

THE LAW COMMISSION AND SCOTTISH LAW COMMISSION

CONSUMER REMEDIES FOR FAULTY GOODS

JOINT CONSULTATION PAPER: SUMMARY

- 1.1 In December 2007, the Department of Business, Enterprise and Regulatory Reform (BERR) asked the two Law Commissions to review the legal remedies available to consumers when they buy goods which do not conform to contract.
- 1.2 On 10 November 2008 we issued a joint Consultation Paper (CP) with provisional proposals for reform. Copies are available on our websites at <http://www.lawcom.gov.uk> and <http://www.scotlawcom.gov.uk>.
- 1.3 We seek responses by **2 February 2009**:
- (1) by **email** to
- commercialandcommon@lawcommission.gsi.gov.uk;
- (2) or by **post** to
- Donna Birthwright, The Law Commission,
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0284 Fax: 020 3334 0201
- 1.4 The European Commission is currently reviewing the eight existing consumer directives. In October 2008, it published a proposal for a new directive on consumer rights which would (among other things) reform the law on consumer remedies. BERR is conducting its own consultation on the European Commission's proposal (available at www.berr.gov.uk).
- 1.5 We would urge stakeholders to consider both papers. However, you only need to draft one reply to both papers. Responses sent to us will be copied to BERR and responses sent to BERR will be copied to us (unless you ask that they should not be).

THE PROBLEM

- 1.6 Goods do not conform to contract when they breach one of the terms implied by statute. These state that goods must, for example, be of satisfactory quality and correspond to their description.¹ This consultation does not look at the implied terms themselves.
- 1.7 Instead it considers the remedies available to consumers when the implied terms are breached. The central question is when should a consumer be entitled to reject the goods and receive a full (or partial) refund of their purchase price? Alternatively, should the retailer be entitled to decide that it would be more appropriate to repair or replace the goods?

¹ The implied terms are set out in the CP at para 2.7.

AN OUTLINE OF THE CURRENT LAW

- 1.8 Returning faulty goods is a common problem that millions of consumers face every year without legal advice. However, the law is complicated. We describe it in Parts 2 and 3 of the Consultation Paper, and explore its complexities in Part 7. There are effectively two legal regimes: the traditional UK remedies; and the European remedies, based on the 1999 Consumer Sales Directive (CSD).

The UK remedies

- 1.9 The traditional UK remedies were originally codified in 1893. They have been amended over the years, and are now found in the Sale of Goods Act 1979. Essentially, the consumer is entitled to reject faulty goods and terminate the contract. The consumer may then refuse to pay for the goods, or (if they have paid already) claim a full refund. We refer to this as “the right to reject”. However, consumers must act quickly. The right to reject is lost once the consumer is deemed to have accepted the goods, which may happen “after the lapse of a reasonable time”.² Thereafter, the consumer is entitled only to damages.
- 1.10 The case law on what amounts to a reasonable time provides little guidance as to how long it lasts. In one case a consumer was said to have accepted a new car in less than four weeks;³ in another, the consumer was entitled to reject a car after seven months.⁴ A reasonable time is said to be a question of fact, taking into account the time necessary to examine the goods and the dealings between the parties.

The 1999 Consumer Sales Directive remedies

- 1.11 In 2002, the Sale of Goods Act 1979 was amended to implement the CSD. There are four new remedies, organised into two tiers. The first tier remedies are repair or replacement. The second tier remedies are rescission or reduction in price.
- 1.12 Under the CSD regime, the consumer must begin by asking for a first tier remedy. In theory the consumer may choose whether to ask for a repair or a replacement, but the trader may provide an alternative, if the requested remedy is impossible or disproportionate. For example, if a consumer buys a washing machine with a fault which could easily be fixed, the retailer may refuse the consumer’s request for a replacement, and provide a repair instead.
- 1.13 If the retailer fails to carry out the repair or replacement within a reasonable time or without significant inconvenience to the consumer, the consumer may move to the second tier.

² SoGA, s 35(4). There are three methods of acceptance, described in the CP, Part 3.

³ *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220: see CP paras 3.25 to 3.32.

⁴ *Bowes v Richardson & Son Ltd*, 28 January 2004 (unreported): see CP paras 3.42 to 3.43.

- 1.14 Where the consumer opts to rescind the contract, the consequences are similar to exercising the right to reject. There is one main difference. While the right to reject entitles the consumer to a full refund, the remedy of rescission allows the trader to make a deduction for the use the consumer has had from the goods. Alternatively, the consumer may opt for a reduction in price: they may keep the goods and receive a discount for their reduced value.

The relationship between the two regimes

- 1.15 The Sale of Goods Act 1979 now contains both regimes with little attempt to integrate the two. The Davidson Review criticised this as an example of “double-banking”, where EU directives are superimposed on domestic legislation, causing complexity and confusion.
- 1.16 As the law currently stands, the consumer may choose to use either regime. A consumer who asks for a repair must give the seller a reasonable time to carry it out. However, if the repair fails, the consumer may then exercise the right to reject, provided they act sufficiently quickly.⁵

THE EUROPEAN COMMISSION’S PROPOSAL

- 1.17 On 8 October 2008, the European Commission published a proposal for a new directive on consumer rights, based on “full harmonisation”. At present member states must ensure that consumers have no less protection than the CSD provides. In future, member states would need to ensure that consumers did not have either fewer or more rights than the reformed CSD requires.
- 1.18 In our Consultation Paper we take stock of our system of remedies, in the light of the European Commission’s proposal. Here we summarise our main proposals and questions. For those who wish to read more, we refer to the relevant paragraphs of the Consultation Paper (set out in brackets below).

RETAINING THE RIGHT TO REJECT (paras 8.9 – 8.31)

- 1.19 If the EU’s proposal were to be agreed, the UK would need to repeal the right to reject. Instead, where goods proved faulty, the retailer could choose to provide either a repair or a replacement. Consumers would only be entitled to a refund if there was a problem with a repair or replacement.
- 1.20 For example, if a consumer buys a faulty kettle in a shop and finds that it does not work, the consumer would not be entitled to take it back and receive a refund. Instead the retailer could choose to repair or replace the kettle. The consumer would become entitled to a refund if the retailer failed to remedy the problem within a reasonable time or without significant inconvenience, or if the same fault reappeared more than once within a short period.

⁵ And cannot be said to have accepted by another method.

1.21 In distance selling (for example, through the internet) the effect of this change would be muted by improved cancellation rights. The European Commission has proposed that consumers should be entitled to cancel a contract within 14 days of delivery, whether the goods were faulty or not. However, for shop sales, this would be a major change to consumers' legal rights. Even for distance sales, 14 days is a short period to discover faults. It allows the consumer to inspect the goods, but provides little time to test them in practice.

The evidence we considered

1.22 In the course of our review we consulted retailers, manufacturers, consumer groups and academics, and we commissioned focus groups with consumers.

(1) Generally, retailers and manufacturers accepted the current right to reject as part of the established legal framework in which they operated.

(2) Consumer groups argued strongly for retaining the right to reject. It was felt to strengthen the consumer's bargaining position and stop them from becoming trapped into a cycle of failed repairs. It was felt to drive up standards (by, for example, encouraging motor dealers to carry out thorough checks on vehicles before they left the forecourt).

(3) In the focus groups, we asked consumers what remedy they would want for the faulty kettle, discussed above. Most were happy to accept a replacement kettle – but a substantial minority (20%) were not. Consumers were unhappy with a replacement if they perceived the goods to have a design fault, or if they had lost confidence in the brand or the retailer. Almost everyone thought that they should have the right to their money back without fuss, if they wished it.

1.23 The main argument for abolishing the right to reject is that retailers are discouraged from trading across national borders because of the difficulties of coping with different legal regimes. It has been suggested that most EU states do not include a right to reject, so there is no reason why the UK should provide additional rights.

1.24 We therefore looked at how consumer remedies work in other member states. At least eight European jurisdictions currently recognise an initial right to a refund for faulty goods.⁶ Our survey of European Consumer Centres found that even in states where no such right exists in law, retailers often provide such a right in practice, due to consumer demand. There appears to be a cultural tradition across Europe in favour of refunds.

Conclusion

1.25 We provisionally propose that the right to reject should be retained as a short-term remedy of first instance. It is a simple remedy which is easy to use and inspires consumer confidence. Consumers know that they can get their money back without argument if, for example, the product proves to have a design flaw. This makes them more prepared to try unknown brands or new retailers. The retention of the right to reject was strongly supported by consultees.

⁶ UK, France, Ireland, Greece, Portugal, Latvia, Lithuania and Slovenia.

- 1.26 If the consumer remedies regime is to be fully harmonised, we think it should include a right to reject. This is particularly important in cross-border sales, where it is less practical to organise repairs and replacements across long distances.

SHOULD THE RIGHT TO REJECT BE EXTENDED? (paras 8.32 – 8.41)

- 1.27 At present, consumers are not entitled to demand a refund where goods have a latent defect which only becomes apparent after the lapse of a reasonable time. We consider whether the right to reject should be extended to cover latent defects. We conclude that it should not. Extension may be of benefit to many consumers, but it is, unfortunately, too open to abuse and is therefore likely to increase costs and prices.

CLARIFYING THE RIGHT TO REJECT: A NORMAL PERIOD OF 30 DAYS
(paras 8.42 – 8.77)

- 1.28 The main problem with the right to reject is uncertainty over how long it lasts. This exacerbates disputes. Consumer advisers find it difficult to give guidance, and shops find it difficult to train their staff in what the law requires.
- 1.29 We propose that, in normal circumstances, a consumer should exercise the right to reject within 30 days from the date of delivery. This would provide a reasonable opportunity to inspect the goods and to test them for a short period in actual use.
- 1.30 However, the 30-day period would have some flexibility in defined circumstances. We think a shorter period may be appropriate where goods are perishable, or where the consumer should have noticed the fault before carrying out an act inconsistent with returning the goods (such as altering clothes). Similarly, a longer period may be appropriate where it was clear at the time of the sale that the consumer would not be able to test the goods within a month (for example, where a consumer buys a Christmas present in October, or a lawnmower in November). We also ask whether the period should be extended to allow for the consumer's personal circumstances (where, for example, they have been ill).
- 1.31 We welcome views on whether 30 days is an appropriate starting-point, and on the reasons which may justify a shorter or longer period.

A RIGHT TO REJECT FOR “MINOR” DEFECTS (paras 8.82 – 8.91)

- 1.32 Under the current law, once a consumer has shown that one of the implied terms has been breached, they may exercise the right to reject, provided they have not accepted the goods. There is no exclusion for minor defects.
- 1.33 Under the European Commission's proposal, this would change. Consumers would not be entitled to rescind a contract for a minor defect. If the retailer were unable to repair the defect or replace the goods, the consumer would be required to accept a reduction in price.

- 1.34 Consumers often care a great deal about the appearance and finish of new consumer goods such as cars, furniture and white goods. In our research we asked consumers whether they would be prepared to accept a scratched table in return for a reduction in the price. Most were reluctant to even consider keeping an item that did not look good. A scratch which is minor to the retailer may not be minor to the consumer.
- 1.35 Removing the right to a refund for “minor” defects would lead to unnecessary disputes. We provisionally propose that the current law should be retained.

THE RIGHT TO REJECT IN OTHER SUPPLY CONTRACTS (paras 8.92 – 8.112)

- 1.36 The law makes distinctions between sales and other contracts to supply goods (such as hire, hire purchase, exchange and work and materials contracts). For other supply contracts, consumers’ rights are more extensive. Consumers do not lose the right to reject after the lapse of a reasonable time. Instead they may reject goods even for latent defects, provided they have not acted to “affirm” the contract or (in Scotland) to “waive” their rights.
- 1.37 We consider whether the normal period of 30 days should apply to other supply contracts involving the transfer of property, such as work and materials and exchange contracts. The argument for a uniform regime is that it would simplify the law, removing a complexity that few consumers or retailers understand. On the other hand, it would reduce consumers’ rights in some particularly problematic areas, such as double glazing and other home improvements. We welcome views on this issue.
- 1.38 Where a fault arises in a hire contract, the law allows the consumer to terminate the contract, paying for past hire but not future hire. We think this should be preserved. We ask how hire purchase contracts should be treated.

MOVING TO A SECOND TIER REMEDY (paras 8.119 – 8.146)

- 1.39 Under the scheme of remedies set out in the CSD, it is often difficult to know when a consumer can move from a first to a second tier remedy. When can they give up on a series of failed repairs or replacements, and demand a refund instead?
- 1.40 Our survey of European Consumer Centres showed a wide variety of interpretations across member states as to what amounts to “a reasonable time” and “significant inconvenience”. When we gave examples of faulty goods and asked how many repairs would justify rescission, responses ranged from one attempted repair per item, to three attempts per fault.
- 1.41 The European Commission has addressed the problem by proposing a new provision, allowing a second tier remedy where “the same defect has reappeared more than once within a short period of time”. We are concerned that this provides scope for disputes over whether a fault is the same as a previous fault and what constitutes a short period of time. We propose that a consumer should proceed to a second tier remedy after two failed repairs, or one failed replacement.

- 1.42 Consumers were particularly concerned about accepting repairs or replacements when products had proved to be dangerous. An example emerging from the focus groups was where the brakes had failed on a new car. Consumers who had undergone this experience felt that they should not be forced to drive the same model or make of car again. We propose that where goods have proved to be dangerous, the consumer should be entitled to a second tier remedy. Similar considerations apply when the retailer has behaved so unreasonably as to undermine trust between the parties.
- 1.43 We also discuss possible best practice guidance on the process of repairs, addressing the need for clear information and reliable appointment times. We would welcome views on all these issues.

RESCISSION AND THE “DEDUCTION FOR USE” (paras 8.147– 8.157)

- 1.44 The European Commission has proposed to remove the deduction for use. Instead, when a consumer reaches the stage of rescinding the contract, they should be entitled to a full refund.
- 1.45 We agree. At present the deduction for use is seldom used, difficult to calculate, and has the potential to lead to disputes. Consumers felt strongly that after enduring a series of failed repairs, they should be entitled to all their money back.

THE PROPOSED TWO-YEAR CUT-OFF PERIOD (paras 8.164 – 8.171)

- 1.46 The European Commission has proposed that consumers would not be entitled to pursue a retailer for any remedy where a fault becomes apparent more than two years after delivery.
- 1.47 For food, clothing, electronics, or most household goods, it is difficult to imagine that faults will arise after two years. However, we are concerned that this provision may cause problems in unusual cases, where goods are intended to be long-lasting and where faults take time to come to light. An example would be where a steel joist collapses after 26 months, or water pipes burst during the first hard frost. Similarly, where a consumer buys a fake antique, it may take time for the problem to be discovered.
- 1.48 We welcome views on whether this provision is needed, and whether it might cause problems in particular cases.

THE SIX-MONTH REVERSE BURDEN OF PROOF (paras 8.78 – 8.81 and 8.158 – 8.163)

- 1.49 A consumer seeking one of the CSD remedies currently benefits from a six-month reverse burden of proof. This means that where a fault arises within six months of delivery, it is presumed to have existed at the time of delivery. It is up to the retailer to show either that the fault arose later, or that this is inconsistent with the nature of the goods.
- 1.50 We propose that in the interests of simplicity the same presumption should apply where a consumer seeks to rely on a traditional remedy, such as the right to reject.

- 1.51 We think it would be also be helpful if the CSD were clarified to provide that when the retailer redelivers goods following a repair or replacement, the period begins again.

WRONG QUANTITY (paras 8.172 – 8.174)

- 1.52 The Sale of Goods Act 1979 currently includes specific provisions to give buyers a range of remedies when the seller delivers the wrong quantity of goods (either too many or too few). We ask whether these sections are needed, or whether the issue can be dealt with as a specific example of goods failing to match their description.

LATE DELIVERY (paras 8.175 – 8.179)

- 1.53 Under current law, consumers may only reject goods for a late delivery if the delivery date is of the essence of the contract. The European Commission has proposed increased protection in this area, so that a consumer would be entitled to a full refund whenever “the trader has failed to fulfil his obligation to deliver”.
- 1.54 We ask whether consumers should be entitled to a full refund whenever the trader fails to meet an agreed delivery date. Alternatively, should a refund be available only when the consumer has indicated that the date is particularly important to them?

DAMAGES (paras 8.180 – 8.187)

- 1.55 There is some similarity between the traditional remedy of damages and the CSD concept of reduction in price. They will often be calculated on the same basis: the difference between the value of the actual goods received and the goods to which the consumer was entitled. However, the traditional damages remedy also allows recovery for consequential loss. Furthermore, damages may be needed where consumers pay for a repair themselves, which is not uncommon.⁷ For these reasons we conclude that damages are an important remedy and should be retained.
- 1.56 We ask whether more guidance would be helpful on when damages should be available, particularly for distress and inconvenience.

INTEGRATING THE CSD REMEDIES WITH THE RIGHT TO REJECT (paras 8.188 – 8.202)

- 1.57 We think that a short-term right to reject should be incorporated within a revised system of remedies, either as part of a fully harmonised European regime, or as a UK addition to minimum harmonisation. However, the right to reject needs to be better integrated with the other remedies. At present, the Sale of Goods Act 1979 makes little attempt at integrating the two regimes. In particular, it is unclear whether, if repairs fail, the consumer is pursuing a revived right to reject, or rescission under the CSD.

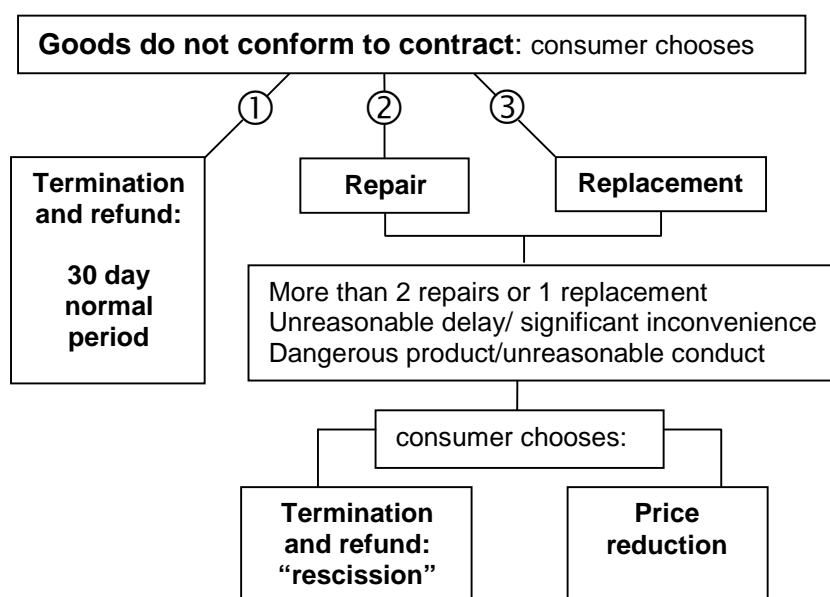
⁷ See Office of Fair Trading *Consumer Detriment* (April 2008). Available at http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf.

1.58 We think that the right to reject and European remedies require simplification and proper integration. We provisionally propose that a consumer who buys defective goods should have three remedies available:

- (1) termination of the contract of sale plus a full refund, if the remedy is exercised within a reasonable period (which we suggest might normally be 30 days);
- (2) repair; or
- (3) replacement (the latter two remedies being as in the CSD).

If the consumer opts for repair or replacement but problems persist, then the consumer should proceed to a second tier remedy in the way that we have proposed above.

1.59 Our proposed scheme is illustrated in the following diagram. There are a few issues not shown: for example, the retailer could still offer a replacement instead of a repair, if a repair were impossible or disproportionate, or vice versa.



CONSUMER EDUCATION (paras 8.203 – 8.218)

1.60 Consumers are often unaware of their legal rights. The phrase “This does not affect your statutory rights” is familiar, but widely misunderstood. We suggest a change in the wording to “This does not affect your legal rights” with further information on how consumers can find out what their legal rights are. An alternative would be to publish a summary of consumers’ legal rights at points of sale.

1.61 We seek views on these suggestions, and on other possible methods of increasing awareness of consumer law.

ASSESSING THE IMPACT OF REFORM (Part 9)

1.62 We assess the costs and benefits of four options:

- (1) *Doing nothing*: we think the current law is overly complicated and uncertain. This puts avoidable administrative burdens on business and encourages disputes.
- (2) *Abolishing the right to reject*: we think this would damage consumer confidence. Currently in about 20% of cases, consumers decide that the right to reject is the most appropriate remedy. If denied this, consumers would “play it safe”. They would be reluctant to try unknown products, or buy from unfamiliar shops, if they thought that they would not get their money back where the goods were not as described, or not fit for their purpose.
- (3) *Extending the right to reject*: this might encourage abuse, leading to increased costs and more landfill.
- (4) *Retaining the right to reject with clarification over how long it lasts*: we think of the four options this has the greatest benefits,

1.63 We welcome comments about the costs and benefits of our proposals.