

IT consumer contracts made at a distance

**Guidance on compliance with the
Distance Selling and Unfair Terms
in Consumer Contracts
Regulations**

December 2005

Information on the internet

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CONTENTS

<i>Chapter</i>		<i>Page</i>
1	Introduction	1
2	Regulations	5
3	How to comply	8
 <i>Annexes</i>		
A	DSRs requirements	58
B	ECRs requirements	64
C	Unfair Terms in Consumer Contracts Regulations 1999	66
D	Enforcement	70
E	Other consumer protection legislation	72

1 INTRODUCTION

1.1 This guidance is aimed primarily at IT suppliers who enter into contracts with consumers using distance selling means such as the internet, telephone or fax. It outlines some of the UK law relating to the way goods are sold, and the additional rights consumers have when buying at a distance. The regulations covered by the guidance are:

- The Consumer Protection (Distance Selling) Regulations 2000 (for links see paragraph 2.2)
- The Electronic Commerce (EC Directive) Regulations 2002 (ECRs) (for links see paragraph 2.8)
- The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) (for links see paragraph 2.16)

For general information on other important consumer legislation, please refer to the DTI website www.dti.gov.uk/ccp/

1.2 The DSRs apply to contracts with consumers that are concluded exclusively at a distance. They do not apply if you only sell to the public face to face. All sales to consumers by internet email or text messaging must also take account of the ECRs. If you use preformulated contracts (i.e. those which have not been individually negotiated with the consumer), you must comply with the UTCCRs whether or not the contract is concluded at a distance.

Aim of guidance

1.3 We want to assist suppliers of IT goods and services to understand their legal obligations and adopt standard terms in their consumer contracts that are fair and clear. This will enhance consumer confidence and increase the likelihood that consumers will want to do business with you. While most of the guidance relates to distance selling, the guidance on UTCCRs may also help in drafting contracts for in-store sales.

1.4 The guidance is intended to assist other regulators and co-enforcers of the legislation, principally Trading Standards Services, as well as

consumer advisers working within Consumer Direct (www.consumerdirect.gov.uk) and other organisations.

- 1.5 This guidance should not be relied upon as a substitute for legal advice. **Please note that this Guidance states the OFT's views.** It is for the courts to decide if a term is unfair or there has been a breach of the DSRs or ECRs.

Use of the guidance

- 1.6 Suppliers can greatly reduce the risk of a legal challenge by regularly reviewing their agreements and business practices in the light of new or existing legislation. This guidance highlights a number of areas where compliance issues can arise, and makes suggestions to help achieve fairness.
- 1.7 The regulations do not prevent you from offering consumers more than they are legally entitled to, such as no quibble warranties, extended cancellation periods and other benefits. However, these additional contract terms must be carefully drafted so as not to compromise the consumer's legal rights. For example, a contract giving the consumer a longer cancellation period than is required under the DSRs but then insisting that the cancellation notice is sent by recorded delivery has the potentially unfair effect of limiting the consumer's rights under the DSRs by placing an additional burden on them when exercising their DSRs cancellation right.

The shape of the guidance

- 1.8 Chapter 2 briefly outlines the consumer law which applies to distance selling of IT goods.
- 1.9 Chapter 3 indicates the type of terms typically used in these contracts. We explain your obligations under the DSRs and make reference to the ECRs where appropriate. We consider where unfairness can occur and how it may be avoided. We also give examples of terms which the OFT has challenged as unfair, along with the revised terms that were subsequently adopted.

- 1.10 More detailed information is given in the annexes on the DSRs, ECRs, UTCCRs and the enforcement roles of the OFT and other enforcement bodies. Annexe E further summarises some other consumer protection legislation that may be relevant to you.

Examples of terms

- 1.11 The examples of unsatisfactory terms in Chapter 3 are generally drawn from standard contracts in the IT sector which have led to complaints. These terms have been challenged by the OFT as unfair and/or inconsistent with the provisions of the DSRs. Under the UTCCRs, we would object to terms if they deprive consumers of the protection given to them by the DSRs and other consumer legislation. The DSRs state that contract terms which are inconsistent with its provisions are automatically void.
- 1.12 To indicate why example terms were considered unfair, we refer (in brackets) to the relevant paragraph in Schedule 2 to the UTCCRs, which illustrates the meaning of “unfairness” by listing categories of terms which may be unfair (see paragraphs C.5 and C.6 in Annexe C for further information on Schedule 2). We similarly refer to the DSRs where appropriate.
- 1.13 Some of the text used as examples has been edited for purposes of clarity and in order to help readers see more easily what the OFT considers to be fair or unfair. Wording may also be left out because the revised term dealt with several issues, of which only one is relevant to any particular aspect of fairness. Where text has been omitted this is indicated by “...”. Text that has been added to preserve the sense of the term is contained in square brackets. Terms have also been edited to correct grammar in order to improve readability.

- 1.14 Where possible, we have included the revised term which replaced the one we objected to, and was sufficiently improved to require no further action by us at the time. However, these terms do not guarantee compliance with the law and we have a statutory duty to consider any terms about which we receive complaints. New complaints and other evidence can and do shed new light on terms that we have previously reviewed.
- 1.15 For this reason, revised terms should not be viewed as meeting all possible objections from all enforcers in all circumstances. The OFT cannot recommend or 'clear' terms or provide legal advice. Ultimately, it is for the courts to rule whether there has been a breach of the DSRs or if a term is fair or unfair.

2 REGULATIONS

Consumer Protection (Distance Selling) Regulations 2000 (DSRs)

- 2.1 You must comply with the DSRs if you sell goods or services to consumers through an organised distance selling scheme where there is no face-to-face contact between your business and the consumer up to and including the moment at which the contract is concluded. Distance selling includes, but is not limited to, contracts made by mail order, phone, fax, or over the internet.
- 2.2 The Consumer Protection (Distance Selling) Regulations 2000 can be obtained from the Office of Public Sector Information (OPSI) website at www.opsi.gov.uk/si/si2000/20002334.htm
- 2.3 Recent amendments to the DSRs can be found at www.opsi.gov.uk/si/si2005/20050689.htm
- 2.4 In addition, further guidance on DSRs is available on the DTI website at www.dti.gov.uk/ccp/topics1/ecom.htm
- 2.5 The DSRs give consumers additional rights when shopping at a distance. These include the right to:
- certain information before a contract is concluded
 - certain information in writing or some other durable medium available and accessible to the consumer, to be given at the latest when goods are received or in good time during the performance of services.
 - cancel many types of contract
 - performance of the contract in 30 days or as otherwise agreed
 - protection against payment card fraud and demands for monies in relation to inertia selling
- 2.6 Annexe 0 provides more information on the DSRs.

Electronic Commerce (EC Directive) Regulations 2002 (ECRs)

- 2.7 The ECRs are relevant for businesses, among others, that sell IT products on the internet, by email and by text messages (see paragraph 2.10). Unlike the DSRs and the UTCCRS, the ECRs may also apply to your dealings with other businesses. However, this guidance focuses upon the application of the ECRs to dealings with consumers.
- 2.8 The full text of the Electronic Commerce (EC Directive) Regulations 2002 can be found on the OPSI website at www.opsi.gov.uk/si/si2002/20022013.htm
- 2.9 Guidance from the DTI is available at www.dti.gov.uk/industries/ecommunications/electronic_commerce_directive_0031ec.html
- 2.10 The ECRs govern the provision of 'Information Society Services', a term covering any service normally provided by payment, at a distance, by means of electronic equipment at the individual request of a recipient of a service. This includes any business that sells goods or services to consumers (and business) on the internet.
- 2.11 Further information about the ECRs is given in Annexe B .

Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)

- 2.12 The UTCCRs are not limited to distance selling contracts. They also apply to contracts used in face-to-face dealings with consumers, such as in-store purchases. However, the primary focus of this guidance is on distance sales.
- 2.13 The UTCCRs require that all standard contract terms used by suppliers with consumers are fair and transparent. The UTCCRs say that such standard terms are unenforceable if they are unfair. A standard term is one that is drafted in advance and is not negotiated with the consumer. Certain terms relating to the price or main subject matter of the contract are exempt from the test of fairness provided they meet the transparency requirement described at paragraph 2.18. These are known as 'core terms'.

- 2.14 Standard terms are considered unfair if they create a significant imbalance between the rights and obligations of the business and those of consumers under the contract, to the detriment of consumers, and contrary to the requirement of 'good faith'. The requirement of good faith is a general principle of fair and open dealing.
- 2.15 Assessment of fairness takes into account the nature of the goods or services, all the circumstances relating to the conclusion of the contract and the effect of other terms in the contract or another dependent contract. This means that a term considered fair in one agreement is not necessarily fair in another.
- 2.16 We recommend IT suppliers become familiar with the requirements of the UTCCRs before drafting their terms and conditions. The full regulations are on the OPSI website at www.opsi.gov.uk/si/si1999/19992083.htm
- 2.17 The OFT's Unfair Contract Terms Guidance (OFT311) can be found at www.offt.gov.uk/Business/Legal/UTCC/guidance.htm (the guidance is split into several parts on this site).
- 2.18 The UTCCRs state that written contracts should be in plain and intelligible language. Consumers should have the opportunity to read all the terms and conditions before agreeing to the contract.
- 2.19 Standard terms in your contract must take account of the interests and rights of consumers. Terms giving you powers or safeguards which could put the consumer at a disadvantage are at risk of being unfair under the UTCCRs.
- 2.20 More information on the UTCCRs is provided in Annexes C and D of this guidance.

3 HOW TO COMPLY

- 3.1 In this section, we look at ways to assist you to comply with the DSRs, ECRs and the UTCCRs. Where possible, the headings of this section relate to issues or headings that commonly occur in terms and conditions used by IT suppliers.
- 3.2 Having easily understandable and fair terms and conditions will protect both your business and your consumers, by ensuring you are both aware of each other's rights and responsibilities. We outline types of terms that in our view may be challenged as unfair and/or inconsistent with the DSRs. We explain possible ways to avoid such action. We also explain your legal obligations, to help you ensure your sales and returns processes comply with consumer legislation.

Making the contract

Statements in advertising, brochures and on websites

- 3.3 Your advertising should accurately describe the goods or services you are selling and should not mislead consumers. Consumers are protected against misleading advertising by the Control of Misleading Advertisements Regulations 1988, more details of which can be found at www.offt.gov.uk/Business/Legal/CMAR/default.htm. Advertisements should also comply with the advertising codes governing broadcast and non-broadcast media.
- 3.4 Any public statements made about the specific characteristics of a product, particularly in advertising or on labelling, may form part of the contract. This applies to statements made directly by you or the manufacturer if you could reasonably have been aware of the manufacturer's statements at the time the contract was made.
- 3.5 There is a clear risk of unfairness where your terms exclude liability for your public statements, such as descriptions in sales literature and price list details.

Oral representations and statements

3.6 During the sales process, negotiations between consumers and your business or business's representative may lead to changes to your standard contract. It is a good idea for both parties to put these changes in writing. Where this is not possible, you must honour any oral agreements/changes to your contract.

3.7 Terms are open to objection where they:

- say that all terms and conditions are contained in the written contract and that these replace oral statements or representations
- only allow changes to be made in writing
- require that consumers' changes have to be approved by a director of the company
- state that no employee has authority to change terms of the contract
- exclude your liability for any promises made that are not written in the contract

Example of a potentially unfair term limiting liability for oral statements (Reference Paragraph 1(n) to Schedule 2 to the UTCCRs).

Original term	New term
<p>The placing of the order with the company will be deemed to bind the customer to the following terms and conditions and no oral representation shall bind the company. Any variation or alteration in the following terms and conditions shall only be binding upon the company if made in writing and signed by a director of the company.</p>	<p>To protect your own interests please read the conditions carefully before signing them. ... If you are uncertain as to your rights under them or you want any explanation about them please write to or telephone our customer queries department, at the address and telephone number set out above.</p>

Prior information

3.8 Under the DSRs, the following information must be made available to consumers in good time before a contract is concluded:

- Your identity
- Your address, if you require payment in advance
- A description of the main characteristics of the goods or services
- The price of the goods or services inclusive of all taxes
- Any delivery charges
- How consumers are to pay
- Delivery and other performance arrangements
- The existence of a right to cancel. Further information is given on cancellation rights at paragraphs 3.54 - 3.69
- How long a price or offer remains valid
- The cost of using the means of distance communication where it is calculated other than at a basic rate
- Whether you reserve the right to provide substitute goods or services of equivalent quality or price in the event of the ordered goods or services being unavailable. If you do, you must also tell the consumer that you will pay for the return of unwanted substitute goods
- The minimum duration of any service or goods contract that is to be performed permanently or recurrently.

3.9 The DSRs state that this prior information must be given in a clear and comprehensible manner appropriate to the means of distance communication used, and with due regard to the principles of good faith in commercial transactions. For example, if you sell to consumers

through a website, brochure or advertisement from which consumers can send you their order, you should ensure that all the appropriate information is clearly included in the website, brochure or advertisement.

Information for traders using websites or electronic communications

3.10 If you are providing an Information Society Service, for example this may involve selling goods or services on the internet or by text messaging, the ECRs require you to provide the following information (some of which overlaps with the DSRs) in an easily and permanently accessible form:

- The name of your business
- Your geographical address
- Your contact details, including an email address, to enable rapid direct and effective communication
- Details of any trade organisation to which you belong, where the register is open to the public, including details of the register and your registration number or other means of identification on the register
- If your service is subject to an authorisation scheme, the details of the relevant supervisory authority
- If you are a member of a regulated profession, details of any professional body or similar institution with whom you are registered, details of any professional titles you hold, details of the Member States in which the titles are granted and a reference to the professional rules and how they can be accessed
- VAT registration number, if you are subject to VAT
- Where you refer to prices, a clear and unambiguous indication of prices, including any associated taxes and delivery costs.

Best practice tip:

Websites can be difficult to navigate. In order to ensure that the prior information is provided in a clear and comprehensible manner, you may wish to include an 'About Us' page containing your company details and a 'Terms and Conditions' page, both with a direct link from your home page.

Providing your terms and conditions as a single printable document will help to ensure that consumers do not overlook important terms (see paragraph 3.23 for the obligations imposed when the ECRs apply).

Drafting of terms and conditions

3.11 Contract terms and conditions should be understandable to consumers without the need for legal advice. As far as possible use:

- ordinary words
- short sentences
- subheadings to group similar issues

and avoid:

- technical language or legal jargon, such as references to 'indemnity' or copying out legislation.
- extensive cross referencing

Consumers' rights to terms and conditions

3.12 Terms that bind consumers to terms they have not seen are open to objection. Whether you present your terms and conditions in a brochure or on your website, or pass them on separately, they should be complete, clear and readily accessible.

- 3.13 If you conclude a contract by telephone, you should explain to consumers what terms and conditions apply, if any, and how they can get hold of these.
- 3.14 If you conclude contracts by electronic means, the ECRs require that any terms and conditions are made available to the consumer in such a way that they can be stored and reproduced.

Written or durable information

- 3.15 Under the DSRs, the following information must be provided to consumers in writing or some other durable medium available and accessible to the consumer prior to the conclusion of the contract or if after, in good time and in any event, **at the latest** when the goods are delivered or during the performance of a service contract:
- Most of the details described in paragraph 3.8 on 'Prior information' (the first eight bullet points)
 - Conditions and procedures on how consumers can cancel the contract under the DSRs
 - Information on how the right to cancel may be affected if the consumer agrees to a service contract starting before the end of the usual cancellation period
 - Where it is intended that the consumer should return the goods upon cancelling under the DSRs, notification of that requirement.
 - Information about who will be responsible for the cost of returning the goods should the consumer cancel under the DSRs
 - Your geographical address to which complaints may be sent
 - Details of any after sales service and guarantees
 - Any conditions for exercising the right to cancel where the contract is for over a year or an unspecified duration.

- 3.16 You must also provide this information and the prior information for any additional service contracts made at a distance, such as PC support packages, that are associated with the main contract.
- 3.17 There is no legal definition of a 'durable medium'. However, in our view a consumer must be able to keep the information, unchanged, for as long as it is needed and access it for future reference. We consider durable information to include brochures, letters, emails or faxes but not website content, which can be amended. Technological advances may change what is regarded as durable in future.

When has the contract been made?

- 3.18 You have a right to decide at what stage, or in what circumstances, you accept a consumer's order. However both parties should be clear about when the contract has been entered into.
- 3.19 Terms that effectively give you discretion to decide whether or not the contract has been formed are vulnerable to challenge. Fairness is more likely to be achieved if there is clarity over when the parties become bound by the contract.

Terms are open to objection where they:

- give you a right to cancel a concluded contract regardless of whether the consumer is at fault
 - give you discretion to change without a valid reason what is being supplied, particularly if this relates to a price or product specification.
- 3.20 Where you deal with products that are frequently modified or changed, you must include clear information explaining the length of time that the offer or related price will remain valid.
- 3.21 Some material on websites, brochures or advertising will be for information only. It must not be misleading. Material that is relied upon as part of the contract, such as a product specification, will be treated

as a contractual term and must meet fairness and other legal requirements accordingly.

- 3.22 Terms that exclude or limit your liability for the accuracy of the information or product details you provide are open to strong objection, particularly if this relates to the product's fitness for purpose or quality. Your statutory obligations form part of the contract once concluded. You cannot deprive consumers of their statutory rights. Any attempt to limit your liability under sale of goods legislation by use of an exclusion clause or similar notice would be void and unenforceable.

Contracts formed electronically

- 3.23 For contracts concluded by electronic means, the ECRs require that a service provider must provide the following information in a clear, comprehensible and unambiguous manner to consumers before the order is placed:

- the different technical steps to follow to conclude the contract
- whether or not the contract will be filed by you and whether it will be accessible
- the technical means for identifying and correcting input errors before placing their order
- the languages offered for the conclusion of the contract
- any relevant codes of conduct to which you subscribe, and how these can be consulted electronically.

The above bullet points do not apply to contracts concluded exclusively by the exchange of emails or an equivalent method of individual communication.

- where you provide contract terms and conditions applicable to the contract, you must make these available in a form that can be stored and reproduced.

- 3.24 Unless the contract is concluded exclusively by the exchange of emails (or an equivalent individual communication), consumers placing orders through technological means (e.g. through a website) must receive acknowledgement of receipt of their order electronically without delay. You must also provide an effective and accessible means by which consumers can identify and correct input errors before they place the order. If you fail to do so, consumers will be entitled to rescind the contract (unless a court orders otherwise).

Declarations required from consumers

Consumer declarations

- 3.25 For the contract to go ahead, consumers are often required to confirm that they have read and understood terms and conditions and other contractual information, for example by ticking a check box on a website page.
- 3.26 Terms that require consumers to state expressly that they 'have read and understood' the terms and conditions give rise to concern, as this may not be the case and may put consumers at a legal disadvantage in any subsequent dispute. It could be argued that they have 'signed away their rights' even where they did not in fact understand a term.
- 3.27 More likely to be fair is a clear and prominent warning that the consumer should read and understand the terms before placing an order. Alternatively, you may ask consumers to check a box to indicate that they accept the terms and conditions. As previously stated, the terms must be clear, understandable and clearly written, and consumers must have a genuine opportunity to examine and, if necessary, query anything they do not understand.

Best practice tip

It is important that you word your terms and conditions carefully using clear language that consumers can understand.

IT suppliers often supply complex equipment with a variety of complicated specifications. Some suppliers who often sell to less experienced consumers provide glossaries and explanations of technical terms. These help consumers to make informed choices. Therefore, they are less likely to make a purchase error and find they need to rely on their DSRs cancellation rights.

Example of a potentially unfair declaration term (Reference Regulation 5 of the UTCCRs)

Original term	New term
I have read and understood the terms and conditions.	It is important that you read and understand the terms and conditions that will apply to this contract before signing. If there are any terms that you do not understand or do not wish to agree to please discuss it with us before signing. Only sign this agreement if you wish to be bound by the terms and conditions ...

Price and additional charges

Clarity over price

- 3.28 The DSRs require that consumers are aware of the price of goods and services before they conclude a contract with you. Accordingly, prior to that point you must:

- advise the consumer of the full price, inclusive of all taxes (for instance if you sell via website, the DSRs require that you include the full price of goods and services on your website)
- give the consumer details of any delivery charges
- make clear the price of any additional service contract that a consumer may be entering into when purchasing goods (such as a support services contract)
- let the consumer know for how long the offer or price remains valid.

3.29 Price terms are open to objection if they are unclear or uncertain about what will be charged or allow unilateral variation of the price once an agreement has been concluded.

Example of a potentially unfair price variation term and inconsistent with the DSRs (Reference Paragraph 1(I) to Schedule 2 to the UTCCRs)	
Original term	New term
The vendor reserves the right to vary the quoted price of the goods by upward additions in accordance with the market conditions at the date of actual supply	Wherever it is not possible to accept your order to buy goods of the specification and description at the price indicated, we will advise you by email, offer to sell you the goods of the specification and description at the price stated in the email and will state the period for which the offer or the price remains valid.

Recovery and return charges during the DSRs cancellation period

- 3.30 For an explanation of the consumer's cancellation rights under the DSRs see paragraph 3.54.
- 3.31 When a consumer exercises their right to cancel under the DSRs, you can not make consumers responsible for the direct costs of recovering goods on cancellation of the contract unless the contract states that they must return the goods when they cancel. Both this requirement to return goods and the fact that consumers will be responsible for the return cost must form part of the written or durable information described in paragraph 3.15.

Charges for returning damaged or faulty goods

- 3.32 Consumers cannot be charged for the return of faulty or unsatisfactory goods. Consumers have the right to various remedies where goods are faulty (see paragraphs 3.81 - 3.83). These rights apply whether or not the consumer cancels under the DSRs.

Restocking fees

- 3.33 You may charge consumers a restocking fee if, after the DSRs cancellation period has expired, you allow them to return unwanted goods that conform to the contract. This fee should reflect the actual costs you incur.
- 3.34 Terms are open to objection if they say that a restocking fee is payable in all instances:
- where consumers are exercising their statutory right to reject faulty or misdescribed goods
 - where consumers are correctly exercising their cancellation rights under the DSRs
 - where the fee is excessive.

Example of a potentially unfair term imposing the penalty of an excessive restocking fee on cancellation, and inconsistent with the DSRs (Reference Paragraph 1(e) to Schedule 2 to the UTCCRs).

Original term	New term
<p>All items returned to the vendor by pre-arrangement and found to contain no fault, will be subjected to a 25% restocking charge, provided the goods are in original condition.</p>	<p>Your right to cancellation [i.e. under the DSRs] ... We will reimburse any sum paid by you or on your behalf under or in relation to the agreement including the costs of carriage and any insurance which you directed us to incur.</p> <p>[The restocking fee was deleted].</p>

Interest on overdue accounts

- 3.35 There is a clear risk of unfairness, if terms impose uncertain or excessive rates of interest on consumers' overdue accounts. It is unfair to impose disproportionate financial penalties for breach of contract. A requirement to pay unreasonable interest on outstanding payments, for instance at a rate excessively above the clearing banks' base rates, is likely to be regarded as an unfair penalty. Rates should not be in excess of the cost you would reasonably incur as a result of late payment. A margin of up to 3% per annum above the clearing banks' base rate is unlikely to be challenged.

Example of a potentially unfair term imposing the penalty of excessive interest (Reference Paragraph 1(e) to Schedule 2 to the UTCCRs).

Original term	New term
Failure to comply with the payment of the balance on the due date ... will entitle the company to charge interest on the balance at the rate of 7% compound interest [i.e. per annum] above bank base rate.	Failure to pay the balance outstanding will entitle the company to charge interest on the balance at the rate of 3% interest [p.a.] above the [name of bank] base rate

Performance and delivery

Performance times

3.36 Whether supplying goods or providing a service, you must perform the contract:

- within the agreed time
- if no time is agreed, within a maximum of 30 days beginning the day after the consumer sent the order to you.

Delayed performance

3.37 If you cannot perform the contract on time:

- you must tell the consumer (within the agreed time or 30 day period)
- you can only go ahead with a later delivery or performance of the services if the consumer specifically agrees to this

- your inability to perform will not affect consumers' right to cancel under the DSRs (see paragraph 3.54). For instance, in relation to goods contracts this right extends from the day the contract is concluded until seven working days beginning with the day after delivery of the goods (and even longer if you have not provided the written or durable information outlined in paragraph 3.15).

3.38 Where more than one item is delivered, the seven working days is taken from when the last item is delivered, not the first.

3.39 If you know you do not have an item or component part in stock, and this is likely to cause delay, you should tell the consumer at the outset and agree an alternative delivery date.

Where the consumer does not agree

3.40 If the consumer does not agree to a revised performance date you must:

- treat the contract as if it had not been made (except for any rights or remedies the consumer has as a result of non-performance)
- refund all monies paid as soon as possible and no later than 30 days beginning with the day after the day on which the period for performance expired.

Late delivery

3.41 Terms are likely to be challenged, if they:

- exclude your liability for delayed delivery, regardless of the cause
- try to prevent consumers cancelling if delivery is not at the agreed time
- exclude your liability to refund the consumer in full where there has been delay
- exclude your liability for the consumer's reasonably foreseeable loss caused by the late delivery.

Example of a potentially unfair term excluding liability for delayed delivery (Reference Paragraph 1(b) to Schedule 2 to the UTCCRs).

Original term	New term
The Company will do its best to meet the installation date, but will only accept this contract on the strict understanding that no guarantee whatsoever can be given regarding the delivery dates.	The Company will do all it reasonably can to meet the dates given for delivery and/or installation. In the case of unforeseen circumstances, beyond the reasonable control of the Company, the Company will contact the Consumer and give an alternative date.

Delivery by Instalments

3.42 Terms are open to challenge if they:

- prevent the consumer from cancelling a contract for goods where some of the goods have already been delivered but you have failed to deliver a subsequent instalment
- are so widely drafted as to leave consumers with no remedy for breaches of delivery terms
- give you a wide discretion to deliver and/or install goods in as many stages as you see fit. We think this creates an unfair balance in the contract if no consideration is given to the consumer’s convenience.

3.43 If you cannot deliver the whole order on time, terms that give consumers the choice of either terminating the contract without penalty or deferring payment are more likely to be acceptable.

Example of a potentially unfair term giving the supplier the right to determine when to deliver the goods (Reference Regulation 5 of the UTCCRs).

Original term	New term
The Company shall be entitled to make delivery of the goods by instalments.	Delivery of any goods will be on a mutually agreed date.

Storage costs

3.44 Consumers will sometimes unreasonably defer delivery or delay collecting goods after a repair. You are entitled to charge for reasonable storage costs in these circumstances, provided you have notified the consumer that the goods are ready and allowed them reasonable time to accept delivery or collection.

3.45 Terms are likely to be considered unfair if they impose charges for storage:

- that are more than the reasonable costs you reasonably incur (these can include actual administrative costs as well as the cost of rental space).
- while the goods are still undergoing repair
- before consumers have had reasonable notice to collect them.

Example of a potentially unfair financial penalty (Reference Paragraph 1(e) to Schedule 2 of the UTCCRs).

Original term	New term
<p>If the Goods remain undelivered for a period of 14 days, ...due to the Buyer’s failure, ... then the Seller shall be entitled to ...make a storage charge to the Buyer at its discretion.</p>	<p>The Buyer’s goods cannot be stored by the Seller for longer than two weeks after ... delivery has been attempted to the Buyer’s delivery address. The Buyer’s goods will be put into storage ... at the cost charged by the storage company to the Seller</p>

Substitutions / variation of contract

Variation to what is supplied under a contract

3.46 You should inform consumers of the main characteristics of the goods and services you are providing. If it becomes impossible to fulfil the order as agreed (e.g. because of unavailability of goods from your own suppliers) consumers have a right to cancel without penalty. Terms are open to strong objection if they allow you discretion to change the contract without a valid reason. Terms that allow you not to fulfil the original order for genuine reasons beyond your control are more likely to be acceptable if:

- this is made clear to the consumer at the outset and
- the consumer is given the unconditional right to cancel the contract without penalty (in addition to their cancellation rights under the DSRs) if they are unhappy with the change, and to receive a full refund.

Example of a potentially unfair term allowing the supplier to vary the contract (Reference Paragraph 1(k) to Schedule 2 to the UTCCRs).

Original term	New term
<p>... the vendor is not responsible for minor variations in specification in colour or other design features, and no such minor variation shall entitle the purchaser to rescind the contracts or shall be the subject of any claim against the vendor</p>	<p>Wherever it is not possible to accept your order to buy the goods of the specification and description ... we will advise you by email and offer to sell you the goods of the specification and description ... in the email and will state the period for which the offer or the price remains valid.</p>

Substitute goods and services

3.47 If contracted goods or services are unavailable, you may wish to change the contract in the interest of serving your consumers by providing substitute goods or services of equivalent quality and price.

3.48 In order to reserve the right to offer substitutes you must:

- inform the consumer of this in good time before the conclusion of the contract
- tell the consumer at the outset (in good time before the conclusion of the contract) that you will meet the costs of returning any substitute goods
- not charge the consumer the direct costs of recovering any substitute goods delivered if the consumer wants to cancel under the DSRs or otherwise
- confirm in a written or durable medium, on delivery at the latest, that you will pay the cost of returning substitute goods.

Cancellation

Unequal Cancellation Rights

- 3.49 Fairness and balance require that consumers and suppliers should be on an equal footing in terms of their rights to end or withdraw from a contract. Your rights should not be excessive nor should the consumer's rights be overly restricted. This does not, however, mean a merely formal equivalence in rights to cancel, but rather that both parties should enjoy rights of equal extent and value.
- 3.50 In law, each party has a right to end the contract – and may be entitled to compensation - if the other commits a serious breach. Even if terms provide for the refund of all repayments, consumers may face considerable inconvenience if you cancel. Terms are clearly open to challenge if they give the supplier too much freedom to cancel or the consumer too little. Further any cancellation term must not interfere with the consumer's unconditional right to cancel under the DSRs, see paragraph 3.54- 3.69.

Supplier's rights to cancel

- 3.51 Terms give rise to concern if they can be used to force the consumer to pay where the supplier, in breach of contract, decides to cancel.
- 3.52 For example terms open to challenge include those that:
- make consumers pay for goods and services they have not received
 - allow you to cancel without acknowledging the consumer's right to a refund
 - seek to deny or limit your liability for breach of contract
 - give you a unilateral right to cancel a contract with no liability other than to return prepayments

- allow you to cancel the contract for vague reasons or for a trivial breach by the consumer, particularly when the consumer cannot cancel in similar circumstances
- allow you to justify cancellation by citing external circumstances which may be within your control.

3.53 Terms that clearly explain the circumstances in which you could cancel the contract may be acceptable provided the circumstances are outside your control (see also paragraph 3.37).

Example of a potentially unfair term allowing the supplier to cancel the contract without liability (Reference Paragraph 1(f) to Schedule 2 to the UTCCRs).

Original term	New term
<p>...If [goods are not available] the seller shall be at liberty to determine the contract ... by giving [the buyer] notice in writing</p>	<p>If we are unable to deliver the goods within 30 days beginning with the day after the day of the agreement: we shall inform you by email; ... we will reimburse any sum paid by you or on your behalf under ... the agreement within a period of 30 days beginning with the day after the day on which the time for delivery expired.</p>

Cancellation rights under the DSRs

Cancellation rights for goods

3.54 Once a contract is concluded, consumers have the unconditional right to cancel most goods and receive a full refund. Provided you give the consumer the required written or durable information at the time described in paragraph 3.15, cancellation rights end seven clear working days starting the day after the receipt of the goods. These rights are in addition to the consumer’s statutory right to reject faulty or misdescribed goods.

- 3.55 This cancellation period can be extended by up to three months if you do not supply the required information described above. If you do not give the consumer the required information (at the latest) when the goods are delivered but do so within the following 3 months starting with the day after the consumer receives the goods, then the consumer's cancellation rights will end after seven working days beginning with the day after they receive the information.
- 3.56 You do not have to give consumers cancellation rights for the following:
- personalised goods or those made specifically to the consumer's specification but we consider that this exemption would not apply to a PC that was built from a range of standard options (see paragraph 3.57)
 - software or audio/video recordings which have been unsealed by the consumer (see paragraphs 3.92 - 3.97).

Goods made to order

- 3.57 The right to cancel may apply to goods made to order, unless the goods are made to the consumer's specification or clearly personalised. Whether this exemption will apply will be a question of fact in each case. Goods manufactured to a unique design are likely to be exempt. However, in our view, a relatively standard product – such as a PC – assembled from a standard range of components will not be exempt.
- 3.58 In our view, a contract for the supply of a manufactured item is a contract for the supply of goods, not services, and therefore the DSRs cancellation rights for goods will apply.

Cancellation rights for services

- 3.59 In general, provided that consumers are given the required written or durable information described in paragraph 3.15 on or before the day the contract is concluded, consumers have an unconditional right to cancel most service contracts from the day the contract is concluded up to seven working days beginning the day after the contract was concluded. If the required written or durable information is provided after the

contract is concluded but within three months (beginning the day after the contract was concluded), cancellation rights will ordinarily extend for seven working days beginning with the day after the information is received.

- In some circumstances a consumer may want the service to start immediately or at any rate before the usual cancellation period expires. In that case it is possible to displace the above timings. Providing that the consumer gets the required written or durable information before you start supplying the service and he or she has agreed to performance of the contract starting before the usual cancellation period has expired, cancellation rights will end when you start supplying the service.

3.60 If the consumer has agreed to such an early start but you have not provided the required written or durable information before starting to supply the service, as long as it is supplied in time for it still to be useful, the consumer continues to enjoy the DSRs cancellation rights until seven working days beginning the day after the information was received, unless performance of the contract is completed within those seven working days. In that case, the cancellation rights will end on the day of completion.

3.61 If you do not supply the written or durable information at all, the cancellation period ends on the expiry of three months and seven working days beginning with the day after the day on which the contract was concluded.

Information about cancellation rights for goods

3.62 You must:

- inform consumers of their cancellation right in good time prior to the conclusion of the contract
- confirm this information - and explain the conditions and procedures for cancelling the contract - in a written or durable medium. This can be done prior to the conclusion of the contract

or, if after, in good time, but at the very latest, on delivery of the goods (see also paragraph 3.31).

- 3.63 In the case of a separate add-on service contract, e.g. for installation and/or support, you must tell consumers about their right to cancel this contract as well as the goods contract. The cancellation period for goods and services contracts will not necessarily be the same (see also paragraph 3.64 below).

Information about cancellation rights for services

- 3.64 If you do not want consumers to cancel their service contract once you have started work, you must obtain their consent before work begins and provide them with the required written or durable information. This must include an explanation of how their cancellation rights will be affected by an agreement to start work before the end of the usual cancellation period.

Time and form of cancellation

- 3.65 A contract is cancelled on the day the consumer sends the cancellation notice by post, email or fax, or leaves it at the supplier's last known address. This notice must be in writing or some other durable medium which is accessible to the supplier, and make clear the consumer's intention to cancel the contract.
- 3.66 We would consider terms to be inconsistent with the DSRs, and therefore open to challenge under the UTCCRs (see paragraph 1.11), if they:
- demand that the consumer use a particular form of wording or method of communication in order to exercise their cancellation rights
 - insist that you receive the notice within the cancellation period. It is sufficient for consumers to post, email, fax, or leave the notice with you during the cancellation period

- require consumers to give reasons why the goods are being returned.

Interference with cancellation rights

3.67 Consumers must be given a reasonable opportunity to examine the goods you supply. This will mean that in appropriate cases, they are entitled to remove goods from their packaging and to try them out, provided they take reasonable care of them (see paragraph 3.70). Terms would be inconsistent with the DSRs, and therefore open to challenge under the UTCCRs (see paragraph 1.11), if they require consumers who are exercising their DSRs cancellation rights to do more than take reasonable care of the goods, although you may inform consumers what you consider to be “reasonable” (see paragraphs 3.70 and 3.71). We consider that terms open to objection are those that:

- require that the goods are returned as new
- require that goods be returned in their original packaging
- make cancellation and any refund conditional on the consumer returning the goods. However, you can use terms in your contract to require that goods be returned by the consumer (see paragraph 3.73).

3.68 Terms are also open to challenge if they:

- only allow cancellation where there has been a breach of contract by the supplier
- make all cancellations subject to part payment
- stipulate that a consumer will always be liable to pay you compensation if they cancel.

3.69 You must ensure that any advice or term relating to faulty goods and any statement of policy on contractual returns does not interfere with the consumer’s unconditional right to cancel under the DSRs.

Example of a term restricting cancellation under the DSRs, also potentially unfair exclusion of liability (Reference Paragraph 1(b) of Schedule 2 to the UTCCRs).

Original term	New term
<p>The vendor will not accept goods [returned on cancellation] unless ... [the] return has been authorised by a director, and the goods are received by the vendor in stock condition, with original packaging, software</p>	<p>You have a right to cancel the agreement at any time before the expiry of a period of 7 working days beginning with the day after the day on which you receive the goods. You may cancel by giving us notice in any of the following ways...</p>

After cancellation under the DSRs

Care of cancelled goods

3.70 Consumers who have exercised a right to cancel under the DSRs are under a statutory duty (see paragraph 3.76) to:

- retain possession of the goods and take reasonable care of them, which generally speaking, starts when the goods are received and continues until the consumer has made the goods available for collection or sends them back.
- make them available for collection at their own premises on receiving notice in writing (or another durable medium).

3.71 We consider that a term which describes what ‘reasonable care’ is, would not normally give cause for concern, provided this does not impose a burden on consumers that goes beyond their statutory duty.

3.72 Consumers who do not take reasonable care of goods retain the right to cancel, but you may have a claim against them for any loss in value caused by their failure to take reasonable care.

Recovery of goods

- 3.73 Consumers who exercise their right to cancel do not have to return goods to you unless this is stated in your contract terms. If you have not asked consumers to return goods and you wish to collect them from the consumer, you should make this request in writing or some other durable medium available and accessible to the consumer.
- 3.74 Where a contract requires a consumer to return cancelled goods at their own cost, and the consumer fails to do so, you may charge the direct cost of recovering the goods. This must reflect the cost you actually incurred.
- 3.75 You must not make the consumer responsible for the cost of returning defective goods or substitute goods, which have been supplied where the ordered goods or services are unavailable.

Duty of care

- 3.76 Generally, where a contract makes the consumer responsible for returning goods, the consumer's duty of care will last for six months or until they return the goods. If the contract does not make consumers responsible for return, their duty of care will expire 21 days after the cancellation notice was given, unless within that time they unreasonably refuse your written request to make the goods available for collection. In these circumstances, the consumer's duty of care ends when you collect the goods or the consumer sends them to you. If they send the goods consumers must take reasonable care to see that you receive them and that the goods are not damaged in transit. For example, consumers will have taken reasonable care if the goods are correctly addressed, adequately packaged and bear adequate postage, or they have used a reputable carrier. If consumers fail to exercise reasonable care and goods are damaged you will have a claim against them for breach of this duty.
- 3.77 Terms are open to challenge, if they require consumers to:
- send returned goods by registered or recorded mail

- use a registered courier
- use some other specific method of return that involves unnecessary additional cost or difficulty.

Refunds

3.78 Consumers who exercise their right to cancel a goods or service contract and any related credit agreement should receive a full refund of everything paid under the original contract. You must make this refund as soon as possible but within a maximum of 30 days beginning with the day the notice of cancellation was given.

3.79 Under the DSRs and UTCCRs any contract wording which could have the effect of depriving consumers of their protection under the DSRs is open to strong challenge (see paragraph 1.11). Terms are open to objection, if they allow you to:

- make a refund conditional on the consumer returning the goods
- fail to refund the whole amount, including deposit, advance payment and outbound delivery charges
- require a consumer to accept a credit note
- deduct a restocking fee.

3.80 The only deduction you can make from the refund is the direct cost of recovering the goods where consumers have breached a contract term requiring them to send the goods back when they cancel.

Faulty goods

Liability for Defective goods

3.81 The law requires goods to be of satisfactory quality, which includes appearance, finish, safety and durability and fitness for purpose (including any particular purpose made known by the consumer to you). Goods must also be provided as described.

3.82 Consumers have a right to a reasonable opportunity to examine the goods, to reject them if faulty and receive a full refund and possibly compensation (see paragraph 3.88). This is a separate legal entitlement from the cancellation right under the DSRs. If goods do not conform to the contract, consumers may be able to seek a repair or a replacement. There is a clear risk of unfairness where contractual terms limit the type of redress available to consumers, for instance, by allowing you to decide what redress is provided.

3.83 Terms which may have the effect of limiting or excluding your liability for defective goods include those which:

- fail to allow consumers reasonable time to examine the goods, for example by imposing a very short time limit for making claims (see paragraph 3.87 for an explanation of reasonableness)
- mislead consumers into thinking that by signing an acceptance note they have given up the right to reject goods that do not conform to contract or to seek another form of redress. An example of this would be a term requiring that goods are accepted as satisfactory on delivery
- require consumers to comply with specific requirements before they can return defective or misdescribed goods, such as having to follow a strict or detailed refunds policy
- require consumers to seek permission to reject defective or misdescribed goods, for example by stating that a rejection has to be authorised by a director of the company
- require consumers to make a premium rate telephone call to reject goods that do not conform to contract
- require consumers to accept a free repair, a replacement or a credit note when they are legally entitled to reject the goods
- require consumers to pay the cost of returning goods that do not conform with the contract

- say that deposits are not refundable whatever the circumstances
- require consumers to pay unreasonably high call out charges before the supplier will inspect potentially faulty goods
- make any call-out charge to inspect goods non-refundable even when goods are subsequently rejected
- exclude your liability for faulty goods by transferring liability to the manufacturer (see also paragraphs 3.123 - 3.124)
- deny consumers a right to compensation for reasonable foreseeable losses (i.e. loss arising naturally from the breach as well as loss that can fairly and reasonably have been within the contemplation of both parties at the time the contract is made.) (see paragraph 3.88).

Example of a potentially unfair term excluding liability for faulty goods (Reference Paragraph 1(b) to Schedule 2 to the UTCCRs).	
Original term	New term
The Seller will not be liable to the Buyer at any time ... for ... economic-loss, or consequential loss (including loss or damage suffered by the Buyer as a result of an action brought by a third party) caused by defects in the goods even if such loss is reasonably foreseeable.	The Buyer and the Seller shall only be liable under this contract for losses, which are a reasonably foreseeable consequence of the relevant breach of contract

Refunds and credit notes

3.84 Terms are open to objection, if they:

- restrict the refund payable, whatever the circumstances, upon the return of goods
- allow you to refuse a full cash refund to consumers rejecting faulty goods
- require consumers rejecting faulty goods to accept credit notes or replacement goods.

3.85 You may issue a credit note for the return of unwanted goods only if the goods conform to the contract, i.e. are not faulty and the DSRs cancellation period has expired.

Example of a potentially unfair term that restricts liability by denying cash refunds for rejected goods (Reference Paragraph 1(b) to Schedule 2 to the UTCCRs).

Original term	New term
... the company will issue a credit note to the buyer for any goods found to be defective by reason of faulty materials or by poor workmanship	The term was deleted

Faults at date of delivery

3.86 You are legally responsible for faults present at the date of delivery. Consumers do not lose their right to reject faulty goods until they have had a reasonable opportunity to check that they conform to contract (see paragraph 3.87). Where defects in goods become apparent within six months of delivery, and the consumer asks for a repair, replacement, price reduction or refund, the law presumes that the goods were faulty at the time of delivery unless you prove otherwise.

Time to inspect

- 3.87 A consumer should be given reasonable time to inspect goods (both hardware and software) and reject them as faulty and seek a remedy. What is reasonable will depend on the facts of the case, and will vary depending on the technical nature of the goods.

Example of a potentially unfair term that restricts liability by imposing time limits on seeking redress for faulty goods (Reference Paragraph 1(b) to Schedule 2 to the UTCCRs).

Original term	New term
Upon taking possession of the goods the Buyer shall ... notify the Seller if the goods are damaged or defective In any case such notification must take place within 3 working days and in writing.	If the Buyer seeks to reject the goods, as defective, within a reasonable period of time, then the Buyer will ... notify the Seller.

Compensation

- 3.88 Consumers have a right to seek compensation for loss or damage caused by faulty goods, poor service or any other breach of contract. This is the case even if they are no longer entitled to reject the goods, or choose not to do so. In some instances the consumer may be entitled to reject the goods, seek a full refund and also receive compensation (see paragraph 3.82 for a reference to other remedies that may be available). In general, compensation is awarded for loss or damage that the parties themselves could have reasonably foreseen at the time of entering the agreement, even if others could not have foreseen it. This may include:
- the cost of returning the goods
 - damage to people or other property arising out of defects in goods.

Fault diagnosis and supplier's discretion

3.89 There is a clear risk of unfairness where terms:

- prevent consumers from seeking independent confirmation of defects in goods
- give you sole discretion to decide whether goods are faulty
- require consumers to pay for independent testing, inspection or other charges where they have a justifiable complaint.

Example of a potentially unfair term allowing the supplier to decide whether they are in default (Reference Paragraph 1(m) to Schedule 2 to the UTCCRs).

Original term	New term
All goods returned as faulty must be tested in our workshop by our technicians before replacement or refund.	... Each party will agree that only a qualified person in Computers ... performs an inspection [of goods returned as faulty].

Cancellation of services where the supplier is at fault

3.90 Where the consumer cancels a service contract because the supplier is at serious fault, for instance if they have not received anything of value, they are entitled to a full refund of any prepayments and possibly to compensation as well.

3.91 Terms are open to challenge which:

- penalise consumer cancellations whatever the circumstances
- make the deposit non-refundable in all circumstances or on consumer cancellation.

Software

Information about the software

- 3.92 Most software is sealed, so it needs to be unsealed before it can be used. It is important to note that consumers do not have cancellation rights under the DSRs if the computer software is unsealed by them. Consumers must be informed of this. In addition, we consider that fairness can only be achieved, if software terms and conditions are made available to consumers before they have accepted the software, that is, before they have broken its seal.
- 3.93 Of course, you must provide consumers with information in writing or some other durable medium about the main characteristics of software, including the hardware requirements and any limitations to the software's functionality. This information must be given to consumers at the time of delivery at the latest.

Protection of intellectual property rights

- 3.94 It is our view that terms that seek to protect software from being copied or downloaded for free are likely to be acceptable, provided they do not deny redress to consumers who find that the software is defective after they have opened or downloaded it.

Cancellation of software

- 3.95 Under the DSRs, provided that they have not unsealed it, consumers are allowed to cancel software, even if it conforms with the contract (see paragraph 3.92). You must always inform consumers of this right. Software may be sealed electronically or through the use of a security seal on the inner packaging.

Rejection of faulty software

- 3.96 Terms denying consumers their rights to reject software that does not conform to contract are open to strong objection. This is the case even where seals have been broken.

3.97 Software installation and the way it may interact with other software can be complex. It is our view that there is unlikely to be a problem with you encouraging consumers to contact a helpline as the first step in assessing the problem, provided this is not a condition of returning faulty software.

Example of a potentially unfair term excluding liability for faulty software (Reference Paragraph 1(b) to Schedule 2 to the UTCCRs).	
Original term	New term
.... defects in the Software ... do not give rise to a liability on the part of the Seller.	The Seller will replace any faulty disks if the defect is notified to them within a reasonable period of time after delivery...

Risk

Risk in outbound delivery

3.98 Terms are open to objection if they seek to deny your legal responsibility for goods while they are in transit to the consumer.

3.99 The consumer's right to cancel under the DSRs is unconditional. You should not seek to circumvent it by passing the risk of loss or damage in transit to the consumer. If consumers do not receive the goods they have ordered, they can cancel and you must refund the total price, including delivery charges.

Risk and damage in transit after cancellation

3.100 A consumer who decides to cancel under the DSRs has a duty to take reasonable care of the goods (see paragraph 3.76). If they send the goods consumers must take reasonable care to see that you receive

them and that the goods are not damaged in transit (see paragraph 3.76). Terms that impose a greater duty on the consumer, for instance, by making them absolutely liable for damage in return transit, are open to challenge.

Example of a term inconsistent with Regulation 17(6) of the DSRs and a potentially unfair exclusion of special rights (Reference Regulation 5 of the UTCCRs).	
Original term	New term
The purchaser shall ... be responsible for the cost of ... insurance of all goods returned ...to the vendor. ... Goods shall be at the risk of the purchaser until actual receipt of the goods by the vendor. The onus of proof of safe delivery shall rest with the purchaser.	The term was deleted

Transfer of risks

3.101 Terms which make consumers carry risks that are more appropriate for you to bear, such as where the risk lies within your control, or is one which the consumer cannot be expected to be aware of or insure against, are potentially unfair. Often, terms can be made fairer if the consumer is merely made responsible for losses caused by their own actions. Alternatively, fairness may be achieved if the term relates only to risks against which consumers are likely to be insured, or can easily insure – for instance loss or damage while the goods are in the consumer’s home.

Support services

Additional service contracts

- 3.102 If you offer a service as well as goods, and this service is optional rather than a necessary element of the goods contract, the consumer may well be entering into two separate contracts with you. If so, you must comply with the requirements set down in the DSRs – including those relating to information and cancellation rights - for each contract. The two contracts must also have separate prices.
- 3.103 See paragraph 3.64 for further guidance about service contracts.

Support and installation services - DSRs

- 3.104 If you supply an optional freestanding installation or support package that is more than a product warranty, this will be viewed as a separate service contract subject to the full DSRs information requirements and cancellation rights. This is the case regardless of whether you or a third party provides the service. Again, see paragraph 3.64 for more information.
- 3.105 With such contracts it is important for consumers to know if:
- you are providing the services remotely or on site
 - aspects of the service are provided using a premium rate line, and if so, the cost of using it.
- 3.106 If you provide an optional installation service, you must offer cancellation rights for this service as well as for the goods being installed (see paragraphs 3.59 - 3.62). If you intend to send a technician out to install and set up the goods before the goods' cancellation period has expired - and ensure that you can charge for this service regardless of whether or not the goods contract is cancelled - you must do certain things. See paragraph 3.64 for information on the effect of a consumer agreeing to early performance of such contracts and your obligations.

Support packages

3.107 Under the DSRs, you must give consumers a description of the main characteristics of a support service - including how it operates - in good time prior to conclusion of the contract (see paragraph 3.8). For example if your practice is to make initial diagnosis and offer first line support via a telephone help-line, followed by discretionary on-site visits where faults cannot be resolved over the phone, you need to make this clear to consumers.

3.108 Terms are open to challenge if they:

- give you the right to decide not to attend on-site, when the service is described as 'on-site'
- require consumers to make a premium rate call to reject services that do not conform to the contract.

Warranties

Free warranties and guarantees

3.109 Manufacturers and retail suppliers may offer free guarantees (also called warranties) which give consumers more than their statutory rights. These guarantees are legally binding against the provider.

Statutory requirements for guarantees

3.110 Guarantees must:

- be in plain, intelligible language
- include the essential particulars necessary for making a claim under the guarantee
- say how long the guarantee lasts
- indicate the territorial scope of the guarantee

- give the name and address of the guarantor
- be made available within a reasonable time to the consumer on request in writing or some other durable medium
- be written in English where the goods are offered within the United Kingdom.

Insurance warranties

3.111 Warranties that are insurance products are currently outside the scope of the DSRs. However, they are covered by the Financial Services (Distance Marketing) Regulations 2004, which came into force on 31 October 2004 and give effect to the Distance Marketing of Consumer Financial Services Directive (2002/65/EC). Some of the provisions of the Supply of Extended Warranties and Domestic Electrical Goods Order 2005 may also be relevant (see paragraph 3.118).

Free after-sales service and guarantees

3.112 If you offer free after-sales service and product guarantees that do not constitute service contracts in their own right, you still have to provide details of these services or guarantees as part of the written or durable information, described in paragraph 3.15. This information should include:

- the cost of using premium rate lines to obtain the after-sales service advice
- whether repairs will be carried out on site or, if not, who will be responsible for the cost of transporting goods for repair.

Suppliers' guarantees

3.113 Terms that have the effect of reducing legal protection for consumers are likely to be considered unfair. That is not the case with guarantees that add to the consumer's ordinary legal rights.

3.114 Guarantee terms may be considered unfair if they:

- exclude liability for any loss incurred by the consumer for defects in the goods or for goods which do not match their description
- purport or appear to deny consumers their rights to reject goods that do not conform with the contract e.g. because they are faulty
- rely on an additional qualifying statement such as 'this does not affect your statutory rights' after a more explicit statement that appears to restrict those statutory rights
- impose unjustified formality requirements on the consumer such as following specified procedures or completing specific forms, as a precondition of claiming warranty cover
- allow you to opt out of important obligations if consumers commit a minor breach of their obligations
- make the guarantee conditional on the consumer performing unreasonable obligations
- purport to charge consumers for returning goods rejected because they do not conform to contract
- impose an unreasonably short time limit on claims
- are buried in the small print.

3.115 We consider that it will assist the consumer if you:

- have clear warranty terms that enlarge the scope of the consumer's ordinary legal rights, particularly in respect of faulty or misdescribed goods, without purporting to exclude those rights
- provide your contact information for warranty cover clearly and distinctly from your contact details for complaints about goods that do not conform to contract.

Best practice tip:

To help make consumers fully aware of your guarantee arrangements, it is often useful to highlight these through prominent headings in your terms and conditions

Assignment

3.116 Terms that state, without good reason, that guarantees are not transferable potentially unfairly restrict the consumer's right to sell the goods and realise their full value.

3.117 However, terms are unlikely to raise concern if they simply require:

- the new purchaser to demonstrate that the guarantee was properly assigned, provided the procedures for this are straightforward
- your consent to the transfer of the guarantee, provided this cannot be withheld unreasonably.

Example of a potentially unfair term denying the consumer the right to assign (Reference Regulation 5 of the UTCCRs).

Original term	New term
This warranty is not transferable. ... If you sell or transfer the product to a third party, the company will not be required to provide any warranty (or warranty services) to such a third party	If you sell the product to someone else, the benefit of the warranty set out above may also be transferred.

Extended warranties

3.118 Extended warranties are additional contractual arrangements extending the manufacturer's guarantee. They cover repair and replacement of goods if they break down, and in some cases cover other risks such as accidental damage, loss or theft. They may also provide helpline support for PCs. The Supply of Extended Warranties on Domestic Electrical Goods Order 2005 imposes certain obligations on particular suppliers of extended warranties. These include the provision of information to the consumer before the sale of an extended warranty. It also provides consumers with certain cancellation and termination rights. However the cancellation and termination rights will not apply in relation to extended warranties that are distance contracts to which the Directive 2002/65/EC concerning the distance marketing of consumer financial services applies (see paragraph 3.111 above). More information on the Order, which is outside the scope of this guidance, can be found at www.opsi.gov.uk/si/si2005/20050037.htm

3.119 Terms are open to challenge if they:

- place an unreasonably short time limit on claim notifications
- act as exclusion terms, for example by purporting to take away consumers' statutory rights
- force consumers to go through unjustifiable formalities in order to make a claim
- are unclear in scope
- refer to other documents not supplied with the agreement.

Manufacturer's warranties

3.120 A term stating that consumers who receive faulty goods on delivery should seek redress from a third party warranty provider, and not from yourself is potentially unfair. Consumers may indeed have a legal right to

seek repair under the terms of a manufacturer's warranty, and we recognise that in some instances it may be more convenient for the consumer to go direct to the manufacturer. However it is not their only remedy and you should not seek to avoid your own liability under legislation such as the Sale of Goods Act 1979. Fairness is more likely to be achieved if the contact details relating to sale of goods redress are distinct from and as prominent as, any given by the manufacturer.

Insurance warranties

- 3.121 Where extended warranties take the form of insurance agreements, you may specify what events are or are not covered. However, for fairness to be achieved we consider that you need to explain this to the consumer before the contract is concluded (see also paragraph 3.111).

Printer warranties

- 3.122 Terms that invalidate printer warranties if the consumer uses third party ink cartridges, are at clear risk of being considered unfair if they purport to exclude liability for any failure/defect in the printer which is not caused by these cartridges. Any other printer warranty terms that potentially exclude or restrict liability for faulty or mis-described goods would also raise concerns.

Liability

Terms excluding or limiting legal obligations

- 3.123 When providing goods and services to consumers you accept certain contractual obligations as a matter of law, such as ensuring that goods are of satisfactory quality or that services are carried out to a reasonable standard. This applies to everything you do as part of the transaction.
- 3.124 Terms which have the object or effect of either excluding or limiting your legal obligations are particularly likely to be considered unfair. Examples are terms that:

- exclude or limit your liability for damage caused by faulty goods or poor service, for example by denying responsibility for loss of data if the consumer has not made back-ups. We consider that a term is unlikely to cause concern if it simply recommends that consumers back-up their data
- seek to transfer all liability for any defect to the manufacturer
- limit the kind of loss for which compensation is paid, including the consumer's claim to consequential losses. A more promising way to achieve fairness is to exclude liability for losses that were not reasonably foreseeable by both parties at the time the contract was entered into
- Other terms open to objection include those which:
 - limit your liability where the goods have been physically damaged before or during delivery
 - limit your liability to the value of the goods sold
 - exclude or limit your liability if the consumer has not paid
 - limit your liability to the amount that you can claim against the manufacturer in any given case
 - require consumers to go to unjustifiable lengths when returning goods.

Death or injury

3.125 Terms that seek to exclude or restrict liability for death or personal injury caused by a supplier's negligence are always void under section 2 of the Unfair Contract Terms Act 1977. Moreover terms which seek to exclude such liability where it arises from any act or omission, including a breach of statutory duty or contract, are also open to objection.

Example of a potentially unfair term excluding liability for death and personal injury (Reference Paragraphs 1(a) of Schedule 2 to the UTCCR's).

Original term	New term
No responsibility is accepted by [the supplier] for any ...injury ... even when such ... injury ... is attributed to any negligence on the part of [the supplier] or its servants.	In absence of any negligence or other breach of duty by [the supplier] or its servants and agents, you will be responsible for any ... injury

Terms excluding the consumer's right of set-off

3.126 Where a consumer has an arguable claim against you under a contract, the law generally allows the consumer to deduct the amount of that claim from monies they owe you. Terms which exclude this right of set-off, including terms that require consumers to pay in full even when the goods are defective or there has been poor service may be considered unfair.

Example of a potentially unfair term excluding the right of set-off (Reference Paragraph 1(b) of Schedule 2 to the UTCCR's).

Original term	New term
The Customer will pay all amounts due to the Company free from all deductions and without set-off. The Customer shall not be entitled by reason of any claim against the Company to withhold payment for the Goods.	The term was deleted

Breach of contract by the consumer/ penalties

Consumer refusal to accept delivery

3.127 A consumer who has exercised a right to cancel under the DSRs may refuse to accept delivery of goods. Cancellation within the permitted period cannot be treated as a breach of contract.

3.128 There is a clear risk of unfairness where terms require consumers to pay more in compensation for a breach of contract than the reasonable costs you have incurred, or would expect to incur. Under common law, this type of term would normally be void as a penalty. Terms are open to strong objection if they impose excessive penalties on consumers for breach of contract.

Example of a potentially unfair penalty term (Reference Paragraph 1(e) to Schedule 2 to the UTCCRS, and inconsistent with the cancellation provisions of the DSRs)	
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Original term	New term
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... If goods are refused without inspection or returned unused with no defects attributable to the goods supplied, ... then a handling charge of 25% of the total invoice will be applied.	... If goods are ... returned used, with no defects attributable to the goods supplied, or the buyer cancels the order outside the ... cancellation period under the DSRs [when the seller is not in breach of contract], then a reasonable ...fee will be charged to cover for depreciation in value. The fee will not be greater than 15% of the original invoice value.
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Damages and costs

3.129 Terms may be unfair if, where a consumer is in breach of contract, they allow you to:

- claim all your costs and expenses, not just your reasonable costs

- claim both your costs and your loss of profit where this would lead to 'double counting'
- pass on all your legal costs to the consumer, when it is unreasonable to do so
- claim a fixed or minimum sum, which could be too high in some cases
- transfer responsibility for all claims to the consumer, even where they are not at fault.

Indemnity terms

3.130 The word 'indemnity' is frequently not understood by consumers. They may view it as a threat to pass on legal and other costs incurred without regard to reasonableness. Transparency requires that you make the true scope of your right to pass on liabilities to consumers clear and understandable.

3.131 Terms are open to challenge where they seek:

- to make consumers responsible for all costs which could arise, even when they are not at fault
- to cover all liabilities arising from third party or other claims for breach of rights or copyright.

Termination on consumer's breach of contract

3.132 Where a consumer ends the contract and is at fault, you may have a right to compensation but you have a legal duty to keep your loss to a minimum, for example by seeking replacement business.

3.133 Terms are potentially unfair if they:

- allow you to terminate the contract of a consumer who is in default, and require the balance of the charge to be paid immediately

- do not take account of your duty to keep your loss to a minimum.

Compensation

3.134 There is no objection to terms reflecting the ordinary legal position where a consumer is in breach of contract. A consumer is expected to pay reasonable compensation or compensation according to the law.

Arbitration and choice of law terms

Compulsory arbitration clauses

3.135 Section 91 of the Arbitration Act 1996 makes a compulsory arbitration clause automatically unfair if it relates to claims of £5,000 or less. Under the UTCCRs such terms are always unfair. Any clause forbidden by the Act is legally ineffective and open to challenge under the UTCCRs in all cases.

3.136 Terms are problematic if they:

- are able to be used to prevent or hinder consumers from seeking legal redress when you are in default
- make arbitration compulsory
- fail to make clear that the consumer can choose whether or not to go to arbitration.

Exclusive jurisdiction clauses

3.137 Terms are likely to be considered unfair if they prevent consumers from starting legal proceedings in their local courts, for example by requiring the exclusive jurisdiction of, say, the courts in England and Wales despite the contract being used in another part of the UK having its own laws and courts.

**Example of a potentially unfair term restricting the consumer's remedies
(Reference Paragraph 1(q) to Schedule 2 to the UTCCRS).**

Original Term	New Term
... The parties submit to the jurisdiction of the Courts of England and Wales We both agree to submit to non-exclusive jurisdiction of the English courts.

Access and powers over consumers' goods

Unfair enforcement powers

3.138 A contract can not be considered fair and balanced if it gives you the power to impose unreasonably severe penalties on consumers of whatever kind including sanctions that interfere unduly with consumers' property rights.

Rights of entry

3.139 Terms that claim to give you the right to enter private property without consent - whether to repossess goods or for any other purpose - are open to challenge, since you would normally require a court order for this. There is no justification for a term that purports to exclude your liability for causing damage to the consumer's property during the recovery of goods.

Example of a potentially unfair enforcement term allowing the supplier forceful entry to consumer’s premises to repossess goods (Reference Regulation 5 of the UTCCRs).

Original term	New term
At any time the company may recover from the buyer the goods remaining in the buyer’s possession and for the purposes thereof may enter upon any premises ... occupied by the buyer	The term was deleted.

Sale of the consumer’s goods

3.140 There are detailed legal provisions (in particular the Torts (Interference with Goods) Act 1977, sections 12 and 13) concerning the disposal of goods in your possession belonging to others. A contract need not reflect these in detail, but a term is likely to be unfair if it overrides or contradicts them.

Terms are at real risk of being considered unfair if they:

- claim to allow you to take direct action to secure remedies that the court would not necessarily allow
- indicate that goods may be sold immediately
- allow a sale of the goods without adequate notice of the date and place of the sale
- exclude your duty to get the best price that can reasonably be obtained
- exclude your duty to refund any surplus to the consumer.

ANNEXES

A DSRs REQUIREMENTS

Introduction

- A.1 The full DSRs can be found at:
www.opsi.gov.uk/si/si2000/20002334.htm as amended by
www.opsi.gov.uk/si/si2005/20050689.htm
- A.2 What follows is a summary of the DSRs requirements when you make the contract. The DSRs apply to contracts concluded via an organised distance sales scheme where there has been no face-to-face contact with a consumer. Distance selling includes, but is not limited to, contracts made by mail order, phone, fax, or over the internet.
- A.3 Where goods or services are provided under a contract concluded exclusively by distance means, the DSRs give consumers additional rights and a legal entitlement to certain information.

Pre-contractual information requirements

- A.4 You must provide the consumer with clear information about the goods and services offered in good time before the conclusion of the contract. This information must include:
- Your identity (and address if payment is required in advance)
 - a description of the main characteristics of goods and services and the price including all taxes
 - arrangements for payment
 - arrangements for delivery or performance and any delivery costs
 - where applicable the existence of the right to cancel under the DSRs

- the cost of using the means of distance communication where it is calculated other than at the basic rate
- where appropriate, the minimum duration of the contract for any services or goods contract that is to be performed permanently or recurrently
- how long an offer or price remains valid
- if you propose to provide substitute goods and services of equivalent quality and price, where those ordered by consumers are not available
- that consumers are not liable for the cost of returning these substitute goods if they cancel.

A.5 You must make sure that the information required above is provided in a clear and comprehensible manner appropriate to the means of distance communication you use, with due regard among others to the principle of good faith.

Durable information requirements

A.6 You must provide in writing, or in another durable medium available and accessible to the consumer prior to conclusion of the contract or thereafter, in good time and in any event, at the latest, during performance of a contract for services or, in a contract for goods, when goods are delivered:

- most of the above pre-contractual information (the first five bullet points listed at A.4 above)
- information about the conditions and procedures for exercising the right to cancel under the DSRs
- where a term of the contract requires (or you intend that it will require) that the consumer shall return the goods to the supplier in the event of cancellation, notification of that requirement

- who is responsible for the cost of returning or recovering the goods where the consumer cancels under the DSRs
- for service contracts, information as to how the right to cancel may be affected by the consumer agreeing to the services starting before the end of the usual seven working days cancellation period
- a geographical address of your place of business to which the consumer can address complaints
- information about after sales services and guarantees
- conditions for cancelling contracts of an unspecified duration or which last for more than a year.

A.7 There is no definition of durable medium. A consumer must be able to keep the information, unchanged, for the time it is needed, and access it for future reference. Emails are a durable medium but website information, which may change, will not normally meet this requirement.

Performance of contract

A.8 You will have 30 days in which to perform the contract beginning with the day after the day the consumer sent an order to you, unless otherwise agreed. If you cannot meet the period for performance because the goods or services are not available, you should inform the consumer before the date of delivery or performance expires and you can agree to an extension of the period. If you fail to do this, you should make a refund to the consumer. You may supply substitute goods, but only where you have told consumers about this possibility prior to the contract being made. A consumer may return substitute goods without being charged for the cost of return or collection.

Cancellation

A.9 In most contracts, consumers have an unconditional right to cancel which begins the day on which the contract is concluded. In goods contracts where the supplier provides the written or durable information in line with paragraph A.6 above, the cancellation period expires seven

working days beginning with the day after the goods are received. In service contracts where the supplier provides the written or durable information on or before the day on which the contract is concluded, it expires seven working days beginning with the day after the service contract is concluded (but see paragraph A.10 for other details). The only condition that can be placed upon the consumer's right to cancel is to require that you be notified in writing or in another durable medium. Once proper notice has been given, the contract is cancelled and you must make any refund as soon as possible, but, in any case, within 30 days beginning with the day the notice was given.

- A.10 In service contracts, cancellation rights will end when performance starts if the required written or durable information has been supplied before performance starts and the consumer has agreed to performance starting before the usual cancellation period has expired. Where the consumer agrees to such an early start but you have not provided the required written or durable information until the performance has started, nevertheless it is provided in time for it still to be useful, the cancellation period will start when the contract is made and end seven working days beginning the day after the information was received. However, in this case, if performance of the contract is completed before the end of the seven working days (beginning the day after the consumer receives the required written or durable information), cancellation rights will end on the day of completion.

Cancellation exceptions

- A.11 Among others, consumers do not have to be given cancellation rights for the following goods:
- Clearly personalised goods or goods made specifically to the consumer's specification
 - goods which, by their nature, cannot be returned or are liable to deteriorate or expire rapidly
 - computer software or audio/video recordings which have been unsealed by the consumer.

Extension to the cancellation period

A.12 If the required written or durable information is not given at the times set out in paragraph A.9 above cancellation periods will be extended beyond the periods set out above. Generally, where the written or durable information is not given as described in paragraph A.9 but it is given within three months from the day after the day the consumer receives the goods or, in the case of service contracts, within three months beginning the day after the day the contract is concluded, the cancellation periods will not expire until seven clear working days after the durable or written information has been received by the consumer. Where a supplier fails to give the written or durable information at all, the cancellation period will not expire until three months and seven working days beginning with the day after the conclusion of a contract for services or delivery of goods, whichever is appropriate.

Returned goods

A.13 Consumers must take reasonable care of goods and make them available for collection (following a request in writing) but they cannot be forced to physically return them. You may include a term in your contract which requires the consumer to return the goods to you when the contract is cancelled. You cannot make DSRs cancellation conditional upon return of the goods. The consumer cannot be charged for returning or for the recovery of substitute goods.

Collecting the goods

A.14 In order for you to collect the goods, the consumer must be given a request in writing, or another durable medium, which can be given either before or at the time goods are collected.

Refunds

A.15 If consumers have paid in advance, you must refund all their money as soon as possible and, in any case, within 30 days of their giving notice of cancellation.

- A.16 You may deduct from the refund the direct cost of recovering the goods where it was a term of the contract that they must return the goods and they have failed to do so, or have done so at your expense. There is, otherwise, no right to charge for return of the goods.

Payment card protection

- A.17 Consumers whose payment card is used fraudulently for any type of home shopping can cancel the payment and the card issuer must refund all the money to their account.

B ECRS REQUIREMENTS

- B.1 The ECRs govern the provision of Information Society Services, a term that covers any service normally provided for payment, at a distance, by means of electronic equipment for the processing and storage of data at the individual request of a recipient of a service. For example, this includes any business that sells goods or services to consumers (and business) on the internet.
- B.2 The ECRs list information that a person providing an information society service must supply about your business and prices charged. This includes:
- the name of your business
 - your geographic address
 - your contact details, including an email address, to enable rapid direct and effective communication with you
 - details of any relevant trade organisations to which you belong, if the register is open to the public, including the details of the register and your registration number or other means of identification on the register
 - if your service is subject to an authorisation scheme, details of the relevant supervisory authority
 - details of any professional body or similar institution with whom you are registered, details of any professional titles you hold, details of the Member States in which the titles are granted and a reference to the professional rules and how they can be accessed
 - VAT registration number if you are subject to VAT
 - where you refer to prices, a clear and unambiguous indication of prices and whether the prices include associated taxes and delivery costs.

B.3 And, where contracts are to be concluded by electronic means (other than exclusively by exchange of e-mails or by equivalent individual communications), you must provide the following information to consumers in a clear, comprehensible and unambiguous manner before an order is placed:

- the different technical steps to follow to conclude the contract
- whether or not the contract will be filed by you and whether the concluded contract will be accessible
- the technical means to enable consumers to identify and correct input errors prior to placing the order
- the languages offered for conclusion of the contract
- any relevant codes of conduct to which you subscribe and information about how they can be consulted electronically.

B.4 Where you provide terms and conditions applicable to the contract you must make them available in a way that allows the consumer to store and reproduce them.

B.5 Unless the contract is concluded exclusively by the exchange of e-mail (or by equivalent individual communication) consumers who place orders through technological means (e.g. through a website) must receive acknowledgement of the receipt of orders electronically without undue delay. In addition, such consumers must be provided with effective and accessible technical means allowing them to identify and correct input errors before they place the order. If you do not provide consumers with the means to do this, they are entitled to rescind the contract (unless a court orders otherwise).

C UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999

What they do

C.1 The UTCCRs protect consumers from unfairness in standard terms and conditions. A standard term is one which has not been negotiated with the consumer. In a contractual dispute, if a consumer argues that a term is unfair but a supplier disagrees, either can ask for the help of a court. Where the meaning of a term is unclear, it will be given the meaning most favourable to the consumer. If the court decides that the term is unfair, the term shall not be binding on the consumer. The OFT, and other enforcers such as Trading Standards Services, have the power where necessary to take injunctive action in the courts against the continued use of terms they consider unfair.

What makes a term unfair?

C.2 A standard term is unfair if it creates a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers, and contrary to the requirement of good faith. 'Good faith' is not defined in the regulations but it means that suppliers must deal fairly, equitably and openly with consumers. You are expected to respect consumers' legitimate interests in drafting contracts. Contractual imbalance may arise, to the detriment of the consumer, wherever a term gives powers or safeguards to you which could put the consumer at a disadvantage, whether or not actual harm is being caused. Our concern under the UTCCRs is with the object or effect of terms, not just their form.

C.3 Most standard terms are covered by the UTCCRs but exceptions are those:

- that reflect provisions which by law have to be or are expressly permitted to be included in contracts
- that have been individually negotiated

- in contracts between businesses
- in contracts between private individuals
- in certain contracts that people do not make as consumers – relating to employment, succession rights, family law, or setting up a business
- in contracts entered into before 1995.

Core terms

C.4 Terms that set the price or describe the main subject matter of the contract are exempt from the test of unfairness provided they are in plain, intelligible language. These are usually known as ‘core terms’. The purpose of the exemption given to the two kinds of “core” terms is to allow freedom of contract to prevail in relation to terms that are genuinely central to the bargain between the consumer and supplier. As such, in our view, the “core term exemption” is seen as conditional upon such terms being expressed and presented in such a way as to ensure that they are, or at least are capable of being, at the forefront of the consumer’s mind in deciding whether to enter the contract.

Types of unfair terms

C.5 Schedule 2 of the UTCCRs illustrates the meaning of ‘unfairness’ by listing 17 categories of terms, which can be unfair. The terms listed are not necessarily unfair. It is a ‘grey’ list. But terms are under suspicion of unfairness if they either have the same purpose or can produce the same result as terms in the ‘grey’ list. They do not have to have the same form or mechanism. All the illustrative terms listed in Schedule 2 have the object or effect of altering the position, which would exist under the ordinary rules of contract and the general law if the contract were silent. They either protect the supplier from certain sorts of claim in law, which the consumer might otherwise make, or give the supplier rights against the consumer that they would not otherwise enjoy.

C.6 Some terms fail the test of fairness set out in Regulation 5 without falling obviously within any of the categories set out in Schedule 2. The

list in Schedule 2 reproduces the Annexe to the Unfair Contract Terms Directive. As this implies, the types of term featured are those commonly used over the EU as a whole, not in any particular member state. The list is expressly said to be non-exhaustive. The OFT has found a range of different types of term being used in the UK which have a potential for unfairness comparable to that illustrated by items in Schedule 2, but which operate in different ways.

Clarity

C.7 Regulation 7 of the UTCCRs states:

'(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail...'

C.8 Ordinary words should be used as far as possible in contracts, and with their normal meaning, and there should also be clarity in the way terms are set out in contracts. Sentences should be short, and the text of the contract broken up with easily understood subheadings covering recognisably similar issues. Complicated references and definitions, and extensive cross-referencing should be avoided.

C.9 Transparency of contracts is clearly desirable, but the underlying EC Directive 93/13/EEC which the UTCCRs implement goes further in stating that consumers should actually be given an opportunity to examine all the terms. This means 'transparency' in the full sense. Consumers should be put in a position where they can make an informed choice. The full terms and conditions should be available to the consumer from the outset.

C.10 Terms that may mislead or not be understood by consumers are open to challenge. Terms should be readily understood by consumers without the need for legal advice. It is our view that technical jargon such as references to 'indemnity' can have onerous implications of which

consumers are not likely to be aware without such advice. This type of term can be put into plain language and where it is possible to set out the effect of such a term in plain language, this should be done.

- C.11 In private disputes that may occur between you and a consumer, where a term is unclear and open to different interpretation, a court may be able to find at least one fair meaning in it, and enforce it on that basis, rather than declaring it unfair and void. However, the “most favourable interpretation rule” is intended to benefit consumers in private disputes, not to provide a defence against regulatory action. If such a term could cause detriment to consumers we may challenge it as unfair even if one of its possible meanings is fair.

Small print

- C.12 Contracts will not be understood if they are difficult to read. The legibility of the contract depends not only on the size of print used but also its colour, that of the background and, where used, the quality of the paper.

D ENFORCEMENT

- D.1 The OFT, the Trading Standards Services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI) have enforcement powers under the DSRs and the UTCCRs.
- D.2 We follow the principles set down in the Cabinet Office concordat on enforcement which can be viewed or downloaded at www.cabinetoffice.gov.uk/regulation/public_services/concordat/enforcecon.asp

The Enterprise Act 2002

- D.3 Part 8 of the Enterprise Act, which came into force on 20 June 2003, gives the OFT, Trading Standards Services and certain designated enforcement bodies powers to take enforcement action through the courts against businesses that breach consumer legislation, including the DSRs, the UTCCRs and certain Regulations of the ECRs – see D.7 below. For further information see www.offt.gov.uk/Business/Legal/Enterprise/part+8.htm

The UTCCRs

- D.4 Under the UTCCRs, the OFT has a duty to consider any complaint received about unfair terms. Since October 1999 this enforcement role has been shared with other 'Qualifying Bodies', including most of the national regulatory bodies, all local authorities providing a Trading Standards Service, including the DETI, and Which? (formerly the Consumer's Association)

D.5 The OFT and qualifying bodies share the power, where they consider terms to be unfair, to take action on behalf of consumers in general to stop its continued use, if necessary by seeking a court injunction in England and Wales or an interdict in Scotland. Businesses may choose to give undertakings about their compliance with the Regulations. The OFT cannot take action on behalf of nor seek redress for individuals. However the UTCCRs do give individual consumers certain legal rights in respect of unfair terms, independent of any action by the OFT or other Qualifying Bodies. An unfair term is not binding on consumers.

The DSRs

D.6 The DSRs place a duty on the OFT and Trading Standards Services to consider complaints about a possible breach of the DSRs. Where it is considered that a breach has occurred, these designated enforcement authorities have the power to apply for an injunction (or an interdict in Scotland), including an interim injunction, in the courts against any person who appears to be responsible for a breach, in order to obtain compliance with the DSRs. Businesses may choose to give undertakings about their compliance with the regulations. In deciding whether to apply for an injunction or interdict, an enforcement authority may have regard to any undertaking given previously relating to compliance with the regulations. It should also be noted that the DSRs contain provisions preventing “contracting out” aimed at ensuring that terms are not inserted into contracts denying consumers their rights under the Regulations or imposing obligations on consumers that are inconsistent with the DSRs.

The ECRs

D.7 Under the Enterprise Act the OFT and other designated enforcers have powers to take enforcement action through the courts against businesses that breach Regulations 6,7,8,9 and 11 of the ECRs.

E OTHER CONSUMER PROTECTION LEGISLATION

E.1 We bring to your attention other pieces of consumer protection legislation, in particular:

- **Trade Descriptions Act 1968**
This makes it an offence for traders to apply, supply or offer to supply goods to which a false trade description is applied. It also makes it an offence to make knowingly false statements about aspects of services provided.
- **Consumer Credit Act 1974**
This regulates the full scope of consumer credit activities and includes requirements on a range of matters such as documentation, advertising, and the calculation of the cost of credit. It sets out rules, not just for credit providers, but also for others involved in the credit industry.
- **Sales of Goods Act 1979**
This sets out the law governing contracts for the sale of goods and governs a wide range of matters such as formation of contract, implied terms, remedies for breaches, transfer of ownership and performance of contract.
- **Supply of Goods and Services Act 1982**
This covers contracts for services, hire contracts and contracts where goods are transferred other than by a contract of sale. For example, contracts for work and materials including contracts for the installation of goods where there is not a sale of goods contract within the meaning of the Sales of Goods Act.
- **The Consumer Protection Act 1987**
Among other things this covers product safety and product liability and prohibits the use of misleading price indications.
- **Control of Misleading Advertisements Regulations 1988**
These provide protection against misleading advertisements and unacceptable comparative advertisements.

- **Sale and Supply of Goods to Consumers Regulations 2002**
These amend existing legislation on the sale and supply of goods and the Unfair Contract Terms Act 1977 and provide consumers with additional remedies in specific circumstances. The key provisions relate to remedies for consumers when the seller of goods is in breach of contract. The regulations also contain provisions on the legal status of guarantees offered to consumers.
- **Supply of Extended Warranties on Domestic Electrical Goods Order 2005.**
- **Computer and peripheral sellers who supply extended warranties on their domestic electrical goods to consumers would need to comply with the Order, which requires suppliers to provide information to consumers before the sale. It also provides consumers with certain cancellation and termination rights. The cancellation and termination rights specified in Article 8 of the Order do not apply in relation to extended warranties that are distance contracts to which the Directive 2002/65/EC concerning the distance marketing of consumer financial services applies. The Order came into force on 6 April 2005 and can be found on the website for the Office of Public Sector Information at www.opsi.gov.uk.**