



# **The Law Commission and The Scottish Law Commission**

(LAW COM No 317)

(SCOT LAW COM No 216)

## **CONSUMER REMEDIES FOR FAULTY GOODS**

*Presented to the Parliament of the United Kingdom by the Lord Chancellor  
and Secretary of State for Justice*

*by Command of Her Majesty*

*Laid before the Scottish Parliament by the Scottish Ministers*

*November 2009*



The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 28 September 2009.

**The text of this report is available on the Internet at:**

[http://www.lawcom.gov.uk/consumer\\_remedies.htm](http://www.lawcom.gov.uk/consumer_remedies.htm)

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<sup>1</sup> Mr Kenneth Parker QC's term of appointment as Law Commissioner came to an end on 30 September 2009.

<sup>2</sup> Mr Colin J Tyre QC's term of appointment as Scottish Law Commissioner came to an end on 30 September 2009.

**THE LAW COMMISSION  
THE SCOTTISH LAW COMMISSION**

**CONSUMER REMEDIES FOR FAULTY GOODS**

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## **LIST OF ABBREVIATIONS USED IN THIS REPORT**

BERR	Department for Business, Enterprise and Regulatory Reform
BIS	Department for Business, Innovation and Skills
CSD	Directive 1999/44/EC of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 OJL 171 12-16
DTI	Department of Trade and Industry
FDS	FDS International Limited
OFT	Office of Fair Trading
SoGA	Sale of Goods Act 1979

**THE LAW COMMISSION  
AND  
THE SCOTTISH LAW COMMISSION**

**CONSUMER REMEDIES FOR FAULTY GOODS**

**SUMMARY**

- 1.1 This Report looks at the remedies available to consumers when they buy goods which do not conform to contract. The central question is: when should a consumer be entitled to reject goods and receive a refund of the purchase price, as opposed to other remedies such as repair and replacement?
- 1.2 The most common examples of non-conforming goods are faulty goods (that is, goods which are not of satisfactory quality), such as domestic appliances which do not work. We therefore use the term “faulty goods” as a short hand for “non-conforming goods”. However, goods may fail to conform when they breach one of the terms implied by statute or an express term of the contract.<sup>1</sup> The terms implied by statute are that goods must, for example, be of satisfactory quality, fit for purpose, and correspond to their description.<sup>2</sup>
- 1.3 Whilst buying faulty goods is a problem that millions of consumers face every year without legal advice, the law is complicated. There are effectively two legal regimes which co-exist: the traditional UK remedies; and the European remedies, based on the 1999 Consumer Sales Directive (CSD). Our aim is to clarify and simplify these remedies.

**Background**

- 1.4 In December 2007, the Department for Business, Enterprise and Regulatory Reform<sup>3</sup> asked us to review this area, and we issued a joint Consultation Paper in November 2008.
- 1.5 In October 2008, the European Commission published a proposal for a new consumer rights directive which would (among other things) reform the law on consumer remedies. The proposed directive has been drafted as a measure of “maximum harmonisation”, which would mean that member states could not maintain or adopt provisions diverging from those it lays down.
- 1.6 Our Report makes recommendations on our system of remedies, in the light of the proposed directive. We put our recommendations forward as part of the current debate within the EU about the proposed directive, and with the aim of improving the remedies in it.

<sup>1</sup> Sale of Goods Act 1979 (SoGA), s 48F.

<sup>2</sup> The implied terms are set out in this Report at para 2.6.

<sup>3</sup> The Department for Business, Enterprise and Regulatory Reform is now the Department for Business, Innovation and Skills (BIS).

- 1.7 As well as forming part of the European debate, it may be possible to implement some of our recommended reforms in the UK only, provided that the proposed directive (or relevant parts) is adopted as a measure of “minimum harmonisation”. Minimum harmonisation means that member states may maintain or adopt measures which give greater rights.
- 1.8 Below, we briefly summarise the current law. We then summarise our main recommendations, setting out the relevant paragraphs of the Report in brackets for those who wish to read more.
- 1.9 We are publishing, alongside this Report, an Impact Assessment which is available on our websites at [www.lawcom.gov.uk](http://www.lawcom.gov.uk) and [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk). It discusses the costs and benefits of some of the proposals that we have considered.

## **THE CURRENT LAW (Part 2)**

### **The traditional UK remedies**

- 1.10 Put simply, the consumer is entitled to reject faulty goods and terminate the contract.<sup>4</sup> The consumer may then refuse to pay for the goods, or (if they have paid already) claim a full refund. We refer to this as “the right to reject”. However, the right to reject is lost once the consumer is deemed to have accepted the goods, which may happen “after the lapse of a reasonable time”.<sup>5</sup> Thereafter, the consumer is entitled only to damages.
- 1.11 The case law on what amounts to a reasonable time provides little guidance on how long it lasts. In one case a consumer was said to have accepted a new car in less than four weeks;<sup>6</sup> in another, the buyer was entitled to reject a car after seven months.<sup>7</sup>

### **The European remedies – the 1999 Consumer Sales Directive**

- 1.12 In 2002, the Sale of Goods Act 1979 was amended to implement the CSD. There are four new remedies, organised into two tiers. The first tier consists of repair or replacement. The second tier consists of rescission and reduction in price.
- 1.13 Under the CSD regime, the consumer must begin by asking for a first tier remedy, but the trader may provide an alternative, if one is impossible or disproportionate. If the retailer fails to carry out the repair or replacement within a reasonable time or without significant inconvenience to the consumer, the consumer may move to the second tier.

<sup>4</sup> The traditional UK remedies can be found in the Sale of Goods Act 1979.

<sup>5</sup> SoGA, s 35(4). There are three methods of acceptance, described in Part 2 of this Report.

<sup>6</sup> *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220, see para 2.12 of this Report.

<sup>7</sup> *Bowes v Richardson & Son Ltd*, 28 January 2004 (unreported), see para 2.15 of this Report.

- 1.14 In the second tier, where the consumer opts to rescind the contract, the contract comes to an end in a similar way to the right to reject. However, in the case of rescission, the consumer may be required to give some value for the use they have had from the goods.<sup>8</sup> Alternatively, the consumer may opt for a reduction in price: they may keep the goods and receive a discount for their reduced value.
- 1.15 The Sale of Goods Act 1979 now contains both regimes with little integration of the two. The Davidson Review criticised this as an example of “double-banking”, where EU directives are superimposed on domestic legislation, causing complexity and confusion.<sup>9</sup>

### **RETAINING THE RIGHT TO REJECT AS A SHORT-TERM PRIMARY REMEDY** (paras 3.1 – 3.35 and 6.9 – 6.12)

- 1.16 If the European Commission’s proposed directive were adopted as published, on the face of it, the UK would have to repeal the right to reject. This would mean that, if goods proved faulty, the consumer would not initially be entitled to a refund. The retailer could choose to provide either a repair or a replacement.<sup>10</sup>
- 1.17 In our Report, we recommend that the right to reject should be retained in the UK as a short-term remedy of first instance. It is a simple, easy-to-use remedy which inspires consumer confidence. Consumers know that they can get their money back if the product is not as promised, provided they act quickly. This makes them more prepared to try unknown brands and new retailers.

### **What consultees said**

- 1.18 We consulted retailers, manufacturers, consumer groups, and academics. In addition, we commissioned two phases of market research among consumers.<sup>11</sup>
- (1) Generally, retailers and manufacturers accepted the current right to reject as part of the established legal framework in which they operated.
  - (2) Consumer groups argued strongly for retaining the right to reject. They thought it encouraged consumer confidence and higher standards in the quality of goods. It also strengthened the consumer’s bargaining position and stopped them from being trapped in a cycle of failed repairs.

<sup>8</sup> SoGA, s 48C(3). Recital 15 CSD.

<sup>9</sup> Davidson Review, *Final Report* (November 2006), at [www.berr.gov.uk/files/file444583.pdf](http://www.berr.gov.uk/files/file444583.pdf).

<sup>10</sup> The consumer would only be entitled to a refund if the retailer: implicitly or explicitly refused to remedy the fault; failed to remedy the fault within a reasonable time or without significant inconvenience; or if the same fault reappeared more than once within a short period. See proposal for a directive on consumer rights, COM (2008) 614 final, art 26, available at [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm).

<sup>11</sup> FDS’s report of April 2008 is attached to the Consultation Paper at Appendix A. The results of FDS’s quantitative market research of February to March 2009 are summarised in Consumer Remedies for Faulty Goods: A Summary of Responses to Consultation (13 May 2009) Part 9 at [http://www.lawcom.gov.uk/consumer\\_remedies.htm](http://www.lawcom.gov.uk/consumer_remedies.htm).

- (3) Although consumers are generally unaware of their precise legal rights, most are aware that they have a legal right to a refund for faulty goods, and seek it in about 20% of cases where goods are faulty. In research, 94% of consumers said the right to a refund was important to them, and 89% thought it should be retained even though other remedies (repair and replacement) are available.

### **The European debate**

- 1.19 In the context of the proposed directive, the retention of the right to reject in UK law could be achieved in at least three ways. First, the UK would be permitted to retain the right to reject if the proposed directive were adopted as a measure of minimum harmonisation. Alternatively, the proposed directive could be adopted as a measure of maximum harmonisation incorporating the right to reject. A third alternative, which has recently been debated by stakeholders, is “differentiated harmonisation”.<sup>12</sup> This would mean that harmonisation would be targeted at areas of consensus and, for example, the right to reject might fall outside of the scope of maximum harmonisation.

### **CLARIFYING THE RIGHT TO REJECT: A NORMAL PERIOD OF 30 DAYS**

(paras 3.36 – 3.95)

- 1.20 Consultees told us that the problem with the right to reject is uncertainty over how long it lasts. This uncertainty brings complexity to what is intended to be a simple and certain tool. We recommend that in normal circumstances, a consumer should exercise the right to reject within 30 days from the date of purchase, delivery or completion of contract, whichever is later. This would give a reasonable opportunity to inspect the goods and to test them for a short period in actual use.
- 1.21 We think that the introduction of a normal 30-day period for the right to reject will benefit the average consumer by simplifying the law. It is rare for consumers to obtain legal advice for consumer disputes, so the law should be capable of being understood, remembered and asserted by consumers.
- 1.22 At present, consumer advisers are often concerned about advising consumers that they can exercise the right to reject after two weeks. If consumer advisers were able to tell consumers that the standard period was 30 days, it would give consumers greater confidence and reduce the need to rely on ambiguous case law. We also think that our recommendation will assist retailers by providing a simple standard for their staff.
- 1.23 Most consultees agreed that the 30-day normal period should apply with limited exceptions, in order to strike an acceptable balance between flexibility and certainty. We recommend that the 30-day period should have some flexibility in limited circumstances. A shorter period would be appropriate where goods are of a type expected to perish within 30 days. A longer period would be appropriate where it was reasonably foreseeable at the time of the sale that the consumer would not be able to test the goods within 30 days (for example, where a consumer buys a Christmas present in October, or a lawnmower in November).

<sup>12</sup> For example, see EU Consumer Rights Directive: getting it right, Volume I: Report of the House of Lords European Union Committee (2008-09) p 19, paras 58-60.

#### **“MINOR” DEFECTS (paras 3.98 – 3.110)**

- 1.24 We recommend that legal protection for consumers who purchase goods with “minor” defects should not be reduced with regard to the right to reject and also to the proposed directive.
- 1.25 Under the current law, once a consumer has shown that one of the implied terms has been breached, they may exercise the right to reject, provided they have not accepted the goods. There is no exclusion for minor defects, such as imperfections in appearance, finish or small malfunctions.
- 1.26 Under the European Commission’s proposed directive, this would change. Not only would the right to reject be abolished, but in addition under the European remedies consumers would not be entitled to rescind a contract for minor defects.<sup>13</sup> If the retailer were unable to repair the defect or replace the goods, the consumer would be required to accept a reduction in price.
- 1.27 Consumers generally care a great deal about the appearance of new goods, such as cars, furniture and white goods. They often spend a long time selecting goods for their appearance, and pay extra for a specific appearance. In these cases, if a repair or replacement is not practical or possible, the consumer will only have the remedy of price reduction. Furthermore, the trader will not be bound by clear rules about how price reduction should be calculated.
- 1.28 Another risk is that traders might argue that any fault is minor, so that rescission will no longer be offered in practice. Consultees felt strongly that removing the right to a refund for minor defects would be a retrograde step, leading to unnecessary disputes over whether a fault was minor.

#### **THE RIGHT TO REJECT IN OTHER SUPPLY OF GOODS CONTRACTS (paras 5.1 – 5.33)**

- 1.29 The law makes distinctions between sales and other contracts to supply goods (such as hire, hire purchase, exchange and work and materials contracts). For other supply of goods contracts, consumers do not lose the right to reject after the lapse of a reasonable time. Instead they may reject goods even for latent defects, provided they have not acted to “affirm” the contract or (in Scotland) to “waive” their rights.
- 1.30 We recommend that the normal period of 30 days should apply to other supply contracts involving the transfer of property, such as work and materials and exchange contracts. We also recommend that it should apply to hire purchase contracts. The argument for a uniform regime is that it would simplify the law, removing a complexity that few consumers or retailers understand.

<sup>13</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, art 26(3).

- 1.31 Some consultees were concerned that the 30-day normal period might operate harshly in work and materials contracts (such as double-glazing or conservatories). However, the period will not start to run until the date of purchase, delivery or completion of contract, whichever is later. So, where the goods are under the control and in the possession of the trader for a prolonged period, or where the trader takes some time to finish the job, so that the consumer is unable to examine the goods, the 30-day period will not begin to run until work is complete.
- 1.32 In addition, the 30-day period is a standard period and not an absolute fixed period, so that account can be taken of circumstances rendering it reasonably foreseeable that the consumer will need longer than 30 days to test the goods in use. A typical example would be double-glazing fitted in summer. The consumer would need longer than 30 days to check that it was watertight in storm conditions.
- 1.33 Where a fault arises in a hire contract, the law allows the consumer to terminate the contract, paying for past hire but not future hire. We recommend this should be preserved.

#### **REFORMING THE CONSUMER SALES DIRECTIVE - MOVING TO A SECOND TIER REMEDY** (paras 6.17 – 6.39)

- 1.34 Under the scheme of remedies set out in the CSD, it is often difficult to know when a consumer can move from a first to a second tier remedy. When can they give up on a series of failed repairs or replacements, and rescind instead?
- 1.35 This proves to be a problem in practice, as consumers suffer detriment as a result of failed repairs and replacements. They fear becoming locked in a cycle of failed repairs.
- 1.36 The European Commission has attempted to address the problem by proposing a new provision, allowing a second tier remedy where “the same defect has reappeared more than once within a short period of time”.<sup>14</sup> We are concerned, however, that this provides scope for disputes over whether a fault is the same as a previous fault and what constitutes a short period of time.
- 1.37 We recommend that a consumer should be able to proceed to a second tier remedy after one failed repair or replacement. We think it would be beneficial if the proposed directive provided this level of clarity, which would be easy for consumers and traders to understand.

#### **THE PROPOSED TWO-YEAR CUT-OFF PERIOD** (paras 6.60 – 6.70)

- 1.38 The European Commission has proposed that consumers should not be entitled to pursue a retailer for any fault which becomes apparent more than two years after delivery.<sup>15</sup> Currently, in the UK, the limits which apply are those set in general contract law. In England and Wales, there is a limitation period of six years, and in Scotland a prescriptive period of five years.

<sup>14</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, art 26(4)(d).

<sup>15</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, art 28(1).

- 1.39 Our concern is that the European Commission's proposed two-year cut-off might not be suitable for some goods which are intended to be long-lasting and where faults take time to come to light: for example, a boiler which breaks down after 26 months, or water pipes which burst during the first hard frost. Similarly, where a consumer buys a fake antique, it may take time for the problem to be discovered.
- 1.40 Consultees felt strongly that introducing this proposed time limit to claims would add complexity to the law, and would lead to an undesirable reduction of consumer rights. We recommend that the time limits for bringing claims should continue to be those applying to general contractual claims in England, Wales and Scotland.

**THE SIX-MONTH REVERSE BURDEN OF PROOF** (paras 3.96 – 3.97 and 6.51 – 6.59)

- 1.41 A consumer seeking one of the CSD remedies currently benefits from a six-month reverse burden of proof. This means that where a fault arises within six months of delivery, it is presumed to have existed at the time of delivery. It is up to the retailer to show either that the fault arose later, or that this is inconsistent with the nature of the goods.
- 1.42 We recommend that in the interests of simplicity the same presumption should apply where a consumer seeks to rely on a traditional remedy, such as the right to reject.
- 1.43 In terms of reforming the CSD, we recommend that the six-month reverse burden should be suspended while repairs are being carried out and should resume after goods are redelivered following repair. We also recommend that a further six-month reverse burden should start after goods are redelivered following replacement.

**DAMAGES** (paras 4.1 – 4.25)

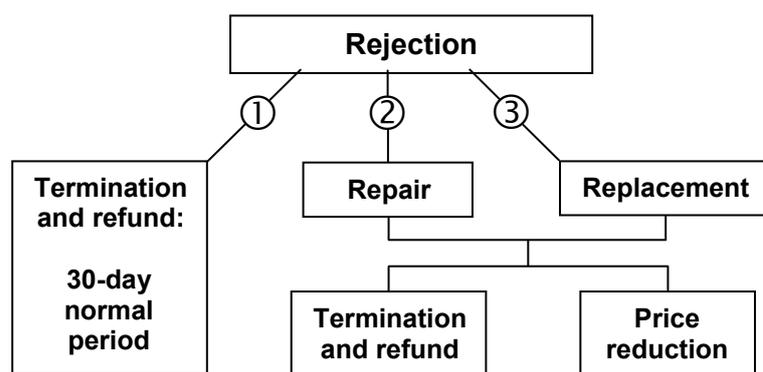
- 1.44 We recommend that the domestic remedy of damages should be retained. Damages are an essential element of our remedial system, providing compensation in circumstances not covered by the other legal remedies. For example, damages may be needed where the consumer pays for a repair themselves, which is not uncommon,<sup>16</sup> or to allow recovery for consequential loss.
- 1.45 We also recommend that guidance should be drafted and issued on the circumstances in which consumers can claim damages to compensate them when they purchase goods which do not conform to contract.

<sup>16</sup> See Office of Fair Trading *Consumer Detriment* (April 2008). Available at [http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/oft992.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf).

## INTEGRATING THE EUROPEAN REMEDIES WITH THE RIGHT TO REJECT (paras 3.111 – 3.125)

### Rejection with three possible options

- 1.46 We think that a short-term right to reject should be retained in the UK system of remedies, as a UK addition to a directive adopted on a minimum harmonised basis, or as part of a fully harmonised European regime.
- 1.47 However, the right to reject needs to be better integrated with the European remedies. This could be done by joining the three primary remedies under the umbrella of the concept of “rejection”. We recommend that a new provision in the Sale of Goods Act 1979 should provide that a consumer can reject non-conforming goods, with three remedies available at first instance:
- (1) termination of the contract plus a full refund (if the remedy is exercised within a normal period of 30 days, subject to limited exceptions);
  - (2) repair; or
  - (3) replacement.<sup>17</sup>
- 1.48 Our proposed scheme is illustrated in the following diagram.<sup>18</sup>



## CONSUMER EDUCATION (paras 7.1 – 7.38)

- 1.49 Consumers are often unaware of their legal rights. The phrase “This does not affect your statutory rights” is familiar, but widely misunderstood. We recommend that the Department for Business, Innovation and Skills should consider replacing it with the phrase “This does not reduce your consumer rights” together with an indication of how the consumer can obtain further information, for example by contacting Consumer Direct.

<sup>17</sup> If the consumer opts for repair or replacement but the attempt at repair or replacement fails, then the consumer should be able to proceed to a second tier remedy of rescission or price reduction.

<sup>18</sup> The diagram is for the purpose of illustration only and does not show all of the issues. For example, the trader can decline the consumer’s request for repair or replacement and offer the alternative first tier remedy if the request is impossible or disproportionate when compared with the other first tier remedy.

1.50 We recommend that there should be a summary of consumer legal rights for faulty goods available at point of sale or in another similarly prominent position in shops. We also recommend that the Consumer Advocate<sup>19</sup> should consider whether the most effective current consumer education initiatives should be promoted and rolled out on a wider scale.

<sup>19</sup> In its White Paper, *A Better Deal for Consumers*, published in July 2009, the UK Government announced its intention to appoint a Consumer Advocate to take the lead on consumer education and information.



# THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

## CONSUMER REMEDIES FOR FAULTY GOODS

*To the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice,  
and the Scottish Ministers*

### PART 1 INTRODUCTION

- 1.1 In December 2007, the Department for Business, Enterprise and Regulatory Reform<sup>1</sup> asked us to review the legal remedies available to consumers when they buy goods that do not conform to contract. Our review commenced that month, and we published a Consultation Paper in November 2008.<sup>2</sup>
- 1.2 There is general awareness that goods must, for example, be of satisfactory quality. However, there is less understanding about the remedies available to consumers if goods do not meet these terms. There are effectively two legal regimes: the traditional UK remedies have been overlain by the scheme set out in the EU Consumer Sales Directive (CSD).<sup>3</sup> This makes the law difficult for consumers and retailers to understand, and can generate unnecessary disputes.
- 1.3 Goods do not conform to contract when they breach one of the terms implied by statute or an express term of the contract.<sup>4</sup> The implied terms are that goods must be of satisfactory quality, correspond to their description, be fit for purpose, and must correspond with the sample where there is a sale by sample.<sup>5</sup> This review does not look at the implied terms themselves, or what standards goods should meet. Instead, it considers the remedies available to consumers when an implied term or an express term is breached.
- 1.4 In this Report, when we refer to non-conforming goods, we often write about “faulty goods”, as these are the most common examples. Typical examples are electrical goods that do not work, or shoes that fall apart. However, other examples of non-conforming goods are those which are not as described, or not fit for their purpose. We also look briefly at what remedies are available when the trader delivers the wrong quantity of goods.

<sup>1</sup> The Department for Business, Enterprise and Regulatory Reform is now the Department for Business, Innovation and Skills (BIS).

<sup>2</sup> Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

<sup>3</sup> Directive 1999/44/EC, Official Journal L 171 of 07.07.1999.

<sup>4</sup> Sale of Goods Act 1979 (SoGA), s 48F. The definition of non-conformity that we use in this Report is that in Part 5A of SoGA, which implemented the CSD remedies.

<sup>5</sup> SoGA, ss 13, 14 and 15.

1.5 Our terms of reference are:

- (1) to examine the existing consumer remedies under the Sale of Goods Act 1979, the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982 for goods which do not conform to contract, together with related issues; and to consider the case for simplification and rationalisation, so far as possible, to make the law easier for all users to understand and use, and to reduce burdens on business;
- (2) following full consultation with relevant stakeholders, to make appropriate recommendations within the current framework of EU law; and
- (3) to advise BIS on issues raised in the course of the European Commission's review of the consumer directives relating to the reform of the CSD and/or remedies for breach of a consumer contract.

### **THE EUROPEAN COMMISSION'S PROPOSAL**

- 1.6 Although this review was sparked by UK concerns, it is being conducted against the backdrop of the European Commission's review of the consumer directives, which began in 2004. In 2007, the European Commission published a Green Paper.<sup>6</sup> The most recent development was in October 2008 when the European Commission published a proposal for a new directive on consumer rights to harmonise consumer rights across member states.<sup>7</sup> It is intended to replace the four Directives on: doorstep selling,<sup>8</sup> distance selling,<sup>9</sup> unfair terms<sup>10</sup> and consumer sales.<sup>11</sup>
- 1.7 Among other things, the proposed directive recommends major changes to the law on consumer remedies for goods which do not conform to contract. The European Commission proposes that the directive should be a "measure of maximum harmonisation". This means that member states would not be able to provide lesser or greater rights in any area that falls within the scope of the proposed directive.
- 1.8 With regard to consumer sales, the proposed directive raises the issue of whether the UK "right to reject" should be abolished. The right to reject is the right to return non-conforming goods for a refund, and is discussed in more detail below in paragraphs 2.7 to 2.20. A literal interpretation of the proposed directive suggests that the right to reject would no longer be compatible with EU law and that the right to reject would be lost.

<sup>6</sup> European Commission *Green Paper on the Review of the Consumer Acquis* COM (2006) 744 final.

<sup>7</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, see [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm).

<sup>8</sup> Directive 85/577/EEC, Official Journal L 372 of 31.12.1985 p 31.

<sup>9</sup> Directive 97/7/EC, Official Journal L 144 of 04.06.1997 p 19.

<sup>10</sup> Directive 93/13/EEC, Official Journal L 095 of 21.04.1993 p 29.

<sup>11</sup> Directive 1999/44/EC, Official Journal L 171 of 07.07.1999 p 12.

- 1.9 For example, if a consumer buys a microwave in a shop, takes it home and finds that it does not work, the consumer would no longer be entitled to return it and receive a refund. Instead, the trader would be entitled to attempt a repair or replacement. The consumer would only be entitled to rescind the contract if the repair or replacement could not be performed within a reasonable time or without significant inconvenience, as set out in the proposed directive.
- 1.10 The European Commission has given some indication that it is not its intention to abolish the right to reject.<sup>12</sup> However, at the time of writing this Report, negotiations on the proposed directive are continuing, and the future of the right to reject is one of the issues which will need further clarification. At this stage, we do not know what the end result of the European Commission's negotiations will be, and how UK law will be affected.
- 1.11 Apart from the right to reject, other areas which fall within the scope of the European Commission's proposed directive and therefore could lead to changes in the current law include:
- (1) If the lack of conformity does not become apparent within two years, the consumer would have no remedy.<sup>13</sup>
  - (2) Rescission would not be allowed for "minor defects".<sup>14</sup>
  - (3) The trader would have the initial choice between repair and replacement.<sup>15</sup>
  - (4) Whether consumers should give value for use of goods upon rescission.<sup>16</sup>
  - (5) Whether the specific provisions in UK law on delivering the wrong quantity should be repealed. Under the proposed directive, the consumer would not be entitled to reject the goods.<sup>17</sup>
- 1.12 These issues are discussed in more detail in Parts 3 and 6 of this Report.

<sup>12</sup> Commissioner Kuneva at the IMCO Committee hearing on the Consumer Rights Directive 2 March 2009 and at the 10<sup>th</sup> Anniversary European Consumer Day on 13 March 2009.

<sup>13</sup> Art 28.

<sup>14</sup> Art 26(3).

<sup>15</sup> Art 26(2).

<sup>16</sup> Recital 41.

<sup>17</sup> The proposed directive provides relatively generous remedies for late delivery (a full refund) but much less generous remedies for a wrong delivery (where the goods are not as described, the trader may attempt a repair or replacement). There must come a point when the goods delivered are so different from the goods described that a wrong delivery should be regarded as no delivery (where, for example, the consumer ordered apples and receives oranges). The proposed directive gives little guidance on this issue.

## THE NEED TO REVIEW OUR LAW

- 1.13 Whilst the proposed directive affects the issues in this review, our Consultation Paper was not a direct response to it. Instead, we took stock of the current system of remedies, and looked in more depth at the principles on which an appropriate scheme of remedies might be based. In particular, we considered the circumstances in which consumers should be entitled to a full refund of the price, rather than a repair or a replacement. We hope that this Report will inform the current debates on this subject, at a European and national level.
- 1.14 The domestic law relating to the sale of goods is set out in the Sale of Goods Act 1979 (SoGA). Essentially, it allows the consumer to reject faulty goods and claim a full refund (the “right to reject”). However, the right is lost once the consumer is deemed to have accepted the goods, which may happen “after the lapse of a reasonable time”.<sup>18</sup> Thereafter, the consumer has the right to damages only.
- 1.15 In 2002, the UK implemented the CSD, which sets out a separate regime of remedies. Implementation was effected by means of amendments to SoGA and the Supply of Goods and Services Act 1982.<sup>19</sup> Under this regime, consumers may ask for a repair or replacement. If this is impossible or disproportionate, or if a repair or replacement cannot be provided without “unreasonable delay” or “significant inconvenience”, the consumer may move to a second tier of remedies. These are rescission or reduction in price.<sup>20</sup>
- 1.16 In November 2006, the Davidson Review recommended that the DTI (now BIS) should ask the two Law Commissions to produce a joint report “on the reform and simplification of remedies available to consumers relating to the sale and supply of goods”.<sup>21</sup>
- 1.17 The Davidson Review found that following the implementation of the CSD, the remedies available to consumers for faulty goods were too complicated, making it unclear how the choice should be made between the various remedies available. This followed representations by retailers about difficulties in training sales staff to know when consumers could return faulty goods. It was argued that this led to a lack of shared understanding between consumers and retailers, and increased amounts of litigation.<sup>22</sup>

<sup>18</sup> SoGA, s 35(4).

<sup>19</sup> The Sale and Supply of Goods to Consumer Regulations 2002 (SI 2002 No 3045) amend SoGA and the Supply of Goods and Services Act 1982. They implement Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Official Journal L171 of 07.07.1999 p 12.

<sup>20</sup> See paras 2.31 to 2.33 below for an explanation of rescission and reduction in price.

<sup>21</sup> Davidson Review, *Final Report* (November 2006), at [www.berr.gov.uk/files/file444583.pdf](http://www.berr.gov.uk/files/file444583.pdf). The Davidson Review was set up in 2005 by Gordon Brown (then Chancellor of the Exchequer) under the aegis of the Better Regulation Executive. It looked at the way EU Directives were implemented.

<sup>22</sup> Davidson Review, *Final Report* (November 2006) para 3.20.

- 1.18 The domestic law has been criticised for its uncertainty: in particular, for its conflicting case law over what constitutes “a reasonable time” to reject goods.<sup>23</sup> In addition, the EU remedies have their own uncertainties, for example, over what amounts to “significant inconvenience”. These problems are compounded by the fact that the two separate regimes co-exist, using different language and concepts and imposing different burdens of proof. As a result, SoGA has been described as “a disjointed, often incoherent, amalgam”.<sup>24</sup>

### **The Consultation Paper**

- 1.19 In the Consultation Paper, we provisionally concluded that although most stakeholders now accept and understand the basic structure of the existing law, there are significant and often unnecessary complexities. These are not just theoretical complexities, but affect standard day-to-day examples of faulty goods. As a result, consumers may be put at a disadvantage in asserting their rights. On the other hand, consumers may over-estimate their rights, causing unnecessary disputes with businesses.
- 1.20 This review has been welcomed by those involved in this area of law. It is regarded as a particularly problematic area requiring prompt reform. Consultees told us that there is a need for clarification and simplification for the benefit of retailers and consumers alike.
- 1.21 This area of law covers all consumer sales, and accordingly applies to a vast range of different goods and of defects in those goods. Consequently, it is not always possible to make the law simple and clear cut if it is to cover the full range of possible cases. However, we identified four major areas where simplification or clarification would be desirable:
- (1) The length of the reasonable time to reject goods in the context of the right to reject is uncertain.
  - (2) There are different burdens of proof depending on whether a consumer is asking for a refund or a repair or replacement.
  - (3) Different remedies apply to supply of goods contracts, as opposed to pure sale of goods contracts.
  - (4) Progression from a first tier to a second tier remedy in the CSD regime.

<sup>23</sup> For example, see *Bernstein v Pamson Motors (Golders Green) Limited* [1987] 2 All ER 220 and *Clegg v Andersson T/A Nordic Marine* [2003] EWCA Civ 320; [2003] 1 All ER (Comm) 721.

<sup>24</sup> L Miller, “The Common Frame of Reference and the feasibility of a common contract law in Europe” [2007] *Journal of Business Law* 378.

- 1.22 We received responses to the Consultation Paper from 53 consultees, and we met with a wide range of consumer representatives, retailers, manufacturers, academics and lawyers. We are very grateful to all those who met with us and commented on our Paper. We published a summary of responses to our consultation on 13 May 2009.<sup>25</sup>

#### **Retaining the right to reject**

- 1.23 We mention above that the European Commission's proposal for a directive is a measure of maximum harmonisation, which would mean that member states would not be able to provide greater or lesser rights in any field falling within its scope. On the face of it, this appears to mean that the UK right to reject would be lost.
- 1.24 The responses to our Consultation Paper indicate that there is widespread support for retaining the right to reject in the UK. This has been confirmed by what consumers say. In January 2008, we commissioned FDS International Ltd (FDS) to carry out market research into consumers' views, which indicated that most consumers were aware that they had a right to a refund for faulty goods, and valued it highly.<sup>26</sup>
- 1.25 Then, in February and March 2009, FDS carried out a second phase of market research which showed that 94% of consumers believed that the right to a refund was important to them. 89% thought the right to reject should be retained, even though other remedies (repair and replacement) are available.
- 1.26 The majority of consultees who expressed a view on the scope of the proposed directive opposed maximum harmonisation of the provisions relating to consumer remedies, for shop sales at least.

#### **Clarifying the right to reject**

- 1.27 Whilst consultees felt that the right to reject should be retained, they said that it requires clarification as to how long it lasts. This is a problem that presents difficulties in practice. In the Consultation Paper, we illustrated this with a faulty washing machine scenario.<sup>27</sup> The complexities involved in assessing a reasonable time are revisited in more detail in Part 3 of this Report.

#### **THIS REPORT**

- 1.28 In this Report we consider the issues concerning our traditional domestic remedies and the CSD remedies in the light of the responses to consultation, and set out the Law Commissions' recommendations.

<sup>25</sup> Consumer Remedies for Faulty Goods: A Summary of Responses to Consultation (13 May 2009), at [http://www.lawcom.gov.uk/consumer\\_remedies.htm](http://www.lawcom.gov.uk/consumer_remedies.htm). A list of respondents is provided at Appendix A to this Report.

<sup>26</sup> FDS's report of April 2008 is attached to the Consultation Paper at Appendix A.

<sup>27</sup> Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139) p 67.

1.29 This Report has been written with reference to the European Commission's proposed directive as published in October 2008. In this Report, we recommend that the Sale of Goods Act 1979 should be amended. Where the Law Commissions recommend that legislation should be changed, it is usual for us to include draft legislation within our Report. We have decided, however, not to do so in this Report due to the uncertainty of the proposed directive, in particular the question of whether relevant provisions will be implemented on a maximum harmonised basis. However, we will set out the substance of the provisions which we recommend should be included in a revised Sale of Goods Act and CSD.

# PART 2

## THE CURRENT LAW

### INTRODUCTION

- 2.1 This Part is intended as an overview of the current legal regime. A more detailed discussion is available in Parts 2 and 3 of our Consultation Paper.<sup>1</sup> Historically, in England and Wales, the buyer of faulty goods had two options. If done quickly enough, the buyer could reject the goods, terminate the contract, and demand a refund (“the right to reject”). Alternatively, or if too much time had passed, the buyer could seek compensation for the seller’s breach of contract.<sup>2</sup> These two remedies emerged from English case law and were included in the Sale of Goods Act 1893. The 1893 Act also amended Scots law to provide similar remedies in Scotland. These remedies are still applicable today, with a few changes, through the Sale of Goods Act 1979 (SoGA).
- 2.2 For consumers, the historical right to reject and damages are now joined by remedies that have their origin in EU legislation. Since 2003 the consumer buyer of faulty goods has been able to demand that the seller repair or replace the goods or, failing that, to rescind the contract or receive a reduction in the purchase price.<sup>3</sup>
- 2.3 The law makes a distinction between sales of goods, and other contracts to supply goods. Section 2 of SoGA sets out the definition of a “sale”:

A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.<sup>4</sup>

- 2.4 This definition does not include:
- (1) contracts for hire or hire purchase (which do not necessarily transfer property in goods); or
  - (2) contracts for barter or exchange (which do not involve money); or
  - (3) contracts for work and materials, where the contract is mainly for work or services, and the supply of materials is incidental to its main purpose.<sup>5</sup>

<sup>1</sup> Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

<sup>2</sup> The buyer, as well as being entitled to reject goods and obtain a refund if the price had already been paid, might also be entitled to compensatory damages. See Part 4 below.

<sup>3</sup> Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Official Journal L171 of 07.07.1999 p 12, implemented by the Sale and Supply of Goods to Consumers Regulations 2002. These Regulations came into force on 31 March 2003.

<sup>4</sup> SoGA, s 2(1).

<sup>5</sup> See *Benjamin’s Sale of Goods* (7<sup>th</sup> ed 2006) para 1-041.

- 2.5 There are important differences between the remedies available when goods are sold and when they are supplied under other contracts. We start by looking at sales. The remedies available for other supply contracts are set out below at paragraphs 2.38 to 2.49.
- 2.6 This review is concerned with the remedies available to a consumer where goods do not conform to contract, which means:<sup>6</sup>
- (1) goods are sold by description, and they do not correspond with the description;<sup>7</sup>
  - (2) goods are sold by sample, and they do not correspond with the sample;<sup>8</sup>
  - (3) goods are not of satisfactory quality;<sup>9</sup>
  - (4) goods are not fit for the buyer's purpose, where the buyer has made that purpose known to the seller;<sup>10</sup>
  - (5) the wrong quantity is provided;<sup>11</sup> or
  - (6) goods do not conform to another express term of the contract.<sup>12</sup>

## **SALES CONTRACTS**

### **The “right to reject”**

- 2.7 SoGA gives the buyer a right to examine the goods following delivery.<sup>13</sup> A consumer who examines the goods and discovers that they are faulty is entitled to reject the goods and terminate the contract, provided that they have not accepted the goods. This entitles the consumer to refuse to pay for the goods, or to receive a refund of any money paid to the seller.

<sup>6</sup> This definition of non-conformity that we use in this Report is based upon that in Part 5A of SoGA, which implemented the CSD remedies.

<sup>7</sup> For sales contracts, see SoGA, s 13. For other supply contracts, see Supply of Goods and Services Act 1982, ss 3, 8, 11C and 11I; and for hire purchase contracts, see Supply of Goods (Implied Terms) Act 1973, s 9.

<sup>8</sup> SoGA, s 15. See also Supply of Goods and Services Act 1982, ss 5, 10, 11E and 11K; and Supply of Goods (Implied Terms) Act 1973, s 11.

<sup>9</sup> SoGA, s 14. Factors relevant to the quality of the goods include fitness for the purposes normally required of such goods and fitness for any particular purposes for which the goods were bought, and of which the seller knew. See also Supply of Goods and Services Act 1982, ss 4, 9, 11D and 11J; and Supply of Goods (Implied Terms) Act 1973, s 10.

<sup>10</sup> SoGA, s 14(3).

<sup>11</sup> Above, s 30.

<sup>12</sup> Above, s 48F.

<sup>13</sup> This is done in two ways. SoGA, s 34 requires the seller “on request to afford the buyer a reasonable opportunity of examining the goods”. Even without a request, however, the buyer effectively is given a reasonable time to examine the goods because he will not be deemed to have accepted the goods until that time has passed: SoGA, s 35.

- 2.8 The rejection of the goods and the termination of the contract are separate concepts.<sup>14</sup> There are circumstances where the rejection of goods will not be followed by the termination of the contract.<sup>15</sup> In this Report, we use the term “the right to reject” as a short-hand term to include both the rejection of faulty goods and the refund to the consumer of any money paid.
- 2.9 SoGA states that the consumer cannot exercise the right to reject if they have accepted the goods. Goods can be accepted in three ways:<sup>16</sup>
- (1) where the buyer intimates to the seller that the goods have been accepted;
  - (2) where the buyer does something with the goods that is inconsistent with the seller’s ownership of the goods; or
  - (3) where, after the lapse of a reasonable time, the buyer retains the goods without telling the seller that the goods have been rejected.
- 2.10 The first two listed methods of deemed acceptance are discussed in more detail in the Consultation Paper.<sup>17</sup> The most common form of acceptance is method 3, where the consumer is deemed to have accepted the goods because the reasonable time for rejecting them has lapsed. A consumer wishing to exercise the right to reject goods must do so quickly. The exact length of the reasonable time depends on the facts of the case, and there is relatively little authoritative case law on how this principle should be applied to consumer sales. Few cases are litigated, and even fewer are reported.

***A reasonable time for rejection: the case law***

- 2.11 Early cases tended to require the buyer to inspect the goods immediately, at the place of delivery.<sup>18</sup> However, over the years, as goods have become more complex, courts have allowed buyers more time to inspect goods. For example, in *Manifatture Tessile* the Court of Appeal held that the reasonable time had not elapsed three and a half months after delivery.<sup>19</sup>

<sup>14</sup> See s 11(3) of SoGA, and s 48D(2)(a) and s 48D(2)(b) which refer respectively to rejection and termination of the contract in England, Wales and Northern Ireland and rejection and treating the contract as repudiated in Scotland.

<sup>15</sup> See R Bradgate and F White, “Rejection and Termination in Contracts for the Sale of Goods” in J Birds, R Bradgate and C Villers (eds), *Termination of Contracts* (1995) pp 169 and 170.

<sup>16</sup> SoGA, s 35.

<sup>17</sup> See paras 3.7 to 3.16, Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

<sup>18</sup> For example, *Perkins v Bell* [1893] 1 QB 193. This case preceded the 1893 Sale of Goods Act.

<sup>19</sup> *Manifatture Tessile Laniera Wooltex v J B Ashley Limited* [1979] 2 Lloyd’s Rep 28. This case was a commercial case concerning the purchase of textiles.

- 2.12 In the well known case of *Bernstein v Pamson Motors (Golders Green) Limited* it was held that a reasonable time for rejection of a new car had lapsed after three weeks and 142 miles.<sup>20</sup> There are two major problems with this case. First of all, the interpretation of a reasonable time in *Bernstein* was generally considered by commentators to be too strict. In the event, the case was settled out of court, prior to appeal, with the consumer receiving full payment. Secondly, it is doubtful whether it is still good law.<sup>21</sup> In *Clegg v Andersson T/A Nordic Marine*, speaking of *Bernstein*, Sir Andrew Morritt VC said: "In my view it does not represent the law now".<sup>22</sup> It is unlikely that *Bernstein* would be decided in the same way following the 1994 amendments to SoGA.<sup>23</sup> These amendments made the time for examination only one issue relevant to the reasonable time for rejection.
- 2.13 The buyer in *Clegg* was held to be entitled to reject a yacht six months after delivery. In particular, the court was influenced by the fact that Mr Clegg had not received information he had sought in relation to the problems for around six months.
- 2.14 In *Truk (UK) Limited v Tokmakidis GmbH* it was held that a commercial buyer was entitled to reject goods over a year after the sale.<sup>24</sup> An important factor in the court's decision was that the vehicle had been sold with the intention it should be resold. The reasonable period was said to take into account the amount of time it was likely to take to find a sub-buyer and then a period for the sub-buyer to test the goods. Another important factor was that there was a prolonged period of negotiation as to the proper course of action once the fault was discovered.
- 2.15 The buyer in *Bowes v Richardson & Son Ltd* was held to be entitled to reject a new car seven months after delivery.<sup>25</sup> There were several problems with the car, some of which had occurred immediately after delivery, others months later. The seller had carried out repairs, but had never properly completed them. As such, the court held that the buyer had never had the opportunity to fully assess the repairs and so could not be held to have accepted the goods.
- 2.16 *Fiat Auto Financial Services v Connelly* concerned a buyer who rejected a car after nine months and more than 40,000 miles.<sup>26</sup> This was held to be a reasonable time. The sellers had attempted but failed to rectify several faults. Sheriff Deutsch said the right to reject is not lost during any period where the purchaser is waiting for information to make an informed judgement as to whether to accept or reject the goods and the actions of a seller in dealing with defects and attempts to cure defects may postpone deemed acceptance.

<sup>20</sup> [1987] 2 All ER 220.

<sup>21</sup> See R Goode, *Commercial Law* (3<sup>rd</sup> ed 2004) p 355.

<sup>22</sup> [2003] EWCA Civ 320; [2003] 1 All ER (Comm) 721 at [63].

<sup>23</sup> The Sale and Supply of Goods Act 1994 inserted ss 35(5) and (6) into SoGA.

<sup>24</sup> [2000] 2 All ER (Comm) 594.

<sup>25</sup> Rugby County Court, District Judge Sanghera, 28 January 2004, unreported.

<sup>26</sup> 2007 SLT (Sh Ct) 111.

- 2.17 In *Hurst v Grange Motors*, the buyer rejected a second-hand Rolls Royce after three months.<sup>27</sup> This was held to be a valid rejection, since in the three months between purchase and learning of the seriousness of the defect the buyer had not had an opportunity to ascertain whether the car had conformed to the contract, and so had not accepted it.
- 2.18 *J & H Ritchie Limited v Lloyd Limited* concerned a combination seed drill and harrow, purchased as a single item.<sup>28</sup> The harrow had vibrated when used and the seller repaired it to “factory gate standard” but refused to tell the buyer what had been wrong with it. The buyer discovered, through informal means, what the fault had been. Due to the nature of the fault, the buyer was concerned that it could have caused other problems in the harrow and so decided to reject it eleven weeks after purchase.
- 2.19 The House of Lords held that the buyer had been entitled to reject the harrow, based on two different strands of reasoning. Lord Hope said that, given the facts of the case, a term should be implied into the contract of sale to the effect that the seller was required to inform the buyer as to the nature of the repairs carried out. Lord Rodger reasoned that there was a separate contract for repair between the two parties and that the term should be implied as part of the latter contract.

### **Conclusion**

- 2.20 The length of the reasonable period is not easy to predict. It depends on the facts of the individual case, including the nature of the goods. In addition, the period may be extended by repairs and any negotiations as to repairs.<sup>29</sup>

### **Damages**

- 2.21 Where goods are faulty, the buyer might be entitled to damages. The measure of damages is the contractual one of seeking to put the consumer into the position they would have occupied had the contract been properly performed. Damages may be payable both where the buyer has rejected the goods,<sup>30</sup> and where the buyer has not rejected them.<sup>31</sup>
- 2.22 Generally, there are two types of loss for which a consumer buyer might seek compensation:

<sup>27</sup> *M & T Hurst Consultants Ltd v Grange Motors (Brentwood) Ltd*, Manchester High Court, Judge Russell, October 1981, unreported.

<sup>28</sup> 2007 SC (HL) 89; [2007] 1 WLR 670; [2007] 2 All ER 353.

<sup>29</sup> Section 35(6) of SoGA provides that if a buyer asks for, or agrees to, repairs being carried out by a seller, they are not deemed to have accepted the goods and therefore retain the right to reject.

<sup>30</sup> Above, s 51 allows the buyer to receive the difference between the contract price and the current market price in cases of non-delivery. Where the buyer is entitled to and does reject goods on the ground of breach of condition as to quality or description, damages may be assessed on the basis of non-delivery. See *Benjamin's Sale of Goods* (7<sup>th</sup> ed 2006) para 17-047.

<sup>31</sup> Above, ss 53 (for England) and 53A (for Scotland). The buyer, as well as being entitled to reject goods and obtain a refund if the price has already been paid, might also be entitled to compensatory damages. See Part 4 below.

- (1) *The difference in value.* Where the buyer keeps the goods, this is the difference between the value of the goods contracted for and the value of the goods actually received. Where the buyer has rejected the goods, it is the difference between the contract price and the current market price.
  - (2) *Any consequential losses,* including any injuries or damage to other property caused by the faulty goods.
- 2.23 SoGA caters for both of these. The general contractual limits on foreseeable losses apply, so that consequential losses will only be recoverable if they were within the contemplation of the parties at the time of the sale.<sup>32</sup>

### **Delivering the wrong quantity**

- 2.24 SoGA contains specific provisions to deal with cases where the seller delivers the wrong quantity of goods.
- 2.25 Section 30(1) applies where too few goods are delivered, and gives the buyer two options:
- (1) to reject the goods, recover the price paid and sue for any further loss; or
  - (2) to accept the goods that have been delivered and pay for them pro rata (although it is still possible to claim damages for breach).
- 2.26 Sub-sections 30(2) and (3) apply where an excess of goods is delivered. They give the buyer three options:
- (1) to reject all the goods;
  - (2) to accept the correct amount and reject the rest; or
  - (3) to accept all the goods, paying for the extra goods at the contract rate.
- 2.27 These rights are subject to two qualifications. First, in English law, consumers may not reject the goods if the shortfall or excess is “microscopic” and not capable of influencing the mind of the buyer.<sup>33</sup> Secondly, if the buyer rejects the goods for a shortfall or excess, the seller may subsequently make delivery of the correct quantity within the delivery period.<sup>34</sup> In Scots law, there is further statutory provision to the effect that the buyer is not entitled to reject the goods under section 30(1) or to reject the whole under section 30(2) unless the shortfall or excess, as appropriate, is material.<sup>35</sup>

<sup>32</sup> The general rule is derived from *Hadley v Baxendale* (1854) 9 Exch 341. See also SoGA, s 53 (for England) and s 53A (for Scotland).

<sup>33</sup> See Lord Atkin in *Arcos Ltd v E A Ronaasen & Son* [1933] AC 470 at 479, and *Shipton Anderson & Co v Weil Brothers & Co* [1912] 1 KB 574. See also *Benjamin's Sale of Goods* (7<sup>th</sup> ed 2006) para 8-050.

<sup>34</sup> See *Benjamin's Sale of Goods* (7<sup>th</sup> ed 2006) para 8-052. Note that the seller could not agree to deliver the balance at a later time, as this would be an instalment delivery and, unless otherwise agreed, the buyer is entitled to receive all of the goods at the same time.

<sup>35</sup> SoGA, ss 30(2D) and (2E).

## **THE CONSUMER SALES DIRECTIVE REMEDIES**

- 2.28 In 2002, SoGA was amended to include new remedies for consumers.<sup>36</sup> The new Part 5A of SoGA gives consumers four new remedies, based on the 1999 Consumer Sales Directive (CSD).<sup>37</sup> These are split into two tiers. The first tier remedies allow for the repair or replacement of faulty goods. These are designed to be a consumer's primary remedy. If they fail, the consumer is allowed to rely on the second tier of rights: rescission or a reduction in price.

### **The first tier of rights: repair and replacement**

- 2.29 In theory, the choice between repair and replacement is for the consumer, and the seller should honour that selection. In practice, however, the choice is often the seller's. The seller can refuse to carry out the chosen cure on the ground that it is impossible, or because it is disproportionate compared with the other remedies in the CSD.<sup>38</sup> If both repair and replacement are disproportionate compared with the second tier remedies, then the consumer must accept a second tier remedy.<sup>39</sup>
- 2.30 Once the consumer has requested repair or replacement, and providing it is neither impossible nor disproportionate, the seller must carry out that remedy within a reasonable time and without significant inconvenience to the buyer. The seller must also bear any costs incurred in carrying out the remedy.<sup>40</sup>

### **The second tier of rights: rescission and reduction in price**

- 2.31 Where repair and replacement are disproportionate, or where the seller has failed to carry out a cure within a reasonable time or without significant inconvenience, the consumer can rely on the secondary remedies of rescission or a reduction in the purchase price.<sup>41</sup>
- 2.32 Where the consumer opts to rescind the contract, the contract comes to an end in a similar way to the right to reject.<sup>42</sup> However, in the case of rescission, the buyer may be required to give some value for their use of the goods.<sup>43</sup> SoGA and the CSD do not define how this should be calculated.

<sup>36</sup> SoGA was amended by the Sale and Supply of Goods to Consumers Regulations 2002.

<sup>37</sup> Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Official Journal L171 of 07.07.1999 p 12.

<sup>38</sup> SoGA, s 48B(3).

<sup>39</sup> It has been argued that this is out of line with the Directive, and too unfavourable to consumers.

<sup>40</sup> SoGA, s 48B(2).

<sup>41</sup> Above, s 48C.

<sup>42</sup> There is no statutory definition of "rescission" as used in SoGA, s 48C, and there is very little guidance as to how it should be used. It is, however, a term which is used in the Scots law of contract where the meaning is reasonably clear.

<sup>43</sup> SoGA, s 48C(3). Recital 15 CSD.

- 2.33 A reduction in the purchase price leaves the goods with the consumer but with a discount for their reduced value. The reduction in price is not defined, but should be “an appropriate amount”.<sup>44</sup> It seems that the proper approach is to ask how much a consumer would have paid for the goods in their defective state.

### **Burden of proof**

- 2.34 A consumer seeking one of the CSD remedies receives the benefit of a six-month reverse burden of proof. This means that where a fault arises within the first six months after delivery there is a presumption that it existed at the time of delivery.<sup>45</sup> There are two ways to rebut the presumption. The seller may produce evidence that the fault did not exist at the time of delivery. Alternatively, the presumption may be incompatible with the nature of the goods or the nature of the fault.<sup>46</sup>
- 2.35 Following the expiration of the six-month period, the normal burden of proof applies, and it is up to the consumer to show that the goods were faulty at the time of delivery.

### **The interaction between the traditional remedies and the CSD remedies**

- 2.36 Generally speaking, the CSD remedies were inserted into SoGA as an additional layer of consumer protection, and there is little indication as to how the remedies are to interact. The consumer appears able to choose any of the remedies, provided that the relevant requirements are met.
- 2.37 There is only one section of SoGA that attempts to tie the two regimes together. Section 48D states that the buyer who requires a repair or replacement must give the seller a reasonable time to carry out the remedy before rejecting the goods and terminating the contract or, in Scotland, rejecting the goods and treating the contract as repudiated.

### **CONTRACTS FOR THE SUPPLY OF GOODS, OTHER THAN SALES**

- 2.38 As we have seen, UK law has long maintained a distinction between pure “sales” and other contracts for the supply of goods. SoGA only applies to sales, as narrowly interpreted.<sup>47</sup> Hire purchase contracts are covered by the Supply of Goods (Implied Terms) Act 1973, and other supply contracts by the Supply of Goods and Services Act 1982. Those Acts imply the same terms as to quality as SoGA implies into sales.
- 2.39 However, the remedies are different. The main difference is that a buyer/hirer is not deemed to have accepted goods after the lapse of a reasonable time. Instead, the buyer can only lose their right by a positive act, or by inaction, once they are aware of the breach.

<sup>44</sup> SoGA, s 48C(1)(a).

<sup>45</sup> Above, s 48A(3).

<sup>46</sup> Above, s 48A(4).

<sup>47</sup> See paras 2.3 and 2.4, above.

- 2.40 For hire and hire purchase contracts, case law suggests that following a breach the hirer is not generally entitled to a full refund of their payments. Instead, the hirer must pay for the use they have had from the goods and may only terminate for the future. A further complication is the way that the CSD applies to supply contracts other than sales, which we describe below.

### **Affirmation and waiver**

- 2.41 The right to reject in sales contracts is a short-term right which ceases after the buyer is deemed to have accepted the goods. By contrast, in other supply contracts, the right to terminate the contract is only lost through the consumer's conduct once aware of the fault. In England and Wales, the right is lost only if the consumer "affirms" the contract, by recognising its continuing validity. The Law Commissions' 1987 Report set out the following principles of the law on affirmation:<sup>48</sup>

- (1) On discovering the breach, an innocent party must elect between his available remedies.
- (2) As a general rule, an innocent party cannot be held to have affirmed the contract, unless he had knowledge of the breach.<sup>49</sup>
- (3) Affirmation may be express if the innocent party expressly refuses to accept the other party's repudiation of the contract.
- (4) Affirmation may be implied if the innocent party does some act (for example, pressing for performance), from which it may be inferred that he recognises the continued existence of the contract.
- (5) Mere inactivity by the innocent party after discovering the breach will not of itself constitute affirmation unless (a) the other party would be prejudiced by the delay in treating the contract as repudiated, or (b) the delay is of such length as to constitute evidence of a decision to affirm the contract.
- (6) If the contract is held to be affirmed, the innocent party can no longer terminate the contract for breach.

<sup>48</sup> Sale and Supply of Goods (1987) Law Com No 160; Scot Law Com No 104, para 2.51. For a more detailed discussion of various cases on the application of the affirmation doctrine to hire purchase contracts see K Mullan, "Satisfaction guaranteed or no deal" [1990] *Journal of Business Law* 231. The doctrine of affirmation has also been applied in a hire case: *Guarantee Trust of Jersey Ltd v Gardner* (1973) 117 SJ 564.

<sup>49</sup> See *Yukong Line Ltd of Korea v Rendsburg Investments Company of Liberia* [1996] 2 Lloyd's Rep 604 at 607.

- 2.42 In Scotland, in contracts for the supply of goods other than sales, the right to return the goods is lost where, through the consumer's conduct, the consumer is personally barred from insisting on the return of the goods. A buyer would be taken to have waived the breach if he has accepted the performance either expressly or by inference from the facts and circumstances of the case.<sup>50</sup>
- 2.43 The practical effect of the law in both jurisdictions is that a consumer may reject goods if a latent defect comes to light long after purchase. The consumer does not have to reject within the "reasonable period" set out in SoGA. The only time limit which applies is the limitation period under English law (six years), and the prescriptive period under Scots law (five years). Of course, the consumer would still have to prove that the fault existed at the time of delivery, which becomes more difficult as time passes.

### **Hire and hire purchase contracts**

- 2.44 For hire and hire purchase contracts the breach of an implied condition only gives the innocent party a right to reject the goods and terminate<sup>51</sup> the contract for the future. Therefore, the hirer may not have an automatic right to recover all the money paid under the contract. The basic principle is set out in *Yeoman Credit*.<sup>52</sup> Here the defendant entered into an agreement for the hire purchase of a second-hand car which was so seriously defective that he was held to be entitled to reject it, terminate the contract and claim damages. However, because there had been no total failure of consideration he could not recover his deposit and the instalments he had paid.
- 2.45 In two subsequent hire purchase cases, however, the hirer was held to be entitled to reject goods and recover money paid under the contract despite obtaining some enjoyment from the goods. In *Charterhouse Credit v Tolly* the hirer's use of a car was substantial and the parties conceded that there had not been a total failure of consideration.<sup>53</sup> In this case, however, the hirer's damages consisted of the money he had paid under the contract less only a small deduction for use of the car. In *Farnworth Finance Facilities v Attryde* a defective motorcycle had been driven for 4,000 miles.<sup>54</sup> Despite such substantial use, the hirer recovered all the money he had paid under the contract. The Court of Appeal made no deduction for use because of the inconvenience he had suffered. There is therefore a degree of uncertainty about how to calculate damages when a consumer rejects goods under a hire purchase contract.

<sup>50</sup> See *Armia Ltd v Daejan Developments Ltd* 1979 SC (HL) 56; Sale and Supply of Goods (1987) Law Com No 160; Scot Law Com No 104, para 2.53; and E Reid, *Personal Bar* (2006) paras 3-08 (and following) and 3-42 (and following).

<sup>51</sup> Or, in Scots law, treat the contract as repudiated.

<sup>52</sup> *Yeoman Credit Ltd v Apps* [1962] 2 QB 508.

<sup>53</sup> [1963] 2 QB 683.

<sup>54</sup> [1970] 1 WLR 1053.

- 2.46 In Scotland, the Supply of Goods (Implied Terms) Act 1973 states that a breach by the creditor of any term of the hire purchase agreement entitles the hirer to claim damages and, if the breach is material, to reject the goods and repudiate the contract.<sup>55</sup> Scottish courts would probably reach similar results to the English courts by applying principles of unjustified enrichment. For example, if a consumer repudiated the contract after enjoying three months effective use of the product, the courts would be unlikely to allow a full refund but would make a deduction for the consumer's use and enjoyment of the goods. On the other hand, if a product had caused trouble from the beginning, the consumer would probably obtain a full refund.

### **The application of CSD remedies**

- 2.47 Member states are required to apply CSD remedies for work and materials contracts.<sup>56</sup> The UK has therefore implemented CSD remedies by amending the Supply of Goods and Services Act 1982 in such a way as to extend CSD rights to work and materials contracts.<sup>57</sup>
- 2.48 The CSD does not apply to hire or hire purchase contracts, or to barter or exchange contracts.<sup>58</sup> In the case of hire or hire purchase contracts, the position is straightforward. The relevant legislation has not been amended, and CSD rights do not apply either to hire<sup>59</sup> or to hire purchase.<sup>60</sup>
- 2.49 For barter and exchange contracts, the position is more complex. The amendments to the Supply of Goods and Services Act 1982 applying to work and materials contracts also cover barter and exchange, suggesting that the CSD rights do apply.

<sup>55</sup> S 12A.

<sup>56</sup> In particular, art 1(4) specifically includes "contracts for the supply of consumer goods to be manufactured or produced" while art 2(5) applies the Directive where "installation forms part of the contract of sale... and the goods were installed by the seller or under his responsibility". For discussion of this point, see R Bradgate and C Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003) pp 22 to 26.

<sup>57</sup> Supply of Goods and Services Act 1982, ss 11M to 11S. It has been argued that these sections do not cover all the contracts within the CSD. It is possible that a contract (for example) to paint a portrait would be regarded as a service under UK law, but a sale under the CSD: see R Bradgate and C Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003), p 32.

<sup>58</sup> The CSD does not specifically define sales contracts, but we think that it must be interpreted in the light of the Draft Common Frame of Reference. This states, at p 341, that a sales contract is one in which the seller undertakes to transfer ownership of the goods to the buyer, for a price. R Bradgate and C Twigg-Flesner note that proposed amendments to include hire purchase, exchange or barter were specifically rejected by the Council: see *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003) pp 22 to 26.

<sup>59</sup> Note that s 11S of the Supply of Goods and Services Act 1982 does not apply to the implied terms relating to hire.

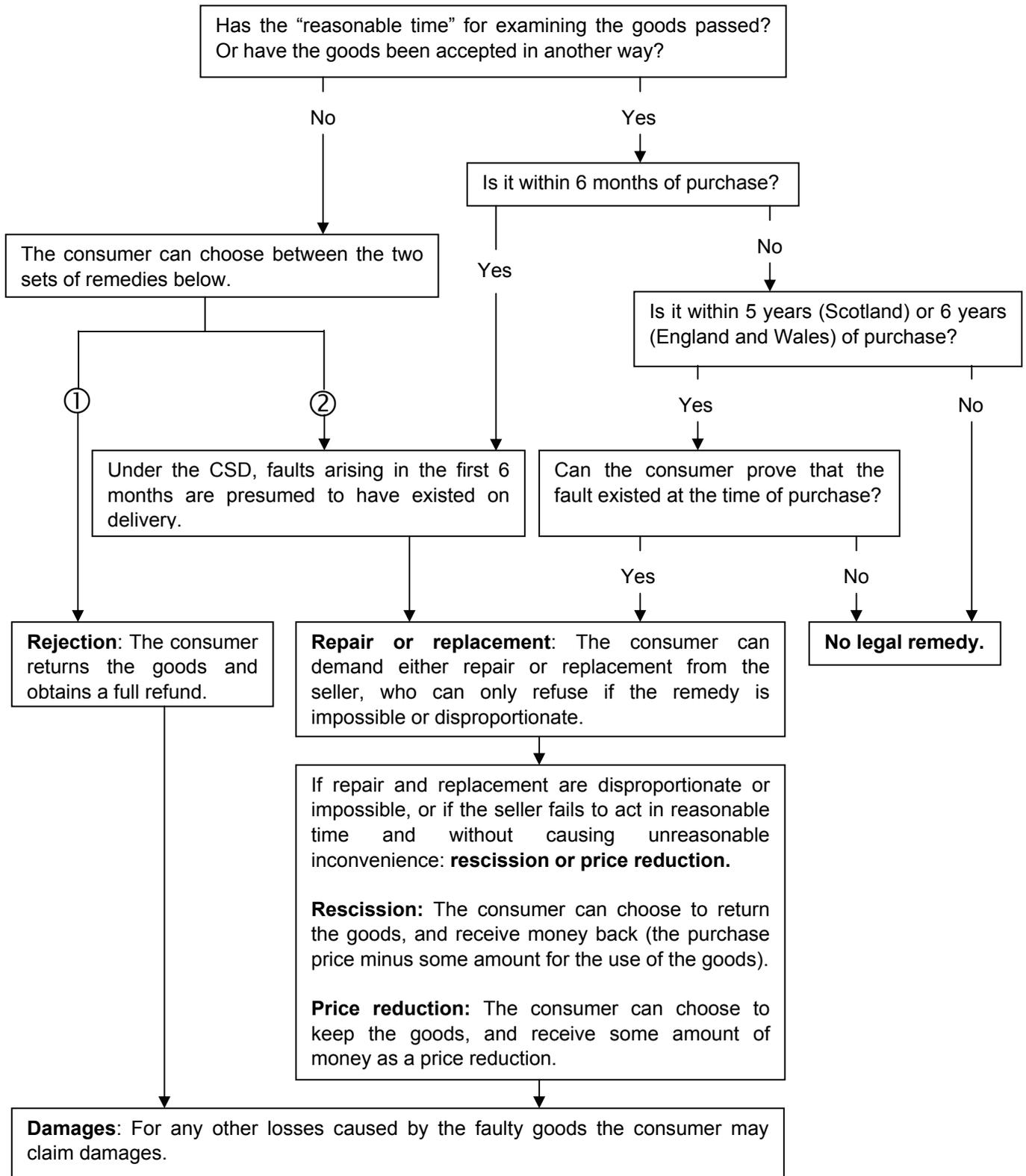
<sup>60</sup> See Supply of Goods (Implied Terms) Act 1973.

## **FLOWCHART OF REMEDIES FOR FAULTY GOODS**

- 2.50 The flowchart on the next page lays out the scheme of remedies where a consumer has bought goods which turn out to be faulty. It only applies to “sales” under SoGA. We have tried to keep the chart as simple as possible, and it does not include all the complications which can arise. For example, there is no reference to the fact that the right to reject can be revived after failed attempts to repair goods.
- 2.51 Even so, it can be seen that the remedies are quite complex for everyday transactions. It is no surprise, therefore, that our research into consumer knowledge of legal rights showed a general lack of awareness of consumer remedies for faulty goods.<sup>61</sup>

<sup>61</sup> See Appendix A to the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

## REMEDIES FOR THE SALE OF FAULTY GOODS



# **PART 3**

## **SIMPLIFYING THE RIGHT TO REJECT IN SALES CONTRACTS**

### **RETAINING THE RIGHT TO REJECT**

#### **The Consultation Paper**

- 3.1 In the Consultation Paper, the first question we considered was whether the UK should retain the initial right to return goods and obtain a refund.
- 3.2 The European Commission's proposal for a directive has been drafted as a measure of maximum harmonisation.<sup>1</sup> If adopted, this would mean that member states would not be able to provide greater or lesser rights in any field falling within its scope. Upon literal interpretation, this appears to require the right to reject to be removed, so that the consumer's first recourse would be to the European remedies of repair or replacement.
- 3.3 We provisionally proposed that the right to reject should be retained as a short-term remedy of first instance for consumers for several reasons, including the following:
- (1) It is fairly easy for consumers and retailers to understand. Consumers know that if the goods they bought were not as promised, they can return the goods and get their money back, provided that they act quickly.
  - (2) The right to reject inspires consumer confidence, making them more prepared to try unknown brands or new retailers.
  - (3) It provides consumers with an effective remedy when they have lost confidence in a product or retailer, for example if they think that the product is dangerous, or that the fault will recur.
  - (4) The right to reject drives up standards, both by encouraging retailers to check products before they are sold and to improve the repair process.
  - (5) It is a useful bargaining tool that prevents consumers being trapped in a cycle of failed repairs.
  - (6) It is a long-established remedy; removal would lead to disputes as consumers would still expect to have it.

#### **What consultees said about the right to reject**

- 3.4 The vast majority of consultees agreed with us. There was a widespread consensus in favour of retaining the right to reject, for the reasons listed above in paragraph 3.3. In particular, consultees focused upon the positive effect the right to reject has on consumer confidence and the vital part it plays in the UK regime.

<sup>1</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, see [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm).

### ***The right to reject bolsters consumer confidence***

- 3.5 Respondents said that the right to reject inspires consumer confidence. Consumer confidence is considered key, particularly in difficult economic times. The right to reject may be the only satisfactory remedy in circumstances where a consumer has lost trust in goods because the fault has involved the possibility of personal injury. In other cases, it may be the only satisfactory remedy where goods are not fit for purpose and repair or replacement will not remedy the non-conformity.
- 3.6 Willett, Morgan-Taylor and Naidoo summarised the views expressed by the majority when they said:

Losing the short-term right to reject could have an adverse impact on the competitiveness of SMEs and new entrants into the market. This is because the absence of the right to reject means that consumers are locked into longer relationships with traders following the sale of faulty goods. It means that there is an incentive for consumers to favour who they perceive as being capable ... of repairing the product effectively. This may well impose a competitive disadvantage on SMEs, new entrants and new traders from outside of the UK.<sup>2</sup>

- 3.7 On the same topic, the Office of Fair Trading wrote:

When considering the issue of rights and responsibilities for remedies it should always be borne in mind that it is the trader who is in breach of the contract. Consumers are entitled to expect fault-free purchases, and easily exercisable remedies where this is not the case.

It is important that the right to reject is retained. In our view consumer confidence would be significantly impaired by its removal. While we appreciate the findings that both consumers and traders have difficulty understanding the extent of their remedies it is generally the one remedy that consumers are fairly confident about, at least in the immediate period following purchases. If this remedy were removed, consumers may be less adventurous in their purchasing and tend to favour known brands and suppliers making cross-border trade less likely.

### ***The right to reject underpins the UK regime***

- 3.8 A large proportion of consultees argued that the right to reject is a fundamental component of our system, the removal of which would represent a significant reduction in consumer rights.

<sup>2</sup> Professor Chris Willett, Martin Morgan-Taylor and André Naidoo of the School of Law, DeMontfort University.

- 3.9 It was pointed out that the removal of the right to reject would create inconsistency between modes of purchase, which might have a negative effect on the competitiveness of face to face shop sales. In distance sales, consumers have a “cooling-off period” which entitles them to return goods for any reason. Abolition of the right to reject might cause consumers to shop by distance means, rather than visiting the high street, because they will perceive that they are in a stronger position.
- 3.10 The cooling-off period in distance sales is provided because the consumer cannot see and touch the goods at point of sale. In many instances, this is also the case for the consumer who purchases an item from a shop. The goods may be presented to the consumer in a sealed package, and the consumer is not expected to unpack the goods until they arrive home. In other cases, the goods are paid for in store and delivered to the consumer at a later date. In these very common scenarios, consumers' lack of opportunity to see the goods they are buying is very similar to the distance sale scenario. Several consultees considered that it was anomalous that the purchaser of goods from a shop in those circumstances would not have a legal right to return goods for a refund if they were faulty.
- 3.11 Others pointed out that removal of the right to reject in consumer sales would be anomalous with its continuance in business sales - consumers would have fewer rights than businesses. Some suggested that this might encourage consumers to pose as business purchasers in order to obtain the benefit of the right to reject. However, it was stressed that this potential anomaly should not be relied upon to remove the right in business sales.
- 3.12 Consumer groups made the point that a repaired product may not be as good as one which has never shown a fault. In many cases a repair will result in a reduction of market value, and it was thought wrong that this loss should be borne by the consumer.<sup>3</sup> This is particularly important in view of modern methods of production, where factory machinery routinely achieves much greater precision and higher standards than can ordinarily be achieved when an article or component (for example a car engine) is repaired and reassembled. In this respect, the emphasis on repair in the EU remedies can be seen as distinctly old-fashioned.

***The right to reject drives up standards***

- 3.13 Consultees said that the right to reject encourages higher standards in the quality of goods sold. It creates an incentive for sellers to ensure that goods are in conformity at the time of sale because they do not want consumers to return goods for a refund. For instance, we have been informed that reputable motor dealers undertake a thorough check of cars prior to sale (for example, the “50 point check”) to ensure that there are no faults and that cars will not be returned. As higher quality goods are less likely to prove faulty they are less likely to need to be scrapped. This benefits businesses and consumers alike. In the absence of the right to reject, sellers may reduce the depth of pre-sales quality checks.

<sup>3</sup> Which? provided a case study of a faulty car which we summarised at paras 8.19 to 8.21 of the Consultation Paper.

- 3.14 The right to reject also provides an incentive to traders to ensure effective and speedy repairs, so that consumers will be prepared to agree to repairs instead of exercising the right to reject.
- 3.15 Our discussions with retailers and manufacturers indicate that the large majority do not seek the abolition of the right to reject faulty goods. Generally, they recognised that consumers expect to be able to obtain refunds for faulty goods, and a mismatch between consumer expectations and the law might lead to disputes.

#### **Manufacturers' comments**

- 3.16 Our project concerns remedies for goods which are faulty. Most manufacturers we spoke to told us that they were not opposed to the right to reject goods that are genuinely faulty. Instead, their primary concern was consumers returning goods that are not faulty under retailers' voluntary policies which permit the return of goods because consumers change their minds about purchases. The "no-quibble money back" policies offered by some retailers are undoubtedly popular with consumers and encourage consumers to shop. However, in some cases, the costs are passed from the retailer to the manufacturer even though the goods are not faulty. Manufacturers were concerned that some goods returned due to consumers' change of mind are difficult to resell or cannot be resold at full price, and there are associated costs, such as transport costs.
- 3.17 Some manufacturers also felt that consumers returning goods suspected to be faulty should be offered better customer service on the shop floor. Those manufacturers complained that retailers sometimes wrongly classify goods as faulty when all that is needed is for the retailer to show the consumer how to operate them correctly.

#### **What consumers said about the right to reject**

- 3.18 Research shows that consumers strongly value the right to reject, and want it to be retained. We commissioned FDS International Ltd (FDS) to carry out market research into consumers' views.<sup>4</sup> The first phase was qualitative research undertaken in February 2008. This research indicated that although consumers were generally unaware of their legal rights, most were aware that they had a legal right to a refund for faulty goods, and valued it highly. In about 20% of cases, consumers take the view that a refund is the appropriate primary remedy, and that a repair or a replacement would not be acceptable. This was mirrored by the consumer research in the 2008 Office of Fair Trading's Report on Consumer Detriment.<sup>5</sup>

<sup>4</sup> FDS's report of April 2008 is attached to the Consultation Paper at Appendix A.

<sup>5</sup> OFT, *Consumer Detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008).

3.19 As a follow-up, in February 2009, we commissioned FDS to carry out a quantitative phase of market research in order to obtain more detailed figures about consumers' views on remedies for faulty goods.<sup>6</sup> 1021 consumers were questioned from February to March 2009. 94% of consumers said the right to a refund was important to them and 89% thought the right should be retained, even though other remedies (repair and replacement) are available. Consumers thought that the right to a refund was important: if the product was not fit for purpose; if the product proved to be dangerous; and because they would not have to wait for a repair or replacement. 37% of consumers said the right to a refund made them more confident about buying an unfamiliar brand.

### **The right to reject in other European jurisdictions**

3.20 The European Commission's proposal for a consumer rights directive was drafted as a measure of maximum harmonisation, which means that member states would not be able to provide greater rights in any area which fell within its scope. Therefore, in the Consultation Paper, we looked in as much detail as time allowed at how consumer remedies currently operate in other member states.<sup>7</sup> We were greatly assisted in that exercise by legal experts who advised us on the law in other jurisdictions, and by the European Consumer Centres in 18 member states.

3.21 We provisionally concluded that if there is a need to harmonise laws across the EU, there is a strong argument that the harmonised regime should incorporate a right to reject. We found that there is a fairly strong cultural tradition across Europe that where consumers take home products only to find that they are faulty, they should be entitled to return them and receive a refund.

3.22 At least nine European jurisdictions currently have a "right to reject" of some description. This means that consumers have a right to return goods, cancel the contract and obtain a refund for faulty goods as a remedy of first instance in those jurisdictions. In five member states,<sup>8</sup> consumers have the right to exercise a free choice between the four CSD remedies (which means that they can rescind the contract at first instance and obtain money back). In addition, consumers in the UK, Ireland and France have a "right to reject" which exists outside the CSD regime.<sup>9</sup> It is worth noting that some other jurisdictions outside Europe, such as New Zealand and the states of the United States, also have a right to reject.

<sup>6</sup> Consumer Remedies for Faulty Goods: A Summary of Responses to Consultation (13 May 2009) Part 9 at [http://www.lawcom.gov.uk/consumer\\_remedies.htm](http://www.lawcom.gov.uk/consumer_remedies.htm).

<sup>7</sup> See Appendices C and D to the Consultation Paper, provided on our websites at [www.lawcom.gov.uk](http://www.lawcom.gov.uk) and [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).

<sup>8</sup> Latvia, Greece, Lithuania, Slovenia and Portugal.

<sup>9</sup> We understand that consumers have a similar right in Italy – the *azione redibitoria*.

- 3.23 Furthermore, several other member states recognised a right to reject before the CSD reforms.<sup>10</sup> It is therefore part of the consumer culture even in jurisdictions where it is no longer recognised in law. Our survey of European Consumer Centres shows that even in member states where no legal right to reject exists, retailers will often offer such a right in practice, recognising that consumers desire it.
- 3.24 Many retailers, in the UK and in other jurisdictions, have voluntary policies which permit consumers to obtain refunds for faulty goods. However, we do not think that the consumer's right to a refund for faulty goods should be left merely to retailers' voluntary policies. Not only are there wide variations among them but, as voluntary marketing tools, their terms can and do change from time to time and it is also possible that a retailer might withdraw its policy entirely. We think that the right to a refund if goods are faulty is sufficiently important to be enshrined in law.

### **The right to reject - latent defects**

- 3.25 Some commentators and consumer advisers have argued that the right to reject should be extended to cover latent defects. These are defects which do not come to light for some time - several months or possibly years after purchase.
- 3.26 One method of extending the right to reject would be to dispense with the rules on acceptance which apply to sales, and apply the rules on affirmation (or, in Scotland, personal bar/waiver) to all sale and supply of goods contracts. A consumer would then be able to reject goods unless they had affirmed the contract or were personally barred from rejecting them following the discovery of the fault.<sup>11</sup>
- 3.27 Similarly, in the Republic of Ireland, the buyer is deemed only to accept goods "when, without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them".<sup>12</sup> The fact that a defect was latent, and took a while to be discovered, would be a good and sufficient reason for the delay.

<sup>10</sup> The "right to reject" is a concept which is familiar to many other member states, as it formed part of their remedial regimes before the CSD. The European Commission's *Green Paper on Guarantees for Consumer Goods and After-sales Services* COM (93) 509 final, indicates that a "right to reject" of some description existed as a remedy for defective goods in all member states at that time, bar one. The member states with a "right to reject" were Germany, Belgium, Denmark, Spain, France, Greece, Portugal, Italy, Luxembourg, the UK and Ireland. The Netherlands was the sole exception, relying primarily on the remedies of repair and replacement.

<sup>11</sup> In England and Wales, the common law doctrine of affirmation applies to supply of goods contracts, eg in hire purchase or work and materials contracts. This means that consumers do not lose the right to reject until they learn of the defect. In Scotland, an equivalent result is achieved through the operation of personal bar. Personal bar cannot operate until the consumer knows of the defect.

<sup>12</sup> Sale of Goods Act 1893, s 35, as amended by the (Irish) Sale of Goods and Supply of Services Act 1980.

3.28 Another method of extending the right to reject, in the context of the CSD regime, would be to give consumers a free choice between repair, replacement, rejection (“rescission”) or reduction in price, whenever the right was exercised. This possibility was also raised in the European Commission’s review of the eight consumer protection directives.<sup>13</sup>

3.29 Conversely, we know from our discussions that in the interests of certainty retailers are generally keen for the length of time for rejection to be kept quite short. They feel strongly that it should not be extended. It is also thought that extending the time for rejection might encourage abuse by some consumers who may use an item for a period of time, and then seek a refund when they no longer need it.

3.30 The law currently favours finality, as the right to reject is a short-term remedy. In particular, section 35(4) of SoGA was intended to prevent a consumer exercising the right to reject where a defect emerges only after a period of time.<sup>14</sup> As Reynolds commented:

There must certainly be some element of securing early finality within the policy of section 35.<sup>15</sup>

3.31 In our Consultation Paper, we provisionally concluded that this was the correct approach. The main reason for our provisional conclusion was the difficulty of accounting for interim use. Currently, consumers who exercise the right to reject may recover the full purchase price, notwithstanding that they have enjoyed some use from the goods.<sup>16</sup> In this respect, the right to reject differs from the European remedy of rescission, where some member states provide that a deduction can be made for the use the consumer has had from the product.<sup>17</sup>

3.32 We provisionally concluded that it would not be fair to allow a long-term right to reject goods without giving some form of credit for use and enjoyment. However, giving credit for use and enjoyment raises difficult problems of calculation which would take away much of the force of the remedy of the right to reject. It is likely that the consumer would become involved in argument or negotiation. The other reason for our provisional conclusion that the right to reject should not be extended is the potential for abuse by consumers who have had the use they wanted from goods.

<sup>13</sup> European Commission, *Green Paper on the Review of the Consumer Acquis* COM (2006) 744 final, para 5.7.2.

<sup>14</sup> SoGA, s 35(4) states: The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

<sup>15</sup> FMB Reynolds, “Loss of the right to reject” [1988] *Law Quarterly Review* 16.

<sup>16</sup> See *Benjamin’s Sale of Goods* (7<sup>th</sup> ed 2006) para 12-068.

<sup>17</sup> SoGA, s 48C(3). Recital 15 CSD.

### **What consultees said about the right to reject and latent defects**

- 3.33 More than two-thirds of respondents agreed with our provisional conclusion that the right to reject should not be extended to cover latent defects. Whilst many could see the attractions of extending the right to reject, they agreed that consumers who had enjoyed the benefits of goods for some time should give credit for that use. This, it was felt, would undermine the efficacy of the right to reject, which is a powerful tool for consumers because it is a “short and sharp” remedy. For example, there would undoubtedly be arguments about the extent to which the consumer had enjoyed trouble-free use and what value should be attributed to that, as against the inevitable inconvenience the purchaser of faulty goods suffers.

### **Conclusion**

- 3.34 We think the arguments against extension of the right to reject continue to be persuasive. In Part 2 of this Report we summarise the law on affirmation and waiver which applies to hire purchase contracts, and other supply of goods contracts. Paragraphs 2.45 and 2.46 illustrate the uncertainty of “credit for use” calculations in hire purchase cases and the considerable potential for argument they present. The right to reject is a powerful weapon which should be kept for faults that manifest themselves immediately or after a short period of use. After the product has been used for a while, the primary remedy should be a repair or replacement. Under our proposals, retailers would be free to agree to extend the period if they thought that there was a competitive advantage in doing so.
- 3.35 **We recommend that the right to reject should be retained as a short-term primary remedy.**

### **A PROBLEM WITH THE RIGHT TO REJECT**

- 3.36 As we explained in Part 2, the law gives consumers the right to reject faulty goods provided they have not accepted them.<sup>18</sup> The most common form of deemed acceptance is when a consumer retains goods beyond a reasonable time, without indicating they have rejected them.<sup>19</sup>
- 3.37 The main reported problem with the right to reject is that there is uncertainty as to what constitutes a reasonable time. This presents very real difficulties in practice for consumers and retailers alike. Consultees said that the law would work better if this were clarified. As Bridge has commented:

A buyer, particularly one who is a consumer, requires a degree of nerve to exercise rejection rights. First of all, the uncertainty of the rejection period makes it difficult to give advice on the subject.<sup>20</sup>

<sup>18</sup> See paras 2.7 to 2.20.

<sup>19</sup> SoGA, s 35(4).

<sup>20</sup> M G Bridge, *The Sale of Goods* (2<sup>nd</sup> ed, 2009) para 10.71.

- 3.38 Some consumer advisers, including Consumer Direct,<sup>21</sup> told us that consumers often face difficulties when seeking to exercise the right to reject beyond a two-week period. This is so despite the fact that, legally, the period in which the right to reject can be exercised is probably much longer.
- 3.39 Consumer Direct told us that it is difficult to advise consumers how long they have to exercise the right due to uncertainties in the law. Consumers expect to be told how long they have based upon the simplicity of a set period; that is in terms of a number of days, weeks, or months. They do not find it helpful to be told that the answer depends on a series of factors that must be applied on a case by case basis. Retailers told us that it is difficult to train their staff about what the law requires, especially as the retail sector has a relatively high turnover of staff.
- 3.40 In the Consultation Paper, we used a faulty washing machine scenario to illustrate the practical problems these uncertainties can cause. We shall set out the scenario again here, for ease of reference.<sup>22</sup>

A consumer (C) buys a washing machine. C uses it once and goes on holiday for three weeks. On C's return (four weeks after purchase), C uses the machine for a week before it breaks down. C contacts the retailer. The retailer promises to arrange a repair. The retailer rings back several days later and informs C that a repairman will come to fix the machine. The repairman comes out and repairs the fault, but only a few days later the machine breaks again, for a different reason (Fault (2)). C complains to the retailer and a week later (7 weeks after purchase), C purports to reject the machine.

- 3.41 This fairly typical scenario raises a series of questions and highlights the complexities involved in an assessment of a reasonable time. Can C exercise the right to reject the machine? When will C lose the right to reject because C is deemed to have accepted it? When does time begin to run? Is seven weeks after purchase a reasonable amount of time?
- 3.42 An examination of case law fails to provide a definitive answer. In *Bernstein*<sup>23</sup> a car was held to be accepted after only three weeks, which would suggest that seven weeks is too long. However, the court discounted a period of illness, so it may be possible to argue that the holiday period should also be discounted, which would reduce the period under consideration to four weeks.

<sup>21</sup> A government-funded telephone and online service offering information and advice on consumer issues – [www.consumerdirect.gov.uk](http://www.consumerdirect.gov.uk).

<sup>22</sup> Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139) p 67.

<sup>23</sup> *Bernstein v Pamson Motors (Golders Green) Limited* [1987] 2 All ER 220.

- 3.43 Does the week long period between the request for repair and repair being effected count towards a reasonable time? As we have seen,<sup>24</sup> *Clegg* would suggest that that period should be discounted.<sup>25</sup> In addition, the effect of the 2002 Regulations seems to be that the period will not be counted.<sup>26</sup> This would reduce the period under consideration to three weeks.
- 3.44 Is three weeks beyond a reasonable time? Given the result in *Bernstein* it might seem so, but as discussed in Part 2, it is questionable whether *Bernstein* is good law.<sup>27</sup> Ultimately a reasonable time is a question of fact. One factor which might be important is whether the fault arose from a particular wash cycle that was not used immediately.
- 3.45 The question of how long a reasonable time is before goods are held to be accepted is particularly problematic in cases where there is a considerable delay before the goods are inspected, or where there are delays while negotiations or repairs are undertaken.
- 3.46 The ambiguity of the period in which the right to reject can be exercised makes it less likely that a consumer will pursue it in the face of an intransigent retailer. This is because if a consumer asserts the right to reject in the face of opposition from the retailer, the consumer will not receive their money back but, at the same time, will not be able to use the goods. The problem is compounded if the retailer will not accept the return of the item. It is also compounded if the item is an expensive item that the consumer is not in a financial position to replace without a refund; or if it is an essential item that the consumer cannot manage without for any significant length of time.

## **A NORMAL PERIOD OF 30 DAYS**

### **The Consultation Paper**

- 3.47 Since this review began, the recurring message from stakeholders has been that whilst the right to reject should be retained, some clarification is needed as to how long it lasts. It is clear that the uncertainty over how long the right to reject lasts adds complexity to what is intended to be a simple and certain tool. This view was reflected in responses to the Consultation Paper.

### ***A standard period: not an absolute fixed time limit***

- 3.48 In order to overcome the considerable problem of uncertainty, we considered whether there should be a fixed time limit, after which the right to reject is automatically lost.

<sup>24</sup> See paras 2.12 to 2.13.

<sup>25</sup> *Clegg v Andersson T/A Nordic Marine* [2003] EWCA Civ 320; [2003] 1 All ER (Comm) 721.

<sup>26</sup> The Sale and Supply of Goods to Consumers Regulations 2002 may impliedly provide the answer. SoGA, s 48D (inserted into SoGA by those Regulations) provides that if a request for repair or replacement has been made, the buyer cannot reject the goods until the seller has been given a reasonable time to repair or replace. The effect of this must be that time does not run for the purposes of acceptance while repair is being requested. Otherwise, the right to reject could be lost during a period where the buyer was not entitled to exercise it.

<sup>27</sup> See para 2.12.

- 3.49 In the Consultation Paper, we provisionally concluded that there should not be an absolute fixed time limit. Consultees agreed. We concurred with the Law Commissions' conclusions in 1987 when they considered a fixed time limit and rejected it as unworkable.<sup>28</sup> The 1987 report concluded that the enormous variety of goods made it impossible to set a fixed time. Similarly, it would be impractical to set different time periods for different goods, because the different categories (however carefully defined) would inevitably create borderline cases where it was not clear into which category a product fell. A fixed period would also remove any possibility of flexibility which could be unfair in some cases.
- 3.50 Very few consultees felt there should be an absolute fixed period with no exceptions. We provisionally proposed that the legislation should set out a 30-day period during which consumers should, in normal circumstances, exercise their right to reject. The 30-day period should run from the date of purchase, delivery or completion of contract, whichever is later.
- 3.51 We provisionally concluded that in most cases 30 days would give the consumer a reasonable opportunity to inspect the goods and to test them for a short period in actual use. So, in the case of clothes, for example, it enables the consumer to do more than simply try the clothes on. The 30-day period is intended to allow enough time to wear the clothes and wash them and, if they fall apart in the wash, return them to the shop. For a washing machine, 30 days should provide enough time to install the machine and use the main programmes. For a new computer, it enables the consumer to install the software they intend to use and to test it in practice. However, the 30-day period does require the consumer to act promptly. A consumer will lose the right to reject if they just leave their new clothes in the wardrobe for six weeks.

#### **What consumers said**

- 3.52 A secondary reason for choosing a 30-day period is that it appears to correspond with consumers' expectations. Our opinion poll, described in paragraph 3.19 of this Report, provides some support for a 30-day period. When consumers were asked to say how long the right should last, the most common reply, given by 30% of consumers, was that the right should last for about a month. This may partly be because consumers have become used to 30-day "no-quibble money-back guarantees" offered by some high street retailers. Although the right to reject faulty goods is quite different from the right to return non-faulty goods, we think that a 30-day period is one which the public will understand and remember.
- 3.53 We know that it is very rare for consumers to take disputes to court; it is also very rare for consumers to employ lawyers to advise them. It is therefore imperative that the law is capable of being understood, remembered and asserted by consumers. On balance, and in practical terms, we think that the introduction of a 30-day normal period for the right to reject will benefit the average consumer. It will also assist retailers by providing a simple standard for their staff.

<sup>28</sup> Sale and Supply of Goods (1987) Law Com No 160; Scot Law Com No 104, p 47.

- 3.54 At present, consumer advisers are often concerned about advising consumers that they can reject goods after two weeks. If consumer advisers were able to tell people that the standard period was 30 days, it would give consumers greater confidence and reduce the need to rely on ambiguous case law.

**What consultees said about a normal period of 30 days**

- 3.55 The majority of respondents agreed in principle with our proposal for a 30-day normal period. The central argument in favour was that the advantages of clarity provided by a standard period outweigh the potential disadvantages. The main benefit of the right to reject is that it is a “short and sharp” remedy that should be exercised relatively quickly. Generally respondents agreed that the 30-day normal period would provide sufficient time for most purchases to be tested in use, and it would encourage consumers to test goods promptly after purchase.
- 3.56 When we discussed our proposal of a 30-day normal period with Consumer Direct, they said that they supported the proposal on the ground that consumers would benefit from clarification of the law; consumers would find it easier to enforce their right to reject if they knew exactly how long it lasted. For example, it would be beneficial to the average consumer who faces considerable difficulty in pursuing the argument that a period beyond two weeks is “reasonable”, and tends to give up as a result. The law would be easier to enforce informally.
- 3.57 In response to the Consultation Paper, the Office of Fair Trading (including Consumer Direct) wrote in support of the proposal:

We agree that the idea of a finite time in which the right to reject is available would be a sensible reform, provided that the period is long enough. Although we appreciate that even specification is likely to reduce the period of time in which the right may currently be exercised in some circumstances, the advantages of simplicity outweigh the potential disadvantages in our opinion. Further we believe that many possible disadvantages could be avoided by a good consumer/trader awareness programme. If both consumers and traders knew there was a specific period in which this right could be exercised we think it may give consumers added confidence in their dealings with traders and vice versa.

Many traders and consumers already appear to believe that consumers have 30 days in which to return goods (probably as a result of voluntary systems offered by some traders) so we think that this period is probably appropriate and gives the consumer sufficient time to test the goods and enables the trader to have some certainty.

- 3.58 Also in support of our proposal for a 30-day normal period, Alan Miles of the Institute of Consumer Affairs concluded:

I’m all for simplification and clarity and feel that the greater good will be served if consumers can understand the law ...<sup>29</sup>

- 3.59 The British Retail Consortium responded:

The BRC is not campaigning for the removal of the initial right to reject. On the contrary, we are working for its introduction in a revised form in EU law.

Given even the highest courts in the land seem to have difficulty in determining the meaning of “reasonable time” it is essential to define it in legislation. If we are looking at a purely UK solution the proposal for 30 days would be acceptable... .

3.60 Similarly, the Confederation of British Industry wrote:

The main problems in relation to the right to reject have arisen in respect of the length of time within which the consumer may exercise that right.

To clarify and simplify the position we would support a defined and short-term right of rejection.

...if it appears that the Directive will be long delayed then careful consideration might be given to the introduction of a right to reject of limited duration in order to clarify and simplify the UK position.

We consider that it would be helpful for the right to last for a defined period to provide certainty about the exercise of the right for consumers as well as business. There are merits to the period being 30 days as suggested by the Law Commissions.

3.61 Some consultees feared that our proposal for a normal period of 30 days would be misinterpreted by retailers as an absolute cut-off, which would lead to a reduction in consumer protection. They felt that the 30-day period should be expressed as a minimum period.

3.62 Consumer Focus responded that the 30-day normal period was too short. They also suggested various alternatives, for example that the rules on affirmation should apply,<sup>30</sup> or alternatively that the consumer should have a free right to choose between all of the CSD remedies.<sup>31</sup>

3.63 Which? objected to our proposal for a 30-day normal period. They argued that the right to reject “should continue for as long as the consumer has a legal remedy available (ie six years in England and Wales, five years in Scotland).”

<sup>29</sup> *The Institute of Consumer Affairs Newsletter* Spring 2009 Issue 67, p 2.

<sup>30</sup> The rules on affirmation are explained at paras 2.38 to 2.43 of this Report.

<sup>31</sup> The CSD remedies are explained in more detail at paras 2.28 to 2.35 of this Report.

- 3.64 Others proposed that, rather than setting a standard period, the law should clarify the relevant factors for determining the reasonable period. However, we think that the law requires more than a restatement or clarification of the principles that are applied in case law. Such a restatement of principles would not advance us much further forward from where we are now; and most importantly, it would not assist the average consumer in understanding how long they have to reject faulty goods and in asserting that right.
- 3.65 **We recommend that the law should do more to clarify how long the right to reject lasts. We recommend a normal period of 30 days in which the right to reject should be exercised. This normal period could be extended or reduced in the limited circumstances set out below.**

#### **THE 30-DAY NORMAL PERIOD: REASONS FOR A SHORTER OR LONGER PERIOD**

- 3.66 Whilst the majority of respondents agreed with our proposal for a 30-day normal period, there was less consensus about the circumstances in which that period should be shortened or lengthened.
- 3.67 Some consultees felt that too many exceptions to the period would undermine certainty and defeat the purpose of clarifying the law. For example, the British Retail Consortium said: “The fewer caveats, uncertainties and opt outs there are, the less will be the room for misunderstandings.”
- 3.68 Conversely, others were concerned that a greater degree of flexibility was necessary to ensure fairness. They pointed out that the law currently allows a great deal of flexibility to enable various personal circumstances as well as objective circumstances to be taken into account. However, in our view, this leads to a large degree of uncertainty, which most consultees have complained is undesirable.
- 3.69 On balance, most consultees seem to agree that the 30-day normal period should apply with a limited number of exceptions, including perishable goods, express agreement, and objective circumstances which are within the reasonable contemplation of the parties. Professor Roy Goode represented the views of the majority in concluding that objective, but not personal, circumstances should be taken into account:

I agree that the right to reject should be retained as a short-term remedy but should not be extended to allow for latent defects which appear only after a prolonged period. Finality is important in sales law... . There should be a presumption that the period for rejection should be 30 days, capable of being displaced where the circumstances otherwise require, as in the case of perishables (shorter period) or foreseeability of a longer period.

- 3.70 Having considered the arguments, we found the views of the majority persuasive. In order for the 30-day normal period to be effective, and attempting to strike an acceptable balance between flexibility and certainty, we think that the circumstances in which it can be departed from should be limited to a small number of specified categories. Below, we set out our recommendations for the possible reasons for departing from the 30-day normal period.

## Reasons for a shorter period

### *Perishable goods*

- 3.71 In the Consultation Paper we asked whether it should be open to the trader to argue that the right to reject should be exercised in less than 30 days where the goods are of a type expected to perish within 30 days, such as fresh food. In these cases, a 30-day normal period would be incompatible with the nature of the goods.
- 3.72 On the question of perishable goods, the vast majority of respondents agreed that it should be possible for the retailer to argue for a shorter period. Consumers should not be given the impression that they can take a month to return sour milk or bad meat. It is important that consumers should return goods in a state where the presence of the fault can still be detected.
- 3.73 This argument would only apply where the consumer claims that perishable goods are faulty (that is where they are not of satisfactory quality under section 14 of SoGA). It would not apply where the consumer claims goods do not conform to contract for other reasons, such as that they did not meet their description. Nor would it apply to foodstuffs which are not expected to perish within 30 days, such as vintage wine.
- 3.74 **We recommend that it should be open to the trader to argue that the right to reject should be exercised in less than 30 days where the goods are of a type expected to perish within 30 days; in these cases, a 30-day normal period would be incompatible with the nature of the goods.**

### *Acts inconsistent with returning goods*

- 3.75 In the Consultation Paper, we asked whether the legislation should provide that where a consumer has carried out an act which is inconsistent with returning the goods (such as altering clothes), they may not reject for a fault which should have been discovered before the inconsistent act.
- 3.76 The principle behind this is that in many cases it is reasonable to expect consumers to check goods before they alter them. For example, a consumer should check the colour of paint or tiles before applying them to a wall.
- 3.77 On the other hand, we do not wish to suggest that altering goods should always result in the loss of the right to reject. In many cases, altering goods is a necessary part of the testing process. For example, a consumer will only be able to discover that the wine is bad after they have opened the bottle.
- 3.78 Less than half of respondents answered this question directly, and their views were split. No one argued strongly in favour of retailers being able to argue for a shorter period where a consumer seeks to reject for a fault which should have been discovered before the inconsistent act. Those against appeared to have stronger views than those in favour; they objected on the grounds that exceptions defeat the aim of simplifying the law, and that it would be an unnecessary complication.

3.79 Notably, the British Retail Consortium did not express support for this exception. The British Retail Consortium's general approach was "the fewer caveats the better", and the majority of consultees who responded to the Consultation Paper in general appeared to favour sacrificing this type of exception for the benefit of simplicity. Some respondents were concerned that such an exception might be difficult for consumers and retailers to understand and apply in practice. For example, the Office of Fair Trading wrote:

We do not agree with this proposal as we believe it complicates the issue and will introduce uncertainty and the possibility for legal dispute. ...

This type of exception to the right will make consumers uncertain as to what they are able to do with a product and when they can return goods.

3.80 Other respondents, such as Dr Christian Twigg-Flesner queried whether the exception might introduce a "duty to examine" goods after purchase, and pointed out that it might cause confusion.

3.81 We find the arguments submitted against this exception persuasive, in particular that consumers and retailers would find such an exception difficult in practice, and it would detract from the simplicity of the 30-day standard period for the right to reject.

3.82 **We recommend that retailers should not be able to argue for a shorter period than 30 days where a consumer seeks to reject for a fault which should have been discovered before an inconsistent act.**

### **Reasons for a longer period**

#### ***Objective circumstances***

3.83 There are some instances where it is clear to both parties from the nature of the sale that the consumer will not be able to test the goods in use during the following 30 days. Two-thirds of respondents agreed with the proposal that, in such circumstances, a consumer should be able to argue for a longer period than 30 days.

3.84 In appropriate cases, the extension could be quite lengthy. Examples include seasonal goods, such as skis bought in April, which might not be used until the following winter. Similarly a lawnmower bought in November would typically remain unused for five or six months.

3.85 Macleod wrote about the example of skis bought at an end of ski-season sale.<sup>32</sup> When this scenario was discussed in Parliament, it was said that if the skis were left unused in a cupboard for many months, the court should discount that period, so that the reasonable time for exercising the right to reject would be extended.<sup>33</sup>

<sup>32</sup> J K Macleod, *Consumer Sales Law* (2<sup>nd</sup> ed, 2007) para 29.07A.

<sup>33</sup> House of Commons Standing Committee C, 16 March 1994, col 37.

- 3.86 Several other respondents to our Consultation Paper used Christmas presents purchased in autumn as an example. In the FDS research, consumers discussed a scenario in which a teddy bear was bought in October, and fell apart as soon as it was opened on Christmas day. Almost everyone thought that the consumer should be entitled to a refund in this case.<sup>34</sup>
- 3.87 Another example would be a pregnant woman who buys baby equipment, such as a pram and cot, in preparation for the birth of her child.
- 3.88 **We recommend that where it is reasonably foreseeable by, or reasonably within the contemplation of, both parties that a longer period will be needed to inspect the goods and to try them out in practice, then a consumer should be able to argue for a period longer than 30 days.**

#### ***Personal factors***

- 3.89 In the Consultation Paper, we asked whether it should be open to consumers to argue that the period should be extended for longer than 30 days where they have been unable to test the goods for a specific good reason (not merely disinclination), for example because they have been ill or on holiday. There would need to be some element of inability to test goods, rather than it merely being the consumer's choice not to test. However, this category covers circumstances that are outwith the trader's knowledge. Under current law, personal factors such as periods of illness can extend the period for rejection. For example, in the *Bernstein* case, the judge commented:

I discount the period when the plaintiff was ill because reasonable seems to me to be referable to the individual buyer's situation as well as to that of the seller.<sup>35</sup>

- 3.90 Subsequent cases have also suggested that the current law should take into account the buyer's personal circumstances, even if the retailer could not foresee them.<sup>36</sup> However, the period allowed for these personal circumstances has typically been short, on the ground that it has to be weighed against what may seem reasonable to the seller.
- 3.91 Consultees' views were split on this question, with the very slight majority against a consumer being able to argue for a longer period in these circumstances; this was generally on the ground that it would be undesirable to introduce subjectivity and uncertainty which would rob the 30-day period of its simplicity. Some were also concerned about the potential for abuse. We are persuaded that personal factors would erode the advantages of certainty which a 30-day normal period would bring.
- 3.92 **We recommend that personal circumstances should not be able to extend the 30-day normal period.**

<sup>34</sup> See Appendix A to the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

<sup>35</sup> *Bernstein v Pamson Motors (Golders Green) Limited* [1987] 2 All ER 220 at 230-231.

<sup>36</sup> See for example, Judge Raymond Jack's statement in *Truk (UK) Ltd v Tokmakidis GmbH* [2000] 2 All ER (Comm) 594 that the reasonable period should bear in mind both the buyer's and the seller's position.

### **Express agreement**

- 3.93 In some cases, the seller may specifically agree to extend the period for the right to reject by, for example, providing a “gift receipt”. We proposed that where sellers agree to allow the buyer to test the goods outside the 30-day period, the normal period should be extended.
- 3.94 The vast majority of those who responded to this question agreed that this should be possible. A number of those added, however, that it should not be possible to *reduce* the period by express agreement. We agree with this view.
- 3.95 **We recommend that a consumer should be able to argue for a period longer than 30 days where the parties agreed to an extended period.**

### **THE REVERSE BURDEN OF PROOF FOR THE RIGHT TO REJECT**

- 3.96 Under the CSD, durable goods are presumed to be faulty at the time of the sale if the fault appears within six months of delivery. This means that if such a fault appears it is up to the retailer to show that the goods were not faulty at the time of delivery. In the Consultation Paper, we asked whether this should be extended to the right to reject. Respondents agreed with this proposal because it would simplify the law and make it more consistent.
- 3.97 **We recommend that a consumer who exercises the right to reject should be entitled to a reverse burden of proof that faults appearing within six months of delivery were present when the goods were delivered.**

### **THE RIGHT TO REJECT FOR “MINOR” DEFECTS**

- 3.98 Under current law, once a consumer has shown that one of the implied terms of quality has been breached, they may exercise the right to reject, provided they have not accepted the goods. There is no exclusion for minor defects, such as imperfections in appearance, finish or small malfunctions.
- 3.99 SoGA provides that the quality of goods includes their state and condition. Appearance and finish, and freedom from minor defects are among the factors which are, in appropriate cases, aspects of quality.<sup>37</sup>
- 3.100 This provision in SoGA resulted from the Law Commissions’ 1987 Report, in which they recommended that the new definition of quality should specifically refer to appearance, finish, and freedom from minor defects.<sup>38</sup> The Law Commissions made that recommendation in order to clarify the law, because at the time doubt about the extent to which the implied term as to quality in SoGA covered minor defects led to a lot of unnecessary disputes. The Law Commissions also thought that damages were unlikely to be a satisfactory remedy for goods rendered of unsatisfactory quality by minor defects:

<sup>37</sup> SoGA, s 14(2B).

<sup>38</sup> Sale and Supply of Goods (1987) Law Com No 160; Scot Law Com No 104.

Even if compensation were agreed, this would often still not be an adequate remedy for the consumer. What he wanted was goods of the proper quality at the full price, not defective goods at a lower price.<sup>39</sup>

- 3.101 Now, in 2009, it is evident that the appearance of goods is as important (if not more important) to consumers. In many cases consumers spend a great deal of time selecting goods specifically because of their appearance. Therefore, it is appropriate that dents, scratches and blemishes will sometimes be breaches of the implied term as to quality. In these cases, a repair or replacement may not be practical or possible, and the consumer will not want a reduction in price because they have selected the goods for their appearance and paid for a specific appearance.
- 3.102 This point emerged strongly from the research carried out by FDS.<sup>40</sup> When participants were asked what remedy they would expect in the case of a scratched table, most were very reluctant to consider keeping an item which did not look good. They gave many examples of carefully choosing kettles and other kitchen equipment to match their décor. They would not want to keep items which were discoloured or did not match the sample.
- 3.103 When considering this area of law, it is important to note that not all faults entitle the consumer to exercise the right to reject. The right will only arise where the fault is significant enough to amount to a breach of an implied term, for example if it renders the goods of unsatisfactory quality.<sup>41</sup> As Howells and Weatherill note:

The 1994 amendments clarify that appearance and finish and freedom from minor defects are relevant factors, but note that the presence of such a defect will not necessarily render the goods unsatisfactory as they are only to be considered in appropriate cases as part of the overall assessment of the goods' quality.<sup>42</sup>

- 3.104 They go on to explain that, in some cases, the defect might be so minor that it is considered *de minimis*. That is, the defect may be too trivial to constitute a breach. For example, in *Darren Egan v Motor Services (Bath) Ltd* Lady Justice Smith said:

<sup>39</sup> Above, p 37.

<sup>40</sup> See Appendix A to the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

<sup>41</sup> In Scotland, the breach must be material: SoGA, s 15B(1)(b). In a consumer contract, however, breach of any term as to quality or fitness for purpose, or any term that the goods will correspond with a description or sample, is deemed to be a material breach: SoGA, s 15B(2).

<sup>42</sup> Howells and Weatherill, *Consumer Protection Law* (2<sup>nd</sup> ed 2005) p 178.

However, it seems to me unlikely that a buyer will be entitled to reject goods simply because he can point to a minor defect. He must also persuade the judge that a reasonable person would think that the minor defect was of sufficient consequence to make the goods unsatisfactory... . The reasonable person may think that the minor defect is of no consequence.<sup>43</sup>

- 3.105 This differs from Article 3(6) of the CSD, which states that “the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.” At present, the UK, among other member states, has not implemented that provision. However, under the European Commission’s proposal for a consumer rights directive, this would change. Member states would no longer be permitted to allow consumers to rescind a contract for minor defects. Furthermore, as currently drafted, consumers would lose the right to reject. The only remedies for minor defects would be repair or replacement and, if those were not possible or proportionate, price reduction. Therefore, in some cases, a consumer would only be offered a reduction in price.
- 3.106 In discussions about the proposed directive, some consumer representatives have expressed concern that the combined effect of Article 26(2) which allows the trader to choose the remedy, and Article 26(3) which does not allow rescission if the lack of conformity is minor, will in practice result in a real reduction in consumer protection on the following basis. The risk is that rescission will no longer be offered because the temptation will be for the retailer to argue that any fault is minor. Rescission will often be the least desirable option from the trader’s point of view. This might mean that in practice the trader exercises a choice of three options: repair, replacement or price reduction. Price reduction might be the retailer’s preferred option because it could be cheaper than repair or replacement - the retailer is not bound by clear rules about how it should be calculated. In practice, the consumer would seldom be in a position to dispute the trader’s conclusion.
- 3.107 Our research with the European Consumer Centres indicated that many member states which have implemented Article 3(6) of the CSD experience considerable difficulties in practice with the question of what constitutes a minor defect, and that this is a significant cause of disputes.<sup>44</sup>
- 3.108 In the Consultation Paper, we provisionally proposed that legal protection for consumers with respect to minor defects should not be reduced. Virtually all respondents agreed. They expressed a strong concern that reducing protection in this area would be a “major retrograde step”, weakening the consumer’s position vis-à-vis the trader. One of the reasons that excluding minor defects would be perilous is that there is a lack of clarity over what constitutes a minor defect. It typically involves a subjective judgment, and disputes about what constitutes a minor defect would detract from the simplicity of the right to reject. Many respondents also added that the current law creates an incentive for the production of high quality goods.

<sup>43</sup> [2007] EWCA Civ 1002; [2008] 1 WLR 1589.

<sup>44</sup> The European Consumer Centre Questionnaire responses are summarised at paras 6.49-6.58 of the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

- 3.109 Consultees pointed out that the appearance of goods is often as important as function to consumers. If a consumer purchases a new item, they are paying the price for something new, not second-hand or repaired. The consumer, if given the option, would usually not have chosen to purchase the damaged item, even at a discount. The City of London Law Society spoke for the majority when they responded:

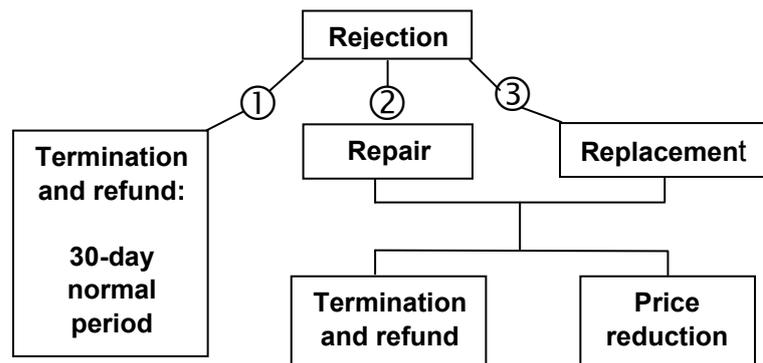
We would agree with the views expressed in the Law Commission's 1987 report that cosmetic issues, such as product finish, are of major importance to consumers. The current law does not require absolute perfection in goods sold by retailers and the 1994 reforms to the Sale of Goods Act 1979 recognise freedom from minor defects as an element of "satisfactory quality". We are not aware that this has caused major problems in practice. Removing the right to reject for "minor" defects would create further uncertainty in the law and would lead to costly disputes.

- 3.110 **We recommend that legal protection for consumers who purchase goods with "minor" defects should not be reduced with regard to the right to reject and also to the CSD.**

## **INTEGRATION OF CSD REMEDIES WITH THE RIGHT TO REJECT**

### **Rejection with three possible options**

- 3.111 In Part 2 of the Consultation Paper, we explained that the rejection of goods and the termination of the contract are two separate concepts. The rejection of goods (that is, the refusal to accept goods) is not necessarily followed by termination of the contract. For example, the consumer may reject goods and give the trader an opportunity to cure the fault. We use the short-hand term of "right to reject" to mean rejection and termination (including a refund) or, in Scots law, the consumer treating the contract as repudiated by the trader.<sup>45</sup>
- 3.112 As stakeholders complained that they found the two separate remedies regimes confusing and disjointed, we considered how the right to reject under SoGA might be better integrated with the CSD remedies in order to make the remedies regime simpler. We proposed that this could be done by combining the right to reject with repair and replacement. These three first instance remedies could be joined under the umbrella of the concept of rejection.
- 3.113 A new provision in SoGA could provide that the consumer buyer can *reject* faulty goods with three possible remedies of first instance: termination plus full refund; or alternatively the consumer can request repair or replacement. A diagram of the remedial regime would look like this, focusing on the three remedies that consumers use most: refund, repair and replacement.



3.114 There was a large degree of consensus from consultees on this proposal. The great majority of respondents agreed with the principle that the provisions should be simplified in this way and that this was a sensible approach. Many concurred with the Bar Council’s view:

Assuming this can be done, then we agree that this is the ideal outcome. However, if this cannot be achieved at European level, then an independent right to reject should be retained.

3.115 Also in agreement, the Faculty of Advocates wrote:

The Faculty considers that clarity in consumer law is particularly important. The Faculty agrees with the proposal that the SoGA and CSD remedies be integrated into a single instrument through the broadening of the concept of “rejection”.

It considers, however, that it is crucial in any single instrument that termination and refund are a first tier remedy (as is presently proposed) to avoid a consumer being required by a seller to accept mere repair or replacement.

**Other points**

3.116 The CSD provides that its remedies are available if goods do not conform to contract. Unfortunately, it does not define non-conformity, as such; instead it provides that goods are presumed to be in conformity if they satisfy a list of conditions, relating to description, fitness for purpose, and quality and performance.<sup>46</sup> On the other hand, SoGA is much clearer about when remedies apply because it defines non-conformity as a breach of an express term of the contract or of a term implied by section 13, 14 or 15.<sup>47</sup>

<sup>45</sup> That is, rescinding the contract as a result of a material breach.

<sup>46</sup> Article 2.

<sup>47</sup> SoGA, s 48F.

3.117 The Office of Fair Trading was concerned that if the right to reject were integrated with CSD remedies so that it was only available in cases of non-conformity (as set out in the CSD), this would restrict the right to reject. We agree with the Office of Fair Trading's point that the right to reject should continue to be available for breach of contractual conditions generally, and this should not be lost as a result of integration of the right into the CSD.

3.118 **We recommend that the right to reject and CSD remedies should be better integrated in a single instrument, by use of the concept of rejection.**

#### **The right to reject: the effect of repairs and negotiations**

3.119 In the Consultation Paper, we provisionally proposed that once a consumer has accepted a repair, their right to reject should cease. If the repair fails, the consumer should proceed to a second tier remedy along the lines we proposed in relation to the reform of the CSD. We made this provisional proposal in the interests of simplicity.

3.120 This differs significantly from the current law, which provides that if a consumer seeks to exercise the right to reject, but is persuaded by the retailer to allow one or more attempts at repair, then the right to reject is suspended. If the repair(s) fails, the consumer may exercise the right to reject.<sup>48</sup>

#### ***Consumers should not be discouraged from attempts at cure***

3.121 The majority of respondents disagreed with our provisional proposal. There was general concern that it would discourage consumers from agreeing to attempts at cure, because in doing so they would lose the right to reject. It was felt that attempts at cure should be encouraged where acceptable to both parties, and the consumer should not be penalised for being cooperative.

3.122 Retailers, academics, and consumer groups alike feared the proposal would lead to an undesirable reduction in repairs, as consumers would be advised not to risk repair. For example, the British Retail Consortium said:

... We believe that if a consumer who waives his right to a refund in the first 30 days in favour of a repair or replacement loses his right to a refund if the repair or replacement also fails, then consumers will learn simply to demand a full refund in the first 30 days and start again. This would be detrimental where a simple repair would have been possible and should have been tried.

3.123 In view of the feedback we have received, we are persuaded that the current law should be retained. It is important that the law should not discourage consumers from accepting repairs.

<sup>48</sup> SoGA, s 35(6)(a). This provision in SoGA was introduced following a recommendation made by the Law Commissions in 1987. The objective of that recommendation was to encourage attempts at repairs.

- 3.124 In the context of our recommendation for a period of 30 days in which the right to reject should normally be exercised, we consider that where a consumer has initially sought to reject goods, but accepts the trader's offer of repair, the consumer should be able to argue that they need longer than 30 days in which to test goods. This is because it would be within the contemplation of both parties that the consumer would need to inspect goods following repair.
- 3.125 **We recommend that the 30-day period should be suspended whilst repairs or negotiations about repairs take place. Where a consumer discovers a fault within 30 days and seeks to exercise the right to reject, but accepts the trader's offer of repair, or where there are negotiations about the possibility of repair, the 30-day period should be suspended.**

### **WRONG QUANTITY**

- 3.126 Section 30 of SoGA provides consumers with a choice between exercising the right to reject or asking for a cure where the seller has delivered the wrong quantity of goods. Under the European Commission's proposed directive, as drafted, consumers would not be entitled to exercise the right to reject goods.
- 3.127 In the Consultation Paper, we invited views on whether there are reasons to retain section 30 of SoGA for consumer sales, or whether cases of wrong quantity can be dealt with through the application of general principles applying to non-conforming goods, that is the application of the duty to provide goods that correspond to their description.<sup>49</sup> Generally, consultees doubted that the duty to deliver the correct quantity of goods may be thought of as an application of the more general duty to provide goods which correspond to their description. Consultees tended to see section 30 as a reasonable, sensible and logical set of rules to deal with the wrong quantity of goods being delivered.
- 3.128 Professor CJ Miller was among those who made the point that wrong quantity does not necessarily fall within section 13 of SoGA which relates to description. Professor Roy Goode shared that view, and commented:

I do not agree that delivery of the wrong quantity goes to description, since this is concerned with the identity of the subject matter of the contract.

- 3.129 Some consultees also expressed doubt about whether wrong quantity amounted to non-conformity under the CSD. In view of this, and the doubt that wrong quantity should be dealt with as a breach of the implied term as to description, we think that the provisions of section 30 of SoGA should be retained.
- 3.130 **We recommend that the provisions of section 30 of SoGA, which sets out remedies for consumers where a retailer delivers the wrong quantity of goods, should be retained.**

<sup>49</sup> SoGA, s 13.

# PART 4

## DAMAGES

### THE DOMESTIC REMEDY OF DAMAGES

- 4.1 As we mentioned in Part 2 of this Report, the Sale of Goods Act 1979 (SoGA) provides that where goods are faulty, the buyer may be entitled to damages. Damages may be payable both where the buyer has rejected the goods,<sup>1</sup> and where the buyer has not rejected them.<sup>2</sup>
- 4.2 Generally, there are two types of loss for which a consumer buyer might seek compensation:
- (1) *The difference in value.* Where the buyer keeps the goods, this is the difference between the value of the goods contracted for and the value of the goods actually received. Where the buyer has rejected the goods, it is the difference between the contract price and the current market price.
  - (2) *Any consequential losses,* including any injuries or damage to other property caused by the faulty goods.
- 4.3 The general contractual limits on foreseeable losses apply, so that consequential losses will only be recoverable if they were within the reasonable contemplation of the parties at the time of the sale.<sup>3</sup>

### RETENTION OF THE DOMESTIC REMEDY OF DAMAGES

- 4.4 Throughout this project, there has been strong support from stakeholders for retention of the domestic remedy of damages. This was reflected in the responses to the consultation.
- 4.5 Consultees described damages as an essential element of our remedial system; a useful “catch all” and flexible enough to deal with a variety of situations. They pointed out that there are some circumstances where the other legal remedies are not sufficient, bearing in mind that consumers should be compensated by being put into the position in which they would have been had the goods conformed to the contract. For example, by the time consumers go to court, they often claim damages for the cost of repair or replacement, having had no alternative but to arrange for repair or replacement themselves. Others noted that a claim for damages requires consumers to mitigate their loss, which is sensible and beneficial.

<sup>1</sup> SoGA s 51 allows the buyer to receive the difference between the contract price and the current market price.

<sup>2</sup> Above, ss 53 (for England) and 53A (for Scotland).

<sup>3</sup> The general rule is derived from *Hadley v Baxendale* (1854) 9 Exch 341. See also SoGA, ss 53 (for England) and 53A (for Scotland).

## GUIDANCE ON DAMAGES

- 4.6 A secondary issue that was brought to our attention is that in practice there is a considerable amount of uncertainty about the circumstances in which a consumer may claim damages with respect to faulty goods. Office of Fair Trading research has shown that it is not uncommon for consumers to experience financial loss due to faulty goods.<sup>4</sup> However, it appears that consumers rarely claim for such financial loss. There is even greater confusion about whether consumers can claim for non-financial loss, such as disappointment, distress and inconvenience.
- 4.7 In the Consultation Paper, we sought views on whether the issue of damages should be left to the common law or whether guidance would be helpful on the circumstances in which damages should be payable to consumers. In particular, should damages be available for loss of earnings, distress, disappointment, and inconvenience? If so, for which types of goods, and in which circumstances?
- 4.8 The majority of respondents felt that guidance would be useful so that consumers are more aware of when damages are and are not available. The Bar Council's response reflected the view of the majority:
- Guidance as to what the common law states might be helpful, in particular for litigants in person or their advisers who frequently plead such claims unsuccessfully.
- 4.9 Some consultees commented on the circumstances in which damages should be payable. Most considered that damages should be payable where quantifiable financial loss within the contemplation of the parties flows from the breach of contract. This would include proven loss of earnings and other costs. That was seen as a fairly non-contentious matter.
- 4.10 Non-financial loss, such as distress, disappointment, and inconvenience were more contentious topics. However, the majority of those who expressed a view on such potential heads of loss favoured the possibility of recovery in appropriate cases. For example, the Institute of Consumer Affairs wrote:
- Clear guidelines should be produced, this will be helpful for consumers, traders and consumer advisers. All types of goods should be covered and any monetary loss made good. It is obviously more difficult to adduce damages for more abstract features such as distress and loss of enjoyment but nevertheless we see no reason why, if sufficient justification is produced, these should not be included.
- 4.11 In our view, guidance on damages should include the following heads.

<sup>4</sup> OFT, *Consumer Detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008).

### **Damages for financial loss**

- 4.12 We have mentioned the possibility of a claim for the difference in value.<sup>5</sup> The consumer may also seek damages where they incurred quantifiable financial loss in terms of expenses in obtaining substitute goods, or otherwise as a result of the breach of contract. Examples include travel costs and telephone calls.<sup>6</sup>
- 4.13 Damages will be recoverable where the goods themselves are damaged due to their defective condition. A leading textbook on the sale of goods gives the example of a collision due to defective brakes causing further damage to a motor vehicle.<sup>7</sup>

### **Damages for non-financial loss**

- 4.14 Damages will be recoverable for loss which is within the reasonable contemplation of the parties where the faulty goods cause physical injury to the buyer, their property or family.<sup>8</sup>
- 4.15 Other non-financial loss, such as distress, disappointment and inconvenience are more contentious topics. However, the law does allow for these heads of damages where pleasure or peace of mind is a major or important part of the contract.<sup>9</sup>
- 4.16 The main case in English law is *Farley v Skinner*.<sup>10</sup> In this case, Lord Steyn cited Bingham LJ in *Watts v Morrow*.<sup>11</sup>

A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, but on considerations of policy.

<sup>5</sup> See para 4.2(1), and SoGA, s 51(3). If, at the time of breach, the market price is the same as or lower than the contract price, the buyer is entitled to nominal damages.

<sup>6</sup> See *Samuels v My Travel Tour Operations Ltd (t/a Cresta Holidays)* [2005] CLY 1979 (Barnet County Court), where the consumer sued the travel operator for damages for breach of contract regarding a luxury holiday; the judge awarded £135 to compensate the claimant for expenses including taxi fares and telephone calls.

<sup>7</sup> *Benjamin's Sale of Goods* (7<sup>th</sup> ed) 2006 at 17-073.

<sup>8</sup> *Benjamin's Sale of Goods* (7<sup>th</sup> ed) 2006 at 17-072. Damages may also be available in certain circumstances under the Consumer Protection Act 1987, but such a claim would normally be against the producer.

<sup>9</sup> *Benjamin's Sale of Goods* (7<sup>th</sup> ed) 2006 at 17-071. See also Lord Steyn in *Farley v Skinner* [2002] 2 AC 732 at p 750.

<sup>10</sup> *Farley v Skinner* [2002] 2 AC 732.

<sup>11</sup> [1991] 1 WLR 1421.

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.<sup>12</sup>

- 4.17 In *Farley v Skinner*, Lord Steyn noted some cases where damages had been awarded because the object of the contract had been to provide pleasure, relaxation, or peace of mind. These included: *Diesen v Samson* which concerned a photographer who failed to turn up at a wedding;<sup>13</sup> *Jarvis v Swans Tours Ltd* which concerned a disastrous holiday;<sup>14</sup> and *Jackson v Chrysler Acceptances Ltd* detailed below.<sup>15</sup>
- 4.18 In *Jackson v Chrysler Acceptances Ltd*, the consumer agreed to the hire purchase of a car from the defendant finance company. The consumer made clear to the plaintiff that he wanted the car for a family trip to France. The car was faulty and spoilt the holiday. The judge awarded £75 for the spoilt holiday. The Court of Appeal increased the total damages awarded, some of the increase being attributable to a finding that £75 was not sufficient compensation for the spoilt holiday. It should also be noted that in *Bernstein*, which concerned another faulty car, the judge awarded the buyer damages for a ruined day out occasioned by the breach of contract.<sup>16</sup>
- 4.19 The Scottish courts also award damages for trouble and inconvenience resulting from a breach of contract.<sup>17</sup> In *Smith v Park*, which concerned a second-hand car, the court held that the breach of contract had caused the buyer considerable trouble, inconvenience and expense.<sup>18</sup> The court awarded the buyer damages of £75, based on the trouble and inconvenience caused. Sheriff Croan said:

The case of *Webster & Co. v Cramond Iron Co* (1875) 2 R 752 is authority for the view that when a contract is broken and the pursuer has been put to trouble and inconvenience even though no specific damage is proved the pursuer is entitled to an award of damages.<sup>19</sup>

<sup>12</sup> At 745, citing Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421 at 1445.

<sup>13</sup> 1971 SLT (Sh Ct) 49.

<sup>14</sup> [1973] QB 233.

<sup>15</sup> [1978] RTR 474.

<sup>16</sup> *Bernstein v Pamson Motors (Golders Green) Limited* [1987] 2 All ER 220.

<sup>17</sup> See McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) para 22-99.

<sup>18</sup> 1980 SLT (Sh Ct) 62. This case concerned breach of the duty under the Supply of Goods (Implied Terms) Act 1973, s 3.

<sup>19</sup> Above, p 63.

4.20 In *Mack v Glasgow City Council* a tenant sought damages from a landlord for the inconvenience of having to live in unpleasant conditions resulting from the landlord's failure to keep the flat in a habitable condition.<sup>20</sup> The court held that where a breach of contract caused inconvenience, that inconvenience might be reflected in an award of damages, which would not be confined to nominal damages.<sup>21</sup> The court stated that it would look at the true nature of the claim and award damages for inconvenience.

4.21 Several consultees, such as Consumer Focus, responded that the common law was adequate on the question of damages, but that the real difficulty is informing consumers and their advisers about the law on damages. Consumer Focus responded:

The difficulty is that even in Scotland, where the principle of damages for trouble and inconvenience is more clearly settled, it seems not to be one that is well-known to consumers and their advisers. This raises wider issues about informing consumers of their rights and is best dealt with in discussing that problem.

4.22 In our view, if clear and helpful guidance on damages were issued, as we recommend, it would serve as a useful tool in the education of consumers and retailers. It would also assist consumer advisers.

4.23 Respondents to the recent Consumer Law Review undertaken by the Department for Business, Enterprise and Regulatory Reform highlighted gaps in knowledge of consumer rights.<sup>22</sup> The Government intends to appoint a new Consumer Advocate who will improve the co-ordination and effectiveness of consumer education.<sup>23</sup> We hope that the Consumer Advocate will give consideration to who is best placed to draft guidance on damages, and the other areas of law with regard to which we recommend that guidance should be issued.

4.24 **We recommend that the domestic law on damages should be retained.**

4.25 **We recommend that guidance should be drafted and issued on the circumstances in which consumers can claim damages to compensate them where they have purchased goods which do not conform to contract.**

<sup>20</sup> 2006 SC 543.

<sup>21</sup> Above, paras 7 and 15, citing *Webster v Cramond Iron Co.* (1875) 2 R 752 as authority. In Scots law, damages are also awarded for mental distress (solatium); see MacQueen and Thomson, *Contract Law in Scotland* (2<sup>nd</sup> ed, 2007), para 6.28. Solatium can provide the basis of a claim where, because of the nature of the contract, the likelihood of distress was or ought to have been in the contemplation of the defender at the time of the contract.

<sup>22</sup> Consumer Law Review Call for Evidence, Summary of Responses (July 2009). Available at [www.berr.gov.uk/files/file52071.pdf](http://www.berr.gov.uk/files/file52071.pdf). The Department for Business, Enterprise and Regulatory Reform is now the Department for Business, Innovation and Skills (BIS).

<sup>23</sup> White Paper: *A Better Deal for Consumers* (July 2009) pp 8 and 60.

## **PART 5**

# **THE RIGHT TO REJECT IN OTHER SUPPLY OF GOODS CONTRACTS**

- 5.1 In the Consultation Paper, we discussed how other supply of goods contracts should be treated, for example work and materials contracts, exchange, hire and hire purchase contracts. In these contracts, unlike sales contracts, the right to reject is not lost by acceptance. In England and Wales, the right to reject continues until the contract has been affirmed. Affirmation can only take place once the consumer is aware of the fault. Similarly, in Scotland, the right to reject is lost when the consumer, through words or conduct, waives the right to reject.

### **THE PROBLEM WITH THE CURRENT LAW**

- 5.2 During this project, many stakeholders have told us that it is undesirable that different rules apply depending on the method of purchase, because it adds to the complexity of the law. The effect can be illustrated by looking again at the washing machine scenario we set out in paragraph 3.40 of this Report. We raised the question of whether the consumer in that scenario would have the right to reject. The applicable law is different if a consumer purchases a washing machine on hire purchase or as part of a fitted kitchen, as opposed to a straight sale. Generally, a consumer has longer to exercise the right to reject under a hire purchase agreement, or a work and materials contract.
- 5.3 The courts have struggled with this issue. In *Jones v Gallagher* the buyers had made some complaints about a fitted kitchen soon after the work was done.<sup>1</sup> Some remedial work was undertaken but further complaints were made. The buyers then tried to reject the kitchen five months later. The Court of Appeal held that they could not do so as they had accepted the kitchen. The validity of this decision has been doubted because the Court of Appeal appears to have erroneously considered acceptance within the meaning of the Sale of Goods Act 1979. The court should have considered whether the contract had been *affirmed*, as the transaction in *Jones* was not one of sale, but a contract for work and materials.
- 5.4 If judges and lawyers are confused by the law in this area, it is unrealistic to expect consumers to understand it. We know that consumers seldom obtain legal advice in consumer disputes. Moreover, some consumer advisers have told us that they find it difficult to advise consumers on this area. Even though the law is theoretically more favourable to consumers, we doubt whether it is often used because it is so complex. The majority of consultees expressed the view that it is paramount that the law should be simple enough for consumers to understand and use.

<sup>1</sup> *Jones v Gallagher (trading as Gallery Kitchens and Bathrooms)* [2004] EWCA Civ 10; [2005] 1 Lloyd's Rep 377.

- 5.5 The UK Government's recent White Paper highlights the need for simplification and uniformity of the law where possible. The Department for Business, Innovation and Skills ("BIS", previously the Department for Business, Enterprise and Regulatory Reform) began a Consumer Law Review in May 2008. Under the heading of "Sale and supply of goods and services" the White Paper states:

Responses to the Consumer Law Review suggested that there would be strong benefits for business, consumers and enforcers from a coherent consolidated law which as far as possible minimised the differences between different types of contract and different manners of purchase.<sup>2</sup>

- 5.6 The White Paper also states the Government's aims in relation to the modernisation of consumer law, based upon the Consumer Law Review, one of which is that: "Consumer rights should be accessible to the many, not the few."<sup>3</sup>

### **THE CONSULTATION PAPER**

- 5.7 At an early stage, we were made aware that this was a contentious issue. Whilst many pointed out the undesirable complexity of the law, there was no consensus as to how it should be simplified.
- 5.8 We considered whether our proposal for a 30-day normal period for exercising the right to reject goods should also apply to other supply of goods contracts. We thought that the arguments differed between contracts where property passes (such as work and materials contracts, hire purchase, exchange and barter) and those where property does not pass (such as hire contracts). However, we reached no concluded view. On the one hand, we thought that removing the distinction would simplify the law. On the other hand, we had been told that affirmation/waiver is an important safeguard for consumers in certain contracts where faults may not be apparent for some time.
- 5.9 We asked consultees whether the 30-day normal period for exercising the right to reject should also apply to other supply of goods contracts in which property is transferred, or whether the current law should be retained. Respondents' views were split with half in favour and half against.

### **Arguments in favour of the 30-day normal period applying to other supply of goods contracts where property is transferred**

- 5.10 The Office of Fair Trading (including Consumer Direct) were among those who argued that the benefits of simplicity of the 30-day period applying to these contracts would outweigh any perceived loss of consumer rights. They pointed out that consumers generally do not know about these rights and therefore there would be little practical detriment; the proposal would bring greater benefits to consumers as they would benefit from simplification of the law.

<sup>2</sup> *A Better Deal for Consumers* (July 2009) para 4.2.4.

<sup>3</sup> Above, p 9.

5.11 Others agreed that simpler law would benefit consumers, advisers and retailers. Some said it did not make sense to have different rights if a faulty cooker was bought as part of a fitted kitchen, as opposed to a free-standing model bought separately. Several consultees considered that it was difficult in practice to distinguish a sale contract from a contract to supply goods and services. Courts struggled with this classification as well as the application of the law on acceptance as opposed to affirmation (as seen in the *Jones* case).<sup>4</sup>

5.12 The Association of Her Majesty's District Judges responded:

The Consultation Paper points out rightly the difficulty often encountered in analysing which type of contract is applicable. In our view, in any contract where property which is substantial (within the context of the contract) is transferred, the same rules should apply as for sales of goods, even if this in theory means a possible reduction in consumer protection.

**Arguments against the 30-day normal period applying to other supply of goods contracts where property is transferred**

5.13 Many of those who argued against this did so on the basis that the current law should be retained, expressing the view that the arguments for uniformity do not outweigh the reduction of consumers' rights. Several said that they could see no justification for a change in the law, and there was no evidence of it causing unfair results in practice.

5.14 The Local Authorities Co-ordinators of Regulatory Services expressed concern that a 30-day period would operate particularly harshly in these contracts. Others pointed out that in many of these contracts the consumer is much more reliant on the trader who has selected, obtained, examined and fitted the goods on the consumer's behalf. In these cases it is common for the consumer to rely on the trader's expertise, skill and advice in relation to the goods.

5.15 The Council of Her Majesty's Circuit Judges concurred that the current law should be retained, and said that faults in these contracts often take longer to appear:

Although we see benefit in simplifying the law to substitute the 30-day rejection period in supply contracts other than simple sale of goods contracts, we do not consider that the benefit of simplification should outweigh the views of consumer groups as to the advantages of the different regimes in contracts of work and materials and exchange, particularly as, in those contracts, it is more often than not that defects may take a substantial time to manifest themselves. We therefore consider that the current law should be retained.

5.16 Which? expressed the view that a single remedies regime based upon affirmation/waiver should apply to both sales contracts and supply contracts. They suggested that this would increase clarity and provide more appropriate protection.

<sup>4</sup> See para 5.3 above.

## CONCLUSION

- 5.17 This is a particularly difficult area because of the diversity of views among consultees. The arguments are finely balanced. However, we are mindful of the policy expressed in the Government's White Paper.<sup>5</sup> We are persuaded that the law requires simplification so that it can be used by consumers, explained by consumer advisers, and understood by retailers.
- 5.18 The current law is not satisfactory, not merely because it is not widely known, but also because its application presents problems in practice. The main benefit of the current law for consumers is that the right to reject can be exercised for defects of which the consumer is not aware for some length of time, such as latent defects. In paragraph 3.35 of this Report we recommend that the right to reject should be retained as a short-term remedy, and should not be available for defects which are discovered only after a period of time. One of the reasons for that conclusion was the difficulty in accounting for interim use, illustrated in hire purchase cases.<sup>6</sup> These cases also highlight problems with the application of the law on affirmation/waiver.
- 5.19 Affirmation is not necessarily a straightforward concept. It has its own complexities, as it shares much in common with the principle of "acceptance" in the Sale of Goods Act 1979 (SoGA) which has been heavily criticised by consultees. Our summary of the law, in paragraphs 2.41 and 2.42 of this Report, explains that affirmation may be implied by the buyer's actions; it may also be deemed if the buyer's delay is of such a length as to constitute evidence of affirmation. This is very similar to the problematic concept of deemed acceptance under SoGA where the buyer retains goods beyond a reasonable time. The courts take many of the same factors into account, such as the conduct of the parties, repairs, negotiations and the nature of the goods. If the aim is to simplify the law, then the vehicle for simplification should not be affirmation.<sup>7</sup>
- 5.20 Whilst some fear that the 30-day normal period might operate particularly harshly in supply of goods contracts, it ought to be noted that according to our recommendation the period does not start to run until the date of purchase, delivery or completion of contract,<sup>8</sup> whichever is later. So, for example, in a work and materials contract, where goods are under the control or possession of a trader for a prolonged period, or where the trader takes some time to finish the job, so that the consumer is unable to examine the goods, the 30-day period will not begin to run until work is complete.

<sup>5</sup> See paras 5.5 and 5.6 above.

<sup>6</sup> See paras 2.44 to 2.45.

<sup>7</sup> The same can be said of the law of waiver in Scotland.

<sup>8</sup> The period cannot start to run until "delivery" has taken place. This means that the consumer must have material possession of the goods. The goods must be in the consumer's control so that the consumer has the opportunity to test the goods in use.

- 5.21 It should also be noted that the 30-day normal period is a standard period and not an absolute fixed period. Therefore, account can be taken of circumstances rendering it reasonably foreseeable that the consumer will need longer than 30 days to inspect the goods and to try them out in practice. A typical example in a work and materials contract would be double-glazing or a conservatory fitted or built in summer. It would be within the contemplation of the parties that the consumer might need longer than 30 days to test the goods in use – the consumer would need to check the windows were watertight in storm conditions.
- 5.22 A further point to consider is that the Consumer Sales Directive applies to work and materials contracts.<sup>9</sup> This means that, for that type of contract, if a consumer does not have the right to reject because they are out of time, other remedies are available such as repair or replacement.

### **Hire purchase**

- 5.23 We invited views on the issues raised by hire purchase contracts, in particular whether they should be treated as supply contracts to transfer property in goods, or analogous to hire contracts. Respondents' views were split with approximately half thinking that hire purchase should be treated as a supply contract to transfer property in goods and the other half thinking that hire purchase should be treated in a different way. Only two thought hire purchase contracts should be treated as analogous to hire contracts.
- 5.24 Hire purchase is still an important method of financing car purchases for consumers. The Finance and Leasing Association said:

In 2007, 63% of the consumer motor finance agreements written (for the purchase of new and used cars) were hire purchase agreements. It remains, therefore, the most popular method of finance for purchasing vehicles.

- 5.25 We have also been informed that hire purchase is still used in the purchase of household appliances and goods. In the vast majority of hire purchase contracts, it is envisaged by the parties that the transaction will result in a transfer of property to the consumer, and more often than not, the transaction does end in the transfer of ownership. In a relatively small proportion of cases, the transaction does not end in the transfer of ownership. This is more likely where the hirer is required to make a large “balloon” payment at the end of the agreement if they wish to obtain ownership.<sup>10</sup> As the Bar Council wrote:

The popularity of agreements which carry a large “balloon” payment, rather than a typical small option to purchase fee, has complicated the picture. It is accordingly difficult to align hire purchase with either sale or hire, since traditional hire purchase is very similar to sale, but the “balloon” agreements perhaps have more in common with hire.

<sup>9</sup> See paras 2.47 to 2.49 of this Report for a more detailed summary of the application of CSD remedies to supply of goods contracts.

<sup>10</sup> In these cases, at the end of the contract, the hirer has the choice of making the large balloon payment to acquire ownership, or alternatively not making the balloon payment and terminating the contract without acquiring ownership.

- 5.26 However, even where a transfer of ownership does not occur in practice, the hire purchase contract gives the consumer the right to own the goods if they make all the payments. That right does not exist in pure hire contracts. We therefore consider that for the purpose of our 30-day normal period recommendation and the right to reject, hire purchase transactions should be treated in the same manner as contracts where property is transferred.
- 5.27 **We recommend that the 30-day normal period should apply to supply of goods contracts where property is transferred (such as work and materials contracts and exchange and barter). It should also apply to hire purchase contracts.**
- 5.28 As discussed in paragraph 2.48 of this Report, the CSD does not apply to hire purchase contracts. This means that consumers do not have the right to request repair or replacement of faulty goods. The House of Lords European Union Committee recently conducted an inquiry on the European Commission's proposal for a consumer rights directive.<sup>11</sup> We note that several stakeholders thought that hire purchase should be included within the scope of the proposed directive so that the hirer would have additional remedies.

#### **Hire contracts**

- 5.29 In the Consultation Paper, we provisionally proposed that for hire contracts the current law should be preserved.
- 5.30 The current law is that when goods develop a fault, the consumer is entitled to terminate the contract, paying for past hire but not future hire. The doctrine of affirmation applies to the exercise of the right to reject. However, the monthly hire charge is a convenient basis for valuing use. It seems legitimate that the trader continues to have an obligation to ensure that the goods conform to contract throughout the period of hire because the trader retains ownership of the goods. It is not envisaged that the consumer will benefit from a future transfer of ownership. The consumer is only paying for the *use* of goods. The argument that the consumer should be able to exercise the right to reject once they become aware of a fault which interrupts use is persuasive.
- 5.31 The vast majority of respondents agreed with this proposal, on the basis that the current law appears to be understood and operate well in practice. The Judges of the Court of Session succinctly represented the views of the majority in saying:
- We consider that the law as it presently stands appears to be understood and operate well in practice. In these circumstances we consider that there is neither demand, nor justification, for innovation in the law.
- 5.32 The CSD does not apply to hire contracts, so that consumers do not have the right to request repair or replacement.

<sup>11</sup> EU Consumer Rights Directive: getting it right, Volume I: Report of the House of Lords European Union Committee (2008-09) p 26.

**5.33 We recommend that the current law on the right to reject for hire contracts should be preserved.**

# PART 6

## REFORMING THE CONSUMER SALES DIRECTIVE

### INTRODUCTION

- 6.1 The UK implemented the Consumer Sales Directive (CSD) in 2002. In 2004, the European Commission launched a review of the eight consumer protection directives.<sup>1</sup> The European Commission published a proposal for a new directive on consumer rights in October 2008.<sup>2</sup> This is intended to reform four existing consumer protection directives, including the CSD.
- 6.2 The provisional proposals in our Consultation Paper were put forward as part of the current debate within the EU about how the CSD should be reformed, and aimed at improving the remedies in it. As well as forming part of the European debate, it may be possible to implement some reforms in the UK only, provided that any replacement of the CSD continues to be a measure requiring only minimum harmonisation.
- 6.3 The proposed directive has been drafted as a measure of maximum harmonisation, which would mean that member states could not maintain or adopt provisions diverging from those it lays down. In contrast, minimum harmonisation means that member states may maintain or adopt measures which give greater rights.
- 6.4 The European Commission's rationale for maximum harmonisation is that it would decrease fragmentation and increase legal certainty. The European Commission believes that this will contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market and reducing businesses' reluctance to trade cross-border.<sup>3</sup> Meglena Kuneva, the European Commissioner for Consumer Affairs, has expressed particular concern about the low level of consumers currently engaging in cross-border purchasing.
- 6.5 We note that stakeholders have expressed doubts about whether the proposed consumer rights directive, as a measure of maximum harmonisation, will achieve its objective of increasing cross-border retail transactions.
- 6.6 The House of Lords European Union Committee conducted an inquiry into the proposed consumer rights directive, in which it received evidence from stakeholders. In its report, the Committee questioned the ability of the proposal as drafted to deliver the European Commission's desired increase in cross-border trade:

<sup>1</sup> European Commission, *European Contract Law and the revision of the acquis: the way forward* COM (2004) 651 final.

<sup>2</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, see [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm).

<sup>3</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, see "Explanatory Notes" and Recital 8.

We consider that the Government should withhold agreement from the proposal as drafted. We are unconvinced that it will deliver the desired boost in trade across borders and we fear that, in some instances, it may reduce the overall level of protection currently afforded to consumers. The proposal should not be abandoned, but some of the issues as highlighted in this report must be revisited. ...

We agree that there is a need to update the existing Directives. ...The [European] Commission's solution is to apply the principle of "full harmonisation", whereby Member States' national rules will no longer diverge from those set at the EU level. We acknowledge that this could increase legal certainty for both consumers and businesses. Nevertheless, we would prefer to see a more targeted use of this principle, harmonising certain aspects but allowing Member States room to manoeuvre in other areas.<sup>4</sup>

6.7 The report continues:

We recommend that the [European] Commission gives further consideration to other factors, such as language, culture, distance of delivery and handling of cross-border complaints, and the extent to which these may also be responsible for current low levels of cross border retail trade.<sup>5</sup>

6.8 Below we discuss why we agree with the House of Lords European Union Committee, and think that the proposed directive should not be agreed without substantial changes to Chapter IV: *Other consumer rights specific to sales contracts*.

6.9 In Part 3 of this Report,<sup>6</sup> we recommend that the right to reject should be retained as a primary remedy in the UK. In the context of the proposed directive, this could be achieved in at least three ways. Firstly, if the proposed directive were adopted as a measure of minimum harmonisation, this would permit the UK government to provide greater rights than those laid down by the proposed directive. Alternatively, the proposed directive could be adopted as a measure of maximum harmonisation incorporating the right to reject.

6.10 A third alternative, which has recently been debated by commentators and stakeholders, is "differentiated harmonisation", also known as "targeted full harmonisation".<sup>7</sup> This would mean that harmonisation would be targeted at areas of consensus and, for example, that the right to reject might be excluded from the scope of full harmonisation. Consequently, the UK could retain its right to reject, and other member states could retain theirs.

<sup>4</sup> EU Consumer Rights Directive: getting it right, Volume I: Report of the House of Lords European Union Committee (2008-09) p 5.

<sup>5</sup> EU Consumer Rights Directive: getting it right, Volume I: Report of the House of Lords European Union Committee (2008-09) p 15.

<sup>6</sup> See para 3.35.

<sup>7</sup> For example, see EU Consumer Rights Directive: getting it right, Volume I: Report of the House of Lords European Union Committee (2008-09) p 19, paras 58-60.

### **The right to reject**

- 6.11 In Part 3 of this Report we explain our conclusion that if there is a need for the maximum harmonisation of laws across the EU, there is a strong argument that the harmonised regime should incorporate a right to reject.<sup>8</sup> This argument has gained strong support. For example, in its submission to the House of Lords European Union Committee, with respect to the European Commission's proposal for a consumer rights directive, the British Retail Consortium wrote:

For example, we support the introduction of a right to get a full refund for defective goods in the first 14 or 30 days, with a reversed burden of proof – provided it can be agreed on a full harmonisation basis.

...in our view the appropriate way forward would be to change the Directive to introduce a right to reject for a limited period of 14 or 30 days. This would be an alternative to repair or replacement for that period – though these should remain options for the consumer.<sup>9</sup>

- 6.12 In a recent article, Dr Christian Twigg-Flesner wrote that our proposals could provide a template for a better EU-wide scheme:

Therefore, it is submitted that the Law Commission's proposals should be given very serious consideration by the European legislator. Adopting this on an EU-wide basis would provide a set of consumer remedies which would be more favourable and might stand a better chance of encouraging consumers as well as traders to take advantage of the internal market. It would also be appropriate where the non-conformity is the lack of goods' fitness for the particular purpose for which the consumer requires them.

It seems more likely that a consumer might buy goods abroad if he has the opportunity of getting the quick remedy of a full refund if they do not work, rather than being locked into a circle of repair and replacement.<sup>10</sup>

<sup>8</sup> See paras 3.20 to 3.24.

<sup>9</sup> EU Consumer Rights Directive: getting it right, Volume II: Evidence House of Lords European Union Committee (2008-09) pp 155 and 159.

<sup>10</sup> Dr Christian Twigg-Flesner, "Fit for purpose? The proposals on sales" in G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (2009).

### **A cycle of failed repairs**

- 6.13 During the course of our review, stakeholders repeatedly told us that clarification of how the CSD operates is required. In particular, there was confusion about how a consumer can move from first tier to second tier remedies. What amounts to “unreasonable delay” and “significant inconvenience”? In practice, these terms allow considerable scope for dispute. Consumers are particularly concerned about becoming locked into a cycle of failed repairs, because it is difficult to prove that an unreasonable delay or a significant inconvenience has been caused. For example, after how many repair attempts can a consumer say they have been significantly inconvenienced? Our research among European Consumer Centres shows that there is no consistency; member states have different approaches to this question and it is a problem area.
- 6.14 The consumer suffers financial and non-financial losses as a result of failed repairs and replacements. For example, the cost of telephone calls, travel, obtaining expert advice and assistance, and time off work.<sup>11</sup> These costs have a greater effect on consumers with lower incomes.
- 6.15 Which? summarised a recent case they had advised on which illustrates that the question of numerous repairs can prove to be a problem under the CSD regime:

A car was purchased for more than £30,000. The car developed an electrical fault which meant that control of certain functions of the car was lost. For example, the windows would open without warning, which made it difficult to leave the car parked.

Sometimes the effects were more serious. Once the electrical fault caused the engine to start and the car lurched forward whilst parked. Another time the car accelerated to 60 mph without warning. The consumer had to drive the car into a lay-by and apply the brakes while the wheels continued to spin at 60 mph.

As a result of a total loss of confidence in the car, the consumer was unable to drive it and was forced to cancel a holiday. The dealer refused the consumer’s attempt to reject the car, on the ground that the consumer was out of time. Instead, the dealer attempted to repair the car. After each repair, initially the problems appeared to have been corrected, but would then return soon after.

The consumer became locked into a cycle of failed repairs. Each time remedial work was carried out it was done quickly and efficiently and within a reasonable time, and so in practice each repair in isolation could not be said to have caused significant inconvenience; as such it is questionable that the right to rescind was triggered under the CSD. Ultimately, the consumer purchased another car while the faulty car remained in his garage for approximately two years.

<sup>11</sup> The Office of Fair Trading *Consumer Detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008).

6.16 The European Commission has made some suggestions for reform in its proposed consumer rights directive. For example, it proposes to allow consumers to proceed to a second tier remedy where “the trader has implicitly or explicitly refused to remedy the lack of conformity” or where “the same defect has reappeared more than once within a short period of time”.<sup>12</sup> However, we are concerned that those proposals do not provide sufficient clarity. They raise further difficult questions. For example, what is a short period of time? What constitutes implicit refusal? We consider that further clarification is needed. In our view, that clarification is generally best dealt with at a European level, and it should be provided within the new directive.

**CLARIFYING WHEN CONSUMERS MAY MOVE TO A SECOND TIER  
REMEDY: “REASONABLE TIME” AND “SIGNIFICANT INCONVENIENCE”**

6.17 In the Consultation Paper we made several proposals to clarify the CSD. Firstly, we provisionally proposed that the directive which replaces the CSD should state that after two failed repairs, or one failed replacement, the consumer is entitled to proceed to a second tier remedy.

6.18 All respondents who expressed a view appeared to agree that the law requires clarification in this area. Most pointed out that the benefit of our proposal would be that it would introduce a much needed measure of certainty.

6.19 One-third of respondents agreed with our proposal. Another third said our proposal should have gone further, namely, to allow a consumer to proceed to a second tier remedy after one failed replacement or one failed repair.

6.20 This means that a combined total of two-thirds of respondents felt that consumers should be able to proceed to a second tier remedy after one failed replacement, and either one or two failed repairs. Many argued that it would be clearer and more consistent to equalise the number of attempts at repair or replacement that are permitted before the consumer should be entitled to proceed to a second tier remedy. We find that argument persuasive. We think it would be beneficial if the directive were to provide such a level of clarity, which would be easy for consumers and traders to understand.

6.21 **We recommend that the directive which replaces the CSD should state that after one failed repair or replacement, the consumer is entitled to proceed to a second tier remedy.**

6.22 Our second provisional proposal was that further guidance should be provided stating that the consumer should be entitled to rescind the contract, either after one failed repair where the product is in daily use, or immediately where the product is essential, unless the retailer has reduced the inconvenience to the consumer by, for example, offering a temporary replacement or a 24-hour repair.

<sup>12</sup> Proposal for a directive on consumer rights, COM (2008) 614 final, see [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm), art 26(4)(a) and (d).

- 6.23 In our view, the category of essential items should be a narrow one, consisting of only those types of goods on which people are particularly dependent for their health, safety or well-being. These might include items such as wheelchairs, stair lifts, and hearing aids, the absence of which must by their very nature amount to significant inconvenience; and such a level of inconvenience that it would be unreasonable to expect a consumer to tolerate it. For such items, a repair might be unsatisfactory unless a temporary replacement was provided.
- 6.24 Many consultees had previously indicated their support for the proposal that the consumer should be entitled to rescind the contract after one failed repair when responding to the previous question. As a result, the response rate for this question was relatively low. Of those who did respond, about half agreed with the proposals. The remainder made other suggestions, some of which were more generous to the consumer, such as that the consumer should be able to rescind immediately where the product is in daily use as well as where the product is essential.
- 6.25 We have concluded that the consumer should be entitled to rescind immediately where the goods fall into the narrow category of genuinely essential items we have described. We think this change would be important if the right to reject we have recommended is not incorporated into the proposed directive, and if it is not permitted under UK law. We do not think that category should encompass all goods that are in daily use as this would result in a very wide category, covering many household appliances, such as kettles and toasters.
- 6.26 **We recommend that the directive which replaces the CSD should state that the consumer should be entitled to rescind the contract without affording the retailer the opportunity to repair or replace where the product is essential, unless the retailer has reduced the inconvenience to the consumer by, for example, offering a temporary replacement.**

#### **BEST PRACTICE GUIDANCE**

- 6.27 Thirdly, we provisionally proposed that there should be best practice guidance on the repair and replacement process under the CSD. This guidance should cover common problem areas. For example, it would be helpful to state that the retailer should use best endeavours to:
- (1) estimate how long repairs will take;
  - (2) keep the consumer informed of material developments, including information about the nature of the fault;
  - (3) provide reliable appointment times; and
  - (4) keep appointments.
- 6.28 This proposal was intended to address consumer dissatisfaction and disputes about the repair and replacement process.

- 6.29 Most of those who responded to this question agreed with our proposals, citing the benefits of clarification. The main argument in favour of the proposal was summarised by Professor CJ Miller who said that clarification would reduce the annoyance, frustration and the potential for loss of earnings occasioned by the inefficiencies in the repair and replacement process.
- 6.30 On the question of whether guidance should be at EU or national level, views were divided with approximately half saying that guidance should be at EU level and half saying it should be at national level. We think that this type of guidance is best dealt with at national level because of the variations in trade practices between different member states. We would suggest that, in the UK, guidance should be developed by the Department for Business, Innovation and Skills, in consultation with industry and consumer groups.
- 6.31 We note that the necessity for this type of guidance will be reduced if the directive which replaces the CSD states the consumer is entitled to proceed to a second tier remedy after one failed repair or replacement, as we recommend above in paragraph 6.21. This is because the consumer will be less likely to become locked into a cycle of failed repairs or replacements.
- 6.32 **We recommend that once the proposed directive is finalised the Department for Business, Innovation and Skills should give consideration to whether best practice guidance is needed on the repair and replacement process.**

**OTHER REASONS TO PROCEED TO SECOND TIER REMEDIES:  
DANGEROUS GOODS AND UNREASONABLE BEHAVIOUR**

- 6.33 Our fourth proposal regarding the CSD was that it should be reformed to allow a consumer to proceed to a second tier remedy when a product has proved to be dangerous or where the retailer has behaved so unreasonably as to undermine trust between the parties.
- 6.34 The research carried out by FDS showed that consumers felt strongly that they should be able to return goods and receive a refund in these circumstances.<sup>13</sup> One example which was given by a consumer was where the brakes failed on a new car whilst she was driving at speed on the motorway. The consumer survived the experience, but was considerably shaken and felt lucky to be alive. She did not want to drive that make or model of car again. Another example might be an electrical item that bursts into flames. The consumer may not feel safe using the product again. We think that, in these circumstances, the consumer should be entitled to bypass the remedies of repair or replacement and proceed to rescission.

<sup>13</sup> FDS's report of April 2008 is attached to the Consultation Paper at Appendix A.

- 6.35 Where traders have, to the detriment of buyers, deliberately delayed in answering correspondence or providing information, or unreasonably refused to tell a buyer what was wrong with a faulty product, the UK courts have taken the view that this type of behaviour should permit the buyer to receive a refund.<sup>14</sup> In these cases the traders behaved so unreasonably as to undermine the buyer's trust, and the relationship broke down. We think that the CSD should recognise that unreasonable behaviour of this type should permit the consumer to rescind the contract without proceeding through the first tier remedies.
- 6.36 The overwhelming majority of respondents supported our proposal. Some respondents, including the Local Authorities Co-ordinators of Regulatory Services and the Office of Fair Trading, suggested that care should be taken with the terminology and definitions of "dangerous" and "unreasonable behaviour", in order to avoid disputes and prevent ambiguity in practice.
- 6.37 The British Retail Consortium objected to this proposal saying that the tests would be too subjective:

In the context of a faulty product, whether or not it is dangerous is likely to be a highly subjective judgment for the consumer. While that consumer may believe or "feel" it is dangerous, the retailer might objectively believe that it was not the product that was dangerous but its improper use – or indeed that it was defective but not dangerous. The proposal is, therefore, likely to give rise to excessive disputes and to undermine the simplification process. In classifying a product as dangerous it is vital that objective criteria be set and objective assessments be made – not least because it is entirely possible that the apparent danger may have been caused by misuse. The same is true of an assessment of whether the retailer has behaved unreasonably. The consumer who has been denied something is likely to believe that the retailer has acted unreasonably.

- 6.38 We agree that the categories of dangerous goods and unreasonable behaviour should be narrow, and there should be a degree of objectivity. The consumer should be able to show that the goods they purchased proved dangerous. That is, a reasonable person would have concluded that the goods they purchased represented a risk to their health and safety. A kettle bursting into flames would satisfy that criterion. Similarly, a consumer would have to show that they were acting reasonably in concluding that a trader had acted so unreasonably as to undermine trust. That is, a reasonable person would have arrived at the same conclusion.
- 6.39 **We recommend that the CSD should be reformed to allow a consumer to proceed to a second tier remedy when a product has actually proved to be dangerous or where the consumer can show that the retailer has behaved so unreasonably as to undermine trust between the parties.**

<sup>14</sup> See, for example, *J&H Ritchie Limited v Lloyd Limited* 2007 SC (HL) 89; [2007] 1 WLR 670; [2007] 2 All ER 353.

## **RESCISSION AND THE DEDUCTION FOR USE**

- 6.40 If a consumer progresses to the second tier remedy of rescission, they are entitled to a refund. However, the retailer is permitted to deduct an amount to reflect the consumer's use of the faulty goods.
- 6.41 This deduction for use is an option in the CSD<sup>15</sup> which the UK chose to implement, but many member states did not. Under the European Commission's proposals for a new directive, this option would be removed. Recital 41 of the proposed directive states that "the consumer should not compensate the trader for the use of the defective goods".
- 6.42 In the Consultation Paper, we provisionally concluded that the European Commission is right to propose the removal of the deduction for use. We arrived at this provisional conclusion for several reasons. In meetings, stakeholders told us that the deduction for use is seldom used, and uncertain. Currently, there is no indication as to how it should be calculated which leads to disputes.
- 6.43 The deduction for use is an inflammatory topic with consumers. Consumers said that if they had been unfortunate enough to buy a faulty product, and repairs and/or replacements had been unsuccessful, they would feel aggrieved if they were then charged for use of the product. Further, they felt that if the refund was going to be reduced in this way, the consumer should be entitled to compensation for time off work, other associated costs such as telephone calls, and also for general inconvenience.<sup>16</sup>
- 6.44 Common sense tells us that in order to get to the second tier remedy of rescission, it is highly likely that the consumer would have suffered considerable delay and inconvenience, and probably at least one attempt at repair or replacement.
- 6.45 In the Consultation Paper, we asked whether consultees agreed that the "deduction for use" in the event of rescission should be abolished. Two-thirds of those who responded to this question were in favour of this proposal for consumer sales, mainly for reasons of simplicity, and to reduce uncertainty and the potential for disputes.
- 6.46 The Citizens Advice Bureau said that the damages the consumer suffers will often offset usage. Most agreed with that view. Similarly the Council of Her Majesty's Circuit Judges commented:

The calculation of the appropriate reduction is fraught with difficulties and in most cases the rough and ready set off between the use the consumer has had of the goods and the likely inconvenience he or she has experienced in obtaining repairs or replacements seems to strike an equitable balance.

<sup>15</sup> Recital 15.

<sup>16</sup> See Appendix A to the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

- 6.47 Those respondents who objected to the abolition of the deduction for use generally did so on the ground that the consumer might have had a substantial period of trouble-free use, and it was appropriate that the consumer should pay a reasonable amount for this. Several agreed with our proposed method of calculation based on the expected life span of the goods, discussed at paragraph 8.150 of the Consultation Paper.
- 6.48 The Radio, Electrical and Television Retailers' Association suggested a different approach in terms of calculating the deduction for use. That is, to have no reduction in the refund during the first six months from the date of purchase/delivery, but after that a reduction of some 10-15% per year.
- 6.49 On balance, we think that the European Commission is right to propose the removal of the deduction for use. The arguments in favour of the abolition of the deduction for use are more persuasive than the arguments against. The deduction for use is uncertain and relatively rarely used. It adds complications to the law, and causes disputes as consumers retaliate with damages claims. We favour simplicity and, in our view, the approach of the Council of Her Majesty's Circuit Judges set out in paragraph 6.46 is a sensible one.
- 6.50 **We recommend that the "deduction for use" in the event of rescission should be abolished.**

#### **THE SIX-MONTH REVERSE BURDEN OF PROOF**

- 6.51 Under the CSD regime, goods which do not conform to contract at any time within six months of "delivery" will be considered not to have conformed at that date.<sup>17</sup> Normally, "delivery" means the point at which goods are first delivered to the consumer. However, we raised the question of whether the redelivery of repaired goods, or delivery of replacement goods, qualify as relevant deliveries.
- 6.52 In the Sale of Goods Act 1979 (SoGA), delivery is defined as "voluntary transfer of possession from one person to another",<sup>18</sup> which could cover a redelivery. Elsewhere, in Part 5A of SoGA, however, the term is used in a manner which seems inconsistent with this interpretation.
- 6.53 *Benjamin's Sale of Goods* argues in favour of restarting the six-month period upon redelivery. This is said to be "consistent with the thrust" of the European approach, though it is recognised that difficult problems may arise if different defects manifest themselves at different times.<sup>19</sup>
- 6.54 Our view was that the same logic that provides a six-month reverse burden of proof for the original delivery should also apply where there is redelivery following cure, or delivery of a replacement. Therefore, we provisionally proposed that the six-month reverse burden of proof should recommence after goods are redelivered following repair or replacement.

<sup>17</sup> SoGA, s 48A(3).

<sup>18</sup> SoGA, s 61(1).

<sup>19</sup> *Benjamin's Sale of Goods* (7<sup>th</sup> ed 2006) para 12-087. R Bradgate and C Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003) p 97 agrees that it would be "common sense" to restart the period, but says that this may go against the strict reading of the Directive.

- 6.55 The large majority of those who responded to this question agreed with the proposal, for the reasons put forward in the Consultation Paper. Only a handful disagreed. For example, the British Retail Consortium argued:

The six-month reversal relates to the original purchase and is provided because a fault that appears in that time is presumed to have been present at the time of delivery. It does not relate to a repair but the good itself. Should the repair be unsuccessful the consumer has alternative routes ... . He does not need a new six-month period to be protected.

- 6.56 Some respondents suggested that the six-month reverse burden should begin again in the case of replacement but not repair. Others suggested that there was some merit in the argument that the reverse burden should be suspended while repairs are being carried out and resumed after the repair is complete.
- 6.57 We find these arguments convincing. It would mean that if a fault was discovered two months after purchase, and repairs took two weeks, the reverse burden would restart after repair and run for a further four months. We think that a fresh six-month reverse burden should commence after replacement.
- 6.58 **We recommend that the six-month reverse burden of proof should be suspended while repairs are being carried out and should resume after goods are redelivered following repair.**
- 6.59 **We recommend that a further six-month reverse burden of proof should start after goods are redelivered following replacement.**

#### **THE TIME LIMIT FOR BRINGING A CLAIM**

- 6.60 The CSD currently states that member states must allow consumers at least two years to bring a claim before the courts.<sup>20</sup> The UK exceeds this minimum, as the limits which apply are those set in general contract law. In England and Wales there is a limitation period of six years,<sup>21</sup> and in Scotland a prescriptive period of five years.<sup>22</sup>
- 6.61 Under the European Commission's proposed directive consumers would not be able to pursue a retailer for any fault which becomes apparent more than two years after delivery.<sup>23</sup> Our concern was that this provision might not be suitable for some goods which are intended to be long-lasting and where defects may take time to come to light, such as boilers. It seems odd that a business buyer in these circumstances would have a remedy, but a consumer buyer would not.

<sup>20</sup> Art 5(1).

<sup>21</sup> The Law Commission published a Report on the law on the limitation of actions in July 2001 *Limitation of Actions* (Law Com No 270), which recommended changes to the law on limitations. The Government accepted the Report and is considering its implementation.

<sup>22</sup> Prescription and Limitation (Scotland) Act 1973, s 6.

<sup>23</sup> Art 28(1).

- 6.62 We provisionally proposed that the time limits for bringing a claim should continue to be those applying to general contractual claims within England, Wales and Scotland. More than three-quarters of respondents supported our proposal.

#### **Arguments in favour of the proposal**

- 6.63 Many consultees were concerned that the time limits for bringing claims are already complicated enough for consumers without introducing new ones. The Faculty of Advocates added that consumers might be misled into thinking they had the usual period to bring a claim, only to discover, after the expiry of two years, that their claim has become time barred.

- 6.64 The City of London Law Society concurred:

Multiple limitation periods for claims of this nature would add yet another complexity to the law that would confuse consumers further. We view it as extremely unlikely that a consumer would be able to make a successful case beyond the period of two years. It is for this reason that we do not feel it is necessary to add the extra limitation period into the law, when we feel that the position as it currently stands is adequate to cover instances of consumer abuse.

- 6.65 Gillian Black and others agreed with our proposal and added:

We do not understand why a consumer should be deprived of remedies where defects (as opposed to wear and tear or consumer-inflicted damage) arise after two years.

In particular, many high value consumer goods are intended to last for more than two years (examples being cars, televisions/sound equipment) and it is not clear why consumers should bear the risk of any latent fault which is revealed after two years.

Further, imposing a cap on the period in which a consumer has a remedy potentially disadvantages the consumer in comparison with a non-consumer buyer, who does not suffer from this time bar.

- 6.66 Consumer Focus said:

In practice, it is not likely that consumers will pursue such claims as, in most cases, faults will have appeared much earlier. However, there will be cases with more complex products such as cars and consumer durables with long life spans where faults will not manifest themselves for some time. To prevent consumers asserting their rights after two years would be most unfair. It would diminish the importance of the durability aspect of the satisfactory quality standard and would provide no incentive to manufacturers to improve the quality of their products.

- 6.67 Which? were concerned that the proposed two-year cut-off would raise serious environmental questions. They argued that if consumers could not expect goods to last longer than two years then manufacturers would be more likely to produce poor quality products with reduced life spans, which would encourage waste.

### **Arguments against the proposal**

- 6.68 The Radio, Electrical and Television Retailers' Association were among the very few respondents who objected to the proposal. They did so on the following basis:

To have an entitlement to claim in a court of law that there was an inherent fault in a product for up to six years is unreasonable and the present statute of limitation of six years is too long and should be reduced to two years.

Most faults with products appear within the first six to eighteen months of use and certainly most inherent faults would be obvious within this time span. Reducing the statutory limit to two years would still provide adequate assurances for consumers.

- 6.69 We do not find the case for introducing a further time limit persuasive. The arguments in favour of the time limits for general contractual claims continuing to apply to consumer claims outweigh the arguments in favour of a two-year time limit.

- 6.70 **We recommend that the time limits for bringing a claim should continue to be those applying to general contractual claims within England, Wales and Scotland.**

# **PART 7**

## **CONSUMER EDUCATION**

### **INTRODUCTION**

- 7.1 When we talked to stakeholders in the early stages of this project, many raised the need for consumer and retailer education about the legal remedies available for faulty goods. They felt that this should go hand in hand with our proposals for simplification of the law. As Consumer Focus pointed out, it will be easier to educate consumers if the law is less complex.
- 7.2 Stakeholders told us that the lack of knowledge resulted in unnecessary disputes. It leads to consumers underestimating or over-estimating their legal rights, and shop staff not knowing how to deal with consumers returning faulty goods. Unnecessary disputes result in costs to the economy which could be avoided.
- 7.3 In January 2008, we commissioned FDS International Limited (FDS) to carry out some research into consumers' perceptions of their legal rights when they buy faulty goods.<sup>1</sup> FDS reported that the most striking finding was the extent to which participants were unaware of their legal rights. This was illustrated by reactions to the phrase "This does not affect your statutory rights". Participants were familiar with the words, but almost universally unaware of what the words meant or what their rights were. In some cases, the phrase had the effect of leading the consumer to believe that they had fewer rights than they did. Those with some understanding of their rights often had a flawed understanding of the extent of those rights.
- 7.4 The Confederation of British Industry represented the views of the majority with regard to the importance of consumer education when they wrote:
- We agree with the Law Commissions' report that consumers may be unaware of their legal rights and that more could be done to provide consumer education. CBI regards consumer education as of fundamental importance; indeed in our response to the BERR Call for Evidence we stated that it was a "golden thread" running through the various elements covered in the Consumer Law Review. It is our view that good quality information targeted to the real needs of consumers and education at the front end of transactions would help to align consumer expectations with reality, highlighting responsibilities as well as rights, and would reduce the likelihood of problems further down the line.
- 7.5 Whilst everyone agrees about the necessity for education in this area, the more difficult question is how it should be achieved. There is a wide range of views about how it should be taken forward.

<sup>1</sup> The FDS Report is attached at Appendix A to the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

## CURRENT CONSUMER EDUCATION INITIATIVES

- 7.6 Since publishing our Consultation Paper, we have met several people involved in the development and provision of consumer education. We are particularly grateful to Louise Baxter and Michele Shambrook of the Consumer Education Liaison Group, and Sam Brew at the Office of Fair Trading (OFT).
- 7.7 We found that there is a very large number of consumer education initiatives taking place.<sup>2</sup> Many of these are effective and work well. However, they tend to be run by individual organisations operating independently, achieving success at a local level only. The overall picture is somewhat fragmented and disjointed. It became clear to us that central co-ordination would be beneficial, so that where appropriate the most effective schemes could be publicised and rolled out nationwide.
- 7.8 Consultees have told us about several initiatives which work well and, they submit, should be promoted and expanded nationally. For example, the University of Strathclyde Law Clinic wrote to us about their work on various local programmes aimed at the most vulnerable members of society:
- We have recently become involved in many programmes, for example outreach clinics, in order to educate those who do not have access to legal help and provision.
- 7.9 Other successful schemes operate on a wider scale, but consultees submitted that the scale should be expanded. One example is the Young Consumers of the Year Competition.<sup>3</sup> This was designed to educate school children about consumer rights and responsibilities and is run by the Trading Standards Institute. The scheme involves local trading standards officers running the programmes in schools. Currently, about half of the local education authorities in the UK have schools which participate in this scheme.<sup>4</sup>
- 7.10 Similarly, the Consumer Challenge Quiz was developed by Birmingham Trading Standards to deliver consumer education to children with learning difficulties in special education schools. Approximately 200 schools have participated in that scheme over the past year.<sup>5</sup> In 2008, the scheme won a European Commission award for the “Most Original Idea for a Consumer Campaign in Europe”. Commissioner Meglena Kuneva praised the scheme for its innovative approach to helping vulnerable young people.

<sup>2</sup> In K Ritters (for the Trading Standards Institute), *Consumer Education in the UK* (May 2003), it was estimated that around 600 individual organisations in this country are involved in consumer education.

<sup>3</sup> See <http://www.tradingstandards.gov.uk/events/events-youngconsumers.cfm>.

<sup>4</sup> Figures provided by the Consumer Education Liaison Group in July 2009.

<sup>5</sup> Figures provided by the Consumer Education Liaison Group in July 2009.

7.11 Other examples are “Ask CEdRIC” and “Wiseguys”, two consumer education teaching resources developed by trading standards officers and teachers.<sup>6</sup> They contain teaching plans and materials and are used by teachers to deliver consumer education as part of the national curriculum.

7.12 In recent years, the UK Government has identified the need to raise levels of consumer knowledge, and the importance of the role it plays in the economy. In 2004, it argued that:

Empowered consumers are knowledgeable, confident, assertive and self-reliant.

... By demanding high standards from business, consumers help promote vigorous, competitive markets.<sup>7</sup>

7.13 The Enterprise Act 2002 gave the OFT new powers to use consumer education to support its work in making markets work well for consumers. Consequently, the OFT conducted a consultation on consumer education, which resulted in the publication of a strategy and framework for consumer education.<sup>8</sup> The OFT identified an important link between effective consumer education and levels of numeracy and literacy:

The confidence and skills that consumer education aims to develop depend on sound levels of numeracy and literacy.

... To be most effective, consumer education initiatives must be focused on clear priorities and targeted at those most in need. ... By deciding priorities in this way, consumer education will bring real benefits for vulnerable and socially excluded consumers by offering the opportunity to gain valuable life skills.

... There is also a tendency for work to target those consumers who are easiest to reach, rather than those with the greatest need.<sup>9</sup>

7.14 As a result of this approach of targeting vulnerable and socially excluded consumers, and further research, the OFT launched its “Skilled to go” programme in 2008. It is a consumer education toolkit designed for use in further education literacy and numeracy programmes in places such as colleges, workplaces and prisons. It is aimed at 16-18 year olds and adults with lower levels of literacy and numeracy. Since its launch, approximately half of further education institutions in the UK have registered to access the resource.<sup>10</sup>

<sup>6</sup> [www.askcedric.org.uk](http://www.askcedric.org.uk) and [www.wiseguys.org.uk](http://www.wiseguys.org.uk).

<sup>7</sup> *A strategy and framework for consumer education – a consultation paper*, July 2004 OFT735, p 6.

<sup>8</sup> *A strategy and framework for consumer education – a consultation paper*, July 2004 OFT735; and *Consumer education: a strategy and framework*, November 2004 OFT753.

<sup>9</sup> *Consumer education: a strategy and framework*, November 2004 OFT753, pp 3, 4 and 5.

<sup>10</sup> Figures provided by the Office of Fair Trading in February 2009.

## **THE UK GOVERNMENT'S RECENT WHITE PAPER – THE CONSUMER ADVOCATE**

- 7.15 In its White Paper published in July 2009, the UK Government announced its intention to appoint a Consumer Advocate to take the lead on consumer education and information:

In a climate where consumers are under pressure it is important that they are empowered to assert their needs clearly and make the best purchasing decisions possible. It is also important to reduce the cost to the economy of problems after sales have been made. Empowered consumers are confident consumers. Yet too often the help that is available is scattered and hard to find. ... A Consumer Advocate will be appointed to bring a national profile to improving the co-ordination of education and information campaigns.<sup>11</sup>

- 7.16 The White Paper continues, under the heading of “Improving the effectiveness of consumer education and information”:

In the area of consumer education responses to the Consumer Law Review gave much praise for the good work being done by a number of different organisations but seemed to indicate a fragmentation amongst providers. The Consumer Minister met representatives from consumer organisations, business organisations, enforcers and others involved in education on 8 May 2009 to discuss how best to improve the effectiveness of consumer education and information campaigns.

The consensus was that specific initiatives to raise consumer awareness about rights and what to do when things go wrong are best provided by a range of organisations in response to need. However, there is a need for the Government to provide greater co-ordination of all the different initiatives at both a strategic and national level. The Government believes that this co-ordination can be best delivered through the appointment of a new high-profile figure: a Consumer Advocate.

... The Advocate will have a particular responsibility to look after the vulnerable. He/she will work with community groups and others to deliver messages to the least confident consumers about how to protect their interests.<sup>12</sup>

<sup>11</sup> *A Better Deal for Consumers*, July 2009, para 3.4.1.

<sup>12</sup> *A Better Deal for Consumers*, July 2009, para 3.4.2.

- 7.17 The UK Government also announced its intention to launch a new consumer rights publicity campaign in order to raise awareness of key rights and the availability of advice provided by Consumer Direct.<sup>13</sup> The campaign will be targeted at those consumers with the lowest levels of understanding of, and confidence in asserting, their consumer rights. These are less well-educated adults, and 16-24 year-olds within that group. The campaign will outline the most important legal rights to enable consumers to be more confident shoppers. The essence of these rights is that goods must fit the description given, be of satisfactory quality and be fit for purpose. The UK Government's intention is to work with retailers to convey these messages, complemented by a media campaign.
- 7.18 The campaign will also improve awareness of consumer rights among businesses which deal directly with consumers. In particular, the campaign will attempt to improve small and medium businesses' understanding of consumers' rights. The UK Government will also lead a wider programme of work to bring together the main providers of consumer advice to enable closer integration of the various channels of advice.<sup>14</sup>
- 7.19 We agree with the UK Government's findings on consumer education, as set out in the White Paper. Consumer education is not a case of "one size fits all". It is provided by a range of organisations in response to different needs. We welcome the appointment of a Consumer Advocate to provide much needed co-ordination and better integration of consumer education initiatives, information and advice; we also welcome the new consumer rights campaign. In particular, we hope that the Consumer Advocate will identify consumer education initiatives which work well and consider whether they should be rolled out more widely, on a national basis.

#### **OUR CONSULTATION PAPER**

- 7.20 In our Consultation Paper, we first asked consultees to comment on how the aim of increasing awareness of consumer legal rights for faulty goods might be achieved.
- 7.21 In particular, we asked whether there should be a summary of consumer legal rights for faulty goods available at point of sale.
- 7.22 We then asked consultees whether they agree that notices displayed in shops should:
- (1) Use the expression "This does not reduce your legal rights" rather than "This does not affect your statutory rights".
  - (2) Say how a consumer could obtain further information about their legal rights.

<sup>13</sup> *A Better Deal for Consumers*, July 2009, para 3.5.1.

<sup>14</sup> *A Better Deal for Consumers*, July 2009, para 3.5.2.

## OUR RECOMMENDATIONS

### A summary of legal rights at point of sale

- 7.23 The majority of those who responded favoured a summary of consumer legal rights being available at point of sale, in the form of notices or leaflets. Many emphasised that such a summary would only be beneficial if it was succinct, easy to understand and did not overload the consumer with information. The University of Strathclyde Law Clinic wrote:

We would propose a leaflet which is available at points of sale, advice centres and public buildings etc. This would only have to take the form of a single, small, double-sided leaflet with details of the various rights that a consumer has upon purchasing goods. As a Law Clinic, we would welcome these.

A centrally produced information pack/leaflet could help alleviate consumer misunderstandings on the rules of law which govern these contracts. These could be distributed, not only by Law Clinics, Centres, and Citizens Advice Bureaux, but also made available to retailers to display in shops.

- 7.24 A few respondents were concerned about the burden that leaflets or notices might place upon retailers if they had to be displayed in shops. In addition, the Confederation of British Industry had reservations about point of sale education:

We are not convinced, however, that education at point of sale is the most appropriate time or place for such information. We believe that while there is a role for business in the whole area of consumer education this particular element should be dealt with by independent agencies rather than by retailers. It is anyway a complex area of law and not necessarily one where it would be possible without running the risk of being misleading, to put it in summary form.

- 7.25 Others suggested that information on consumer legal rights should also be provided online, in local newspapers, in local authority newsletters, and in television and radio campaigns. Consumer Focus added:

We are also attracted to the idea of a “shoppers rights card” – a credit card-sized summary of the main SoGA rights, which shoppers can keep in their purse or wallet, such as that produced by the Consumer Council of Northern Ireland.

- 7.26 We understand that consumer education features in the national curriculum in its own right.<sup>15</sup> In meetings and in their responses, however, many consultees have said that it needs to be incorporated more clearly into the curriculum. The British Retail Consortium was among the numerous consultees that saw consumer education in schools as key. They responded:

<sup>15</sup> *Consumer education: a strategy and framework*, November 2004 OFT753, p 4.

Retailers do have a direct interest in consumer education programmes as part of the general school “civics” curriculum because accurate knowledge of rights leads to fewer disputes and also reduces the need for staff training – a key factor when there is such a high turnover of staff and many temporary employees – because new employees will have some basic understanding of consumer rights from their education.

- 7.27 We think that a summary of consumer legal rights for faulty goods should be available at point of sale or in another similarly prominent position. Consumer research has shown that some consumers would welcome this information,<sup>16</sup> and it will also help to raise awareness among shop staff. Such a summary should not, however, be over-burdensome to consumers or retailers. The summary should be simple and succinct, along the lines of the information on key consumer rights in the UK Government’s White Paper,<sup>17</sup> or the “shoppers rights card” developed by the Consumer Council for Northern Ireland. We think that the content should be prepared by the Government, in consultation with consumer groups and business groups.
- 7.28 **We recommend that there should be a summary of consumer legal rights for faulty goods available at point of sale or in a prominent position in shops.**
- 7.29 **We recommend that the Consumer Advocate should consider whether the most effective current consumer education initiatives should be promoted and rolled out on a wider scale.**

**“This does not affect your statutory rights” and how to obtain further information about legal rights**

- 7.30 In our Consultation Paper we considered how the phrase *“This does not affect your statutory rights”* might be clarified. We said that of the various possible approaches, we favoured:

This does not reduce your legal rights.

For further information about your legal rights please contact [name and contact details of Consumer Direct or other appropriate source of information].

- 7.31 Most respondents agreed that the phrase “This does not affect your statutory rights” was problematic and required clarification. As noted in paragraph 7.3, it is not understood by consumers. Many respondents stressed that any change in the wording would only be beneficial if such a change took place alongside a simplification of the law, and/or was accompanied by information about consumers’ rights or how they could obtain such information.

<sup>16</sup> The FDS Report is attached at Appendix A to the Consultation Paper on Consumer Remedies for Faulty Goods (Law Com CP 188; Scot Law Com DP 139).

<sup>17</sup> See above para 7.17.

7.32 Our proposal is consistent with the UK Government's plan to develop a campaign to direct consumers to Consumer Direct as a source of online and telephone advice and support on consumer issues.<sup>18</sup>

7.33 In response to our suggested wording, Consumer Focus said:

The FDS research seems to show that the new formulation would be more effective, and it does seem to us that this phrase is likely to be more meaningful to consumers.

7.34 We think that there is merit in the suggestion made by Louise Baxter of the Consumer Education Liaison Group that "This does not reduce your *consumer* rights" might be preferable to referring to "*legal* rights". This means that our favoured wording would be:

This does not reduce your consumer rights.

For further information about your consumer rights please contact Consumer Direct [contact details of Consumer Direct].

7.35 We also agree, however, with the suggestion of Consumer Focus that it would be beneficial if further consumer research were undertaken to establish the best wording.

7.36 The majority of respondents also agreed that information about how consumers could find out about their rights should be available at point of sale. For example, the City of London Law Society said:

We agree with the approach suggested by the Law Commission at paragraph 8.128, that the wording of existing notices displayed in shops should be clarified, and consumers should be directed to sources of further information if needed (for example, phone number of Consumer Direct could be advertised). We also agree that a standardised summary sheet setting out in only a few bullet points an accurate statement of consumer rights should be produced. Retailers should be obliged to keep copies of the sheet at the point of sale so that if the consumers request information, they can easily obtain advice.

7.37 The University of Strathclyde Law Clinic also agreed:

The information available should be short; offering a website address and a telephone number, for example, to keep things as simple as possible. The website which they are led to should also reflect this simplicity and direct people to online explanations of the disclaimer, and/or online pdf copies of the leaflets mentioned above. Providing both a telephone number and website would appeal to a broader range of consumers... .

<sup>18</sup> *A Better Deal for Consumers*, July 2009, para 3.5.1.

7.38 **We recommend that the Department for Business, Innovation and Skills should give consideration to the clarification of the expression “This does not affect your statutory rights”, and its replacement with the phrase “This does not reduce your consumer rights” together with an indication of how consumers can obtain further information about their consumer rights, for example by contacting Consumer Direct.**

# **PART 8**

## **LIST OF RECOMMENDATIONS**

We make the following recommendations:

### **THE RIGHT TO REJECT**

- 8.1 The right to reject should be retained as a short-term primary remedy. (3.35)

#### **The 30-day normal period**

- 8.2 The law should do more to clarify how long the right to reject lasts. We recommend a normal period of 30 days in which the right to reject should be exercised. This normal period could be extended or reduced in the limited circumstances set out below. (3.65)
- 8.3 It should be open to the trader to argue that the right to reject should be exercised in less than 30 days where the goods are of a type expected to perish within 30 days; in these cases, a 30-day normal period would be incompatible with the nature of the goods. (3.74)
- 8.4 Retailers should not be able to argue for a shorter period than 30 days where a consumer seeks to reject for a fault which should have been discovered before an inconsistent act. (3.82)
- 8.5 Where it is reasonably foreseeable by, or reasonably within the contemplation of, both parties that a longer period will be needed to inspect the goods and to try them out in practice, then a consumer should be able to argue for a period longer than 30 days. (3.88)
- 8.6 Personal circumstances should not be able to extend the 30-day normal period. (3.92)
- 8.7 A consumer should be able to argue for a period longer than 30 days where the parties agreed to an extended period. (3.95)

#### **The six-month reverse burden of proof**

- 8.8 A consumer who exercises the right to reject should be entitled to a reverse burden of proof that faults appearing within six months of delivery were present when the goods were delivered. (3.97)

#### **Minor defects**

- 8.9 Legal protection for consumers who purchase goods with “minor” defects should not be reduced with regard to the right to reject and also to the CSD. (3.110)

### **INTEGRATION OF THE CSD AND THE RIGHT TO REJECT**

- 8.10 The right to reject and CSD remedies should be better integrated in a single instrument, by use of the concept of rejection. (3.118)

- 8.11 The 30-day period should be suspended whilst repairs or negotiations about repairs take place. Where a consumer discovers a fault within 30 days and seeks to exercise the right to reject, but accepts the trader's offer of repair, or where there are negotiations about the possibility of repair, the 30-day period should be suspended. (3.125)

### **WRONG QUANTITY**

- 8.12 The provisions of section 30 of SoGA, which sets out remedies for consumers where a retailer delivers the wrong quantity of goods, should be retained. (3.130)

### **DAMAGES**

- 8.13 The domestic law on damages should be retained. (4.24)
- 8.14 Guidance should be drafted and issued on the circumstances in which consumers can claim damages to compensate them where they have purchased goods which do not conform to contract. (4.25)

### **THE RIGHT TO REJECT IN OTHER SALES CONTRACTS**

- 8.15 The 30-day normal period should apply to supply of goods contracts where property is transferred (such as work and materials contracts and exchange and barter). It should also apply to hire purchase contracts. (5.27)
- 8.16 The current law on the right to reject for hire contracts should be preserved. (5.33)

### **REFORMING THE CONSUMER SALES DIRECTIVE**

#### **Clarifying when consumers may proceed to a second tier remedy**

##### ***The number of repairs and replacements***

- 8.17 The directive which replaces the CSD should state that after one failed repair or replacement, the consumer is entitled to proceed to a second tier remedy. (6.21)
- 8.18 The directive which replaces the CSD should state that the consumer is entitled to rescind the contract without affording the retailer the opportunity to repair or replace where the product is essential, unless the retailer has reduced the inconvenience to the consumer by, for example, offering a temporary replacement. (6.26)

##### ***The process of repair and replacement***

- 8.19 Once the proposed directive is finalised the Department for Business, Innovation and Skills should give consideration to whether best practice guidance is needed on the repair and replacement process. (6.32)

##### ***Dangerous goods and unreasonable behaviour***

- 8.20 The CSD should be reformed to allow a consumer to proceed to a second tier remedy when a product has actually proved to be dangerous or where the consumer can show that the retailer has behaved so unreasonably as to undermine trust between the parties. (6.39)

**Rescission: the deduction for use**

- 8.21 The “deduction for use” in the event of rescission should be abolished. (6.50)

**The six-month reverse burden of proof**

- 8.22 The six-month reverse burden of proof should be suspended while repairs are being carried out and should resume after goods are redelivered following repair. (6.58)
- 8.23 A further six-month reverse burden of proof should start after goods are redelivered following replacement. (6.59)

**Time limit for bringing a claim**

- 8.24 The time limits for bringing a claim should continue to be those applying to general contractual claims within England, Wales and Scotland. (6.70)

**CONSUMER EDUCATION**

- 8.25 There should be a summary of consumer legal rights for faulty goods available at point of sale or in a prominent position in shops. (7.28)
- 8.26 The Consumer Advocate should consider whether the most effective current consumer education initiatives should be promoted and rolled out on a wider scale. (7.29)
- 8.27 The Department for Business, Innovation and Skills should give consideration to the clarification of the expression “This does not affect your statutory rights”, and its replacement with the phrase “This does not reduce your consumer rights” together with an indication of how a consumer can obtain further information about their consumer rights, for example by contacting Consumer Direct. (7.38)

*(Signed)*

JAMES MUNBY  
*(Chairman, Law Commission)*

ELIZABETH COOKE

DAVID HERTZELL

JEREMY HORDER

KENNETH PARKER

JAMES DRUMMOND YOUNG  
*(Chairman, Scottish Law Commission)*

GEORGE GRETTON

PATRICK LAYDEN

HECTOR MACQUEEN

COLIN TYRE

MARK ORMEROD *(Chief Executive)*  
*Law Commission*

MALCOLM MCMILLAN *(Chief Executive)*  
*Scottish Law Commission*

28 September 2009

# **APPENDIX A**

## **LIST OF RESPONDENTS**

### **RETAILERS, MANUFACTURERS AND BUSINESS GROUPS**

Association of Manufacturers of Domestic Appliances  
British Retail Consortium  
Cattles plc  
The Committee of Scottish Clearing Bankers  
The Confederation of British Industry  
Direct Marketing Association  
Finance and Leasing Association  
G Haywood  
Institute of Credit Management  
The Radio, Electrical and Television Retailers' Association  
Retail Motor Industry Federation  
Sainsburys  
S Waddell – Boori (UK) Ltd

### **LAWYERS, LEGAL ASSOCIATIONS AND THE JUDICIARY**

Association of Her Majesty's District Judges  
Bar Council  
City of London Law Society  
Council of Her Majesty's Circuit Judges  
Faculty of Advocates  
James E Petts  
Judges of the Court of Session  
Law Society  
McCartney Stewart  
University of Strathclyde Law Clinic

### **CONSUMERS, CONSUMER GROUPS AND CONSUMER REPRESENTATIVES**

Grant Baisley  
Birmingham City Council  
Linda Cartwright  
Citizens Advice  
Consumer Focus  
East of England Trading Standards  
Robert Gilham  
Vicky Gunther  
Institute of Consumer Affairs  
Local Authority Co-ordinators of Regulatory Services  
Liz Miller  
Mangala Murali  
National Consumer Federation  
Trading Standards Institute  
Ms K Waddilove  
Westminster Trading Standards  
Which?

## **ACADEMICS**

Professor John Adams, Notre Dame  
Gillian Black and others, The University of Edinburgh  
Professor Bridge, London School of Economics  
Gordon Cameron, The University of Dundee  
Professor J Dewhurst and Dr C Montagna, The University of Dundee  
Professor Roy Goode, St John's College, Oxford  
Professor Macleod, University of Liverpool  
Professor CJ Miller, University of Birmingham  
Deborah Parry  
Dr Christine Riefa, Brunel University  
Dr Christian Twigg-Flesner, The University of Hull  
Willett, Morgan Taylor and Naidoo, De Montfort University

## **OTHER**

Office of Fair Trading