Consultation response
EU proposals for a Consumer Rights Directive

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EU proposals for a Consumer Rights Directive

Introduction
Which? is an independent, not for profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. Which? is a member of the EU consumer umbrella body BEUC and of Consumers International. Which? is independent of both Government and industry, and is funded solely through the sale of Which? magazines and books.

Which? welcomes the opportunity to comment on this important consultation. We believe the proposal to be particularly significant as its effects will be felt by all consumers in the UK.

Which? has serious concerns about the proposed directive and cannot support it in the current form, because:

- The proposal seeks to remove some important and highly valued consumer rights in the UK (e.g. the right to reject faulty goods and the right to seek a remedy for faulty goods for up to 6 years from the date of
purchase). For new consumer protection legislation, this is simply an unacceptable approach.

- We do not agree that a maximum harmonisation approach is either necessary or appropriate in the context of the European Commission’s twin objectives.
- We question whether the proposal is consistent with the European Commission’s objectives in any event.

Which? will be unable to support the proposal unless it is substantially amended, and since we question the fundamental basis on which the proposals have been prepared, we believe it may be appropriate for the proposal to be given a complete reconsideration.

The European Commission’s objectives

The Impact Assessment clearly sets out twinned objectives of the proposal as:

(i) making it easier for business to sell cross border to consumers; and
(ii) enhancing consumer confidence in cross border shopping.

It also identifies a number of related objectives, such as stimulating cross border competition and simplifying consumer protection legislation.

Which? believes the proposals neither simplify the legislative provisions nor enhance consumer confidence. While elements of the proposal may make it easier for business to sell cross border, Which? does not agree that the proposed approach is the most appropriate way to achieve this.

If the Commission wants to make it easier for business to sell cross border, then instead of taking steps that reduce the level of consumer protection we believe the European Commission should focus on issues such as: the lack of appropriate cross border redress mechanisms, privacy concerns, national licensing of intellectual property rights, national distribution arrangements and alleviating the practical difficulties for consumers shopping cross border.

Objective 1 - Making it easier for business to sell cross border to consumers

> Meeting this objective does not justify a reduction in consumer rights

Notwithstanding the European Commission has identified that compliance costs for companies trading cross border are significant, it is not certain that:
- a reduction in such costs will lead to increased levels of cross border trade; and
- an increase in cross border trade will deliver consumer benefits in terms of greater choice, improved quality and reduced prices.

At best these are only potential consumer benefits. However, the consumer rights under threat by the proposals are real. It is neither acceptable nor necessary to sacrifice actual consumer protection in the pursuit of theoretical gains.

> Meeting this objective does not require a reduction in consumer rights

The Impact Assessment describes the significant benefits to business - especially reduced costs and increased business opportunity - that a single set of consumer contract laws would deliver.

This in itself should be sufficient to make the proposals attractive to business. It should not be necessary to incorporate further business-friendly concessions such as providing business, rather than the consumer, with the choice of legal remedy in the event a faulty good is sold.

> There are additional significant barriers limiting cross border trade

From both a business and consumer’s perspective, there are a large number of barriers that inhibit cross border trade, for example:

- **Consumer perspective**: the practical difficulties associated with obtaining after-sales care and dealing with traders where problems arise, lack of appropriate cross border redress mechanisms, privacy concerns, language;
- **Business perspective**: restrictions in exclusive and/or national distribution arrangements; national licensing of intellectual property rights, language, the practical difficulties associated with providing after sales care, prompt delivery etc.

It is by no means clear that the lack of harmonisation in contract law is the most significant of these barriers. In fact, when the European Commission consulted European Consumer Consultative Group (ECCG) representatives, the practical difficulties associated with cross border shopping were identified as a key consumer

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1 Survey evidence suggesting the majority of businesses not currently trading cross border would consider doing so were the associated costs to be reduced does not prove this assertion.
Not only is it extremely disappointing to see that this has been largely ignored in the proposals, it is a false assumption to assume that simply addressing the issue of non-harmonised contract laws will enable these other barriers to be overcome.

While it is possible that market competition may alleviate some of these additional barriers, this is by no means certain, and in any event competition is unlikely to address all such barriers. And in the meantime, it is not acceptable to reduce the level of consumer protection.

The proposals are not wholly consistent with the objective to increase cross border trade

It is also important to note that the proposals are, at least in some respects, inconsistent with the objective to increase cross border shopping. For example, the suggestion that consumers should bear the cost of returning goods where the right to withdraw has been exercised will be a significant deterrent for many consumers against purchasing from a foreign retailer.

Objective 2 - Enhancing consumer confidence in cross border shopping

Which? does not agree that the draft directive will increase consumer confidence when shopping cross border.

Strengthening consumer rights increases confidence.

It is simply not possible to increase consumer confidence where, as a first step, the consumer protection regime is weakened. The proposals mean that in some circumstances it would be more advantageous for a consumer to claim they are not acting as a consumer (e.g. because the trader’s liability would not be capped at 2 years). Such a result cannot engender consumer confidence.

Increased consumer confidence does not require full harmonisation

It is a false assumption to assume that consumer confidence can only be achieved with a unified set of contract rules. Consumer confidence comes from knowing that there is a strong protection regime in place, rather than knowing exactly what those rights are.

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2 See section 2.6.2 of the Impact Assessment
For example, if
- a consumer would be entitled to a full refund for any faulty good purchased within Europe,
- but in some countries he would also be entitled to compensation for any distress caused by that fault,
- then, in our opinion, the confidence to shop cross border comes from the knowledge of the right to a refund. Such confidence is not undermined by him being unaware of the additional rights.

Consequently, Which? believes that a minimum harmonisation approach is capable of increasing consumer confidence significantly, providing the bar is set at an appropriate level.

> **Simple and coherent rules will foster consumer confidence**

In our opinion, ensuring the consumer protection rules are as simple and coherent as possible is absolutely fundamental to increasing consumer confidence. This is the case whether a maximum or minimum harmonisation approach is adopted.

Despite having simplification of the law as one of the supplementary objectives of the proposal, Which? believes the draft directive falls far short in this regard, because:
- the European Commission has failed to remove uncertainties that currently exist;
- the draft directive has introduced new uncertainties (e.g. what is a ‘minor defect’, what is ‘material possession’ etc).
- the draft directive maintains artificial distinctions, for example:
  - While the move to a common duration of 14 days is welcome, the certainty this brings is undermined because the start point for the withdrawal period varies according to what you buy and how you buy it.
  - The draft states that when a good is faulty and is replaced by the seller, the 2 year limitation period re-starts but if the faulty good is repaired rather than replaced, the limitation period does not re-start.

It is also important to note that simple, easy to understand legislation is also in the interests of business. Not only will it keep compliance costs to a minimum, but it will also reduce unnecessary costs (both time and resource costs) from unnecessary customer disputes.
Consumers and consumer protection should be at the heart of these proposals

Which? believes it would be far better to proceed with reform on the basis of ‘what do we need, rather than ‘what do we have’. The former approach puts the subject of consumer protection legislation, namely consumers, at the heart of the proposals, and provides the opportunity to create a consumer rights framework with the potential to last well into the future. Reform constrained by the existing legislative framework, will often lead to over-complicated rules and exemptions with work-arounds replacing new ideas. Unfortunately, Which? believes this is evident in the current proposals given the rather complicated result flowing from the ‘forced’ combination of the 4 existing directives.

> Consumer protection legislation should not reduce consumer rights

With consumers put at the heart of the proposal, a reduction in existing consumer protection should neither occur nor be viewed as acceptable.

As the European Commission is aware, a significant number of Member States believe their consumers risk losing one or more significant rights. In the UK, the key concerns relate to
- the right to reject faulty goods and obtain a full refund; and
- the proposal to reduce the period during which a seller is liable for faulty goods from 6 years (5 in Scotland) to only 2 years.

While we understand the Commission has undertaken a comparative assessment of the effects of the proposal on existing legislation, Which? is concerned the Commission has focused on a comparison between the proposals and the current EU directives, rather than a comparison between the proposals and what is actually law in each Member State. The latter comparison is essential where a maximum harmonisation approach is proposed.

> Missed opportunity as Member States are on the defensive

As a result of the European Commission’s approach, consumer associations right across Europe are pre-occupied with defending existing rights. This is disappointing, wasteful and a missed opportunity. It would be far more beneficial were it possible for this energy and resource to be targeted towards developing forward looking legislation with the potential to stand the test of time.

Similarly, it is disappointing that the European Parliament and the Council of Ministers will need to spend considerable time and effort ensuring the status quo is
not undermined, rather than spending time on ensuring the proposals really make a positive impact on all EU consumers.

> **The proposals should address what consumers need**

Digital goods and services are a key omission from the scope of the draft directive. Which? believes this represents a significant missed opportunity, and is perplexed by the approach because:

- It is inconsistent with the single market objective. Digital goods and services are arguably one of the most likely product classes to be traded cross border, both now and in the future.
- Digital goods and services is a fast growing sector with significant growth expected in the coming years. It is reasonable to assume, therefore, that a large number of issues addressed by the proposals would arise in relation to such products.

Which? is also disappointed to see services have been excluded from the scope of the provisions on legal remedies. Not only does significant detriment arise from the provision of services that do not conform to contract, but such an approach would also ensure unnecessary disputes regarding whether the defect relates to a ‘good’ or a ‘service’ are avoided - a particular issue with the increasing prevalence of bundled goods and services contracts.

> **Further evidence that the consumer is not at the heart of the proposals**

There are a number of aspects of the proposals that indicate consumers - and consumer protection - are not really at the heart of the proposals. For example:

- The proposal reverses existing legislation that gives the consumer the right to choose the remedy when he receives a faulty good, so that the trader now gets to choose.
- The proposals make it harder for consumers to exercise their rights where a faulty good has what the trader perceives to be only a minor defect.
- Although consumers are to be told when the directive would not apply, there is no requirement to tell them what this actually means e.g. there is no right to cancel.
- While consumers are to be told where they have a right to cancel, there is no requirement for such notice to be provided prominently.
There are additional and unnecessary obligations placed on consumers e.g. the obligation to notify a trader of a defective good within 2 months.

**Maximum harmonisation is not the only option**

In general, Which? does not support the maximum harmonisation approach, for several reasons:

- Our experience shows that maximum harmonisation normally involves an unnecessary battle to preserve existing consumer rights (e.g. the Consumer Credit Directive).
- It limits the scope of the Member State to provide additional protection where it feels it is appropriate e.g. to reflect national practices.

In addition, Which? does not support the full harmonisation approach in relation to this specific proposal because:

(i) Maximum harmonisation is not necessary to increase consumer confidence when shopping cross border.

(ii) Minimum harmonisation could also lead to a significant reduction in the cost to business of trading cross border.

A high basic level of consumer protection would significantly remove the incentive for Member States to ‘go further’ - this would lead to a de facto harmonisation of the rules.

(iii) Targeted maximum harmonisation could, to a large extent, achieve the same objectives for the same reasons.

(iv) It is inconsistent with the principles based regulatory approach of the directive on unfair contract terms in consumer contracts.

The rationale of ensuring a consistent set of rules in each Member State is undermined where each Member State has the discretion to interpret a general fairness test, and to apply exemptions based on national legislation.
Notwithstanding the serious concerns raised above, and in order to assist with the legislative process, Which? has responded to the majority of the detailed questions posed in the DBERR consultation paper. In doing so, Which? has focused on ensuring the proposals do not remove existing consumer rights. However, Which? believes the proposals should also:

(i) Simplify existing rules wherever possible;
(ii) Remove any existing loopholes; and
(iii) Ensure the new legislation will be future proof.

If the proposals do not adequately achieve any of these, then it will be an opportunity missed.
Chapter 1: Subject Matter, Definitions and Scope (Questions 4-14)

Summary of response on Chapter 1

> The definition of:
  - ‘Business Premises’ should not include ‘market stalls and fair stands’.
  - ‘Goods’ should include gas, electricity and water.
  - ‘Consumer’ should be amended to cover ‘mixed-purpose’ contracts.

> There are a number of new terms used in the draft directive that are not currently defined. Which? believes some of these are unnecessary, but where they are used, a definition is required e.g. ‘material possession’.

Definitions

1.1. Which? welcomes the attempts to harmonise the definitions of terms used across a number of directives impacting the relationship between businesses and consumers. It is clearly an oddity, for example, that whether you are a “consumer” will depend upon exactly which piece of legislation is relevant.

Trader

1.2. The definition should include both private and public companies. This would then reflect the current position under the Unfair Terms in Consumer Contract Regulations.

1.3. Which? does not foresee any particular problems with the definition including “anyone acting in the name of or on behalf of the trader”.

Consumer

1.4. Which? believes the definition should be clarified so it is clear if and when consumers making mixed-purpose purchases are able to rely on the protections foreseen under the draft directive. For example, would a consumer buying a computer online that is to be used for leisure purposes and also for “working from home” be protected by the Directive?

1.5. Consumers should not lose out on the protection simply because their purchase is not exclusively for leisure purposes, and Which? wonders whether a primary purpose test would be a satisfactory compromise.
1.6. Which? also notes that many Member States have a definition of consumer that includes small businesses given that these will often be small family businesses or “one-man” entities. In almost all respects, there is no difference between purchases made by individuals on behalf of those businesses and by the same individuals as “consumers”. There appears to be little reason why those individuals should have a different level of protection depending on the precise purpose of any individual purchase.

1.7. Accordingly, Which? believes the European Commission should give thought to the extent small businesses should also fall within the scope of the draft directive.

**Goods**

1.8. Which? agrees that clarification should be sought from the European Commission in relation to which rights apply to purchases of gas, electricity and water. If such purchases are outside the scope of the directive (such that Member States are free to implement separate rules for such purchases) then this should be made clear on the face of the directive.

1.9. Which? believes purchases of gas, electricity and water should receive the full protection of the rules on distance contracts and off-premises contracts not least because many utilities contracts are sold through such channels, so considerable consumer detriment could arise if such sales weren’t covered by the directive.

1.10. It is also important that the rules on unfair contract terms apply in full to such contracts given the essential nature of these types of purchases.

**Distance contracts**

1.11. Which? welcomes the proposal to remove the requirement that the distance contract must be part of an organised distance selling scheme. Which? also welcomes that contracts negotiated face-to-face but concluded at a distance will now be covered.

1.12. However, Which? believes that further consideration should be given to extending the definition to cover contracts that are negotiated at a distance, but then concluded face-to-face. Having already made the decision to purchase, it is not reasonable to assume that either party will re-open negotiations on signing, nor to assume that the consumer will get more information or the opportunity to
sample the goods at that stage. In addition, the consumer will not appreciate the significance the slight change to the process would have given, after all, to all intents and purposes the contract will have been formed at a distance. Consumers should not lose out on due protection by reason only of a legal technicality.

Means of distance communication

1.13. Which? agrees that it would be useful to include an indicative list of different means of distance communication.

Off-premises contracts

1.14. Which? agrees that this definition should include contracts that are negotiated away from business premises but are then, from a legal perspective, concluded on business premises. To do otherwise would create a loophole that could be exploited by business - the decision to make the purchase on certain terms will have been made away from the business premises and so the protection offered to off-premises contracts should equally apply.

1.15. In addition, consumers are still likely to face a considerable amount of psychological pressure to complete the sale notwithstanding they may have the ability to leave the business premises. A recent example from Which? Legal Services illustrates this well: the case concerned someone who had negotiated the purchase of a car off-premises but had been called into the showroom to “complete the paperwork”. When the consumer expressed reservations about the purchase, the dealer explained how the car had already been registered in his name and so it was too late to cancel the contract.

1.16. Which? supports the proposal to include solicited visits within the definition of off-premises contracts. Not only does it reflect the current UK rules, so anything else would see consumers losing protection, it is also necessary for the very reasons cited when such changes were introduced into the Cancellation of Contracts Made in a Consumer’s Home or Place of Work etc Regulations 2008 (the “Doorstep Selling Regulations”).

Business premises

1.17. Which? believes further consideration should be given to this definition because there appear to be good reasons for excluding “market stalls and fair stands”. At the very least, Which? believes there is a case for distinguishing
between certain types of ‘market stalls and fair stands’ such that traders using
some such ‘premises’ are subject to the provisions on off-premise contracts.

1.18. Under current UK rules, consumers purchasing from market stalls and fair
stands benefit from the protection afforded by the Doorstep Selling Regulations,
and Which? sees no reason to depart from this position. If such a change is to be
implemented, then it should be supported with evidence to prove both the benefit
to business and the lack of detriment to consumers.

1.19. There are also reasons supporting the maintenance of the status quo in the
UK. The rationale behind the cancellation right is to provide the consumer with a
way out of the contract where they have been placed under psychological pressure
to make a purchase. Such psychological pressure can also arise in the context of
market stalls and fair stands. For example, where the purchase is made at a stall at
an exhibition where the consumer has paid to gain entrance, the consumer will be
facing a once-only opportunity to make the purchase and will not have an
opportunity to visit at another time. The same situation will arise with respect to
truly temporary premises e.g. a one-day only stall where, unlike with permanent
business premises, there will be no opportunity to come back.

Other terms

1.20. Which? also believes that a statement clarifying that all time periods are
calculated in calendar days would be helpful.

1.21. There are a number of other terms used in the draft directive that are not
deﬁned in Article 2. For the sake of clarity, Which? believes the following terms
should be properly deﬁned (if they are needed in the Directive at all):

- material possession (used in Articles 22 and 23)*
- diminished value (used in Article 17)*
- works (used in Article 20)
- minor non-conformity (used in Article 26)*
- reasonable time (used in Article 26(4))
- signiﬁcant inconvenience (used in Article 26 (4))

* Which? believes the introduction of these terms are unnecessary.

1.22. Further details on these are provided in the sections below.
Chapter 2: Consumer Information (Questions 15-16)

Summary of response on Chapter 2

> Key objective should be to ensure consumers receive the right information in the best format e.g. summary boxes, traffic light labelling.
> Any increased costs to business must be measured in terms of incremental costs, not total costs.
> The right to cancel is a key consumer right and one that particularly should be drawn to the attention of the consumer.

General comments

2.1. Properly informed consumers are confident consumers, who are more likely to make effective purchasing decisions. Accordingly, Which? supports proposals that seek to ensure consumers are properly informed.

2.2. However, it is the quality of information that is important, not the quantity. Too much information and/or information presented in a poor way can actually do more harm than good. Information should not be provided “just for the sake of it”, but rather the focus should be on what a consumer needs to know. The rules on information provision should not, therefore, permit businesses to adopt a “kitchen sink” approach, whereby they can seek to absolve themselves of liability because the information was “provided” to the consumer.

2.3. The real objective should be to ensure that the information provided is the right information provided in the best format. Examples of using information in a better way would include: summary boxes for credit cards, and traffic light labelling of food nutrition. Which? believes the European Commission should consider whether similar schemes should form part of the current proposals.

2.4. Business may argue that the proposed information requirements are too burdensome. Which? would be sceptical of any such claim, for two main reasons. First, the proposals replicate the requirements under the Consumer Protection from Unfair Trading Regulations 2008. Secondly, there is considerable evidence that mandatory information requirements are actually codified best practice. For example:
- A study by the Real Assurance Risk Management suggests that for many businesses, it is changes to requirements that are the problem rather than the requirements themselves. (page 7 - point 2.10).³
- There is evidence from the study done for the FSA by Deloitte in 2006 that much of what regulation requires is, in fact, regarded by firms as good business practice. They highlight the importance of examining incremental cost rather than total cost - i.e. the costs of regulation that are over and above what would have been done by the firm in the normal course of business.⁴

2.5. It is also worth noting that mandatory information requirements can also drive up standards - this potential benefit should not be overlooked.

Specific comments

2.6. Which? agrees with DBERR that it should be a requirement that information on costs of the means of distance communication should be provided to consumers. Not only is this currently the position in the UK, but Which? also shares the concerns of DBERR that a failure to provide this information could result in considerable consumer detriment, for example, if consumers call a premium rate phone number without realising. Which? is unaware of any evidence to show such a requirement would place an unreasonable burden on business and/or that no consumer detriment would arise were this requirement to be removed. Unequivocal evidence in this regard would be required if any such change is to be implemented.

2.7. Which? believes that in addition to the information provided pursuant to Article 5(1), the trader should also indicate:

- Where a right to cancel exists,
  - Who bears the costs of return when such a right is exercised;
  - In what circumstances a consumer may be required to pay for part performance of the contract;
- the period of time for which the offer and/or current price will remain available;
- where available, the existence of alternative dispute resolution procedures.

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⁴ Deloitte, ‘Cost of Regulation Report’, Study done for the FSA 2006
2.8. The right to cancel is a key consumer right and one that particularly should be drawn to the attention of the consumer. Accordingly, Which? believes that the draft directive should require that notice of the right to cancel should be provided prominently both in the pre-contractual information and in the invoice/delivery documentation.

Remedies for failure to provide the necessary information

2.9. Which? notes that the remedies for failing to provide the necessary information is to be left to the discretion of the individual Member States, and that this approach seems to be inconsistent with the policy of maximum harmonisation.

2.10. Consumers will be deterred from shopping cross border if they are not confident that all the key transactional information will be provided and/or what their rights are in the event that it is not. Which? would therefore suggest that a standard remedy is proposed for non-provision of information (for example, the contract is non-binding, as is currently the case in the UK for off-premises contracts), and believes a minimum harmonisation approach would be the most appropriate way to ensure consumer confidence.

Intermediaries

2.11. Which? suggests that in addition to consumers be told when the provisions of the directive do not apply because an intermediary is involved, there should be an explicit statement as to what this means for the consumer. For example, the consumer should be told, explicitly, that they will not have any cancellation rights. Such information should be provided prominently to the consumer.
Chapter 3: Consumer Information and Withdrawal Right for Distance and Off-premises Contracts (Questions 17-42)

Summary of response on Chapter 3

> The introduction of a standard withdrawal form should not enable traders to prohibit consumers using other means of communicating their desire to cancel.
> Which? would support a standard withdrawal period that ends at the same point, and would propose the following:
  - for goods contracts, the withdrawal period ends 14 days after delivery of the goods; and
  - for services contracts, the withdrawal period ends 14 days after the contract is concluded.
> Which? strongly disagrees that the withdrawal period for distance contracts could be subject to a sunset clause as the rationale for having the cancellation period does not change as consumer familiarity with this shopping method increases.
> It is very important that the Directive includes an express statement as to when any notice of cancellation provided by a consumer is to take effect (i.e. when communicated by the consumer).
> It is not acceptable to reduce the consumer rights that currently apply to off-premises contracts where traders fail to inform consumers of their right to cancel.
> Consumers should be under an obligation to return cancelled goods, but:
  - Traders should not be able to withhold payment of the refund pending return of the goods;
  - Traders should not be able to pay a reduced refund to represent any diminished value;
  - The default position should be that the cost of return is borne by the trader (particularly for off-premises contracts and substituted goods);
> Cancellation of services contracts: Which? believes that
  - consumers should be able to request/consent to early performance of a contract, but this must be a properly informed request/consent - it should not be inferred from a failure to “opt out”;
  - consumers should be able to cancel the contract during the withdrawal period;
  - in the event of such a cancellation, the consumer should bear the costs incurred up to the point of cancellation (assuming informed consent properly obtained - if not, then trader bears costs incurred);
Distance contracts for accommodation, transport, car rental services, catering or leisure services should not benefit from a blanket exemption from the right to cancel.

Information requirements

3.1. Which? agrees that where alternative dispute resolution procedures exist, then this should be brought to the attention of the consumer, either at the point of sale or on performance of the contract (and possibly both). However, Which? believes that this information should be provided in advance of all contracts, not just distance and off-premises contracts.

3.2. In terms of the details of the “conditions and procedures for exercising” the right of withdrawal that should be provided to consumers (Article 9(b)), this should include the time at which any cancellation will take effect, and who will pay the costs of returning any goods received. Such information should also include an express statement that the cancellation period starts immediately on purchase/termination of the contract.

Standard withdrawal form

3.3. Which? believes that it should be as easy as possible for consumers to exercise their right to cancel, and can see that having a standard withdrawal form may serve to achieve this, particularly for cross border purchases. However, the introduction of the withdrawal form should not enable traders to prohibit consumers using other means of communicating their desire to cancel. Accordingly, Which? believes the directive should include an express statement that consumers are able to exercise their right to cancel using any durable medium even where the trader provides a standard withdrawal form.

3.4. Which? welcomes the proposal that internet traders can provide web-based cancellation forms, but again, this should not be at the exclusion of other means of communicating their cancellation.

3.5. In relation to the information to be provided with the withdrawal form (Annex I of the draft directive), Which? believes such information should also state the point at which the cancellation will take effect.
Notice of the right to withdraw from the contract

3.6. Which? agrees with DBERR that it is important for information about the consumer’s right to cancel be provided prominently to the consumer, not least because the right to cancel is such an important consumer right. Not only should the existence of such a right be provided at the time the contract is concluded, but Which? believes it would also be helpful to provide it again in the trader’s email confirming acceptance of the order and/or at the point of delivery/performance of the contract (for example, on the delivery note and/or invoice).

3.7. Which? notes the provisions set down in the Doorstep Selling Regulations that require the information about cancellation rights to be provided prominently, and believes something equivalent to this should be incorporated in the draft directive.

Length and starting point of the withdrawal period

3.8. Which? welcomes the proposal to extend the withdrawal period for distance and off-premises sales to 14 calendar days, but believes Article 12 should make an express reference to the withdrawal period being measured in calendar days. As the consultation paper notes, such a period is applicable in a number of European countries, and we are not aware of any particular issues associated with a 14 day period.

3.9. However, Which? does have some concerns regarding when the withdrawal period starts. One of the aims of the proposal was to create consistency in the application of the withdrawal period thereby reducing consumer confusion. However, the proposals undermine the benefits of introducing a single period by having different start points depending on whether the consumer is contracting on a distance or off-premises basis.

3.10. To make the position as simple as possible for the consumer, Which? would support a standard withdrawal period that ends at the same point, and would propose the following:
   - for goods contracts, the withdrawal period ends 14 days after delivery of the goods; and
   - for services contracts, the withdrawal period ends 14 days after the contract is concluded.

3.11. For a number of reasons, Which? believes it is better to refer to the end
point of the withdrawal period, rather than its start point (as the proposals do). For example:

- the focus for the consumer is the point at which the consumer loses his right to cancel;
- if the right to cancel does not commence until the goods are delivered, this would, technically, prevent the consumer cancelling the contract between concluding the contract and delivery, leading to unnecessary costs and inconvenience to both parties;
- if the right to cancel starts when the contract is concluded, then this right could be lost before the goods are delivered, thereby undermining one of the key rationale for maintaining the withdrawal period.

3.12. While the principle rationale for the withdrawal period in the case of off-premises contracts is to address contracts concluded under pressure, Which? believes that in many cases, it will only be on receipt of the contracted goods that the consumer will fully realise the extent to which they had been bullied into the contract. Accordingly, Which? believes it is important to ensure that the consumer retains the right to cancel after the goods have been delivered.

3.13. Additional specific comments on the proposals:

> We believe Article 12(3) should be clarified to state that the notice of withdrawal is effective if sent within the withdrawal period whether or not it is received by the trader.
> We agree with the proposal set out in recital 26 regarding when the withdrawal period ends in the event that (i) multiple goods are ordered at the same time but delivered separately; and (ii) where one item is delivered in different lots and pieces.
> We strongly disagree with the suggestion that the withdrawal period for distance contracts could be subject to a sunset clause because consumers are becoming increasingly confident with online shopping. One of the key rationales for having the withdrawal period is providing the ability to sample the purchased goods before buying and this will not change with increasing confidence. In addition, it is difficult to see how such a clause could be implemented in practice because “confidence” is a fairly ambiguous concept: how can you measure when consumers are sufficiently confident?
Consequences for failing to provide information about the right of withdrawal

3.14. Which? agrees that a failure to provide the consumer with the necessary details about the right to withdrawal in a clear and prominent manner should result in an extension of the withdrawal period.

3.15. However, we question whether an extension of 3 months is long enough. Which? considers the existence of the cancellation right and the right of the consumer to be informed where this right exists is very important. Accordingly we believe that any consequences for failing to provide information about the right of withdrawal should be sufficiently strong to provide an effective deterrent.

3.16. In this regard, Which? notes that for off-premises contracts, the current position in the UK is that there is no longstop date for the withdrawal period - if the consumer is never informed of his right to cancel, then the consumer never loses his right to cancel. Which? is concerned because the proposals, if adopted, would significantly reduce these rights.

3.17. A finite period after which the right to cancel is lost where notice of such a right was not communicated to the consumer creates an incentive for rogue traders to (i) not provide details about the right to cancel; and (ii) complete the work quickly and receive payment. Accordingly, Which? believes the current UK position for off-premises should be retained and believes there is merit in replicating this position for distance contracts particularly for contracts that are ongoing and/or where the consumer is tied in for a long period of time.

3.18. Which? does not think it is acceptable to reduce the consumer rights that currently apply to off-premises contracts.

Exercise of the right to withdrawal

3.19. Which? believes it is very important that the draft directive includes an express statement as to when any notice of cancellation provided by a consumer is to take effect. Without such a statement, it leaves open the possibility for traders to limit the right, and this could cause considerable consumer detriment.

3.20. In terms of when the notice of cancellation should take effect, it must be at the point such notice is communicated by the consumer to the trader (for example, at the point of posting, emailing or submission of the standard withdrawal form, or upon leaving a voicemail for the trader) rather than when such communication is received by the trader. Were cancellation only to take effect on receipt by the
trader, this would significantly undermine the length of the withdrawal period with the potential for considerable consumer detriment. In addition, it is also far easier to prove ‘sending’ than ‘receipt’, so it is far more appropriate and logical that this should form the basis of the rule.

3.21. As DBERR is aware, this is the position under both the current UK rules on distance and doorstep selling, and so any change would need to be supported by unequivocal evidence that no consumer detriment would result.

**Effects of withdrawal**

3.22. The draft directive should include an express statement that the effect of a valid withdrawal by the consumer should be that the contract is treated as if it has never been made, except where the performance of a services contract begins before the end of the withdrawal period with the consumer’s prior express written consent (see further, below) when the effect is to terminate the obligations of the parties.

**Obligations on the trader and the consumer in the case of withdrawal**

3.23. Which? believes that the obligations on both the consumer and trader in the case of withdrawal should be fair and reasonable, taking into account the different positions of the parties.

**Returning cancelled goods**

3.24. It is right that the consumer should be under an obligation to return the unwanted goods, though we question whether it is always appropriate for the cost of the return to be borne by the consumer. This is particularly the case with off-premises contracts where the return will often be the result of the consumer having been pressurised into the contract. In such circumstances, we believe the cost of the return should be borne by the trader who has acted improperly. Indeed, this is the position under Doorstep Selling Regulations, so any departure from this would need to be supported by appropriate evidence.

3.25. For simplicity, we believe it should be the person bearing the cost of returning cancelled goods should be the same whether the contract is concluded off-premises or at a distance. Given the above, it follows that our preferred position would be that the trader bears this cost. Such a position would deliver at least 3 additional benefits:
- it would address the risk of systemic failures to provide the consumer with relevant information about the product;
- it would enable consumers to purchase large, heavy and/or bulky items online. If the consumer had to bear the return costs, this would often be prohibitive;
- it would support the stated objective of increasing cross border trade - consumers will be deterred from shopping cross border if they have to bear the, potentially significant, costs of returning goods across Europe.

3.26. Consumers should not have to bear the costs of returning substituted goods (whether such substitution takes place with or without the prior consent of the consumer), and whatever the general position, Which? believes this point should be clarified in the directive (as is currently the case in the UK rules). Where substitution has taken place, the consumer should be afforded the opportunity to check the goods and should not be penalised for doing so.

Refunding the consumer

3.27. Which? disagrees with the proposal that traders will be able to withhold part of the purchase price to compensate them for the diminished value of the returned goods. We believe such a provision is likely to lead to a large number of disputes between traders and consumers. There are a number of reasons for this:

- it will be difficult to
  - quantity any actual reduction in value;
  - distinguish between any reduction in value resulting from the consumer’s handling of the goods, and damage occurring in transit;
  - distinguish between damage that happened en route to the consumer and damage that happened on the return to the trader
- this proposal is inconsistent with the passing of risk in the goods as anticipated under the draft directive;
- the phrase “resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods” is vague and open to wide ranging interpretation. For example, testing the product will almost always result in damaging the packaging, but would the above phrase mean that the consumer should not damage the packaging to much? If so, what is too much?
- the consumer will be in no real position to dispute an alleged reduction in value, save for seeking an independent report. Not only would the consumer need to bear the cost of obtaining such a report, it would not be
practicable for him to do so because he would no longer be in possession of the relevant goods;
- there is a risk traders would adopt a ‘standard’ (and possibly excessive) price reduction which would not be appropriate/fair in all cases.

3.28. As a result, we believe such a rule would, we think, have a significant deterrent effect on online trade, particularly if the consumer also has to bear the cost of returning unwanted goods.

3.29. Accordingly, if the proposal is implemented, Which? believes this would represent a significant step back for consumers in the UK, and lead to significant consumer detriment. Which? is not aware of any evidence to suggest the current regime represents a particular burden to business, and accordingly can see no reasonable basis on which to move from the current settled position.

3.30. In addition to the obligation to make a full refund, the trader should also be required to refund the consumer as soon as possible, with a longstop date of 30 days from the date of cancellation. While 30 days may be appropriate in some circumstances, in many a quicker refund would be more appropriate, particularly given the consumer is required to return the goods in a much shorter timeframe.

3.31. We do not see any reason to depart from the current UK position regarding whether the trader may withhold payment of the refund until the goods have been received or until proof of posting has been provided. In the case of off-premises contracts, the draft proposals represent the polar opposite to the current position under UK law which was implemented, we understand, to support the consumer against the unscrupulous trader who had pressured the consumer into the contract. Accordingly, we believe the draft proposals risk significant detriment to consumers in such circumstances, and accordingly, we do not support the proposed change.

Cancellation of services contracts

3.32. Which? believes that consumers should be able to request that services start before the end of the cancellation period should they so choose. Accordingly, the directive should not deter traders from early performance, and Which? believes that a provision that permits a consumer to cancel without bearing any cost would provide such a deterrent.

3.33. Which? believes that a fairer and better position would be one where:

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5 This is currently the position in the UK under the Distance Selling Regulations.
- consumers may request early performance of a contract;
- consumers may cancel the contract during the withdrawal period;
- in the event of such a cancellation, the consumer bears the costs incurred up to the point of cancellation (often pro-rata).

3.34. A key issue is to ensure that early performance of the contract only takes place with the express consent or at the express request of the consumer. At a minimum it should be a request made in writing, but Which? believes the directive should go further than this. The consumer should have to take a positive action to request early performance e.g. by writing on the contract a preferred start date - it should not be sufficient for consent to be assumed by a failure of the consumer to “opt-out” of an immediate start. It should also be incumbent on the trader to inform the consumer of the consequences of requesting early performance - and the directive should reflect this accordingly.

3.35. Which? agrees that there should not be a right to cancel where services have been provided immediately in order to deal with emergency situations, and we agree that a distinction needs to be made between those services actually required, and those which are not needed to address the emergency. To this end, we wonder whether a definition of ‘emergency’ would be a useful addition to the drafting.

3.36. Which? believes that a failure to obtain the proper consent before early performance of the contract would be a serious breach of the consumer’s rights, and accordingly believes that in such circumstances, the ability for the consumer to cancel at no cost is a reasonable remedy.

Exceptions to the right to withdraw

3.37. Our key question in this regard is the basis for the continued exemption from the right to cancel for “distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services”.

3.38. Which? fully understands that there will be circumstances in which it would be unreasonable for such contracts to be cancelled without any cost to the consumer (e.g. because the service has already been provided or it is about to be provided and it is not possible for the capacity to be resold). However, there will equally be a large number of cases where the trader will not suffer any loss as a result of the cancellation by consumer (e.g. where travel services are booked 12 months in advance, cancellation within 14 days would give the trader ample time to re-sell the travel services).
3.39. From the perspective of the trader, there seems to us to be little difference between the cancellation of such services and the return of unwanted goods. Indeed, in many situations it may be easier for the trader to resell the services rather than the unwanted goods (e.g. because the returned goods may have damaged packaging). In contrast, from the consumer’s perspective the rationale for having the cancellation period would be the same.

3.40. Which? Legal Service has received a large number of calls from consumers wishing to cancel travel services etc. booked far in advance for quite legitimate reasons. For example, due to illness or accident, change of travel plans, redundancy - there is clearly the potential for further consumer detriment to arise if the blanket exemption remains unchanged.

3.41. In addition, Which? Legal Service frequently sees companies seeking to rely on the blanket exemption to prevent consumers making changes to an existing booking e.g. to correct misspellings of passenger names. The companies will often refuse to amend the booking on the basis that the change represents a cancellation and ‘re-booking’ whereas the reality is just a simple amendment. In our experience, this is a particular issue with airlines.

3.42. Accordingly, Which? suggests DBERR should seek clarification from the European Commission for the rationale behind this section of its proposal and should seek a more reasonable and balanced approach to cancellation periods for such contracts.

3.43. Which? agrees that rental and works contracts should be subject to the provisions on distance and off-premises contracts as such contracts are frequently concluded through such channels, and because the value of such contracts are often significant. Further, it is our experience that a lot of the consumer detriment arising from off-premises contracts relate to “works” contracts, so to exclude them from the protections provided by the sections on off-premises and distance contracts could lead to significant consumer detriment.

3.44. Which? agrees with DBERR that clarification should be obtained as to the meaning of “works”, for the reasons given in paragraphs 116-119.
Chapter 4: Other Consumer Rights Specific to Sales Contracts (Questions 43-56)

Summary of response on Chapter 4

> Which? strongly disagrees with the draft proposals on legal remedies.
> The right to reject should be retained - its removal would cause significant consumer detriment.
> The seller’s liability should not be capped at 2 years - instead the current UK position should be retained.
> The consumer and not the trader should have the free choice between each of the 3 potential remedies of refund, repair or replacement.
> Cancellation rights under distance and off-premises contracts should not be viewed as a substitute for the right to reject.
> The full range of legal remedies should be available, even where the non-conformity is minor.
> The same legal remedies should be available irrespective of the precise nature in which the goods were supplied and/or financed.
> The common law right to damages should be retained.
> The scope of Chapter 4 should, in principle, be extended to cover all consumer purchases of goods and services.
> Consumer education: more needs to be done to ensure consumers understand their rights, and we suggest an obligation on traders to provide a summary of key consumer rights at the point of sale would be useful.

Scope of Chapter 4

4.1. Which? has three main questions regarding the scope of Chapter 4:
   - the rationale for not including digital goods and services;
   - the rationale for excluding spare parts used by traders to repair faulty goods;
   - the rationale for excluding the provision of services.

4.2. Which? believes the default position should be that consumers have a full range of remedies available to them in relation to any purchase of goods or services that do not conform to contract. In particular, Which? believes that serious consideration should be given to including the provision of services within the scope of Chapter 4, as well as digital goods and services. Not only does significant
detriment arise from the provision of services that do not conform to contract\textsuperscript{6}, but such an approach would also ensure disputes over whether the non-conformity relates to a ‘good’ or a ‘service’ are avoided—a particular issue with the increasing prevalence of bundled goods and services contracts. It may also be of particular relevance in the context of digital goods and services where difficult legal questions arise in respect of whether certain products are goods or services.

4.3. In addition, it is difficult to see how the European Commission can achieve its objectives if the scope of Chapter 4 is limited to goods only. Digital goods and services appear to be one of the fastest growing sectors and it is arguable that they are some of the easiest—and possibly the most prolific—products to be traded cross border. Furthermore, if achieving consumer confidence to shop cross border is a key aim, then rules that vary depending on exactly what is bought and/or how it is brought will cause unnecessary confusion and will likely impact on consumer confidence.

4.4. In addition, with respect to spare parts, Which? is concerned that the current approach adopted by the European Commission provides an incentive for traders to use spare parts that are not of satisfactory quality. Not only would such a scenario lead to direct consumer detriment, but it would also cause more indirect detriment due to sustainability issues and increased waste production.

Delivery and passing of risk

4.5. Which? welcomes the proposal to clarify what is meant by a “reasonable time for delivery”. Which? also welcomes the proposal to introduce clear penalties for traders who miss the agreed delivery times, and agrees with DBERR that clarification should be sought as to whether the trader is still under an obligation to deliver the goods when he has missed the original delivery deadline. However, Which? questions whether it would also be appropriate to incorporate provisions into Article 22 that provide for the compensation of consumers who have been inconvenienced by a missed delivery e.g. where the consumer has taken a period of time off work.

4.6. Which? would support a proposal that sees an obligation to refund the purchase cost as well as to deliver the contract goods when a delivery time is missed, although such a regime does beg the question whether in practice there is

\textsuperscript{6} See, for example, the recent OFT report “Consumer Detriment: assessing the frequency and impact of consumer problems with goods and services” (OFT992, April 2008).
any incentive for the trader to deliver the goods after a full refund has been provided to the consumer.

4.7. If the expectation of the European Commission is that the contract would be cancelled automatically on a late delivery, Which? questions whether this would be the appropriate remedy. In that case, we would prefer the position to be that the contract is cancellable at the election of the consumer i.e. he can decide whether he would like the goods delivered late, or whether he would rather have his money back. We suggest this because of the concern that an automatic right to a refund could see traders relying on this provision in circumstances where they no longer wish to supply the contract goods e.g. because they have run out of stock, or the trader realises they can get a better price elsewhere.

4.8. In terms of defining a reasonable delivery period, Which? would prefer an obligation on a trader to deliver as soon as possible and in any event within 30 days. We do recognise that in some circumstances, it may be necessary for a longer delivery period and consumers should be able to agree to this where desired. However, such agreement must be properly informed and require a positive action by the consumer - simply failing to un-tick a box should not be sufficient. Which? is concerned that without a primary obligation to deliver as soon as possible, there would be a general trend towards traders utilising a standard delivery time of 30 days, whereas in practice now, many traders offer much shorter delivery times.

4.9. In terms of the passing of risk, Which? believes the position should be that the trader bears the risk until the goods have been delivered to the consumer i.e. the consumer has actual possession of the goods. It is unreasonable to expect the consumer to bear the risk prior to actual possession because the consumer has no control over how the goods are packaged or delivered. One possible exception might be where the consumer has specified delivery instructions in the event the consumer was not at home and the trader has followed those instructions. However, the consumer should not bear the risk where the trader (or a courier company on behalf of the trader) has left the goods, say, on the doorstep or with a neighbour at its own volition.

4.10. Which? does not think it is helpful to introduce the concept of material possession. Not only is it unclear what this actually means, but it is also unclear what benefit it brings to the drafting. There is already significant uncertainty with the existing directives that the proposals should be seeking to clarify - introducing new terms, especially where there is little obvious point in doing so, seems inconsistent. At the very least, therefore, material possession should be properly
defined, although, as noted in the preceding paragraph, Which? believes it would be preferable to talk in terms of actual possession.

Definition of conformity

4.11. Which? welcomes the clarification introduced by Article 24(5) in respect of faulty installations.

4.12. However, Which? believes Article 24(2)(d) should refer to “satisfactory quality”, rather than being of a quality “normal” of similar goods. The difference is slight, but the draft wording does leave a potentially significant gap i.e. where all products sold on the market are not of satisfactory quality. Consumers should not be left without a remedy where the purchased good is not of satisfactory quality simply because there is no better product available.

4.13. Which? also considers the definition of conformity would benefit from Article 24 (2) being drafted in the negative i.e. “delivered goods shall not be considered in conformity with the contract unless they satisfy each of the following conditions”.

Remedies for lack of conformity

4.14. The proposed remedies for non-conformity represent a key area of concern for Which? with the draft proposals. Our concerns can be summarised as follows:

- Do not provide for an initial right to a full refund as is currently provided for under UK legislation;
- Limit the liability of the supplier to 2 years, compared to the current 6 years (or 5 years in Scotland) under UK legislation;
- Provide the supplier with the choice of remedies, rather than the consumer, reversing the position under UK law (as well as in many other Member States);
- Limit the remedies available for “minor” defects.

4.15. For these reasons, Which? believes that the proposals for remedies for non-conformity are not acceptable because they would significantly reduce existing consumer rights and as a result would cause considerable consumer detriment.
4.16. The following sections set out Which?’s views on both the draft proposals on legal remedies for non-conformity and the Law Commission study on Consumer Remedies for Faulty Goods.

The Right to Reject is important and should be retained

4.17. The right to reject a faulty product is a fundamental consumer right within the UK, as recognised by the Law Commission. The Law Commission recommend that it should be retained and Which? supports this.

4.18. It is important to note that during the preparation of its report, the Law Commission did not receive any real complaints about this right from business, therefore suggesting little cost to business is associated with the right to reject. Also, from a European perspective, it is important to note that the right to reject in one form or another is currently recognised as a “first tier” remedy in a number of European countries.

4.19. Indeed, the right to reject delivers a large number of benefits to both consumers and traders. For example:

- It puts consumers in a stronger bargaining position and enables consumers to resolve complaints to their satisfaction more quickly and easily
  - It gives consumers access to the full range of potential remedies (refund, repair or replacement): given a refund will often be the most expensive, the right will encourage traders to meet a request for replacement even though this may be more expensive and/or inconvenient to them than a repair remedy.
- It prevents consumers becoming stuck in a cycle of failed repairs
  - This is a particular concern of consumers, especially where the fault is perceived to be a design fault.
- Repair or replacement is not always an adequate remedy
  - While a repair may restore the product to working order, it may not restore the full product value e.g. if a new car with scratches in the paintwork is re-sprayed, the car will be worth less due to its “re-spray history”.
  - A fault may have caused the consumer to have lost faith in the product and/or manufacturer such that only a refund is an adequate remedy e.g. where a fault renders a product dangerous, such as a laptop that is liable to catch fire, or a new car with faulty brakes.

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7 For example, in Ireland, France, Greece, Latvia, Lithuania, Portugal and Slovenia.
- It drives up manufacturing standards
  - The cost to business associated with a significant number of returned goods will encourage businesses to try and prevent the situation arising.
- It encourages consumers to try new or unknown brands and/or retailers, because they know that should the product fall short of the expected quality, they will be entitled to a full refund.

4.20. Which? agrees with the Law Commission that the right to reject must be enshrined in law, rather than being left to the voluntary policies of individual retailers.

The interaction between the different remedies (right to reject, repair and replacement)

4.21. We have some sympathy with the observation that the current regime could be simplified, and agree that given the complexities in how the various remedies sit together, consumers do not fully understand their rights. Which? therefore supports an approach that seeks to simplify the law and make it more easily understood by consumers.

4.22. While Which? recognises some of the advantages of the regime proposed by the Law Commission, Which? believes the proposals could and should have gone further.

4.23. For the reasons more fully discussed below, Which? believes that where a consumer has purchased a faulty good, he should have the right to choose between the three remedies of refund, repair or replacement, with the right to a full refund also underpinning any failed attempts to repair or replace. The choice of remedy should rest with the consumer as they are the innocent party, and not with the trader as the draft directive suggests.

4.24. Which? believes that the right to choose between these three remedies should continue subject only to the current rules on limitation (i.e. for 6 years in England and Wales, and 5 years in Scotland), and not for the reduced period of 2 years as the draft proposal suggests.

4.25. Which?’s preferred approach can be summarised as follows:
4.26. Which? believes the right to reject should continue for as long as the consumer has a legal remedy available (i.e. 6 years in England & Wales, 5 years in Scotland).

4.27. Such a regime would, we believe, provide the following benefits over the suggestion made by the Law Commission:

- It would be simpler for consumers to understand;
- It would remove the difficult questions regarding the circumstances in which it is reasonable for the 30 day period proposed by the Law
Commission to be extended - there seems little sense in replacing one uncertainty with another;
- It would create a regime that is flexible to the individual needs of any one particular case (e.g. delays caused by lack of information, trying to repair the fault etc.);
- It would bring into line the regimes for the simple sale of goods as well as the sale of goods under a ‘goods and services contract’ - Which? does not see any reasonable basis for distinguishing between these two contract types in terms of remedies, and believes the different treatment simply leads to unnecessary confusion;
- It would ensure consumers always obtain a satisfactory remedy in circumstances where, for example, the consumer has lost faith in the product and/or manufacturer or where the fault makes the product dangerous;
- It would help ensure consumers get their choice of a repair or replacement remedy in most circumstances;
- It would remove the anomalous results that arise from the imposition of an arbitrary timeframe e.g. that a fault identified one day could entitle a consumer to a full refund, whereas had that same fault developed the following day, the consumer would only have been entitled to a remedy of repair or replacement;
- It would prevent consumers becoming embroiled in a failed cycle of repairs;
- It would provide a greater incentive to manufacturers and retailers to improve standards, not only with respect to the goods themselves, but also with respect to the quality of any repair services offered;
- It would provide a greater incentive for consumers to try new/unknown retailers or manufacturers.

4.28. Which? recognises that such a regime could lead to anomalous results, but that will be true for any implemented regime, no matter how carefully thought through. However, the benefit of our proposal is that the risk of the any anomalous results rests with the more culpable party rather than the innocent consumer (as is currently the case).

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8 Feedback received by Which? Legal Service (W?LS) Lawyers suggests that consumers experience difficulty in asserting the right to replacement goods. The trader will simply state the cost of replacing is disproportionate to the cost of repair; the consumer has no way of disproving this assertion. In practice advice provided by W?LS lawyers is that while a consumer can specify the remedy they would prefer, the reality is that the trader will choose which of repair or replacement they will get.
4.29. However, we do have some sympathy with the comment that extending the right to reject could ‘squeeze’ small retailers as they will be less able to pass this risk onto the manufacturer. We wonder whether one way around this issue would be to ensure there is also direct liability between the manufacturer and the consumer (as exists in one form or another in various countries within the EU\(^9\)). Direct liability is not an alien concept to manufacturers as most offer guarantees lasting for a number of years (and in some instances, for the lifespan of the product).

4.30. Such a direct right should serve to ensure the equivalence of the return rights between the retailer and the consumer, on the one hand, and the retailer and manufacturer on the other, although we think the consumer would need to have the free choice between pursuing the retailer or manufacturer for this to be fully effective. A situation comparable that created by the rights granted under section 75 Consumer Credit Act could be useful here.

4.31. Introducing a direct right of liability between the manufacturer and the consumer would have a number of additional benefits, for example:

- It would ensure that consumers would not be left without a remedy in the event the retailer went out of business;
- It would encourage consumers to use new or unknown retailers (particularly cross border) where the manufacturer is well renowned;
- It would encourage cross border purchases where the manufacturer is based in certain countries e.g. for the UK, this might include English-speaking countries; and
- It would create an incentive for manufacturers to ensure products do not break/wear out prematurely.

4.32. We understand the arguments against increasing the period during which the right to reject can be invoked are:

- It would increase the costs to business;
- It is open to abuse by consumers because they would be able to deliberately break unwanted items;
- Consumers currently understand they only have a right to a refund for a short period.

\(^9\) For example, Belgium, Finland, France, Latvia, Luxembourg, Portugal, Spain and Sweden. In Hungary and Slovenia there are proposals to introduce such a right.
4.33. We are not persuaded by these. As to costs, we strongly doubt whether in practice, these would be as high as business would allege, because:

- The incremental cost of refund over a repair or replacement remedy will not be significant in many cases, particularly if the good can be sold separately at a reduced price (whether after repair, or as a damaged item);
- Many consumers will, after having made a considered choice for the initial purchase, choose a replacement good as this will often be more convenient (and may also choose repair services if steps are taken by retailers to ensure inconvenience is kept to a minimum);
- The burden of proof being on the consumer after the initial 6 months will deter false claims;
- In any events, goods should be durable, so if the manufacturing process is being undertaken properly, the number of problems should be limited.

4.34. With respect to the potential for deliberate abuse, Which? believes any such abuse would be the exception rather than the rule. Second, in virtually all cases it should be relatively easy for the trader to demonstrate that the product had been deliberately damaged.

4.35. With regard to consumer expectations, our experience conflicts with that of the Law Commission. It may well be that consumers have 30 days in mind for the return of unwanted goods as this is often the time period offered by many voluntary returns policies of retailers, but we doubt whether the same expectation applies to faulty goods. It is our experience that consumers do not know (nor consider to be reasonable) that where, for example, a 6 month old TV breaks, the right to a refund was probably lost 5 months previously.

The cancellation right is not a substitute for the right to reject

4.36. There is some suggestion that the consumer’s right to cancel a distance or off-premises contract could be seen as a substitute for the right to reject. Which? strongly disagrees. The two rights serve completely different functions\(^\text{10}\) and should not be confused. In addition, cancellation rights do not apply to all consumer purchases.

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\(^{10}\) for example, cancellation rights exist to address the issue of pressure selling and to give consumers undertaking distance purchases the ability to sample the acquired goods as they would be able to do in a bricks and mortar shop.
4.37. Such an approach also assumes that faults are usually identifiable within the first week or so of purchase. As explained below, this is simply incorrect.

The proposed 2 year cut off for liability

4.38. Which? agrees with the Law Commission that the current 6 year limitation period (or 5 in Scotland) for bringing a claim for a faulty good should be retained. As the law Commission notes, such a reduction would mean consumers get less protection than businesses buying the same products - a perverse result for what would be the implementation of a consumer protection regime. Also, given the rights provided under section 75 Consumer Credit Act, a 2 year cut-off could also create an incentive for consumers to purchase more goods on credit card as the period for protection would be longer (up to 6 years) - this could lead to a greater risk of over-indebtedness.

4.39. When the 6 year limitation period was implemented, there was considerable debate about the appropriate balance between creating legal certainty for potential defendants and ensuring the rights of potential claimants are not unduly limited. 6 years was seen as an appropriate compromise position for all breach of contract claims, and we are not aware of any evidence to suggest the position should be different for consumer contracts.

4.40. However, we disagree with the Law Commission’s statement (at paragraph 8.166) that it is difficult to imagine faults will arise after 2 years for many goods (with the implication that the practical effect of the proposed change would be minimal). While this is clearly the case for some types of goods (e.g. clothes and shoes), for products with an expected lifespan of significantly longer that 2 years (which would, in our opinion, include most consumer electronic goods), we consider it is reasonably likely that faults may arise. It is also important to note that such goods are also those on which consumers incur the most expenditure (both individually and collectively). Indeed, Which? Legal Services see a large number of cases where faults arise more than 2 years after purchase. For example, recently we have seen cases where:

<table>
<thead>
<tr>
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</tr>
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<tbody>
<tr>
<td>Desktop PC</td>
<td>2 years 3 months</td>
</tr>
<tr>
<td>Freezer</td>
<td>2 years 6 months</td>
</tr>
<tr>
<td>Laptop</td>
<td>2 years 6 months</td>
</tr>
<tr>
<td>Desktop PC</td>
<td>2 years 6 months</td>
</tr>
<tr>
<td>Fridge Freezer</td>
<td>2 years 6 months</td>
</tr>
<tr>
<td>Diamond ring</td>
<td>2 years 8 months</td>
</tr>
<tr>
<td>Product</td>
<td>Warranty</td>
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</tr>
<tr>
<td>Oven</td>
<td>3 years</td>
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<tr>
<td>Boiler</td>
<td>3 years</td>
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<tr>
<td>Oven</td>
<td>3 years</td>
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<tr>
<td>Dishwasher</td>
<td>3 years</td>
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<tr>
<td>Television</td>
<td>4 years</td>
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<tr>
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<td>4 years</td>
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<td>Car</td>
<td>4 years</td>
</tr>
<tr>
<td>Car</td>
<td>4 years 6 months</td>
</tr>
</tbody>
</table>

4.41. The fact that goods can be expected to go wrong after 2 years is also clearly evidenced by the fact that many manufacturers offer guarantees that exceed 2 years. Such guarantees are particularly prevalent in the automotive sector, conservatories as well as with products such as replacement windows and doors. Which? also notes the increasing prevalence of “lifetime guarantees” which again suggests latent faults can develop with their products.

4.42. The proposal for a 2 year cut-off for liability also raises serious environmental and sustainability questions. Which? questions whether the proposal suggests that consumers should not expect the goods they purchase to last longer than 2 years without developing faults. If not the intention, then we believe the proposal, if adopted, would lead to manufacturers producing poor quality products with reduced life-spans - indeed there would be little incentive to manufacture goods that significantly outlast the 2-year liability period. Such an outcome will, we believe, have a significant negative impact on the environment by encouraging higher levels of waste.

4.43. Finally, Which? notes that the proposed 2 year cut-off also appears to be inconsistent with the provisions in Article 24 (conformity). One of the factors used to determine whether the good is in conformity with the contract is whether it “shows the quality and performance which are normal in goods of the same type”. Such an analysis necessarily involves an assessment of the durability of the product which, as is indicated by the above, must take into account that some products are expected to last longer than 2 years.

**The 30 day ‘rejection’ period as proposed by the Law Commission**

4.44. Which? doesn’t support the Law Commission proposal for the introduction of a 30 day period during which the right to reject could be exercised. However, were such a period to be introduced, Which? comments as follows.
4.45. Which? agrees that express provision needs to be made for circumstances in which goods are not expected to last the full period in which the right to reject could be invoked (e.g. perishable goods). Which? also agrees that there is a benefit to consumers in clarifying the time period as consumers are not currently aware what is meant by “a reasonable time”.

4.46. However, Which? does have concerns about the 30 day period proposed by the Law Commission, for 2 main reasons: (i) the basis upon which the 30 day period was arrived at (see above); and (ii) that having such a fixed period could be too restrictive.

4.47. We are concerned that the 30 day proposal by the Law Commission would be a backwards step in as far as it would, in effect, entrench the position as set out in the case of Bernstein. The Law Commission itself notes in Chapter 3 that Bernstein is probably old law, so to propose a return to this position is inconsistent.

4.48. As the Law Commission notes, were a 30 day period to be the presumed standard, then there would be circumstances where a longer period would be necessary. It proposes some such circumstances, but Which? believes there are a number of just cases, for example, where:

- The consumer is unable to check the goods within 30 days due to extenuating /unexpected circumstances;
- The consumer is unable to check the goods within 30 days for reasons explained to the retailer at the time of purchase;
- It is unreasonable for the consumer to have checked the product properly within 30 days e.g. because the product is too complex to test properly in this time;
- It is a seasonable product bought out of season e.g. lawnmower bought in December;

4.49. Incorporating the necessary flexibility would risk undermining the clarity sought by introducing a “standard” returns period. It would also replace existing uncertainties with new, as yet un-litigated, uncertainties and as such Which? questions the merits in doing so. In addition, there is also the risk that in introducing the presumption that a 30 day period applies, this is the period that will be applied by retailers in all circumstances, such that consumers will lose out on their rights - consumers are much more likely to remember “30 days” than “30 days in most circumstances” and then also remember what those circumstances are.

When a consumer is entitled to move to a second tier remedy
4.50. Which? agrees that where a consumer elects a repair or a replacement remedy, they should be entitled to move to a refund where the repair/replacement:

- is refused by the trader;
- cannot be effected within a reasonable time;
- cannot be effected without causing significant inconvenience to the consumer;
- does not solve the issue and/or another fault develops with the product.

4.51. Which? agrees that further guidance on what represents a “significant inconvenience” and what is a “reasonable time” would be beneficial. For example, it should be possible to set out a series of factors to be considered when establishing a reasonable time for effecting a repair such as the purpose for which the good was bought; the frequency of use; the age of those using or relying on the product in question; any relevant medical considerations; and so on. Similar factors could also be used for determining whether the remedy would cause a significant inconvenience. Such guidance should cover, in particular, the cumulative impact of sequential repairs and/or replacement goods.

4.52. Which? believes such factors should be set out at law so that they have full force and effect.

4.53. In terms of when a series of faults (whether these are the same or not) become an inconvenience, Which? would propose the implementation of some simple rules that can be easily understood and recalled by consumers. In addition, Which? does not understand the basis for proposing different rules depending on whether a repair or replacement remedy is first elected by the consumer - to our mind, the distinction being drawn is false: instead the position should be the same in either case as this is what consumers would expect.

4.54. As such, Which? suggests that the consumer should be entitled to a full refund (should he so choose) upon the occurrence of a second fault with the product, whether this is the same or a different fault, and whether the second fault occurred on a repaired or a replacement product. The benefits of such a regime would include simplicity; preventing of cycles of failed repairs; and preventing unnecessary disputes about whether the second fault is the same or different. In this regard, Which? notes that the draft EU proposal that the second tier remedies be available where the same fault reoccurs is not workable in practice. Which? believes that traders will usually try and argue that any subsequent faults are
“different” to avoid giving a full refund, something that will often be hard for the consumer to disprove (especially with electronic and/or complex items).

4.55. Which? also agrees with the Law Commission that there may also be other situations in which the consumer would be justified in moving to the second tier remedy, and would support a proposal to include such a right where, for example, the trader has acted unreasonably, where it is essential the good is available to use immediately, and where the fault renders the good dangerous.

Replacement goods

4.56. Where traders do provide replacement goods, a further potential issue arises which should be clarified if changes are being made to the legal remedies regime. Currently it is unclear whether the replacement goods are to be brand new or of the same age as the product at the point where the non-conformity to contract is discovered. Where the particular item in question is now obsolete would it be reasonable for the consumer to ask for the product to be replaced with the current model? Traders will often resist such a request as the newer model may incorporate advances in technology and offer a higher specification that its predecessor. Clarification on this point would be beneficial.

Deductions for use

4.57. For the reasons set out in its report, Which? agrees with the Law Commission with the proposal that consumers should not be charged for the period of use up to the point at which it becomes clear the good is faulty. Which? also notes that implementation of the proposal would (i) create a more certain regime for business, as well as creating certainty for consumers; and (ii) probably represent a codification of existing best practice.

Minor faults

4.58. For the reasons set out in its report, Which? agrees with the Law Commission that consumers should be entitled to the full range of remedies, whether or not the fault could be categorised as minor.

Reverse burden of proof

4.59. Which? agrees that the reverse burden of proof is an important right for consumers because it is often the case that the retailer is better placed to prove whether or not the fault existed at the time of purchase. For this reason, there is a
good argument for extending the period during which the reverse burden applies - possibly for the full period for which consumer remedies would be available - although any such extension would need to be balanced appropriately with any extension to the right to reject. There is clearly, we believe, a stronger case for extending the reverse burden of proof where the expected life span of the product far exceeds 6 months. Perhaps a compromise position could be that the period during which the reverse burden applies is linked to the value of the product (value being a proxy for expected life span) with a longer period applying, for example, for goods with a purchase price in excess of £250?

4.60. Which? also believes that the 6 month period should restart upon a faulty good being repaired or replaced. Any other situation would not only be counter-intuitive, but would also provide a disincentive to provide repairs/replacements of a satisfactory quality.

4.61. In addition, Which? believes that further guidance should be provided to explain when a retailer has discharged its burden of proof. It is our experience that often retailers will simply try and discharge this burden by telling the consumer that their experience means they know better. We believe retailers need to go further than this, otherwise the reversed burden of proof is relatively meaningless as the consumer is often not in a position to counter argue without going to additional expense.

Should the right to reject in other supply contracts match that in simple sales contracts?

4.62. Which? would support a single remedies regime that applies to the supply of faulty goods under both “Sale of Goods contracts” and “Supply of Goods and Services contracts”. A single regime would improve clarity, improve customer confidence when they exercise their rights and will, for the reasons described above, also provide consumers with an appropriate level of protection in all circumstances (assuming the remedies are set at the right level).

4.63. There appears to be no reasonable basis on which to maintain different remedies regimes. The current position has largely arisen by circumstance, and it creates anomalous situations which cannot have been the intention at the outset. By way of illustration:

4.64. A consumer that buys an electrical appliance from a high street retailer currently has a “reasonable time” in which to reject the goods and seek reimbursement of the contract price. What is “reasonable” will depend on the facts
of the specific case but case law would suggest that this may be in the region of three to four weeks from the date the consumer takes delivery of the appliance even though the fault may not have been apparent until some time later.

4.65. If the same consumer purchases the appliance as part of a kitchen installation contract they can ask for their money back on the faulty appliance as long as they haven’t affirmed the contract. As generally a consumer only “affirms” a contract when they know of the defects in the product and by their conduct elects to go on with the contract despite them discovering the non conformity to contract; in practice the consumer may be able to reject months or even years after taking delivery of the product.

4.66. Which? does not believe it would be appropriate to adopt a single approach for both types of contracts based on the principle of acceptance. As set out above (see paragraph 4.27) there are various reasons for this, not least because this would represent a significant reduction in consumer protection for purchases under a “Supply of Goods and Services contracts”. In addition, the right to reject is a very valuable remedy in “Supply of Goods and Services contracts” because these are often for high value items, and in many cases, involve alterations to a consumer’s house - the single most important asset to most of us.

4.67. Which? strongly suggests that no firm decisions are taken with respect to the remedies regime for simple “Sale of Goods contracts” without proper consideration of the position under “Supply of Goods and Services contracts”.

4.68. Which? also believes there is merit in aligning the regime for purchases made irrespective of the way in which goods are transferred. This is because when making the purchase, the consumer will not be focusing on (and often will not be aware of) the fact that the precise way in which the goods are financed will impact their rights if the goods are faulty.

4.69. Take the example of a consumer buying a car. Having identified the make and model they wish to buy, most consumers will then focus on how the purchase is to be financed; their decision making process is driven by cost and it is unlikely that there will be much if any consideration of the nature of the finance agreement they sign. A single legal position for consumer’s that applies however the purchase is financed would therefore be beneficial. Indeed, from the consumer’s perspective, how the car is financed should not be relevant to determining the consumer’s legal position in the event the car turns out to be faulty. The impact the type of finance can have on the consumer’s legal position is illustrated below:
<table>
<thead>
<tr>
<th>Relevant legislation</th>
<th>Cash/loan/many credit agreements</th>
<th>Hire Purchase</th>
<th>Conditional Sale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claim against</td>
<td>Dealer</td>
<td>Finance company</td>
<td>Finance company</td>
</tr>
<tr>
<td>Right to reject</td>
<td>Yes, for a ‘reasonable period’ after purchase</td>
<td>Yes, for a ‘reasonable period’ after the fault develops</td>
<td>Yes, for a ‘reasonable period’ after purchase</td>
</tr>
<tr>
<td>Right to repair</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to replacement</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Rights to recession</td>
<td>Yes, with deduction for usage</td>
<td>No</td>
<td>Yes, with deduction for usage</td>
</tr>
<tr>
<td>Rights to damages</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Burden of proof</td>
<td>Month 1-6: dealer Month 7 - : consumer</td>
<td>Consumer</td>
<td>Month 1-6: dealer Month 7 - : consumer</td>
</tr>
</tbody>
</table>

Remedies for delivery of the wrong quantity

4.70. The remedies available at law in the event a consumer receives the wrong quantity of ordered goods need to provide for a practical and efficient solution. In most cases, where the wrong quantity is delivered, the outcome is likely to be one of the following:

<table>
<thead>
<tr>
<th>Customer Order</th>
<th>Goods Delivered</th>
<th>Outcome desired</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 planks of wood</td>
<td>15 planks of wood</td>
<td>Consumer retains 10 planks of wood Consumer returns 5 planks of wood at trader’s expense</td>
</tr>
<tr>
<td>10 planks of wood</td>
<td>5 planks of wood</td>
<td>Consumer retains 5 planks of wood Trader delivers 5 planks of wood within a short period at his expense</td>
</tr>
</tbody>
</table>
4.71. The available remedies should not mean that unnecessary returns and deliveries are required. So, where an over-delivery occurs, the consumer should not be required to return all the delivered goods, and then wait for the correct quantity of goods to be delivered. Similarly, an under-delivery should not mean that the consumer needs to return any goods. Either situation would lead to unnecessary cost to one party or another.

4.72. While it is true that in any given situation where the wrong quantity has been delivered the consumer and trader could agree a pragmatic situation, Which? has doubts whether this is a sensible way to proceed. As the law will provide otherwise, it is likely the standard terms and conditions of the trader will create inconsistent legal obligations. This could lead to complications that can easily be avoided.

4.73. Accordingly the remedies provided under section 30 Sale of Goods Act appear to us to be sensible, and therefore should be retained.

**Damages**

4.74. Which? agrees that damages for breach of contract should continue to be available where faulty goods have been supplied. Which? also agrees that further guidance would be useful so that consumers are more fully aware of (i) when damages might be available in addition to the standard legal remedies discussed above; and (ii) how such damages are likely to be calculated.

4.75. The right to damages has an important role in faulty goods cases, for example, because:

- It can encourage traders to remedy the faulty good more quickly and efficiently and incentivise them to cause minimal inconvenience to the consumer;
- There are some circumstances where the simple legal remedies may not be enough e.g. where the consumer is forced to remedy the problem at his own expense due to safety reasons;
- Under the current regime, it can provide a short cut to the desired remedy (it can sidestep the motions of giving the seller the chance to remedy, then rescinding the contract, giving the goods back and then receiving a refund);
- It provides a straightforward and proportionate remedy in unusual cases that are otherwise difficult to legislate for. For example, X buys a nearly
new car at a particularly good price, but this then develops a straightforward fault. If the trader refuses to repair the fault, X would be entitled to rescind the contract, but he won’t want to do this because (i) identifying the appropriate reduction to the purchase price is more complex than calculating the cost of having the fault fixed elsewhere; and (ii) given the low purchase price, X will not want to hand back the faulty car as he may not be able to match the deal elsewhere.

Consumer education

4.76. Which? agrees that consumers are not sufficiently aware of their rights. We also agree that very few consumers understand what is meant by the phrase “your statutory rights are not affected”. We very much doubt the position would be different if the signs were to read “your legal rights are not affected” as consumers just do not understand the underlying rights.

4.77. The first stage in improving consumer awareness of their rights is to ensure the law is as simple and straightforward as possible (without reducing the level of consumer protection available). However, even if the law is considerably simplified, Which? does not think it is realistic to expect that all consumers can be made aware of all their rights. This is particularly the case for vulnerable consumers. However, Which? thinks a realistic aim would be to ensure that all consumers:

(a) Know what their key rights are e.g.
   - statutory implied terms under Sale of Goods Act
   - remedies available in respect of faulty goods
   - cancellation rights

and

(b) Know where to go for further advice.

4.78. With regards to (a), Which? believes there would be merit in obliging all traders to provide their customers with a summary of their key rights at the point of sale. Such a summary would need to be short and user friendly as overloading the consumer with information would be counterproductive. As such, a common summary, and perhaps something prepared by Government could be used. In our experience, this has reasonably worked well in relation to ‘flight rights’ and also with the information requirements in relation to extended warranties\(^\text{11}\).

\(^{11}\) under the Supply of Extended Warranties on Domestic Electrical Goods Order 2005.
4.79. Additional specific comments on the draft EU proposals

> **Article 27(1):** Which? welcomes the proposal that consumers shall be entitled to have any lack of conformity repaired without incurring any cost, although Which? would welcome a statement clarifying that in this situation “cost” includes the reasonable cost of using a temporary replacement while the repair is taking place.

> **Article 28(2):** Which? does not see any reasonable basis on which the European Commission has distinguished between the goods that have been repaired and goods that have been replaced (Article 28(2)). This is an artificial distinction that at best will lead to consumer confusion, and at worst will be exploited to the detriment of consumers. From the consumer’s perspective, there is no difference: in both cases they have a faulty good. The proposed approach provides a disincentive for retailers to provide repair services to a satisfactory quality which in addition to the direct consumer detriment, is also likely to have a detrimental impact on the environment due to increased consumer waste.

> **Article 28(3):** Which? does not see there is any need to make separate provision for second hand goods. For the same reasons as above (see paragraphs 4.38-4.43), Which? does not think there should be a reduction in the period of time consumers have in which to bring a claim, even for second hand goods. While it is true that second hand goods will usually be expected to last a shorter period of time than brand new goods, this is not always the case (for example, nearly new cars) and in any event, Which? feels that any distinction is adequately provided for under the definition of “conformity” in Article 24.

> **Article 28(4)** Which? does not support the introduction of a 2 month period in which consumers must notify the trader of any faulty goods. In our view this is not necessary as it is in the consumer’s interest to bring any faults to the attention of the trader as soon as possible because the greater the delay, the harder it will be to prove the non-conformity. In addition, Which? cannot see any real benefit to business from the introduction of such an obligation, and further, is concerned that the obligation will be used by traders to deter valid claims by introducing the notion of when a reasonable consumer would have spotted the fault.

**Commercial Guarantees**

4.80. Which? believes that commercial guarantees should be transferable, particularly for goods that are typically sold second hand (e.g. cars, motorbikes) and goods that are incorporated in a building (e.g. conservatories, replacement doors and windows). This is because the guarantee relates to the good, rather than
the consumer, and as a matter of principle there appears to be no justifiable reason why a purchaser of a second hand good should not be able to rely on the promises of the original guarantee. Whether or not the good has been on-sold, the goods should be of the same satisfactory quality, and the guarantor should be willing to stand behind his guarantee. To put it another way, non-transferable guarantees implies that the quality of the goods changes upon its resale, and this does not make sense.

4.81. Similarly, Which? believes the guarantee should restart upon a repair or replacement by the guarantor during the guarantee period, and that express provision to this effect should be incorporated within the directive. To do otherwise would, in our opinion, merely incentivise guarantors to complete substandard repairs or use substandard replacements, particularly if the fault arises towards the end of the guarantee period.

4.82. Which? agrees with DBERR that the guarantee should be provided in language in which the contract was concluded.

4.83. One concern Which? does have with the proposed (and current) guarantees regime is the risk it generates for consumers to significantly reduce their legal rights ‘by accident’. Which? is frequently made aware of situations where a retailer refuses to accept his contractual liability because the product is under manufacturer’s guarantee. While in the majority of cases the practical result is the same - the fault is remedied - it can present unexpected consequences. Reliance on the guarantee will usually break the contractual relationship between the retailer and consumer, meaning the retailer will not be liable for any subsequent faults. This can be a particular problem with short guarantees, given the period of potential liability under contract law would be considerably longer. Similarly, if the consumer relies on the retailer to remedy an initial fault, this can often prevent any subsequent reliance on the guarantee (whether due to the terms of the guarantee or simply as a matter of practice because the guarantor refuses to deal with the consumer).

4.84. It should not be the case that consumers can significantly reduce their rights on the basis of a decision which will usually be made on the basis of what is most convenient at the time, particularly where this was made with the ‘guidance’ of the retailer.

4.85. Accordingly, Which? believes the draft directive provides an opportunity to take steps to reduce the potential consumer detriment that arises in such circumstances, and wonders whether introducing the concept of dual liability
between retailer and manufacturer (as discussed above - see paragraphs 4.29-4.31) may be helpful.
Chapter 5: Consumer Rights Concerning Unfair Contract Terms (Questions 57-63)

Summary of response on Chapter 5

> Which? doubts a maximum harmonisation approach is appropriate given the inherent flexibility and discretion that is afforded to (and needed by) the Member States.
> Which? is concerned that the proposals threaten:
  - The validity of existing case law on unfair terms;
  - The validity of existing decisions by regulators on unfair terms;
  - The current, successful operation of the Financial Ombudsman Service.
  - Valuable existing rules and regulations, such as the unfair relationship test under the Consumer Credit Act.

General Comments

5.1. Which? welcomes:
  - the clarifications introduced in Articles 30 and 31;
  - the proposal that where the trader has not obtained the consumer’s express consent for any additional charges, but has inferred it by using a default tick-box that the consumer has failed to un-tick, the consumer shall be entitled to have those additional charges repaid;
  - the proposal that only the remuneration for the trader’s main contractual obligation be exempt from an assessment for fairness (Art 32(3));
  - the introduction of a black list of terms considered unfair in all circumstances.

5.2. However, we also have some concerns with the draft directive in so far as it applies to unfair terms.

5.3. As noted at the outset, we question whether a maximum harmonisation approach is consistent with the provisions on unfair terms, given the inherent flexibility and discretion that is afforded to (and needed by) the Member States. For example:
  - the general rule in Article 32(1);
  - terms reflecting mandatory statutory or regulatory provisions are exempted from a fairness assessment: such provisions will vary between Member States.
5.4. In addition, the maximum harmonisation approach raises some additional potential problems. For example, in common law countries (such as the UK), there is considerable case law that sets out examples of unfair (and fair) terms. Similarly, sectoral regulators have powers to enforce the rules on unfair contract terms and have done so on numerous occasions to date. Where such cases relate to a category of term that does not appear in the black or grey list, to what extent are such cases ‘good law’ and still valid? Would such terms be presumed fair unless and until they are added to the black/grey list through the comitology procedure? The current OFT case on bank charges is a prime example of a case that deals with a non-black/grey listed term whose validity could be called into question. Clarity on these issues is essential given the principles-based regulatory framework currently employed.

5.5. There are also important questions regarding the potential impact of the maximum harmonisation approach on existing rules and regulations. A key example is the unfair relationship test under the Consumer Credit Act - arguably this is a broader test than the legal test for unfair terms, so it is not clear whether the unfair relationship provisions could continue under the proposals. Accordingly, Which? urges DBERR to clarify the precise impact of the proposals on existing rules and regulations before any final decision is taken with regard to supporting the draft proposals.

5.6. Which? is also very concerned about the potential impact a maximum harmonisation approach would have on the Financial Ombudsman Service. FOS currently has the statutory duty to decide cases before it by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances, rather than being bound by legal precedent. This regime works very well for consumers and the flexibility of its decisional powers enables FOS to deal effectively and efficiently with issues that come before it. It seems to us possible that FOS’ statutory powers would be inconsistent with a maximum harmonisation approach to unfair contract terms, and accordingly this would threaten the benefits the current regime brings. FOS deals with a large number of cases founded on unfair contract terms and accordingly, such a change threatens to cause considerable consumer detriment.

5.7. Which? believes that DBERR should pay very close attention to the potential impact of the current proposals on FOS.

5.8. Some additional specific comments on the draft proposals:

- Article 31 should be clarified so that it is clear the provisions apply to both written and oral terms;
- We question whether it would be appropriate to provide for mutual recognition of decided case law on unfair terms between Member States;
- We suggest DBERR seek clarification on why paragraph 1(c) of Annex 3 is not included within the Annex 2 black list;
- Paragraph 2 of Annex 3 should be amended such that the supplier is only able to terminate the contract where an objectively justifiable reason has been provided to the consumer. As currently drafted, this exemption is significantly wider than the current position under UK law.

Chapter 6: General Provisions (Questions 64-65)

6.1 Which? believes that the directive should provide a very clear statement that it is not possible for consumers to contract out of the provisions of this directive, and does not believe the reference in Article 43 to consumers not being able to “waive” their rights is sufficient.

6.2. Which? also suggests DBERR clarifies with the European Commission whether Article 45 prevents the consumer from retaining an unsolicited product (as they are currently entitled to do under section 24 of the Distance Selling Regulations).

Which? (2 February 2009)