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# **Implementation of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees in the United Kingdom**

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### **1. Development of consumer protection in the EU legislation**

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Nowadays there are approximately 370 million consumers in the European Union. The Member States have adopted policies designed to protect the specific interests of consumers, who play a key economic and political role in the society. Investing them with certain number of fundamental rights, the Member States have put in place policies designed to reduce inequalities, abolish unfair practices, promote safety and health and improve living standards in general.

The methods used to guarantee these rights reflect the differences in legal systems, socio-cultural traditions, and institutional and political settings. Certain Member States have opted for a regulation-oriented approach and have created a full-fledged administrative structure to address consumer problems. Others have chosen a more pragmatic approach, and allow the markets and individual sectors a certain degree of self-regulation. Finally, while certain governments attach priority to food law, others have put the emphasis on trade designations or the supply of goods and services.

This diversity of rules and structures was the rationale underlying the development of a Community-level policy designed to ensure that consumers are confident enough to play an active role in the single market, while enjoying a high level of protection.

Consumer policy first emerged in the mid -1970s. The Treaty of Rome did not provide for such a policy and it was not until the Paris Summit in 1972 that the Heads of state and government first called for political action in this era. Shortly afterwards the Commission presented the first action program on consumer policy. This reference text cites five categories of fundamental rights that are the basis for Community legislation in this area: *the right to protection of health and safety, the right to protection of economic interests, the right to damages, the right to information and education and the right to representation*. After this preliminary program other action programs followed and enshrined a certain number of fundamental rights and principles. Initially the Community legislated in the field of cosmetics safety, food labeling, misleading advertising and doorstep selling, but it was not until the Single Act and the attendant perspective of the large market that consumer policy really took off.

The Single Act, which entered into force on July 1, 1987 introduced the notion of the consumer into the EC Treaty: Article 100a {Article 95 after renumbering}, paragraph 3 lays down: "The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective." This notion has not been precisely defined. However, this Article provides the foundation for a legal recognition of consumer policy. Moreover the Single Act repealed the unanimity rule for adoption of directives in numerous areas directly or indirectly having to do with consumer protection.

Hence, consumer policy became part and parcel of a more general policy of completing the Single Market - a perspective that has given it a new impetus. The abolition of frontiers and the completion of the Single Market on 1 January 1993 highlighted the existence of a market of more than 340 million consumers and the need for flanking rules. Furthermore, consumer confidence was shown to be indispensable for the market to work properly.

The new action programs prioritized: consumer representation, consumer information, product safety and transactions. During this period measures were taken in the following areas: toy safety and general product safety, cross-border payments, unfair contract terms, distance selling and timeshares. Considerable progress was made during these years, with the result that it can be said that we now have a genuine corpus of Community consumer protection law.

These positive trends were confirmed by the Maastricht Treaty, which enshrined consumer protection as a fully-fledged Community policy. While the Treaty's general principles stated that the Community must contribute to the "strengthening of consumer protection", Article 129a {now renumbered Article 153} became the indispensable legal framework for consumer policy. Its adoption led to a new momentum as reflected in several Green Papers {financial services, consumer access to justice, food law and sale of consumer goods and associated guarantees} and legislative initiatives concerning injunctions, contracts negotiated at a distance, comparative advertising and cross-border transfers.

The Treaty of Amsterdam gave a fresh impetus to consumer policy. Under the new Article 153 {ex Article 129a} EC Treaty, the general aim was to protect the health, safety and economic interests of consumers, and to promote their right both to information and education and to organize themselves in order to safeguard their interests. The same Article goes on to state that consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.[\[1\]](#)

## 2. Directive 1999/44/ EC on certain aspects of consumer goods and associated guarantees

The Sale of Consumer Goods and Associated Guarantees Directive sets a minimum baseline for consumers' rights across the internal market. That is to say the objective of the Directive is to ensure consumer protection and strengthen consumer confidence in cross-border shopping by laying down a common set of minimum rules valid no matter where the goods are purchased.

The Directive is concerned with the legal guarantee and commercial guarantees. The concept of *legal guarantee* includes all legal protection of the purchaser in respect of defects in the goods acquired, resulting directly from the law, as a collateral effect of the contract of sale. The Directive hence concerns the principle of the conformity of the product with the contract.

The concept of *commercial guarantee*, on the other hand, expresses the will of one person, the guarantor, who assumes personal liability for certain defects. The Directive does not use the terminology of legal and commercial guarantee. The term "guarantee" thus covers only commercial guarantees which are defined as follows: "any additional undertaking given by a seller or producer, over and above the legal rules governing the sale of consumer goods, to reimburse the price paid, to exchange, repair or handle a product in any way, in the case of non-conformity of the product with the contract".

*Consumer goods* are defined as any tangible movable item, with the exception of:

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

**Member States may exclude from this definition second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. However, the Directive applies to contracts for the supply of consumer goods to be manufactured or produced.**

Consumer goods must be *in conformity* with the contract of sale. Consumer goods are presumed to be in conformity with the contract if they:

- a} comply with the description given by the seller and possesses 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 labeling.

The seller *is liable* to the consumer for any lack of conformity which exists when the goods are delivered to the consumer and which becomes apparent within a period of two years unless, at the moment of conclusion of the contract of sale, the consumer knew or could not reasonably be unaware of the lack of conformity.

If the goods *are not in conformity* with the public statements made by the producer or his representative, the seller *will not be liable if* he:

a} shows that he was not, and could not reasonably have been, aware of the statement in question,

b} shows that by the time of conclusion of the contract the statement had been corrected, or

c} shows that the decision to buy the consumer goods could not have been influenced by the statement.

*Any lack of conformity* resulting from incorrect installation of the consumer goods is 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 applies 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.

*Any lack of conformity* becoming apparent within six months of delivery will be presumed to have existed at the time of delivery, unless:

a} proved otherwise;

b} this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

**When a lack of conformity is notified to the seller, the consumer will be entitled to ask:**

- a) for the goods to be repaired or replaced free of charge within a reasonable period and without major inconvenience to the consumer;
- b) if repair or replacement is impossible or disproportionate, or if the seller has not remedied the shortcoming within a reasonable period or without major inconvenience to the consumer, for an appropriate reduction to be made to the price or to have the contract rescinded.

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

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.

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 will 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, will be determined by national law.

Any *{commercial}* guarantee offered by a seller or producer will be legally binding under the conditions laid down in the guarantee document and the associated advertising, and must place the beneficiary in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the applicable national provisions. The guarantee has to 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. On request by the consumer, the guarantee will be made available in writing or feature in another durable medium available and accessible to him. Within its own territory, the Member State in which the consumer goods are marketed may provide that the guarantee be drafted in one or more official languages of the Community.

Non-conformity of the *{commercial}* guarantee with the provisions of the Directive does not affect its validity and the consumer may still require that the guarantee be honored.

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 the Directive are not 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}[2]. However, such period may not be less than one year.

It is possible for Member States to 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.

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

The Directive came into force 7 July 1999 and the Member States were supposed to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2002.

On 2006 at the latest, the Commission will present to the European Parliament and the Council a report on the application of the Directive.[\[3\]](#)

### **3. Implementation of the Directive in the United Kingdom**

The body responsible for implementing the Directive is the Department of Trade and Industry {DTI}. Its Consumer Affairs Directorate plays an important role in this process. Consumer Affairs Directorate takes the lead within the government on consumer policy and helps formulate new consumer legislation in the UK. The Directorate is also active in helping to formulate and implement European Union and wider international consumer-related legislation and regulations.

The DTI has so far produced two consultation documents, which set out its plans for implementing the Directive. The first consultation paper was issued in January 2001. The second and last consultation paper was issued in February 2002. The DTI has already received responses to the first paper and is now waiting for the responses to the second paper {deadline May 2002}.

On the basis of the above given information three questions arise: What is the timetable for transposition, why is the Directive late and will consumers not miss out their possible rights in the first months of 2002? It can clearly be seen that it has not been possible to transpose the Directive by the deadline, i.e. by January 1 2002, but it will be coming into effect later in 2002, after second consultation now taking place with the main stakeholders in business and the consumer arena. Concerning the second question, DTI's explanation is that the Directive will not merely be copied out but its provisions will have to be integrated in so far as possible within existing legislation to produce a more coherent result. This will allow consumers and business to better grasp the new rules rather than having to consult a countless of different pieces of legislation. However, this more thorough approach, necessitating changes to a range of current legislation, takes more time to produce a satisfactory outcome. Regarding the third question, according to DTI not really, since in spite of the fact that the Directive contains some important provisions, most of these are directed at UK's European counterparts in order to establish a common baseline for consumer protection in all Member States. The current UK legislation already exceeds most of these.

I will now like to focus on the first consultation paper[\[4\]](#) and analyze the proposals for implementation put forward by the DTI. The Directive has some impact on the current UK legislation, primarily the Sales of Goods Act 1979 {SoGA}. It can generally be said that the effect on the UK's consumer sales law will be relatively modest but there will be some important changes.

Before I start discussing the main changes introduced by the Directive, I would like to pay attention

to the current extent of consumer protection under SoGA.

#### **4.1 Existing rights under the Sale of Goods Act 1979**

This section will summarize the current position in English law briefly to set the scene for the subsequent analysis of the DTI's consultation document.

Currently, all consumer sales transactions are governed by the provisions of the SoGA. The three main provisions are those contained in section {s.} 13, s. 14{2} and s. 14{3}. These three sections imply terms into a contract of sale between a consumer and a retailer requiring goods to meet the contract description, be of satisfactory {merchantable} quality and to be fit for a particular purpose made known to the retailer before the sale was completed.

The "satisfactory quality" test is a very flexible test. According to the SoGA, a product is satisfactory if a reasonable person would think that it is satisfactory, taking into account a range of factors including the description of the product, its price, and further aspects such as its fitness for all common purposes, freedom of minor defects, safety and durability. It must be noted that this test is not a rigid one. A product can still be of satisfactory quality even if it does not meet all the criteria set down in the Act.

If a product bought by a consumer fails in any of these respects, the consumer will be entitled, for a short period of time[5], to return the product to the retailer. The consumer will also be entitled to a full refund. Once this period has expired, i.e. if a consumer has had a reasonable time to examine the goods or has used them for more than a trial and they go wrong or do not meet these tests, he or she cannot reject them, but can claim compensation {damages}.[6] One can claim for the loss in value of the goods and for any harm caused by their use {or not being able to use them}. In practice, reasonable compensation will often be repair, replacement or price reduction. These remedies are already widely used in the UK but they have not had status in law.[7]

If the defect was present at the time of sale and if it was reasonable for the goods to last that long, a consumer can claim compensation for up to six years after purchase.[8]

As far as manufacturers' guarantees are concerned manufacturers on some goods give these guarantees or warranties. These give rights that are additional to consumer's legal rights against the seller. A manufacturer's guarantee must warn that it does not affect consumer's statutory {legal} rights.

#### **4.2 The DTI's first consultation paper**

In the first consultation document {issued in January 2001} the DTI indicated how it planned to implement the requirements of the Directive into English law. In this section, the first proposals for implementation will be analyzed. At this point it must be noted that the proposals, originating in the first consultation paper, were only very much provisional and that more concrete plans for implementation were issued later.[9] However, the first consultation document has been a good indicator of the general approach adopted by the DTI.

One of the observations that can be made is that there will be no overall review of the SoGA and the transposition of the Directive into national {UK} law will be done through add-on legislation. The DTI has been aware of the fact that there are differences between the existing system and the rules contained in the Directive. Direct adoption of the Directive would require major amendments to the SoGA, and would reduce the current level of consumer protection in the UK significantly.[\[10\]](#)

Another issue is that the SoGA covers all forms of sale transactions, whether it is the purchase of a pair of shoes or a ship. It applies to both consumer and commercial transactions. The implementation of the Directive will therefore have to be a rather fine balancing act between getting the best deal for consumers and preventing the SoGA from becoming unworkable for commercial buyers.

### **Definition of Consumer**

The first problem that is addressed is what the exact definition of the term “*consumer*” for the purposes of the implementing rules should be. The DTI took the view that the definition in the Directive is narrower than that contained in the Unfair Terms in Consumer Contracts Regulations 1999, which implement the current Directive’s sister measure, the Directive on Unfair Contract Terms {1993/13/EC}.

In the Consumer Contracts Regulations, a consumer is defined as “any natural person who is acting for purposes which are outside his trade, business or profession”, whereas in the Directive, the definition is “any natural person who is acting for purposes not related to his trade, business or profession.” According to the DTI, a “self-employed plumber who buys a computer program to use on his home computer to compile his tax return may well not be a consumer under the Directive because his purpose cannot be said to be ‘not related’ to his business, but he may be a consumer within the Regulations because his purpose could be regarded as being ‘outside his business’.”

This interpretation is rather odd, at the very least. Surely the definition in the Directive is the broader one - it is a much stricter test to establish that a particular purpose is “outside” the business rather than “not related”. It is submitted that, in the example given, the plumber would be a consumer both under the Directive and the Regulations.

### **The conformity standard**

Regarding *the conformity standard*, the criteria in the Directive and ss. 13 and 14 of the SoGA for assessing whether or not goods conform to the contract are very similar, although there are several significant differences.

Thus, under s. 14 {2B} of the SoGA, one of the factors to consider if a product is of a satisfactory quality is whether the product is fit for all the purposes for which goods of the kind in question are “commonly supplied”. In the Directive, the equivalent provision requires goods to be fit for the purposes for which goods of the same type are “normally used”.

The DTI proposed that, because these requirements are so close in their scope, that the simplest solution is to retain the current one and simply add the requirement in the Directive. Goods would then be required to be fit for the purposes for which they are “commonly supplied” and those for which they are “normally used”.[\[11\]](#)

### **The remedial scheme**

As has already been noted, the Directive makes provision for four remedies: repair or replacement and rescission or price reduction. The Directive introduces a clear hierarchy of remedies[12]. Thus, in the event of any lack of conformity the consumer is entitled to free repair or replacement of the goods, whichever is the most economical and practical, within a reasonable time and without any significant inconvenience. If a repair or replacement is not possible {practical}, or the seller has not completed a remedy within a reasonable time or has caused significant inconvenience, then the consumer is entitled to a price reduction or to rescission of the contract.

Pursuant to the Directive, the consumer is not entitled to have the contract rescinded if the lack of conformity is minor. However, the Sale of Goods Act states that goods should be free "from minor defects". It means that the Act does not prevent a consumer from rejecting a product and obtaining a full refund even there is only a minor defect. The Government has indicated its intention not to reduce levels of consumer protection where the Directive falls below existing levels and so it would intend to maintain the more favorable provisions of the SoGA.

In English law at present, a consumer has a short-term right of rejection {rescission of the contract} as an initial remedy. There is no clearly ascertainable period for this right - it depends on the nature of product, for example. However, at least for a few weeks after purchase, a consumer will currently be able to take the product back to the retailer and obtain a full refund if it is not of satisfactory quality. The DTI proposed to retain this short-term right of rejection. Consumers would therefore still be entitled to this right before they would have to accept the above hierarchy of remedies. It must be noted that where repair or replacement fail to have the desired effect, a consumer may still be entitled to reject the product.

The proposal mentioned in the previous paragraph must be taken together with the so-called "reversed burden of proof" period; The Directive requires that any lack of conformity that becomes apparent within the first six months be presumed to have existed at the time of delivery unless proved otherwise or unless inconsistent with the nature of the goods or the lack of conformity.[13] However, in DTI's opinion, to ally this reversed burden with the existing short term right to reject could be criticized as going further than the Directive demands since the combination of the two would be too favorable to consumers. Therefore it proposed that the short-term right to reject should only be exercised without the benefit of a reversed burden of proof {as currently is the case}.

The DTI has indicated to retain the existing remedies under the Sale of Goods Act {including the short-term (within a reasonable period) right to reject} along with the other remedies specified in the Directive. The DTI did not know {at the time of issuing the first consultation document} how to make these {"the SoGA remedies"} fit with the remedies under the Directive - including the latter's requirement that the right to reject {contract rescinded} is a final remedy. This raised difficult question about what remedies will be open to the consumer at any specific point or when remedies may no longer be available.[14]

### **Liability and limitation periods**

The DTI has emphasized that the Directive does not provide for a two-year guarantee. It introduces a two-year limitation period, which is something very different from a two-year guarantee. That is to say the remedies under Article 3 of the Directive are applicable where a lack of conformity becomes apparent in goods within two years but only when such a lack of conformity existed at the time of delivery, is not due to normal wear and tear and expected life of the goods {durability} have been taken into account.

In England and Wales they currently have a six year liability period by virtue of the Limitation Act 1980 {five years from the time of discovery in Scotland}. This means that compensation can be

claimed against the supplier of the goods for up to six years after purchase, providing it can be shown that the defect was present at the time of the sale, and it was reasonable for goods to last that long. The Directive, on the other hand, offers protection for a lesser period that presently exists under UK law. The government has been minded to maintain current liability periods since it seems to be the simplest way of proceeding without reducing consumer protection.

The Directive allows<sup>[15]</sup> Member States to require that consumers inform sellers of any lack of conformity within two months of detection. The DTI does not intend to enforce this because of the practical difficulty of confirming any date of detection and because it would reduce the current level of consumer protection.

Regarding the second-hand goods the Directive allows Member States to provide a shorter term, of not less than one year, of liability for second hand consumer goods. Under the Sale of Goods Act the criteria for determining whether goods are satisfactory are the same as for new. As this allows the differences between new and second-hand goods to be taken into account, in DTI's opinion, there is no need for a lesser limitation period for second hand items. The Government has indicated its intention not to reduce existing levels of consumer protection so it is not intended to apply a shorter term of protection for second-hand goods.

### **Guarantees**

The Directive requires that where a business decides to offer a guarantee<sup>[16]</sup> to a consumer, it would become legally binding. It would also have to be set out in plain intelligible language with the necessary time, address, territorial scope and essential claim details. The Directive also requires that any guarantee offered have to be made available in writing on the consumer's request. The DTI has proposed direct implementation of these requirements.<sup>[17]</sup>

The above discussed issues and proposals are the most important ones inherent in the first Consultation paper from January 2001. What I have not mentioned so far is the fact that the consultation took the form of a series of questions relating to the possible impact of the Directive on existing UK legislation and practice. The Department of Trade and Services received around 60 responses from consumer bodies, businesses, trade associations, regulatory authorities, professional institutions and academics. The DTI's conclusion from the responses to the first document is that there was a general support for the tentative proposals outlined by the Department on the way it intended to proceed. Where there was a disagreement, this was sometimes due to a misunderstanding.

#### ***4.2 The DTI's second consultation paper***

The DTI issued a second consultation paper in February 2002. This consultation follows on from the first consultation (January – April 2001). In the second {and last} consultation document the DTI returns to some of the issues where there remain policy choices in transposing the directive. The DTI has also produced Draft Regulations, which are included in the consultation document. After thorough analysis of the responses<sup>[18]</sup> {to be submitted by May 23 2002} to this consultation the finalized Regulations will be laid before Parliament and they should become law a few months later. At this point I will analyse the final proposals made in the second consultation paper. I will stick to the same structure as I introduced in the analysis of the first consultation paper.

## **Definition of consumer**

According to DTI, the definition of “consumer” in UTCCR[\[19\]](#) is 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 UTCCR is only a starting point because the DTI has 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 SoGA makes it clear that “business” includes a profession. In UK law the term “business” also covers “trade”. In the Regulations a “consumer” is defined as: “any natural person who, in the contracts covered by these Regulations, is acting for purposes which are outside his business”.

## **Conformity standard**

Concerning the issue discussed in the framework of the first consultation document, the DTI has not changed its opinion and proposes to retain the current provision {“commonly supplied’} and simply add the requirement in the Directive {“normally used”}.

## **The remedial scheme**

The DTI has transposed the Directive’s remedial scheme in the Draft Regulations. As has already been stated above, 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. The DTI proposes that this will not extend to initial right of rejection that is available within a reasonable time under the existing 1979 ACT {SoGA}. 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.

The new s. 48D {1} of the SoGA 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 requires the seller to repair or replace the goods, pursuant to the Directive’s scheme, then they must give the seller a reasonable time to comply before rejecting and asking for their money back under their continuing existing short-term to reject.

As for the so-called “reversed burden” it has been reflected in the Regulations. But, 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. Thus, this issue is still open to discussion.[\[20\]](#)

The Draft Regulations ally the reversed burden to the four remedies of the Directive but keep them separate from the existing SoGA rights.[\[21\]](#)

## **Liability and limitation periods**

In the DTI’s view, 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.

If the Article 5.1 is not transposed, 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 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 {five years from the date of

discovery in Scotland}. That is how the Regulations are currently drafted.

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 relations to faulty goods inherent there at the time of delivery that do not appear within two years of delivery of the goods. 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, is 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 Soga would continue for the full six years liability and limitation period. Thus this matter is also open to discussion.[\[22\]](#)

The two months notification period is not included in the Draft Regulations. Since the government has committed to maintain existing consumer rights, the two months notification period will not be introduced 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 or 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}. According to DTI, this would be a recipe for confusion and costly debate for consumers, businesses, their staff and legal advisers.

The second-hand goods' period of liability is also not included in the Draft Regulations. The DTI believes that here is no need to cut the liability period for second-hand goods to twelve months.[\[23\]](#) Therefore, the current six years limitation period will be retained for second-hand goods as well.

### **Guarantees**

All the requirements laid down in the Directive concerning any freely given guarantee are reflected in the Draft Regulations.[\[24\]](#)

## **4. Conclusion**

In spite of the fact the United Kingdom has not been able to meet the deadline for implementation {January 1 2002} and comply with the Directive's provision on time, in my opinion, it has taken a very thorough attitude towards its implementation. The Department of Trade and services {DTI} has issued two, very detailed, consultation documents in which possible ways for future implementation of the Directive are discussed.

Overall, the UK sale of goods legislation {principally the sale of Goods Act 1979} sets a relatively high level of consumer protection and the impact of the Directive on existing consumer rights will be relatively modest. In certain aspects the current UK law goes even above the requirements set out in the Directive and the Government intends to retain this. Therefore the transposition of the Directive will be done through add-on legislation without a need of a thorough review of the areas affected by the Directive. On the other hand some significant changes, primarily to the Sale of Goods Act and related consumer legislation, are to be done.

The final proposals {Draft Regulations} meet all the criteria laid down by the Directive. As has

already been mentioned in the text, after thorough analysis of the responses {to be submitted by May 23 2002} to the second consultation, the finalized Regulations will be laid before Parliament and they should become law a few months later. Some matters are still open to discussion, but at the moment it can be said that the future statutory provisions will fully comply with the 1999/44/EC Directive.

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[1] <http://europa.eu.int/scadplus/leg/en/lvb/132000.htm>

[2] i.e. two years limitation period

[3] <http://europa.eu.int/scadplus/leg/en/lvb/132022.htm>;

Directive 1999/44/EC on certain aspects of the sale of goods and associated guarantees.

[4] Though I will mention the second consultation paper from February 2002 as well, I will pay more attention to the first paper since the second paper is based on the first one and its results.

[5] That means when a consumer has first examined or tried out the product. It also depends on the nature of the product.

[6] It is important to point out that if a consumer notices a defect {or should have noticed it because it was obvious}, or it is pointed out by the seller and the consumer decides to buy the goods anyway, then he or she cannot say it makes the goods unsatisfactory.

[7] English law as it stands at present does not provide for any entitlement to having a faulty product repaired, replaced or to having a price reduction.

[8] <http://www.dti.gov.uk/CACP/ca/advice/saleofgoods/unsatis.htm>;

Christian Twigg-Flesner: Are you being served? Consumer Policy Review; London; Jan/Feb 2001.

[9] On the basis of the first consultation paper and its results {in the form of responses to it}, the second consultation paper was issued in February 2002.

[10] This is not the intention of the government, and the proposals put forward make it clear that the current high level of consumer protection under the SoGA and related legislation will not be lowered.

[11] The present "requirement" in s. 14{2B} is not an absolute one. It is merely one factor to be taken into account in appropriate circumstances in determining whether a product was of satisfactory quality. It is not a mandatory standard, though. It is therefore perfectly possible for a product to be of satisfactory quality even though it is not fit for all the purposes for which this type of

product is commonly supplied.

[12] These remedies are already widely used in the UK but they have not had status in law.

[13] It means that the burden of proof when reporting faulty goods is reversed in consumer's favor.

[14] In general the hierarchy of remedies does offer scope for confusion in interpreting exactly what consumer is entitled to and when. For example, if a second fault entitles the consumer to redress after an earlier one has been e.g. repaired, should the consumer be entitled to demand a reduction in price or rescission rather than allow the seller another attempt at repair or replacement?

[15] That is to say it is possible for Member States to decide whether to transpose this particular provision of the Directive or not. In total there are three provisions of such character in the Directive.

[16] It has to be given without extra charge - Article 1{2}{e} of the Directive.

[17] Christian Twigg-Flesner: Are you being served? Consumer Policy Review; London; Jan/Feb 2001;

[http://www2.dti.gov.uk/CACP/ca/consultation/sale\\_of\\_goods.htm](http://www2.dti.gov.uk/CACP/ca/consultation/sale_of_goods.htm)

[18] It should be a similar procedure to the one introduced during the first consultation.

[19] Unfair Terms in Consumer Contracts Regulations 1999

[20] Those stakeholders who wish to extend the reversed burden of proof to existing remedies claim, for example, that to have four remedies 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 vague area. An across the board reversed burden would solve this.

Those who do not wish to extend the reversed burden to the current rights claim, for example, 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.

[21] i.e. to initially reject and thereafter seek damages

[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, for example, that having 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 the 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. Disputes between retail staff and consumers, concerning the issue of two/six year legal rights, would be avoided.

Those supporting transposition of Article 5.1, effectively creating dual six and two years liability periods, for the existing and new remedies respectively cite, for example, that extending the liability period for the Directive's four remedies for an extra four years, beyond the obligatory two of Article 5.1, would substantially increase business costs. It would not be confusing for consumers to have an additional set of rights for a two years liability period {subject to a six years limitation period}.

[23] It is thought that such a move is unnecessary, being considered that the Regulations say that the 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 since the Directive does not introduce a durability requirement.

[24] <http://www.dti.gov.uk/CACP/ca/pdf/2ndsale.pdf>

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