

Summary of Consumer Contracts Roundtable, 2 August 2010

Event Background

1.1 On the 2 August 2010, the Office of Fair Trading (OFT) hosted a roundtable discussion on the Consumer Contracts Market Study launched in January 2010. The purpose of the roundtable was to discuss the issues being considered in the market study. This document summarises the key points of the discussion. The comments and opinions represent the views of the participants and are not necessarily the views of the OFT.

OFT Presentation

1.2 The discussion was kicked off by the OFT presenting the rationale for the study and its emerging thinking. The OFT's presentation can be found on the website. The key points were:

- OFT wants to introduce an effects based approach to consumer policy. This had motivated the study.
- The first step towards this was to understand more about consumers' problems with contracts, firms' problems with it, and how the market might solve it. This was being done through consumer research, reviewing and consolidating past OFT work, external discussions, behavioural economics, behavioural psychology and economic theory.
- The second step was to get a methodology for assessing harm – that is, a series of questions a case officer could ask of an issue that would help to consider the levels of harm.
- The study aimed to draw out generic lessons but also to take a closer look at a five particular types of contracts: rentals and licenses, subscriptions and memberships, necessities and utilities, contracts for managing risk and contracts for outcomes.
- For each of these studies, we would consider common characteristics, examples of contracts, applicable law, prior work in the area and a case study bringing all of these aspects

together. Examples of possible issues in each of these areas were then considered in further detail.

Summary of responses

- 1.3 A number of attendees responded to the OFT's study.
- 1.4 **Gavin Ellison of YouGov** summarised the initial findings of the consumer research. The slides are available on the consumer contract web pages.
- 1.5 **Emma Peplow and Cosmo Gibson of the FSA** explained that there had been lots of research, across a range of markets, on disclosure. This research showed you can only go so far explaining risks to consumers; they can only take so much in. FSA is trying to test when disclosure should come, whether it's more effective if it is oral disclosure upfront or made at the point of entering the contract. The latter may come too late for consumers to make comparisons between contracts. Also, the FSA is currently unable to assess effectiveness of written versus oral disclosure as early indication from post implementation reviews is that a number of firms have failed to provide the required disclosure. This raises the question, where consumers don't understand product features, whether FSA should intervene in product design, that is, before problems arise. Can firms show that features have been designed with consumers in mind?
- 1.6 The issue of product design could be applied more widely than non-financial products. It's a legal rather than typological issue. Product design leads to consumer harm when there are information asymmetries that can not be reduced enough by disclosure at point of sale, for example gym memberships.
- 1.7 Bundled insurance is a classic problem: consumers don't focus on the secondary product, which means it's easier to sell it and easier for it to be poor value to consumers. Indeed, with PPI, this can be the third consideration for consumers, after the good they're buying and the credit they're getting.
- 1.8 **Katherine Stoate from Department of Business, Innovation and Skills (BIS)** commented that the way consumers process

information is important to BIS policy: consumer empowerment, enabling consumers to help themselves, and insights into behavioural economics all have read across. On contingent charges, explained that the BIS call for evidence runs from 8 July to 23 August. It is looking for examples of such charges. Should they be open to the test of fairness under UTCCRs? Which sectors are problematic?

1.9 **Bernadette Kamleitner of Queen Mary University** commented on the consumer psychology perspective and barriers to understanding. For example, with holidays, the consumer won't want to think about what may go wrong, so they won't be inclined to read the small print. She suggested that consumers focus on core contract terms and on the present, rather than terms relating to contingencies in the future; that is, consumers need to shift their mindset to consider all terms. The young focus more on the present than the old, which accords with the finding in the YouGov survey that the young are more susceptible to contract problems than the old. Also:

- Cognitive dissonance is a reason for consumers not reading contracts, that is, they don't want to find negative information in the contract that would suggest their selection of the product was a poor judgment.
- Framing of contracts: as well as highlighting text, simple text perceived as 'favourable' information, complex text associated with 'dangerous/bad' information.
- Mindset is crucial: if you think it will be difficult or meaningless to read, likelihood of actually reading the information is low. How can these barriers be overcome? Using visual cues to draw attention to key text, such as using a red box, is one way.

Roundtable Discussion

1.10 The OFT clarified that while the study was focusing on some specific areas, as illustrations, the idea was to improve the general understanding of what might trip consumers up, and to provide a framework that will inform future thinking about possible action.

The case studies do not set out to solve particular problems. If they produce direct evidence of harm, we will not waste that evidence and will consider enforcement action. Then again, while they may add to the OFT's understanding, they may not find any problems at all. Business-to-business contracts had problems too, and there is some law that applies to this area, but this study is focused only on consumer contracts.

- 1.11 The importance of age and education levels in levels of understanding was discussed. This would be considered in the study. It would also consider whether consumers learn. One attendee commented that with some alternative investment financial products, there are constraints on who you can and can't sell to, for example some can only be sold to sophisticated consumers, depending on the consumer's experience as judged by their history or record of buying that type of product. The availability of consumer redress is also important. Too many people seeking redress at the same time will clog up redress processes.
- 1.12 Several attendees commented that, in some markets, firms try to simplify the process to help consumers avoid problems, for example by offering pay as you go contracts or making simplification a unique selling point.
- 1.13 There was consensus that understanding consumers' capabilities was important in designing good remedies as well as knowing when to intervene.
- 1.14 One attendee commented that it is often rational **not** to read contracts:
 - Sometimes consumers are dealing with monopoly suppliers, so have no choice anyway, for example train tickets.
 - Sometime, there are so many loopholes, contract terms don't protect, for example insurance - we're not relying on the contract, we're relying on the firm's reputation and the protection offered by law and by arbitration services like FOS.
 - Sometimes the product is low value, so there's not much risk or money involved anyway.

- 1.15 Ofcom is considering automatically renewable contracts (ARCs or rollovers) as part of its work to tackle potential contractual barriers to switching. It is looking into issues such as whether consumers are aware that they are in an ARC and are liable to pay early termination charges if they exit during a minimum contract period. Ofcom is also undertaking a strategic review of consumer switching and will consult on this shortly drawing on consumer and experimental research, economic analysis, sectoral and international experiences. A recent BEREC report on switching practices across Europe identified contractual obstacles as the biggest single obstacle to switching across Europe.
- 1.16 It was suggested it might be useful to consider the interaction between advertising and consumer contracts, for example whether it affects how consumers understand their contract or influences the attention consumers pay to contract terms. Gave as an example, broadband speeds, where some firms focus on the 'up to' speed, but consumers are ultimately interested in the actual speeds. Ofcom has discussed the issue with the Advertising Standards Authority ('ASA') and the Committee on Advertising Practice ('CAP') and made suggestions to help improve the information available to consumers. The voluntary code of practice on broadband speeds was also strengthened to improve consumers' ability to leave contracts early without penalty in the event that maximum speeds are below those advertised.
- 1.17 The Law Commission has a current project on private right of redress for unfair commercial practices. It can be summed up as: firms mustn't mislead and mustn't omit. It is looking at whether consumers ought to be given an additional right to rescind the entire contract (and not just the term that is unfair, as under UTCCRs).