial Practices Directive already has a maximum harmonisation clause which prevents Member States of maintaining some measures deemed more favourable for the consumers: an evaluation of the impact of the Directive should be carried out before engaging in such policy in the context of consumer protection.

Some suggest an “ideal” solution: maximum harmonisation based on the highest level of protection currently existing in the Community. This is the only option that would combine the effectiveness of uniform legislation across the European Union and optimum consumer protection.

It should be noted that a number of consumer associations expressed that they would be ready to accept full harmonisation on the condition that the level of protection reached is high and that it is targeted to very specific technical issues and not extended to general principles of contract law. Some Consumer associations go even further by supporting full harmonisation without any conditions attached to it.

A specific consumer group mentioned it would not rule out full harmonisation of certain rules if justified and useful. Prerequisites for introducing full harmonisation within a given area include: a) evidence that market failure has been caused by rules differing between Member States

(otherwise total harmonisation would not work); b) an inability to solve the problem through other, less drastic measures; c) the overall positive impact on consumers of total harmonisation being greater than the negative one; and, d) a procedure that allows for adaptation of rules in reaction to market changes (e.g. comitology which is mentioned in the Green Paper). This is in accordance with the principle of subsidiarity.

Comments expressed with regard to the suggested harmonisation variants included:

- A high number of contributors across all stakeholder groups expressed that the question of minimum or full harmonisation and the harmonisation variants is closely intertwined with the outcome of the Rome I legislation.
- The EP also pointed out that as the law stands at present as regards the non-coordinated areas, the applicable law is determined by the rules of international private law, in particular the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (Rome I); in this regard it will be important, during the current discussions, to avoid divergences between this Convention and specific Community legal acts.
- Concerns with regard to the country of destination principle (as stated in the Rome I regulation) were expressed. It was judged that such as principle would require internet sellers to be familiar with the law of every Member State. As a consequence they might be reluctant to accept orders from other Member States.
- Some respondents expressed having strong reserves towards the mutual recognition principle because this would not imply an identical level of consumer protection and would, in case full harmonisation would be adopted, allow scope for minimal or incomplete harmonisation.
- Concerns were raised about the fact that the principle of mutual recognition would cause a laborious clarification of which regulations should apply.
- Some contributors were of the opinion that the principle of mutual recognition does not focus on consumer interests and thus the interests of the weaker contracting party are overlooked. The principle solely concentrates on the supply side. Moreover, the contributors believed that a concept of this kind is diametrically opposed to the revision of Rome I and the commitment to strong consumer protection in the conflict of laws. They also indicated that the Green Paper was unclear to where the Commission stands with relation to the conflict of law.
- One Member State supported full harmonisation coupled with a country of origin clause applicable both to provisions fully harmonised and those subject to minimum harmonisation, in particular because of the negative consequences of Rome I.

5.2.4 Horizontal issues

1. Definition of "consumer" and "professional"

The definitions of "consumer", "professional" (e.g. trader, seller, etc.) are not consistent in the eight Directives neither are they consistent between the Member States. This means that potential conflicts could arise when a transaction falls under more than one Directive (e.g. Distance Selling and Unfair Contract Terms) and/or at cross-border level. Therefore the Green Paper asked the contributors to choose an option for action on the following question:

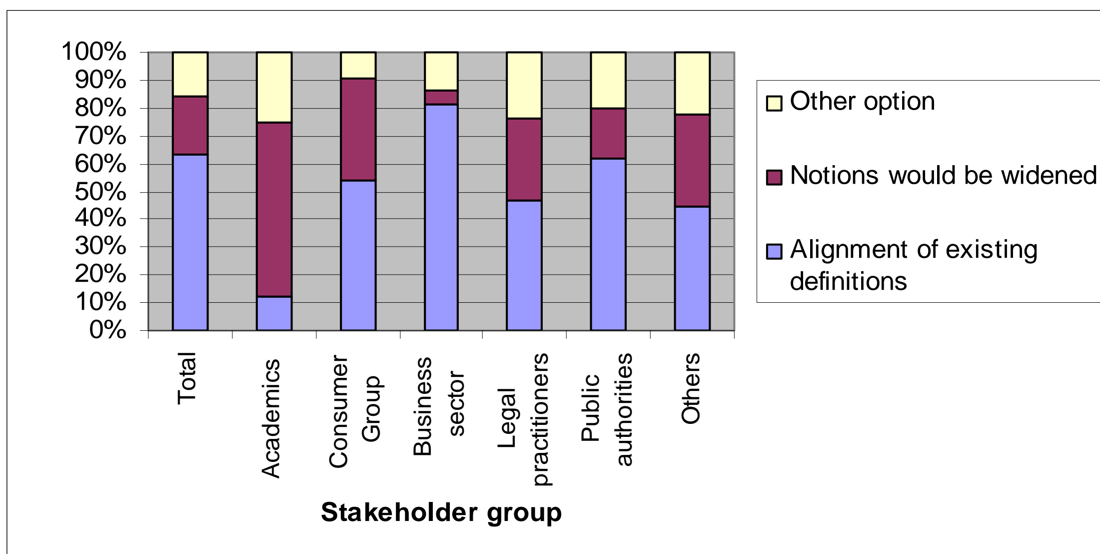
Question B1 "How should the notion of consumer and professional be defined?"

Actions proposed by the Commission in the Green Paper

Option 1: An alignment would be made of the existing definitions in the Acquis, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.

Option 2: The notions of consumer and professional would be widened to include natural persons acting for purposes falling primarily outside (consumer) or primarily within (professional) their trade, business and profession.

Graph 5.4: Contributions on notions of consumer and professional per stakeholder group



Alignment to existing definitions in the Acquis is clearly the favourite option for action (63%). A wide majority of the stakeholders opted for an alignment with the existing definitions in the Acquis, with the exception of academics which chose a widening of the definitions (63%). It is worth noting however that between 9% and 25% of most stakeholders' responses have opted for other options, which is in most cases linked to the comment made below on the restrictiveness of the two options offered by the Green Paper. Some contributors suggested alternative definitions or an alignment with the definition of similar notions in other EU legislation such as UCPD.

The majority of Member States (17) supported option 1. Only three Member States and one EFTA/EEA country opted for option 2 while five Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

General comments included:

Some of the contributors expressed their concerns by indicating that definitions offered by the Green Paper were too strict: legal persons are not included (NGOs, companies buying presents for their employees or clients) and there is no mentioning of the possibility of a mixed used of the object (i.e. for work and leisure purposes). Furthermore, many have criticised the fact that neither the options nor the explanatory comments on the Green Paper made any allusion to situations in which some small entrepreneurs are just as weak in the negotiation of the contract as the consumer. In that case the entrepreneur is indeed a professional but also the weaker party and he would therefore be entitled to the same protection as a consumer.

One Member State highlighted that the consumer should be a physical person as well as a legal person which purchases goods or uses services for its personal use as long as it acts as a physical person (non- entrepreneur) towards seller.

Comments expressed by the contributors who were in favour of option 1 included:

- There was widespread consensus across all stakeholder groups that this option offers the most legal certainty, clarity and consistency, and this because it leaves no room for any interpretations. There was more divergence of opinion as to whether the definition of “consumer” should also include small firms/NGOs and other legal entities that are carrying out a transaction and are just as weak as a consumer would be. The argument exposed against such inclusion is that this would blur B2B and B2C transactions – although one business did suggest that a definition of small firm should be introduced.
- The main reason for not choosing option 2 was that the term ”primarily” is too vague.
- One Member State highlighted that there is a degree of legal uncertainty in option 2 in that it would be necessary to assess the purpose of the transaction in all cases, i.e. to determine whether it is primarily outside the framework of business or whether it is intended primarily for business. Poland agreed that the extension of definition would contribute to hindering appropriate identification of the individual transactions and would introduce the element of uncertainty in running of business activity at the national level and in cross-border trade.
- The EP considers that the clarification of these notions in the horizontal instrument is essential, insofar as they determine the implementation field of consumer law. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions.

Comments expressed by the contributors who were in favour of option 2 included:

- The majority of contributors who chose this option advocated that it leaves room for including in the definition of consumer certain specific situations that would not be taken into consideration otherwise in option 1. It has been argued that legal persons should be considered as “consumers” thus non-profit organisations – as well as companies making a purchase for their employees or their clients – for instance would be included.
- Furthermore, this approach would allow certain small firms who are dealing with other businesses and find themselves in a weak position during the realisation of the B2B transaction, to benefit from the same protection as consumers. Finally, the mixed use of a good can also be taken into account in this option: a doctor that buys a car to go visit

his patients but also uses it for personal purposes would therefore be protected by consumer protection rights.

Alternative options suggested by the contributors

Academics

The following definition was suggested: “consumer means any natural person who is mainly acting for purposes which are not related to this person’s business activity”.

One contribution highlighted the following points:

- the classification of “consumer” cannot be a static classification that goes with the subject; it must be an ad hoc classification for each specific act, which is analysed according to whether or not this purpose outside his profession exists; and
- the inclusion of not-for profit legal persons as consumers would be advisable.

Business sector

A number of contributions considered that the UCPD provides a satisfactory definition of consumer and trader. Furthermore the search for new definitions should not only encompass other Directives but should include the notions in use in private international law and international conventions.

Suggested definitions for consumers included the following:

- “any person being in a lower economic and technical situation compared to the professional”; and
- “any individual acting in ends which do not enter within the framework of its occupation”.

The issue of legal persons not acting for business purposes falling outside both definitions was raised by a number of contributors. One contribution suggested that there is no reason in principle why the definition of consumer should be restricted to “natural persons” and should not encompass, for example, partnerships, trusts, non-trading companies, charitable bodies and clubs.

Some respondents were not aware of any problems that have arisen in relation to the definition of “consumer” or “professional”, therefore they advocated preserving the status quo.

Consumer groups

Also in this group it was mentioned by several contributors that one possible definition could be the one used in the UCPD. This definition, however, would rule out legal persons that do not exercise a professional activity. It was advised to leave the Member States an option on this issue.

A number of contributors argued that the issue of users of public services is not dealt with. To this end a consumer group suggested that “professional” would be defined as persons (natural or legal) acting for purposes relating to their trade, business or profession “whether private or public”.

One contribution suggested that there may be areas where a certain deviation is appropriate in objective terms. Transactions, conducted by dependent employees, which relate to their

profession should in any case also be included in the area of consumer protection at European level. Legal transactions conducted by employees in dependent employment would therefore be included deliberately.

Legal Practitioners

As suggested by several contributions, a wider definition of the consumer would include legal persons (collective consumers, associations, foundations, social cooperatives and non-profit organisations).

One contribution suggested that notions such as "consumer" and "professional" should be abandoned. Instead, the equivalent of the "professional" in individual Directives should be replaced with "supplier acting in the course of trade" and cognate expressions to suit the circumstances. Only a "supplier acting in the course of trade" (or equivalent) should be subject to the enhanced obligations created by the Consumer Acquis, so as to exclude many private C2C and B2C transactions.

It was noted that one aspect has been omitted with regard to the definition of a consumer, i.e. the user of a public service.

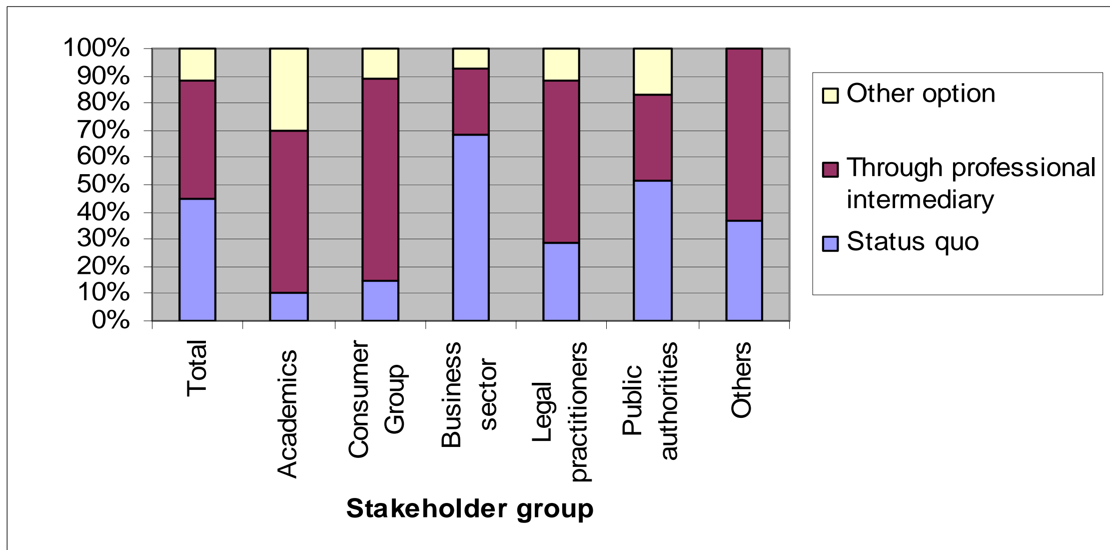
2. Consumers acting through an intermediary

Consumers acting through an intermediary are not protected by “ordinary” business-to-consumer law. The Green Paper thus raised the following question:

Question B2 “Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?”

Actions proposed by the Commission in the Green Paper *Option 1*: Status quo: consumer protection would not apply to consumer-to-consumer contracts where one party makes use of a professional intermediary for the conclusion of the contract. *Option 2:* The notion of consumer contracts would include situations where one party acts through a professional intermediary.

Graph 5.5: Contributions on consumers acting through an intermediary per stakeholder group



Maintaining the status quo was preferred by 45%, but this group is closely followed by the group who chose “the choice of including situations where one party acts through a professional intermediary” (43%) and thus represents a significant percentage nonetheless.

It may be worth noting that for this question there is a stark contrast between the business sector – within which 68% of contributors opted for a status quo – and the consumer groups – within which 74% of contributors chose “the choice of including situations where one party acts through a professional intermediary”.

Maintaining the status quo was preferred by 45%, but this group is closely followed by the group who chose “the choice of including situations where one party acts through a professional intermediary” (43%) and thus represents a significant percentage nonetheless.

A large number of Member States (13) supported option 1 (status quo). Seven Member States opted for option 2. Five Member States and one EFTA/EEA country chose ‘other option’.

Key issues raised by the contributors on the suggested options

General comments included:

- The solutions offered by the Green Paper were, as was the case for the definitions, deemed too strict. Contributors argued that it is impossible to decide since the situation very much depends on what is mainly agreed between the professional intermediary and the consumer contracting him, as well as the awareness of the other party of whether he is dealing with a professional or an intermediary. Some contributors found that it should be treated on a case by case basis.
- A precondition for the inclusion of online actions would be, for many actors from different groups, that the person auctioning the second-hand good is indeed a business who is the direct owner of the good.

- A German business representative added that by over-regulating online auctions such as eBay, which has found great acceptance amongst its consumers, would ultimately rob it of its attractiveness.
- Contributions from the business sector stressed that regulatory intervention should be strictly limited to B2C trade. They were opposed to any extension of the right of withdrawal or other consumer protection measures to on-line auction sales between two private individuals ("P2P" or "consumer-to-consumer" trade) or two professionals (B2B trade).

Comments expressed by the contributors who were in favour of option 1 included:

- It is not clear to define what the intermediary is and at what point the professional stops being just an intermediary and becomes a professional acting on behalf of the other consumer. In this light, extending the scope of the consumer contract and putting liability on the professional would be unfair. This option was favoured by a great majority of businesses and public authorities.

Comments expressed by the contributors who were in favour of option 2 included:

- The party benefiting from the expertise of the professional intermediary's expertise would be in a stronger position with regards to the other party, thus this option re-equilibrates the parties in the transaction and prevents situations created to circumvent the law.
- The consumer will always be a consumer, no matter who the party is dealing with – whether intermediary or consumer – therefore should always be protected under consumer law. It has been suggested nevertheless, that internet platforms should be excluded.

Alternative options suggested by the contributors

Academic

One of the solutions proposed by a contributor was to insert a general clause into a horizontal directive, that, if the parties to a contract use a legal construction for the purpose to circumvent consumer protection laws, the courts may apply these laws by analogy. In such cases the courts also would have to decide, whether the consumer has rights against the other consumer, who acted through an intermediary, or directly against the intermediary itself.

Other contributions merely requested the Commission to reflect upon a clear definition of the notion of intermediary.

Consumer groups

The following points were made:

- if the commission opts for the maintenance of the status quo, there should be an obligation to inform the buyer in advance, that he/she is concluding the contract with a private person and that therefore the liability is excluded; and
- the legal position of intermediaries should be clarified in the Rome I Regulation.

Legal practitioners

It was suggested that none of the two options were appropriate: contracts between private persons while one of the parties acts through a professional intermediary in some cases should be (for example: sales representative) and in some cases should not be (for example: property agent) under the rules of consumer rights.

Public authorities

The following elements have to be taken into account in order to assess whether the intermediary would be acting in his own name or else as an agent for the consumer:

- if the intermediary is acting as an agent, then the law would not extend to the contract. On the other hand, if the intermediary is selling in his own name, then the contract would be regulated as a business-to-consumer contract; and
- the situation could be judged with regard to the specific instructions given by the consumer contracting the intermediary, and considering that the other party is aware that he/she is negotiating with an intermediary or a professional.

3. Concepts of good faith and fair dealing in the Consumer Acquis

The Consumer Acquis does currently not include the concepts of good faith and fair dealing. One of the questions raised in the Green Paper concerning this issue was:

Question C "Should the horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?"

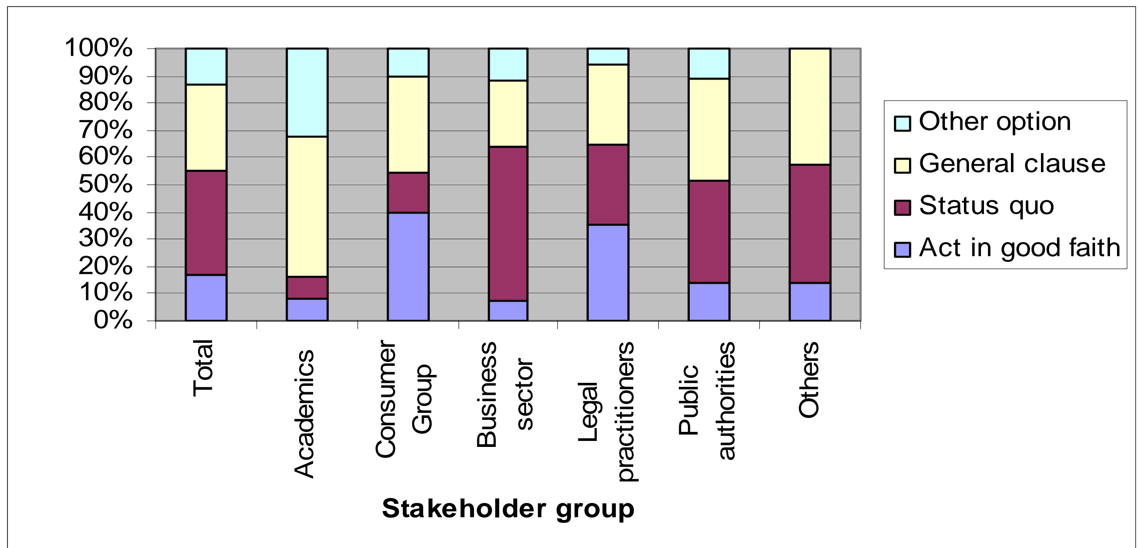
Actions proposed by the Commission in the Green Paper

Option 1: The horizontal instrument would provide that under EU consumer contract law professionals are expected to act in good faith.

Option 2: The status quo would be maintained: There would be no general clause.

Option 3: A general clause would be added which would apply both to professionals and consumers.

Graph 5.6: Contributions on the concepts of good faith and fair dealing per stakeholder group



The status quo was preferred to the other options with 38%, but was closely followed by the option "general clause" for which 32% of the contributors were in favour. Moreover, it is worth noting that there seems to be a significant split between certain stakeholder groups such as legal practitioners, public authorities and "others" – which had the same percentages, respectively 29%, 39% and 43%, for both the status quo and the general clause. Academics also had a significant proportion opting for "other options". Finally, it is worth noting that around half of the contributors choose either option 1 or 3, this indicating to be in favour of a general clause.

The Member States were divided into two main groups, those supporting option 2 (9 Member States and one EFTA/EEA country) and others supporting option 3 (9). Only four Member States supported option 1and three opted for 'other option'.

Key issues raised by the contributors on the suggested options

General comments included:

- Good faith is difficult to prove either way and some contributors were concerned that this could lead to a dilution of the specific requirements of the various pieces of legislation.
- A number of contributions emphasised that the Green Paper did not specify the meaning and content of this principle, and therefore they could not give a specific response. What could be included in the concepts at EU level is very unclear. Fair dealing is a concept very much open to interpretation and would accordingly need to be defined.
- It was expressed amongst the academics that the danger exists that a general clause may be interpreted differently from Member State to Member State. National conceptions of good faith may vary, and it is unlikely that there is a central arbiter on the substance of good faith.

- According to some academics, the debate should concentrate on the full scope and substance of the good faith principle.
- Comprehensive answers to this question can, according to a number of academics, only be formulated on the basis of a CFR which is attempting to generalise the principle of good faith.
- Some legal practitioners debated that a general duty of honesty exceeding the necessary contractual good faith should take into account the duties of information, council, assistance and co-operation.
- Whereas it was deemed beneficial to have the interests of both sides stipulated in a general clause, there is a strong concern amongst the business sector about the shift of the final competence for such an interpretation to the European Court of Justice.
- Some business stakeholders expressed the fear that a European general clause might entail the risk that the national general clauses would become considerably limited in their distinctive meaning or have their meaning changed. A European duty of fair dealing would therefore not lead to greater legal certainty.

Comments expressed by the contributors who were in favour of option 1 included:

- Generally, contributors that opted for this option advocated that this would strengthen general provisions of the UCPD and that it would restore the balance in the relationship between the professional and the consumer.
- While the concept of good faith should apply also to the consumer it is important to maintain the difference between presumption of good faith on the part of the consumers and proof of good faith on the part of the professionals – otherwise it would go against consumer protection.
- Some consumer associations supported option 1 provided it remains minimum harmonisation.

Comments expressed by the contributors who were in favour of option 2 included:

- It has been argued by all stakeholders that the concept of good faith and fair dealing are already part of the UCPD.
- It was debated that it is very difficult to find a definition of good faith and fair dealing: their meaning varies across the different Member States and attempting to put an obligation to act in "good faith" would create additional legal uncertainty and generate further conflicts for each case to be debated on the matter.
- The EP, in its Resolution on the Green Paper, expressed its opposition to the insertion of a general clause of good faith that would apply to consumer contracts in the horizontal instrument.

Comments expressed by the contributors who were in favour of option 3 included:

- It would give more security to consumers and better clarity to businesses thus instating a just balance between both parties. Nonetheless, even for a significant number of contributors for this answer, it has to be kept in mind that the concepts of "good faith" and "fair dealing" are hard to define. Therefore to achieve legal certainty, these principles should be stated in the most comprehensible way possible.

4. The scope of application of the EU rules on unfair terms

Extension of the scope to individually negotiated terms

The Directive on Unfair Contract Terms currently applies to non-negotiated terms only, i.e. contractual clauses which the consumer has had no possibility to influence during the negotiation process. In practice, the Directive is in most cases applicable to pre-formulated contract terms used in mass transactions. In reality consumers often have only a very limited possibility to influence the content of a clause even if it theoretically is open to negotiations. A number of Member States have specific rules on the (un-)fairness of individually negotiated terms. One of the questions of the Green Paper therefore addressed this issue:

Question D1 "To what extent should the discipline of unfair contract terms also cover individually negotiated terms?"

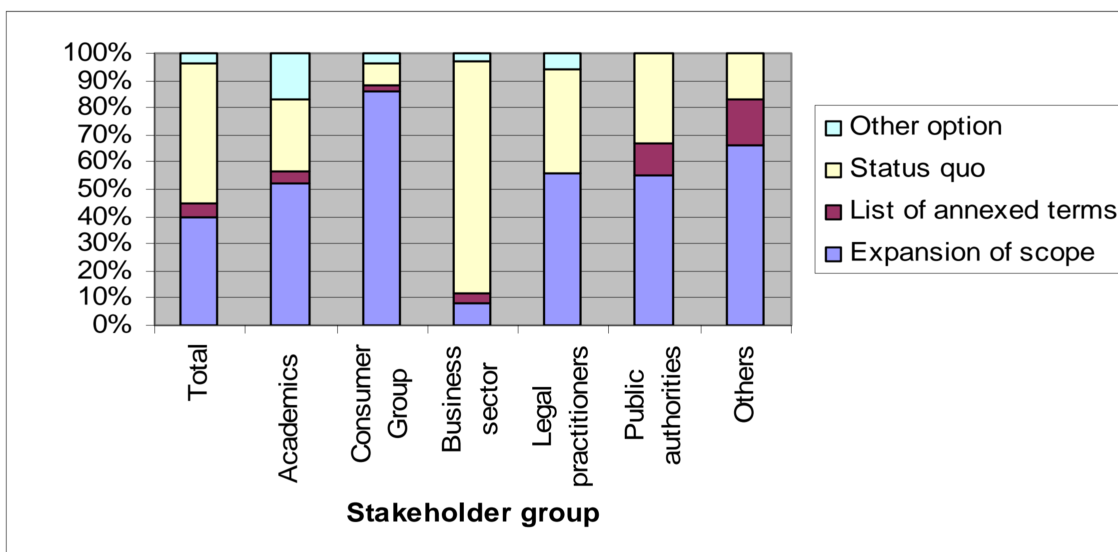
Actions proposed by the Commission in the Green Paper

Option 1: The scope of application of the Directive on Unfair Terms would be expanded to individually negotiated terms.

Option 2: Only the list of terms annexed to the Directive would be made applicable to individually negotiated terms.

Option 3: Status quo – Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms.

Graph 5.7: Contributions on the scope of application of EU rules on unfair terms to individually negotiated terms per stakeholder group



The status quo has the majority of preferences with 51% only followed by "expansion of scope" with 40%. It is also important to note that consumer groups and the business sector disagreed on the issue: while consumer groups opted for an expansion of the scope with 85%, the business sector preferred the status quo with the same majority.

Regarding Member States contributions, a clear majority supported option 1 (14). Seven Member States and one EFTA/EEA country supported the status quo, whereas only four opted for option 2.

Key issues raised by the contributors on the suggested options

General comments included:

- It is not desirable for the review/modernisation envisaged by the Commission to challenge complex notions, the development of which is based on the specificities of each sector. The notion of unfair clauses extended to the subject of an individual negotiation challenges the very foundation of this notion. This approach is not accompanied by a consistent view of all of its consequences in civil, commercial and even criminal law.

Comments expressed by the contributors who were in favour of option 1 included:

- The fact that the terms have been negotiated does not mean that the consumer is not in a weak position anymore; because the professional has more knowledge and expertise in negotiating terms, the balance of power in the negotiation remains uneven.
- Consumers may not be aware of the possibility to dispute the terms. Consumer groups, public authorities, legal practitioners and academics believed that option 1 would increase consumer protection.
- A Member State expressed its support for the extension at the condition that minimum harmonisation should be kept.

Comments expressed by the contributors who were in favour of option 2 included:

This option has been chosen by very few contributors representing a very little proportion of each stakeholder category. Mainly, contributors argued that this option extended the protection of the consumer – like option 1 – without however infringing on the freedom of contract. It provides more flexibility.

Comments expressed by the contributors who were in favour of option 3 included:

- The business sector had a clear majority of contributors opting for this option It was argued that consumers are already protected by the UCPD, and further protection with regard to cases where the consumer was actually in a position to object is not necessary – additionally, such instances are deemed to happen infrequently.
- Most importantly, this would go against the freedom of contract and deter businesses from allowing individually negotiated terms.
- An EFTA/EEA member highlighted that full harmonisation of unfair contract terms is impossible at this stage.
- The EP did not consider it appropriate to apply the rules on unfair terms to individually negotiated terms so as to restrict the freedom of the contracting parties to conclude contracts.

Alternative options suggested by the contributors

Academics

One contribution suggested that it could be envisaged to define more clearly the notion of ”individually negotiated” in order to ensure that only cases where the consumer had a real chance to influence the content of the term fall outside the unfairness test.

Legal Practitioners

Extension was deemed acceptable if it were to be accompanied by the safeguards necessary to ensure that businesses who undertake genuine negotiations with consumers in a transparent fashion would not be placed at risk of having those contracts re-written at a later date.

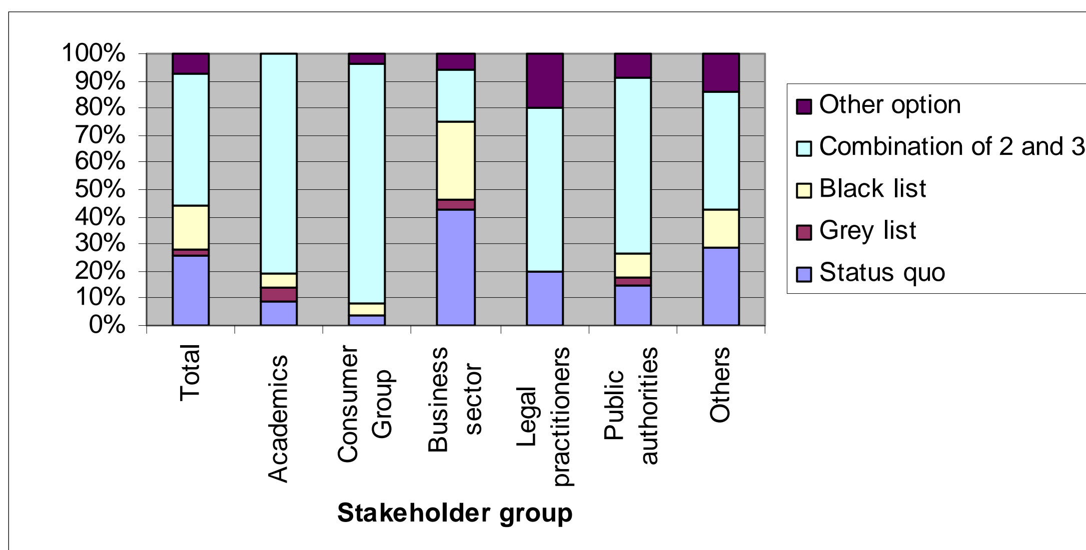
5. List of unfair terms

The current list of unfair terms is only indicative and leads to divergent applications in Member States. It does not make a distinction between terms which are unfair by default and terms which under certain circumstances become unfair. The question in the Green Paper on this issue was:

Question D2 “What should be the status of any list of unfair contract terms to be included in a horizontal instrument?”

Actions proposed by the Commission in the Green Paper *Option 1*: Status quo: To maintain the current indicative list. *Option 2:* A rebuttable presumption of unfairness (grey list) would be established for some contractual terms. This option would combine guidance with flexibility as to the assessment of fairness. *Option 3*: A list of terms – presumably much shorter than the existing list – which are considered to be unfair in all circumstances (black list) would be established. *Option 4:* A combination of options 2 and 3: some terms would be banned completely, while a rebuttable presumption of unfairness would apply to the others.

Graph 5.8: Contributions on the status of the list of unfair terms per stakeholder group



49% of the contributors preferred a combination of option 2 and 3. Only the contributors from the business sector seemed to be relatively split between the status quo (44%), the black list (28%) and the combination of 2 and 3 (19%).

A clear majority of Member States supported option 4 (16). Only three Member States and one EFTA/EEA country supported option 1 and three opted for option 3. Three Member States chose ‘other option’.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- The business sector argued that the present list has been well tested and proved to work well, therefore, unless the Commission provides solid reasons to make any changes, the list should remain indicative.
- The current indicative list is more “future proof” and flexible than the grey and black lists.
- It should be left up to courts in Member States to decide what is fair and unfair (see also the comments on question C).
- One Member State insisted that the comitology should not be used – the list belongs to the essential elements of the Directive.

Comments expressed by the contributors who were in favour of option 2 included:

- Very few contributors chose this option, and the majority of this small number belonged the business sector. According to the contributors maintaining the current indicative list would lead to a divergent application in Member States, therefore a grey list could create more consistency.
- It combines guidance with flexibility.

Comments expressed by the contributors who were in favour of option 3 included:

- The business sector and consumer groups essentially opted for this option, arguing that it would eliminate differentiation difficulties and promote legal certainty.
- It was also pointed out that this list should be shorter than the indicative list already existing and that it should include those terms that are to be banned under any circumstances – i.e. as unambiguous as possible.
- This would provide greater security to consumers and any amendment should be done through co-decision procedures.

Comments expressed by the contributors who were in favour of option 4 included:

- It would simplify the current legislation and improve the regulatory environment for consumers as well as for professionals.
- While the black list is closed, the grey list leaves room for what could be seen as a case-by-case basis analysis of the terms, thus preventing some professionals from circumventing the legislation – as would be the case with only a black list.
- In their resolution, the EP considered that, in order to boost consumer confidence in the internal market, arrangements affording more protection should be introduced, while retaining a degree of flexibility; they requested the Commission to carry out further examination of the use of a combination of a black list of banned terms and a grey list of terms presumed to be unfair and other terms which consumers could demonstrate to be unfair by means of legal action, on the basis of previously determined and uniform criteria;
- This option has been qualified as more protective for consumers and more flexible overall.

Alternative options suggested by the contributors

Public authorities

One Member State favours a non limited black list. New unfair terms tend to appear in contracts.

6. Scope of the unfairness test

Under the Directive on Unfair Terms a non-negotiated contractual term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, for instance the unfairness test. According to this test, the assessment of the unfair nature of the terms relates neither to the definition of the main subject matter of the contract nor to the adequacy of the price (as far as these terms are expressed in plain intelligible language). The Green Paper addressed the following question concerning the scope of the unfairness test:

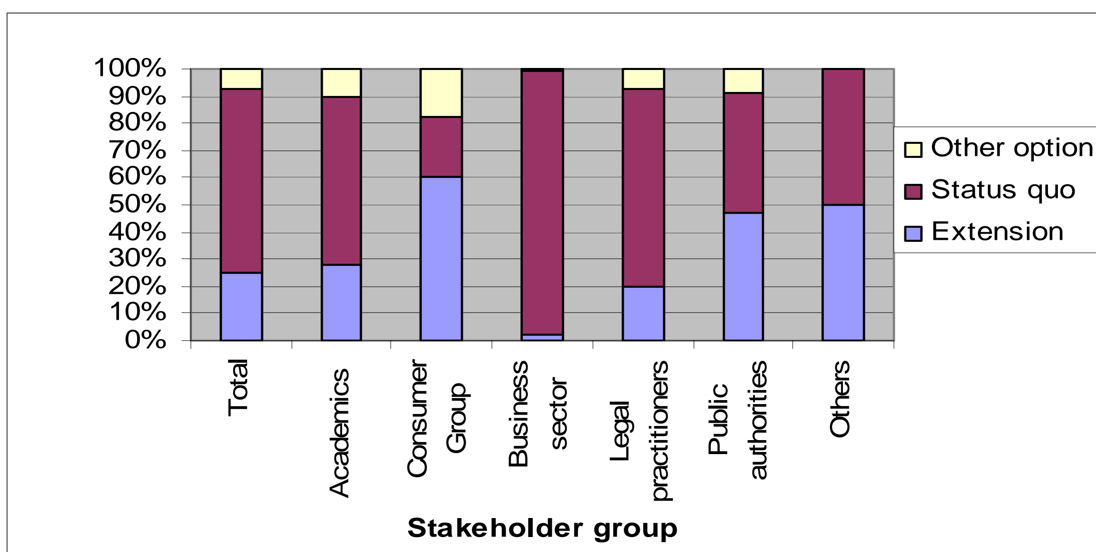
Question D3 "Should the scope of the unfairness test of the directive on unfair terms be extended?"

<u>Actions proposed by the Commission in the Green Paper</u>

Option 1: The unfairness test would be extended to cover the definition of the main subject matter of the contract and the adequacy of the price.

Option 2: Status quo - the test of unfairness would be kept in its present form.

Graph 5.9: Contributions on the extension of the scope of the unfairness test of the directive per stakeholder group



The status quo has the clear majority with 68%. The business sector and consumer groups have once more opposing views on the matter with respectively 97% for the status quo and 60% for the extension of the scope. Furthermore, it might be worth noting that the group "others" is evenly split (50%) between the two options.

The contributions from Member States were evenly split between those in favour of the status quo (12) and those supporting option 1 (11 Member Sates and one EFTA/EEA country) - extension. Two Member States opted for 'other option'.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- This option was favoured by the majority of consumer groups since it would extend consumer protection by requiring a higher level of objectivity and transparency throughout the whole contracting process.
- The freedom to set prices on which market economy is based has been argued to create an imbalance between the professional and the consumer; the extension of the unfairness test would facilitate to restore the balance between parties.

Comments expressed by the contributors who were in favour of option 2 included:

- Given that agreement on the subject and price is the basis of a sales contract, the risk of legal uncertainty would be too high if option 1 was adopted and this could eventually also impact on the freedom of contract.
- It would risk going against market economy whereby the price is determined by competition– price is not something to be determined by a court – and the free choice of consumers – who has the possibility to assess the contract and make a conscious choice.
- A number of contributors argued that the Green Paper did not provide good enough reasons to make any changes on the matter. The majority of the business sector opted for this option.
- The EP resolution rejected the idea of extending the unfairness test to all the core terms of a contract, including the main subject matter of the contract and the assessment of the price, having regard to the principle of contractual freedom.

Alternative options suggested by the contributors

Academics

Reservations with regard to option 1 were expressed: while the scope of the unfairness test should be expanded, it should not be extended to the price. Most prices are freely determined throughout the European Union.

Consumer groups

A number of contributions highlighted the need to exclude the adequacy of the price, considering that it is not up to the judge to rule on the economic balance of the contract. The fate of contracts concluded for a prohibitive price should be covered by the texts on unfair commercial practices, not in the law on unfair terms.

Other responses focused on the existence of exceptional cases. If in principle, the price and subject matter of the contract should remain outside of judicial control, some clauses that refer to price should be subject to that control, for example clauses that refer to price increases, price formation and incidental costs (airport fees for example) or ancillary services (switching costs, etc.) – when price formation is opaque, the formation of prices according to market forces is not possible. A mechanism that defines whether a certain restriction, code or specification can be considered fair under consumer protection law is urgently needed according to these responses.

Legal Practitioners

It was noted that extending the scope of the unfairness test to cover the adequacy of the price can create problems for bank and insurance contracts, thus this extension should be limited to situations exploited by the contractual counterpart through charging an exorbitant price.

Public authorities

A number of contributions opted for option 1 with a restriction: the unfairness test would be extended to cover the definition of the main subject matter of the contract, except for the adequacy of the price

7. Information requirements

Several Directives impose obligations on professionals to provide consumers with information before, during or after the conclusion of a contract but the failure to comply with these obligations is regulated in an incomplete and inconsistent way. Sometimes no remedies are available, sometimes an extension of the cooling-off periods is offered (e.g. Distance Selling Directive). Moreover, these obligations are regulated differently between the Member States. Therefore the Green Paper raised the following question:

Question E "What contractual effects should be given to the failure to comply with information requirements in the Consumer Acquis?"

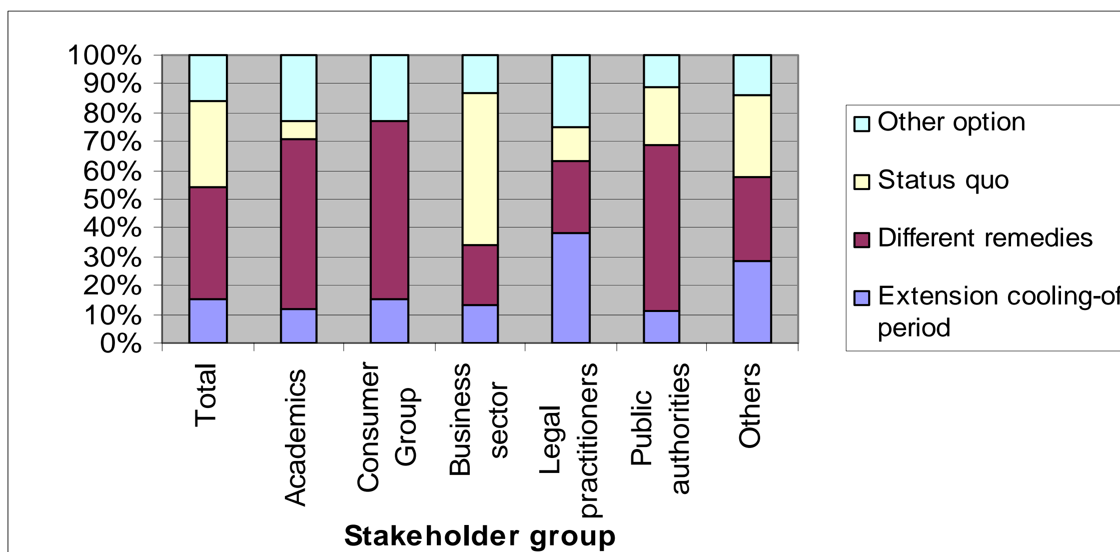
Actions proposed by the Commission in the Green Paper

Option 1: The cooling-off period, as a uniform remedy for failure to comply with information requirements, would be extended, e.g. up to three months.

Option 2: There would be different remedies for breaching different groups of information obligations: some breaches at the pre-contractual and contractual level would give rise to remedies (e.g. incorrect information on the price of a product could entitle the consumer to avoid the contract), whilst other failures to inform would be treated differently (e.g. through an extension of the cooling-off period or with no contractual sanction at all).

Option 3: Status quo: The contractual effects of failure to provide information would continue to be regulated differently for different types of contract.

Graph 5.10: Contributions on contractual effects for failure to comply with information requirements per stakeholder group



"Different remedies for breaching different groups of information requirements" was the preferred option for 39% of the contributors. The status quo was the second preferred option for 30%. Consumer groups, academics and public authorities seemed to prefer option 2 whereas only a minority of contributors from the business sector and legal practitioners chose

this option – with most of the contributors opting for the status quo for the business sector (52%) and the extension of the cooling-off period for the legal practitioners (38%). It might be worth noting that the “other” category was evenly split between the three options.

The majority of Member States also supported option 2 (17). Only four and one EFTA/EEA country opted for the status quo and only one chose option 1.Three Member States chose ‘other option’.

The Commission requested to also analyse if the contributors indicated in their answer whether they were in favour or against a common core of pre-contractual information. Only 12% of respondents made reference to this issue. Of these the overall majority was in favour. Only five Member States expressed an opinion on this issue: one Member State was against a core of pre-contractual information whereas four Member States expressed their support for such a principle.

Nevertheless, a recurring comment even amongst those contributors in favour was that, in the process of establishing the common core, there is a need to ensure that the consumer is not overloaded with information. Contributors from the business sector argued that the catalogue of obligations is far too extensive and does not fit consumers’ needs. There should therefore be an emphasis, as an academic body stated, on the notion of “quality” of information rather than “quantity”.

In terms of its more detailed content, the business sector, consumer groups and public authorities) agreed that there is room for more consistency and less unnecessary overlap in the pre-contractual information requirements in the different directives. General rules cannot totally replace more detailed lists of information that may have to be provided in the context of particular transactions. Therefore these rules could be complemented by more detailed lists of items to respond to the particularities of transactions in fields such as Timeshare and Package Travel or in the context of particular technologies.

All contributors in favour of the common core agreed that this will improve consumer protection.

There were no comments given by the contributors who were against the common core of pre-contractual information.

Other comments with regard to pre-contractual information included:

- A contributor referred to the fact that analysis has shown that the differences with regard to the pre-contractual stage do not result in substantial differences in the level of consumer protection within the individual Member States. For the most part, such differences are just national peculiarities, which effectively hinder cross border trade without substantively improving the consumer protection level. Therefore, the contributor recommended that it would be useful to harmonise fully at least the provisions on pre-contractual information and general elements of withdrawal rights.
- A few contributors expressed however that general rules on pre-contractual statements can not totally replace more detailed lists of information that may have to be provided in the context of particular transactions, such as time-share or package travel or in the context of particular technologies, such as Digital Rights Management. Any horizontal instrument would thus have to be complemented by specific rules for specific situations.
- One Member State contribution highlighted that broader principles could be established about how specific information obligations in the Consumer Acquis tie in with the UCPD,

and in particular whether there is scope for more consistent rules on information requirements, followed by detailed sector specific rules where necessary.

Key issues raised by the contributors on the suggested options

General comments included:

- While consumer associations tend to opt for the different remedies in case of lack of information, businesses argued very often that it depends on the breach: was it essential information or was it just a small part that did not really make a difference in the protection of the consumer?
- Issues were also widely raised with regard to m-commerce: when a contract is displayed on a mobile phone, where the screen display leaves very little room for extensive information, it is very difficult for a contractor to give extensive information to the consumer? There is simply no room for it and moreover, many people do not read the information at all. Many contributors have actually also referred to the fact that very often, especially on the internet where there is the possibility to click on “I agree” without having read what the content of the information provided was, people click without caring to inform themselves of their own rights.
- Linked to the above issue, namely the fact that a lot of consumers do not read the information provided to them, it was expressed by a high number of contributors that the quality of information is more important than the quantity.
- The EP estimated that it was complex, at this stage, to determine general rules on the contractual effects to be given to the failure to comply with information requirements that would take into account all the characteristics of each contract.

Comments expressed by the contributors who were in favour of option 1 included:

- Some contributors expressed that they would like to preserve the distinction between pre-contractual and contractual information and therefore option 2 is not possible for them.
- A few contributors did not see how information relating to e.g. price should be treated differently from information relating to e.g. description of the product.
- It was explained by a contributor that the various current Directives impose different remedies, which can mislead the consumer. The contributor further discussed that “Prolonging the cooling-off period to up to three months and using it as a general remedy for failure to comply with information requirements is an acceptable solution to the current fragmented situation. However it is worth stressing that the meaning of “cooling-off period” and “right of withdrawal” is not the same. In certain Member States the former definition applies to the pre-contractual phase and is not considered as a remedy but as a right, while the latter term is used only once a contract has already been signed. In the insurance sector, for instance, information requirements imposed on operators with a view to protecting consumers widely lack homogeneity. This contributor from the business sector believed however that the consumer should not be placed in the position of being able to exercise the right of termination without any time limits, as this would result in an unacceptable state of suspension. For this reason a cooling-off period to up to three months seems a good solution.
- Some of the contributors, even though they favoured option 1, expressed however that it is essential that the information requirement can be fulfilled according to current new durable media where the information is readily accessible. In some cases even the

posting of the information on a website should be sufficient according to these contributors. It was found that many of the sanctions imposed by national law for non-compliance with information requirements is exaggerated and the hope was expressed that a general review of the right of withdrawal (the special case of timeshare excluded) would lead to common rules that help to enforce compliance with information duties while avoiding consumerist zeal in legal actions against traders who fail to formally inform the consumer about the right of withdrawal. In their view, simplicity in the rules the trader has to observe is the most appropriate tool to ensure consumer information. This would, according to some contributors from the business sector, also exclude involuntary non-compliance that is occasionally observed among some SMEs (direct and distance) sellers.

Comments expressed by the contributors who were in favour of option 2 included:

- A differentiation of the contractual remedies for breaching different groups of information requirements (from monetary sanctions to the contestability of the contract to the extension of the cooling-off period to the right of withdrawal) seems the best way to take into account the different degrees of importance of the information omitted in reference both to the consumer rights breached and to the pre-contractual or contractual phase referred to. Failure to meet the information requirements, depending upon the context in which it takes place, produces different consequences.
- According to some businesses, option 1 seemed to be far too harsh on traders where even an unimportant failure to give information would expose the trader to cancellation without any real justification. It may also provide a vehicle for consumer fraud. It was considered that option 2, i.e. different remedies would be more effective than an extension of the cooling-off period. If information is important enough to be required there must be appropriate sanctions for breach.
- According to some consumer associations, the possibility of a general extension of the cooling-off period for all consumer contracts would not appear to be a very practical solution, since in many cases the passage of time alone would resolve these shortcomings; they further believed that this option would have a significant impact on the legal safety of contractual relationships by establishing an excessively long period of uncertainty over the validity of the contract.
- According to a contributor, most of the studies have shown that failure to comply with information requirements is a persistent problem, in particular for distance contracts. European legislation should grant consumers adequate protection, depending on the type of information which is lacking. At present, however, there are no penalties for the majority of cases in which professionals have not complied with information requirements. Extending the cooling-off period to three months is an effective method, although in certain cases it may not be sufficient, where, for example, incorrect information on the price is given.
- According to one Member State, there should be a right of consumer not just to terminate the contract but also get the contract modified or seek redress when necessary.

Comments expressed by the contributors who were in favour of option 3 included:

- It was considered that option 1 was too inflexible and option 2 would involve unnecessary complexity in trying to group different types of transactions. Furthermore, concerns were expressed that the results might be arbitrary.

- Some businesses expressed that the contractual effects of the violation against information requirements do not only depend on the character of the information, but also on the specificities and circumstances of the contract. In most cases there are good reasons why the directives regulate the contractual effects in a different way.
- It was expressed that remedies to failure to comply with information requirements should not be the priority of the review, unless there is evidence for a need to change the status quo. The main problem for distance sellers is the information requirements themselves as these are not adapted to new technologies and selling methods (e.g. m-commerce, tele-shopping) and add up with other information requirements from several other EU directives (distance selling, data protection, environmental law.) Furthermore, information requirements are not based on the same reasons across the directives. For instance, in door step selling, the criterion is the possible feeling of pressure leading to making commitments; in distance selling, the criterion is that the costumer has not seen the product

Alternative options suggested by the contributors

Academics

The issue raised was that there should be an adequate sanction for non-observance of the requirement. This could be the damage suffered by the consumer as a consequence of entering into the contract, even when there is no (sufficient) causal relation between the non-observance of the information requirement and the damage. This has been the solution applied in a number of informed consent cases for medical liability, especially in Germany.

One of the academics suggested another possibility: the adoption of Option 1 in principle, with certain attenuating two-fold modifications: on the one hand giving the consumer an opportunity to retract his withdrawal in the event that the professional should agree to eliminate or amend the disputed term (silence or refusal on the part of the professional would result in the automatic dissolution of the contract), and on the other hand providing for the possibility of a penalty clause providing for compensation in the case where a consumer suffers substantial loss due to lack of information (this would eliminate the cost of legal action).

Business sector

The following points were made:

- In the interests of proportionality between the nature of the violation of duty and the legal effect, the consequences of an extended cooling-off-period could be limited to the information requirements that are essential for the consumer's decision whether to conclude the contract or not.
- The legal effects of an infringement should be mitigated or graduated, depending on how serious the infringement was. If the failure to provide information did not concern any essential information, penalties should be dispensed with entirely.
- According to a business representative, the remedies would need to take account of the method of purchase. For example, it would not be appropriate to give the same remedy to a consumer who purchased a product face to face as to a person who purchased the product at a distance.
- It was furthermore expressed that legislation must leave a breathing space for (collective) self-regulation and (individual) company "no-question-refund" policies as competitiveness tools on the retail market.

- Contributors from the business sector have expressed that any kind of generalisation has to be ruled out. They pointed out that the relevant information requirements are not easy to handle or to understand and therefore suggested to simplify the information requirements. At present, even negligible infringements lead to cautioning under competition law. This hinders on-line trade. The information requirements are so diverse, unclear and manifold that they are confusing to consumers. For business companies they imply a huge work burden and additional costs.

Consumer groups

A consumer group's contribution suggested a combination between option 2 and 3: the consequences of non compliance with the information requirements should be strengthened but without a ceiling. In the case of certain fundamental breaches (name and address of the trader (e-mail), price of the good(s) and/or service(s), the consumer should be allowed to denounce the contract. When the seller has failed to provide the information on the right of withdrawal, the cooling-off period should commence when that information has been provided. The establishment of a consistent horizontal approach in the field of remedies should not prejudice the need for specific (more protective) rules in some sectors (distance selling, timeshare).

Other contributions also formulated the principle that penalties should be adapted to the type of information and the impact which the lack of information could have on the consumer. They must range from the possibility of terminating the contract without fees and with reimbursement to different forms of compensation for damages.

Legal Practitioners

- The remedy could vary according to the importance of the breach

Public authorities

- Requirements vary greatly in significance (some have a major impact, others have no impact to the consumers' decision making and position), and that fact should be considered when determining the effects.

8. Right of withdrawal

8.1. The cooling-off periods

The Directives on Timeshare, Doorstep and Distance Selling include divergent cooling-off periods. Such differences may be confusing and overlaps may occur (e.g. a timeshare purchased through distance selling method). Moreover, the concept of working days is differently interpreted by the Member States and varying national holidays may cause uncertainties for consumers and businesses. Therefore the Green Paper raised the following question:

Question F1 "Should the length of the cooling-off periods be harmonised across the Consumer Acquis?"

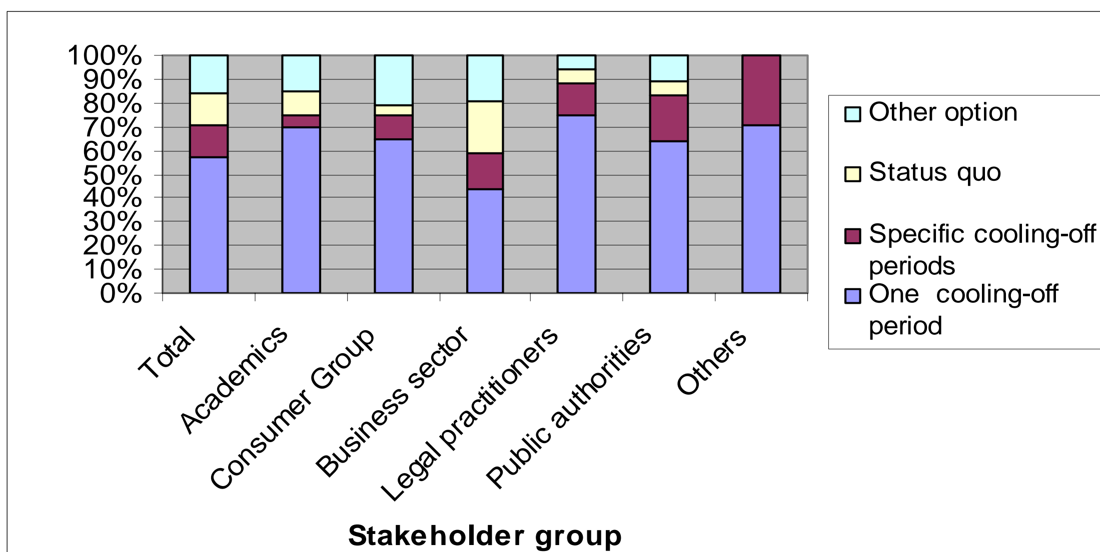
<u>Actions proposed by the Commission in the Green Paper</u>

Option 1: There would be one cooling-off period for all cases when the consumer directives grant consumers a right to withdraw from the contract, e.g. 14 calendar days.

Option 2: Two categories of directives would be identified and to each of them a specific cooling-off period would be attached (e.g. 10 calendar days for door-to door and distance contracts as opposed to 14 calendar days for timeshare).

Option 3: Status quo: cooling-off periods would not be harmonised in the Consumer Acquis; they would be regulated in the sectoral legislation.

Graph 5.11: Contributions on harmonisation of cooling-off period across the Consumer Acquis per stakeholder group



One cooling-off period for all cases is the preferred option for the majority of respondents (57%). All stakeholder groups have 44% or more of their respondents choosing this option. It may be worth noting that 22% of contributors in the business sector opted for the status quo.

The majority of Member States were in favour of option 1 (18 Member States and one EFTA/EEA country). Four Member States supported option 2 and only one Member State supported option 3 and two Member States chose ‘other option’.

Key issues raised by the contributors on the suggested options

General comments included:

- The Green Paper question has been criticised for not mentioning when the right of withdrawal begins. A consumer group pointed out that this is an extremely important point, since consumers encounter numerous problems with regard to this issue, especially in the context of distance selling.

Comments expressed by the contributors who were in favour of option 1 included:

- A business stakeholder strongly advocated a uniform withdrawal period for distance selling across Europe. Apple is not in favour of extending the cooling-off period to other contracts than distance selling, doorstep selling and the like. Further, a market survey seems appropriate in order to assess the necessary length for a cooling-off period. Any attempt to harmonize a cooling-off period should be subject to an in-depth and extensive assessment.
- A business stakeholder fully supported the harmonisation of the right of withdrawal since the differences across Member States represent a disincentive to cross-border distance selling business. However, it did not agree with the suggested 14 days period and suggested seven calendar days instead. This was also advocated by other business stakeholders. It can be supposed that parcels are opened as soon as they are in hands of the person who ordered them, and not put aside for inspection after several days. Too long of a period would also increase the risk of abuse by the consumer and extend the period in which the consumer needs to take care that the products stay as new. If there is a problem with the product, i.e. if it is defective, the consumer has adequate protection and rights under other legislation. If a company wishes to offer a longer period than seven days, it should be free to do so but this must remain a marketing option.
- The broad variety between Member States makes it very difficult to handle withdrawals in cross border cases and even more difficult to give the consumer correct notice on his right of withdrawal. It would maintain or improve the level of consumer protection in most of the Member States.
- Two Member States expressed supporting a uniformed period of 14 days. One Member State expressed support for option 1, as long as this provides for a cooling-off period of 15 calendar days.
- Another Member State remarked that some more protective provisions for consumers should be kept (e.g. article 6(1) of the Directive 2002/65/CEE).
- The EP, in its Resolution on the Green Paper, emphasised the need to standardise the methods for triggering and calculating the withdrawal period by giving priority to calculation according to calendar days in order to enhance the legal certainty of transactions; the length of the period should be harmonised where this is justified by the circumstances.

Comments expressed by the contributors who were in favour of option 2 included:

- Splitting into two categories would seem a sensible approach and ensure proportionality dependent on how the sale was conducted.
- Not all pieces of legislation fit neatly into one category. Undoubtedly, a single cooling-off period would take away confusion and inconsistency, but the period decided on may be disproportionate for the type of contract. Cooling-off periods should protect the consumer without being too onerous on the trader. A 14 day cooling-off period, for example, is more appropriate for timeshare and doorstep sales contracts than the majority of distance contracts. The period should be commensurate with the risk to the consumer. Option 2 will provide for an appropriate level of protection within a reasonable time scale providing clarity for both business and consumers.

Comments expressed by the contributors who were in favour of option 3 included:

- During the original discussions on the Distance Selling, Direct Selling, Distance Selling of Financial Services, and Timeshare Directives, differences in the "cooling-off" periods were created specifically because of wide variations in the monetary values, and other aspects of the products. An insurance contract or commitment to a mortgage, are both much more expensive, and more important to the consumer than buying a T-shirt or paperback book. These differences should be respected. The key issue here is that the cooling-off period calculation is standardised, i.e. the use of calendar days, working days or "jours francs".
- The particularity of different services may advise different cooling-off periods. There are inclusive services which evaluation can only be completed after the first billing cycle (normally not less than 30 calendar days). For example, this is again the case of broadband where the tariff plan subscribed to has an associated flat rate with a traffic limit in relation to which a subscriber, without experience of usage, does not have any sensibility.

Alternative options suggested by the contributors

Remarks on terminology were made by a several contributors: from a legal point of view, while the cooling-off period refers to a situation occurring before the conclusion of the contract and can apply during the pre-contractual phase, the right to withdraw from the contract can be exercised only after the latter has been duly signed and concluded.

Business sector

The banking sector suggested an option based on the type of product sold and the introduction of a number of categories of products with cooling-off periods adjusted in line with the complexity and the level of consumer risk of the product being sold. This could allow a range of alternatives, including no cooling-off period in some cases where legal certainty is required on conclusion of the contract, and an extended period for contracts which are more complex or risky to allow the consumer to take independent advice.

Consumer groups

A number of contributions suggested a combination of Option 1 and 2: the length and the calculation of the cooling-off period could be harmonised, provided the period is adequately set. However, for certain consumer contracts, which are particularly complicated for consumers (e.g. timeshare), derogation from the general rule will be necessary.

8.2. The modalities of exercising the right of withdrawal

Existing modalities for withdrawal are regulated differently in the Consumer Acquis, thus relating to specific types of contracts only. In addition, Member States have transposed the directives differently. This is confusing for consumers when shopping cross border. The Green Paper addressed this issue with the following question:

Question F2 “How should the right of withdrawal be exercised?”

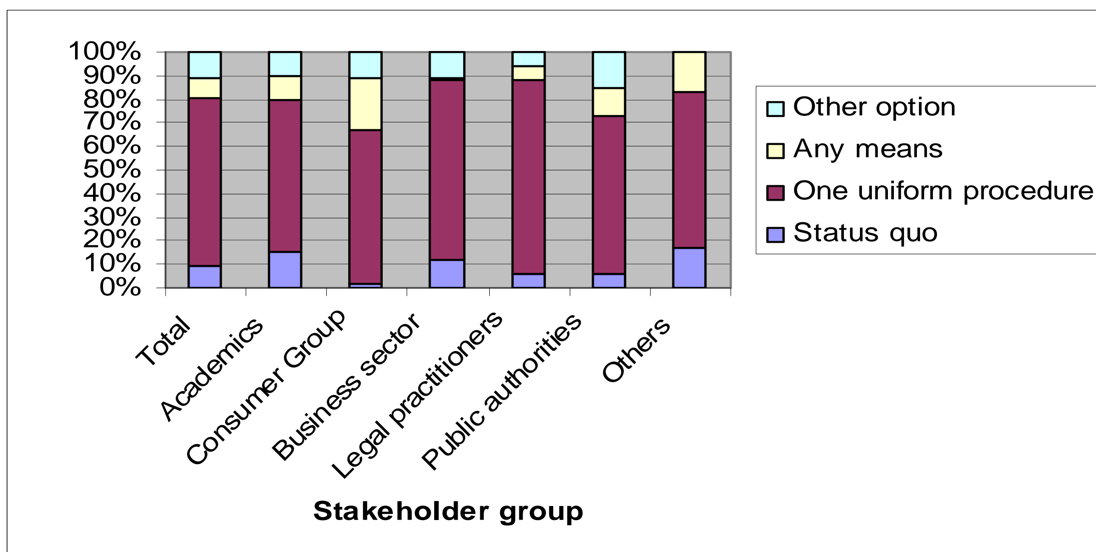
Actions proposed by the Commission in the Green Paper

Option 1: Status quo: Member States would be free to determine the form of the notice of withdrawal.

Option 2: One uniform procedure for the notice of withdrawal across the Consumer Acquis would be established.

Option 3: All formal requirements for the notification of withdrawal would be excluded. A consumer would then be able to withdraw from the contract by any means (including by returning the goods).

Graph 5.12: Contributions on how the right of withdrawal should be harmonised per stakeholder group



One uniform procedure has the clear majority with 71% leaving no doubt that this is the preferred option. Consumer groups however, have also chosen option 3 “withdraw from the contract by any means” as another possible alternative with a percentage of 22%. Most of those who chose option 1 have gone as far as suggesting that a standard form given at the moment of the purchase be used to exercise the right of withdrawal.

The majority of Member States also supported option 2 (14 + 1 EEA/EFTA country). Four Member States were in favour of option 3 and only two opted for the status quo. Five Member States chose ‘other option’.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

It was noted that, given that the traditions, the availability of technical conditions and the legal situation vary in the different Member States, the national legislator should be able to consider this when regulating how to exercise the right of withdrawal.

Comments expressed by the contributors who were in favour of option 2 included:

- Consumer groups expressed their support for the establishment of a uniform procedure that would eventually result in the simplification of the procedure of withdrawal for all the consumers.
- A unified and consistent regulation that would be understandable for the consumer would provide the greatest degree of legal clarity.
- Many business contributors insisted on the importance of imposing a form of proof: most of them advocated a written communication support such as registered mail with receipt or other written support (email, fax etc.). A Member State also highlighted the importance of giving notice in a written form. An EEA member insisted on minimum formal requirements.
- A standardised information form about the right of withdrawal could be provided. A Member State suggested that a model withdrawal form should be established.
- One Member State suggested the application of fixed form in case of withdrawal from the contract (determined by the professional e.g. a letter, phone, mail etc.), however, in case the professional does not advise the consumer of this form, the consumer can withdraw from the contract in any form (e.g. by returning the goods).
- The EP emphasised that consumer confidence in the internal market will be enhanced if the horizontal instrument provides for the consumer to be able to withdraw from the contract. The means of withdrawal should be harmonised to improve legal certainty for both consumers and economic operators and the horizontal instrument should also provide that consumers should not bear any costs other than the direct cost of returning the goods; The introduction of a standard withdrawal form in all community languages would simplify procedures, reduce the costs and increase transparency and consumer confidence.

Comments expressed by the contributors who were in favour of option 3 included:

- For the purposes of achieving strong consumer protection, it should be possible to exercise the right of withdrawal free of all unnecessary conditions.
- The exercise of the right of withdrawal should be the simplest and the least expensive for the consumer, as straightforward and uncomplicated as possible.

Alternative options suggested by the contributors

Academics

It was suggested that option 3 (no formal requirements) could be accompanied by an obligation of the businesses, to provide a form that the consumer can use in order to withdraw, and to recommend the consumer to do so.

Business sector

The following options were suggested:

- The procedure should be flexible enough to adopt firm-specific processes. For example, many companies give the consumer a unique code to put on goods in order to easily identify the goods when returned.
- A uniform procedure for notice of withdrawal per sector.

Consumer groups

The following points were made by contributors:

- For reasons of evidence the means should be limited to a withdrawal in writing (email, letter or fax) or by sending back the good.
- An alternative solution was suggested whereby the consumer will have a choice of a variety of specified means by which to communicate his exercise of the right of withdrawal.

Public authorities

Some of the public authorities considered that contracting parties should retain their flexibility to enter into appropriate contractual agreements but they proposed the creation of a standard notice of withdrawal rights that professionals could use to fully meet their information obligations with regard to the right of withdrawal.

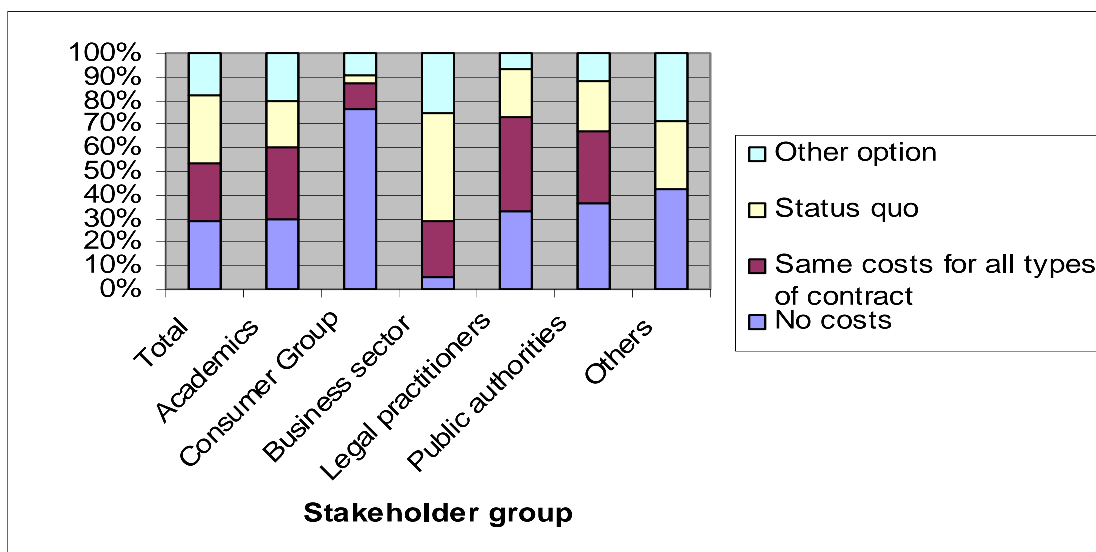
8.3. The contractual effects of withdrawal

The legal effects of a consumer withdrawing from a contract are regulated differently in the Directives. For example, the Doorstep Selling Directive releases the consumers from any obligations while the Distance Selling Directive enables the seller to charge the direct cost of returning the goods. It also includes a time limit for reimbursements, which other Directives do not. The question the Green Paper therefore raised is:

Question F3 "Which costs should be imposed on consumers in the event of withdrawal?"

Actions proposed by the Commission in the Green Paper
Option 1: The current regulatory options would be removed - consumers would then not face any costs whatsoever when exercising their right of cancellation.
Option 2: The existing options would be generalised: consumers would then face the same costs when exercising the right to withdrawal irrespective of the type of contract.
Option 3: Status quo: The current regulatory options would be maintained.

Graph 5.13: Responses on costs to be imposed on consumers in the event of withdrawal per stakeholder group



Both the option "Status quo" and the option "consumers bearing no costs" were the preferred option (29%). It has to be stated though that option 1 and 2 combined, which relate to common rules on costs, is favoured by a little more than 50% of the contributors.

This question seemed to have divided the stakeholder groups amongst them rather than between them, thus making it very difficult to identify one answer as the most viable option. Except for the consumer groups, all other stakeholders seemed to have their opinions divided between the different options. "Other options" has been opted by academics, the business sector and "others" with a 20% to 29% share of their contributors, thus justifying the mixed feelings amongst stakeholders caused by this question. Additionally, it might be worth noting that academics seemed to be equally split between all options.

While it is perfectly natural for consumer associations to opt for the solution that would bring fewer costs on the consumers, other stakeholders have often made one main comment on the issue: it has been widely recognised that the consumer should be paying for the returning of the good to the seller.

Regarding Member States' contributions, option 1 was chosen by the largest group of Member States (10). However six Member States supported Option 3 and six supported option 2. Three Member States and one EFTA/EEA country chose 'other option'.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- Contributors from consumer groups highlighted that it should be made clear that the risk lies with the seller during the period for withdrawal (except – as the case may be – for returning the goods). Otherwise, the intention of the right would become meaningless.
- It might be fair that the consumer pays the direct costs of returning the goods when he/she withdraws from the contract for no specific reason.
- It was expressed by one of the contributors that in Finland consumers can return goods bought at a distance free of charge if they do not match the impression conveyed in the

sales catalogue. This was said to act as an efficient deterrent against fraudulent practices.

- Information to be provided regarding the right of withdrawal should be expressed unambiguously.
- The EP supported the idea that consumers should not have to bear any costs other that the cost of returning the goods.

Comments expressed by the contributors who were in favour of option 2 included:

- Many contributors expressed the idea that Option 2 encourages the responsibility of the consumer and prevent abuses and excesses. The absence of costs would impose an unfair burden on traders.
- A consumer group emphasised the importance that consumers are made aware of any obligations as to the cost of returning a product. With option 1, in reality the costs would be added to the purchase price. This would mean that all consumers would pay for the rights only some consumers use.
- A contributor suggested that this possibility could be restricted to such costs that would not have accrued as part of the performance of the contract, i.e., those costs that are occasioned exclusively by the withdrawal itself.
- A Member State argued that before the conclusion of the contract, the consumer should be informed that in case of using the right to withdraw from contract, the consumer would bear the costs of return of the goods.

Comments expressed by the contributors who were in favour of option 3 included:

- A large number of contributions highlighted that different sales methods have different consequences for professionals when consumers take advantage of their withdrawal rights. Companies incur varying degrees of costs associated with different types of contracts.
- A uniform approach would not be appropriate also because the rationale for providing a right of withdrawal is not uniform, either. It should be regulated on a sectoral basis to allow sufficient flexibility.
- If return costs cannot or are not allowed to be passed on to those who incur them, all consumers will have to bear a share of the costs. Goods will eventually become more expensive for all consumers and the internal market will therefore become less attractive.
- However, a few contributions insisted that companies should be allowed to agree to alternative arrangements – on a voluntary basis. Some may regard it as a competitive advantage to accept returns at no charge to the consumer.
- In their contribution, a Member State tended to support option 3 unless the Commission can supply evidence of the benefits of option 2.

Alternative options suggested by the contributors

A number of contributions highlighted the fact that the options were not formulated in a clear way. In particular, what is meant by "same costs" and does that refer to the costs of returning the goods or other additional costs? Given the ambiguity many contributors found it hard to choose a particular option.

Academics

In order to achieve a balanced solution, several contributions remarked that it is necessary to distinguish between different categories of costs that may arise in case of a withdrawal: costs of returning the goods, compensation for using the goods, damage for diminished value of the goods.

Business sector

It was highlighted that Option 2 ignores that the costs for withdrawal are not comparable across the directives; they range from defraying expenses for legal formalities and costs for returning goods.

Secondly, many contributions from the business sector urged the Commission to address the issue of the adequate compensation that a company can claim for goods which following the withdrawal, are no longer new:

- A physical good that has been transferred to the consumer becomes a second-hand product and loses part of its value; an intangible such as a data file cannot be returned without high risk of an identical copy already having been made.
- A harmonised regulation is needed in particular to stipulate which claim a professional can assert for the goods which, due to withdrawal, are no longer new; the individual directives concerning cost liability should urgently be reviewed.
- Differentiating between types of products/services as there will be different costs associated with each. Any costs imposed should reflect reasonable costs likely to be incurred by the provider. The best option should be a "reasonable cost for the product being returned".
- A business stakeholder pointed out that for years the rate of returned goods has constantly been rising. They explained that in spite of comprehensive measures to limit returns, the continuing increase could not be prevented. To unburden the costs on companies alone would have serious consequences for both national and cross-border mail order businesses.

Consumer groups

Several contributions recommended that the only cost that could be charged to the consumer would be the actual cost of returning the goods.

Public authorities

Again it was advocated that only costs to be imposed on a consumer in the event of withdrawal should be the direct costs for returning the goods, therefore, any postage or transport payable to third parties to deliver the goods. It is not clear whether this corresponds to a particular option suggested by the Commission.

An EFTA/EEA member highlighted that timeshare should be treated differently then other directives.

9. General contractual remedies

Existing remedies in the Consumer Acquis are related to certain types of contracts only. The absence of general remedies creates a deficit in consumer protection and confusion for those shopping cross border. The Green Paper thus addresses the following question:

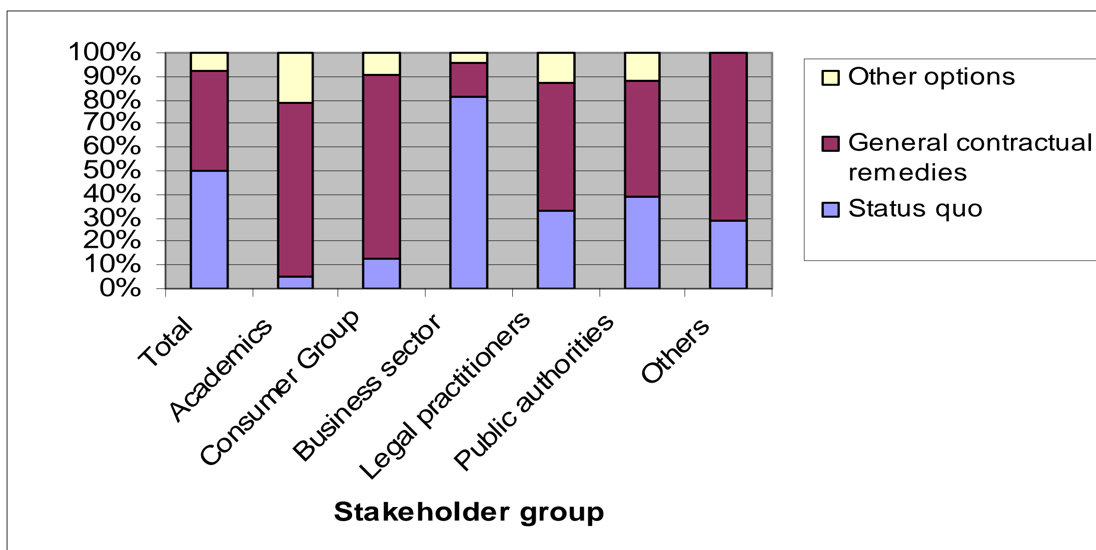
Question G1 “Should the horizontal instrument provide for general contractual remedies available to consumers?”

Actions proposed by the Commission in the Green Paper

Option 1: Status quo: the existing law provides for remedies limited to the particular types of contracts (i.e. sales). The general contractual remedies would be regulated by national law.

Option 2: A set of general contractual remedies available to consumers in the case of a breach of any consumer contract would be provided. These remedies would include: the right of a consumer to terminate the contract, to ask for a reduction of the price and to withhold performance.

Graph 5.14: Contributions on general contractual remedies per stakeholder group



The status quo was the favoured option with 50% of the contributions followed closely by “general contractual remedies” with 42% of the contributions.

The business sector and consumer groups once more had contrasting views: the former opted for “status quo” (81%) and the latter preferred “general contractual remedies” (78%). Legal practitioners (53%) and public authorities (48%), although demonstrating a choice for the “general contractual remedies”, also had a relatively significant number of respondents that opted for a status quo – respectively 33% and 39%.

Regarding Member States’ contributions, they were almost equally split between option 1 and option 2 (receiving respectively the support of nine Member States and one EFTA/EEA country, and 12 Member States). Four countries opted for ‘other option’.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- A large number of business contributors rejected option 2. It was argued that the national legal systems rightly provide for different legal consequences in the case of a breach of contract – depending on the type of contract and article in question. These different contractual remedies should absolutely be reserved to national law.
- Public authority contributions also highlighted the fact that the right to contractual remedies is a mechanism which is a concept of general civil law, falling under the remit of national legal systems to handle. The introduction of general contractual remedies for every type of consumer contract would lead to a fragmentation of the national legal systems.
- Contributions also highlighted the fact that the directives deal with different types of circumstances which require different remedies.
- Additionally, it was noted that a number of EU instruments already provide consumers with appropriate remedies, e.g. the European Order for Payment Procedure, the European Enforcement Order for Uncontested Claims, the Small Claims Procedure, the Resolution of Disputes by use of Mediation, etc.
- Academics pointed out that there is no evidence that the disparities between the national remedies pose a real problem.
- The EP highlighted that the introduction of general contractual remedies goes beyond the scope of the review as it is something to be determined by national contract law; they also believe that the discussion on collective redress deserves further consideration.

Comments expressed by the contributors who were in favour of option 2 included:

- Several contributions highlighted the fact that there are significant variations among the laws of the Member States which result in some consumers being less effectively protected than others. It would be most important to create general remedies for all types of consumer contracts.
- A number of contributors suggested that the adequate way forward would be to improve the set of remedies in each directive separately.
- Legal practitioners drew attention on the fact that the particular remedy would presumably depend on the nature of the breach and possibly also the nature of the particular consumer contract.
- It was also suggested that, while the general contractual remedies in consumer transactions should be set and defined by community law rather than national law, particular remedies could vary from sector to sector.
- Academics pointed out that it might be preferable to tackle differences in the field of remedies in the course of the broader and more comprehensive exercise of elaborating a Common Frame of Reference.

Alternative options suggested by the contributors

Business sector

The proposal for remedies should be flexible and non-exhaustive. Buyers and sellers should be allowed to negotiate their own contract terms and remedies should they choose to as long as they meet the minimum standards of EU law.

Public authorities

A horizontal instrument could set out a framework of consumer rights that cover more broadly rules on consumer sales (including goods, and possibly services and digital content). There may be scope for a clearer statement of when remedies are available, the principles that underpin remedies in consumer sales (failure to perform a contractual obligation) and specific remedies for different types of consumer sale.

10. General right to damages

Except for the Package Travel Directive, the issue of contractual damages is governed by national law. This leads to uneven situations in the Member States and confusion for those shopping cross border. The Green Paper therefore addressed the following question:

Question G2: "Should the horizontal instrument grant consumers a general right to damages for breach of contract?"

Actions proposed by the Commission in the Green Paper

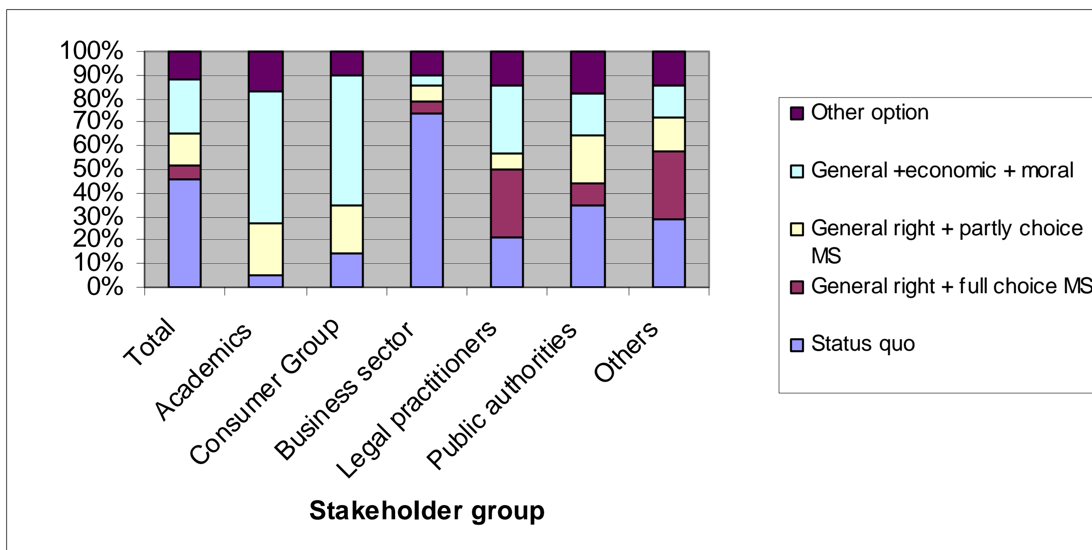
Option 1: Status quo: the issue of contractual damages would be governed by national laws, except when provided for in the Community Acquis (e.g. package travel).

Option 2: A general right to damages for consumers would be foreseen – they would be able to claim damages for all breaches, irrespective of the type of breach and the nature of the contract. It would remain up to the Member States to decide what types of damages could be compensated.

Option 3: A general right to damages for consumers would be foreseen and it would be provided that these damages should at least cover purely economic (material) damages that the consumer has suffered as a result of the breach. Member States would then be free to regulate non-economic loss (e.g. moral damages).

Option 4: A general right to damages for consumers would be introduced and it would be provided that these damages should cover both the purely economic (material) damage and moral losses.

Graph 5.15: Contributions on general rights to damages per stakeholder group



The preferred option was "status quo" (46%) with the second preferred option "general right to damages covering both economic damages and moral losses" only being chosen by 23% of the contributors.

The majority of the business sector opted for maintaining the status quo with 73% of contributions in favour of this option. Academics and consumer groups both opted for option "general right to damages covering both economic damages and moral losses" with respectively 56% and 55% of responses in favour. However, it is worth noting that both groups also opted for "general right to damages leaving the choice of damages to be used to Member States" with respectively 22% and 21%. Legal practitioners and the group of "others" did not seem to have a clear preference for any of the options. Therefore, there does not seem to be a clear agreement among the stakeholder groups on one specific option except for the business sector.

Member States' contributions were divided between the different options, with nine Member States and one EFTA/EEA country supporting the status quo, six Member States supporting option 3 and three Member States supporting option 4. Only two Member States supported option 2 whereas five Member States were in favour of another option.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- It was felt by many contributors (in particular from the business sector and public authorities) that a largely autonomous consumer contract law which includes the right to damages should be firmly rejected. The type and extent of damages, as well as the calculation of claims for damages, play a pivotal role in national legal structures. Issues concerning the right to damages for material or moral losses, fault liability or risk liability, exemplary damages claims, etc. are all of a piece with the national legal systems.
- Many pointed out that a European Law in respect of contractual damages would imply a European Contract Law. The creation of an entire legislation on consumer contracts

besides the Member States' legislation would severely intervene in the national legal systems.

- Almost all Member States already provide for compensation for damages in their legislation in case of breach of contract, although the amount and type of damage compensated may differ from one country to another.
- Some contributors suggested that what would really enhance consumers' confidence are efficient, cheap and reliable enforcement schemes of cross-border disputes and more advertising of ECCs and similar systems that are free of charge for consumers.

Comments expressed by the contributors who were in favour of option 2 included:

It was felt by some contributors that, while there should be a general right to damages for consumers, for the time being it should be left to the Member States to regulate non-economic damages. The reason given was that the laws on this issue differ so widely across the EU Member States that it can not realistically be expected to be harmonised within the foreseeable future.

Comments expressed by the contributors who were in favour of option 3 included:

- A number of contributors highlighted that damages in case of moral losses should be excluded from general right since this notion will be hard to define at EU level because it has a strong cultural dimension.
- Leaving to Member States the right to regulate damages of a non-material nature seems justified according to some contributors since the category of "moral damages" is defined differently in national legislations based on not codified criteria, general rules of procedure, good customs, etc.

Comments expressed by the contributors who were in favour of option 4 included:

- Option 4 was advocated because it ensures a uniform consumer protection.
- Consumer organisations were in favour of the creation of this general right to damages but insisted that the establishment of this right be accompanied by the development of the ADR in order to allow the consumers to easily obtain this compensation.

Alternative options suggested by the contributors

Remarks were made regarding the clarification as to what is meant by a "breach of contract" and what kind of breach is being contemplated in the framework instrument.

<u>Business sector</u>

The following comments and suggestions were made:

- Option 3 with separate regulations for various sectors on grounds of significant differences with regard to moral damage (e.g. failure to respect the confidentiality of correspondence).
- The work on the Common Framework of Reference is also addressing this issue, and the outcome of this exercise should possibly be taken into account to provide a clear and coherent legal framework.

- The breach of contract on the part of consumers also produces damages and should cause compensation liability.

5.2.5 Specific rules applicable to Consumer Sales

1. Types of contracts to be covered

Currently, the Directive on Consumer Sales does not apply to any other type of contract involving the supply of goods, except for goods to be manufactured in the future. Therefore the Green Paper addressed whether other areas should also be covered in order to protect the consumer.

Question H1 "Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?"

Actions proposed by the Commission in the Green Paper

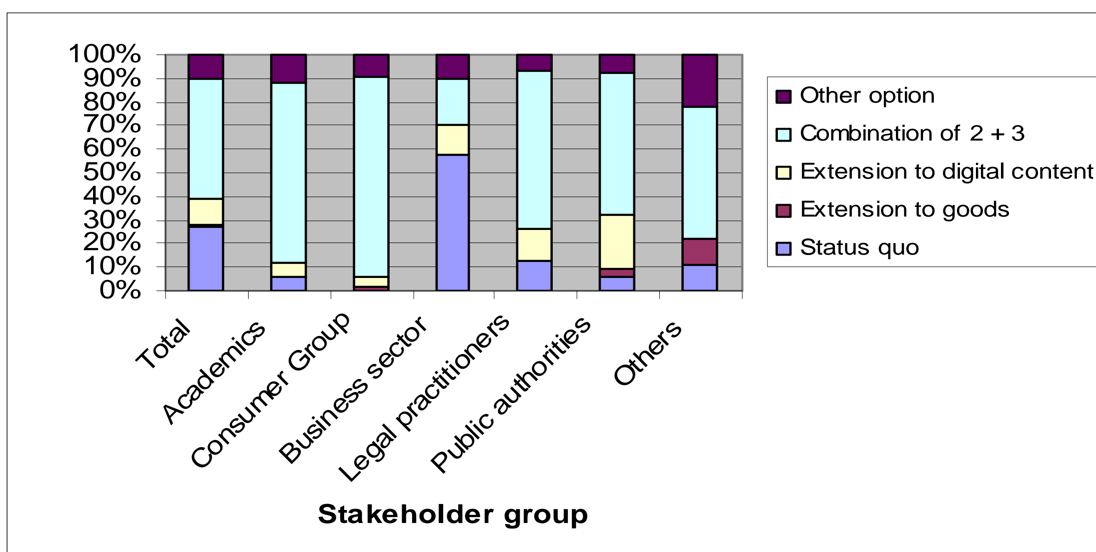
Option 1: Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced.

Option 2: The scope would be extended to additional types of contracts under which goods are supplied to consumers (e.g. car rental).

Option 3: The scope would be extended to additional types of contracts under which digital content services are provided to consumers (e.g. on-line music)

Option 4: Combination of Option 2 and 3

Graph 5.16: Contributions on types of contract to be covered by rules on consumer sales per stakeholder group



A combination of options 2 (extension to additional types of contracts under which goods are supplied to consumers) and 3 (extension to additional types of contracts under which digital content services are provided to consumers) was preferred by half of the contributors (50%).

For a large group of the business sector this was however not the case: the majority opted for the status quo.

The question on covering additional types of contracts under the consumer sales rules has raised a lot of debate. On the one hand, consumer groups, academics, legal practitioners, public authorities and “others” have all chosen the following option: the types of contracts covered by the consumer sales rules should also include contracts under which goods are supplied to consumers, as well as contracts under which digital content services are provided to consumers (option 4).

The business sector however, which comprises a significant number of digital service providers, has widely criticised the inclusion of the digital content services with 59% choosing the status quo – option 1 – versus 20% for option 4 and 11% for inclusion of only goods supplied to the consumer – option 3. The main explanation for this contrast seems to be that digital providers are concerned about the nature of their service and its applicability to the consumer sales contract. More specifically the following issues were expressed as being important:

- The digital service is licensed.
- It very much depends on the way the consumer installs the software on his computer, and whether he/she was aware or not at the beginning of the compatibility of the service with his/her own material.
- There are many different parts that interact with each other but are not necessarily always compatible according to the quality of the product, the “age” of the computer or the other software/hardware installed. Contributors indicated that if there is a malfunctioning of the digital product supplied, it would be extremely difficult to determine which one of the elements caused the damage.

Member States’ contributions revealed a large support for option 4 (15). Five Member States and one EFTA/EEA country supported option 3. Only two Member States supported the status quo. Option 2 was supported by one Member State. Two Member States chose ‘other option’.

Key issues raised by the contributors on the suggested options

General comments included:

A small number of stakeholders, especially business representatives, indicated that the Green Paper does not provide any evidence that there are substantiated complaints in this area, nor that there is market failure. According to the latter, the Green Paper fails to explain concretely what the problem is and why it is a problem other than an “anecdotal” concern. They also indicated that there already is an effective legal framework in place for online transactions as part of the distance and e-commerce directives. Indeed, one of the respondents regretted that the Commission envisages a revision of the consumer protection on digital content services independently of the revision of the directive on e-commerce.

Others noted that several Member States have already extended the scope of their rules to other types of contracts. The UK however, confirmed that there is considerable uncertainty as to digital content and a need to clarify the position around software downloaded from the internet. They argued however for a feasibility study or other forms of testing of the effectiveness of the changes proposed to the Acquis in changing markets and products. They also highlighted that digital services demand specific rules.

One Member State argued that a new framework should be as technological neutral as possible. In case the scope of the framework should be extended to include services a wide scope should be strived for, even though digital services to a certain extent might need to be subject to particular considerations.

The EP asked the Commission to examine in detail issues relating to the protection of consumers when they conclude contracts providing digital content, software and data, in the light of the protection afforded by Directive 1999/44/EC, so as to determine whether it is appropriate to propose one or more specific rules or to extend the rules set out in that Directive to this type of contract.

Comments expressed by the contributors who were in favour of option 1 included:

Comments from the business sector:

- In a sector with such a high level of competition as in the security software industry, quality and interoperability are vital for survival. Including software in the directive on consumer sales would not change anything, it would only increase legal uncertainty due to the prospect of court cases that would be difficult and costly for reasons further outlined below, both for consumers and businesses.
- Professionals in the media sector indicated that given the subject of the contracts and their dependence on technology, there could not be a proper implementation of consumer rights in relation to digital content services on an equivalent basis to existing rights relating to consumer goods.
- Under no circumstances should the definition of consumer goods be extended to include the acquisition of licences for software and electronic data. As these contracts are inextricably linked with underlying copyrights, licence claims and different contractual characteristics they are not suitable to the principles of consumer sales.

Comments expressed by the contributors who were in favour of option 2 included:

- Some businesses have argued for the scope to be extended to additional types of contracts under which goods are supplied to consumers.

Comments expressed by the contributors who were in favour of option 3 included:

- Many public authorities and consumer organisations expressed a specific concern as to digital contents such as music and ring tones. In their view, however, the regulation of digital content should not just be undertaken as an extension of the consumer sales directive: other instruments may require updating too or new specific instruments may have to be created.

Comments expressed by the contributors who were in favour of option 4 included:

- Despite agreeing with the need to include both types of contracts, some public actors emphasise the need to further analyse and determine the precise nature of consumer protection issues and the exact need for further legislation in these areas. In addition, many are concerned about the rapidly developing nature of digital content services.
- A UK respondent indicated that, prior to including the two types of contracts in the consumer sales directive, it would be useful to elaborate definitions of ”fit for purpose” and “professional diligence” together with information requirements that descriptions must be accurate and not misleading. A service would have to be, like goods, fit for

purpose; and delivered with professional diligence in a manner that an average consumer would expect given the price and description.

- It was confirmed by a consumer association in France, which has nearly 18 million “cyber-purchasers”, that many consumer complaints concern problems with music downloaded from the Internet or used in MP3 players, software and digital content for use in cell phones (e.g. ring tones). They are in favour of including these types of contracts in the horizontal instrument proposed.

Alternative options suggested by the contributors

Contributors made the following suggestions:

- It is not possible to widen the definition of "sale" to encompass contracts for the supply of digital content. Contracts of sale involve the transfer of property/ownership but, where digital content is supplied, a consumer merely acquires a licence to use that content.
- Inspiration for specific rules for service contracts may be gained from the work of the Study Group for a European Civil Code.
- The definition of consumer goods of Article 1(2)(b) of Directive 1999/44/EC is derived from Article 2 of the UN Convention on Contracts for the International Sale of Goods of 1980 (CISG). The notion of “goods” in sales contract law should therefore not be changed without very good reasons.

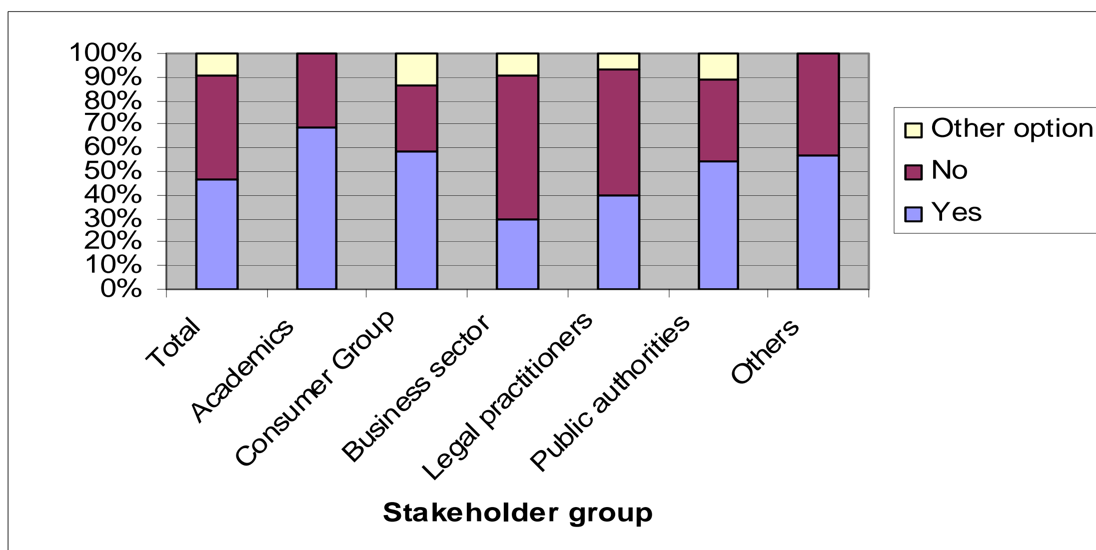
2. Second-hand goods sold at public auctions

Under Article 1(3) of the Consumer Sales Directive, Member States may provide that the definition of consumer goods does not cover “second-hand goods sold at public auctions where the consumer has the opportunity to attend the sale in person”. This exemption is a source of uncertainty both for businesses and consumers. The Commission therefore is of the opinion that a horizontal instrument could define the notion of “public auctions” in order to remove this uncertainty; having said this it may be necessary to follow a specific and different approach for on-line auction. The Green Paper addressed this issue with the following question:

Question H2: “Should the rules on consumer sales apply to second-hand goods sold at public auctions?”

Actions proposed by the Commission in the Green Paper
Option 1: Yes.
Option 2: No, they would be excluded from the scope of Community rules.

Graph 5.17: Contributions on second-hands goods sold by public auctions to be covered by rules on consumer sales per stakeholder group



The application of the rules of consumer sales to second hand goods sold at public auctions was the preferred answer with 47%. However it is important to note that the choice of not extending to second hand goods was favoured by 44% of the contributors. It is therefore worth to have a closer look at the answers.

Favourable answers to this question are split almost evenly: three stakeholder groups – academics, consumer groups and public authorities – were in favour of applying the same rules to second hand goods sold at public auctions with percentages ranging from 54% to 69%; two stakeholder groups – business sector and legal practitioners – have opted for the option "no inclusion of the second-hands sold at public auctions" with respectively 61% and 53%. While this choice reflects a majority of academics, consumer groups and business sector, other stakeholders are more divided: legal practitioners, public authorities and "others" chose option 1 with percentages ranging from 40% to 57% and option 2 with percentages ranging from 34% to 53%. Once more consumer groups (59%) and business sector (62%) were having contrasting views.

Member States' contributions revealed that the largest group supported option 1 (13 Member States and one EFTA/EEA country). However ten Member States opted for option 2. Two Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

General comments included:

Firstly, it was expressed by legal practitioners that they do not understand the reason why the Commission states that the exemption for second-hand goods sold at auctions is a source of uncertainty. It is not obvious for this group of stakeholders that this area should be regulated

A number of actors, from different stakeholder groups, questioned the reasons that justify the different "treatment" of internet auctions as they do indeed generate a large number of complaints. However, the issue of "conformity" with the sales contract is a complicated issue: when second hand goods are sold at public auctions, it is often presumed by law that there is

an “as is” sale. The consumer cannot always inspect the article for sale before concluding the contract, nor obtain adequate information beforehand from the seller.

A few respondents indicated that the problems underlying the question are very similar to the ones outlined in question B2, i.e. concerning contracts between individuals where one of them acts through a professional intermediary. They argued that if the problems are the same the solution should likewise be similar.

Comments expressed by the contributors who were in favour of option 1 included:

Business and consumer organisations requested a clearer definition of the notion of public auction. They also considered that, whilst a horizontal instrument should indeed cover second hand goods sold at public auctions, vertical provisions or an instrument could be useful to set out some specific rules which take, for example, into account the fact that often consumers to not have the practical possibility of inspecting the good prior to purchasing it.

Several public authorities and business stakeholders quoted that in their country, the inclusion of second-hand goods sold at public actions in national law has led to positive results.

Comments expressed by the contributors who were in favour of option 2 included:

Several respondents, including legal representatives and business, noted that by their nature, goods sold at public auctions can not be subject to the same remedies as stipulated in the consumer sales directive. Similar problems are anticipated with regard to the right to withdraw and the information requirements. The essence of a sale by action lies precisely in the fact that a buyer should be satisfied with a visual inspection of the item and that for this reason he or she has the possibility to negotiate a more favourable price.

A similar argument was put forward by a public stakeholder from the UK, who claimed that second-hand goods are “unique”, rather than mass-produced goods, and as such irreplaceable (for example, many works of art and antiques). Their value is related more to their cultural and artistic attributes rather than their function. The specific nature of second-hand goods makes it generally impossible to replace them. For these reasons, the concept of conformity is not appropriate and a delimitation of liability necessary. The UK is the second largest player in the world in the sales of fine arts and antiques. Without any evidence of consumer detriment, harmonisation of new rules at a European level would have a serious effect on what is essentially a global market and could lead to shifts of trade to the US or the Far East.

The EP supported the exclusion of this issue from the field of application of the horizontal instrument and suggested instead to maintain the possibility left to member states to decide whether the notion of consumer goods applies to goods sold at public auctions or not. They recommended nevertheless the adoption of specific rules with regards to online auctions.

Alternative options suggested by the contributors

Many contributions expressed the fact that greater clarity was needed as to what constitutes a public auction. A clear definition is needed before giving an answer on whether these should be regulated under the rules on consumer sales.

Consumer groups

It was suggested that sales at public auctions should be excluded from the scope of Community rules on consumer sales, but consumers should be entitled to more extensive information on the non-application of these rules.

3. General obligations of a seller – delivery and conformity of goods

The Consumer Sales Directive does not include a definition of the notion of delivery. Delivery can, for example, mean that the consumer has acquired physical possession of the goods or be informed that the goods are at his / her disposal. In addition, the Directive does not provide for remedies against lack of delivery, late or partial delivery. The Green Paper included a question on this matter which is the following:

Question I1 "How should 'delivery' be defined?"

Actions proposed by the Commission in the Green Paper

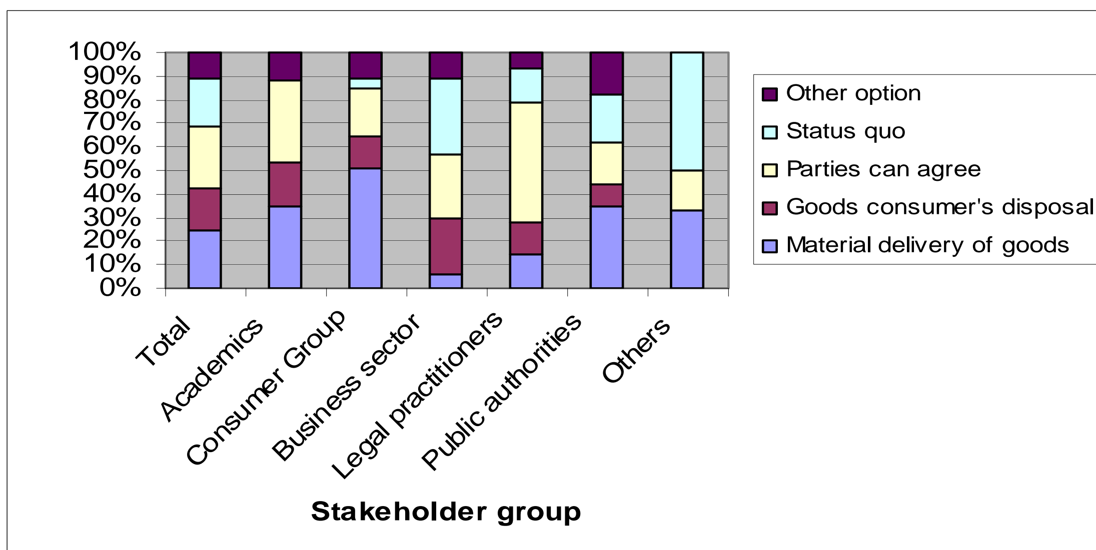
Option 1: Delivery would mean that the consumer materially receives the goods (i.e. the goods are handed over to the consumer).

Option 2: Delivery would mean that goods are placed at the consumer's disposal at the time and place specified in the contract.

Option 3: Delivery would mean, by default, that the consumer takes physical possession of the goods, but the parties can agree otherwise.

Option 4: Status quo: the term delivery would not be defined.

Graph 5.18: Contributions on how delivery should be defined per stakeholder group



The definition of delivery as material delivery of goods with parties that can agree was the preferred option with 27%, but this was closely followed by the option "material delivery of good" with 25% of contributions. Except for the consumer groups (51%) who opted for

"materially delivery of goods" with a majority, all other stakeholders seemed to have quite diverse views on the matter. Consumer groups and public authorities opted for the "material delivery of goods" with respectively 51% and 35%, while the business sector and "others" chose the status quo with respectively 32% and 50%. Academics were split evenly between "the material delivery of goods" and "parties can agree" while the legal practitioners showed a clear preference for "parties can agree". This indicates that there was not really a preferred option in this case. However, even though there is no clear preferred option, almost 70% are in favour of adopting EU rules on the definition of delivery, i.e. option 1 to 3.

Regarding Member States' contributions, option 1 received the support of the largest group (10 countries). Five Member States and one EFTA/EEA country opted for the status quo and four Member States supported option 3. Only one Member States opted for option 2. Five Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

General comments included:

Several EU and national consumer organisations noted, despite the fact that they are in favour of introducing an EU-wide definition of "delivery", that in some Member States the concept of delivery is indeed inter-twinned with the transfer of ownership. The introduction of such a definition could therefore affect national contract laws to a greater extent than can be anticipated at the moment. They pleaded for further study and analysis. Others raised concerns about the fact that the definition would not apply to immaterial goods.

Additional problems envisaged related to the issues such as partial delivery in the case of bundled purchases, where option 1 would fail. Option 2 could encounter problems when the item purchased could not be successfully accessed. Respondents also queried about items lost and stolen in transit.

Comments expressed by the contributors who were in favour of option 1 included:

A Czech public stakeholder emphasised the importance of the moment of delivery as numerous rights and obligations of the parties are connected to it. A clear, uniform regulation was therefore considered desirable. Even when ensuring that delivery is dependent on the availability of the consumer, which was considered the most positive approach, some flexibility should still be maintained with regard to alternative agreements between buyers and sellers.

One Member State argued that acceptance of option 3 may result in the situation where the professionals indicate the moment of delivery themselves in the generally used contractual patterns.

Comments expressed by the contributors who were in favour of option 2 included:

Several contributors indicated that by default the delivery should mean that the goods are placed at the disposal of the customer. Modern lifestyle implies increasingly that delivery should not necessarily take place at the customer's residence. Option 2 leaves the time and place open to further agreement, thus allowing for letters being posted through a letter box with no contact with the consumer, items left in an agreed place outside a property or left with neighbours and items being delivered to a place of work. However, all these modalities make a clear definition of delivery difficult and potentially restrictive.

Comments expressed by the contributors who were in favour of option 3 included:

Whilst agreeing with the option 3, some actors indicated that any agreement for delivery reached should be subject to a fairness test.

A Member State representative noted that their national law has introduced a definition of delivery and also provides that in the case where a consumer is absent, goods remain at the seller's risk until they are delivered to the consumer. Risk will therefore be with the seller during transit. This Member State representative also expressed its support for option 3 provided the passing of risk is linked to this definition of delivery.

The EP considered that the notion of delivery and the regulation of the passing of the risk are closely linked. They suggested that the horizontal instrument should include a common definition of the notion of delivery in which priority should in principle be given to contractual agreements.

Comments expressed by the contributors who were in favour of option 4 included:

Another UK public sector respondent indicated that most Member States no doubt have well-developed laws on the subject. Superimposing specific rules in consumer cases would be likely to cause difficulties and uncertainty. Several stakeholders argued that for conventional delivery operations the significance of delivery is clear. Variants of "delivery" are more likely to cause problems, but any single definition may not fit all practical purposes that exist in the consumer sector. A stakeholder went as far as claiming that there is no evidence that problems arise from divergent definitions of delivery which are binging about tangible disadvantages as claimed in the Green paper.

A number of business representatives, mainly from Germany, agreed on that fact that a restrictive harmonised definition of "delivery"; would stand in the way of many types of contractual relations in which seller and buyer wish to agree on a different way of delivery. They quoted the example of consumers ordering flowers that are to be delivered to another place and person. This would become impossible if the consumer had to physically hold the object of purchase in his hands.

Alternative options suggested by the contributors

Academics

Definition could be accompanied by a default rule in case there is no agreement in the contract. Such a default rule could be modelled on the relevant provision in the upcoming CFR and could read as follows: "If the place of delivery of the good cannot be determined from the contract, it is the residence of the business".

Business sector

The following options were suggested:

- This issue should be dealt with by a vertical approach, taking into account the specificities of each sector. Differences are often explained by the specific products or

services, i.e. a car is not delivered according to the same terms as a mobile phone or a cosmetic product.

- Option 2 with the clarification that if the contract does not provide a definition then delivery means that the goods are placed at the consumer's disposal.
- Option 2 with the possibility that parties can agree: the scenario should be flexible enough to allow buyers and sellers to agree an arrangement corresponding to the type of good purchased.

Consumer groups

A combination of options 1 and 2 was proposed: a harmonized definition for all Member States is indeed necessary, whereby delivery would mean that the consumer materially receives the goods or, by default, the goods are placed at the consumer disposal at the time and place specified in the contract.

A consumer group further emphasised that in the case of distance selling, one of the biggest problems remains non-delivery. A better way to improve consumer confidence would be to provide consumers with remedies in case of non-delivery, late or partial delivery.

Public authorities

A combination of options 2 and 3 was suggested: delivery would mean that the goods are handed over to the consumer at the time and place specified in the contract, unless the parties agree otherwise.

4. The passing of risk in consumer sales

At present, the passing of the risk from the seller to the consumer is regulated differently in the Member States (e.g. in some Member States the risk passes to the buyer at the time of conclusion of the contract while in others property does not pass with the conclusion of the sales contract but with delivery). This leads to confusion for consumers when shopping cross-border. The following question was included in the Green Paper:

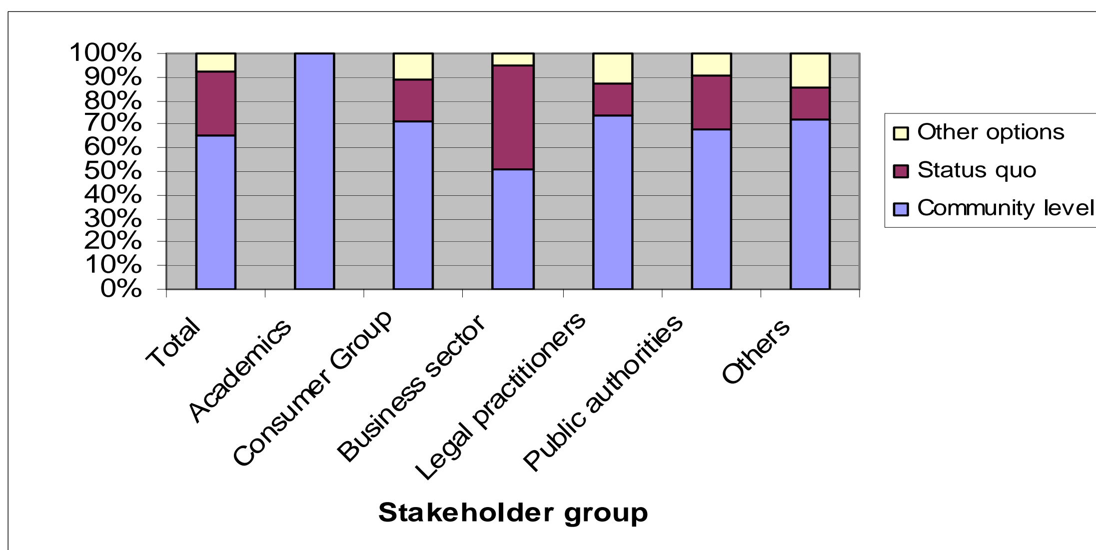
Question I2 "How should the passing of the risk in consumer sales be regulated?"

Actions proposed by the Commission in the Green Paper

Option 1: The passing of the risk would be regulated at Community level and be linked to the moment of delivery.

Option 2: Status quo: the passing of risk would be regulated by the Member States, with the consequence of divergent solutions.

Graph 5.19: Contributions on how the passing of the risk in consumer sales should be regulated per stakeholder group



The passing of the risk regulated at community level was the most favoured option with 65%. Percentages for this option ranged from 51% to 100% (for the academics). The business sector mostly opted for the regulation at community level with 51%; however, 43% of contributors within the business sector chose for maintenance of the status quo, which indicates that there is not a clear consensus among this group.

The majority of Member States (16) supported option 1. Only six Member States and one EFTA/EEA country opted for the status quo. Three Member States chose ‘other option’.

Key issues raised by the contributors on the suggested options

General comments included:

A number of respondents commented that without a common definition of “delivery”, the passing of risk in accordance with option 1 can actually not be chosen. Only if it is accepted that “delivery” equals the handing over of goods the consumer then the passing of risk can be linked to the moment of delivery or material possession of the goods by the consumer.

Comments expressed by the contributors who were in favour of option 1 included:

A business representation agreed with option 1 but foresaw potential complications, for example, with regard to the passing of risk in the case of bespoke goods which would require particular attention as well as goods stored at a customer’s request.

Other business representatives also agreed with the Commission that the present system in which the passing of risk is regulated differently in different Member States may lead to confusion. They would welcome the introduction of a uniform approach that regulates the passing of risk at Community level linking it to the moment of delivery. Several viewed such harmonisation useful in particular in relation to cross-border transactions.

A consumer organisation suggested that in some cases, the passing of risk should even occur after the delivery. They quoted the example of a client in Wales which made a distance purchase of parts for this car. When the latter were delivered and signed for, upon closer inspection he found out that the bumper was faulty. However, the seller refused to replace the item arguing that the document signed stated that by signing the buyer would waive all further rights. The act of delivery therefore does not always mean that the reception has carefully examined an item and found to be in order.

Comments expressed by the contributors who were in favour of option 2 included:

Those in favour of option 2 often argued that the passing of risk is of a wider contractual nature, going beyond business to consumer contracts. Some considered that any further developments in this area would better fit with the work on the Common Frame of Reference (CFR). One Member State for instance argued that if would be difficult to link to delivery, for example when the consumer cannot receive the goods at home – and therefore should be dealt with in the CFR. Others went as far as claiming that the changes proposed would be a further step towards a European civil code, which meets a lot of resistance. In the same vein, some business organisations considered that the EU has no legislative authority to regulate a new civil law.

An EU consumer organisation stressed that the concepts of delivery and the passing of the risk do not coincide in all Member States, simply because they are conceptually not conceived in the same way. The passing of risk is of a wider contractual nature which goes mere consumer contracts and which touches upon longstanding legal traditions.

A business stakeholder considered that there might be a need for parties to agree to whom and when the risk is transferred, in case the latter will indeed be linked to the delivery. Such a need would occur when the buyer requests a complicated shipment of goods, as in such situations the seller often requests that the buyer collects the good and therefore assumes the risks involved.

Finally, several business organisations considered that there is no need to define the passing of risk in consumer sales at EU-level because most national laws already provide their own definitions. In addition, few believed that there are any real, substantial problems because of the slight variations in rules on the passing of risk.

Alternative options suggested by the contributors

The following suggestions and comments were made by the contributors:

- A solution at community level should only be a default rule and the contractual parties are still free to specify the delivery individually in the contract. It is important that the parties can agree on to whom and when the risk is transferred.
- The question should be regulated in the context of the CFR.

5. Conformity of goods

5.1. Extension of time limits

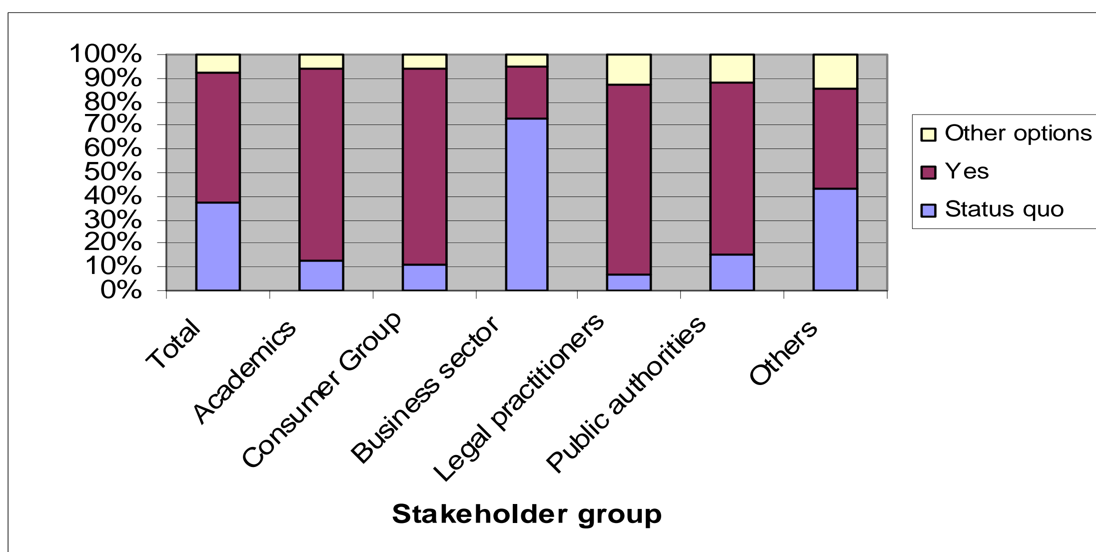
The suspension or interruption of the legal guarantee of two years as included in the Directive on Consumer Sales is not regulated. Some Member States have introduced specific rules on the extension of this period, for example to cover the period during which the consumer was not able to use the good in the event of repair, replacement or negotiations between seller and

consumer. This leads to confusion for consumers when shopping cross-border. For this reason the Green Paper raised the following question:

Question J1 "Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?"

Actions proposed by the Commission in the Green Paper *Option 1:* Status quo: no changes would be made. *Option 2:* Yes. The horizontal instrument would provide that the duration of the legal guarantee is extended for a period during which the consumer was not able to use the goods due to remedies being performed.

Graph 5.20: Contributions on extension of time-limits applying to lack of conformity for the period during which remedies were performed per stakeholder group



The extension of the time limits was the most favoured option with 55%. There was a significant opposition between consumer groups and academics on the one hand and business sector on the other hand. While the former two opted for an extension of the time limits with respectively 81% and 83%, the latter chose to maintain the status quo with 72%. Except for the business sector, all other stakeholders opted for an extension with percentages ranging from 73% to 83%, and there was no major split among groups since they all had a majority that had opted for the same option.

Regarding Member States' contributions, a large majority (19) supported option 2. Only three Member States and one EFTA/EEA country supported the status quo whereas three Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- A significant number of business contributors pointed out that they were not aware of any problems arising from the present situation or adversely affecting consumers or businesses. Many questioned the need to intervene in this area.
- In addition, some argued that the proposed extension of the time limits would only grant a rather limited benefit to the consumer. The benefit of getting an extension of the guarantee period does not really compensate for any disadvantages the consumer suffered during the time the remedies were performed.
- Contributions highlighted that option 1 provides the simplest possible approach and leads to the least possible misunderstandings about whether a product is still within the period covered by the Directive. option 2 would mean that every individual item would potentially be covered for a different length of time.
- It was pointed out by the industry sector that such an extension of the warranty period would require a transparent registration and tracking system to measure the "extended" guarantee period. Such a system would be very complex, would increase operational cost and produce a far higher burden than the benefits that it can bring for consumers.

Comments expressed by the contributors who were in favour of option 2 included:

- Contributors argued that given the link between the use of the goods and the required guarantee, it would be reasonable to extend this guarantee to cover the period when the product is unusable for reasons connected with the reparation of a defect.
- Others pointed out that such a solution could be justified, provided that evidence could be brought forward of problems arising from the differences that exist across Member States, and of consumer detriment where the two-year time limit expires while remedies are being performed.
- Suggestion was made to provide the consumer with a substitution during this period.
- The EP considered that the horizontal instrument could, to good effect, extend the length of the statutory guarantee to include the period when the goods are unable to be repaired.

Alternative options suggested by the contributors

Alternative options suggested by contributors included the following:

- The review of the regulations on consumer sales shall be effectuated in the context of the corresponding directive.
- This issue should be regulated this in the context of the CFR.
- The Federal Government of Germany advocated a modified version of Option 2. An amendment to Directive 1999/44/EC could provide, as a general rule, that legal guarantees will be extended when consumers are unable to use purchased goods due to remedies being performed. However, this matter should not be regulated within the framework of a horizontal instrument. Therefore, the proposed regulation should provide national legislatures with the corresponding flexibility that will allow contracting parties to maintain current practices that are beneficial to consumers.

5.2. Recurring defects

The Consumer Sales Directive does not include cases where defects which became apparent during the two years guarantee reappear after this period. Some Member States have introduced specific rules to deal with recurring effects. This leads to uneven situations and confusion for consumers when shopping cross-border. Therefore the Green Paper included the following question:

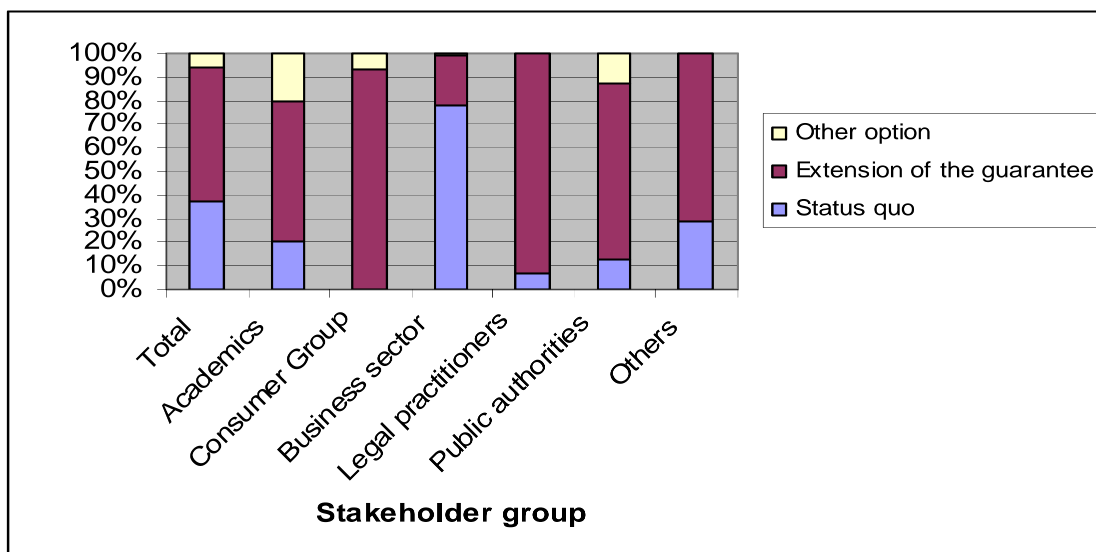
Question J2 “Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?”

Actions proposed by the Commission in the Green Paper

Option 1: Status quo: The guarantee would not be extended.

Option 2: The duration of the legal guarantee would be extended for a period to be specified after the repair to cover the future re-emergence of the same defect.

Graph 5.21: Contributions on automatic extension in case of repair of goods to cover recurring defects per stakeholder group



The extension of the guarantee in case of recurring defects was the preferred option with 57%. It might be worth noting that the option to maintain the status quo closely followed with 37%.

Once more, there is a major contrast between consumer groups – which chose for the extension of the guarantee (93%) – and the business sector – which opted for maintaining the status quo (77%). The percentages for the other options for each of the two stakeholders being very low, it is clear that the two strongly disagreed on the matter. All other stakeholders opted for the extension of the guarantee with a majority within their group and percentages ranging from 60% to 93%.

A majority of Member States (19) opted for an extension of the guarantee. Only three Member States and one EFTA/EEA country supported the status quo. Three Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

General comments included:

If recurring defects, apparent within two years from delivery, re-appear after the legal guarantee expired, even though they have been repaired, the consumer must be able to ask for the extension of the legal guarantee or to obtain the replacement of this good. This extension will be valid for a period corresponding to the total duration of immobilization of the good concerned.

Comments expressed by the contributors who were in favour of option 1 included:

- The majority of contributor in favour of this option came from the business sector where most contributors argued that situations involving recurring defects can be handled within the system of the two-year legal guarantee period.
- It was argued that time limits help create legal clarity and legal satisfaction which could not be achieved if it were always possible for new time limits to begin running on behalf of one contractual party.
- The potential extension of this period would be unreasonable because it would involve unquantifiable liability for the retailer, and the most recurrent concern in this regard is the fear that this would eventually result in a never-ending period of time in which the professional is liable.
- Contributors were not aware of any evidence that the present situation adversely affects consumer or business, and it was widely argued that extending the guarantee would create legal uncertainty for professionals and would place an unreasonable burden on trade.

Comments expressed by the contributors who were in favour of option 2 included:

- A great majority of consumer groups favoured this option on the basis that it offers wider consumer protection.
- To avoid that this guarantee be extended endlessly, it has been widely suggested that a period be specified after the repair. To this end, it was also suggested that after a certain pre-determined number of times whereby the good has incurred the same defect, the good would be replaced.

Alternative options suggested by the contributors

Suggestions and comments made by contributors include the following points:

- It might be better to rely on other of the tools available to the consumer, such as good faith and fair dealing on the part of the seller, to protect the consumer in the event of a recurring defect after the expiry of the two-year guarantee.
- An alternative option could be to automatically extend guarantees for the period when the consumer was not able to benefit from the contract, but the length of the extension would reflect the life expectancy of the item.

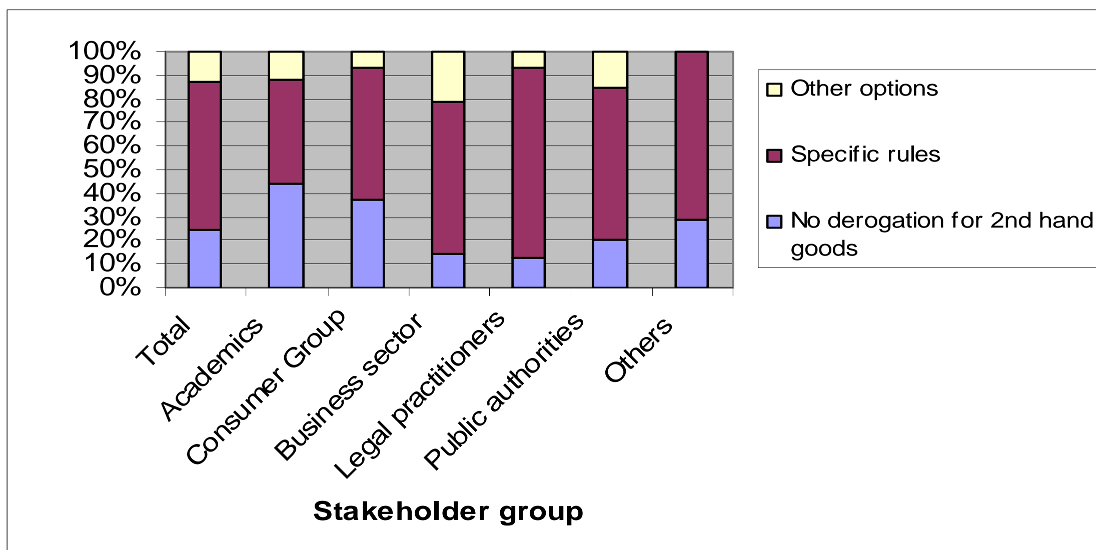
5.3. Second-hand goods

The Consumer Sales Directive leaves it up to the Member States to decide whether a shorter time period for the liability of the seller (not less than one year) would be possible in the case of second-hand goods (to be agreed between the seller and consumer). Varying conditions in different Member States cause legal uncertainty and confusion for consumers when shopping cross-border. The question raised in the Green Paper is as follows:

Question J3 “Should specific rules exist for second-hand goods?”

Actions proposed by the Commission in the Green Paper
Option 1: A horizontal instrument would not include any derogation for second hand goods: the seller and consumer would not be able to agree on a shorter period of liability for defects in second hand goods.
Option 2: A horizontal instrument would contain specific rules for second hand goods: the seller and the consumer may agree on a shorter period of liability for defects in second hand goods (but not less than one year).

Graph 5.22: Contributions on specific rules for second-hand goods per stakeholder group



“Specific rules for the conformity of second hand goods” is clearly the preferred option with 62% of the contributors who opted for this option. Academics seemed to be divided between both options given by the Green Paper since 44% of the groups’ contributors opted for option 1 and 44% opted for option 2. It is also worth noting that while consumer groups have clearly chosen specific rules to apply with 56%, there are nevertheless 37% of the contributors that chose no derogation. While the majority of the business sector have opted for option “specific rules” (64%), there is also a relatively high number that opted for ‘other options’ (20%), therefore confirming that this issue has most likely raised relevant concerns that are worth looking into.

A majority of Member States (18) supported option 2. Only three Member States and one EFTA/EEA country opted for option 1. Four Member States chose ‘other option’.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- Implementing specific rules for second hand goods would most likely be detrimental to the consumer since he/she has a weaker bargaining power than the professional and he/she probably would end up agreeing on the shorter period of time.
- Keeping the same rules applying to second hand goods will provide greater legal certainty and simplicity.
- At the moment, the defect of conformity of second-hand goods is appreciated compared to the qualities that the buyer can legitimately expect. Therefore the current directive (99/44) is already complete and balanced.
- Certain Member States, such as France, have argued that such provision already exists in national law and therefore there is no need to review the existent legislation.
- The EP emphasised that the horizontal instrument should not include specific rules for second hand goods in order to respect the rules adopted by Member States in accordance with their own legal traditions.

Comments expressed by the contributors who were in favour of option 2 included:

- The characteristics of second-hand goods are so specific that it would be unreasonable of the consumer to have the same expectations as with new goods and inflexible general rules are unlikely to produce an acceptable result.
- The business sector has once more raised the issue of contractual freedom: by restricting the possibility to agree on shorter periods of time, this contractual freedom would be infringed.
- Determining too long a period of liability would be disproportionate and would have an adverse impact on the number of transactions.
- References have been made nevertheless to the need to be careful with the definition of second-hand goods.

Alternative options suggested by the contributors

Business sector

Alternative options proposed included the following:

- Specific rules on a shorter period of liability could be less than one year.
- The seller and consumer could agree on a shorter period of liability for defects in second hand goods, or no liability depending on the cost of the goods and their age.

Consumer groups

The following alternative option was suggested: second hand goods could be included in the instrument provided that liability for non-conformity takes account of 1) the age of the item; 2) the price of the item; and 3) whether defects were pointed out or noted by the consumer.

Public authorities

Public authorities' contributions included the following remarks:

- One public authority was not aware of specific problems relating to second hand goods in cross-border trade and would prefer to see the trader and the consumer negotiate as to what is most appropriate for them in respect of the product in question.
- One Member State was not aware that the differences that are present across the Member States cause a lack of consumer and business confidence or significant legal uncertainty and was therefore in favour of the status quo.
- Another Member State would prefer that the matter continues to be regulated by Article 7 of the Directive 1999/44/EC.

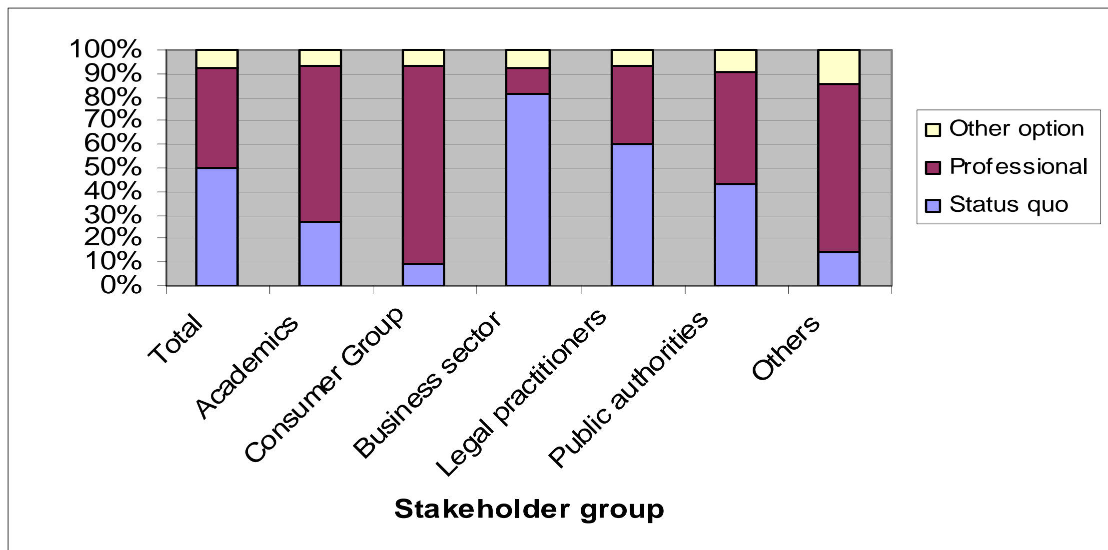
6. Burden of proof

The Consumer Sales Directive establishes a rebuttable presumption that any lack of conformity which becomes apparent within six months from delivery shall be presumed to have existed at the time of delivery. Once the six month period has passed, consumers have to prove a fact (the existence of the defect at the time of delivery) which is extremely difficult to establish without access to relevant technical data and/or specialised assistance. The Commission included the following question in the Green Paper on this issue:

Question J4 "Who should bear the burden to prove that the defects existed already at the time of delivery?"

Actions proposed by the Commission in the Green Paper *Option 1*: Status quo: During the first six months it would be up to the professional to prove that the defect did not exist at the time of delivery. *Option 2:* It would be up to the professional to prove that the defect did not exist at the time of delivery for the entire duration of the legal guarantee, as long as this would be compatible with the nature of the goods and the defects.

Graph 5.23: Contributions on who should bear the burden of proof per stakeholder group



The status quo was the most favoured option with 50%, but it is important to note that the burden of proof being put on the professional was favoured by 42% of the contributors- this might call for a further analysis of the answers given to this question. This question has also raised a lot of contrast between business sector and consumer groups. Consumer groups – and to a certain extent academics – have mostly opted for the professional to bear the burden of proof – option 2 (84%) – while the business sector opted for a status quo – option 1 (82%). All stakeholders, except for the business sector and legal practitioners, opted for the professional to bear the burden of proof, while the latter opted for a status quo to be maintained. Public authorities seemed to be almost evenly divided between the two options – 43% for option 1 versus 48% for option 2 – thus revealing a difficulty in choosing one preferred option.

Some of the consumer groups indicated that the professional has easier access to information on the good than the consumer. They argued that, for the consumer to prove that the defect was there from the moment of the purchase, may actually involve the hiring of an expert, which can be very expensive. They further commented that the reversal of the burden of proof after six months has often been used as an excuse by professionals not to fulfil their duty in case of non-compliance of the good. The business sector on the other hand argued that the reversal of the burden of proof after six months is not an excuse used by businesses to bypass their obligations, but a necessary condition since not all the goods have the same life span and when it comes to perishable goods it is necessary that the consumer proves as soon as possible that the good was non-compliant.

Member States' contributions revealed a slightly larger number of countries in favour of option 2 (13), with an almost equal number supporting option 1 (10 Member States and one EFTA/EEA country). Only two Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- A great number of contributors from the business sector selected this answer arguing that extending the six months period to the whole guarantee period would open the trader up to unfair accusations – a significant amount of time after the product was sold

– that defects were known at the time of sale. This is a matter of finding the appropriate balance between the professional and the consumer and annulling the reversal of the burden of proof would put an unjustified burden on the former and could encourage abuse by the latter.

- The longer the goods are in possession of the consumer the greater the probability that the goods were not defective at the time of delivery – the seller has no way of knowing how and what the consumer is using the product for.
- Many doubts have been raised as to the probability of many cases arising where the defect which existed at the time of delivery does not become apparent within the six month period.
- The present rule has proved to be successful and reliable so far, thus most contributors could not see any valid reason to make any changes.
- The EP advocated to maintain the principle of rebuttable presumption in its present form.

Comments expressed by the contributors who were in favour of option 2 included:

- The majority of consumer groups and a significant number of academics opted for this option arguing that the burden should fall on the professional 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. Otherwise the consumer would have to hire professional expertise to justify his/her cause and this could be too great a cost.
- The reversal of the burden of proof has proven to be something that goes against consumers since it has turned out to be a way of limiting the legal guarantee. There are often cases reported by consumer associations whereby once the six-month guarantee has elapsed, the consumer is obliged to comply with certain obligations as regards proof that are not compulsory by law.

Alternative options suggested by the contributors

<u>Academics</u>

Option 2 should be formulated as follows: “It would be up to the professional to prove that the defect did not exist at the time of delivery for the entire duration of the legal guarantee”.

<u>Business sector</u>

Contributors suggested the following options:

- Combination of options 1 and 2, whereby during the first twelve months it would be up to the professional to prove that the defect did not exist at the time of purchase. In this way, the legal framework will better match the commercial practice applied by many companies in the industry.
- Extending the reversal of burden of proof to 24 months.

<u>Consumer groups</u>

It was recommended to adopt the formulation “It would be up to the professional to prove that the defect did not exist at the time of delivery for the entire duration of the legal guarantee”. The last part of the sentence - “as long as this would be compatible with the nature of the goods and the defects” – undermines the effect of the regulation, because it will be difficult to use in practice.

7. Remedies

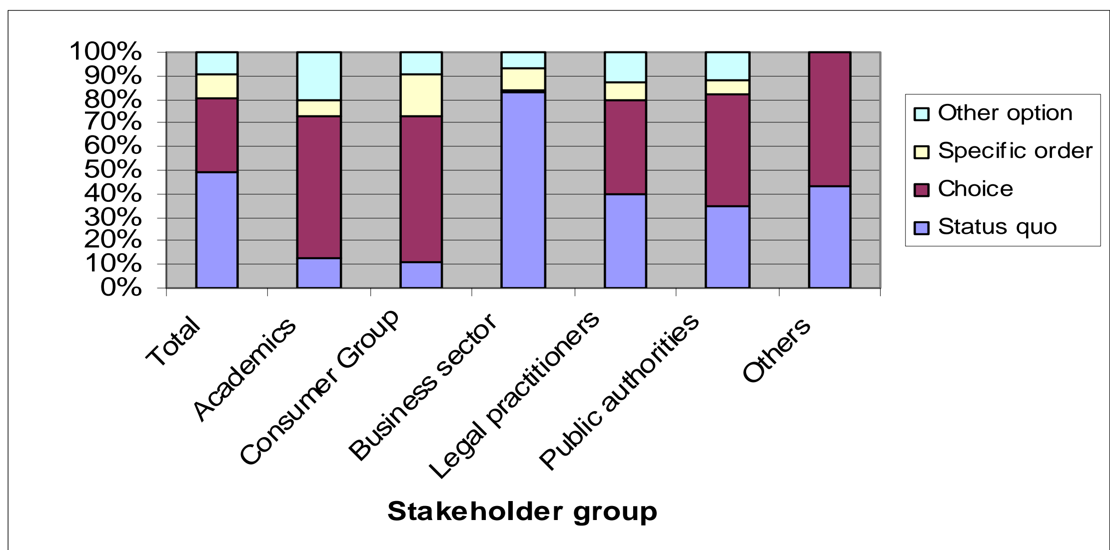
The order in which remedies may be invoked

The Consumer Sales Directive only provides for remedies in the case of non-conformity and not for other kinds of breaches such as non-delivery. In addition, the Directive provides for a particular order in which remedies may be invoked in case of non-conformity. Consumers first have to request repair or replacement. A reduction of price or termination of contract can only be invoked if repair and replacement are impossible or disproportionate. The Green Paper included the following question on this matter:

Question K1 "Should the consumer be free to choose any of the available remedies?"

Actions proposed by the Commission in the Green Paper
Option 1: Status quo: consumers would be obliged to request repair/replacement first, and ask for a price reduction or termination of contract only if the other remedies are unavailable.
Option 2: Consumers would be able to choose any of the available remedies from the start. However, termination of the contract would only be possible under specific conditions.
Option 3: Consumers would be obliged to request repair, replacement or reduction of price first, and would be able to ask for termination of contract only if these remedies are unavailable.

Graph 5.24: Contributions on choice of consumers for available remedies per stakeholder group



The status quo for the order for remedies to be invoked was the preferred option (49%). The business sector and consumer groups had once more contrasting views: while the former opted for maintaining the status quo with 83%, the latter opted for "choice of available

remedies" with 61%. The fact that only 11% of consumer groups opted for status quo and 1% of the business sector opted for "choice of available remedies" shows quite clearly that the two groups strongly disagreed on the matter. It might be worth noting that legal practitioners, public authorities and "others" seem to be divided in their choice with percentages for option 1 ranging from 40% to 43% and percentages for option 2 ranging from 40% to 57% thus almost marking an even division between both options across stakeholders.

Member States' contributions were almost equally divided between options 1 and 2 (10 Member States and one EFTA/EEA country, and 10 responses respectively). Only two Member States supported option 3. Three Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

General comments

The EP considered that the horizontal instrument could establish an order of available remedies in the case of wrong performance, with termination of the contract being reserved for total non-performance or particularly serious breaches of contract.

Comments expressed by the contributors who were in favour of option 1 included[18]:

- Contributors from the business sector stated that the hierarchy set up by Directive 999/44 is effective and foreseeable. Option 1 is a satisfactory balance between sellers and consumers' interests.
- They emphasised that the principle of 'free choice' obstructs the implementation of a standard service and repair policy and would lead to considerable uncertainty to the sellers of products.
- The risk of giving the freedom to consumers to choose their remedy is that a high percentage would opt for replacement or termination, leading to increased costs for manufacturers. It could be a source of fraudulent behaviours on behalf of consumers.
- In general, the cost of replacement by new goods is higher than repair cost (except for low cost commodity products). This would create disproportionate economic burdens, which based on general economic theory will soon or later be transferred to consumers in the form of higher prices in the marketplace.
- One Member State recalled that he priority of supplementary performance through replacement or repair gives effect to the legal principle of "pacta sunt servanda".
- Modifying the grounds for termination could have unpredictable market effects detrimental to consumers. Right to immediate withdrawal could damage the sector considerably.

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[18] A specific example illustrating the problem was given by *EICTA (European Information, Communications and Consumer Electronics Technology Industry Associations). "*The electronic sector mentioned that freedom of choice would lead to a substantial increase in electronic waste. EICTA provides an estimation of the scale involved: 5.5 million warranty repairs were carried out in the EU by just nine EICTA member companies in 2005. This is only a small percentage of the overall total across industry sectors. Besides, 10% of claims in the digital technology industry are 'no problem founds' (misunderstanding of the user instructions or of the product specifications). In such cases, free choice of remedy will bring the consumer and supplier into a vicious circle".

- Legal practitioners suggested that problems arising at present may be due to the relative complexity of these provisions. A useful change would be to review the current wording to make more transparent and understandable.

Comments expressed by the contributors who were in favour of option 2 included:

- Contributors considered that this option provides a higher level of consumer protection, while it secures the position of seller by limiting the right of termination. Academics argued that the systematic preference currently given to repair and replacement is disputable in so far as it denies the consumer's right to be the best judge of his own interests.
- However, many consumer groups claimed that consumers' choice of immediate termination should not be restricted to serious breaches and that consideration should be given to the consumer's loss of confidence in the goods and the seller. A consumer group highlighted that this places the burden of proof on consumers who would have to determine whether the breaches are serious enough. The result could be that the consumer is de facto refused the right to cancel and that industry applies the disproportional rule to their advantage. Therefore, conditions for the termination of the contract should not be too severe.
- One contributor highlighted that in the services sector, supplementary services and price reduction are inadequate remedies. A right to terminate the contract must be available as a legal remedy from the start.
- Contributions from academics stated that an important issue is arising from option 2: there will inevitably be cases in which the consumer and the vendor will not agree on the remedies to be used and resolving this conflict in front of a tribunal would be way to inconvenient and expensive for the consumer. There should therefore be, in addition to this choice, conflict resolution and mediation techniques to avoid the need to go in a tribunal.

Comments expressed by the contributors who were in favour of option 3 included:

- Contributions noted that this option guarantees the interest of the consumer as well as encourages the continuation of contracts and the responsible behaviour of consumers.
- An ECC suggested setting a specific time limit for the seller to complete the remedy chosen (e.g. 14 days). Failure to do so would avail the consumer to request the other remedy. The establishment of a timeframe would also help to define "reasonable time", for example failure to compete one of the aforesaid remedies within 28 days would entitle consumers to request a reduction of the price or have the contract rescinded, as set by Article 3(5).

Alternative options suggested by the contributors

<u>Academics</u>

Contributors made the following suggestions:

- At a distance, repair or replacement may be rather difficult to provide. Giving a consumer the choice to reject the goods and terminate the contract immediately might be more appropriate.
- Option 2 should be formulated as follows: "Consumers would be able to choose any of the available remedies from the start".

Business sector

In order to prevent abuse, it was noted that there should be some strict guidelines, for example offering replacements, in sealed packages of products with the same title/format/artist.

Consumer groups

A modified option 2 was suggested: consumers would be able to choose any of the remedies available in the Directive but would also be able to rescind the contract from the start.

Legal Practitioners

The same suggestion was made by legal practitioners: the consumer should have the choice between the four suggested remedies, including the resolution of the sale except in the event of minor defect of conformity.

8. Notification of the lack of conformity

The Consumer Sales Directive leaves it up to the Member States to determine whether a consumer must inform the seller of the lack of conformity within a period of no less than two months from the moment of discovery. Most Member States have made use of this option; some have included exceptions to this rule under certain circumstances. This had led to divergences which causes confusion for consumers and businesses. The Green Paper raised the following question:

Question K2 “Should consumers have to notify the seller of the lack of conformity?”

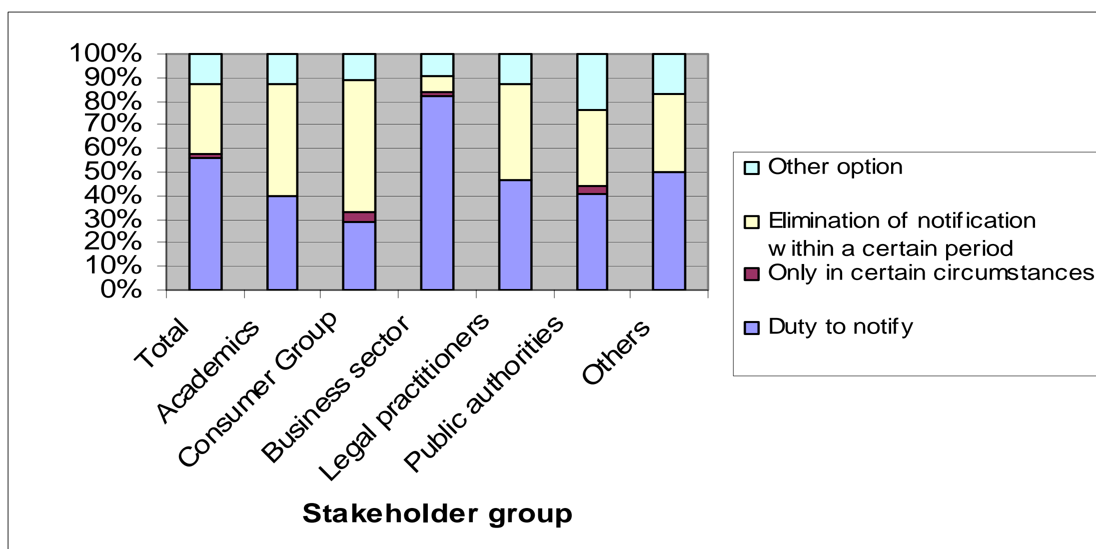
Actions proposed by the Commission in the Green Paper

Option 1: A duty to notify the seller of any defect would be introduced.

Option 2: A duty to notify in certain circumstances would be introduced (e.g. when the seller acted contrary to the requirement of good faith or was grossly negligent).

Option 3: The duty to notify within a certain period would be eliminated.

Graph 5.25: Contributions on consumers having to notify the seller of the lack of conformity per stakeholder group



Overall, the duty to notify the lack of conformity was the favoured option (56%). Consumer groups and the business sector had contrasting views: the former opted for “elimination of notification within a certain period” with 56% and the latter for “introduction to notify” with 82%. The contrast however was not as significant as in other questions since there were 29% of consumer associations which opted for option “duty to notify”. Only academics and consumer groups had a majority choosing the elimination of notification within a certain period.

Regarding Member States’ contributions, the duty to notify was the option favoured by the largest group (12 countries). Eight Member States supported option 3 and only one Member State supported option 2. Four Member States and one EFTA/EEA country opted for ‘other option’.

Key issues raised by the contributors on the suggested options

General comment

The EP considered it appropriate for the horizontal instrument to eliminate existing divergences concerning the notification of lack of conformity, which are currently a source of confusion.

Comments expressed by the contributors who were in favour of option 1 included:

- A large number of business stakeholders favoured the introduction of a duty to notify within a time limit of two months. They also believed that the introduction of such a duty would create legal certainty, while it does not place an unreasonable burden on consumers.
- The necessity to introduce a clear time period was mentioned by many contributors, whatever the duration chosen.
- For another group of respondents, including a number of consumer groups, legal practitioners and public authorities, notification should be done “within a reasonable time” rather than establishing a cut-off date which would deprive consumers of their remedies.
- A consumer group expressed its support for option 1 provided that the duty runs from discovery of the non-conformity and applies where the consumer wishes to claim a

remedy. This would be helpful where a product is not used immediately – e.g. advance purchase of products to be given later as gifts, for example at Christmas.

- Some contributions expressed concern at the possibility of the creation of a new area for dispute between consumers and business as the moment of "discovery" of the defect would be difficult to prove.

Comments expressed by the contributors who were in favour of option 2 included:

- According to a consumer association, determined circumstances should be clearly expressed to ensure legal certainty.

Comments expressed by the contributors who were in favour of option 3 included:

- A large number of contributors emphasised that a duty to notify would be an additional duty and burden for the consumer.
- It is in the buyer's interest to notify the seller in due time anyway, to get fully functioning products as quickly as possible (and within the designated liability period). The absence of such a duty has not posed any problems in France for instance.
- The delay suggested (two months) was also deemed too short by many contributors, especially when dealing with cross-border complaints.
- The position of consumers would also be worsened in those cases where sellers refuse to provide remedies because the consumer did not inform in time.
- The contribution from a university highlighted that Member States have abstained from introducing such a duty, and that it was questionable whether such a duty could effectively be implemented. In practice, it would be rather easy for the consumer to circumvent the notification duty by simply lying about when he or she detected the defect. In most cases it would be rather difficult for the business to prove that the consumer was not telling the truth about the time of detecting the defect. Thus, from a pragmatic perspective existing differences regarding the notification duty should be eliminated by simply abolishing such a duty.

Alternative options suggested by the contributors

The maintenance of the status quo was advocated by a number of contributions across the different groups of stakeholders.

Other suggestions included:

- Notification should be given at any time, for the benefit of the consumer and the professional, during the period of legal guarantee - an extension of the two months time period already in place is necessary, especially in the case of cross-boarder notifications.
- A more flexible period than a period fixed in days or months, for instance that the notification must be given "within reasonable time", is preferred.
- It is not clear how such a notification could be effectively policed as it would be hard to prove when a consumer had discovered a lack of conformity.

9. Direct producers' liability for non-conformity

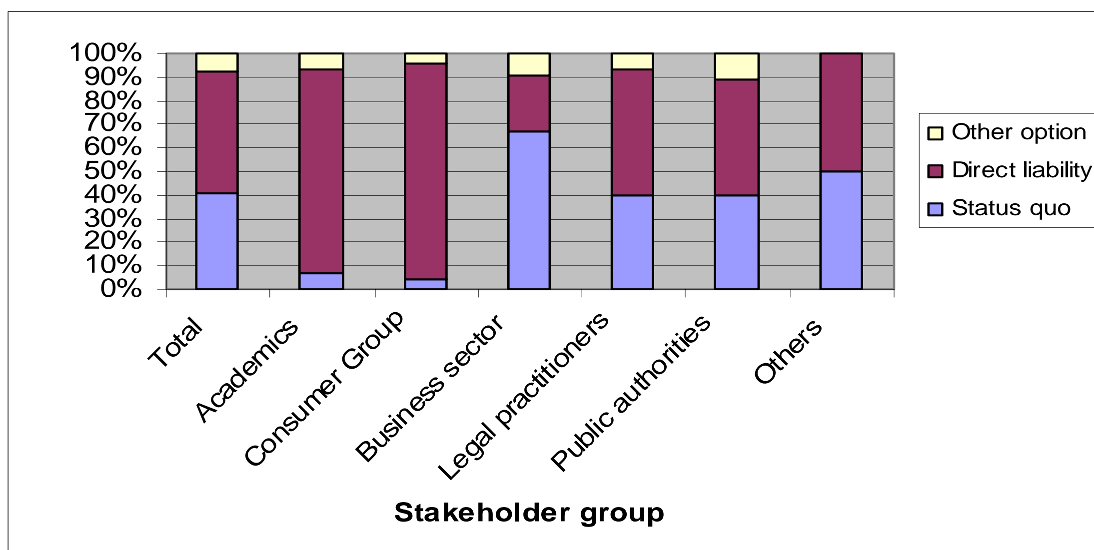
Some Member States have introduced various (different) forms of direct liability of producers in case of non-conformity of the good with the consumer contract. This creates internal market

barriers and is especially disadvantageous for consumers shopping cross-border. The question therefore raised by the Green Paper is:

Question L "Should the horizontal instrument introduce direct liability of producers for non-conformity?"

Actions proposed by the Commission in the Green Paper *Option 1*: Status quo: no rules on direct liability of producers would be introduced at EU level. *Option 2:* A direct liability for producers would be introduced under the conditions described above.

Graph 5.26: Contributions on introduction of direct liability of producers in the horizontal instrument per stakeholder group



Introduction of direct liability was the preferred option for the majority of the contributors (51 %), albeit closely followed by the status quo (41%). Consumer groups and the business sector had contrasting views: the former opted for the introduction of direct liability with 91% and the latter opted for maintaining the status quo with 66%. It is worth noting however that public authorities and "others" seemed to have diverging opinions on the matter, public authorities opting for maintaining the status quo with 40% and "others" being evenly divided (50%) between the two.

The majority of Member States (13) supported direct liability. Eight Member States and one EEA/EFTA country supported the status quo while four opted for 'other option'.

Key issues raised by the contributors on the suggested options

General comments

- Some business representatives expressed the issue of products that are sold by a manufacturer in a given Member State (subject to local legal requirements) and then subsequently commercialised by a reseller in another country in which the consumer protection rights (e.g. remedies in case of defective products) are different. The manufacturer may not have considered this difference when putting the product on sale in that specific country.

Comments expressed by the contributors who were in favour of option 1 included:

- A large number of business stakeholders vehemently opposed the introduction of such a liability. For many it is unthinkable to expect manufacturers to deal with contractual complaints from consumers with whom they have no contractual relationship.
- Several public authorities expressed their concern at the fact that any direct claim of the consumer against the producer would disrupt the principle of the relativity of obligations. Consumers enter into a contractual relationship with the seller and not the producer.
- A business stakeholder recalled that the European Court of Justice established that it is "incompatible with the principle of legal certainty" to burden the manufacturer, "who has

no contractual relationship with the sub-buyer and undertakes no contractual obligation towards that buyer and whose identity and domicile may, quite reasonably, be unknown to him" with claims of the sub-buyer.

- Mutual business relations between sellers and producers must be respected. Such a rule would have major implications on existing contract law.
- The UK Government highlighted that by introducing direct producer responsibility in the UK, the responsibility as to who is liable for a defective product, for example the seller or the manufacturer, may be obscured to the detriment of the consumer. The consumer could then find themselves in the middle getting redress from neither. Consumers are best protected by having the certainty that the seller is liable.
- A number of contributions expressed their fear that such a rule would create significant burdens for professionals on the EU territory and threaten the competitiveness of European companies.
- Consumers are already protected by the Product Liability Directive (85/374 EEC). It is doubtful whether the liability of a remote producers located in another Member State would influence consumers' purchase decision.
- It was noted that the proposal of direct liability was extensively discussed prior to the adoption of the consumer sales directive. There were numerous arguments against it, which led to the idea being abandoned, and these are still valid today.
- A minority of consumer groups supported option 1. One consumer group highlighted cases where the producer takes the role of retailer too. With the growth of e-purchasing many manufacturers do sell directly to consumers. The horizontal instrument could be an opportunity to clarify that the manufacturer does take the retailers' liability where they sell direct.
- The EP did not deem it appropriate to introduce direct liability of producers.

Comments expressed by the contributors who were in favour of option 2 included:

- Many contributors pointed out that this option would encourage cross-border transactions: consumers can easily identify the identity of the producer because the name of the producer appears on the product. They could easily address a branch of the manufacturer in their own country.
- Many contributors insisted that this liability should be an option in addition to and not instead of the seller's liability. The consumer should have the choice to exercise his or her right against one or the other.
- It was pointed out by a business stakeholder that retailers only act as conduit; producers are usually responsible for any defects as these will have occurred during the manufacturing process.
- Retailers are also more likely to go out of business (e.g. cases of bankruptcy): consumers will be left with no redress in such circumstances unless the producer is also responsible.
- Academics highlighted that most producers assume a degree of responsibility under voluntary guarantees, suggesting that many producers already accept a degree of liability. Direct producer liability may also encourage investment in improving durability in order to minimise the number of claims.

Alternative options suggested by the contributors

Academics

Contributions from a university advocated that the Commission should take steps to encourage producers to offer a "Europe-wide" guarantee under which the producer would be obliged to ensure that the consumer can have non-conforming goods repaired or replaced by one authorised representative of the producer in each Member State.

Business sector

One contributor suggested that the EU wide system should be based on a system whereby the costs under the legal guarantee should legally be able to be passed on up the chain but it should be possible to freely contract not to do so at the request of the retailer and with the agreement of the producer. The relationship between the retailer and the producer should be a matter for the contract between the two.

Public authorities

The introduction of a limited direct liability for producers was suggested. Consumers should under certain circumstances have a legal possibility to claim damages from producers earlier on in the line, for example if the salesperson is bankrupt, has ceased their business or cannot be reached.

10. Consumer Goods Guarantees (Commercial guarantees)

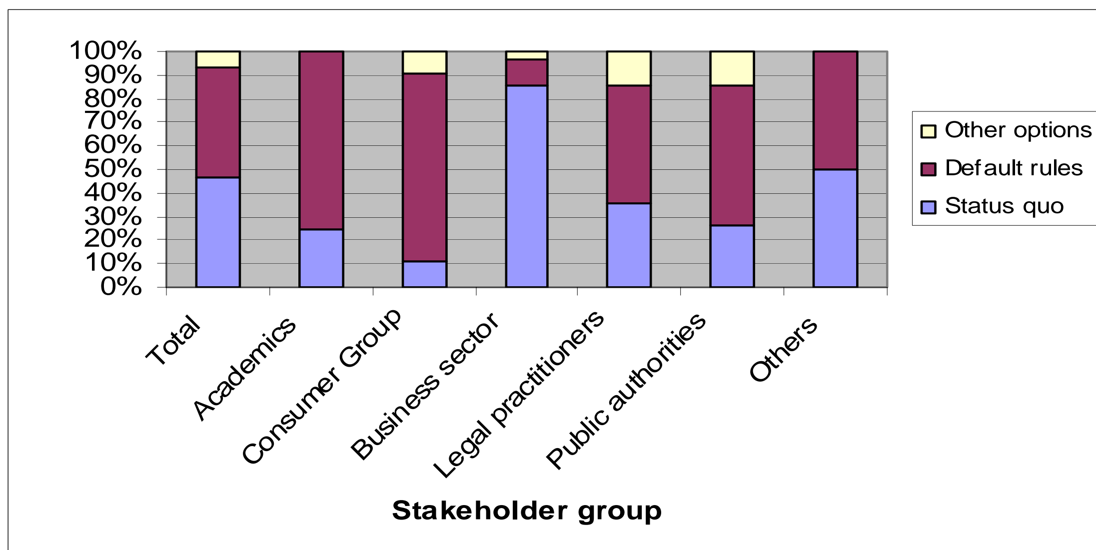
10.1. Content of the commercial guarantee

The Consumer Sales Directive does not address the question of what happens if the guarantee statement omits to inform the consumer on the content of the guarantee. It has been stated that the current situation may mislead consumers who rely on such vague statements without checking whether they are actually granted any additional rights. The question raised by the Green Paper on this matter is the following:

Question M1 "Should a horizontal instrument provide for a default content of a commercial guarantee?"

Actions proposed by the Commission in the Green Paper
Option 1: Status quo: the horizontal instrument would contain no default rules.
Option 2: Default rules for commercial guarantees would be introduced.

Graph 5.27: Contributions on provision of a default content of a commercial guarantee in the horizontal instrument per stakeholder group



Maintaining the status quo was the favoured option (47%), but this was very closely followed by the option “default rules” which was chosen by 46% of the contributors.

Consumer groups and the business sector had contrasting views on this issue: while the former preferred the introduction of default rules with 80%, the latter opted for maintaining the status quo with 85%. It might be worth noting that legal practitioners (36% in favour of maintaining the status quo and 50% in favour of introducing default rules) and the other groups (with an even division of 50% for the two options) did not have a clear preference for one of the two options.

Regarding Member States’ contributions, the majority (15 Member States and on EFTA/EEA country) supported option 2, whereas eight Member States supported the status quo. Two Member States opted for ‘other option’.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- A large number of contributors (mostly business stakeholders) highlighted that guarantees are benefits provided on a voluntary basis by the producers or the sellers and, as such, go beyond the legal mandatory framework. They are a marketing tool in order 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 proportion of cases.
- Many contributors also noted that consumers are already protected by the UCPD Directive: the issue of vague statements is dealt with by the Directive as it will be unlawful to offer a guarantee which offers no additional benefits.
- Certain public authorities would not support any extra administrative burden on businesses where they seek to offer market differentiation through a commercial guarantee that is clear and does not seek to mislead consumers; nor should any

ambiguities in the guarantee lead to a default presumption of the highest level of protection for the individual consumer.

- The EP emphasised that all questions in relation to the commercial guarantee (content, transfer, limitation) are not to be determined by a legal framework but are subject to the principle of contractual freedom. These issues should not be part of the horizontal instrument.

Comments expressed by the contributors who were in favour of option 2 included:

- A large number of contributors insisted on the fact the additional rights granted by the seller or producer to attract consumers are often a source of confusion. The vast majority of consumers fail to differentiate legal and commercial guarantees as they are not properly informed. The first aim of the default rules should be to give clear information to the consumers.
- Some of the academics mentioned the principles of European Sales Law developed by the Study Group for a European Civil Code, whereby the document shall (a) state that the buyer has legal rights which are not affected by the guarantee; (b) point out the advantages of the guarantee for the buyer in comparison with the conformity rules; (c) list all the essential particulars necessary for making claims under the guarantee; (d) is drafted in plain, intelligible language.

A contribution from a public authority warned against the risk that consumers get confused and understand “default rules” as “minimum” rules.

Alternative options suggested by the contributors

<u>Public authorities</u>

One contribution suggested that the disposition provided for in the directive should be clear on the following points:

- that it is a matter of added guarantee with respects to the legal guarantee;
- that the remedies provided for in the commercial guarantee are limited to the repair/replacement of the defective good; and
- that in terms of the content of the guarantee the followings be included: indication of the content, validity and fulfilment terms, identification of the warrant, indication of the modalities to make use of it, the territorial scope not inferior to the EU countries.

10.2. The transferability of the commercial guarantee

The Consumer Sales Directive does not regulate the transferability of the commercial guarantees to subsequent buyers. This is important for consumers who intend to re-sell a product as well as for subsequent buyers who would like the products still to be covered by the commercial guarantee especially in the context of a cross-border transaction. The Green Paper included the following question on this issue:

<u>Question M2</u>: “Should a horizontal instrument regulate the transferability of the commercial guarantee?”

<u>Actions proposed by the Commission in the Green Paper</u>

Option 1: Status quo: the possibility to transfer a commercial guarantee would not be regulated by Community rules.

Option 2: A mandatory rule that the guarantee is automatically transferred to the subsequent buyers would be introduced.

Option 3: The horizontal instrument would provide for the transferability as a default rule, i.e. a guarantor would be able to exclude or limit the possibility to transfer a commercial guarantee.

Graph 5.28: Contributions on the horizontal instrument regulating the transferability of the commercial guarantee per stakeholder group

The automatic transfer of the commercial guarantee was the preferred option for 43% of the contributors. Consumer groups and the business sector had contrasting views on this issue: the former opted for the automatic transfer of the commercial guarantee (82%) and the latter preferred to maintain the status quo (62%).

As for Member States' contributions, twelve member States supported option 2, five Member Stated and one EFTA/EEA country supported option 1 and five opted for option 3. Three Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- Contributors highlighted that this issue should be regulated on the basis of the parties' agreement, considering that retailers offer these guarantees on a voluntary basis.

- The business sector mentioned that when goods transferred from original buyers to subsequent buyers, it becomes very difficult to obtain and control the vital evidence data to track the duration of the guarantees (such as purchase date etc.).
- The EP emphasised that all questions in relation to the commercial guarantee (content, transfer, limitation) are not to be determined by a legal framework but are subject to the principle of contractual freedom. These issues should not be part of the horizontal instrument.

Comments expressed by the contributors who were in favour of option 2 included:

- Many contributors noted that the guarantee is associated with a specific product, irrespective of the buyer. Such a transfer would not increase the burden on businesses. There is no reason why the guarantee should expire with the resale.
- It was mentioned that the scope for consumers to resell goods to one another is increasing with online auctions.

Comments expressed by the contributors who were in favour of option 3 included:

- Contributors stressed that, although it would be incompatible with the voluntary nature of a commercial guarantee to make the transfer mandatory, the guarantee should be treated as transferable unless the guarantee document states otherwise, since consumers are likely to assume that it is transferable.
- The exclusion of the transferability should be clear, precise and easily identifiable by the consumer.
- Option 3 allows for a degree of flexibility. It is also one of the Principles of European Sales Law developed by the Study Group for a European Civil Code.

Alternative options suggested by the contributors

The following comments were made by contributors:

- It may be necessary to introduce an obligation to notify the producer about a change in ownership to prevent abuse.
- For the sake of clarity, there could be an information requirement that any such guarantee should indicate whether or not it is transferable.

10.3. Commercial guarantees for specific parts

In the case of complex goods (e.g. cars) producers offer commercial guarantees limited to specific parts. The horizontal instrument could make sure that consumers are clearly informed on which parts are covered by a particular guarantee. If such information is not provided the limitation would be without any effect. The question included in the Green Paper on this issue is:

<u>Question M3</u> “Should the horizontal instrument regulate commercial guarantees limited to a specific part?”

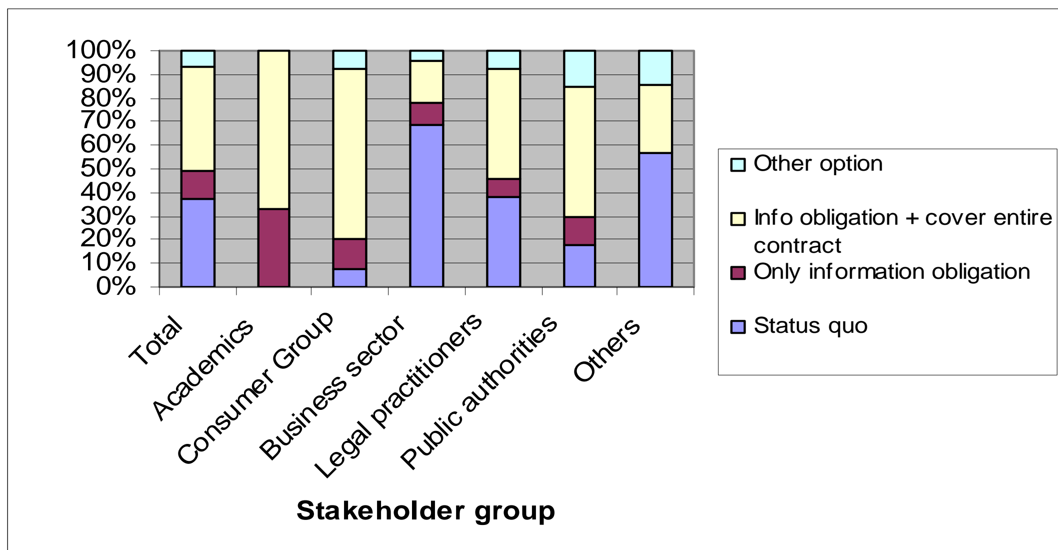
<u>Actions proposed by the Commission in the Green Paper</u>

Option 1: Status quo: the possibility to provide commercial guarantee limited to specific part would not be regulated by the horizontal instrument.

Option 2: The horizontal instrument would only provide for the information obligation.

Option 3: The horizontal instrument would include an information obligation and would provide that, by default, a guarantee covers the entire contract goods.

Graph 5.29: Contributions on a horizontal instrument regulating commercial guarantees limited to a specific part per stakeholder group



The option "Information obligation and a guarantee covering the entire contract unless specified otherwise" was the preferred option for 44% of the contributors. Nevertheless this percentage of contributors is closely followed by those who chose to maintain the status quo (37%).

Consumer groups and the business sector had contrasting views: the former opted for "Information obligation and a guarantee covering the entire contract unless specified otherwise" (72%) and the latter opted for maintaining the status quo (68%).

The majority of Member States supported option 3 (13 Member States and one EFTA/EEA country). Five Member States supported the status quo and four opted for option 2. Only three Member States chose 'other option'.

Key issues raised by the contributors on the suggested options

Comments expressed by the contributors who were in favour of option 1 included:

- A large number of contributions highlighted that a commercial guarantee is provided by retailers as a form of market differentiation.

- Any ambiguities with the guarantee could be dealt with by the UCPD.
- As already pointed out for question M2, the EP emphasised that all questions in relation to the commercial guarantee (content, transfer, limitation) are not to be determined by a legal framework but are subject to the principle of contractual freedom. These issues should not be part of the horizontal instrument.

Comments expressed by the contributors who were in favour of option 2 included:

- Contributors argued that it is fair to implement an obligation to be transparent and clear on specific parts in cases where a commercial guarantee is given.
- It does not pose a significant burden on business.
- It is extremely important for the consumer to know the precise conditions of the commercial guarantee he or she is granted.

Comments expressed by the contributors who were in favour of option 3 included:

- Many consumer groups highlighted that one of the main problems regarding guarantees is the lack of intelligible information available to consumers about their legal rights and the extent of the commercial guarantee provided by the professional.
- Providing that the guarantee covers the entire goods by default would ensure proper compliance with the information requirement, and provide an incentive for professionals to improve the information concerning the area of application of the guarantees offered.
- A problem area mentioned by various contributors is mobile phone chargers.
- The Study Group for a European Civil Code recommended that a guarantee relating only to a specific part or specific parts of the goods must clearly indicate this limitation in the guarantee document; otherwise the limitation is not binding on the consumer.

No alternative options were suggested by the contributors

ANNEX 1: LIST OF CONTRIBUTORS

Country	Type of stakeholder/organisation	Name of stakeholder/organisation
Austria	Academics	Personal response Dr. Johannes W. Pichler
	business association/representative	Federation of Austrian Industry (IV)
		Österreichischer Genossenschaftsverband (ÖGV)
		Fachverband der Raiffeisenbanken
		Wirtschaftskammer Österreich (WKÖ)
		Austrian Savings Banks Association
	consumer association	Österreichischer Automobil-, Motorrad- und Touring Club (ÖAMTC)
	legal representatives	Österreichischer Rechtsanwaltskammertag (ÖRAK)
	Public authorities	Bundesministerium für Justiz, Bundesministerium für soz. Angelegenh., Vertreter von Verbraucherorg., Wirtschaftsorg. und Rechtsberufsorg.
		Bundesarbeiterkammer (BAK)
	other	Bundesarbeitskammer - BAK
Belgium	academics	KBOR Research
	business association/representative	Association Professionnelle de la vente directe
		Business Software Alliance
		Federation des entreprises de Belgique
		Fédération des Entreprises du Commerce et de la Distribution
		AIM - European Brands Association
		Assuralia
	consumer association	TEST ACHAT
		OIVO-CRIOC (Belgian Consumer Organisation)
		Belgian Consumer Organisations
	Public authorities	SPF
	other	Cyber Security Industry Alliance
Bulgaria	business association/representative	BAIT - Bulgarian Association of Information Technologies.

		Bulgarian Association of Electronic Commerce
	Public authorities	Bulgaria- Ministry of Economy and Energy
Cyprus	Public authorities	Ministry of Commerce, Industry and Tourism - CYPRUS
Czech Republic	Public authorities	Czech Republic Ministry of Industry and Trade
Denmark	business association/representative	Danish Shareholders Association
	consumer association	The Danish Consumer Council
Estonia	Public authorities	Government of Estonia
	other	Heinar Tammet
Finland	business association/representative	The Central Chamber of Commerce of Finland
		EK - Confederation of Finnish Industries
		The Federation of Finnish Commerce
	consumer association	Consumer Ombusman Finland
	Public authorities	Ministry of Justice Finland
		Association of Finnish Local and Regional Authorities
France	academics	University of Montpellier
		Société de législation comparée
		Guy Raymond
		French workgroup of the European Acquis Group
	business association/representative	Association Professionnelle de la solidarité et du Tourisme
		FIEEC
		FICIME
		Assemblée des Chambres Françaises de Commerce et d'Industrie
		Décathlon
		Fédération de la Vente Directe
		Fédération Bancaire Française
		Chambre de Commerce et d'Industrie de Paris

		MEDEF
		Fédération Française des Sociétés d'Assurances (FFSA)
		Association Francaise des Entreprises Privees (AFEP)
		Bouygues Telecom
		CSF
		France Telecom Orange
		CGPME - Confederation General des Petites et Moyennes Entreprises.
		Chambre des Métiers et de l'Artisanat
	consumer association	European Consumer Center
		FAMILLES DE FRANCE
		ConsoFrance
		UFC- Que choisir
		Consommation Logement et Cadre de Vie (CLCV)
		Institut National de la Consommation (INC)
		CNAFC Consommateurs
		Euro-Info-Consommateur
		Union feminine civique et sociale
		OR.GE.CO
	legal representatives	Lawyer
		Euroconseil
		Delegation des Barreaux de France
		Société de législation comparée
	Public authorities	Autorités Françaises
		Conseil des vente de meubles aux enchères publiques
	other	Lucica Tudoran
		ACFCI
Germany	Academics	
		University of Hamburg
		University of Bielefeld, Lehrstuhl für Bürgerliches Recht, Europäisches Privatrecht, Rechtsvergleichung, Deutsche und Europäische Rechtsgeschichte

		University of Applied Sciences Kempten Hans-W.Micklitz/Norbert Reich Klaus Tonner
	business association/representative	German Retail Federation (HDE), Federation of Medium-sized and Major retailers (BAG), German Mail order Federation (bvh)
		Central association for the electrotechnical and electronics industry, registered association (ZVEI - Zentralverband Elektrotechnik- und Elektronikindustrie e.V.)
		BUNDESVERBAND DEUTSCHER BANKEN (Federal Association of German Banks)
		The VDMA (Verband Deutscher Maschinen- und Anlagenbau e.V. - German Engineering Federation)
		Bundesverband der Deutschen Industrie (BDI) Federation of German Industries
		Bundesverband Direktvertrieb Deutschland e.V. (BDD), Gerrman Direct Selling Association
		Vorwerk & Co KG
		German Confederation of Skilled Crafts and Small Businesses (ZDH)
		German Bar Association (Deutscher Anwaltverein - DAV)
		Association for the Prevention of Unfair Competition (Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.)
		Bundesverband deutscher Banken e.V.
		Deutsche Bank
		Steuerberaterverband e.V.
		Federal Association of the Services Industry Bundesverband der Dienstleistungswirtschaft (BDWi)
		Gesamtverband textil + mode

		Deutsche Reiterliche Vereinigung e.V./ Fédération Equestre National
		Zentralverband Gewerblicher Verbundgruppen e.V. (ZGV)
		Markenverband e.V.
		Deutscher Steuerberaterverband e.V.
		Deutscher Notarverein
		German Retail Federation
		Bundesvereinigung der Deutschen Arbeitgeberverbände
		German Travel Association (Deutscher ReiseVerband e.V.)
		National Association of German Commercial Agencies and Distribution (CDH)
		DIHK - Association of German Chambers of Industry and Commerce Representation to the European Union
	consumer association	The consumer commission of Baden-Württemberg (Verbraucherkommission Baden-Württemberg)
		Verbraucherzentrale Bundesverband e.V. (vzbv)
		European Consumer Centre Germany/Kehl
		ADAC e.V.
		Automobilclub von Deutschland
	legal representatives	Bundesrechtsanwaltskammer (BRAK)
		Federal Chamber of German civil law notaries (Bundesnotarkammer)
	Public authorities	Ministerium für Ernährung und Ländlichen Raum Baden-Württemberg
		Federal Government of Germany Bundesministerium der Justiz
	other	Ben Berlin
Greece	Public authorities	Greece Ministry of Development
	consumer association	KEPKA - Consumer Protection Centre
Hungary	Public authorities	Ministry of Health

	consumer association	European Consumer Centre Hungary
Ireland	academics	Dublin Institute of Technology
	business association/representative	Retail Ireland
		Dublin City Centre Business Association
		Irish Hardware & Building Materials Association (IHBMA)
	consumer association	ECC Dublin
	Public authorities	Department of Enterprise, Trade and Employment
	other	Maurice Fizgerald
Italy	academics	Studi di Diritto Comparato ed Europeo (CeSDiCE) and LiderLab
		Universita Cattolica del Sacro Cuore
		Universita di Pisa, Facolta di Giurisprudenza
		European University Institute of Florence, Law and Economics Working Group.
		Universita di Firenze
	business association/representative	AIE (Italian Publishers' Association)
		Confartigianato Montebelluna
		Unioncamere del Veneto
		Italian Bankers' Association
		UniCredit Group
		AVEDISCO, Associazione vendite dirette servizio consumatori
	consumer association	Federconsumatori Liguria
		CONFCONSUMATORI
		Unione Nazionale Consumatori
		ACU Associazione Consumatori Utenti
		Altroconsumo
	legal representatives	Associazione Civilisti Italiani
		Avvocati Giusconsumeristi Italiani Association
		Società degli studiosi del diritto civile (SISDIC)

	Public authorities	Economic Development Ministry
	other	Individual response by Dr. Andrea Carrassi
Latvia	consumer association	Club for Protection of Consumer Interests
	Public authorities	Ministry of Economic of the Republic of Latvia
Lithuania	Public authorities	Lithuanian State Consumer Rights Protection Authority
	consumer association	Lithuanian Consumer Institute
Luxembourg	business association/representative	Association des Banques et Banquiers
	business association/representative	Chambre de Commerce et Chambre des Métiers
	consumer association	Union luxembourgeoise des consommateurs
	consumer association	The Luxembourg Consumers' Association (ULC)
	Public authorities	Luxembourg authorities
Malta	Public authorities	Malta
Netherlands	academics	Viola Heutger University of the Netherlands Antilles
		Universiteit Utrecht
		University of Amsterdam, Centre for the Study of European Contract Law
		Joint response by Hanneke A. Luth and Katalin Cseres
	business association/representative	Gesamtverband der Deutschen Versicherungswirtschaft e.V
		Confederation of Netherlands Industry and Employers VNO-NCW
		Platform Detailhandel Nederland
Norway	consumer association	ECC Norway and The Consumer Council of Norway.
	Public authorities	The Royal Ministry of Justice and the Police of Norway and the Consumer Ombudsman.
Poland	business	Biuro Regulacji Prawnych (Polish Post)

	association/representative	Polish Confederation of Private Employers Lewiatan
	Public authorities	Polish Civil Law Codification Commission
		Office of Competition and Consumer Protection (Poland)
Portugal	business association/representative	TV CABO
	consumer association	UNIÃO GERAL DE CONSUMIDORES (General Union of Consumers)
		DECO
	Public authorities	Portuguese authorities
		ANACOM Autoridade Nacional de Comunicacoes
	other	CGTP-IN
Romania	consumer association	The National Association for Consumers' Protection and Promotion of Programs and Strategies from Romania
	Public authorities	Romanian Representation to the European Union
Slovenia	Public authorities	Ministry of Economy, Directorate for Internal Market
Slovakia	Public authorities	Slovak republic, Ministry of Economy
	consumer association	Association of service users (ASU)
Spain	academics	Universidad de Zaragoza
		Immaculada Barral
		Universidad de Barcelona
		Universidad de Barcelona
		Universidad de Cantabria Cátedra Euroamericana de Protección Jurídica de los Consumidores
		Universidad de Barcelona
	business association/representative	Brussels Delegation of Registrars of Spain (Delegada Oficina Bruselas Colegio de Registradores de España)
		Spanish Association of Household Appliances (ANFEL)
		Catalan Association of Travel Agencies

		Landwell - PricewaterhouseCoopers
		TELEFONICA
	consumer association	Government of the Balear Islands
		Spanish Confederation of Housewives', Consumers' and Users' Organisations - Confederación Española De Organizaciones De Amas De Casa, Consumidores Y Usuarios (Ceaccu)
		Asociasion de Usuarios de la Comunicacion
		Unión de Consumidores de Galicia (UCGAL, Galician Union of Consumers)
		Consejo de Consumidores y Usuarios
	Public authorities	Spanish authorities
		Comunidad de Madrid - Community of Madrid
	other	Joint response of Garcia Alvaro, Jose Antonio and Iago Pasaro Mendez
Sweden	consumer association	
		The Swedish Consumers' Association
	Public authorities	Ministry of Integration and Gender Equality The Swedish Consumer Agency
UK	academics	Pablo Cortes PhD Candidate- University College Cork
		UK's Society of Legal Scholars
		University of Oxford
	business association/representative	British Vehicle Rental and Leasing Association
		Forum of Private Business (FPB)
		Federation of European Direct & Interactive Marketing (FEDMA)
		FLA (Finance & Leasing Association)
		British Vehicle Rental and Leasing Association (BVRLA)
		British Art Market Federation
		The Building Societies Association (BSA)
		Investment Management Association

		TUI UK
		Royal Bank of Scotland Group (RBSG)
		British Telecom Plc
		The Direct Marketing Association (UK) Limited
		the Investment and Life Assurance Group (ILAG)
		The Association of Independent Tour Operators (AITO)
		Bonhams
		The Wine and Spirit Trade Association (WSTA)
		Trading Standards Institute
		Tesco plc
		International Federation of the Phonographic Industry
		Royal Institute of Chartered Surveyors
		British Retail Consortium
		The Advertising Association (AA)
	consumer association	Holiday Travel Watch
		WHICH?
		UK Financial Services Consumer Panel
		Consumer Credit Association
		National Consumer Council
		National Consumer Federation
	legal representatives	Law Society of England and Wales
		City of London Law Society
		Anthony Ridge (Denison Till Solicitors)
		Bar Council of England and Wales
	Public authorities	Trading Standards Partnership in south west England - SWERCOTS
		OFT (Office of Fair Trading)
		UK Government
		Trading Standards East Midlands
		LACORS

	other	Trading Standards Institute
EU level	academics	Jacobien W. Rutgers and Ruth Sefton-Green
		Groupe européen de droit international privé
	business association/representative	European Federation of Building Societies
		Federation of European Direct Selling Associations (FEDSA)
		European Federation of Magazine Publishers
		Federation of European Publishers
		GSM Europe (GSME)
		International Chamber of Commerce
		European Digital Media Association
		Orgalime
		Business Europe
		Confcommercio International
		UGAL - the Union of groups of independent retailers of Europe (Union des Groupements de Détaillants indépendants de l'Europe a.i.s.b.l.)
		CIBJO Europe
		Visa Europe
		Eurocommerce
		European Financial Services Round Table
		CEA, the European insurance and reinsurance federation,
		European Savings Banks Group (ESBG)
		European Mortgage Federation

		Organisation for Timeshare in Europe - OTE
		International Federation of Tour Operators (IFTO)
		European Banking Federation (EBF)
		ENPA - European Newspaper Publishers' Association
		AEDT and FENA European Association of Fashion Retailers and European Federation of Furniture Retailers
		EMOTA
		European Automobile Manufacturers Association
		Apple
		CITIBANK
		CEEV-Comité Européen des Entreprises Vins
		EURMIG
		eBay
		The Global Entertainment Retail Association-Europe (GERA-Europe)
		European Fund and Asset Management Association
		European Telecommunications Network Operators' Association
		European Association of Directory and Database Publishers
		Direct Selling Europe
		sanofi aventis
		Electronic Retailing Association Europe
		EICTA
		EUROFINAS
		Group of National Travel Agents' and Tour Operators' Associations within the EU
		Performing Arts Employers Associations League Europe (Pearle)
		CECED

		METRO AG group (a member of the German retail Federation, HDE)
		ORGALIME The European Engineering Industries Association
	consumer association	Citizens Advice Bureau (CAB) network
		NEPIM
		BEUC
		European Community of Consumer Cooperatives
		EURO-INFO-VERBRAUCHER e.V. – eCommerce-Verbindungsstelle
	legal representatives	The Pan-European Organisation of Personal Injury Lawyers
		Council of the Notariats of the European Union
		Council of Bars and Law Societies of Europe - Representing Europe's Lawyers
		MEDEL- Magistrats européens pour la démocratie et les libertés
	EU bodies	European Parliament (Committee on Internal Market and Consumer Protection) and response from Rapporteur Beatrice Patrie European Economic and Social Committee
	other	EEA - Standing Committee of the EFTA States
International	business association/representative	AeA Europe (American Electronics Association)
		Symantec
		International Electronic Commerce Association (INTECA)
		American Chamber of Commerce to the European Union (AmCham EU)

ANNEX 2: OVERVIEW TABLE OF STAKEHOLDERS' DISTRIBUTION ACROSS THE GREEN PAPER OPTIONS

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
A.1 General legislative approach	25	52	122	18	34	7	25
A.1.1 Vertical	12	2	20	17	12	14	4
A.1.2 Horizontal	80	86	67	72	82	71	92
A.1.3 Status quo	0	0	4	0	0	0	0
Other option	8	12	9	11	6	14	4
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
A.2 Scope of horizontal instrument	22	48	113	17	34	7	25
A.2.1 Apply to all consumer contracts	82	88	78	88	79	86	80
A.2.2 Only to cross-boarder contracts	9	2	7	6	3	0	0
A.2.3 Only to distance contracts	5	4	3	0	3	0	4
Other option	5	6	12	6	15	14	16
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
A.3 Degree of harmonisation	23	51	116	18	35	7	25
A.3.1 Minimum	43	31	12	39	26	71	16
A.3.2 Targeted full	26	29	37	39	31	14	48
A.3.3 Full	22	16	42	22	17	0	20
A.3.4 28th Regime	4	0	0	0	0	0	0
Other options	4	24	9	0	26	14	16
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
Variant	21	46	111	16	31	5	25
A.3.6 Mutual recognition	24	30	36	31	16	40	20
A.3.7 Country of origin	0	9	5	19	3	0	4
A.3.8 No variant	38	20	33	31	29		24
Other options	38	41	26	19	52	60	52
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
B.1 Definition of consumer and professional	24	46	121	17	34	9	26
B.1.1 Alignment	12	54	81	47	62	44	65
B.1.2 Notion widened	63	37	5	29	18	33	15
Other options	25	9	14	24	20	22	19
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
B.2 Consumer acting through intermediary	20	46	95	17	35	8	26
B.2.1 Status quo	10	15	68	29	51	37	50
B.2.2 Through professional Intermediary	60	74	24	59	31	63	27
Other option	30	11	7	12	17	0	23
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
C. Good faith and fair dealing in the CA	25	48	109	17	35	7	26
C.1 Act in good faith	8	39	7	35	14	14	15
C.1.2 Status quo	8	15	57	29	37	43	38
C.1.3 General clause	52	35	24	29	37	43	35
Other option	32	10	12	6	11	0	12
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
D.1 Scope application of EU rules on unfair terms	23	48	104	16	33	6	26
D.1.1 Expansion of scope	52	85	8	56	55	67	54
D.1.2 List of annexed terms	4	2	4	0	12	17	15
D.1.3 Status quo	26	8	85	38	33	17	31
Other option	17	4	3	6	0	0	0
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
D.2 List of unfair terms	21	48	105	15	34	7	26
D.2.1 Status quo	9	4	44	20	15	29	15
D.2.2 Grey list	5	0	3	0	3	0	0
D.2.3 Black list	5	4	28	0	9	14	11
D.2.4 Combination	81	87	19	60	65	43	62
Other option	0	4	6	20	9	14	12
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
D.3 Scope of unfairness test	21	45	107	15	34	6	26
D.3.1 Extension	28	60	2	20	47	50	46
D.3.2 Status quo	62	22	97	73	44	50	46
Other option	10	18	1	7	9	0	8
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
E. Information requirements	17	47	108	16	35	7	26
E.1 Extension cooling-off period	12	15	13	38	11	29	4
E.2 Different remedies	59	62	22	25	57	**29**	**65**
E.3 Status quo	6	0	52	12	20	29	19
Other options	23	23	13	25	11	14	12
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
Indication of common pre-contractual information	14	38	72	12	27	5	20
In favour	0	13	1	0	22	0	20
Against	21	0	7	0	4	0	5
No indication given	79	87	92	100	74	100	75
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
F.1 Cooling-off period	20	48	110	16	36	7	26
F.1.1 One cooling-off	70	65	44	75	64	71	73
F.1.2 two categories	5	10	15	13	19	29	15
F.1.3 Status quo	10	4	22	6	6	0	4
Other options	15	21	19	6	11	0	8
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
F.2 Modalities	20	45	108	16	33	6	26
F.2.1 Status quo	15	2	12	6	6	17	8
F.2.2 one uniform procedure	65	64	76	81	67	67	58
F.2.3 any means	10	22	1	6	12	17	15
Other options	10	11	11	6	15	0	19
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
F.3 Contractual effects	20	46	104	15	33	7	26
F.3.1 No costs	30	76	5	33	36	43	38
F.3.2 Same all	30	11	25	40	30	0	23
F.3.3 Status quo	20	4	45	20	21	29	23
Other options	20	9	25	7	12	29	15
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
G.1 Contractual remedies	19	45	104	15	33	7	26
G.1.1 Status quo	5	13	81	33	39	29	38
G.1.2 General contractual remedies	74	78	15	53	48	71	46
Other options	21	9	4	13	12	0	15
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
G.2. General rights to damages	18	42	102	14	34	7	26
G.2.1 Status quo	5	14	73	21	35	29	38
G.2.2 General right+ full choice 0MS	0	0	5	29	9	29	8
G.2.3 General right+ choice MS	22	21	7	7	20	14	23
G.2.4 General+economic+ moral	56	55	5	29	18	14	12
Other option	17	10	10	14	18	14	19
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
H.1 types of contracts to be covered	17	47	87	15	35	7	26
H.1.1 Status quo	6	0	59	13	6	11	8
H.1.2 Extension to goods	0	2	0	0	3	11	4
H.1.3 Extension to digital content	6	4	11	13	23	0	23
H.1.4 combination	76	85	20	67	60	56	58
Other options	12	9	10	7	8	22	8
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
H.2 Second hand goods sold on public auctions	16	44	65	15	35	7	26
H.2.1 Yes	69	59	29	40	54	57	54
H.2.2 No	31	28	62	53	34	43	38
Other options	0	14	9	7	11	0	8
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
I.1 Definition of delivery	17	47	82	14	34	6	26
I.1.1 Material delivery of good	35	51	6	14	35	33	38
I.1.2 Goods consumer's disposal	18	13	23	14	9	0	4
I.1.3 Parties can agree	35	21	28	50	18	17	15
I.1.4 Status quo	0	4	32	14	20	50	23
Other options	12	11	11	7	18	0	19
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
I.2 Passing of the risk	16	45	76	15	34	7	26
I.2.1 Community level	100	71	51	73	68	71	61
I.2.2 Status quo	0	18	43	13	23	14	27
Other options	0	11	5	13	9	14	12

Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	**Consumer Groups (%)**	**Business Sector (%)**	**Legal Practitioners (%)**	**Public authorities (%)**	**Other (%)**	**25 Member States + EFTA**
J.1 Extension of time limits	16	46	79	15	34	7	26
J.1.1 Status quo	13	11	72	7	15	43	15
J.1.2 Yes	81	83	23	80	73	43	73
Other options	6	6	5	13	12	14	11
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	**Consumer Groups (%)**	**Business Sector (%)**	**Legal Practitioners (%)**	**Public authorities (%)**	**Other (%)**	**25 Member States + EFTA**
J.2 Recurring defects	15	44	81	15	33	7	26
J.2.1 Status quo	20	0	77	7	12	29	15
J.2.2 Extension	60	93	22	93	76	71	73
Other option	20	7	1	0	12	0	11
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
J.3 Conformity 2nd hand goods	16	43	64	15	34	7	26
J.3.1 No derogation for 2nd hand goods	44	37	16	13	20	29	15
J.3.2 Specific rules	44	56	64	80	65	71	69
Other options	12	7	20	7	15	0	15
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
J.4 Burden of proof	15	44	81	15	35	7	26
J.4.1 Status quo	27	9	82	60	43	14	42
J.4.2 Professional	67	84	11	33	48	71	50
Other options	7	7	7	7	9	14	8
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
K.1 Order for remedies to be invoked	15	44	86	15	34	7	26
K.1.1 Status quo	13	11	83	40	35	43	42
K.1.2 Choice	60	61	1	40	47	57	38
K.1.3 Specific order	7	18	9	7	6	0	8
Other options	20	9	7	13	12	0	11
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
K.2 Notification lack of conformity	15	45	82	15	34	6	26
K.2.1 Duty notify	40	29	82	47	41	50	46
K.2.2 Only in certain circumstances	0	4	2	0	3	0	4
K.2.3 Elimination within a certain period	47	56	7	40	32	33	31
Other option	13	11	9	13	24	17	19
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
L. Direct producer's liability	15	45	88	15	35	8	26
L.1 Status quo	7	4	66	40	40	50	35
L.2 Direct liability	87	91	25	53	49	50	50
Other option	7	4	9	7	11	0	15
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
M.1 Content of commercial guarantee	16	45	79	14	35	6	26
M.1.1 Status quo	25	11	85	36	26	50	31
M.1.2 Default rules	75	80	13	50	60	50	61
Other options	0	9	2	14	14	0	8
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	**Consumer Groups (%)**	**Business Sector (%)**	**Legal Practitioners (%)**	**Public authorities (%)**	**Other (%)**	**25 Member States + EFTA**
M.2 Transferability of commercial guarantee	15	44	72	14	34	6	26
M.2.1 Status quo	0	4	62	14	26	33	23
M.2.2 Automatically transferred	40	82	16	57	41	67	46
M.2.3 Default rule	53	14	15	29	21	0	19
Other option	7	0	7	0	12	0	11
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)	25 Member States + EFTA
M.3 Commercial guarantee for specific parts	15	40	69	13	34	7	26
M.3.1 Status quo	0	8	68	38	18	57	19
M.3.2 Only information obligation	33	12	9	8	12	0	15
M.3.3 Info obligation + cover entire contract	67	72	19	46	56	29	54
Other option	0	8	4	8	15	14	11
Total in %	**100**	**100**	**100**	**100**	**100**	**100**	**100**

	Academics (%)	Consumer Groups (%)	Business Sector (%)	Legal Practitioners (%)	Public authorities (%)	Other (%)
Collective redress	6	20	31	6	11	2
In favour	50	25	3	33	9	0
Against	0	0	3	0	0	0
No answer	50	75	94	67	91	100
Revision of the Injunction Directive	5	18	31	7	11	3
In favour	20	6	10	14	9	0
Against	0	0	0	0	0	0
No answer	80	94	90	86	91	100
Total in %	**100**	**100**	**100**	**100**	**100**	**100**