



Consumer Affairs Directorate

STRENGTHENING CONSUMERS AND BUSINESS

Sale of Consumer Goods Directive

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EC DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

PART 1: INTRODUCTION & SUMMARY

Purpose

1 The Sale of Consumer Goods and Associated Guarantees Directive (1999/44/EC) sets a minimum baseline for consumers' rights across the internal market. Its impact on existing consumer rights in this area is relatively modest but it will introduce some important changes such as the so called "reversed burden of proof". It is vital that the changes are transposed properly after consultation with stakeholders. This consultation document invites and seeks to encourage as wide a range of comments as possible.

2 The Directive has been the subject of much misinterpretation, for example the suggestion that it introduces a two years guarantee and thereby dramatically increases consumer rights. Where appropriate, this consultation document seeks to correct such misunderstandings and set out the true position.

Key Issues

3 In this second consultation we return to some of the issues where there remain policy choices in transposing the Directive and we invite comments on draft regulations (to be found at page 23). Topics that we return to, and which we particularly welcome comment on, include:

Limitation periods and liability periods

- Whether or not to transpose Article 5.1 of the Directive, which provides that the four remedies provided for by the Directive (repair, replace, refund partial and refund full) shall only be available in relation to faults which existed at the time of purchase and which become apparent within two years of the date of delivery.

There are two alternatives:

- If we do not transpose Article 5.1, then the new remedies provided for by the Directive, like those currently available under the Sale of Goods Act 1979, will potentially be available to the consumer at any time before

expiry of the limitation period for breach of contract, which in England and Wales is generally six years from the date on which the contract is made (five years from the date of discovery in Scotland).

- If we do transpose Article 5.1, we would only allow consumers access to the remedial regime provided for by the Directive (but not their current remedies) in relation to faults that appeared within two years of delivery of the goods. In this scenario, the Limitation Act would, of course, continue to apply, generally allowing consumers to bring an action for a remedy within six years from the date on which the contract is made.

Reversal of the burden of proof

- Whether to extend the reversed burden of proof provided for by the Directive to the initial right to reject currently available in UK law or to apply it only to the Directive's four remedies.

Hire and hire-purchase

- Whether we harmonise the implied terms for conformity of contract across the sale, hire purchase and hire of goods but keep the redress remedies distinct, as is currently the case, or
- Whether there is a case for extending the Directive's remedies to hire and hire-purchase transactions

Previous Consultation

4 This consultation follows on from the first consultation (January – April 2001) which can be found on the DTI's website at:

http://www2.dti.gov.uk/cacp/ca/consultation/sale_of_goods.htm

5 Full background details on Directive 1999/44/EC *on certain aspects of the sale of consumer goods and associated guarantees* are included in the earlier consultation and this extends to the history of the Directive, the key provisions and the relevant existing legislation. Again these can be found at the above website address. Hard copies are available from the address detailed below. The key provisions of the Directive are also listed in Annex 1 to Part 1.

6 Before responding to this consultation it is advisable to read the summary of the first consultation's feedback available on the DTI website at http://www.dti.gov.uk/CACP/ca/consultation/sale_of_goods_result1.htm. The main narrative of this is reproduced in Part 5.

Transposition

7 The date for transposition set by the Directive was 1 January 2002. It was not possible to finalise legislation by then but we will introduce the new Regulations as quickly as possible following this consultation. After thorough analysis of the responses to this consultation the finalised Regulations will be laid before Parliament and they will become law three months later.

8 The proposed legislative vehicle for transposition is Section 2(2) of the European Communities Act.

Regulatory Impact Assessment

9 The Department has prepared the Regulatory Impact Assessment (RIA), at Part 4, using the information provided in reply to previous consultations. The Regulatory Impact Assessment will ultimately be submitted to Parliament and will be made publicly available. **Unfortunately, we received no new figures, and very little by way of narrative, in reply to our 2001 consultation. As it is in stakeholders' interests to have a robust and authoritative estimate of costs and benefits – in support of their future lobbying efforts – we ask, again, for well supported/costed contributions.**

Responses & Queries

10 Responses and queries should be directed to:

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Closing Date

11 In line with Cabinet Office guidance, we are allowing twelve weeks for this consultation. We therefore **request your response by Thursday 23 May 2002.**

Confidentiality/Open Government

12 Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the Internet.

Key Provisions of the Directive

- A presumption that goods delivered to the consumer are “in conformity” with the contract of sale if they comply with certain criteria set out in Article 2. The conformity requirement is similar in many respects to the terms implied by ss. 13 and 14 of the Sale of Goods Act 1979, but there are some differences, particularly with regard to the liability of the seller for statements made by the producer or his representative.
- A right to repair and replacement of goods (Article 3), where defects appear within two years of delivery. These remedies are not currently available under UK law, although they are frequently offered by retailers and manufacturers. Article 3 provides for four remedy stages for the consumer, with rescission of the contract/rejection of the goods as the last resort. This is in marked contrast to the consumer’s remedies under the 1979 Act, which allows the consumer to reject goods up until such time as he is deemed to have “accepted” them under s.35 of that Act, and thereafter to claim for damages for breach of warranty.
- A “right of recourse” for the final seller against the producer or other intermediaries in the contractual chain (Article 4). However, the Directive makes it clear that the seller may renounce this right. It also states that the Directive does not affect the freedom of contract between the seller, the producer, a previous seller or any other intermediary (Recital 9). The Department is of the view that no change is needed to UK law in order to transpose this Article.
- In relation to the remedies provided for by the Directive, there is a so-called “reversed burden of proof”, under which any lack of conformity in the goods that becomes apparent within six months of delivery is deemed to have existed at the time of delivery. This presumption does not apply if it is incompatible with the nature of the goods or the nature of the lack of conformity (Article 5(3)).
- A provision that guarantees offered to consumers shall be legally binding (Article 6).

EC DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

PART 2: BACKGROUND AND QUESTIONS

N.B. To be read in conjunction with the Draft Regulations at Part 3.

1 In preparing the Draft Regulations the following broad policy criteria have guided our approach, taking account of the responses received to the first 2001 consultation:

- The existing level of consumer protection in the areas covered by the Directive should not be reduced.
- The amendments to UK law required by the Directive should, in so far as possible, be integrated into existing primary legislation on the sale and supply of goods, rather than enacted as a separate “stand alone” regime. This approach is designed to minimise the need for businesses, consumers and their advisers to have to study a number of different legislative provisions in order to find out what the law is in this area.
- Where there is currently consistency in UK legislation on the sale and supply of goods, e.g. on implied terms as to quality, then this consistency should be maintained, so far as possible.

Article 1

Definitions (pages 23-27, 31-37, 39, 42-49, Draft Regulations)

2 As a starting point we have taken the definition of “consumer” in Directive 93/13/EC (on unfair terms in consumer contracts) to reflect the policy of maintaining consistency with definitions used in related legislation, where possible. This definition is arguably slightly wider than the definition used in Directive 1999/44/EC (“purposes which are outside his trade, business or profession” versus “purposes which are not related to his trade business or profession”). The definition in Directive 93/13/EC is only a starting point because we have made a minor textual change, removing the references to “trade” and “profession” in order to adhere more closely to the

terminology used in the Sale of Goods Act. Section 61 of the Sale of Goods Act makes it clear that “business” includes a profession. In UK law the term “business” also encompasses “trade”. In a similar vein, in order to avoid unnecessary fragmentation, we have not found it necessary to propose amendment to the Sale of Goods Act 1979’s definition of “seller”. Where we have amended the Act to give new rights to consumers, derived from the Directive, we have generally limited the application of these new provisions to cases where goods are sold by a seller who is “acting for purposes relating to his business”. This repeats the formulation used in the unfair terms directive and is also slightly wider than the definition in Directive 1999/44/EC.

Auctions and second hand consumer goods (pages 25, 28, 33, 35, 37, 44, 47 & 49, Draft Regulations)

3 With regard to Article 1(3), instead of amending the 1979 Act to include a modified definition of goods to exclude auction sales only in consumer cases, we propose to limit the application of the new rights to cases where second hand goods are not “sold at public auction etc. etc.”

..to be manufactured or produced... (para 14 below)

4 With regard to Article 1(4), proposed changes to the Supply of Goods and Services Act 1982, which mirror those made in the 1979 Act, will transpose this and this is referred to in the Article 3 section below.

Article 2

Conformity criteria (pages 25-26, 28, 32-33, 35, 42-45, & 47-48 Draft Regulations)

5 Amendments are proposed to section 14 of the Sale of Goods Act 1979 (implied terms as to quality and fitness) in order to bring that section into line with what is required by Article 2 of the Directive (conformity with the contract). The biggest change is with regard to a seller’s liability for public statements made by the producer or his representative, particularly in advertising or on labelling. Parallel amendments are proposed to very similar provisions on quality and fitness in the Supply of Goods (Implied Terms) Act 1973 (hire-purchase) and the Supply of Goods and Services Act 1982 (hire). These proposed amendments would maintain consistency in relation to implied terms as to quality and fitness where it currently exists.

6 New provisions in the proposed sections 14(3A) and (3B) concern the situation where a consumer makes known the particular purpose for which he

requires goods. Article 2(2)(b) says that where the seller accepts any particular purpose made known to him by a consumer it can be used to help judge conformity. Section 14(3A) transposes the requirements of the Directive in consumer cases while section 14(3B) maintains the current situation with regard to business to business transactions.

7 We do not propose to limit the application of the extra words “or normally used” in ss.14(2B) and (3) to consumer cases as this is a very minor proposed change to the current law.

8 Article 2.2(d) makes a reference to the “performance” of goods, in addition to quality, which is not found in the 1979 Act. We propose to rely on the reference in s.14(2A) to “all the other relevant circumstances” to take account of this.

9 With regard to goods sold with inadequate self-installation/self-assembly instructions, the Department considers that those goods are sold in breach of s.14 of the 1979 Act (quality and fitness).

10 We propose to retain the reference to “price (if relevant)” in s.14(2A) even though it does not appear in Article 2, as we do not take the view that transposition of the Directive requires its removal.

11 We propose to retain the elaboration of quality in s.14(2B) which is not found in the Directive. It is likely that a court would take into account these factors in interpreting the Directive, even if they were not spelled out in our legislation. There is evidence from the case law that this is what happened before s.14(2B) was added in 1994.

12 In pursuing the objective of minimising the changes to settled law, and in wishing to minimise the number of criteria that are to be used in judging sale of goods cases, we propose making amendments to the implied terms in the 1979 Act rather than enacting a new statutory presumption of conformity. Our attention has been drawn to the fact that, at least in theory, the presumption referred to in Article 2 may in certain circumstances be capable of being rebutted, enabling a consumer to maintain that his goods do not conform to the contract in terms of description/quality/fitness, even though all of the requirements of Article 2 are satisfied, for example because an express term has been breached. However we are unaware of any practical examples of express terms, breach of which might lead the consumer to want to avail himself of the remedies provided for by the Directive. In addition, if we were to enact a new statutory presumption of conformity which would operate in place of the statutorily implied terms as to quality and fitness in consumer

cases, then this would result in a separate sales code for consumers and we are unconvinced that this is appropriate

Q1 Views are welcomed on our proposed changes to s.14 and the method employed to extend the remedies to consumer sales.

Installation by the supplier (page 38, Draft Regulations)

13 If the installation of goods is by the supplier, then it is likely to be a contract for work and materials and the implied terms in Part I of the Supply of Goods and Services Act 1982 will apply. Section 13 of this implies a term that work will be carried out with reasonable care and skill. Amendment to the SGSA is proposed to provide for the availability of the Directive's four new remedies in the proposed new Part 1A.

Q2 Do you agree that the proposed change of the 1982 Act deals adequately with the provisions in Article 2(5) concerning installation by the seller?

Article 3

14 A new Part 5A of the Sale of Goods Act (page 27) is proposed, transposing the requirements of the Directive with regard to consumers' remedies (Article 3). Similarly a new Part 1A (page 36) dealing with consumers' remedies is proposed to be added to the Supply of Goods and Services Act 1982, as the Directive puts the label "contract of sale" on certain contracts which would probably fall to be considered as contracts for work and materials under UK law (Article 1(4)). We are, therefore, obliged to extend the provisions of the Directive to such contracts, which are governed by Part I of the 1982 Act.

Switching between existing and new remedies (page 30, Draft Regulations)

15 The new s.48D (1) deals with the interaction between the existing short term right to reject and the new remedies of the Directive. It says that if a consumer asks for a repair or replacement, pursuant to the Directive's scheme, then they must give the seller a reasonable opportunity to comply before rejecting and asking for their money back under their continuing existing short term right to reject. Similarly, the existing s.35(6)(a) of the Sale of Goods Act will also need to be amended to refer to repair "or replacement".

Q3 Does this offer a fair solution to the issue of swapping between new and existing remedies?

Minor lack of conformity (pages 30 and 40, Draft Regulations)

16 In the hierarchy of four remedies that the Directive introduces the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

17 This will not extend to initial rescission that is available within a reasonable time under the existing 1979 Act. That right will be maintained in its current form. It also does not extend to the redress of damages under that Act or the other three remedies of the Directive.

Article 4 (not in the Draft Regulations)

Final sellers pursuing redress up the supply chain

18 We have included no provisions for transposing Article 4, on the right of recourse for final sellers, in the Draft Regulations. It is our view that UK law is already in compliance. Article 4 is not intended to affect parties' freedom of contract, in particular their freedom to exclude a right of recourse on the part of the seller, as Recital 9 makes clear.

Article 5

Liability and limitation periods

19 There is a choice as to whether or not to transpose Article 5.1 of the Directive, which provides that the four remedies provided for by the Directive shall only be available in relation to faults, that existed at the time of purchase, which become apparent within two years ("the liability period") of the date of delivery.

20 If we do **not** transpose Article 5.1, then the new remedies provided for by the Directive, like those currently available under the Sale of Goods Act 1979, will potentially be available to the consumer at any time before expiry of the limitation period for breach of contract claims, which in England and Wales is generally six years from the date on which the contract is made, or strictly speaking, six years from when the cause of action accrues (*five years from the date of discovery in Scotland*). That is how the Regulations are

currently drafted. See Annex¹ 1 for the current remedies available and Annex 2 for the future remedies, if we adopt this approach. We are, of course, permitted to adopt or maintain more stringent provisions to ensure a higher level of consumer protection by way of Article 8.2. (*As previously noted we are committed to maintaining existing levels of consumer protection so the time within which consumers may exercise their existing remedies will remain the same in any event*).

21 The alternative is to transpose Article 5.1, which would deny consumers access to the four stage remedial regime provided for by the Directive in relation to faults inherently there at the time of delivery that do not appear within two years of delivery of the goods. See Annex 3 for the future remedies if we adopt this approach. In this scenario, the Limitation Act would, of course, continue to apply, allowing consumers to bring an action for a remedy within six years from the date on which the contract is made. The difference being, in this scenario, that such cases could not be brought for the four stage regime in respect of inherent faults which became apparent after the end of the two years liability period. Of course, existing rights under the Sale of Goods Act would continue for the full six years liability and limitation period.

22 Those wanting the Department not to transpose Article 5.1 and so increase, from two to six years, the *liability* period for the Directive's redress remedies cite the following in support:

- To have one period of six years would simplify the legislation. Both business and consumers would know that they had six years for all statutory rights and remedies with regard to goods that did not conform to contract. This would keep things simple and simplicity should equate to lesser costs if professional advice is not called for to help decide on legal interpretation. Staff training costs would be kept lower and the possibility of staff understanding the regulations better, and more quickly, would be improved. Disputes between retail staff and consumers, concerning the issue of two years/six years legal rights, would be avoided.
- The right to damages under the current Sale of Goods Act is effectively the same as a right to a repair or replacement or a reduction in cost. Courts currently assess the level of damages with regard to such factors as what it would cost to either repair the product, to make it work reasonably, or what the cost of buying a similar working product would be. Such considerations equate exactly to what the Directive would cost business in individual cases when requiring that they organise a repair or a replacement or pass on an appropriate price reduction.

¹ Of necessity, some matters are over simplified in Annexes 1-3 so should not be taken as an authoritative statement of the law.

23 Those supporting transposition of Article 5.1, effectively creating dual six and two years liability periods, for the existing and new remedies respectively, cite the following (some need expansion/factual evidence):

- To extend the liability period for the Directive's four remedies for an extra four years, beyond the obligatory two of Article 5, would substantially increase business costs.
- It would not be confusing for consumers to have an additional set of rights for a 2 years liability period (subject to a six years limitation period) as described in Annex 3.
- The right to a specific performance of repair, replace or reduction in price is a new addition to current damages and they were only envisaged for a two years liability period by the authors of the Directive.
- It would undermine commercial warranties.

Q4 Could consultees please give their views on the dual liability period issue, supported by hard evidence, for example:

- Particular data will be needed on the different levels of consumer complaints in years one, two, three, etc and their relative costs.
- Information on the level of knowledge among shop staff and consumers, with regard to current legislation, and what lessons this might suggest for the introduction of the new rights.

24 The Law Commission is currently reviewing the law on limitation periods. A Consultation Paper (Consultation Paper No 151 on Limitation of Actions) was published in January 1998.

Notification period (not in the Draft Regulations)

25 Directive 1999/44/EC gives the option to insist that consumers inform sellers of any lack of conformity within two months of detection. Almost all do anyway, but this does not lend itself to transposition in the UK although it may do so in other Member States. Because of the Government's commitment to maintain existing consumer rights, it will not introduce a two months notification period for the existing remedies in the 1979 Act. Given that commitment, there is a fear that the situation could arise that a consumer would be obliged to notify faults within two months if they wished to pursue

the repair and replacement (and thereafter the refund or rescission) remedies of the Directive but not if they wished to pursue the 1979 Act's damages route (which frequently equates to the cost of repair or replacement). This would be a recipe for confusion and costly debate for consumers, businesses, their staff and legal advisers. This goes against the objectives of unnecessary fragmentation and the pursuit of consistency and we have drafted accordingly.

Presumption of a lack of conformity and the current initial right to reject

26 Under the Sale of Goods Act, consumers have a right to reject goods, within a reasonable period, if they were inherently faulty at the time of sale. As already mentioned, such rights will be maintained. In theory at least, the onus on such occasions is on the consumer to prove that the goods are faulty, if the retailer disputes the claim. However, in practice, faced with a court case concerning goods that would ordinarily be expected **not** to develop a fault within the first six months, the court will look to the retailer for an explanation as to why he nevertheless maintains that the implied terms as to quality and fitness are not breached.

27 The Directive says that “unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery...”. This has become known as the *reversed burden* and, as it is not an option within the Directive, it will be reflected in the Regulations.

28 A decision now has to be made on whether the reversed burden is to be applied only to the Directive's four stage hierarchy (repair, replace, partial refund and full rescission) or extended to the current right to reject goods, within a reasonable period, and damages thereafter, that will be maintained. Those stakeholders who wish to extend the reversed burden of proof to existing remedies claim that:

- To have four remedies (repair, replace, partial refund and full rescission) that could be demanded with a reversed burden and two remedies (initial rejection and thereafter damages) that could not, would be confusing and inconsistent. This could add to costs if consumers and retailers argued because of this grey area. An across the board reversed burden would solve this.
- So many goods are offered with no-quibble warranties, or money back pledges, that consumers would often have no need to call upon any reversed burden right. This suggests that a reversed burden might not be necessary but, if so, it similarly might suggest its extension would be a merely formal, and non-costly, addition.

- The reversed burden is only a presumption and its successful use would rely on a retailer saying nothing to advance their own cause. This is already the case, in practice, for if a consumer alleged an inherent fault, and the retailer refused to communicate with the court, then the consumer would probably win the case.
- Often courts give the benefit of the doubt to consumers in the first six months and demand convincing counter evidence, about the intrinsic integrity of the goods, from the retailer to refute the consumer's claim of an inherent fault. This suggests the reversed burden might not be such a novel idea but, if so, it similarly might suggest it was not necessary.
- If the reversed burden is not made available for initial rejection there is a risk that retailers will say "if you want to reject you will have to prove the inherent fault but if you want a repair or replacement you will not have to prove anything." This might result in consumers being persuaded to settle for the easier option of accepting a repair or replacement and in fewer consumers getting their desired form of redress than before the introduction of the Directive; a perverse outcome.

29 Those who do not wish to extend the reversed burden to the current rights claim that:

- Consumers would have a much extended scope to reject goods where the evidence to support a claim might be weak but could not be directly refuted by the retailer.
- To extend the reversed burden to the initial right to reject would add to businesses' costs and, potentially, result in lost sales, if customers became more willing to reject goods, within the necessary reasonable time, rather than accept a repair or replacement, as (i) the Directive alternatively suggests they should and (ii) current UK practice suggests is a reasonable outcome in many cases.

Q5 The Draft Regulations ally the reversed burden to the four remedies of the Directive but keep them separate from the existing 1979 Act's rights (to initially reject and thereafter to seek damages). We welcome views on this and request, as ever, strong evidence to back up arguments, including costings, and we welcome comparisons with our existing rights.

Article 6

Freely given consumer guarantees (pages 50-51, Draft Regulations)

30 The Directive does not specify a minimum period for the length of guarantees despite the misunderstanding that has arisen that it demands a two years period. Of course, they can be for any period or, indeed, there is no need to provide a guarantee at all. In such latter cases consumers would have the protection of their statutory rights (as outlined elsewhere in the Draft Regulations).

31 What the Directive does provide is that any freely given guarantee to consumers will become legally binding, it comments on how it should be worded and says that they should be made available to consumers to read to help them in their purchase decision. This is all reflected in the Draft Regulations as is the option to require that freely given guarantees be written in the relevant official language.

32 Powers are proposed to be given to the Director General of Fair Trading and to local trading standards authorities to enforce the provisions on guarantees by way of applications for injunctions.

33 The Consumer Transactions (Restrictions on Statements) Order 1976 already makes it an offence not to state that consumers have statutory rights apart from the freely given ones in the guarantee.

Q6 Are you content with the guarantees section of the Draft Regulations?

Article 7 (not in the Draft Regulations)

Second hand goods' period of liability

34 Although the Directive allows for the liability period for second hand goods to be cut to twelve months this would be an especially dramatic step for the UK considering our current six years limitation period for breach of contract for both second hand and new goods. We believe that such a move is unnecessary bearing in mind that the Regulations say that goods only need to "meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances". The second hand aspect to any good would therefore be taken fully into account by the courts. Also,

retailers are only liable for inherent faults that were there at delivery, and not for wear and tear as, contrary to widespread misunderstanding, the Directive does not introduce a durability requirement.

Hire Purchase and Hire Transactions (pages 41-49, Draft Regulations)

35 The Draft Regulations make certain changes to the law on the transfer of goods (i.e. otherwise than by sale), hire and hire purchase. As previously stated our objective is one of maintaining consistency across different legislation dealing with different forms of contracts under which consumers acquire goods. This involves drawing a distinction between

- (a) the implied terms as to quality, fitness, etc, which, as the law stands, are almost identical in the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Supply of Goods (Implied Terms) Act 1973; and
- (b) the remedies available to consumers under the various types of contracts, where there is currently no consistency.

36 On the face of it the remedies are the same – rescission of the contract (rejection of the goods and money back) for breach of condition, or an action for damages in respect of a breach of warranty. The difference lies in when the right to reject is lost. It is lost at different times and in different circumstances depending on whether the goods are bought, hired or taken on hire purchase. There are sound underlying policy reasons for these differences which are to do with the fundamentally different nature of the property rights which are transferred to the consumer under a contract for sale as compared with an HP or hire agreement.

37 When a sales contract (this includes credit sales and conditional sales) is made, the property in the goods is transferred to the consumer and the seller retains no property rights in the goods. Of course, the seller remains liable to the consumer for up to six years if the goods were sold in breach of the implied terms as to quality, fitness for purpose etc. But the fact remains that after purchase, the goods belong to the consumer and he is liable, for example, for damage to the goods due to reasonable wear and tear. Under the 1979 Act, where the term broken is a condition, the consumer will have a right to reject the goods, unless it can be shown that he has “accepted” the goods. If he is found to have done so, he is limited to an action for breach of warranty only (section 11(4) of the 1979 Act). Section 35 of the 1979 Act sets out the circumstances when the buyer is deemed to have accepted the goods, namely:

- when he intimates to the seller that he has accepted them, or
- when he does any act which is inconsistent with the ownership of the seller, or
- (most commonly) after a “reasonable” lapse of time, though this must allow for a reasonable opportunity for examining the goods.

38 The few cases on the point indicate that what is a “reasonable time” is likely to be interpreted as quite short. This reflects the fact that the courts are, of course, wary of allowing buyers to have full use of a product for any considerable length of time and still be able to reject and recover the price in full.

39 In contrast to contracts of sale, under all other contracts by which consumers acquire goods, the time when the right to reject is lost is by reference to the common law doctrine of “affirmation”. The common law regime is more generous to the buyer than the provisions of the 1979 Act. In order to be found to have affirmed a contract, the injured party must have elected to continue with the contract, despite his knowledge of the breach of contract **and** he must have acted with full knowledge of his right to rescind the contract. Mere knowledge of the defect alone will not suffice to deprive the injured party of his right to rescind (*Peyman v. Lanjani* [1985] Ch 457).

40 Under a contract for hire, the hirer never takes ownership of the goods, only possession for a limited time. He is not liable for reasonable wear and tear. As the relationship is a continuing one, with periodical hire payments made to the owner, the courts have concluded that the goods should be of satisfactory quality during the continuance of the agreement. Similarly with HP agreements, which are continuing debtor/creditor agreements with an option to purchase given to the consumer at the end of a series of instalment payments. Until such time as that option is exercised by the consumer, the goods remain the property of the finance company owner. During this period the consumer is under a duty to take reasonable care of the goods, but the owner is under no duty to repair them (*Tilling v. Balmain* (1892) 8 TLR 517). However the consumer is not liable for loss caused other than through his fault, nor for fair wear and tear (*Sanderson v. Collins* [1904] 1 KB 628).

41 We, therefore, need to take account of the fact that under an HP agreement the property rights are very different to a contract of sale. With hire the difference is even greater. As shown above, the ways in which the remedies may be exercised are not the same now, as between credit sales,

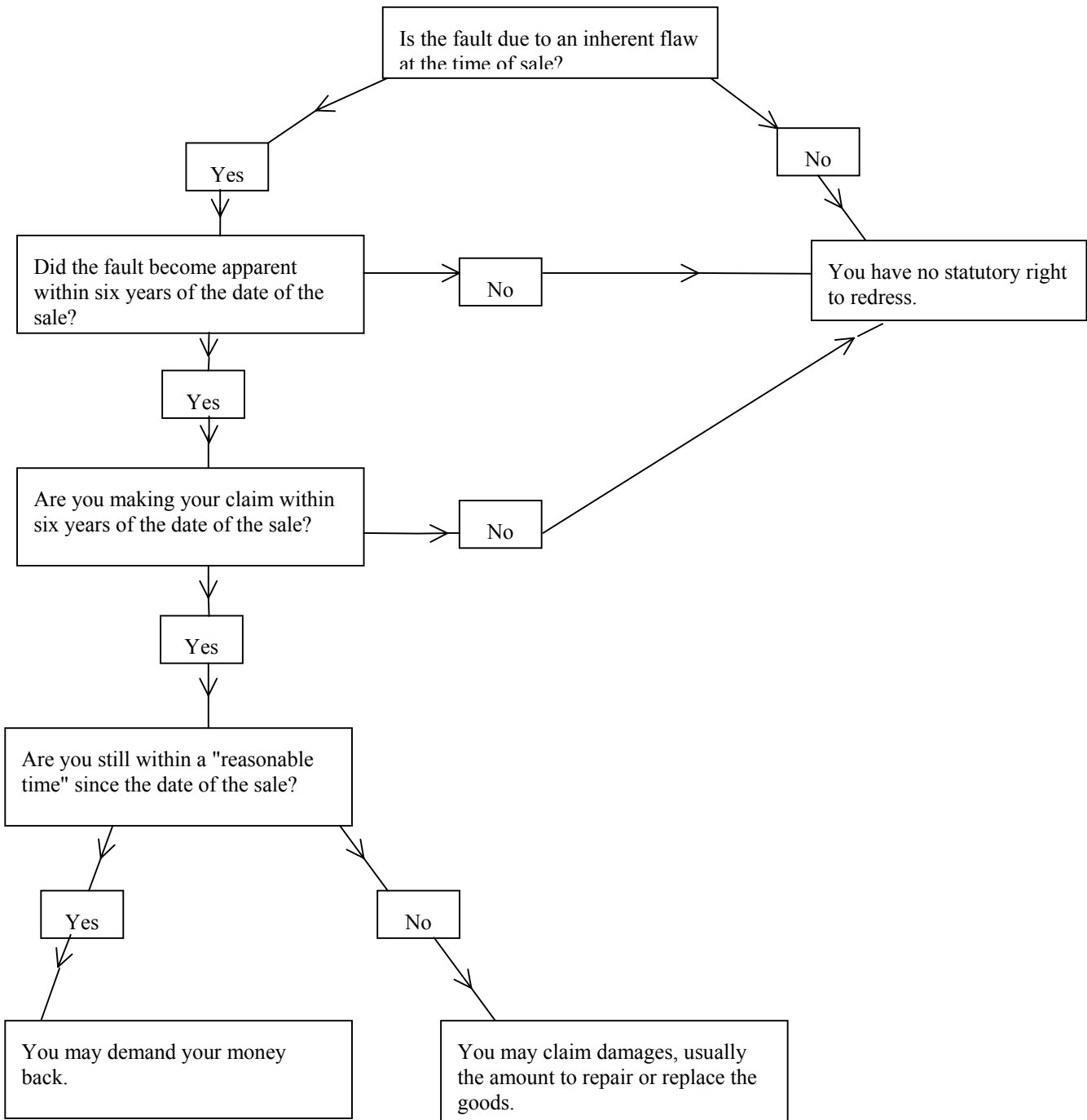
HP and hire. Thus in the Draft Regulations we have maintained consistency where it currently exists (the implied terms) but not imposed it where there is currently none (the remedies).

Q7 Are you content with our action to maintain consistency where it currently exists (in the implied terms) but not to extend it to areas where it currently is not present (in the remedies)?

Important

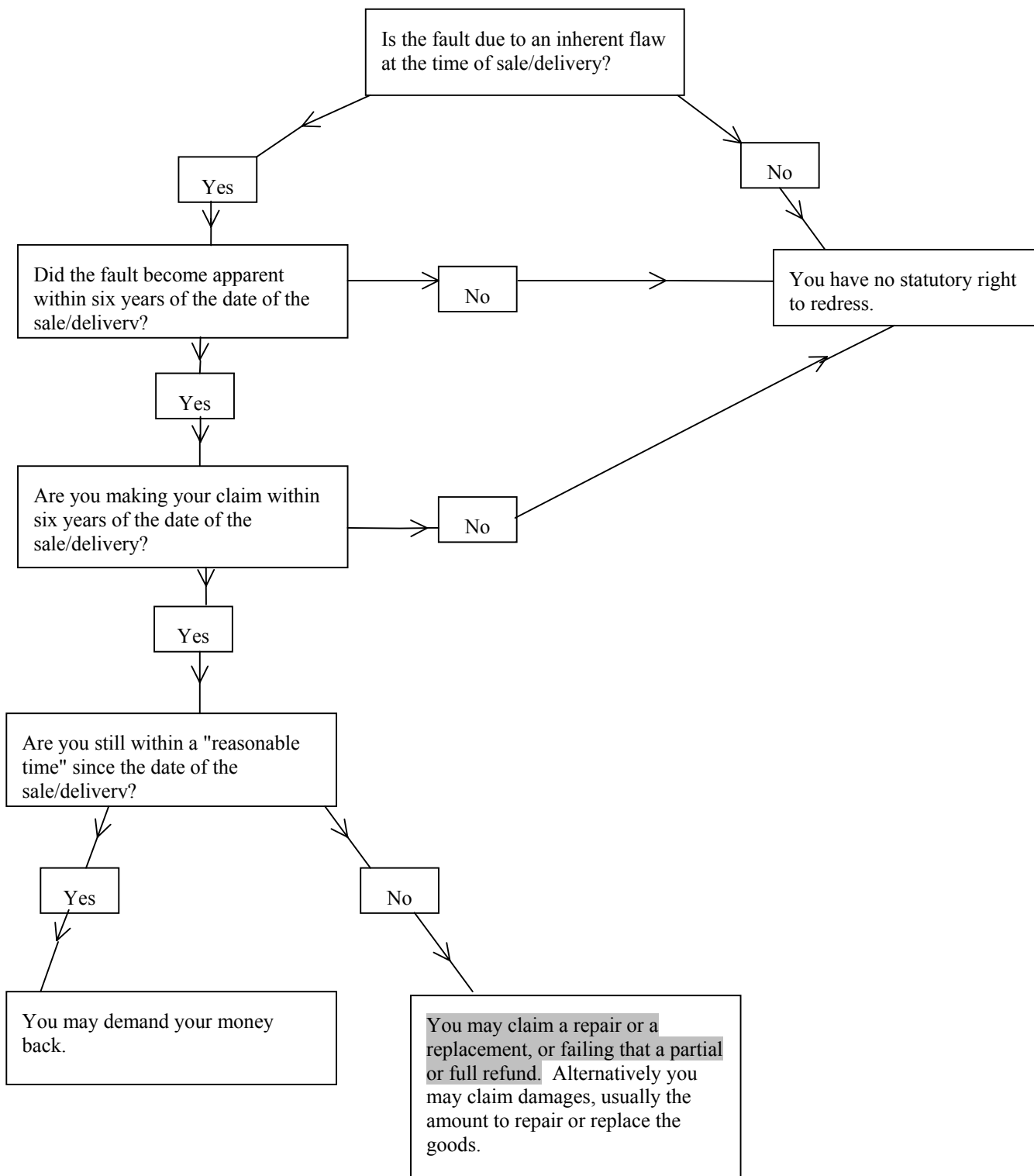
We welcome comments on any areas either expressly referred to above or not.

Current Six Years Liability/Limitation Period

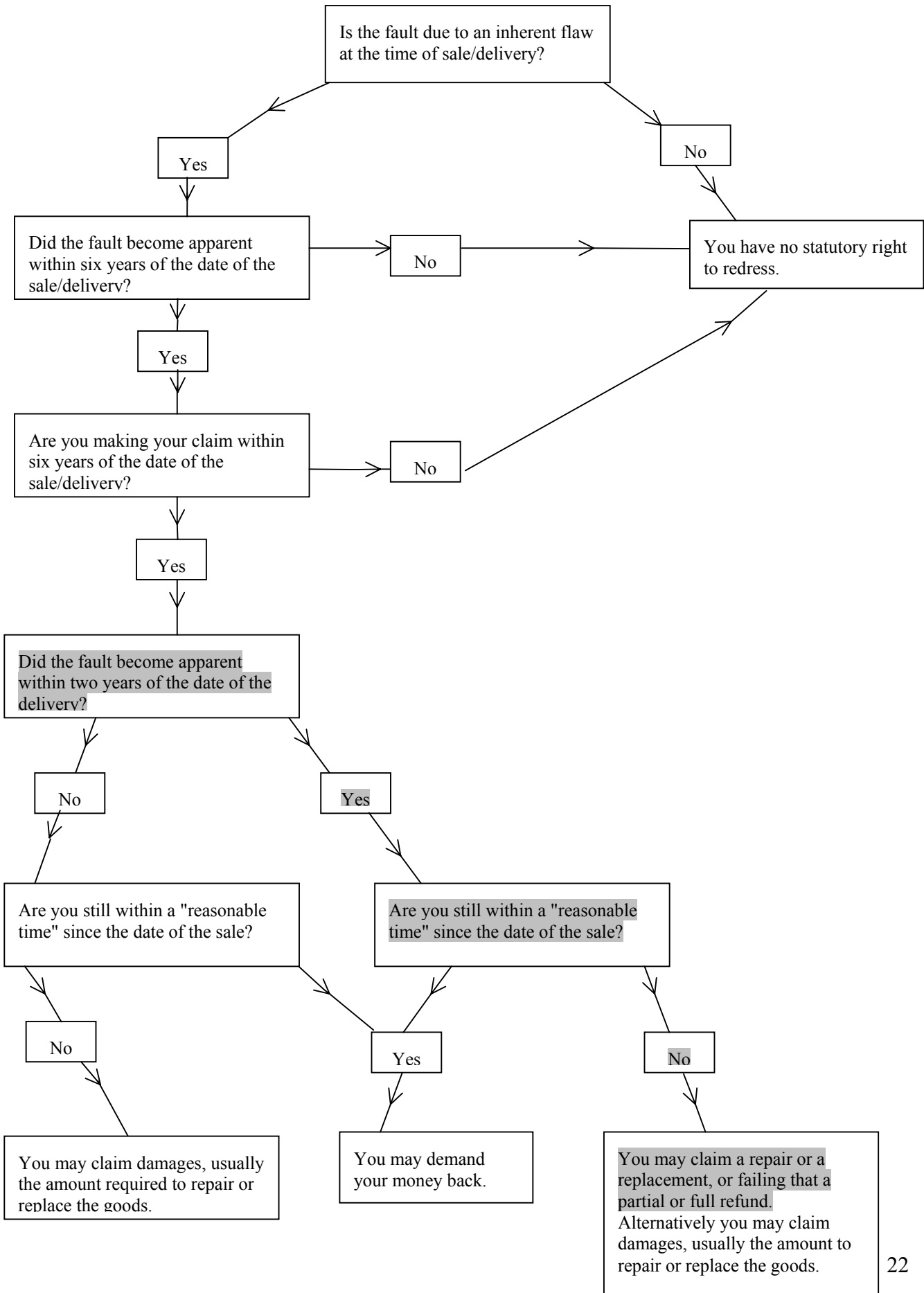


² Possible changes appear shaded in the following two Annexes.

Possible New Six Years Liability/Limitation Period



Possible New Two and Six Years Liability Periods and Six Years Limitation Period



Interpretation

2. In these Regulations-

“consumer” means any natural person who, in the contracts covered by these Regulations, is acting for purposes which are outside his business;

“consumer guarantee” means any undertaking by a person acting in the course of his business to a consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising”;

“court” in relation to England and Wales and Northern Ireland means a county court or the High Court, and in relation to Scotland, the sheriff or the Court of Session;

“enforcement authority” means the Director General of Fair Trading, every weights and measures authority in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland;

“goods” has the same meaning as in the Sale of Goods Act 1979;

“guarantor” means a person who gives a consumer guarantee to a consumer;

“supply” has the same meaning as in the Fair Trading Act 1973; and

“producer” means the manufacturer of goods, the importer of goods into the European Economic Area or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on

the goods.

Amendments to the Sale of Goods Act 1979

3. Additional implied terms in consumer cases.

(1) Section 14 of the Sale of Goods Act 1979 is amended as follows.

(2) At the end of subsection (2B)(a) add "or normally used".

(3) After subsection (2C) insert—

"(2D) Where the buyer deals as consumer, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

(2E) For the purposes of subsection (2D) above the buyer shall not be regarded as dealing as consumer if—

(a) the goods in question are second-hand goods, and

(b) the contract of sale is made at public auction where persons dealing as consumers have the opportunity of attending in person.

(2F) A public statement shall not by virtue of subsection (2D) above be a relevant circumstance for the purposes of subsection (2A) above in the case of a contract of sale, if the seller shows that—

(a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,

(b) by the time the contract was made, the statement had been corrected, or

(c) the decision to buy the goods could not have been influenced by the statement.

(2G) Subsections (2D) to (2F) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A)

above (whether or not the buyer deals as consumer) if the statement would have been such a circumstance apart from those subsections."

(4) In subsection (3)—

(a) after "commonly supplied" insert "or normally used", and

(b) for the words from "except where" to the end substitute "except where subsection (3A) or (3B) below prevents such a term arising."

(5) After that subsection insert—

"(3A) Where the buyer deals as consumer, no implied term arises under subsection (3) above unless the seller or credit-broker has accepted that the goods are fit for the purpose in question.

(3B) Where the buyer deals otherwise than as consumer, no implied term arises under subsection (3) above if the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker."

(6) After subsection (8) insert-

"(9) For the purposes of this section, the cases where the buyer deals as consumer are those cases where—

(a) the buyer is a natural person who enters into the contract for purposes other than those of a business, and

(b) the seller enters into the contract for the purposes of a business,

and accordingly section 61(5A) below does not have effect for the purposes of this section.

(10) In this section "producer", in relation to any goods, means—

(a) the manufacturer of the goods,

(b) the importer of the goods into the European Economic Area, or

- (c) any person who, by placing his name, trade mark or distinctive sign on the goods, purports to be their producer."

Buyer's additional remedies in consumer cases

- (7) After Part 5 of the Sale of Goods Act 1979 insert—

"PART 5A

ADDITIONAL RIGHTS OF BUYER IN CONSUMER CASES

48A Introductory.

- (1) This section applies where—

- (a) the buyer deals as consumer, within the meaning given by section 14(9) above, and
- (b) the goods do not at the time when the property in the goods is transferred to the buyer conform to the contract of sale.

- (2) Where this section applies, the buyer has the right—

- (a) under and in accordance with section 48B below, to require the seller to repair or replace the goods, or
- (b) under and in accordance with section 48C below—
 - (i) to require the seller to reduce the purchase price of the goods to the buyer by an appropriate amount, or
 - (ii) to rescind the contract with regard to the goods in question.

- (3) For the purposes of subsection (1)(a) above, a buyer shall not be regarded as dealing as consumer if-

- (a) the goods in question are second-hand goods, and

(b) the contract of sale is made at public auction where persons dealing as consumers have the opportunity to attend in person.

(4) For the purposes of subsection (1)(b) above, goods do not conform to a contract of sale if there is, in relation to the goods, a breach of a term implied by section 13 or 14 above.

(5) It shall be presumed for the purposes of subsection (1)(b) above that, unless the contrary is established, goods which do not conform to the contract of sale at any time within the period of six months starting with the date on which property in the goods in question was transferred to the buyer did not so conform at that date.

(6) Subsection (5) above shall not apply if the presumption in that subsection is incompatible with the nature of the goods or the nature of the lack of conformity.

48B Repair or replacement of the goods.

(1) Where section 48A above applies, the buyer may require the seller—

(a) to repair the goods, or

(b) to replace the goods.

(2) Where under paragraph (a) or (b) of subsection (1) above the buyer requires the seller to repair or replace the goods, the seller must—

(a) repair or, as the case may be, replace the goods within a reasonable time and without causing significant inconvenience to the buyer, and

(b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) For the purposes of subsection (2)(a) above, any question as to what is a reasonable time or significant inconvenience shall be determined by reference to—

(a) the nature of the goods, and

(b) the purpose for which the goods were acquired.

(4) The buyer may not under paragraph (a) or (b) of subsection (1) above require the seller to repair or, as the case may be, replace the goods if that remedy is—

(a) impossible,

(b) disproportionate in comparison to the other of those remedies,
or

(c) disproportionate in comparison to an appropriate reduction in the purchase price under paragraph (a), or rescission under paragraph (b), of section 48C below.

(5) For the purposes of subsection (4)(b) above, as between the remedies of repair and replacement, the one shall be deemed to be disproportionate in comparison to the other if the one imposes costs on the seller which, in comparison to those imposed on him by the other, are unreasonable, taking into account—

(a) the value which the goods would have if they conformed to the contract of sale,

(b) the significance of the lack of conformity to the contract of sale,
and

(c) whether the other remedy could be effected without significant inconvenience to the buyer.

(6) In this section "repair", in relation to any goods, means bring the goods into conformity with the contract of sale.

48C Reduction of purchase price or rescission of contract

(1) Where section 48A above applies, the buyer may—

(a) require the seller to reduce the purchase price of the goods in question to the buyer by an appropriate amount, or

(b) rescind the contract with regard to those goods,

if the condition in subsection (2) below is satisfied.

(2) The condition is that—

(a) by virtue of section 48B(4) above the buyer may require neither repair nor replacement of the goods under section 48B(1)(a) or (b) above; or

(b) the buyer has required the seller to repair or replace the goods under section 48B(1)(a) or (b) above, but the seller is in breach of the requirement of section 48B(2)(a) above to do so within a reasonable time and without significant inconvenience to the buyer.

(3) The buyer may not rescind under subsection (1)(b) above if the lack of conformity to the contract of sale is minor.

48D Relation to other remedies etc.

(1) If the buyer requires the seller to repair or replace the goods under section 48B(1)(a) or (b) above, the buyer may not reject the goods for breach of condition, or in Scotland for breach of terms, implied or express, as to the quality of the goods or their fitness for a purpose, until he has given the seller a reasonable time in which to repair or replace the goods.

(2) In England, Wales and Northern Ireland, nothing in sections 48A to 48C above (or this section) prejudices the right of a buyer to bring an action for damages for breach of warranty.

(3) In Scotland, nothing in sections 48A to 48C above (or this section) prejudices the remedies for breach of contract as respects Scotland."

Powers of the court

(8) After section 53A of the Sale of Goods Act 1979 insert—

"53B Powers of the court in Part 5A cases

(1) This section applies in relation to any action in which relief is sought by virtue of Part 5A above.

(2) The powers of the court include power, on the application of the buyer, to make an order requiring specific performance by the seller of any obligation imposed on him by virtue of section 48B above.

(3) Where—

(a) the buyer has required the seller to give effect to a remedy under section 46B or 46C above or has claimed to rescind under section 46C, but

(b) the court decides that another remedy under section 46B or 46C is appropriate,

the court may proceed as if the buyer had instead required the seller to give effect to that other remedy or, where that other remedy is rescission under section 46C, as if the buyer had instead claimed to rescind the contract under that section.

(4) The court may make its order unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court."

Meaning of "deal as consumer"

(9) In section 61(5A) of the Sale of Goods Act 1979 after "Unfair Contract Terms Act 1977" insert "(other than sections 6(5) and (6) and 7(6))".

Other amendments to the 1979 Act

(10) in section 61(1) after the definition of "buyer" there is inserted-

““consumer” means any natural person who, in contracts to which this Act applies, is acting for purposes which are outside his business;”

(11) in section 61(1) after the definition of “plaintiff” there is inserted-

““producer” means the manufacturer of goods, the importer of goods into the European Economic Area or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods;”

(12) in section 61(1) after the definition of “property” there is inserted-

““repair” means, in cases where there is a lack of conformity in goods for the purposes of section 48A(5) of this Act, to bring the goods into conformity with the terms implied by sections 13 and 14 of this Act.

4. Amendments to the Supply of Goods
and Services Act 1982

Additional implied terms in cases where goods are transferred to consumers – England Wales and Northern Ireland

(1) Section 4 of the Supply of Goods and Services Act 1982 is amended as follows.

(2) After subsection (2A) insert—

"(2B) Where the transferee deals as consumer, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by

the transferor, the producer or his representative, particularly in advertising or on labelling.

(2C) For the purposes of subsection (2B) above the transferee shall not be regarded as dealing as consumer if—

- (a) the goods in question are second-hand goods, and
- (b) the contract for the transfer of goods is made at public auction where persons dealing as consumers have the opportunity of attending in person.

(2D) A public statement shall not by virtue of subsection (2B) above be a relevant circumstance for the purposes of subsection (2A) above in the case of a contract for the transfer of goods, if the transferor shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) by the time the contract was made, the statement had been corrected, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(2E) Subsections (2B) to (2D) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A) above (whether or not the transferee deals as consumer) if the statement would have been such a circumstance apart from those subsections."

(3) In subsection (5)—

after "commonly supplied" insert "or normally used".

(4) In subsection (6)-

for the words from "the circumstances show" to the end substitute "subsection (6A) or (6B) below prevents such a term arising."

(5) After that subsection insert—

"(6A) Where the transferee deals as consumer, no implied term arises under subsection (5) above unless the transferor or credit-broker has accepted that the goods are fit for the purpose in question.

(6B) Where the transferee deals otherwise than as consumer, no implied term arises under subsection (5) above if the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker."

(6)After subsection (8) insert—

"(8A) For the purposes of this section, the cases where the transferee deals as consumer are those cases where—

(a) the transferee is a natural person who enters into the contract for purposes other than those of a business, and

(b) the transferor enters into the contract for the purposes of a business,

and accordingly section 18(4) below does not have effect for the purposes of this section.

(8B) In this section "producer", in relation to any goods, means—

(a) the manufacturer of the goods,

(b) the importer of the goods into the European Economic Area, or

(c) any person who, by placing his name, trade mark or distinctive sign on the goods, purports to be their producer."

Additional implied terms in cases where goods are transferred to consumers – Scotland

(7) Section 11D of the Supply of Goods and Services Act 1982 is amended as follows.

(8) After subsection (3) insert—

"(3A) Where the transferee deals as consumer, the relevant circumstances mentioned in subsection (3) above include any public statements on the specific characteristics of the goods made about them by the transferor, the producer or his representative, particularly in advertising or on labelling.

(3B) For the purposes of subsection (3A) above the transferee shall not be regarded as dealing as consumer if—

- (a) the goods in question are second-hand goods, and
- (b) the contract for the transfer of goods is made at public auction where persons dealing as consumers have the opportunity of attending in person.

(3C) A public statement shall not by virtue of subsection (3A) above be a relevant circumstance for the purposes of subsection (3) above in the case of a contract for the transfer of goods, if the transferor shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) by the time the contract was made, the statement had been corrected, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(3D) Subsections (3A) to (3C) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (3) above (whether or not the transferee deals as consumer) if the statement would have been such a circumstance apart from those subsections."

(9) In subsection (6)—

after "commonly supplied" insert "or normally used".

(10) In subsection (7)-

for the words from "the circumstances show" to the end substitute "subsection (7A) or (7B) below prevents such a term arising."

(11) After that subsection insert—

"(7A) Where the transferee deals as consumer, no implied term arises under subsection (6) above unless the transferor or credit-broker has accepted that the goods are fit for the purpose in question.

(7B) Where the transferee deals otherwise than as consumer, no implied term arises under subsection (6) above if the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker."

(12) After subsection (9) insert—

"(10) For the purposes of this section, the cases where the transferee deals as consumer are those cases where—

(a) the transferee is a natural person who enters into the contract for purposes other than those of a business, and

(b) the transferor enters into the contract for the purposes of a business,

and accordingly section 18(4) below does not have effect for the purposes of this section.

(11) In this section "producer", in relation to any goods, means—

(a) the manufacturer of the goods,

(b) the importer of the goods into the European Economic Area, or

(c) any person who, by placing his name, trade mark or distinctive sign on the goods, purports to be their producer."

Transferee's additional remedies in consumer cases

(13) After Part 1A of the Supply of Goods and Services Act 1982 insert—

—

"PART 1B

ADDITIONAL RIGHTS OF TRANSFEREE IN CONSUMER CASES

11M Introductory.

(1) This section applies where—

(a) the transferee deals as consumer, within the meaning given by section 4(9) above (in relation to Scotland, section 11D(10) above), and

(b) the goods do not at the time when the property in the goods is transferred to the transferee conform to the contract for the transfer of goods.

(2) Where this section applies, the transferee has the right—

(a) under and in accordance with section 11N below, to require the transferor to repair or replace the goods, or

(b) under and in accordance with section 11P below—

(i) to require the transferor to reduce the amount to be paid for the transfer by the transferee by an appropriate amount, or

(ii) to rescind the contract with regard to the goods in question.

(3) For the purposes of subsection (1)(a) above, a transferee shall not be regarded as dealing as consumer if-

(a) the goods in question are second-hand goods, and

(b) the contract for the transfer of goods is made at public auction where persons dealing as consumers have the opportunity to attend in person.

(4) For the purposes of subsection (1)(b) above, goods do not conform to a contract for the transfer of goods if-

- (a) there is, in relation to the goods, a breach of a term implied by section 3 or 4 above (in relation to Scotland, section 11C or 11D above), or
- (b) installation of the goods forms part of the contract for the transfer of goods, and the goods were installed by the transferor, or under his responsibility, in breach of the term implied by section 13 below or (in Scotland) in breach of any rule of law.

(5) It shall be presumed for the purposes of subsection (1)(b) above that, unless the contrary is established, goods which do not conform to the contract for the transfer of goods at any time within the period of six months starting with the date on which property in the goods was transferred to the transferee did not so conform at that date.

(6) Subsection (5) above shall not apply if the presumption in that subsection is incompatible with the nature of the goods or the nature of the lack of conformity.

11N Repair or replacement of the goods.

(1) Where section 11M above applies, the transferee may require the transferor—

- (a) to repair the goods, or
- (b) to replace the goods.

(2) Where under paragraph (a) or (b) of subsection (1) above the transferee requires the transferor to repair or replace the goods, the transferor must—

- (a) repair or, as the case may be, replace the goods within a reasonable time and without causing significant inconvenience to the transferee, and
- (b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) For the purposes of subsection (2)(a) above, any question as to what is a reasonable time or significant inconvenience shall be determined by reference to—

- (a) the nature of the goods, and
- (b) the purpose for which the goods were acquired.

(4) The transferee may not under paragraph (a) or (b) of subsection (1) above require the transferor to repair or, as the case may be, replace the goods if that remedy is—

- (a) impossible,
- (b) disproportionate in comparison to the other of those remedies,
or
- (c) disproportionate in comparison to an appropriate reduction in the purchase price under paragraph (a), or rescission under paragraph (b), of section 11P below.

(5) For the purposes of subsection (4)(b) above, as between the remedies of repair and replacement, the one shall be deemed to be disproportionate in comparison to the other if the one imposes costs on the transferor which, in comparison to those imposed on him by the other, are unreasonable, taking into account—

- (a) the value which the goods would have if they conformed to the contract for the transfer of goods,
- (b) the significance of the lack of conformity to the contract for the transfer of goods, and
- (c) whether the other remedy could be effected without significant inconvenience to the transferee.

(6) In this section "repair", in relation to any goods, means bring the goods into conformity with the contract for the transfer of goods.

11P Reduction of purchase price or rescission of contract

(1) Where section 11M above applies, the transferee may—

(a) require the transferor to reduce the purchase price of the goods in question to the transferee by an appropriate amount, or

(b) rescind the contract with regard to those goods,

if the condition in subsection (2) below is satisfied.

(2) The condition is that—

(a) by virtue of section 11N(4) above the transferee may require neither repair nor replacement of the goods under section 11N(1)(a) or (b) above, or

(b) the transferee has required the transferor to repair or replace the goods under section 11N(1)(a) or (b) above, but the transferor is in breach of the requirement of section 11N(2)(a) above to do so within a reasonable time and without significant inconvenience to the transferee.

(3) The transferee may not rescind under subsection (1)(b) above if the lack of conformity to the contract for the transfer of goods is minor.

11Q Relation to other remedies etc.

(1) If the transferee requires the transferor to repair or replace the goods under section 11N(1)(a) or (b) above, the transferee may not reject the goods for breach of condition or (in Scotland) a material breach until he has given the transferor a reasonable opportunity to repair or replace the goods.

(2) In England, Wales or Northern Ireland, nothing in sections 11M to 11P above (or this section) prejudices the right of a transferee to bring an action for damages for breach of warranty.

(3) In Scotland, nothing in sections 11M to 11P above (or this section) prejudices the right of a transferee to invoke his remedies for breach of contract."

11R Powers of the court

(1) This section applies in relation to any action in which relief is sought by virtue of this Part.

(2) The powers of the court include power, on the application of the transferee, to make an order requiring specific performance by the transferor of any obligation imposed on him by virtue of section 11N above.

(3) Where—

(a) the transferee has required the transferor to give effect to a remedy under section 11N or 11P above or has claimed to rescind under section 11P but

(b) the court decides that another remedy under section 11N or 11P is appropriate,

the court may proceed as if the transferee had instead required the transferor to give effect to that other remedy or, where that other remedy is rescission under section 11P, as if the transferee had instead claimed to rescind the contract under that section.

(4) The court may make its order unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court."

Additional implied terms where goods are hired to consumers – England, Wales and Northern Ireland

(14) Section 9 of the Supply of Goods and Services Act 1982 is amended as follows.

(15) After subsection (2A) insert—

"(2B) Where the bailee deals as consumer, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the bailor, the producer or his representative, particularly in advertising or on labelling.

(2C) For the purposes of subsection (2B) above the bailee shall not be regarded as dealing as consumer if—

- (a) the goods in question are second-hand goods, and
- (b) the contract for the hire of goods is made at public auction where persons dealing as consumers have the opportunity of attending in person.

(2D) A public statement shall not by virtue of subsection (2B) above be a relevant circumstance for the purposes of subsection (2A) above in the case of a contract for the hire of goods, if the bailor shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) by the time the contract was made, the statement had been corrected, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(2E) Subsections (2B) to (2D) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A) above (whether or not the bailee deals as consumer) if the statement would have been such a circumstance apart from those subsections."

(16) In subsection (5)—

after "commonly supplied" insert "or normally used".

(17) In subsection (6)-

for the words from "the circumstances show" to the end substitute
"where subsection (6A) or (6B) below prevents such a term
arising."

(18) After that subsection insert—

"(6A) Where the bailee deals as consumer, no implied term arises under subsection (5) above unless the bailor or credit-broker has accepted that the goods are fit for the purpose in question.

(6B) Where the bailee deals otherwise than as consumer, no implied term arises under subsection (5) above if the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit-broker."

(19) At the end of the section add—

"(9) For the purposes of this section, the cases where the bailee "deals as consumer" are those cases where—

- (a) the bailee is a natural person who enters into the contract for purposes other than those of a business, and
- (b) the bailor enters into the contract for the purposes of a business,

and accordingly section 18(4) below does not have effect for the purposes of this section.

(10) In this section "producer", in relation to any goods, means—

- (a) the manufacturer of the goods,
- (b) the importer of the goods into the European Economic Area, or
- (c) any person who, by placing his name, trade mark or distinctive sign on the goods, purports to be their producer."

Additional implied terms where goods are hired to consumers – Scotland

(20) Section 11F of the Supply of Goods and Services Act 1982 is amended as follows.

(21) After subsection (3) insert—

"(3A) Where the person to whom the goods are hired deals as consumer, the relevant circumstances mentioned in subsection (3) above include any public statements on the specific characteristics of the goods made about them by the hirer, the producer or his representative, particularly in advertising or on labelling.

(3B) For the purposes of subsection (3A) above the person to whom the goods are hired shall not be regarded as dealing as consumer if—

- (a) the goods in question are second-hand goods, and
- (b) the contract for the hire of goods is made at public auction where persons acting for purposes other than those of a business have the opportunity of attending in person.

(3C) A public statement shall not by virtue of subsection (3A) above be a relevant circumstance for the purposes of subsection (3A) above in the case of a contract for the hire of goods, if the hirer shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) by the time the contract was made, the statement had been corrected, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(3D) Subsections (3A) to (3C) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (3) above (whether or not the person to whom the goods are hired deals as consumer)

if the statement would have been such a circumstance apart from those subsections."

(22) In subsection (6)—

after "commonly supplied" insert "or normally used".

(23) In subsection (7)-

for the words from "the circumstances show" to the end substitute
"where subsection (7A) or (7B) below prevents such a term
arising."

(24) After that subsection insert—

"(7A) Where the person to whom the goods are hired deals as consumer, no implied term arises under subsection (6) above unless the hirer or credit-broker has accepted that the goods are fit for the purpose in question.

(7B) Where the person to whom the goods are hired deals otherwise than as consumer, no implied term arises under subsection (6) above if the circumstances show that the person to whom the goods are hired does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the hirer or credit-broker."

(25) At the end of the section add—

"(10) For the purposes of this section, the cases where the person to whom the goods are hired "deals as consumer" are those cases where—

(a) the person to whom the goods are hired is a natural person who enters into the contract for purposes other than those of a business, and

(b) the hirer enters into the contract for the purposes of a business,

and accordingly section 18(4) below does not have effect for the purposes of this section.

(11) In this section "producer", in relation to any goods, means—

(a) the manufacturer of the goods,

- (b) the importer of the goods into the European Economic Area, or
- (c) any person who, by placing his name, trade mark or distinctive sign on the goods, purports to be their producer."

Meaning of "deal as consumer"

(26) In section 18(4) of the Supply of Goods and Services Act after "Unfair Contract Terms Act 1977" insert "(other than sections 6(5) and (6) and 7(6))".

Other Amendments to 1982 Act

(27) in section 18(1) after the definition of "business" there is inserted-

““consumer” means any natural person who, in contracts to which this Act applies, is acting for purposes which are outside his business;”

(28) in section 18(1) after the definition of "hire-purchase agreement" there is inserted-

““producer” means the manufacturer of goods, the importer of goods into the European Economic Area or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods;”

(29) in section 18(1) after the definition of "redemption" there is inserted-

““repair” means, in cases where there is a lack of conformity in goods for the purposes of section 11M(5) of this Act, to bring the goods into conformity with the terms implied by sections 3 and 4 of this Act.”

5. Amendments to the Supply of Goods (Implied Terms) Act 1973

Additional implied terms in consumer cases.

(1) Section 10 of the Supply of Goods (Implied Terms) Act 1973 is amended as follows.

(2) At the end of subsection (2B)(a) add "or normally used".

(3) After subsection (2C) insert—

"(2D) Where the person to whom the goods are bailed or hired deals as consumer, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the creditor, the producer or his representative, particularly in advertising or on labelling.

(2E) For the purposes of subsection (2D) above the person to whom the goods are bailed or hired shall not be regarded as dealing as consumer if—

(a) the goods in question are second-hand goods, and

(b) the hire-purchase agreement is made at public auction where persons dealing as consumers have the opportunity of attending in person.

(2F) A public statement shall not by virtue of subsection (2D) above be a relevant circumstance for the purposes of subsection (2A) above in the case of a contract of hire-purchase, if the creditor shows that—

(a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,

(b) by the time the contract was made, the statement had been corrected, or

(c) the decision to acquire the goods could not have been influenced by the statement.

(2G) Subsections (2D) to (2F) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A)

above (whether or not the person to whom the goods are bailed or hired deals as consumer) if the statement would have been such a circumstance apart from those subsections."

(4) In subsection (3)—

- (a) after "commonly supplied" insert "or normally used"; and
- (b) for the words from "except where" to the end substitute "except where subsection (3A) or (3B) below prevents such a term arising."

(5) After that subsection insert—

"(3A) Where the person to whom the goods are bailed or hired deals as consumer, no implied term arises under subsection (3) above unless the creditor or credit-broker has accepted that the goods are fit for the purpose in question.

(3B) Where the person to whom the goods are bailed or hired deals otherwise than as consumer, no implied term arises under subsection (3) above if the circumstances show that the person to whom the goods are bailed or hired does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the creditor or credit-broker."

(6) At the end of the section add—

"(8) For the purposes of this section, the cases where the person to whom the goods are bailed or hired deals as consumer are those cases where—

- (a) the person to whom the goods are bailed or hired is a natural person who enters into the contract for purposes other than those of a business, and
- (b) the creditor enters into the contract for the purposes of a business,

and accordingly section 61(5A) below does not have effect for the purposes of this section.

- (9) In this section "producer", in relation to any goods, means—
- (a) the manufacturer of the goods,
 - (b) the importer of the goods into the European Economic Area, or
 - (c) any person who, by placing his name, trade mark or distinctive sign on the goods, purports to be their producer."

6. Amendments to the Unfair Contract Terms Act 1977

(1) The Unfair Contract Terms Act 1977 is amended as follows.

(2) At the end of section 6 insert—

"(5) For the purposes of this section, so far as relating to section 13 or 14 or 15 of the 1979 Act or section 9 or 10 or 11 of the 1973 Act a party to a contract deals as consumer where—

- (a) he is a natural person who makes the contract otherwise than in the course of a business, and
- (b) the other party does make the contract in the course of a business,

and accordingly section 12(1) and (2)) does not have effect for those purposes so far as so relating.

(6) A person shall not by virtue of subsection (5) above be regarded as dealing as consumer if—

- (a) the goods in question are second-hand goods, and
- (b) the contract is made at public auction where persons dealing as consumers have the opportunity of attending in person."

(3) At the end of section 7 insert—

"(6) For the purposes of this section so far as relating to any obligation arising in respect of—

(a) the goods' correspondence with description or sample, or

(b) their quality or fitness for any purpose,

references to a person dealing as consumer shall be construed in accordance with subsections (5) and (6) of section 6 (and section 12(1) and (2) accordingly does not have effect for those purposes so far as so relating)."

7. Consumer guarantees

(1) Where goods are sold or otherwise supplied to a consumer which are offered with a consumer guarantee, the consumer guarantee takes effect at the time the goods are delivered as a contractual obligation owed to the consumer by the guarantor, subject to the conditions set out in the guarantee statement and the associated advertising.

(2) The guarantor shall ensure that the guarantee statement sets out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

(3) On request by the consumer to a person to whom paragraph (4) applies, the guarantee shall within a reasonable time be made available in writing or in another durable medium available and accessible to him.

(4) This paragraph applies to the guarantor and any other person who offers to consumers the goods which are the subject of the guarantee for sale or supply.

(5) Where consumer goods are offered with a consumer guarantee, and where those goods are offered within the territory of the United Kingdom, then the guarantor shall ensure that the consumer guarantee is written in English.

(6) If the guarantor fails to comply with the provisions of paragraphs (2) or (5) above, or a person to whom paragraph (4) applies fails to comply with paragraph (3) then the enforcement authority may apply for an injunction or (in Scotland) an interdict against that person requiring him to comply.

(7) The court on an application under this Regulation may grant an injunction on such terms as it thinks fit.

Parliamentary Under-Secretary of State
for Competition, Consumers and Markets
Department of Trade and Industry

Dated

**EC DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE OF
CONSUMER GOODS AND ASSOCIATED GUARANTEES**

PART 4: REGULATORY IMPACT ASSESSMENT

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Section 1: Regulatory Impact Assessment - Background

Attached is a draft Regulatory Impact Assessment that we welcome views on. It will be presented to Parliament with the draft Regulations for Directive 1999/44/EC, when finalised. It has evolved from the Regulatory Appraisal presented to Parliament in April 1998. This was circulated to a wide audience of around 400 stakeholders in January-April 2001 with a request for comments and amendments. Unfortunately, we received no new figures, and very little by way of narrative, in response.

In the absence of any substantive comments, and revised figures, the attached draft will go forward as the final Regulatory Impact Assessment.

For further advice on you may wish to consult the Cabinet Office publication "Good Policy Making: A Guide to Regulatory Impact Assessment" at <http://www.cabinet-office.gov.uk/regulation/2000/riaguide/default.htm>.

David Hoggett, 020 7215 5736

Section 2: REGULATORY IMPACT ASSESSMENT

EC DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

Purpose and objectives of the Directive

1 The Directive aims to encourage consumers to take full advantage of the Single Market by setting common minimum standards of consumer rights throughout the European Union. In addition to the provisions on consumers' rights when they buy defective products, the Directive also contains provisions on guarantees given to consumers without extra charge.

2 This Regulatory Impact Assessment assesses the likely costs and benefits to those affected in the UK from the changes to legislation which will arise as a result of transposing the Directive. Overall, the UK sale of goods legislation (principally the Sale of Goods Act 1979, as amended) sets a relatively high level of consumer protection. In so far as UK legislation already goes beyond the requirements of the Directive, Government has indicated its intention to preserve the current provisions for consumer protection. In some areas, the Directive goes further than existing law. In particular it introduces:

- A reversal of the burden of proof for up to six months after delivery (Art.5(3));
- A statutory right to repair and replacement of goods (Art. 3);
- A requirement that any commercial guarantees will be legally binding and should be available for scrutiny on request by the consumer (Art.6(3)).

3 In other areas, the rights provided by the Directive are already available in UK law:

- Contracts for the supply of goods to be manufactured (Art.1(4)) would be covered by the Supply of Goods and Services Act 1982 which implies into contracts a requirement that goods be of satisfactory quality and fit for their purpose.
- Public statements (Art.2(2)(d)) are already taken into account by courts (s.13 Sale of Goods Act – Grant v Australian Knitting Mills (1936) a case about description on packaging), although the Directive goes

further in making the seller liable for certain statements made by the producer or his representative, particularly on advertising or labelling. Description is specifically mentioned in s.13 of the Sale of Goods Act.

- Incorrect installation (Art.2(5)) is likely to be covered by the Supply of Goods and Services Act 1982 which implies into contracts that work will be carried out with reasonable skill and care.
- A shortcoming in installation instructions (Art.2(5)) is covered by s.14 of the Sale of Goods Act concerning quality and fitness.
- The right of redress (Art.4) is a non-consumer provision which requires no amendments to UK law, as Recital 9 makes it clear that the seller may renounce an entitlement to pursue remedies against the producer or other intermediary, and that the Directive does not affect the principle of freedom of contract.

Options

4 The Directive includes a number of optional provisions, including the option to adopt or maintain more stringent provisions, compatible with the Treaty, to ensure a higher level of consumer protection (Art.8(2)). We propose to take advantage of the option to exclude sales of second hand goods at public auctions (Art.1(3)) and to require guarantees to be in English (Art.6(4)). We do not propose to take up the option to insist that the consumer must inform the seller of the lack of conformity within two months of detection (Art.5(2)) nor to provide that second hand goods have a shorter period of liability than new (Art.7(2)).

5 We are consulting on whether to implement the provision in the Directive (Art.5(1)) which says that its remedies shall only be available in respect of defects which appear within two years of delivery or to allow claims to be made for faults that become apparent for up to six years, as is the case for existing rights under UK law. We will also consult on whether to ally the presumption of lack of conformity (the “reversed burden”) (Art.5(3)) with claims for initial rescission of contract.

Benefits

6 The Directive might be expected to bring the following general benefits:

- (i) the knowledge of certain minimum rights when shopping in the European Union should give consumers greater confidence to shop in other Member States and to take advantage of the single market; this could lead to increased sales by EU retailers;
- (ii) remedies in the Directive - repair, replacement and reduction in price - are the ones that, in practice, UK consumers commonly receive, which may make it easier for UK consumers to understand their rights. Similarly, businesses may find it easier to understand these rights and a meeting of minds may decrease confrontational situations;
- (iii) the remedies in the Directive, along with the six months reversal of the burden of proof in consumers' favour, and the clear statement that commercial guarantees are legally binding, may make it easier for consumers to obtain redress³. Where this helps in disputes with rogue traders this can only assist in the development of a level playing field to the benefit of all legitimate traders;
- (iv) UK consumers shopping in Member States whose levels of sale of goods protection are currently lower than that in the Directive should benefit from improved protection in those countries;
- (v) access to better information about any freely given guarantees prior to purchase. Improved information leads to more efficient operation of markets and all the benefits associated with this.

Cost implications

7 Considering first the aspects of the Directive that have to be transposed:

Right to repair or replacement (Article 3)

8 Under the Directive, if the product does not conform to the contract, eg if it was faulty at the time of delivery, the consumer has a right to a repair or replacement of the goods, unless the chosen remedy was not possible or would be disproportionate. In this case the consumer would be entitled to a refund or price reduction. The seller is liable under this provision for at least two years after delivery (the consultation considers whether this should be set at six years or five in Scotland in line with current UK law). However, many defects tend to show themselves at the time the goods are unpacked or immediately after use starts so we expect that most claims will be made within a short period from delivery.

³ Some firms have claimed that this is likely to lead to a greater level of conflict between retailers and consumers.

9 Present UK law contains no specific right to repair or replacement but consumers have a more powerful protection in terms of the right to reject faulty goods within a reasonable time and get a refund. After this period, consumers have a right to damages if goods are defective.

10 UK retailers often offer, and consumers often accept, repair or replacement, if it is the most cost effective solution. Under the Directive the consumer who preferred a replacement might find it easier to make a case for one, for example where repair and replacement were evenly balanced in cost terms. However, if repair was feasible, a retailer would not be obliged to give a replacement, if it would be significantly more expensive. The Department, therefore, believes there is unlikely to be anything more than a very limited increase in replacements given and that these should not cost seriously more than the alternative repairs (or the current damages awarded).

Extended right to cancel the contract (Article 3)

11 Under the Directive, if neither repair nor replacement offers an appropriate remedy, or the seller has not complied in a reasonable time, the consumer would be entitled to a price reduction or to cancel the contract. There would be no right to cancel if the lack of conformity was minor. Currently, in the UK, once the right to reject is lost the consumer retains a right to damages. However, we believe that in those cases which might be sufficiently serious under the Directive to merit cancellation, the remedy which might be given under current UK law would be broadly equivalent - i.e. damages equal to the price paid, damages which may be reduced to take account of the extent to which the consumer has had use of the goods. Therefore the Department does not believe the cancellation right in the Directive would have any significant impact on costs.

Reversal of the burden of proof (Article 5(3))

12 The Directive states that, in the absence of proof to the contrary, any lack of conformity appearing in the first six months after delivery would be presumed to have existed at the time of delivery. The burden of proof would be moved from the consumer, on whom it currently rests (at least in theory), to the retailer. In some cases, such as those involving technically complex products, the reversal of the burden of proof might make it easier for the consumer to sustain his complaint. This could lead to some increase in the number of claims resolved in consumers' favour. However, a proportion of these costs would represent just claims that would not have been resolved in favour of the consumer under the existing UK arrangements.

Commercial guarantees to be available on request before purchase (Article 6(3))

13 The Directive states that on request by the consumer, any commercial guarantee would have to be made available for them to consult. This would allow them to factor this detail into the purchase decision. Retailers may take a number of approaches to fulfilling this requirement. Although it may give rise to costs for some traders, it is noted that the British Retail Consortium's guidance on commercial guarantees already says that consumers should be able to study the guarantee before purchase. The advent of the Internet, as a database, will increasingly offer a cost effective mechanism for retrieving guarantees.

14 Turning now to the options in the Directive that are at Member States' discretion as to whether to transpose:

Second hand goods sold at public auction (Article 1(3))

15 Under existing legislation buyers' rights, in relation to the description, quality and fitness for purpose of the goods to be provided, can be excluded or restricted, in relation to business sales, providing that any such contract term is reasonable. The Unfair Contract Terms Act 1977 does not allow such exclusions or restrictions in relation to consumer sales but for auctions the Act specifies that buyers are not to be regarded as acting as a consumer. Consequently, the terms and conditions that are generally used at auctions, which restrict statutory rights, apply to consumers as well as businesses. To maintain this position for the new rights in the Directive the UK intends to take advantage of the derogation allowed for public auctions where consumers have the opportunity of attending the sale in person – N.B. this excludes online auctions, which would fall within the Directive.

16 If the UK did not do so, transposition of the Directive would have the effect of increasing the trade seller's liability to any consumer buyer at auction. However, since the seller would not know, until after the conclusion of the sale, whether the buyer was a consumer or another trader, he would face uncertain liabilities. Because of the nature of auctions, sellers would not be able to obtain higher prices to offset their increased liabilities. Auctions might therefore become less attractive as a selling method for trade sellers to the detriment of all participants.

17 The derogation only applies to second hand goods. Although new goods cannot, therefore, be excluded, as the majority of the goods sold at auction are second hand this is not expected to have an adverse effect on

auction activity. Similarly, because of this, the cost impact is expected to be minor.

Consumers to inform of lack of conformity within two months (Article 5(2))

18 The Directive says that Member States may require a consumer to inform the seller of any lack of conformity within two months of detection. This requirement is not a feature of current sales of goods law although the need to mitigate loss would suggest that a consumer should bring his claim for damages within a reasonable time.

19 It is felt that it is not necessary to transpose the two months requirement. It could prove unfair on a consumer to lose their rights if there was an entirely reasonable explanation for their not being able to lodge a complaint within two months. There is also the general pressure on consumers to report a fault early so that courts find their complaints more plausible; the passage of time undermines this. In the case of a consumer reporting a fault outside of the first six months - but claiming it was detected in this period to allow them to make use of the "reversed burden" right - the consumer would find themselves having to prove the date of detection and then explain why it was reasonable to have delayed lodging a complaint. Finally, rogue consumers would find it easy to lie about the date of detection.

Guarantees to be drafted in an official language (Article 6(4))

20 In the case of the UK, this would be English and we intend to transpose this option. Although this would impact on very few products, it seems reasonable to require companies to translate these marketing tools. As so few companies use non-English language guarantees as a marketing tool in the UK we do not believe that this requirement will result in any significant additional costs.

A shorter period of liability for second hand goods (Article 7(1))

21 The Directive allows the minimum two years liability period to be reduced to not less than one year for second hand goods. We do not intend to make use of this option. The Draft Regulations provide that goods conform to the contract "if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances". This allows full

account to be taken of whether a good is second hand and so we see no need to make use of Article 7(1). This is consistent with our current approach under existing legislation.

22 Finally, we consider the options in meshing the Directive with the UK's existing legislation:

One definition of "consumer" (Article 1(2))

23 We wish to streamline legislation, wherever possible, and present a single set of definitions/rules to assist with clarity and understanding for both consumers and business. Currently the Directive, the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) and the Unfair Contracts Terms Act (UCTA) use different definitions for consumer goods, consumer and for when consumers are acting "outside" or "not related to" their trade, business or profession.

24 We therefore intend to align the Directive's definition of "consumer" more closely with the UTCCR definition that a consumer is "any natural person who ...is acting for purposes which are outside his trade, business or profession".

25 We do not expect these changes to result in increased costs but they will bring about some simplification which will assist with understanding and with improved clarity that should help both consumers and business overall.

One set of conformity criteria (Article 2)

26 The criteria in the Directive and s.14 of the Sale of Goods Act 1979 for assessing whether or not goods conform to the contract are very similar, although there are several significant differences. In order to make the legislation as clear and straightforward as possible, the Regulations transposing the Directive will amend existing legislation to produce a single set of criteria to judge on the issue of conformity with contract with regard to consumer sales.

27 We believe that having one set of criteria will minimise business' costs in understanding their obligations and reduce their need for professional advice while making it easier for consumers, and their advisers, to know their rights, although this will require re-learning/training and hence there will be a start up cost.

Two and six years (and the continuation of current Sale of Goods Act rights)

28 The Directive imposes a two years liability period. Redress can be sought (for up to six years from the time of delivery; a time limit imposed by the Limitation Act 1980) for any lack of conformity with the contract that becomes apparent during this two years liability period.

29 The current legislation allows for damages (after the reasonable period for initial rescission has lapsed) to be pursued for up to six years after the sale has been made (a time limit imposed by the Limitation Act 1980). This, in practice, gives consumers a six years liability and limitation period. Very few cases are brought in the latter part of this period, however.

30 There would be considerable difficulties in reducing the six years liability period for existing rights:

- An across the board reduction of the liability period of the Sale of Goods Act from six to two years would be beyond our power under the European Communities Act. This is because the Sale of Goods Act concerns itself with all sales but the Directive only with the sale of consumer goods.
- Differentiating between the liability period for sales of consumer goods and other goods would introduce more confusion and costly argument between consumers and businesses over definitions.
- Such differentiation would mean that business had greater protection than consumers.
- There has been no request to reduce the current six years liability period for the current remedies. Indeed, business groups such as CBI and the British Retail Consortium have praised the current legislative framework.
- Ministers have given a commitment not to reduce consumers' existing rights.
- It is possible that the harmonisation of all consumer rights onto a two years liability period might perpetuate the myth of a "two years guarantee" that has dogged the Directive.

- Finally, there is very little international competitive disadvantage to UK plc in maintaining its six years liability period. For there to be it would have to be shown that UK sellers were losing out in providing a six years liability against mainland European counterparts offering only a two years period. In theory this could be through lost sales. Yet internationally mobile consumer purchases (surely a small percentage of UK sales anyway) would more likely be drawn towards the UK if a longer liability period was offered. The alternative reason for adverse costs is that the redress remedies hit the UK sellers especially hard for goods where the faults became apparent in years three to six inclusive (surely a small percentage of overall claims). This would not have stopped them making a sale in the first place; merely that the sales proved less profitable on a comparison with mainland European rivals. It is rather extreme to think that any/many UK sellers would withdraw from the UK, to mainland Europe, with a net cost to UK plc in terms of GDP, jobs and consumer choice because of this.

31 We have, therefore, decided to keep the current six years liability period with regard to the right to damages under existing legislation (primarily the Sale of Goods Act). However, whether we increase the Directive's two years liability period - with regard to its specific four remedies - to six has still to be finally decided although the draft Regulations as they stand do not implement the two years liability period, thus making the Directive's remedies available for six years. There are business fears as to the costs of such an extension and that it would amount to "significant gold plating". But any additional cost is likely to be balanced, if not exceeded, by savings on the cost of the training required for two parallel liability periods and any associated problems of interpretation by retail staff when dealing with consumers. The only changes with which staff would need to be familiar, for a uniform six years period, would be the (relatively modest) changes to existing consumer rights introduced by the new remedies. In practice, we are convinced that the vast majority of cases would be brought within a two years period. But, if two parallel liability periods were in operation, consumers would still be able to pursue damages between three and six years inclusive even without access to the four specific remedies.

Article 5(3)'s "reversed burden" and application to the existing right to reject

32 Having said that we would not reduce any current consumer rights, it would be possible to consider allowing the existing initial right to rescind the contract to be used with the Directive's presumption of lack of conformity, unless proved otherwise, within the first six months.

33 The draft Regulations keep the two rights separate although costed views are, again, sought on this. The “reversed burden” may, in certain circumstances, be a powerful new tool in its own right, to be used with the new specific remedies of repair and replace (in the first place). The existing right to reject, within a reasonable time, will remain for the consumer to call upon albeit without the “reversed burden” right. Of course, if the consumer pursues the Directive’s four remedies and gets to that final right to rescission, within six months of delivery, then they will be able to make use of the “reversed burden”. The cost implications of this should, therefore, remain as stated above under paragraph 12.

Evaluation of costs

34 The above factors will give rise, mainly, to policy costs which will recur each year. These costs are extremely difficult to evaluate because much depends on how consumer and trader behaviour might change after the transposition of the Directive, and because it is very hard to obtain data on, for instance, the current level and cost of repairs and replacements for the sectors most likely to be affected. This has not been possible on a consistent basis.

35 The Department has taken account of the findings of the economic impact study carried out for the Commission by Wilhelm Consulting, published in 1998. However, the Wilhelm estimates were made on the basis of an earlier draft of the Directive. They suggested that costs in the following sectors might increase as follows:

- clothing and footwear: 0%;
- cars: 0.7-1.7%;
- furniture: 0.65%;
- consumer electronics (brown goods): 0.5-1.4%;
- personal computers: 1.6-1.7%;
- household appliances (white goods): 0-6.1%.

36 In some cases Wilhelm considered different scenarios depending on how far the Directive might restrict choice of remedy. For computers, for example, assuming a greater proportion of repairs gave a range of 1.6-2.7%. Wilhelm's figures applied to the EU as a whole and so the results cannot merely be replicated for the UK. Indeed, the report recognised that the Directive would require fewer changes to the law in the UK than in a number of other Member States where existing consumer protection was lower.

The Department's conclusion based on the evidence we have seen, is that the average additional recurring costs are likely to be up to 0.25% of consumer expenditure on durable and semi-durable goods and no change for non-durables.

37 Most of these extra recurring policy costs would be attributable to the greater ease consumers could have in understanding the alternative remedies to damages, such as repair and replacement, that they are used to requesting anyway. A proportion would be attributable to the reversal of the burden of proof. Recurring transposition costs would include the making of commercial guarantees available for scrutiny before purchase.

38 In addition, non-recurring transposition costs, arising from the need to amend purchase/supply contracts, set up arrangements for making commercial guarantees available for scrutiny before purchase and train shop workers about the law, might amount to a further 1-2% of annual recurring costs.

39 The costs would be borne initially by manufacturers and retailers of durable and semi-durable goods. It could be unevenly spread depending on the extent to which traders have already adopted a practice of translating the consumer's right to damages (which some consumers may not know how to claim) into redress in terms of repair and replacement and their current practice on responding to consumers' requests for information. In 2000 total expenditure on the consumer goods concerned was around £106 billion (at 2000 prices).⁴ This represents 18% of total consumers' expenditure. The table below lists the principal sectors affected and consumers' expenditure⁵ in these sectors.

Sector	Value (£ million)
Audio-visual equipment	7,054
Photographic & optical equipment	2,364
Major appliances	6,586
Computer hardware and software	14,676 ⁶
Furniture and floor coverings	12,928
Clothes and footwear	34,458

⁴ Source: ONS, Consumer Trends Q4 2000

⁵ Source: ONS, Consumer Trends Q4 2000, tables 1.2 and 2.1.

⁶ Source: ONS, Product Sales & Trade 1999, p.36

Vehicles	27,930
Total in 2000	105,996

40 In 1999, based on VAT returns and standard industrial classifications, according to the Office for National Statistics there were the following number of companies in these sectors:

- Motor vehicle sales 29,245
- Retail sale of clothing 13,650
- Retail sale of footwear and leather goods 5,025
- Retail sale of furniture, lightening equipment and other household goods 10,070
- Retail sale of electrical household appliances, radios and televisions 7,225

41 Who eventually bears the costs of the legislation will depend on retailers' and other suppliers' responses to increased costs. Firms have a range of alternatives including: bearing the costs themselves; altering product quality and passing costs on in the form of higher prices. The stronger the competition in sectors of the consumer durables markets, the less likely it is that costs will be passed on to consumers. If average additional recurring costs are likely to be up to 0.25% of consumer expenditure on durable and semi-durable goods then, with the above total of around £106bn, this would equate to £265m or just over £4 per person per year in the UK.

Comparison with industry estimates

42 Industry believes the costs arising from the Directive would be much higher than we conclude in this Regulatory Impact Assessment and suggests they are typically in the region of 3-5% of turnover. As we note below, small firms estimate that their costs will rise by 5-10% of turnover. Several factors may help explain why industry's figures are higher:

- many are based on the original version of the Directive which gave the consumer a free choice of all four remedies in the first year after delivery;

- subsequent changes to the text in 1997 (including the remedy stages and the principle of proportionality) did not cause industry to alter its views greatly, mainly because the right to replacement, while limited, became available for up to two years after delivery. As we note above, the final version of the Directive rules out a remedy if it would be significantly more expensive than the alternative, so we do not think that the overall volume of replacement goods is likely to rise in any major way;
- industry has also expressed concern that the transposition of the Directive in the UK would increase the extent to which consumers exercise their rights beyond the first year after purchase. In other words, publicity over the two years minimum liability period in the Directive would make it more likely that consumers would become aware of their rights than they are already of those they have (which, actually, can extend to six years) under existing law. We believe it is possible to exaggerate the likely impact of this factor. The argument depends on an assumption that consumers either are ignorant of their rights or are aware of them and behave unreasonably.

Impact on enforcement/advisory bodies

43 There will be a non-recurring transposition cost as local authorities and Citizens Advice Bureaux train their staff in the new regulations. With such fundamental legislation being changed it is likely that most staff will require some training. The publicity around the time of transposition will also generate an increased demand for advice.

44 Recurring transposition costs should be capable of being absorbed within existing budgets given over to providing Sale of Goods advisory services and through the additional funding to be provided to local authorities from 2002. This is to take action under the Stop Now Orders (EC Directive) Regulations 2001 to stop traders infringing this, and other legislation transposing specific EC directives, where infringements harm the collective interests of consumers.

Impact on Small Business

45 A small business litmus test was conducted in 1997. It found that the small retailers interviewed had similar concerns to the larger retailers and trade associations. However, with the exception of a furniture retailer and a car retailer (which tended to be more optimistic than others in those sectors we heard from) the smaller businesses we interviewed were more pessimistic.

Their estimates of the extra costs the Directive would impose ranged from 5-10% of turnover. This more pessimistic outlook seems to stem partly from concern about the likely impact of the reversal of the burden of proof, and partly from a perceived worsening of the existing difficulties smaller retailers face in persuading manufacturers to take responsibility for faulty goods they have supplied. From the table below, 5-10% of turnover would amount to £3.28-6.56bn (small enterprises are those employing fewer than 50). No evidence has been advanced to substantiate this small sample's high estimate.

46 Small enterprises (under 50 employees) represent 99.5% of the retail sector in terms of businesses, and about 31% in terms of economic activity according to the data below from the Small Business Service's Sheffield Statistical Unit. These include both registered and unregistered firms for VAT.

	Number	Employment '000	Turnover '000,000
All enterprises	307,985	2,809	208,737
No employees	162,855	212	10,744
Employers	145,130	2,596	197,994
1-4	102,255	332	24,832
5-9	27,800	205	14,194
10-19	10,720	149	9,991
20-49	2,755	83	5,880
50-99	730	50	3,840
100-199	355	49	3,568
200-249	70	15	1,251
250-499	160	57	4,733
500 or more	285	1,657	129,706

Results of consultations

47 The Department published consultation documents in September 1996 and July 1997 and received a large number of responses from consumer bodies, regulatory authorities, businesses, trade associations, professional institutions, academics and others. Both consultation exercises were on the basis of the Commission's original draft of the Directive. The second concentrated on compliance costs and also invited views on a possible alternative to the remedies proposed by the Commission and on the

impact of the Directive if commercial guarantees were only required to be made available for scrutiny at the consumer's request. The Directive thereafter changed significantly in negotiation.

48 The Department consulted on the finalised Directive in January 2001. Almost sixty replies were received, ranging from less than one page up to thirty. Again, the replies were from consumer bodies, regulatory authorities, businesses, trade associations, professional institutions, academics and others. In general, there was reasonable support for the tentative proposals outlined by the Department on the way it intended to proceed. Where there was more disagreement this was often down to a misunderstanding by either party. Productive meetings were held to dispel such issues. The resulting consensus and views were taken on board in the production of the draft Regulations. Very little cost information was supplied to update the previous figures.

Summary and recommendations

49 The Directive should make it easier for consumers to understand their rights. In some cases they might be able to sustain a case for replacement or repair. Retailers would assume some concomitant liabilities which may increase average costs in some affected sectors by up to 0.25%. Overall this appears a reasonable result in terms of necessary consumer protection achieved at minimum cost.

50 In the Department's view the Directive provides a good overall balance between the interests of consumers and traders. Consumers would benefit from clearer remedies and might feel better able to take advantage of the single market. The Directive should have little effect on traders who adopt a good standard of response to consumer complaints and could encourage other traders to adopt a more positive approach.

51 Guidance will be provided alongside the new Regulations to ensure that consumers and traders know how the new rights will impact on them both. We will aim to produce guidance in close consultation with the main stakeholders, and their representative bodies, to ensure it is easily understood and up to the task. We will further look for their support in distributing guidance and advice.

Enforcement, sanctions and review

52 The main articles of the Directive, relating to consumers' legal rights when they buy goods, would be introduced into UK civil law. Enforcement of rights and duties would, as now, be for the parties concerned. It is proposed that powers to enforce the provisions on guarantees will be given to the DGFT and local trading standards authorities. The number of cases coming before the courts is not expected to increase. In addition, the Director General, and qualified entities (including all local authority trading standards departments), will have the power under the Stop Now Orders (E.C. Directive) Regulations 2001 to apply to the courts for an injunction to stop or prevent any actual or potential infringement of the Regulations that harm, or are likely to harm, the collective interests of consumers. Article 12 of the Directive includes a requirement on the Commission to review and report on the application of the Directive by July 2006.

David Hoggett

Consumer Affairs Directorate 2e

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EC DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

PART 5: SUMMARY OF RESPONSES TO THE FIRST CONSULTATION

1. The Department issued a [consultation paper](#) on 4 January 2001. Consultation took the form of a series of questions relating to the possible impact of the Directive on existing legislation and practice.

2. We received around 60 responses from consumer bodies, businesses, trade associations, regulatory authorities, professional institutions and academics. We would like to express our gratitude to all those who contributed. Copies of the replies, apart from one where confidentiality was requested, are available for viewing in the DTI Library at 1 Victoria Street, London, SW1H 0ET (call the Open Government Unit on 020 7215 6226).

3. Non-attributable summaries of comments on the major issues can be accessed by clicking the hyperlinks below:

[Responses - Document 1](#)

- Auctions and Second Hand Goods
- "Bespoke" Goods
- Changing Definitions
- Guarantees

[Responses - Document 2](#)

- HP, Hire and Barter
- Keep Sale of Goods Act Remedies
- Minor faults
- Price

[Responses - Document 3](#)

- Reversed Burden

- Limitation & Liability Periods
- Two Months Rule

4. There was general support for the tentative proposals outlined by the Department on the way it intended to proceed. Where there was disagreement, this was sometimes down to a misunderstanding. Meetings were held to address confusion on such issues. The views expressed during the consultation have been taken on board in the course of the production of the draft Regulations. However, very little information on possible cost impacts was supplied to update previous figures.

5. The area that attracted most debate was the possibility of aligning, at six years, the liability and limitation periods for both the remedies of existing legislation and those of the Directive. This was suggested with the objective of simplifying the redress system for both consumers and business as simplification usually leads to lower costs. Consumer organisations generally favoured this proposal. However, strong representations were made by some business respondents in support of dual systems of six and two years liability for the old and new redress regimes respectively (with six years limitation for both). They feared a substantial upward revision of their earlier cost estimates if this was not done.

6. It was apparent that some still thought the Directive enforced a two years durability requirement. Of course, the two years liability period only covers faults that arise at a time when it is still reasonable for goods to have lasted that long (see Art. 2.2(d), which refers to the reasonable expectations of the consumer, given the nature of the goods). In addition, it must be demonstrable that the faults were inherently present at the time of delivery. During the first six months after delivery the presumption in Art. 5.3 operates, namely that the fault is presumed to have been present at the time of delivery, unless this is incompatible with the nature of the goods or the nature of the fault. A general request was made that any guidance emphasised these important points.

7. There was widespread agreement that, so far as possible, future legislation should be kept as flexible as current legislation, without attempts being made to be too prescriptive. These would always fail to capture all situations. Instead, courts could, and should, be relied on to decide on reasonable solutions taking account of all relevant facts (as now). Having said that, there were frequent requests for the new legislation to either be self explanatory or to be accompanied by the best guidance possible to indicate the probable outcome in disputes in as wide a number of cases as possible.

8. There was concern, from some of the business respondents, that without a two months notification requirement an unscrupulous consumer would always claim any fault had materialised within the six months "reversed burden" period. However, others pointed out that it was also the case that the onus was on the consumer to substantiate the date on which the fault was identified and to explain, ultimately to the satisfaction of the court, any delay in reporting it. One academic respondent pointed out that the so-called "reversed burden of proof" in Art. 5.3 will make very little practical difference to the way in which the courts approach cases of defective goods. He commented that in cases involving goods which are designed to last significantly longer than six months (in which case Art 5.3 may not be applicable) the evidential burden will in practice be on the supplier to show that the defect was not present at the time of delivery.

9. There was general agreement that ensuring any freely given guarantees were written in plain intelligible language, and with essential particulars provided, should not prove too difficult. Many already met these requirements. However, the availability of any such guarantees for viewing, on request by the consumer, caused some concern. Although many noted that the Internet could provide a solution others feared the cost of holding hard copy alternatives or opening packaging to locate a copy. Some expressed the hope that it was not immediate availability that was called for.

10. Overall, there was a recurring request for adequate guidance to be produced to explain the new legislation to all parties, but especially small businesses who may have been constrained in how much time they were able to give to monitoring this legislation. If doubts and ambiguity were to creep in then there would be wasteful arguments between parties over their rights. Similarly, if consumers are not made aware of new rights there is little point in legislating for them.

11. We have begun the production of draft Regulations, which will be put out for a second Consultation later in 2001. These will first have to be approved by DTI Ministers, Parliamentary Counsel and Other Government Departments, and any necessary amendments taken on board, before being circulated more widely. A revised draft Regulatory Impact Assessment will also be included in the second consultation.

[David Hoggett](#)

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June 2001

EC DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE
OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

PART 6: COPY OF THE DIRECTIVE

Official Journal L 171 , 07/07/1999 p. 0012 - 0016

**DIRECTIVE 1999/44/EC OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL
of 25 May 1999
on certain aspects of the sale of consumer goods and associated
guarantees**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community, and in
particular Article 95 thereof,

Having regard to the proposal from the Commission⁷,

Having regard to the opinion of the Economic and Social Committee⁸,

Acting in accordance with the procedure laid down in Article 251 of the Treaty
in the light of the joint text approved by the Conciliation Committee on 18
March 1999⁹,

(1)Whereas Article 153(1) and (3) of the Treaty provides that the Community
should contribute to the achievement of a high level of consumer protection by
the measures it adopts pursuant to Article 95 thereof;

(2)Whereas the internal market comprises an area without internal frontiers in
which the free movement of goods, persons, services and capital is
guaranteed; whereas free movement of goods concerns not only transactions
by persons acting in the course of a business but also transactions by private
individuals; whereas it implies that consumers resident in one Member State
should be free to purchase goods in the territory of another Member State on
the basis of a uniform minimum set of fair rules governing the sale of

⁷ Quoted by the CBI in its submission.

⁸ Quoted by the CBI in its submission.

⁹ Quoted by the CBI in its submission.

consumer goods;

(3)Whereas the laws of the Member States concerning the sale of consumer goods are somewhat disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted;

(4)Whereas consumers who are keen to benefit from the large market by purchasing goods in Member States other than their State of residence play a fundamental role in the completion of the internal market; whereas the artificial reconstruction of frontiers and the compartmentalisation of markets should be prevented; whereas the opportunities available to consumers have been greatly broadened by new communication technologies which allow ready access to distribution systems in other Member States or in third countries; whereas, in the absence of minimum harmonisation of the rules governing the sale of consumer goods, the development of the sale of goods through the medium of new distance communication technologies risks being impeded;

(5)Whereas the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the Community, will strengthen consumer confidence and enable consumers to make the most of the internal market;

(6)Whereas the main difficulties encountered by consumers and the main source of disputes with sellers concern the non-conformity of goods with the contract; whereas it is therefore appropriate to approximate national legislation governing the sale of consumer goods in this respect, without however impinging on provisions and principles of national law relating to contractual and non-contractual liability;

(7)Whereas the goods must, above all, conform with the contractual specifications; whereas the principle of conformity with the contract may be considered as common to the different national legal traditions; whereas in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer; whereas under such legal traditions, in particular, additional national provisions may be useful to ensure that the consumer is protected in cases where the parties have agreed no specific contractual terms or where the parties have concluded contractual terms or agreements which directly or indirectly waive or restrict the rights of the consumer and which, to the extent that these rights result from this Directive, are not binding on the consumer;

(8)Whereas, in order to facilitate the application of the principle of conformity with the contract, it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situations; whereas that presumption does not restrict the principle of freedom of contract;

whereas, furthermore, in the absence of specific contractual terms, as well as where the minimum protection clause is applied, the elements mentioned in this presumption may be used to determine the lack of conformity of the goods with the contract; whereas the quality and performance which consumers can reasonably expect will depend inter alia on whether the goods are new or second-hand; whereas the elements mentioned in the presumption are cumulative; whereas, if the circumstances of the case render any particular element manifestly inappropriate, the remaining elements of the presumption nevertheless still apply;

(9)Whereas the seller should be directly liable to the consumer for the conformity of the goods with the contract; whereas this is the traditional solution enshrined in the legal orders of the Member States; whereas nevertheless the seller should be free, as provided for by national law, to pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary, unless he has renounced that entitlement; whereas this Directive does not affect the principle of freedom of contract between the seller, the producer, a previous seller or any other intermediary; whereas the rules governing against whom and how the seller may pursue such remedies are to be determined by national law;

(10)Whereas, in the case of non-conformity of the goods with the contract, consumers should be entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded;

(11)Whereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, in comparison with the other remedy, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy;

(12)Whereas in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; whereas it is for the consumer to decide whether to accept or reject this proposal;

(13)Whereas, in order to enable consumers to take advantage of the internal market and to buy consumer goods in another Member State, it should be recommended that, in the interests of consumers, the producers of consumer goods that are marketed in several Member States attach to the product a list with at least one contact address in every Member State where the product is marketed;

(14)Whereas the references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk;

(15)Whereas Member States may provide that any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him; whereas the detailed arrangements whereby rescission of the contract is effected may be laid down in national law;

(16)Whereas the specific nature of second-hand goods makes it generally impossible to replace them; whereas therefore the consumer's right of replacement is generally not available for these goods; whereas for such goods, Member States may enable the parties to agree a shortened period of liability;

(17)Whereas it is appropriate to limit in time the period during which the seller is liable for any lack of conformity which exists at the time of delivery of the goods; whereas Member States may also provide for a limitation on the period during which consumers can exercise their rights, provided such a period does not expire within two years from the time of delivery; whereas where, under national legislation, the time when a limitation period starts is not the time of delivery of the goods, the total duration of the limitation period provided for by national law may not be shorter than two years from the time of delivery;

(18)Whereas Member States may provide for suspension or interruption of the period during which any lack of conformity must become apparent and of the limitation period, where applicable and in accordance with their national law, in the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement;

(19)Whereas Member States should be allowed to set a period within which the consumer must inform the seller of any lack of conformity; whereas Member States may ensure a higher level of protection for the consumer by not introducing such an obligation; whereas in any case consumers throughout the Community should have at least two months in which to inform the seller that a lack of conformity exists;

(20)Whereas Member States should guard against such a period placing at a disadvantage consumers shopping across borders; whereas all Member States should inform the Commission of their use of this provision; whereas the Commission should monitor the effect of the varied application of this provision on consumers and on the internal market; whereas information on the use made of this provision by a Member State should be available to the other Member States and to consumers and consumer organisations throughout the Community; whereas a summary of the situation in all Member States should therefore be published in the Official Journal of the European

Communities;

(21)Whereas, for certain categories of goods, it is current practice for sellers and producers to offer guarantees on goods against any defect which becomes apparent within a certain period; whereas this practice can stimulate competition; whereas, while such guarantees are legitimate marketing tools, they should not mislead the consumer; whereas, to ensure that consumers are not misled, guarantees should contain certain information, including a statement that the guarantee does not affect the consumer's legal rights;

(22)Whereas the parties may not, by common consent, restrict or waive the rights granted to consumers, since otherwise the legal protection afforded would be thwarted; whereas this principle should apply also to clauses which imply that the consumer was aware of any lack of conformity of the consumer goods existing at the time the contract was concluded; whereas the protection granted to consumers under this Directive should not be reduced on the grounds that the law of a non-member State has been chosen as being applicable to the contract;

(23)Whereas legislation and case-law in this area in the various Member States show that there is growing concern to ensure a high level of consumer protection; whereas, in the light of this trend and the experience acquired in transposing this Directive, it may be necessary to envisage more far-reaching harmonisation, notably by providing for the producer's direct liability for defects for which he is responsible;

(24)Whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection;

(25)Whereas, according to the Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes¹⁰, Member States can create bodies that ensure impartial and efficient handling of complaints in a national and cross-border context and which consumers can use as mediators;

(26)Whereas it is appropriate, in order to protect the collective interests of consumers, to add this Directive to the list of Directives contained in the Annex to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests¹¹,

HAVE ADOPTED THIS DIRECTIVE:

¹⁰ Quoted by the CBI in its submission.

¹¹ Quoted by the CBI in its submission.

Article 1

Scope and definitions

1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.

2. For the purposes of this Directive:

(a) *consumer*: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;

(b) *consumer goods*: shall mean any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law,
- water and gas where they are not put up for sale in a limited volume or set quantity,
- electricity;

(c) *seller*: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;

(d) *producer*: shall mean the manufacturer of consumer goods, the importer of consumer goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods;

(e) *guarantee*: shall mean any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising;

(f) *repair*: shall mean, in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale.

3. Member States may provide that the expression "consumer goods" does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person.

4. Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive.

Article 2

Conformity with the contract

1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.

2. Consumer goods are presumed to be in conformity with the contract if they:

(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;

(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

(c) are fit for the purposes for which goods of the same type are normally used;

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:

- shows that he was not, and could not reasonably have been, aware of the statement in question,
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

Article 3

Rights of the consumer

1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:

- the value the goods would have if there were no lack of conformity,
- the significance of the lack of conformity, and
- whether the alternative remedy could be completed without significant inconvenience to the consumer.

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

5. The consumer may require an appropriate reduction of the price or have the contract rescinded:

- if the consumer is entitled to neither repair nor replacement, or
- if the seller has not completed the remedy within a reasonable time, or

- if the seller has not completed the remedy without significant inconvenience to the consumer.

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

Article 4

Right of redress

Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.

Article 5

Time limits

1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.

2. Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.

Member States shall inform the Commission of their use of this paragraph. The Commission shall monitor the effect of the existence of this option for the Member States on consumers and on the internal market.

Not later than 7 January 2003, the Commission shall prepare a report on the use made by Member States of this paragraph. This report shall be published in the *Official Journal of the European Communities*.

3. Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature

of the goods or the nature of the lack of conformity.

Article 6

Guarantees

1. A guarantee shall be legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising.

2. The guarantee shall:

- state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee,
- set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

3. On request by the consumer, the guarantee shall be made available in writing or feature in another durable medium available and accessible to him.

4. Within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee be drafted in one or more languages which it shall determine from among the official languages of the Community.

5. Should a guarantee infringe the requirements of paragraphs 2, 3 or 4, the validity of this guarantee shall in no way be affected, and the consumer can still rely on the guarantee and require that it be honoured.

Article 7

Binding nature

1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.

2. Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.

Article 8

National law and minimum protection

1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.

2. Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.

Article 9

Member States shall take appropriate measures to inform the consumer of the national law transposing this Directive and shall encourage, where appropriate, professional organisations to inform consumers of their rights.

Article 10

The Annex to Directive 98/27/EC shall be completed as follows:

"10. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12)."

Article 11

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive, or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by

Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 12

Review

The Commission shall, not later than 7 July 2006, review the application of this Directive and submit to the European Parliament and the Council a report. The report shall examine, inter alia, the case for introducing the producer's direct liability and, if appropriate, shall be accompanied by proposals.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 25 May 1999.

For the European Parliament

The President

J. M. GIL-ROBLES

For the Council

The President

H. EICHEL

(1) OJ C 307, 16.10.1996, p. 8 and OJ C 148, 14.5.1998, p. 12.

(2) OJ C 66, 3.3.1997, p. 5.

(3) Opinion of the European Parliament of 10 March 1998 (OJ C 104, 6.4.1998, p. 30), Council Common Position of 24 September 1998 (OJ C 333, 30.10.1998, p. 46) and Decision of the European Parliament of 17 December 1998. (OJ C 98, 9.4.1999, p. 226). Decision of the European Parliament of 5 May 1999. Council Decision of 17 May 1999.

(4) OJ L 115, 17.4.1998, p. 31.

(5) OJ L 166, 11.6.1998, p. 51.

LIST OF CONSULTEES APPROACHED

Mr M Birchall

Mr Hilton Dawson MP

Mr A Fletcher

Mr Paul Fletcher-Tomenius

Prof Roy Goode

Mr Eric Hill

Mr Eric Hill

Prof Geraint Howells

Prof J K Macleod

Mr David Muir

Mr W H Thomas

Ms Anne Walley

Mr J Wright

Addleshaw Booth & Co

ADP Group UK Ltd

ADT Auctions Ltd

Advertising Association

Allen & Overy

AMDEA

Amery-Parkes

Amstrad Plc

Apache Leathers Limited

Argos Distributors Ltd

Asda Group Plc

Assn Of Mnfrs Of Domestic Electrical Appliances
Associated Independent Stores Ltd
Association of British Chambers Of Commerce
Association of British Insurers
Association of Charity Shops
Association of Convenience Stores
Association of Optometrists
Atco Qualcast Ltd
Baby Products Association
BAGMA
Baker & Mckenzie
Barnsley Trading Standards Department
BCS
Beaumarck
BHS Plc
Birmingham Chamber Of Commerce and Industry
Birwin & Layton
Bond Pearce
Boots Co Plc
Bournemouth Borough Council
BREMA
British Apparel & Textile
British Association of Nursery And Pram Retailers
British Bathroom Council
British Carpet Manufacturers Association
British Ceramic Federation
British Cutlery & Silverware Association

British Franchise Association
British Furniture Manufacturers Ltd
British Gas Trading Limited
British Hardware Federation
British Jewellery Association
British Luggage & Leathergoods Assn
British Photographic & Imaging Association
British Retail Consortium
British Rubber Manufacturers' Association Ltd
British Shops & Stores Association
British Sports & Allied Industries Federation
British Toy & Hobby Association
British Toy Importers & Distributors Association
Brother International Europe Ltd
Brunel University
BT plc
Burness Solicitors
Camping and Outdoor Leisure Association
Canon UK Ltd
Caradon Mira Ltd
Centrica
China & Glass Retailers
Christie's International Plc
Chubb Fire Ltd
Citizens' Advice Scotland
Clarks - Solicitors
Clifford Chance

Clyde & Co
Centre For Parliamentary & Legislative Studies
Co-Operative Group (CWS) Ltd
Coffin Mew and Clover
Comet
Confederation of British Industry
Consumer Credit Trade Association
Consumer Protection Service
Consumers In Europe Group
Consumers International
Consumers' Association
Consumers' Association Research & Testing Centre
Corndell Furniture Co Ltd
Cornwall & Devon European Liaison Office
COSLA
Country Vogue
Credit Card Research Group
Department Of Economic Development
Direct Car Finance
Direct Marketing Association
Direct Selling Association
Dixons Group Plc
DMA
Domestic & General
Draper Tools Ltd
Dyson Bell Martin
Edwards Geldard Solicitors

EIEMA
Electricity Association
Engineering Employers Federation
European Parliament
Eversheds
F & E Martin
Federation of British Hand Tool Manufacturers
Federation of Multiple DIY Retailers
Federation of Small Businesses
Federation Of Small Businesses
Federation of The Electronics Industry
Fed Of British Electrotechnical & Allied Mnfrs As
Finance & Leasing Association
Fisher-Price Ltd
Footwear Association
Ford Motor Company Limited
Freeplay Energy Europe Ltd
FRN
Fuji Film Electronic Imaging Ltd
General Consumer Council for Northern Ireland
Giftware Association
Glass's Information Services Ltd
Granville Technology Group Limited
Grundig International Ltd
Gunn & Moore Ltd
GUS Merchandise Corporation
Hanimex (UK) Ltd

Hasbro Europe
Heald Heffron
Hire Association Europe
Hitachi Power Tools UK Ltd
Home Warranty Products Ltd
Honda (UK)
Hotpoint
IBM UK Ltd
Iceland Frozen Foods Plc
ICI Paints
Ingersoll-Rand Sales Co Ltd
Institute Of Consumer Affairs
Institute Of Directors
Institute Of Management
International Consumer Policy Bureau
Intertek Testing Services (Leicester) Ltd
IRPC (Krona CCH)
Jeyes Ltd
John Lewis Partnership
JVC Manufacturing UK Ltd
Kemp & Co
Kingfisher Plc
Kodak Limited
Kubota UK Ltd
LACOTS
Law Commission
Law Reform Advisory Committee For Northern Ireland
Lawco Consulting Ltd

Lester Aldridge (Solicitors)
Lift And Escalator Industry Association
Linfresh Systems
Littlewoods Stores Ltd
Liverpool Trading Standards
Mail Order Traders' Association
Marks & Spencer Plc
Martineau Johnson
Medicines Control Agency
Metropolitan Borough of Wirral Trading Standards
MFI Furniture Group Plc
Micromark Bridisco
Moss Of Bath
Mothercare UK Ltd
Motor Cycle Industry Association
Music Industries Association
National Assembly for Wales Executive
National Assn of Shopkeepers & Self Employed
National Association of Citizens Advice Bureau
National Bed Federation
National Caravan Council
National Consumer Council
National Federation of Consumers
National Ireland Association of CABX
Network Computer Buying Ltd
Northern Ireland Office of Law Reform
Northern Ireland Court Service

Northern Ireland Office
Nottingham City Centre Retail Association
Nottingham Aluminium Co Ltd
Office of Fair Trading
Osborne Clarke
Oxford University
Paisner & Co
PERA
Personal Computer Association
Pet Care Trust
Philips Electronics UK Ltd
Pioneer High Fidelity (GB) Ltd
PMS International Group PLC
Progress Glazing
Raisesubmit Ltd
Retail Motor Industry Federation
Robert Bosch Ltd
Roseberry House
Rowenta UK Ltd
Safeway Stores Plc
Sainsburys
Samsung Electrical UK Ltd
Schuh Ltd
Scotland Office
Scottish Consumer Council
Scottish Executive
Scottish Executive Justice Department
Scottish Law Commission

Seiko UK Ltd
Sewing Machine Trade Association
Shandwick
Small Electrical Appliance Marketing Association
SmithKline Beecham
SMMT
Society of British Gas Industries
Somerfield Stores Ltd
Sony United Kingdom Limited
Sotheby's
Spar (UK) Ltd
SRS Microsystems Ltd
Staffordshire University
Stelux Watch (UK) Ltd
Stovelaw
Surrey County Council
Suzuki GB Plc
Tally Ltd
Tesco Stores Ltd
The Agricultural Engineers Association
The Alliance of Independent Retailers
The Automobile Association
The Automotive Aftermarket Association
The Bicycles Association of Great Britain
The British Contract Furnishing Association
The British Phonographic Industry Ltd
The British Radio & Electronic Equipment Mnfrs. Ass.

The Cosmetic, Toiletry & Perfumery Assn

The Forum of Private Businesses

The General Consumer Council for Northern Ireland

The General Council of The Bar

The Incorporated Society of Valuers & Auctioneers

The Law Commission

The Law Society

The Law Society of Scotland

The Lighting Association

The Mail Order Traders' Association

The National Assn of Specialist Computer Retailers

The National Consumer Credit Federation

The National Pharmaceutical

The Nottingham Trent University

The Radio Electrical & Television Retailers Assn

The Royal Institution of Chartered Surveyors

The University Of Sheffield

Theatrical Management Assn & Scty of London Theatre

Tomy UK Ltd

Toys R Us Ltd

Trade Marks Patents & Designs Federation

Trading Standards Institute

United Norwest Co-Operatives Ltd

University Of Bristol

University Of Manchester

University Of Notre Dam

University Of Sheffield
University Of Strathclyde
University Of Wales
University Of Wales
V A G (United Kingdom) Ltd
Veale Wasbrough
Vodafone
Volvo Car (UK)_ Ltd
Waitrose Ltd
Walsall Metropolitan Borough Council
Warwick University
Welsh Consumer Council
Welsh Office
Whitbread Plc
Worcester College
Wragg & Co

Other recent consumer consultations

- The Consumer Provisions Of The Brussels Regulation On Jurisdiction: Consultation On Draft Guidance Note

This is available on the DTI web site at:

<http://www2.dti.gov.uk/CACP/ca/consultation/jurisdiction.htm>

- Consultation on the Report of the Task Force on Car Servicing and Repair

This is available on the DTI web site at:

<http://www2.dti.gov.uk/CACP/ca/carservicing.htm>

- Modernising Trading Standards

This is available on the DTI web site at:

<http://www2.dti.gov.uk/CACP/ca/consultation/tradingstandards.htm>

THE CONSULTATION CRITERIA

- 1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.*
- 2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.*
- 3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.*
- 4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.*
- 5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation*
- 6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.*
- 7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.*

The complete code is available on the Cabinet Office's web site, address www.cabinet-office.gov.uk/servicefirst/index/consultation.htm.

COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to Mr A Dobbie, DTI Consultation Co-ordinator, Room 550, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6509 or email andrew.dobbie@dti.gov.uk.