

# New Rules on Consumer Sales

## An empirical study

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## New Rules on Consumer Sales An empirical study

by

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## **Abstract**

The project described in this report was carried out with support from The Ministry of Justice's Research Pool. The aim of the project is to examine the effects of Amending Act no. 213/2002, amending the rules on consumer sales in the Danish Sale of Goods Act. The amendments were part of Denmark's implementation of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees. The Amending Act came into force on 24 April 2002, having effect on consumer sales made on and after 1 January 2002. At the time of completion of this report, the Amending Act had been in force for more than two and a half years. In the planning of this project, we assumed that at this point in time sufficient experience with the new rules would be available, enabling us to get an impression of its practical consequences for businesses. Also, we assumed that the respondents could still recall the prior state of the law, making it possible for us to gather sufficient information to compare the situation before and after the Amending Act entered into force.

The Amending Act involved a number of amendments to the Danish Sale of Goods Act. Certain amendments, such as those concerning the rules on lack of conformity, were mainly clarifications of the current state of the law. As these in fact did not change the state of the law, they were not intended to change practice either. As this study is empirically oriented, these amendments fall outside its scope. Consequently, in this study we have chosen to focus on the consequences of the following amendments:

Under the new provisions in s. 77a(3), any lack of conformity with the contract is assumed to have existed at the time of delivery if such lack of conformity becomes apparent within six months of the time of delivery.

Where there is a lack of conformity, the consumer in general has a right to choose between replacement and repair under s. 78. Replacement is no longer contingent on the lack of conformity constituting a fundamental breach. Furthermore, it is no longer possible for the seller to decline a request for replacement by offering to repair. If the consumer's request for replacement or repair would impose disproportionate costs on the seller, or if this remedy is impossible, the seller can, however, decline the request.

In s. 83, the limitation period for complaints has been extended from one to two years from the time of delivery to the consumer. In s. 54, the corresponding limitation period on other sales than consumer sales has been extended from one to two years to avoid sellers in the retail trade from being caught in between their consumers and their suppliers. As before, s. 83 cannot be derogated from to the detriment of the consumer. It is, however, still possible for the parties to derogate from s. 54 concerning other sales than consumer sales.

The fundamental question of this study is whether the mentioned alteration to the state of the law has resulted in a notable change in the behaviour of the relevant players. Of the relevant players, our principal focus is the retail trade, whose situation we have examined by way of a questionnaire survey. To a limited extent we have also looked into any changes in the behaviour of wholesalers/producers, mainly by way of interviews with trade organisations. Finally, we have examined the application of the new rules, mainly by looking at the Danish Consumer Complaints Board.

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# **Chapter 1. Introduction**

## **1.1. Presentation of the project**

The project described in this report was carried out with support from The Ministry of Justice's Research Pool. The aim of the project is to examine the effects of Amending Act no. 213/2002, amending the rules on consumer sales in the Danish Sale of Goods Act. The amendments were part of Denmark's implementation of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees. The Amending Act came into force on 24 April 2002, having effect on consumer sales made on and after 1 January 2002. At the time of completion of this report, the Amending Act had been in force for more than two and a half years. In the planning of this project, we assumed that at this point in time sufficient experience with the new rules would be available, enabling us to get an impression of its practical consequences for businesses. Also, we assumed that the respondents could still recall the prior state of the law, making it possible for us to gather sufficient information to compare the situation before and after the Amending Act entered into force.

The Amending Act involved a number of amendments to the Danish Sale of Goods Act. Certain amendments, such as those concerning the rules on lack of conformity, were mainly clarifications of the current state of the law. As these in fact did not change the state of the law, they were not intended to change practice either. As this study is empirically oriented, these amendments fall outside its scope. Consequently, in this study we have chosen to focus on the consequences of the following amendments:

Under the new provisions in s. 77a(3), any lack of conformity with the contract is assumed to have existed at the time of delivery if such lack of conformity becomes apparent within six months of the time of delivery.

Where there is a lack of conformity, the consumer in general has a right to choose between replacement and repair under s. 78. Replacement is no longer contingent on the lack of conformity constituting a fundamental breach. Furthermore, it is no longer possible for the seller to decline a request for replacement by offering to repair. If the consumer's request for replacement or repair

would impose disproportionate costs on the seller, or if this remedy is impossible, the seller can, however, decline the request.

In s. 83, the limitation period for complaints has been extended from one to two years from the time of delivery to the consumer. In s. 54, the corresponding limitation period on other sales than consumer sales has been extended from one to two years to avoid sellers in the retail trade from being caught in between their consumers and their suppliers. As before, s. 83 cannot be derogated from to the detriment of the consumer. It is, however, still possible for the parties to derogate from s. 54 concerning other sales than consumer sales.

The fundamental question of this study is whether the mentioned alteration to the state of the law has resulted in a notable change in the behaviour of the relevant players. Of the relevant players, our principal focus is the retail trade, whose situation we have examined by way of a questionnaire survey. To a limited extent we have also looked into any changes in the behaviour of wholesalers/producers, mainly by way of interviews with trade organisations. Finally, we have examined the application of the new rules, mainly by looking at the Danish Consumer Complaints Board.

## **1.2. The scope of the study**

The main purpose of this study is to examine, in eight specific sectors in Denmark, the actual effect of the new consumer rules in the Danish Sale of Goods Act on retailers and, partly, their suppliers. The primary focus is what the consequences of the new rules are for businesses. Although this study focuses on the retail trade, indirectly it also examines the effect of the amendments on consumer behaviour.

The study seeks to identify and, on this basis, assess the consequences of the amendments to the Act for businesses, practically as well as economically, including the effect on the price of goods and on product ranges. It seeks to explain to which extent and how the amendments have affected complaints handling, the internal procedures of businesses and the sale of supplementary insurance. Furthermore, the consequences of the amendments on retailer/supplier relations are examined, including the effect on guarantees and limitation periods.

However, it falls outside the scope of this report to decide whether the amendments to the Sale of Goods Act constitute an improvement from a social point of view (e.g. as regards consumer politics or law and economics). Such an evaluation would call for a very thorough examination. However, it is worth noting that this topic is an underlying and motivating factor for a substantial part of the questions posed. For example, asking retailers about changes in their product ranges brought about by the amendments to the Act is essential to the assessment of whether the extension of the limitation period has constituted an improvement or not.

### **1.3. Sources and methods**

In chapters 2-5 of the report, we examine the amendments and any consequences their entail for businesses. The natural starting point for this study is an assessment of the state of the Danish law before and after the implementation of the Directive as well as the expected consequences of the amendments to the Act as expressed in the legislative history of the Act.<sup>1</sup>

As part of the project, we have carried out a questionnaire survey in order to make an empirical assessment of the impact the amendments to the Act have had on the conditions in the retail trade. The survey is concerned with sectors which most consumers are in contact with regularly, and which cover a wide assortment of products. The studied sectors are:

Used cars

New cars

Computers and standard software

Ladies' and men's clothing

Electrical household appliances

Furniture

Radio and television

Shoes

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<sup>1</sup> See report no. 1403/2001 on the implementation of the Consumer Sales Directive; the answers from The Danish Ministry of Justice's consultation concerning the same report; the Minister of Justice's Bill (FT 2001-02 (2<sup>nd</sup> session), Appendix A. 97); and the Danish Parliament's consideration of it (FT 2001-02 (2<sup>nd</sup> session), Appendix B. 140, and The Negotiations 157, 2551, 4588, 4989).



## Telecommunications equipment

The sectors and the descriptions of these have been retrieved from KOB, a Danish credit rating company. Their database has made it possible for us to segment Denmark geographically in order that the whole country is represented by the shops chosen as regards the mentioned sectors.

The questionnaire was sent to approx. 1,300 respondents. These respondents had listed their email addresses. The survey includes one-man businesses as well as large national and international retail chains. We would like to emphasise that the respondents are not selected according to any objective criteria such as number of employees or product range. Our only criterion was whether the database contained their email addresses.

The questionnaire was intended to be answered by the person/persons dealing with complaints on a daily basis or the persons responsible for setting up procedures for complaints handling. As all respondents participated anonymously, it cannot be ascertained whether the questionnaires have been answered by the persons intended.

On 9 September 2003, the above-mentioned sectors were presented with an electronic questionnaire consisting of mainly qualitative, but also a few quantitative questions. Most of the questions were formulated so that the typical answers would be “yes”, “no”, “do not know”, “small increase”, “large increase” etc. Furthermore, each respondent was given the opportunity to comment anonymously on the questions in their own words. The questionnaire is found at the end of this report.

The questionnaire survey was closed after a two week response period, with a reminder half way through to increase the response rate.

291 usable responses were returned, which is the equivalent of a response rate of approx. 22 per cent.

As mentioned above, the choosing of the respondents was simply a matter of whether the KOB database contained their email addresses. This enabled us to communicate electronically with the

respondents, but it also meant that potential respondents who had not listed an email address were excluded. However, we did not consider the disadvantages of this to be more significant than the benefits of being able to communicate electronically with the respondents, as we chose mainly to use qualitative questions in the questionnaire. We were aware, of course, that the answers would be influenced by how the questions were interpreted, and therefore potentially by different perceptions of the questions. The sources of error potentially connected with this entailed that it would be difficult to make actual statistical tests of the significance of the answers. Instead, our aim has been to obtain qualitative indications of how the new rules have been received and applied by businesses in the above-mentioned sectors.

Thanks to the industry organisation for consumer electronics (Branchen ForbrugerElektronik, BFE), which has shown a great interest in this project and been very helpful, we have gained access to information on all complaints made in 2002 and 2003 to 11 radio and television manufacturers<sup>2</sup>, who willingly put this information at our disposal.

Furthermore, the practise of the Danish Consumer Complaints Board regarding the new rules has been included in the study to illustrate the practical application of the rules and any doubt they have given rise to interpretation wise.

The results and conclusions of the study are also based on information obtained through interviews with relevant organisations, particularly the above-mentioned industry organisations and consumer organisations. Information obtained during a seminar held on 23 April 2003, with representatives from industry and consumer organisations and the Danish Consumer Complaints Board, is also included.

A number of standard contract terms have been collected randomly from various businesses as part of the study. Some of these terms are entirely inconsistent with the mandatory rules in the Danish Sale of Goods Act, some render some of the rules of the Act, while some give the consumers a better legal position than the Act as regards certain aspects. However, only to a very limited degree do the collected terms illustrate the effects of the amendments to the Sale of Goods Act, the main theme of this study. Thus, they are not mentioned in this report.

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<sup>2</sup> B&O, Finlux, Grundig, JVC, LG, Panasonic, Philips, Pioneer, Sony, Thomson and Yamaha.

We have tried to examine the impact of the new rules on prices, partly through the questionnaire survey and partly through price databases, with which it is possible to compare prices of various products over a period of time. It did, however, prove impossible to make any concrete conclusions as prices vary substantially over a year, and it is impossible to trace the reasons for this. Some of the factors are periods with ongoing sales and products being replaced with newer models. Consequently, it cannot be established on the basis of these databases whether the amendments to the Sale of Goods Act have had an impact on prices.

Due to the difficulties in establishing any causality, the questionnaire did not include questions on price changes. Instead, it included a question about whether the new rules had resulted in an increase in costs, see chapter 4.5.

## **1.4. Structure of the report**

In chapter 1.5., at the end of chapter 1, there is a summary of the main issues and conclusions of the report.

Chapter 2 contains an assessment of the impact the amendments have had on what consumers can require of goods quality wise. The primary concern is the consequences of the changes in the rules about the burden of proof.

Chapter 3 deals with the consequences of the changes in the consumer's rights where a product does not show the quality that can reasonably be expected, the focus being the result of consumers' newly gained right to choose between replacement and repair. It also examines the procedures in businesses when a product needs repairing.

Chapter 4 deals with the practical and financial consequences of the new limitation periods in the Danish Sale of Goods Act and how these altered periods have affected retailer/producer relations. One of the main issues is whether these new periods have had an impact on the number of complaints, and if so, whether this has led to retailers discontinuing from their product range products about which many complaints are received. Another main issue is whether the extension of

the consumer limitation period from one to two years has resulted in retailers being caught in between consumers and suppliers because the agreements with their suppliers entail a shorter limitation period than that of consumers.

The issue in chapter 5 is whether the amendments to the Act have affected practice with regard to guarantees and supplementary insurance.

## **1.5. The main issues and conclusions of the study**

### **1.5.1. The presumption rule**

More than one third of the respondents say that they accept a consumer complaint more often if the product defect becomes manifest in the first six months from the date of the sale. To a certain degree, this is probably explained by the new presumption rule in s. 77(3), under which any lack of conformity appearing within the first six months after delivery is presumed to have existed at the time of delivery.

When consulting the legislative history of the Act, it would appear that the presumption rule seems to have had a larger practical impact than intended and expected. It is therefore reasonable to conclude that consumer protection wise the amendments to the Act have resulted in an improvement as regards the first six months. At the same time, however, the answers suggest that to a certain extent, contrary to the intent of the amendments, the legal position of consumers has de facto been diminished due to the more restrictive attitude toward complaints made after six months; see chapter 2.2.

### **1.5.2. Replacement and repair**

With the amendments to the Act, in general, the consumer now decides whether a lack of conformity should result in replacement or repair; previously, this choice was the seller's, in general.

Almost one third of the respondents state that they replace defective goods instead of repairing them more often than before. Overall, it seems that the scope of this change is relatively modest,

however. The questionnaire survey also shows that consumers request replacement more often than before, but that in less than one third of the cases this request is met initially.

The biggest change seems to have taken place in the radio and television sector. A significant increase in the number of replacements is noted, even if these still only constitute less than 10 per cent of the total number of complaints. The opposite is the case in the telecommunications sector with more than 10 per cent of the respondents stating that they now repair a product more often than they replace it.

For further information on this subject, see chapter 3.1.4.

One conclusion that can be drawn from a number of questions in the questionnaire concerning repair is that approx. 20 per cent of the respondents do not replace a product until three repair attempts have been made; the highest percentages are those of the electrical household appliances sector (47 per cent), the radio and television sector (45 per cent) and the telecommunications equipment sector (approx. 50 per cent). In the telecommunications sector, 20 per cent of the respondents state that they do not replace a product until four repair attempts have been made.

90 per cent of the respondents said that a repair takes less than two weeks, and 59 per cent said less than one week.

For further information on this subject, see chapter 3.2.

### **1.5.3. Extension of the limitation period**

As could be expected, the extended limitation period has led to a general rise in the number of complaints in the sectors studied. However, behind these figures there are great variations: more than half of the respondents have not experienced an increase; some have experienced a small increase; while a few have experienced a significant increase. The average picture is an increase in complaints of between 20 and 30 per cent; see chapter 4.3.

According to the respondents, part of the increase reflects a rise in the number of unjustified complaints; a little higher percentage of the respondents has experienced a rise in the number of unjustified complaints than they have of justified ones. See chapter 4.4. for more on this.

The rise in costs resulting from the general increase in the number of complaints seems to have been “noticeable”, but not “very noticeable”, and certainly not dramatic; see chapter 4.5.

The increase in the number of complaints and the resulting rise in costs have led to changes in product ranges to a not insignificant extent; see chapter 4.6.

Finally, the results of the survey indicate that the extended limitation period has often resulted in retailers being caught in between the two year mandatory limitation period for consumers and a limitation period agreed between manufacturer/supplier and retailer; see chapter 4.7.

Against expectation, the extension of the limitation period does not seem to have brought about a significant fall in the sale of supplementary insurance. On the other hand, in general it does not seem to have resulted in an increase either; see chapter 5.2.

## **Chapter 2. Quality requirements of consumer goods**

### **2.1. The amendments**

The legal definition of non-conformity comprises cases where the quality of consumer goods deviates from that which is agreed on, has been guaranteed or rightfully expected by the other party. From this it follows that there is a lack of conformity if a product does not match the description given by the seller or if it does not possess the qualities normally expected of a similar product. Up until these amendments were implemented, just like the general definition of non-conformity, what consumers could reasonably expect of a product under Danish law was phrased negatively, cf. s. 76 of the Danish Sale of Goods Act. In this section there are descriptions of when a product is considered *not to* live up to what can be expected and certain specific conditions relating hereto are specified, e.g. incidences where a seller or a previous seller in the same chain of contracts has

offered false or misleading information which were of importance in the consumer's evaluation of the product.

Contrarily, in article 2 of the 1999/44/EC Directive a positive phrasing is used to stipulate the normal requirements for consumer goods to be in conformity with the contract. In other words, the article stipulates a number of positive criteria for what consumers can require of a product.

With the Amending Act, the Directive's positively worded description of quality requirements was incorporated into the Danish Sale of Goods Act, which means that the Act now contains a negative phrasing in s. 76, which has been modified slightly, as well as a positive phrasing in s. 75a(2). The main purpose was to increase the information value of the provisions in the Danish Sale of Goods Act and thereby add to a better understanding of the rules. The new provisions in s. 77a(1) and (2) which define the time for determining any lack of conformity have not altered the state of the law, and consumers' legal rights have only been improved marginally by the rule in s. 77b, which is prescribed by the Directive, under which the buyer normally cannot rely on a lack of conformity which was or ought to have been known by the buyer at the time of contracting.

While the new rule in s. 75a and the amendments to s. 76 were not intended to alter the concept of non-conformity, s. 77(1) does entail an actual change as this now provides, as prescribed by the Directive, that a general condition (e.g. "sold as is") on the part of the seller may no longer affect negatively what the consumer can require as to the quality of the product.<sup>3</sup>

The Amending Act contains another amendment prescribed by the directive, namely s. 77a(3) regarding the burden of proof concerning non-conformity complaints, see section 2.2. below.

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<sup>3</sup> S. 77(2) preserves the state of the law regarding the sale of second hand goods at public auctions, where the consumer himself may be present. In this kind of scenario a general condition may still negatively influence the requirements the consumer can make as to the quality of the good.

## 2.2. Burden of proof

### 2.2.1. Amendments

When determining whether a complaint is justified, it is a deciding factor whether a deviation in quality discovered some time after the sale, which other things equal qualifies as a lack of conformity, was there when the product was delivered to the buyer as this point in time is normally deciding for the determination of a lack of conformity.<sup>4</sup> If the deviation in quality existed at this time, it is a case of non-conformity, and the seller is liable, even if the defect was discovered at a later time.<sup>5</sup> Contrarily, if the deviation in quality is a result of an incidence that took place after this time, it is normally not a case of non-conformity as the product was not defective at the relevant point in time.<sup>6</sup> Such incidences could be inappropriate use, factors to do with a third party, or an Act of God.

In compliance with the general Danish procedural rules governing the allocation of the burden of proof, prior to the amendments it was generally the consumer who suffered if there was any relevant factual doubt about the existence of a deviation in quality and whether this existed (latently) at the time of delivery to the buyer. As prescribed by the Directive<sup>7</sup>, the latter matter has been modified by s. 77a(3) of the Danish Sale of Goods Act:

“If, within six months of delivery, it turns out that the goods do not fulfil the requirements listed in sections 75a and 76 of this Act, it is presumed that this lack of conformity existed at the time mentioned in subsection (1), unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.”

According to the legislative history of the Act<sup>8</sup>, this rule was to be considered a technical adjustment, which was expected not to bring about any substantial alteration to the burden of proof during the first six months, and which did not alter the current state of the law regarding the following period, for which the burden of proof for any lack of conformity was unaltered both formally and in reality. As a further explanation hereof, it was stated that also during the previous

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<sup>4</sup> The deciding legal criterion is “the time of the passing of the risk”, now cf. s. 77a(1), a time which pursuant to s. 17(1) is normally the time of delivery, which in consumer sales normally means the actual time of delivery, cf. ss. 9 and 73.

<sup>5</sup> Now cf. s. 77a(2).

<sup>6</sup> In such cases, the buyer may only rely on a defect if the deviation in quality is a result of the seller not conforming with the obligations under the contract, e.g. regarding the installation of a product, now cf. s. 77a(2).

<sup>7</sup> Cf. article 5 (3) of the 99/44/EC Directive.

<sup>8</sup> Report no. 1403/2001, p. 89 ff. and p. 189 ff.



state of the law the demands as to the consumer's production of evidence were relatively limited when a defect was noted after a short period of time in a new product that was expected to have a longer useful life. Also, it was mentioned that the questions of law in the assessment of evidence in cases concerning second hand products both under the previous state of the law and under the one prescribed by the Directive were identical on the main points, which meant that the actual assessment of evidence would lead to the same result in many cases. Furthermore, it was underlined that it would not be possible to conclude conversely from the presumption rule prescribed by the Directive that a complaint made after the expiration of the presumption rule would be denied solely because more than six months had passed.

### **2.2.2. Expectations of the effects of the amendments**

In a letter<sup>9</sup> from Dansk Automobilhandler Forening (DAF), a Danish automobile association, to the Legal Affairs Committee of the Danish Parliament, it was stated that,

“[a] used car is for everyday use. Therefore, no one can predict how it will be used over a six months' period for which the mandatory manufacturer's guarantee (on new parts) might have expired a long time ago. A six month' right to give notice of a defect with this right including a presumption rule could easily develop into an immeasurable obligation with no chance to estimate the content (...). The new Act imposes on car dealers selling used cars of which they perhaps have very little knowledge an ability to predict the condition of the car six months ahead. It seems absurd to us that it is assumed that it is possible to predict any problems that might arise in such used car after numerous months' use and perhaps 15,000 kilometres' driving with an unknown driver”

Oppositely, The Danish Ministry of Justice has declared<sup>10</sup> that the presumption rule does not alter the fact that, as it was before, it is the consumer who normally carries the burden of proof in documenting that there is in fact a deviation in quality assessed on the basis of what can be expected under the contract in question. Furthermore, it was stated that it was to be expected that the practical consequences of the presumption rule would be limited as, in many cases concerning the sale of second hand goods, it is possible to disprove the statutory presumption that the deviation in quality existed at the time of delivery or to rely on the exceptions to the rule.

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<sup>9</sup> Letter of 13 December 2001 (Legal Affairs Committee L 9 – appendix 8).

<sup>10</sup> In an answer to the Legal Affairs Committee's question 15.

Seen from a smaller perspective, the industry association Danish Furniture predicted in a letter to the Legal Affairs Committee<sup>11</sup> that the presumption rule would result in a large number of complaints about scratches in tabletops, defects which the buyer should have discovered upon delivery. The response from The Ministry of Justice<sup>12</sup> was that it was unlikely that the presumption rule would lead to any significant changes to the state of the law concerning the sale of new goods.

### **2.2.3. The practice of the Danish Consumer Complaints Board**

The Danish Consumer Complaints Board has had several occasions to consider the presumption rule.<sup>13</sup> The cases pertain to several of the studied industries, namely the computer and standard software sector, the ladies' and men's clothing sector, the shoes sector and the used cars sector.

One of the cases<sup>14</sup> deals with a processor and a system card which the consumer could not make work. The consumer wanted to rescind the contract. After having examined the product, the seller denied the claim, which made the consumer bring the case to the Danish Consumer Complaints Board. The conclusion of the Danish Consumer Complaints Board's expert in that area was that the processor had burned out due to overclocking<sup>15</sup>, which was caused by changes in the system card settings. It was also stated that it was not possible to rule out that the product was a returned good and that the changes in the settings could have been made by a previous owner. The Danish Consumer Complaints Board referred to the presumption in s. 77a(3) that any defect had existed at the time of delivery. Therefore, it is up to the seller to disprove this presumption. The Danish Consumer Complaints Board found that this had not happened in this case, and since this was a fundamental breach of contract, the buyer was free to rescind the contract.

Another case<sup>16</sup> concerned a cardigan that, within one month of delivery, had been damaged from being washed, as three of four felt letters on the cardigan had been damaged. The consumer wanted to rescind the contract. The shop owner claimed that the cardigan had been treated improperly and

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<sup>11</sup> Letter of 8 January 2002 (Legal Affairs Committee L 9 – appendix 13).

<sup>12</sup> Answer to the Legal Affairs Committee's question 18.

<sup>13</sup> See Forbrugerredegørelsen 2002-2003, p. 57 ff.

<sup>14</sup> Case 2002-4031/7-2134, mentioned in Forbrugerredegørelsen 2002-2003, chapter 6.3.11 (p. 171 ff.).

<sup>15</sup> On the homepage [www.toflo.dk](http://www.toflo.dk) 'overclocking' is explained as: "Overclocking is really quite simple. The purpose is to make the computer run at a higher clock frequency than it is meant to. The advantage in overclocking is that you can buy a processor that runs at a given frequency and then increase the clock frequency so that the processor runs as fast as a much more expensive one. This is also possible with RAM and graphics cards."

<sup>16</sup> Case 2002-613/7-277; mentioned in Forbrugerredegørelsen 2002-2003, chapter 6.7.1. (p. 197 ff.).

denied the claim. The Danish Consumer Complaints Board expert said that since one of the letters had not been damaged, it would seem that the cardigan had not been washed at too high a temperature or with the wrong detergent. It could not be concluded with certainty what had resulted in the ruining of the other three letters. The Danish Consumer Complaints Board found that the presumption rule meant that it was the seller's responsibility to prove that the defect was not due to conditions already existing at the time of delivery. The Danish Consumer Complaints Board found that this was not the case, and since it constituted a fundamental breach of contract, the consumer succeeded in his claim and was free to rescind the contract.

In a third case<sup>17</sup>, a used car burned out two months after delivery. The buyer had travelled 3,000 kilometres in it. The seller denied the complaint, stating that the consumer had not proven that the defect existed at the time of delivery and that the consumer should have noticed the symptoms that had appeared prior to the fire and should have reacted on these. The Danish Consumer Complaints Board's expert found that the fire had probably been started due to a torn petrol hose, and that this does not necessarily mean that there would have been any signs of danger such as a smell of petrol. It was also stated that such a tear develops after a considerable time of mouldering, which means that it could be assumed that the petrol hose was defective already at the time of delivery.

With this in mind, the Danish Consumer Complaints Board found that this constituted a lack of conformity, which the seller had not disproved at the time of delivery. Since it was a fundamental breach of contract, it meant that the buyer was free to rescind the contract – even if the product could not be returned in essentially the same state, see s. 58 of the Sale of Goods Act.

There are three cases concerning shoes. In one of the cases,<sup>18</sup> the matter was a pair of boots whose inner lining was worn out after four months. The buyer wanted to rescind the contract, which was denied by the seller. The Danish Consumer Complaints Board stated:

“The Danish Consumer Complaints Board has had an expert look at the boots and it is noted that the lining around the heels is worn out. This means that the lining was not durable enough to be fit for the kind of use the boots were put to. The question is then whether this is due to a defect in the boots...

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<sup>17</sup> Case 2002-521/7-88; mentioned in Forbrugerredegørelsen 2002-2003, chapter 6.12.3. (p. 217 ff.).

<sup>18</sup> Case 2002-62/7-1355; mentioned in Forbrugerredegørelsen 2002-2003, chapter 6.8.4. (p. 202 ff.).

Since the contract of sale was entered into after 1 January 2002, and since the consumer has given notice of the defect four months after the sale, s. 77a(3) of the Sale of Goods Act, as implemented by Act no. 213 of 22 April 2002, applies. According to this provision, defects or deviations in quality that become apparent within six months of delivery are presumed to have existed at the time of delivery, unless special conditions apply.

The wear must have been caused by the feet sliding up and down in the heel of the boots. This is either the result of the boots not having been laced during use or of rigid boots with no flexibility, which do not follow the movements of the feet. The complainant has stated that the boots were laced when used, and according to the Danish Consumer Complaints Board expert, the boots are very rigid and heavy and generally not suited as footwear.

As the respondent has not disproved the presumption that the wear was caused by characteristics of the boots existing at the time of delivery, the Danish Consumer Complaints Board finds that the quality of the lining was too poor for the general construction of the boots, which means that the boots are defective, see s. 76(1) (iv) of the Sale of Goods Act, read with s. 77a(3). As it is considered a fundamental breach of contract, the contract can be rescinded by the complainant, see s. 78(1) (iv) of the Sale of Goods Act.”

Two other cases concerning shoes had the opposite outcome. One<sup>19</sup> was about a pair of shoes with a design that meant that the long tips could be damaged during normal use. The Danish Consumer Complaints Board expert said, among other things, that a buyer was supposed to realise that shoes that are so long and pointy are fragile, and therefore should only be used for light-duty use if they are to stay in a good condition.

On this basis, the Danish Consumer Complaints Board found that it was justified that the damage had not been a result of circumstances existing at the time of delivery, which meant that the consumer was unsuccessful in his claim.

The other case<sup>20</sup> was about a pair of shoe soles which were worn out after two months’ use. The consumer was of the opinion that the shoes ought to last longer, which was denied by the seller with the explanation that the damage was a result of wear and tear. The Danish Consumer Complaints Board pointed to the fact that the shoes showed signs of improper use, and that it was to be assumed from the state of the shoes that they had been worn after the time the notice of the defect was given. The Danish Consumer Complaints Board concluded that the shoes had been exposed to extraordinary wear and tear, and that therefore the seller had disproved the presumption that the defect was caused by circumstances existing at the time of delivery. The result was that the buyer could not rescind the contract.

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<sup>19</sup> Case 2003-62/7-60.

<sup>20</sup> Case 2002-62/7-1386.

On p. 59 in Forbrugerredegørelsen 2002-2003, the Danish Consumer Complaints Board's practice is summarised as follows:

“... the assumption rule applies in cases in where it cannot be ruled out that the defect existed at the time of delivery and where it also cannot be proved. At the same time it should not be more likely that the defect was a result of improper use.

(...)

If there is a doubt about whether the defect existed at the time of delivery, the Danish Consumer Complaints Board relies on the assumption rule, even if the Danish Consumer Complaints Board possibly would have made the same conclusion under the previous rules. See the case concerning the burned out car.”<sup>21</sup>

#### **2.2.4. The questionnaire survey**

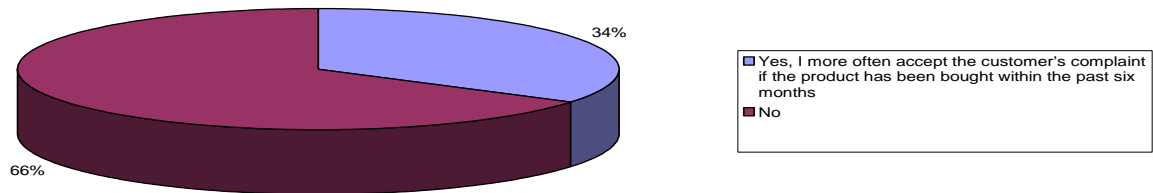
Due to the new rules, several industry organisations have made guidelines for their members concerning complaints handling, including explanations of the most important changes. In these guidelines, with the exception of the ones from The Shoe Association (Skorådet), retailers are made aware of the presumption rule, which means that it may be expected that at least part of the businesses know the rule.

In order to learn more about the importance of the presumption rule for complaints handling practices, the following question was posed to the questionnaire respondents:

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<sup>21</sup> This case is mentioned above.

**When you decide whether to accept the complaint of a customer, do you consider whether the product was bought within the past six months?**



Number of obtained answers:

The answers obtained in the studied industries can be found in the table below.

When you decide whether to accept the complaint of a customer, do you consider whether the product was bought within the past six months?			
	Yes, I more often accept the customer's complaint if the product has been bought within the past six months	No	Total
All respondents	34,1 %	65,9 %	287
Used cars	85,7 %	14,3 %	21
New cars	44,8 %	55,2 %	29
Computers and standard software	29,2 %	70,8 %	65
Electrical household appliances	17,4 %	82,6 %	23
Furniture	9,4 %	90,6 %	32
Radio and television	26,3 %	73,7 %	38
Ladies' and men's clothing	43,8 %	56,3 %	32
Shoes	36,7 %	63,3 %	30
Telecommunications equipment	35,3 %	64,7 %	17

In total, more than one third of the respondents say that they more often accept the customer's complaint about defective goods if the defect has appeared within the first six months, than if having appeared later than that. Two thirds of the shopkeepers do not consider this aspect. When interpreting these figures, it is worth noting under which circumstances the presumption rule can be expected to play a role, and not least when the rule – when applied correctly – ought not to affect the handling of a complaint. Two factors play a role in this.

Firstly: the time factor itself. Many consumer goods (bought as new) are of such a quality that based on experience they can be expected to work problem-less for a considerable time. This means that if

a defect surfaces after a short period of time, that alone indicates that there is something wrong with the product and not with how it is being treated; the sooner this takes place, the stronger the indication. Similarly, complaints made quite a while after the sale are not easily justified. An example of this is scratches in tabletops (see note 12 above). In such cases, it will of course be questioned why the consumer did not give notice of this at an earlier point in time if the defect existed at the time of delivery. In cases in which the time factor itself is a strong indication of whether the defect existed at the time of the sale, the presumption rule of course plays a relatively less significant role.

Secondly, the type of defect itself plays an important role. Some types of defects are of such a character that, both a short and a long time after the sale, it is quite easy to determine if a given defect is caused by the properties of the product or by its use. As regards such defects, the presumption rule is of no great significance either. In other words: The presumption rule is of significance in cases where it is not possible to determine the question of non-compliance based on the time factor or a simple non-costly examination. This link can be noted in the differences between the different sectors:

In the radio and television sector and in the sector for electrical household appliances, the relatively low percentage of affirmative answers from the respondents probably reflects that the typical defects are of a type that means that they are easily detectable. The relatively low percentage of affirmative answers should also be seen in the light of the fact that, prior to the amendments to the Act, one year's industry or manufacturer's guarantee was given in these sectors. The guarantee was interpreted to mean that defects detected during the guarantee period were presumed to have existed at the time of delivery, which meant that the buyer could make a claim. This practice was changed with the amendments to the Act. In the sector for electrical household devices there is now normally offered no guarantee, and the guarantee of BFE (consumer electronics) is replaced by a complaints handling arrangement plus individual arrangements.<sup>22</sup> Because of the presumption rule in s. 77a(3), these changed practices appear not to have brought with them any real changes as regards the burden of proof in the handling of complaints within the first six months of the sale. Oppositely, there has been a deterioration of consumers' legal position regarding defects detected after six but within 12 months, in that the presumption rule does not apply readily as there is no longer any

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<sup>22</sup> See more on this in chapter 5.1. below.

guarantee.<sup>23</sup> As the actual effect of the presumption rule as mentioned seems rather modest in this sector, the adverse effect of the discontinuation of the guarantee is probably also relatively modest for consumers in this sector.

The lowest percentage of affirmative answers is found in the furniture industry in which it assumingly is quite simple to determine whether a defect is caused by improper use or a defect existing at the time of the sale, particularly when including the time factor.

In the sector for used cars, however, a very different scenario is played out as as much as 85 per cent of the respondents say that they more often accept the customer's complaint if it is made within the first six months. This appears to indicate that in the sector for used cars it is considered more difficult to disprove the s. 77a(3) presumption than in other sectors. This being part of the explanation is backed up by comments from several respondents in the sector. They note that a very comprehensive examination is often required in order to determine whether a defect detected in a car is the result of normal use or extraordinary/improper use, as the defect ought not to take place at such an early stage under normal conditions.<sup>24</sup>

It is more difficult to explain that the percentage of affirmative answers in the sectors for ladies' and men's clothing is above the average. Comments from respondents suggest that within these sectors it is easier to conclude whether a defect is the result of wear and tear or improper use, or if it is a result of a defect in the product. One respondent puts it like this:

“A broken zipper will not be accepted, even if the jacket is perhaps two months old, if the customer has applied force in trying to zip it with the zipper not being inserted properly. Or when the bottom button has been ripped through the jacket, thereby making a hole in the leather, it is a clear sign of the jacket being too small for the customer.”

If these comments reflect the typical scenario, a high percentage of affirmative answers is not to be expected since the presumption rule should not play a significant role when the character of the defect is easy to determine. Perhaps part of the explanation is that the time factor plays a significant

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<sup>23</sup> However, see chapter 5.1 concerning arrangements in the BFE sector.

<sup>24</sup> A lack of conformity exists under the law pertaining to the sale of goods when the defect occurs within “the normal period of durability” and is caused by normal wear and tear (as the product in question has then not lived up to normal requirements as to expected durability). Oppositely, all things being equal, such lack of conformity does not exist if the wear is caused by improper use.



role: The typical defects in clothes are often detected relatively quickly after first use/wash/dry cleaning, and shopkeepers might, therefore, be sceptic towards complaints made after a considerable period of time. Possibly, the answers reflect that shopkeepers in this respect differentiate between complaints made before and after six months of the time of the sale. Another possible interpretation is, of course, that there actually are more cases with an element of doubt than the comments from the sector give the impression of.

In conclusion, the presumption rule seems to have gotten a larger importance in practise than it was intended and expected.

## **Chapter 3. Consumers' remedies in case of non-compliance**

### **3.1. Replacement or repair**

#### **3.1.1. Amendments to the Act**

The implementation of Directive 99/44/EC required two essential amendments to the rules on consumers' remedies in case of non-compliance.

While the consumer's right to replacement, i.e. replacing the defective product with a new defect-free specimen of the sold article, was previously contingent on the breach being fundamental, now any breach, in general, in its own right can be the basis of a right to replacement, cf. s. 78(1).

Another important change is that now, in general, the consumer can choose between replacement and repair, i.e. repair of the delivered defective product. Previously, this choice was up to the seller, as he, by repairing free of charge to the buyer and within a reasonable time, could prevent the customer's justified claim for replacement (and vice versa). As mentioned, the choice between replacement and repair now generally rests with the consumer. That means that in general it is now possible to have a new specimen delivered, even if the seller prefers to remedy the defect by repairing the product.

However, the buyer's right to choose between replacement and repair is not without limits. The buyer does not have a right to replacement if such replacement is impossible or would result in disproportionate costs to the seller, taking into consideration the value the goods would have if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy (typically: repair) could be completed without significant inconvenience to the consumer. A similar limitation to the buyer's freedom of choice applies in cases where the consumer requests repair, but the seller prefers replacement. Cf. s. 78(2) for more on this.

In real life, the buyer's interests are often served best by replacement (or rescission),<sup>25</sup> while the seller generally prefers repair to replacement (or rescission). Therefore, the mentioned amendments to the Danish Sale of Goods Act entail a potentially essential change of the state of the law. The practical importance of the amendments depend on the way in which the exceptions to the consumer's general freedom of choice between replacement and repair is interpreted in the application of the law; to begin with that primarily means by the Danish Consumer Complaints Board – for more on this, see chapter 3.1.3. The importance of the amendments obviously also depend on how they are applied in the practice of the retail trade, see chapter 3.1.4.

### **3.1.2. Expectations regarding the effects of the amendments to the Act**

In the responses to the consultation on report no. 1403/2001 about the implementation of the Consumer Sales Directive, several business associations expressed concerns about an expansion of the buyer's right to require replacement instead of repair.

The Danish Chamber of Commerce noted that the amendments prescribed by the directive might cause large problems to shopkeepers in practise.

In BFE's consultation response, it was mentioned that the changes could be expected to result in an increase of up to 300 per cent in the number of replacements, with the consequence that the industry's extra costs for replacements (instead of repair) could be expected to bring a rise in prices of new goods of three to five per cent. Moreover, BFE pointed out that the increase in replacements

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<sup>25</sup> The rescission right remains contingent on the breach being fundamental, see s. 78(1) (iv), and the seller still holds the right to prevent rescission by offering repair free of charge or replacement within a reasonable time, see s. 78(3). The buyer's right to have a reduction in the purchase price ("appropriate reduction") can also be prevented by offering repair or replacement, see s. 78(3).

would mean that there would also be an increase in the volume of waste as returned goods would be scrapped.<sup>26</sup>

Similarly, Danish Commerce & Services, the leading organisation for service enterprises, stated that an increase in replacements (instead of repair) would lead to more goods being discarded, which could have undesirable consequences, both financially and environmentally, at that therefore being allowed to determine that replacement would be a “disproportionate” remedy should not be so limited. This would result in the buyer having to accept repair instead (and thereby deviating from the principle of consumers’ freedom of choice between repair and replacement).

FEHA<sup>27</sup>, the Danish association for producers and importers of electrical household appliances, also noted that the environmental costs should be included in the assessment of the disproportionality, as the consumer’s choice between repair and replacement might result in large quantities of discarded goods. As FEHA members primarily trade in large electrical household appliances, it was also stated that the change in the rules might lead to a growth in wasted resources and in the environmental impact due to the transportation of new goods and the production of new products to replace returned goods.

The industry association Danish Furniture<sup>28</sup> pointed out that augmenting considerably consumers’ right to replacement instead of repair would result in a rise in costs in the manufacturing industries and in the retail industry, which would result in consumer prices also rising. Moreover, there would be a reduction in service levels as replacement is particularly problematic in relation to the furniture business, which is characterised by individually made furniture (function, measurements and finish). The Ministry of Justice’s comment to this<sup>29</sup> was that in most cases where specially made furniture were concerned, it would be impossible or disproportionate to require replacement if the seller offers repair within a reasonable time and without any costs or significant inconvenience to the consumer.

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<sup>26</sup> The issue of scrapped goods and the resulting increased impact on the environment is not treated in this report.

<sup>27</sup> FEHA: Foreningen af Fabrikanter og Importører af Elektriske Husholdningsapparater.

<sup>28</sup> Letter of 8 January 2002 (Legal Affairs Committee L 9 – appendix 13).

<sup>29</sup> In an answer to the Legal Affairs Committee’s question 18.

### 3.1.3. Practice of the Danish Consumer Complaints Board

The Danish Consumer Complaints Board has ruled on a number of cases concerning s. 78 of the Sale of Goods Act about consumers' remedies in case of non-compliance. A few of these cases are discussed below in order to shed light on the limitations on consumers' right to choose between replacement and repair.

One of the cases<sup>30</sup> was about a mobile phone that was sold for DKK 900. After approximately one month, the phone stopped working, which made the consumer contact the seller, requiring replacement. The seller denied the claim and instead offered to repair it. During the Danish Consumer Complaints Board's hearing of the case, the phone was left with the seller, who quickly repaired it. The Danish Consumer Complaints Board declared:

"The complainant gave notice of a defect in the phone display about one month after the sale. The complainant required replacement of the phone. The respondent – who has not denied the defect – has denied this claim and has – against objections from the complainant – repaired the phone...

That a defect can be remedied easily or inexpensively is not alone enough to find the consumer's replacement claim disproportionate, as it should also be considered what the consumer's interest in the chosen remedy is, as well as the seller's possibilities as regards repairing and selling the returned phone as a slightly used product to a third party."

As the consumer, according to the Danish Consumer Complaints Board, needed his phone for daily use, and as the seller had not proven that replacement would involve disproportionate costs, the consumer's replacement claim was accepted.

In another case<sup>31</sup> a consumer had bought a phone for almost DKK 3,000. After approximately 18 months, periodical errors started occurring. After it had been repaired, the error reappeared, resulting in the customer requiring replacement. This claim was denied by the seller, who, against objections from the consumer, repaired the phone. The Danish Consumer Complaints Board stated that the difference between the price of a new phone and the resale price of the "old" repaired phone was only DKK 156, and that therefore the seller had not proved that replacement would impose disproportionate costs on him. Consequently, the consumer's replacement claim was successful.

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<sup>30</sup> Case 2003-4051/7-89, mentioned in Forbrugerjura 2003, chapter 6.4.1 (p. 59 ff.).

<sup>31</sup> Case 2002-4051/7-93, mentioned in Forbrugerjura 2003, chapter 6.4.3 (p. 61 ff.).

In a third case<sup>32</sup> a mobile phone stopped working shortly after the sale. The phone was left with the seller, who required a two week “observance period” to decide whether the defect should be remedied, or if the phone should be replaced. The consumer who was dependant on the phone was not offered a replacement phone during this period. The consumer did not want to be without a phone for such a long time and required replacement. As this was denied, the case was taken to the Danish Consumer Complaints Board, which made the following remarks:

“If the seller believes an “observance period” is required in order to assess the complainant’s claim, this will be to the detriment of the seller as regards the disproportionality assessment, as this will prolong the loss of use period and thereby the impact of the lack of conformity on the consumer. The present case concerns a product that the complainant needs on a daily basis. As the complainant has neither been offered immediate repair nor had a replacement phone at his disposal, it is the Danish Consumer Complaints Board’s opinion that the consumer should not easily be denied his general right to choose. In the assessment of which costs the complainant choosing replacement as remedy would impose on the defendant, not only the purchase price of a new phone, but also the fact that the defendant can repair the returned phone and sell it as slightly used should be taken into consideration. Even if the defect in question can assumingly be repaired for at a minor cost, it is not a given that the difference in costs between replacement and repair is disproportionate.”

Based on an overall assessment, the Danish Consumer Complaints Board found that the seller had not proved that it would impose disproportionate costs on him to replace instead of repair, which resulted in this consumer also being successful with his claim.

In a case about a pair of boots<sup>33</sup> the consumer had given notice of a defect in a pair of boots that had obviously been worn quite a bit. The boots were glued by a shoemaker, against objections from the consumer. The boots were then functional but had cosmetic damage. The Danish Consumer Complaints Board noted:

“The consumer’s right to choose between replacement and repair is, however, subject to the limitation that repair or replacement cannot be required if such remedy is impossible or will impose disproportionate costs on the seller, cf. s. 78(2). The seller bears the burden of proof in this respect. In the assessment, it will be taken into consideration which value the goods would have if there were no lack of conformity, as well as the significance of the lack of conformity and whether an alternative remedy could be completed without significant inconvenience to the consumer, cf. the second sentence of s. 78(2). The boots appear to have been worn quite a bit and, therefore, for a large part of their expected useful life. The value of the boots, were there no lack of conformity, is therefore considered to be small, and the lack of conformity was of a type which could have been remedied within a reasonable time. On the basis that replacement would have imposed

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<sup>32</sup> Case 2002-4051/7-1341, mentioned in Forbrugerredegørelsen 2002-2003, chapter 6.4.4. (p. 175 ff.).

<sup>33</sup> Case 2003-62/7-70, mentioned in Forbrugerredegørelsen 2002-2003, chapter 6.8.3. (p. 201 ff.).

disproportionate costs on the defendant, the Danish Consumer Complaints Board finds that the defendant was not obligated to offer replacement.”

So the shopkeeper had a right to deny the consumer’s replacement claim. In the Danish Consumer Complaints Board’s opinion, the cosmetic damage to the shoe, caused by the gluing, did not give the consumer a right to rescind the contract, only to have an appropriate reduction in the purchase price.

Another case<sup>34</sup> concerns a video camera bought for DKK 4,495 which stopped working after one month. The consumer required replacement, but the seller preferred repair. The Danish Consumer Complaints Board made the following remarks:

“The defendant has stated that their purchase price for the complainant’s camera is DKK 4,118.75, that it has been repaired by the supplier free of charge to the complainant, and that the camera could be sold used for DKK 2,495. Also, the defendant has provided the complainant with a replacement camera at no charge to the complainant. Consequently, replacement would have cost the defendant DKK 1,623.75, whereas the repair that has been made has been cost neutral to the defendant.

The Danish Consumer Complaints Board’s conclusion after having made an overall assessment of the case is that the defendant has proven that replacement would have imposed disproportionate costs on him, compared with repair, and that the complainant, who had a camera at his disposal during the repair period, did not suffer unreasonable loss of use.”

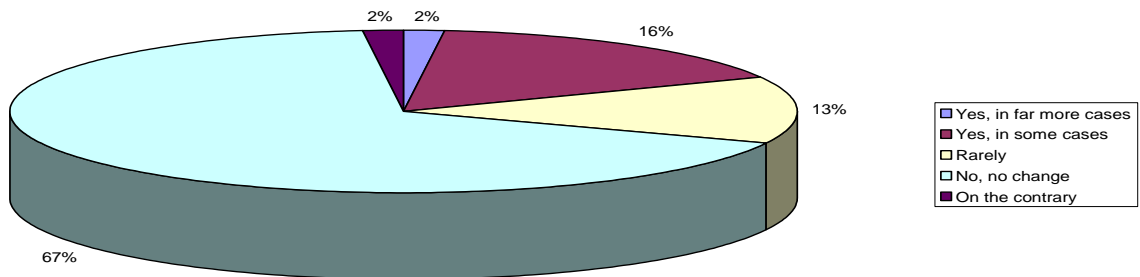
#### **3.1.4. The questionnaire survey**

In order to learn more about the results of the amendments to the Act as regards whether consumer complaints concerning lack of conformity lead to replacement or repair, the questionnaire contained the following question:

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<sup>34</sup> Case 2003-4012/7-368.

Have the new rules in some cases resulted in your replacing a product that you would otherwise have repaired?



Number of obtained answers: 287

Almost one third of the respondents say that to varying degrees they replace a defective product instead of repairing it more often than before. The extent of the change is modest, however, as only two per cent of the respondents say that they replace the product in many more cases than before. That the rules have had some effect is shown by the fact that as much as 46 respondents say that in some cases they replace the product, whereas before they would have repaired it, while 37 respondents do so in few cases.

It is noticeable that the rules seem to have had the opposite effect in some businesses, i.e. a fall in the number of replacements. Two per cent of the respondents say that compared with earlier they now repair a product more often than they replace it. To some extent this may be explained by some retailers' opinion that, in connection with the implementation of the new rules, it was necessary to counter a vast rise in replacements, and that this was done best by following a restrictive course at the outset (possibly on the request of their suppliers). To the extent that this explanation corresponds with the actual situation, it may be presumed that the fall in the number of replacements (as compared with the situation prior to the amendments to the Act) is a transitory phenomenon.

Divided into business sectors, the figures are as follows:

Have the new rules in some cases resulted in your replacing a product that you would otherwise have repaired?

Yes, in far more cases	Yes, in some cases	Rarely	No, no change	On the contrary	Total
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All respondents	1,7 %	16,4 %	13,2 %	66,9 %	1,7 %	287
Used cars	0,0 %	9,5 %	14,3 %	76,2 %	0,0 %	21
New cars	0,0 %	3,6 %	7,1 %	89,3 %	0,0 %	28
Computers and standard software	1,6 %	12,5 %	10,9 %	75,0 %	0,0 %	64
Electrical household appliances	0,0 %	17,4 %	8,7 %	73,9 %	0,0 %	23
Furniture	0,0 %	9,7 %	16,1 %	71,0 %	3,2 %	31
Radio and television	2,6 %	44,7 %	15,8 %	34,2 %	2,6 %	38
Ladies' and men's clothing	3,0 %	15,2 %	12,1 %	66,7 %	3,0 %	33
Shoes	6,3 %	21,9 %	15,6 %	56,3 %	0,0 %	32
Telecommunications equipment	0,0 %	0,0 %	23,5 %	64,7 %	11,8 %	17

The rules seem to have had the largest effect in the radio and television sector. Here no less than 63 per cent of the respondents say that compared with before they replace a product more often. A more accurate impression of the changes in this sector is given in the information about the total number of complaints in 2002-3 that is made available by 11 suppliers of brand name goods via BFE.<sup>35</sup>

From this it appears that in 2002 the number of replacements accounted for about three per cent of the total number of successful complaints (about 35,500 in total), while the corresponding figure for 2003 accounted for seven per cent of the total number of successful complaints (about 42,700 in total).<sup>36</sup>

The same scenario seems to be the case in the shoe business, in which the rules have resulted in an increase in replacements for more than 40 per cent of the respondents. Six per cent of the respondents say that they replace goods in far more cases than they did before, which is above average.

In the used and new cars sectors few respondents seem to have changed their practices for handling complaints. The apparent explanation to this, which also appears from the comments, is that replacing a car is very costly and it would therefore typically impose disproportionate costs on the

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<sup>35</sup> See more under chapter 1.3.

<sup>36</sup> The extension of the limitation period for notices from one to two years had an effect on the rise in the total number of successful complaints from 2002 to 2003. See chapter 4 for more on this. The replacement percentage for 2003 pertains to complaints covered by the amendments to the Act. The replacement percentage for 2002 pertains to complaints covered by the previous rules but also to some extent to complaints covered by the new rules that apply to sales made on and after 1 January 2002. This suggests that the percentage of replacements in 2002 exceeds the percentage of replacements in previous years, to which the old rules applied. Even if it is then reasonable to presume that the rise in replacements in the radio and television sector is larger than stated in the text above, there is still a large jump to the 300 per cent increase predicted by BFE prior to the amendments to the Sale of Goods Act, see chapter 3.1.2.



seller, compared to repairing. Moreover, the sale of a used car is the typical example of a sale of a specific product where replacement not being an option.

In the telecommunications sector, more than ten per cent say that they now repair a product more often than they replace one. In this sector, not a single respondent replaces goods “in far more cases” or in “some cases”, compared with before. From the comments accompanying some of the answers, it may be concluded that the reason for this is that in this sector it is the producers who decide for or against replacement. In addition, one respondent from that sector noted:

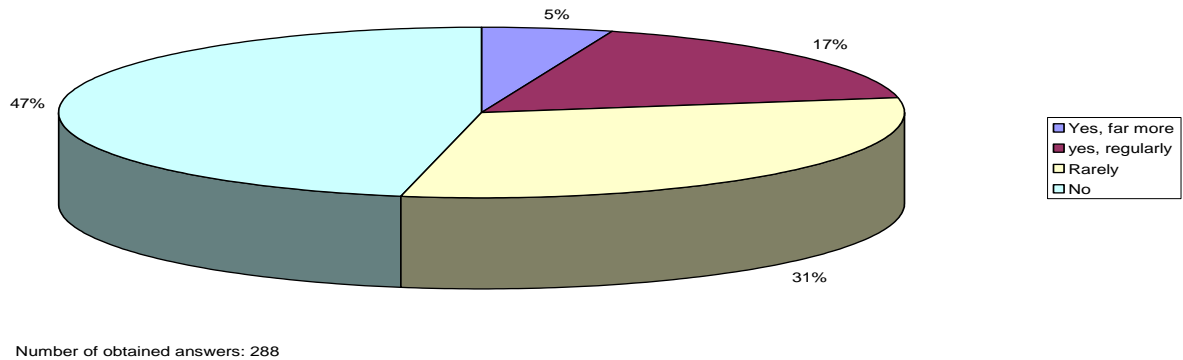
“Today, all goods are repaired, no matter the cost, because many goods would not be credited (in case of a replacement, our addition).”

So in practice it would seem that to some extent the retailers are to pay the costs themselves if they remedy the lack of conformity by replacement. From the respondents’ comments it is also possible to get an idea of this sector’s normal practice for dealing with lack of conformity. One respondent said:

“We are to send the phones off for repair, and then the producer decides whether the product is to be replaced, **the product is normally replaced when it has been repaired three times.**” (our emphasis)

In order to shed light on the extent to which the amendments to the Act have had an effect on what consumers can require of retailers, the following question was asked:

**Compared with before, do more customers now require replacement of a defective product?**



From this it appears that more than 50 per cent of the respondents say that compared with before consumers now more often require replacement of the goods, but it also appears that the increase is relatively modest as the majority of the answers are in the category “rarely”.

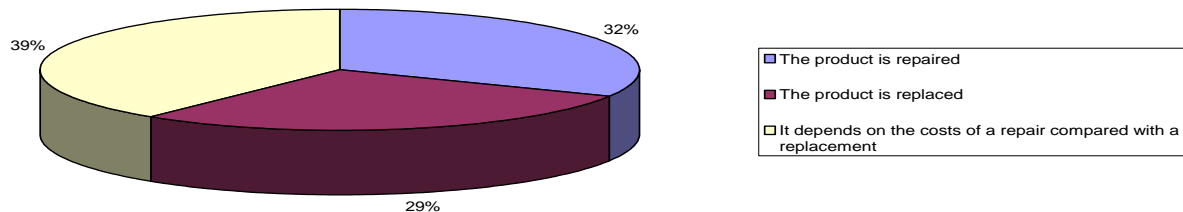
Rather large varieties are found in the studied sectors:

Compared with before, do more customers now require replacement of a defective product?					
	Yes, far more	Yes, regularly	Rarely	No	Total
All respondents	4,9 %	17,4 %	30,9 %	46,9 %	288
Used cars	0,0 %	0,0 %	28,6 %	71,4 %	21
New cars	0,0 %	7,1 %	28,6 %	64,3 %	28
Computers and standard software	4,6 %	10,8 %	26,2 %	58,5 %	65
Electrical household appliances	0,0 %	30,4 %	30,4 %	39,1 %	23
Furniture	6,5 %	16,1 %	41,9 %	35,5 %	31
Radio and television	0,0 %	21,1 %	42,1 %	36,8 %	38
Ladies' and men's clothing	0,0 %	21,2 %	27,3 %	51,5 %	33
Shoes	12,5 %	31,3 %	28,1 %	28,1 %	32
Telecommunications equipment	29,4 %	23,5 %	23,5 %	23,5 %	17

Particularly in the telecommunications equipment sector, the respondents have noticed a change in consumer claims; more than 75 per cent of the respondents say that the customers now more often require that they replace the goods, and no less than 29 per cent of the respondents say that far more customers now require this.

Additionally, it was asked to which extent consumer claims for replacement are successful:

#### What is usually the result?



Number of obtained answers: 248

The answers show that in 29 per cent of the cases in which the consumer had required that the seller replaced the product it was replaced, and in 39 per cent of the cases it was estimated how expensive it would be to replace instead of repairing. In 32 per cent of the cases, the consumer's claim for replacement was unsuccessful.

Divided into business sectors, the figures the following variations are found:

What is usually the result?				
	The product is repaired	The product is replaced	It depends on the costs of a repair compared with a replacement	Total
All respondents	32,3 %	28,6 %	39,1 %	248
Used cars	57,1 %	21,4 %	21,4 %	14
New cars	72,7 %	9,1 %	18,2 %	22
Computers and standard software	16,1 %	33,9 %	50,0 %	56
Electrical household appliances	47,6 %	19,0 %	33,3 %	21
Furniture	38,5 %	30,8 %	30,8 %	26
Radio and television	23,5 %	14,7 %	61,8 %	34
Ladies' and men's clothing	13,8 %	51,7 %	34,5 %	29
Shoes	13,8 %	48,3 %	37,9 %	29
Telecommunications equipment	64,7 %	5,9 %	29,4 %	17

Under s. 78(2) of the Sale of Goods Act, the seller may only deny the consumer's claim for replacement and instead remedy the lack of conformity by repair if replacement is impossible or would impose disproportionate costs on the seller. As illustrated in the above-mentioned Danish Consumer Complaints Board cases, determining whether or not this is the case is dependant on a concrete assessment. It may, though, be expected that certain general guidelines are given in the

various sectors, in order to simplify non-conformity procedures in practice by employees in the shops having certain rules of thumb to work with in a number of typical cases. It goes without saying that this might be problematic in relation to the requirement made in s. 78(2) about a concrete assessment if the guidelines are so exhaustive that in reality they prevent any consideration of the concrete circumstances to the detriment of the customers.

As mentioned above, findings from the questionnaire survey suggest that the handling of the issue just commented on is more far-reaching in the telecommunications equipment sector than was the intention with the amendments. It would seem that this impression is confirmed by the information given in the cases brought before the Danish Consumer Complaints Board, see more on this in section 3.1.3. As it appears from the table, consumer claims for replacement in cases of non-conformity in telecommunications equipment are very rarely successful. Almost 65 per cent of respondents say that in such cases the outcome is usually repair. This figure is considerably higher than the average figure in the other studied sectors. This rather consistent rejection in the telecommunications equipment sector of consumer claims for replacement might have something to do with the previously mentioned point that the retailers to some extent bear the cost themselves if for example mobile phones are replaced.

In cooperation with audio and video suppliers as well as radio and television suppliers, the industry organisation BFE has prepared a consumer complaints guide for the radio and television sector. This guide has general information about the new rules and a number of examples of typical claims and how they are governed under the new rules. The guide also contains this instruction:

“The general principle is that all defective goods are repaired, as replacement normally would impose disproportionate costs on the supplier, compared with repairing the goods.

Therefore, replacement is only possible when this is agreed with the supplier, either by way of a special agreement in the specific case or in cases where a general agreement exists about the product in question being classified as a product qualified for replacement, which the retailer is free to replace in justified complaints.

The individual suppliers have notified their retailers of a number of products qualified for replacement for which it is estimated that the costs involved in a repair is proportionate to the price of the product.

On BFE’s homepage, [www.bfe.dk](http://www.bfe.dk), under ‘BFE Service’, there is a list of each supplier’s products qualified for replacement.”<sup>37</sup>

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<sup>37</sup> The retailers, not the consumers, have access to the list and can check whether a given product warrants replacement.

As it appears from the table above showing an increase in the number of replacements, the radio and television sector is the one of the studied sectors in which the new rules seem to have had the largest effect. Assumingly, one of the factors behind this is the information effort made with the complaints guide; assessed on the basis of the mentioned percentages, the guidelines in the guide do not seem to have had a negative effect on consumers' legal position under s. 78(2).

Another example of industry guidelines set out by suppliers in order to make it easier to assess the question of disproportionality is found in the household appliances sector, in which defective "small" appliances with retail prices under DKK 500 are normally replaced.<sup>38</sup>

In the shoes sector almost half of the replacement claims are successful, and in only 14 per cent of the cases the goods are repaired. The respondents' comments confirm this in that several of them say that in this sector it is relatively expensive to repair the goods, and that denying a replacement claim is damaging to the shop's reputation.

In conclusion, the questionnaire survey shows that almost one third of the respondents in more cases than before, to varying degrees, replace defective goods instead of repairing them. Overall, the change seems to have been of a limited extent, though. The survey also shows that customers require replacement in more cases than before, but that in general less than every third replacement claim is successful initially.

The biggest change seems to be in the radio and television sector, in which a significant rise in replacements is registered, with these, however, still only making up less than ten per cent of all complaints. At the other end of the spectre is the telecommunications equipment sector, in which more than ten per cent of the respondents state that they now repair more often than they replace.

See more on this under chapter 3.2.2.

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<sup>38</sup> Information retrieved from FEHA.

## **3.2. On the remedying of defects (repair)**

### **3.2.1. Amendments to the Act**

Besides the already described changes concerning the choice between replacement and repair, the amendments to the Act did not include any changes as to the content of the remedies. This was considered in the legislative history of the Act as the question was raised if there was a need to regulate the number of allowed attempts to remedy a defect with rules of when remedying must be completed, more specific than “within a reasonable time”. This idea was abandoned,<sup>39</sup> and the result was that a specification was made in s. 79(1), which then specified that the assessment of whether repair (or replacement) had been completed within a reasonable time should rely on the type of product, the nature of the defect and the buyer’s dependency on the product, including whether the seller has offered the buyer a replacement product free of charge to the buyer.

Even if the intent with s. 79(1) was not to make any real changes to the state of the law, it has been considered relevant to include in the questionnaire certain questions that might shed some light on remedying practices.

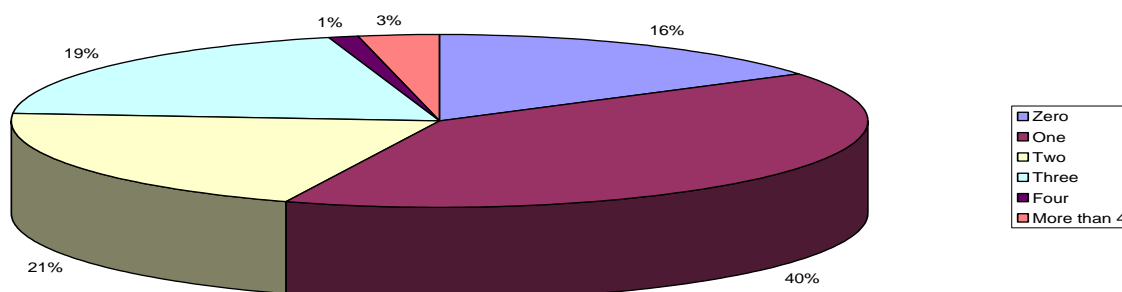
### **3.2.2 The questionnaire**

When answering the question of how many attempts at remedying a defect the retailers make before replacing the goods, 77 per cent said that they repair between zero and two times before replacing a product.

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<sup>39</sup> See report no. 1403/2001, p. 125 ff.

**How many attempts at remedying a defect do you have before replacing a product?**



Number of obtained answers: 233

Divided into business sectors, the figures show these variations:

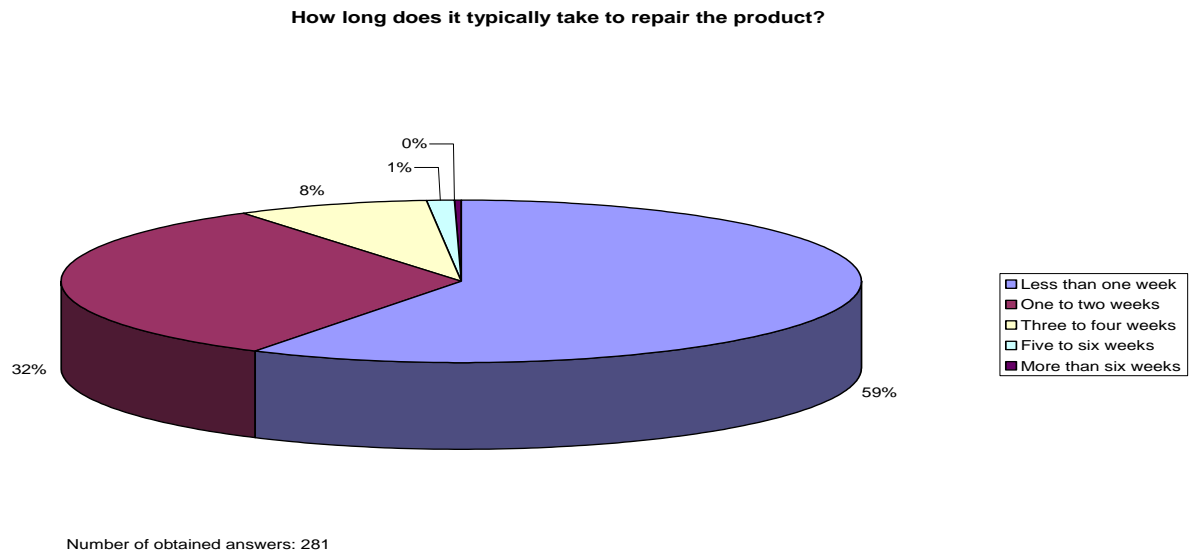
How many attempts at remedying a defect do you have before replacing a product?							
	Zero	One	Two	Three	Four	More than four	Total
All respondents	15,9 %	39,9 %	20,6 %	19,3 %	1,3 %	3,0 %	233
Used cars	11,1 %	55,6 %	11,1 %	22,2 %	0,0 %	0,0 %	9
New cars	25,0 %	25,0 %	41,7 %	0,0 %	0,0 %	8,3 %	12
Computers and standard software	27,1 %	32,2 %	23,7 %	13,6 %	0,0 %	3,4 %	59
Electrical household appliances	5,3 %	10,5 %	26,3 %	47,4 %	0,0 %	10,5 %	19
Furniture	11,5 %	57,7 %	19,2 %	7,7 %	0,0 %	3,8 %	26
Radio and television	6,5 %	12,9 %	35,5 %	45,2 %	0,0 %	0,0 %	31
Ladies' and men's clothing	21,9 %	71,9 %	3,1 %	3,1 %	0,0 %	0,0 %	32
Shoes	13,3 %	70,0 %	13,3 %	3,3 %	0,0 %	0,0 %	30
Telecommunications equipment	0,0 %	6,7 %	13,3 %	53,3 %	20,0 %	6,7 %	15

When ten per cent of the respondents in the electrical household appliances sector state that consumers are to accept their goods being repaired more than four times, it may be due to some retailers of large electrical household appliances in reality not voluntarily accepting replacement (or rescission).

The explanation to the corresponding figures for new cars is probably partly the same, partly the price of new cars, and partly the relatively short duration of the individual repair attempts.

Added to the question of repair attempts was a question of the typical repair time.

More than 90 per cent of the respondents said that a repair job takes less than two weeks, and 59 per cent said less than one week. In eight per cent of the cases the answer was that it typically takes between three and four weeks to repair a product.



Divided into business sectors, the figures showed these variations:

How long does it typically take to repair the product?						
	Less than one week	One to two weeks	Three to four weeks	Five to six weeks	More than six weeks	Total
All respondents	58,7 %	32,0 %	7,8 %	1,1 %	0,4 %	281
Used cars	100,0 %	0,0 %	0,0 %	0,0 %	0,0 %	20
New cars	96,3 %	3,7 %	0,0 %	0,0 %	0,0 %	27
Computers and standard software	56,3 %	31,3 %	9,4 %	1,6 %	1,6 %	64
Electrical household appliances	82,6 %	17,4 %	0,0 %	0,0 %	0,0 %	23
Furniture	17,2 %	44,8 %	31,0 %	6,9 %	0,0 %	29
Radio and television	44,7 %	50,0 %	5,3 %	0,0 %	0,0 %	38
Ladies' and men's clothing	51,6 %	45,2 %	3,2 %	0,0 %	0,0 %	31
Shoes	81,3 %	18,8 %	0,0 %	0,0 %	0,0 %	32
Telecommunications equipment	0,0 %	76,5 %	23,5 %	0,0 %	0,0 %	17

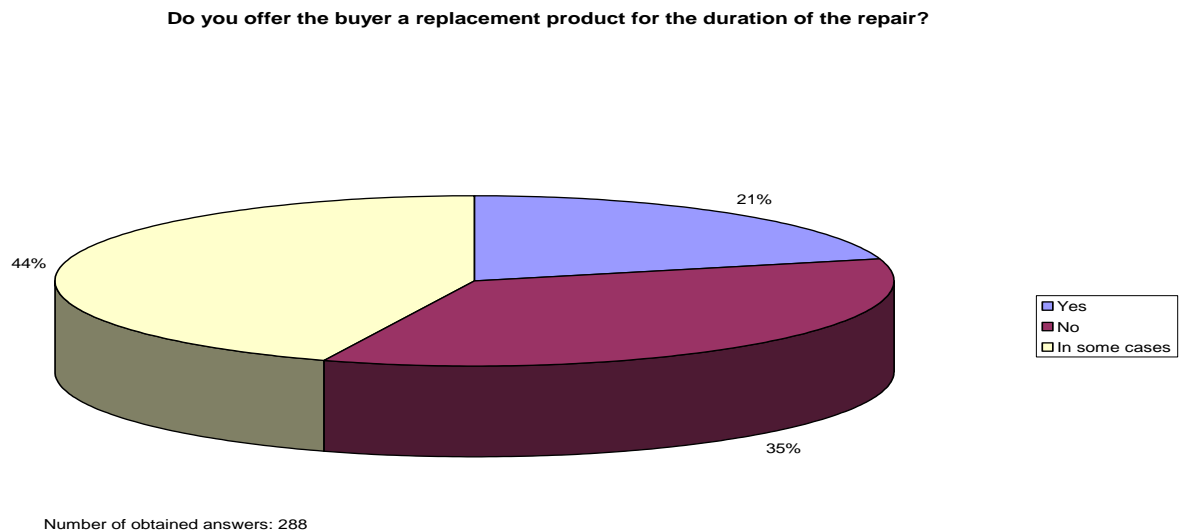
Particularly in the new and used cars sectors there is a short repair time. This is probably because many car dealers have their own garage; more than 90 per cent of the respondents in the car industry said that they have their own garage. Also, it is assumingly very inconvenient for many consumers not to have their car, which means that the car dealers have to complete the repair jobs swiftly.



It appears from the table that it is in the furniture industry that the repair time is the longest. In this industry, the goods are typically repaired partly by the retailer in his repair shop and partly by the supplier, which might explain the repair time being longer. A similar scenario is the case in the computer and standard software industry, which also has relatively long repair times. However, in this industry in far more cases, percentage wise, the goods are repaired by the producer instead of the retailer. This is also seen in the comments to the question.

The comments show that electrical household appliances are often repaired in the shops, which corresponds with the goods being repaired within one week in 83 per cent of the cases and with it never taking more than two weeks.

The respondents were also asked whether a replacement product is offered for the duration of the repair period. As stated in s. 79(1), this is a factor in the assessment of the defect having been remedied within a reasonable time.



About one fifth of the respondents offer the customer a replacement product while the product is being repaired. Almost half of the retailers state that in some cases they offer the customer a replacement product, while one third say that they do not offer the customer a replacement product.

Do you offer the buyer a replacement product for the duration of the repair period?				
	Yes	No	In some cases	Total
All respondents	20,8 %	35,1 %	44,1 %	288
Used cars	23,8 %	19,0 %	57,1 %	21
New cars	37,9 %	3,4 %	58,6 %	29
Computers and standard software	9,2 %	32,3 %	58,5 %	65
Electrical household appliances	8,7 %	47,8 %	43,5 %	23
Furniture	25,8 %	22,6 %	51,6 %	31
Radio and television	50,0 %	7,9 %	42,1 %	38
Ladies' and men's clothing	3,1 %	78,1 %	18,8 %	32
Shoes	0,0 %	90,6 %	9,4 %	32
Telecommunications equipment	47,1 %	0,0 %	52,9 %	17

The radio and television sector often offers a replacement product in that 92 per cent of the respondents say that they do so at least in some cases, if not in all.

These answers can be compared to the above table on repair times, which normally are less than two weeks in the radio and television sector.

In the ladies' and men's clothing sector and in the shoes sector, a replacement product is very rarely offered, which of course is because of the nature of the goods.

On the other hand, it is noticeable that almost 50 per cent of the answers obtained in the electrical household appliances sector show that replacement products are not offered. This is somewhat above average, but perhaps the explanation is found in the previous question about the typical repair time, concerning which it is stated that there is a very short repair time in this sector. Also, from the comments to the questions it may be concluded that, as mentioned, many of the goods are repaired in the shop, and that many of the defective goods can be used for the intended purpose up until the time of the repair.

The comments from the telecommunications sector suggest that only business customers are offered replacement products.

In the computer and standard software sector, a replacement product is usually not offered while a computer is being repaired, the explanation for which being that it is normally the data and programs on the computer that the customer needs, not the computer itself. In the new cars sector, several respondents noted that a replacement car is offered in the cases in which the car dealer's

garage is the direct cause of the defect, or if the garage has failed to remedy the defect properly the first time.

In conclusion, the questionnaire survey shows that about 20 per cent of the respondents only replace the goods when three repair attempts have been made; the highest figures are found in the electrical household appliances sector (47 per cent), the radio and television sector (45 per cent) and the telecommunications sector (about 50 per cent). In the telecommunications sector, 20 per cent only replace after four repair attempts.

90 per cent of the respondents said that a repair takes less than two weeks, and 59 per cent said less than one week.

## **Chapter 4. The new limitation period**

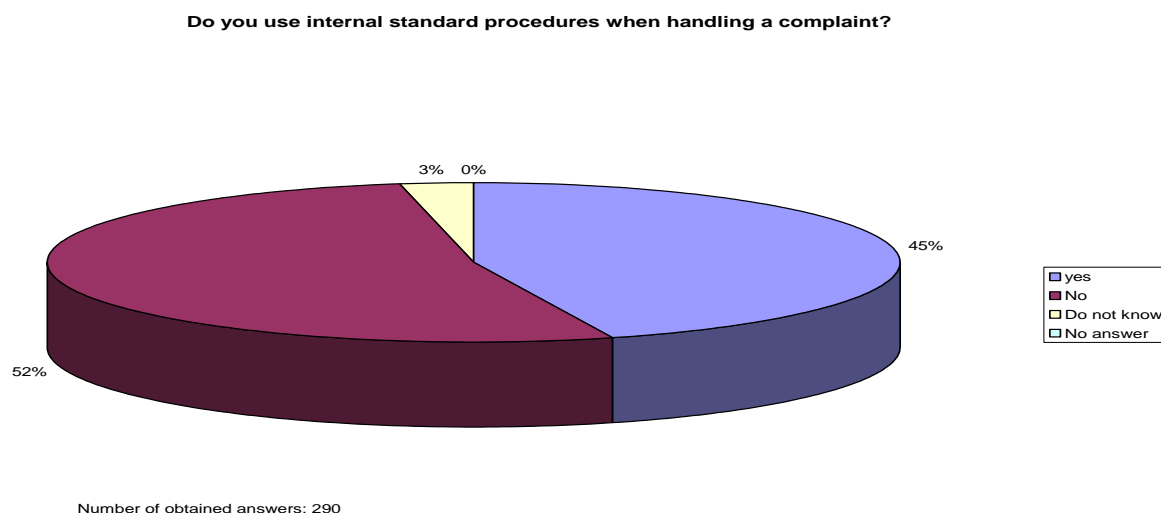
### **4.1. Introduction**

In this chapter, the practical and financial consequences of the changes made to the period for giving notice of non-conformity under the Danish Sale of Goods Act are discussed. The questionnaire included these questions:

- Do you use a standard procedure when handling a complaint?
- Have the consequences of the amendments to the Act been so significant that it has affected these procedures?
- Has the new limitation period resulted in an increase in complaints, and has this had an effect on prices and product range?
- Has there been a considerable increase in the number of complaints considered unjustified (by the retailers)?
- Have retailers been caught in between the two year limitation period regarding consumers and retailer/supplier limitation periods which are not regulated and therefore not necessarily of two years?

## 4.2. Complaints procedures in the businesses

The retailers' complaints procedures can be seen in the below figure.



52 per cent of the respondents say that they do not follow standard procedures (as regards the specific product the questions were centred on), while 45 per cent say that they do follow a certain procedure when handling a complaint.

As it can be seen from the table below, it is particularly in the new cars sector a standard procedure is used. Almost 76 per cent say yes. In the clothing industry (ladies' and men's clothing and shoes) standard procedures are used in more than 50 per cent of the cases. At the other end of the spectre are the used cars sector and the telecommunications equipment sector. In only about one third of the cases standard procedures are used in these sectors.

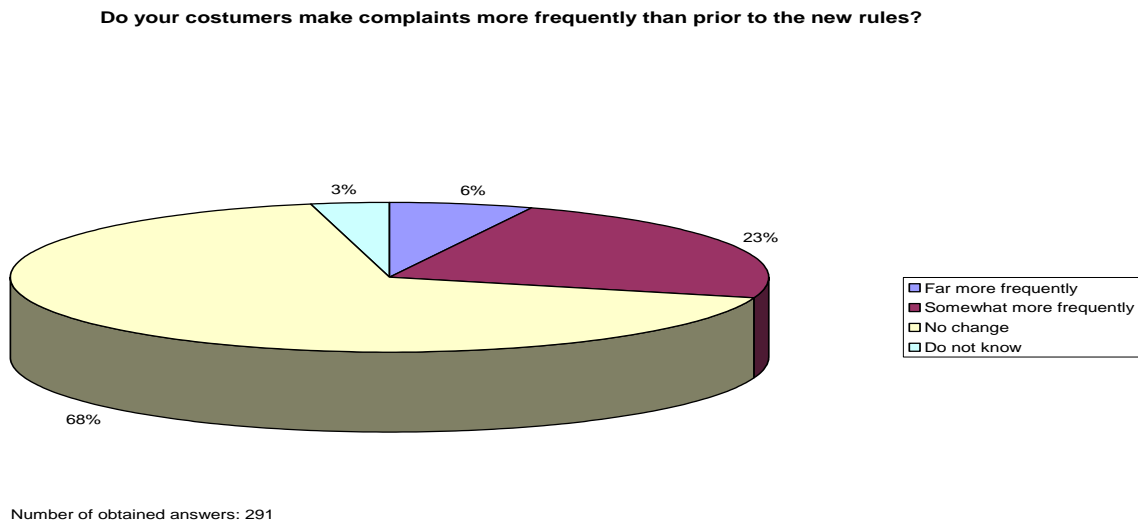
Do you use internal standard procedures when handling a complaint?				
	Ja	Nej	Ved ikke	Total
respondents	44,8 %	52,4 %	2,8 %	290
Used cars	31,8 %	59,1 %	9,1 %	22
New cars	75,9 %	24,1 %	0,0 %	29
Computers and standard software	35,9 %	59,4 %	4,7 %	64
Electrical household appliances	34,8 %	65,2 %	0,0 %	23
Furniture	40,6 %	59,4 %	0,0 %	32
Radio and television	39,5 %	52,6 %	7,9 %	38
Ladies' and men's clothing	54,5 %	45,5 %	0,0 %	33
Shoes	56,3 %	43,8 %	0,0 %	32
Telecommunications equipment	35,3 %	64,7 %	0,0%	17

The retailers were also asked to describe their standard procedures and asked whether they have made any changes to these. The answers demonstrate that the handling of complaints in the studied sectors vary according to the nature of the goods. However, in all the sectors, the general case is that a complaint is handled by the person receiving it and that only in few cases the existing standard procedures have been changed as a result of the new rules in the Sale of Goods Act.<sup>40</sup>

### 4.3. Changes in the number of complaints

The below pie chart shows the answers to the question: Do your customers make complaints more frequently than prior to the new rules?

As can be seen, six per cent state that their customers make complaints far more frequently, while 23 per cent state that their customers make complaints somewhat more frequently. 68 per cent of the 291 answers, perhaps a surprisingly large percentage, say that they have not noticed any change in the frequency of complaints, compared with before.



The below table shows that particularly in the telecommunications sector a significant increase has been noted. In this sector, just under 24 per cent say that their customers make complaints far more

<sup>40</sup> However, it may be noted that following the amendments to the Act certain industry organisations have made complaints guidelines for retailers. One example hereof is the radio and television sector, which utilises BFE's complaints guide. Complaints guidelines have also been devised in the new and used cars sectors as well as the shoe sector for the members of the respective industry organisations.

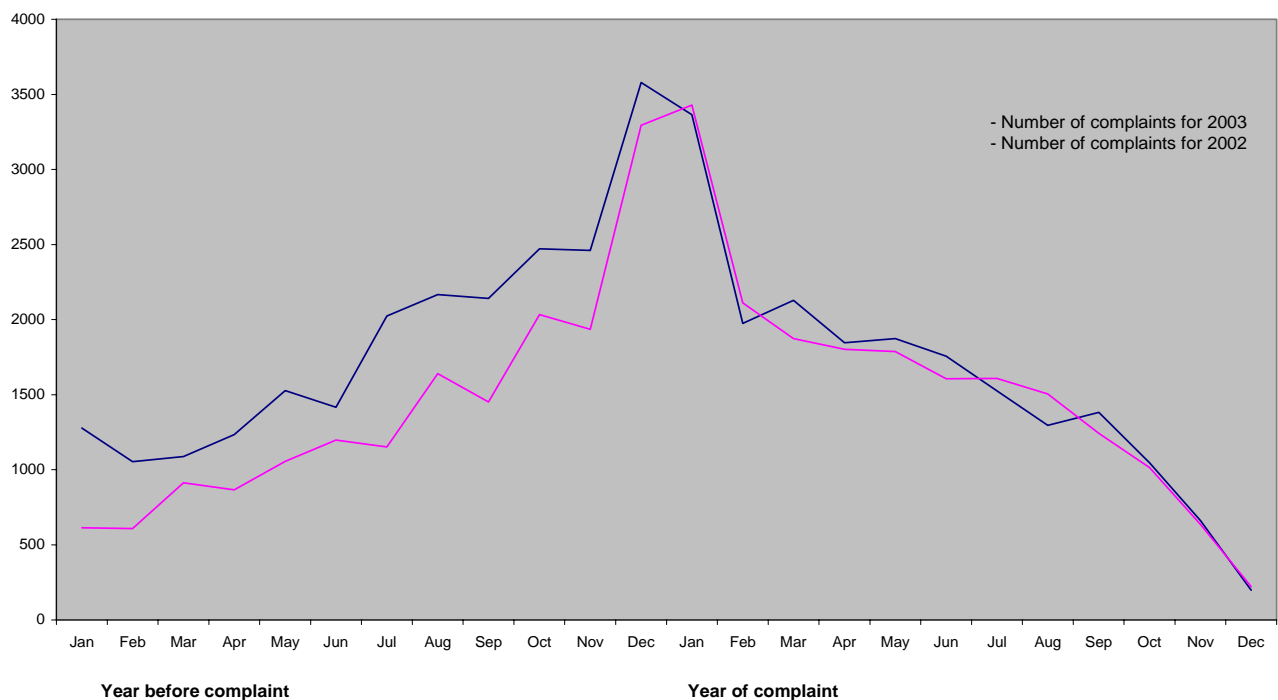
frequently than before, and another 24 per cent say that complaints are made somewhat more frequently than before. There has also been a relatively large increase in the number of complaints in the furniture sector in that almost half of the respondents from that sector have noticed an increase after the new rules entered into force.

Do your customers make complaints more frequently than prior to the new rules?					
	Far more frequently	Somewhat more frequently	No change	Do not know	Total
All respondents	6,2 %	23,4 %	67,0 %	3,4 %	291
Used cars	9,1 %	31,8 %	50,0 %	9,1 %	22
New cars	0,0 %	37,9 %	62,1 %	0,0 %	29
Computers and standard software	3,1 %	16,9 %	76,9 %	3,1 %	65
Electrical household appliances	4,3 %	17,4 %	78,3 %	0,0 %	23
Furniture	12,5 %	28,1 %	53,1 %	6,3 %	32
Radio and television	5,3 %	15,8 %	71,1 %	7,9 %	38
Ladies' and men's clothing	0,0 %	24,2 %	72,7 %	3,0 %	33
Shoes	9,4 %	25,0 %	65,6 %	0,0 %	32
Telecommunications equipment	23,5 %	23,5 %	52,9 %	0,0 %	17

In the used cars sector, however, the increase is not much above average. Less than ten per cent say that the customers now make complaints far more frequently.

This of course raises the question of how large the increases actually are when the respondents choose *far more* frequently and *somewhat more* frequently. We can give some details on this as regards one sector. The BFE suppliers, whose products belong in the radio and television sector in our categorising, and whose products include televisions, radios, DVDs, videocassette recorders, discmen, ghettoblasters and video cameras, have provided us with figures on the number of complaints before and after the amendments to the Act. The below graph is based on figures obtained from the repair facilities that repair consumer electronics and concerns complaints in which the goods have been either repaired or replaced. When comparing the two graphs, the effect of the extension of the limitation period from one to two years can be identified. The top graph shows complaints in 2003; as regards these, the extension of the limitation period from one to two years was had entered into force as the two year period was effective for sales made on and after 1 January 2002. The bottom graph shows complaints in 2002; as regards these, the two year limitation period only applied to sales made in 2002. The distance between the two graphs is then a measure of the impact of the amendments to the Act. More accurately, regarding complaints made in 2003 (at some point during the year; unfortunately, the exact times of the complaints are unknown), the top graph shows when the respective products were sold. The top graph has its starting point in

January 2002; the first point on the graph, furthest to the left, shows how many of the goods concerning which complaints were made in 2003 were sold in January 2002. The bottom graph shows how many complaints were made during 2002; this graph also goes two years back in time, which means that its starting point is January 2001. The distance between the two graphs gives a picture of the effect of the change to the limitation period. For goods sold in January 2001 (indicated by the first point on the below graph), complaints could not be made during the remaining 11 months of 2002, but for goods sold in January 2002 (indicated by the first point on the top graph), complaints could be made during all of 2003. Therefore, it is no surprise that the 2003 graph is above the 2002 graph as regards the first half of the graph since the old limitation period applied to goods sold in 2001, while the new one applied to goods sold in 2002.



It is also no surprise that the graphs are alike as regards complaints made in the same year as the respective goods were sold, meaning that the graphs are alike in the right half of the table, as these complaints were not out of time under the previous limitation period either.

The distance between the two graphs in the left half, i.e. for goods sold before (the complaints are made), then illustrates the effect of the extended limitation period.

The total number of complaints rose by 20 per cent from 2002 to 2003. This percentage gives an idea of the effect of the extension, as the rise is due to the fact that complaints more than one year old (meaning that the goods were bought more than one year ago) could not be denied by retailers in 2003, whereas they could be denied in 2002. The basis for arriving at this conclusion is that the number of complaints regarding goods bought within the year of the sale is the same in 2003 and 2002. In the long run, however, the increase resulting from the extension of the limitation period will probably be of more than 20 per cent as the full effect of the extension could not be identified in 2003: A complaint made in March 2003 regarding a product sold in October 2001, for example, would be out of date – not because of the two year limitation period, but because this new rule was only effective for goods sold on and after 1 January 2002. This means that the year 2003 is too close to the implementation of the new limitation period for the 20 per cent increase to give a true picture of the effect of the extended limitation period. The actual effect would have to have been somewhat larger; our estimate is between 20 and 30 per cent.

#### **4.4. The number of unjustified complaints**

From the below pie chart it can be seen how large a percentage of the complaints are considered unjustified by the respondents in the various sectors. It may, of course, be argued that the answers only represent one of the two parties' opinions, and that other answers would be given if consumers and not retailers were asked. This is probably correct, and the figures should be interpreted with this in mind. It is, though, also worth noting that the obtained answers vary from sector to sector, and that in some sectors retailers believe that the number of unjustified complaints is low.

The answers showed the following: In the sector for computers and standard software, a very large percentage of the complaints are considered unjustified: 30-40 per cent. This is at a level similar to the levels in the telecommunications and used cars sectors.

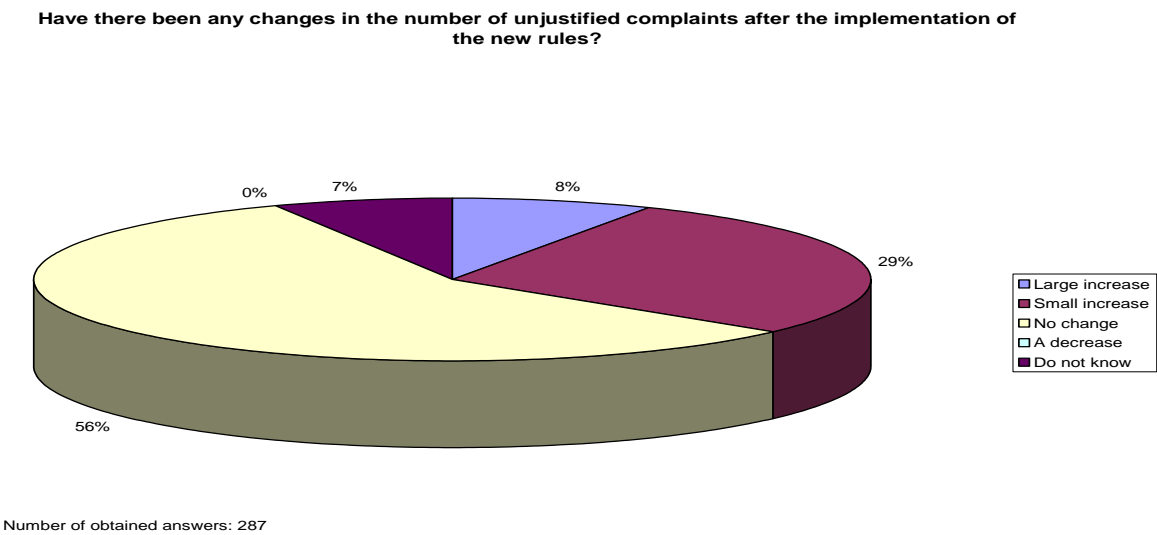
The levels in the sectors for furniture, ladies' and men's clothing and shoes are also high – generally between 20 and 30 per cent – but below those of the above-mentioned sectors. In the radio and television sector, the new cars sector and the electrical household appliances sector the percentage



is generally between 0 and 20 per cent, so in these sectors the retailers think that there is a low percentage of unjustified complaints.

The below pie chart shows the change in the number of complaints considered unjustified by the retailers.

Eight per cent of 287 respondents state that there has been a large increase in the number of unjustified complaints, while 29 per cent have noted a small increase. 56 per cent of the respondents say that there has been no change, while seven per cent of the respondents have not noticed whether there have been any changes.



When these aggregated figures are compared with the corresponding figures for the number of complaints, it can be noted that the rise in the number of complaints considered unjustified by the retailers is a little higher than the rise in the number of complaints. 29.6 per cent say that there had been a few or many more complaints, while 37 per cent say that there has been a small or a large increase in the number of complaints considered unjustified.

The changes in the individual sectors can be seen in the below table.

In the sector for telecommunications equipment, a significant increase has been noted in the number of complaints considered unjustified by the retailers. Almost 24 per cent of the respondents from

this industry believe that there has been a large increase and just under 41 per cent believe that there has been a small increase.

In the used cars sector, 19 per cent of the respondents state that there has been a large increase, and 38 per cent say a small increase.

Also, in the shoe sector, the noted increase is above average.

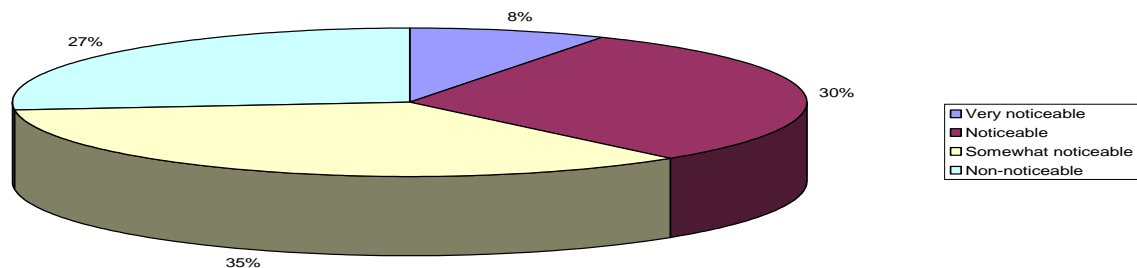
Have there been any changes in the number of unjustified complaints after the implementation of the new rules?						
	Large increase	Small increase	No change	A decrease	Do not know	Total
All respondents	7,7 %	28,6 %	56,8 %	0,0 %	7,0 %	287
Used cars	19,0 %	38,1 %	33,3 %	0,0 %	9,5 %	21
New cars	0,0 %	46,4 %	50,0 %	0,0 %	3,6 %	28
Computers and standard software	4,6 %	20,0 %	67,7 %	0,0 %	7,7 %	65
Electrical household appliances	4,3 %	17,4 %	73,9 %	0,0 %	4,3 %	23
Furniture	9,4 %	25,0 %	50,0 %	0,0 %	15,6 %	32
Radio and television	5,3 %	23,7 %	60,5 %	0,0 %	10,5 %	38
Ladies' and men's clothing	0,0 %	25,0 %	68,8 %	0,0 %	6,3 %	32
Shoes	16,1 %	38,7 %	45,2 %	0,0 %	0,0 %	31
Telecommunications equipment	23,5 %	41,2 %	35,3 %	0,0 %	0,0 %	17

A complaint can be unjustified either on the grounds that the consumer has been careless with the product or has put it to improper use, or on the grounds that the consumer has mistaken his rights. The answers show that the respondents believe that both kinds of unjustified complaints are made; respondents from all of the studied sectors state that many customers do not use the purchased product as prescribed, and that many complaints could be prevented if customers were to read the instruction manuals. Also, many believe that customers often confuse their right to make a complaint with a guarantee, which may complicate the handling of the complaint.

#### 4.5. How significant is the rise in costs?

As an addition to the previous question, the respondents that had noticed an increase in the number of complaints were asked whether they were expecting this increase to result in the rise in costs being very noticeable, noticeable, somewhat noticeable or non-noticeable. Overall, the answers suggest that costs will be affected, but few (eight per cent) estimate the effect to be very noticeable, and 27 per cent believe that the rise in costs will not be noticeable. The majority expect the rise in costs to be either somewhat noticeable or noticeable.

**If your costumers make more complaints now, do you then expect that the increase in the number of complaints will result in a rise in the costs which is:**



number of obtained answers: 184

This general picture conceals the variations between the sectors. As it appears from the below table, a relatively large percentage from the telecommunications sector expects a significant increase. More than one in four (about 27 per cent) expect a very noticeable rise in costs, while 37 per cent expect a noticeable rise. That it is in this sector the largest rise in costs is expected is consistent with the largest increase in the number of claims being noted in this sector, see above.

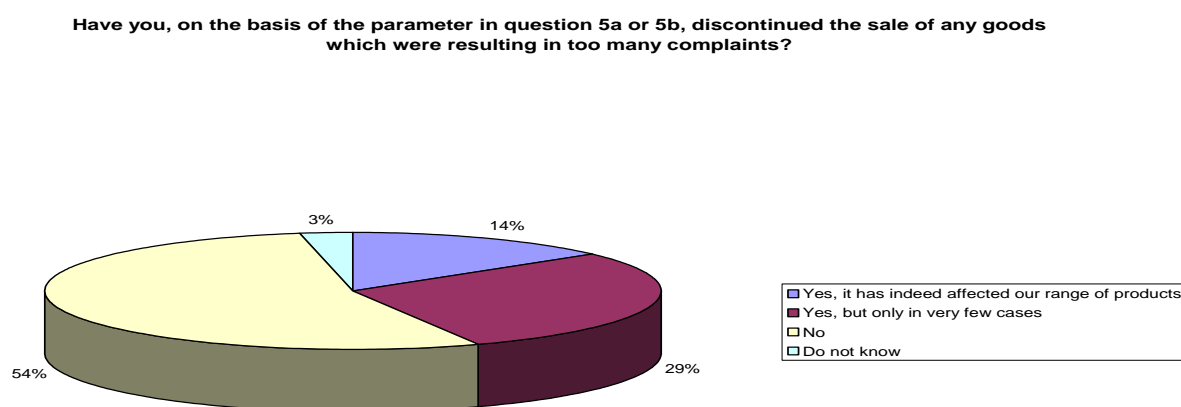
The table also shows that few retailers in the sectors in which there has not been a significant increase in the number of complaints, e.g. the ladies' and men's clothing sector, expect very noticeable rises in the level of costs. It is to be expected that even for those of the retailers in these sectors who have noticed an increase in the number of complaints the increase has not been significant enough for it to have a very noticeable impact on the level of costs. More than 90 per cent of the respondents from the ladies' and men's clothing sector only expect increases in costs to be somewhat noticeable or even non-noticeable.

If your customers make more complaints now, do you then expect that the increase in the number of complaints will result in a rise in costs which is:					
	Very noticeable	Noticeable	Somewhat noticeable	Non-noticeable	Total
All respondents	8,2 %	30,4 %	34,8 %	26,6 %	184
Used cars	5,9 %	29,4 %	29,4 %	35,3 %	17
New cars	4,5 %	31,8 %	27,3 %	36,4 %	22
Computers and standard software	9,5 %	28,6 %	35,7 %	26,2 %	42
Electrical household appliances	8,3 %	41,7 %	25,0 %	25,0 %	12
Furniture	14,3 %	14,3 %	42,9 %	28,6 %	21
Radio and television	4,5 %	50,0 %	27,3 %	18,2 %	22
Ladies' and men's clothing	0,0 %	9,5 %	57,1 %	33,3 %	21
Shoes	6,3 %	43,8 %	31,3 %	18,8 %	16
Telecommunications equipment	27,3 %	36,4 %	27,3 %	9,1 %	11

#### 4.6. Has the increase in costs resulted in a change in the range of products?

Naturally, some goods have more defects than other goods and therefore result in more complaints being made. This brings about the question of whether retailers have discontinued the sale of some of these goods in order to limit the costs connected with complaints.

The pie chart below shows that 14 per cent say that it has indeed affected the range of products, and that 29 per cent say that they have discontinued the sale of products in very few cases. So just under half of the respondents have changed their range of products as a consequence of the new rules, which at the same time means that just over half (54 per cent) of the 275 respondents have not made any changes.



Number of obtained answers: 275

The changes in the range of products in the individual sectors are shown in the below table. Generally, there is no great divergence between the individual sectors and the overall situation. It is, however, worth mentioning the used cars sector. More than 59 per cent of the used cars dealers have changed their product ranges as a result of the rise in costs for the handling of complaints. For most of these, though, it has only had an effect on the product range in very few cases. Some say that very cheap cars have been discontinued, while others say that more dealers now only sell used cars to other dealers (which means that the sale becomes a sale between merchants, and, consequently, that the two year limitation period is not a mandatory rule).

Have you, on the basis of the parameter in question 5a or 5b, discontinued the sale of any goods which were resulting in too many complaints?					
	Yes, it has indeed affected our range of products	Yes, but only in very few cases	No	Do not know	Total
All respondents	14,2 %	29,1 %	53,8 %	2,9 %	275
Used cars	22,7 %	36,4 %	31,8 %	9,1 %	22
New cars	11,5 %	19,2 %	69,2 %	0,0 %	26
Computers and standard software	18,8 %	39,1 %	39,1 %	3,1 %	64
Electrical household appliances	18,2 %	18,2 %	59,1 %	4,5 %	22
Furniture	16,1 %	19,4 %	64,5 %	0,0 %	31
Radio and television	12,5 %	28,1 %	56,3 %	3,1 %	32
Ladies' and men's clothing	6,3 %	28,1 %	59,4 %	6,3 %	32
Shoes	10,0 %	30,0 %	60,0 %	0,0 %	30
Telecommunications equipment	6,3 %	31,3 %	62,5 %	0,0 %	16

From the ladies' and men's clothing sector it is told that goods resulting in too many complaints are returned to the company (the producer), and that goods whose useful lives normally do not exceed two years have been discontinued.

The shoe sector states that several very cheap products have been discontinued. In the computer and standard software sector, it is also mentioned that low price products have been discontinued. However, in some comments it is stressed that in this sector certain products are so popular that the retailers simply cannot discontinue them. One possible consequence of this is that retailers end up being caught in between the two limitation periods; more on this in the next section.

#### **4.7. Caught between consumer and non-consumer sales complaints**

The questionnaire survey was also concerned with finding out whether retailers are caught in between the mandatory two year limitation period in the Danish Sale of Goods Act and the period

agreed with the producer in question, the length of which is not regulated. The question posed was how long a period the retailer has to make a complaint against the producer. As can be seen from the table below, this period differs from sector to sector.

How long a period do you have to make a complaint against your supplier?			
	0-24 months	24 months or more	Number of obtained answers/answers in total*
All respondents	46,0 %	54,0 %	202/291
Used cars	72,7 %	27,3 %	11/22
New cars	31,6 %	68,4 %	19/29
Computers and standard software	48,0 %	52,0 %	50/65
Electrical household appliances	16,7 %	83,3 %	18/23
Furniture	35,0 %	65,0 %	20/32
Radio and television	44,4 %	55,6 %	27/38
Ladies' and men's clothing	70,0 %	30,0 %	20/33
Shoes	42,3 %	57,7 %	26/32
Telecommunications equipment	72,7 %	27,3 %	11/17

\*This question received a relatively low response rate. The reason for this is that many said that it differs from supplier to supplier. These answers have not been included. Especially in the used cars sector, the response rate was very low, which is probably explained by the fact that the majority of used cars are bought from consumers, e.g. when cars are swapped as a part of a deal.

In total, 46 per cent of the respondents have less than two years in which they can make complaints against their suppliers, which means that retailers could be caught in between the two limitation periods. There seems to be a particularly large risk of this being the case in the telecommunications equipment sector, as almost three in four of these retailers have less than two years in which they can make complaints. For the vast majority of the respondents from the clothing sector this period is also of less than two years. This might be explained by the seasonal character of this sector.

In conclusion, these figures suggest that some retailers are indeed caught in between. It has, however, been difficult to determine exactly how many.

#### **4.8. Brief summary of the consequences of the extension of the limitation period**

In brief, the overall conclusion that can be drawn from the above results is that seemingly the change in the limitation period has had noticeable, but not very noticeable and certainly not

dramatic consequences.<sup>41</sup> The consumer electronics sector, which is quite average as regards the increase in the number of complaints and the resulting rise in costs, has had a more than 20 per cent increase in the number of complaints, probably between 20 and 30 per cent.

Generally speaking, the number of complaints considered unjustified by the retailers has risen a little more than has the number of complaints, percentage-wise.

The rise in costs resulting from the growth in complaints (both those considered justified and those considered unjustified by the retailers) has been noticeable, but not very noticeable, and has resulted in not insignificant changes to the range of products.

## **Chapter 5. Manufacturer's guarantee and extended warranty insurance**

A few questions concerned with manufacturer's guarantees and extended warranty insurances have been included in this study. Even though the rules that govern these issues have not been affected directly by Act no. 213/2002, the amendments to the Danish Sale of Goods Act have had an indirect impact on the application of manufacturer's guarantees and extended warranty insurances.

### **5.1. Manufacturers' guarantees**

In the present case, we are concerned with manufacturers' guarantees of the sort where the producer (or importer etc.) of a specific product has committed himself to remedying any defects in the product for a certain period after the sale, as regards consumers. In such cases, the contract, which together with the rules of the Danish Sale of Goods Act govern seller/consumer relations, is supplemented by this particular guarantee commitment, which gives the consumer certain rights towards the producer etc. of the product. Even if the guarantee then gives the consumer certain rights towards other players than the seller, in practice, it is often the seller who handles complaints under this guarantee on behalf of the producer and at his expense. Where the producer's guarantee is of two years, which means that it is identical to the limitation period in the Danish Sale of Goods

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<sup>41</sup> For comparison, it may be worth mentioning that the extended limitation period has had a very modest impact in Danish Consumer Complaints Board cases. In *Forbrugerredøgørelsen* 2004, p. 56, it is stated that the extension of the limitation period only made a difference in 1.5 per cent of all cases in 2003.

Act, the seller does not risk being caught in between the consumer and the producer.<sup>42</sup> Moreover, manufacturers' guarantees entail an advantage to the consumer as regards proof as these guarantees are typically interpreted in such a way that a presumption rule corresponding to that of s. 77a(3) of the Danish Sale of Goods Act applies to all of the guarantee period.<sup>43</sup> From the point of view of the producer, offering such special guarantees (in addition to the producer's obligations towards retailers under the law pertaining to the sale of goods)<sup>44</sup> entails a marketing advantage in that the use of the word "guarantee" by experience has the same special appeal that other words of promise (e.g. "free of charge"/"complimentary") within the world of marketing have.

Prior to the amendments to the Act, manufacturers' guarantees were typically of one year, which corresponded to the then governing limitation period. Under s. 4(1) of the Danish Marketing Act, the word "guarantee" may only be used about a statement that gives a considerably improved legal position than that resulting from the current legislation. As, in relation to s. 4(1) of the Marketing Act, it is generally problematic to use the word "guarantee" about commitments to repair that are valid for a shorter period than the two year limitation period,<sup>45</sup> it might be expected that the amendments to the Sale of Goods Act would result in a reduction in the number of manufacturers' guarantees of the kind mentioned above.

On this basis, the questionnaire included the following question:

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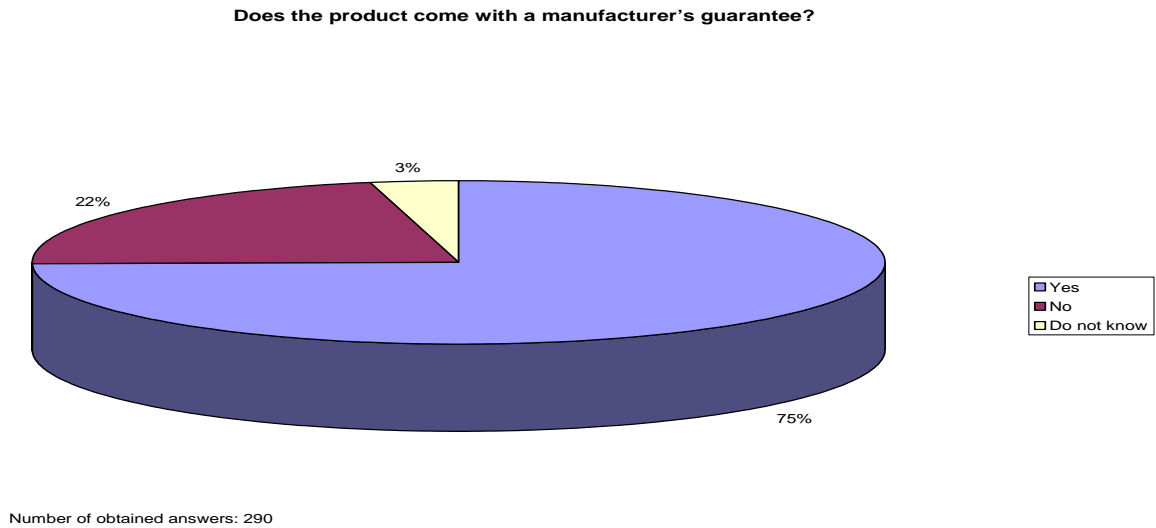
<sup>42</sup> See chapter 4 for more on this subject.

<sup>43</sup> See chapter 3 for more on this subject.

<sup>44</sup> See chapter 4.7. for more on this subject.

<sup>45</sup> See the Danish Consumer Ombudsman's guidelines on the use of guarantees towards consumers in advertisements and contract terms, June 2003: "When giving guarantees on *new goods*, the guarantee period must in general be *considerably* longer than the two year limitation period of the Danish Sale of Goods Act. The legal position of a buyer may, however, due to the content of the guarantee under certain circumstances be considered considerably improved, compared with the consumer's legislative rights, even if the guarantee period-wise is limited to or does not considerably exceed the legal limitation period. This is the case for example where goods that cannot be expected to last for two years are concerned. As regards durable consumer goods, which are expected to last for at least two years, a two year guarantee will normally not be regarded as giving consumers a considerably improved legal position. From the viewpoint of consumers, it would be desirable if an actual guarantee – a voluntary option – were to last longer than the actual useful life of the product in question."





It should be noted that introductorily the respondents were asked to have a specific product in mind when answering the questionnaire. As the answers assumingly only relate to these specific products, it is not possible to generalise about the existence of manufacturers' guarantees on this basis. The answers do, though, show certain trends.

The above pie chart shows that 75 per cent say that manufacturers' guarantees come with the products in question in the studied sectors. It would seem that this figure is too large, as at least in some sectors it must be assumed that manufacturers' guarantees are not as common any longer as the answers would suggest;<sup>46</sup> the explanation to this might be that many of the respondents have equalled manufacturers' guarantees (between producer etc. and consumer) and the complaint the retailer can make towards his supplier.<sup>47</sup>

The table below shows the extent to which manufacturers' guarantees exist in the individual industries.

<sup>46</sup> Below, the radio and television sector and the electrical household appliances sector are looked at closer.

<sup>47</sup> Unfortunately, the question was not clear in its wording.

Does the product come with a manufacturer's guarantee?				
	Yes	No	Do not know	Total
All respondents	74,8 %	21,7 %	3,4 %	290
Used cars	0,0 %	95,2 %	4,8 %	21
New cars	93,1 %	6,9 %	0,0 %	29
Computers and standard software	87,7 %	9,2 %	3,1 %	65
Electrical household appliances	100,0 %	0,0 %	0,0 %	23
Furniture	68,8 %	28,1 %	3,1 %	32
Radio and television	92,1 %	7,9 %	0,0 %	38
Ladies' and men's clothing	57,6 %	27,3 %	15,2 %	33
Shoes	59,4 %	37,5 %	3,1 %	32
Telecommunications equipment	88,2 %	11,8 %	0,0 %	17

The respondents were also asked about the guarantee period. In the vast majority of the cases, the guarantees are of two years or more. Almost all respondents from the shoe sector said that the shoes concerning which they based their answers were covered by a two year manufacturer's guarantee. As stated, this probably does not apply to the sector in general. Likewise, the large percentages registered in the electrical household appliances sector and in the furniture sector do not seem realistic.

From the comments to the question it may be concluded that despite a thorough information effort there are still terminology difficulties in many industries. In several industries, in particular as regards electrical household appliances, it appears to be quite common for retailers to equal "guarantee" and "right to make a complaint".<sup>48</sup> This is confirmed by information received from FEHA, showing that the one year manufacturer's guarantee on electrical household appliances which was common until 2002 no longer exists in the framework of FEHA, which means the majority of the industry, as the two year right to make a complaint is now only used. That the answers show that there is a manufacturer's guarantee on the products in question in 100 per cent of the cases as regards this sector can be perceived as misleading as it may be assumed that these cases include cases in which what was thought of was the right under the Sale of Goods Act.

Similarly, data from BFE shows that a one year industry guarantee was common in the radio and television sector until 2002. In BFE affiliated shops, consumers are no longer offered an industry guarantee, as this arrangement has been replaced by a lack of conformity scheme in the audio and video industry, which now governs retailer/supplier dealings. The purpose of this scheme is to put

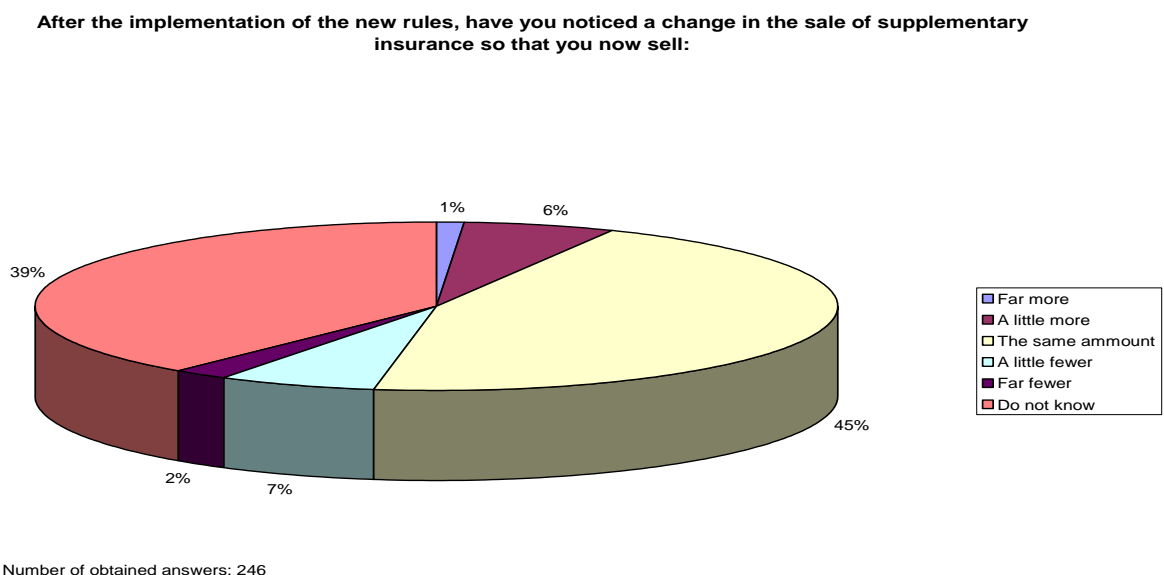
<sup>48</sup> Few say that they offer a "six months' guarantee + 18 months' right to make a complaint", which means that they probably equal "guarantee" with the presumption rule in s. 77a(3) of the Sale of Goods Act.

retailers in the same position towards their suppliers that consumers are in towards retailers under the Sale of Goods Act. Even though individual arrangements do exist, under which the individual suppliers give retailers more rights than they have under the industry scheme, it is questioned whether more than 90 per cent of the products in question in this industry are covered by a manufacturer's guarantee, which the answers suggest.

## 5.2. Supplementary insurance

Supplementary insurance, by way of which the buyer pays to have a higher level of protection than is offered under the Danish Sale of Goods Act against specific defects in a product or damage done to it, are not governed by the Act. It might be expected that the new rules, not least the extension of the limitation period from one to two years, would result in a fall in the sale of supplementary insurance. The immediate assumption would be that an improvement to consumer protection would reduce the need for further insurance.

Consequently, the questionnaire contained this question:



Many respondents refrained from answering this question, which primarily must be explained by many respondents not offering supplementary insurance. The same is the case in most of the other studied sectors. Those who did answer the question mainly said that there has not been a change in

the amount of supplementary insurance sold. Only 9 per cent of the respondents, or 22 persons, have noticed a fall. Oppositely, almost the same amount of people says that they have noticed a rise.

Divided into sectors, the percentages are as follows:

After the implementation of the new rules, have you noticed a change in the sale of supplementary insurance so that you now sell:							
	Far more	A little more	The same ammount	A little fewerfærre	Far fewer	Do not know	Total
All respondents	1,2 %	6,1 %	45,1 %	6,5 %	2,0 %	39,0 %	246
Used cars	0,0 %	4,8 %	66,7 %	0,0 %	0,0 %	28,6 %	21
New cars	0,0 %	4,0 %	60,0 %	4,0 %	0,0 %	32,0 %	25
Computers and standard software	1,8 %	7,0 %	52,6 %	7,0 %	1,8 %	29,8 %	57
Electrical household appliances	0,0 %	22,7 %	54,5 %	0,0 %	4,5 %	18,2 %	22
Furniture	0,0 %	4,0 %	28,0 %	0,0 %	0,0 %	68,0 %	25
Radio and television	5,4 %	8,1 %	45,9 %	21,6 %	8,1 %	10,8 %	37
Ladies' and men's clothing	0,0 %	0,0 %	19,2 %	3,8 %	0,0 %	76,9 %	26
Shoes	0,0 %	0,0 %	29,4 %	0,0 %	0,0 %	70,6 %	17
Telecommunications equipment	0,0 %	0,0 %	37,5 %	12,5 %	0,0 %	50,0 %	16

The table reveals that the electrical household appliances sector and the radio and television sector have noted an increase which is quite a bit above average.

It is noteworthy that at the same time the number of respondents in the radio and television sector who have seen a fall in the sale of supplementary insurance is also much higher than the average for the sectors. So it is not possible to make any general conclusions based on figures from this sector. Some of the shopkeepers who now sell more insurance add that this is due to the media's vast coverage of the problems connected with the new rules.

In comments made in other sectors, it is pointed out that the fall is not explained by the new rules but by home contents policies having a better coverage than earlier.

As mentioned, it is noticeable that there has in fact been an increase in the sale of supplementary insurance in some of the above-mentioned sectors. Part of the reason may be that consumers

possibly doubt what the new rules entail.<sup>49</sup> Another factor might be that the requirements connected with using the term “guarantee” have been increased.<sup>50</sup> It is feasible that this has led to supplementary insurance replacing the guarantees previously in place.

As previously mentioned, confusion about the new rules may have led to some consumers doubting their rights, and therefore taking out unnecessary insurance. So the quality of the information provided to consumers about the new rules is questionable, as is the wording of the rules regarding how comprehensible they are. It may also be doubted if the shops that sell supplementary insurance understand the content of the new rules, and whether they have informed customers correctly of the state of the law. It would appear that the introduction of the presumption rule in s. 77a(3) has been misunderstood as bringing about a tightening of the requirements as to proof on the part of consumers when more than six months have past, meaning that in certain parts of the retail trade there seems to be a tendency to “conclude conversely” from the presumption rule. This means that the understanding is that under the new rules the consumer’s burden of proof is very heavy after six months, cf. chapter 2. This interpretation is confirmed by the below example of a Danish national chain’s wording of the new rules, found in the chain’s insurance sales promotion material:

“On 1 January 2002, the Sale of Goods Act was amended, and the period within which notice must be given of any defects in the product was changed from 12 to 24 months.

As before, it is up to the customer to prove any defect in or lack of conformity of a product, but the introduction of a so-called presumption rule for the first six months after the sale means that [*the chain*] covers during the first six months. After the first six months, the presumption rule does not apply, which means that it is then up to the customer to prove that a defect existed at the time of delivery, or that there was a lack of conformity.

If you take out Service Insurance with [*the chain*], this becomes effective when the presumption period ends.”

Less dramatic descriptions of the presumption rule are also found, however:

“Giving notice of defects and getting a product repair

In 2002 the Sale of Goods Act was amended. The period within which notice must be given of any defects in a product was extended from 12 to 24 months. The concept “presumption period” was

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<sup>49</sup> This is confirmed in a survey made by the opinion research institute Megafon for the public consumer information service Forbrugerinformationen. The survey showed that half of the Danish consumers do not know how long the limitation period is. The survey is mentioned in a newsletter from Forbrugerinformationen dated 24 April 2003.

<sup>50</sup> See chapter 5.1. for more on this.

introduced. In practice, this means that the seller is liable for any defect or lack of conformity which becomes apparent within the first six months, unless there are signs of such defect or lack of conformity having been caused by the buyer. After the expiration of the presumption period, there is a change in this. Then it is up to the buyer to prove that the defect existed at the time of purchase, if the seller is to accept the complaint. This does not mean that you as a consumer must prove that there is a defect. [*The Seller*] will of course assist with a professional assessment, which – if found necessary – will be made at our repair facility. [*The Seller*] can deny the complaint if it is not technically possible to find the source of the defect.”

In conclusion, against expectation the questionnaire survey shows that in general the extension of the limitation period has not resulted in a noticeable reduction in the sale of supplementary insurance, and that surprisingly enough some retailers in some of the studied sectors (the electrical household appliances sector and the radio and television sector) have sold more supplementary insurance.