

# Unfair contract terms guidance

**Consultation on revised guidance for the Unfair Terms in Consumer  
Contracts Regulations 1999**

April 2007

OFT311cons

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## **Contacting the Office of Fair Trading (OFT)**

If you think that any of the standard terms in a consumer contract are unfair you should contact Consumer Direct in the first instance at the address below. The OFT cannot provide advice or assistance to individual consumers or traders.

For consumer advice, information on specific consumer rights, to make a complaint against a trader or to contact your Local Authority Trading Standards Service, please call the Consumer Direct advice service on 08454 04 05 06 or visit the Consumer Direct website [www.consumerdirect.gov.uk](http://www.consumerdirect.gov.uk).

If you have any comments on this guidance, please write to:

Enquiries and Preliminary Investigations Centre  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London EC4Y 8JX  
email: [enquiries@oft.gov.uk](mailto:enquiries@oft.gov.uk)

## **OFT publications**

Further copies of this general guidance document, unfair contract terms bulletins, the explanatory OFT briefing note *Unfair Standard Terms* (ref: OFT 143), and guidance on unfair terms used in specific sectors, can be obtained from the OFT mailing house on 0800 389 3158, by fax from 0870 60 70 321, or email at [oft@ecgroup.co.uk](mailto:oft@ecgroup.co.uk)

Copies of all OFT publications are also available at: [www.oft.gov.uk](http://www.oft.gov.uk)

## **The Regulations**

A copy of the *Unfair Terms in Consumer Contracts Regulations* (SI 1999/2083) is included at Annexe C of this guidance. Alternatively, the Regulations are available from the Office of the Public Sector Information (OPSI) at [www.opsi.gov.uk](http://www.opsi.gov.uk)

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## **PART A: THE CONSULTATION**

### **I FOREWORD**

The Office of Fair Trading (OFT) is conducting a six week public consultation on revisions to the guidance on the Unfair Terms in Consumer Contracts Regulations 1999 (the 'Regulations'). This consultation period fulfils the criteria for an existing publication set out in the Cabinet Office's Code of Practice on consultation (available at [www.cabinetoffice.gov.uk/regulation/consultation/code.asp](http://www.cabinetoffice.gov.uk/regulation/consultation/code.asp))

The changes to the guidance reflect the provisions of Part 8 of the Enterprise Act 2002 and also feedback to a survey conducted in September 2006 of enforcement partners and other organisations. The majority of respondents found the first issue of the guidance offered constructive, and instructive, insight into OFT's enforcement of the Regulations and preferred minimal change.

This remains generic guidance. Guidance on terms and conditions used in specific sectors can be found at [www.oft.gov.uk](http://www.oft.gov.uk).

#### **Responding to the formal consultation**

The consultation period will run until **Tuesday 22 May 2007**.

Consultees responding to this consultation are asked to provide a brief summary of the interests or organisations they represent. We would ask that any comments or suggested changes are made in writing (by email, or alternatively by letter or fax, as indicated below).

All responses should be sent no later than Tuesday 22 May 2007 to:

Peter Orr-Ewing  
Room 3C/023  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London  
EC4Y 8JX

Fax: 020 7211 8505

Email: [peter.orr-ewing@oft.gsi.gov.uk](mailto:peter.orr-ewing@oft.gsi.gov.uk)

**Please note** that we may wish to refer to comments received to this consultation in future publications, for example the summary of responses. If you consider that your response contains commercially sensitive or confidential information which should not be disclosed, please indicate where this applies.

You can download copies of this consultation paper from [www.oft.gov.uk](http://www.oft.gov.uk) or request hard copies free of charge from:

EC Group  
PO Box 366  
Hayes  
Middlesex  
UB3 1DQ

Telephone: 0800 389 3158

Fax: 0870 60 70 321

Email: [oft@ecgroup.co.uk](mailto:oft@ecgroup.co.uk).

## **Next steps**

We will publish revised guidance and a formal summary of responses to the consultation in August 2007.

## **Comments or complaints about the consultation process**

If you wish to comment on the conduct of this consultation or make a complaint about the way it has been conducted, please write to:

Catherine Mason  
OFT Consultation Co-ordinator  
Room 5C/029  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London  
EC4Y 8JX

Phone: 020 7211 8890

Email: [catherine.mason@oft.gsi.gov.uk](mailto:catherine.mason@oft.gsi.gov.uk)

**Peter Orr-Ewing**

**Advisory, Policy & International**

## II CONSULTATION QUESTIONS

We want to work with our enforcement partners to increase consumer and business awareness of the Regulations, and believe that business representatives and organisations share our aim that preventive action is preferable to the risk of enforcement action for non-compliance. We therefore want to ensure that this generic guidance (a range of sector guidance can be found at [www.ofc.gov.uk](http://www.ofc.gov.uk)) is relevant, clear and comprehensive for all users.

OFT is not consulting on the law but how clearly we have presented our interpretation and enforcement of the Regulations.

In assessing the value of the generic guidance we would ask that consideration is given to the following questions:

- Does the revised guidance have any significant omissions?
- Is it sufficiently comprehensive?
- Is the format helpful?
- The guidance can be downloaded as a single document from the OFT website and is available in hard copy. Would you like to see it available in other formats? Please explain.

# I INTRODUCTION

This is the second issue of the guidance on the **Unfair Terms in Consumer Contracts Regulations 1999** (the 'Regulations') and replaces the original issue published in February 2001. In line with the findings of a survey in September 2006 of enforcers and other potential users of the 2001 guidance, and a consultation exercise in 2007, the changes are essentially confined to improving accessibility, reflecting developments in the law and in our thinking, and an explanation of our new powers under the Enterprise Act 2002.

## Using the guidance

The guidance explains why the OFT considers that certain kinds of standard terms used in contracts with consumers have the potential for unfairness under the Regulations. It represents the OFT's view and explains the basis on which we are likely to take enforcement action.

The focus of this guidance is on the application of the test of fairness in Regulation 5 to specific types of terms. For a fuller introduction to the Regulations as a whole, including provisions about enforcement, see the OFT briefing note (OFT143).

This guidance is arranged according to the categories of unfair terms listed in Schedule 2 to the Regulations, with two additional categories covering other types of unfairness (Parts III and IV). Annexe A contains examples of terms regarded as unfair and which suppliers have either removed from their contracts or amended in response to enforcement action. For ease of cross referencing, each type of term is given the same group number in the listing and the Annexe.

The guidance explains what may be considered fair and unfair about particular types of terms, but the final decision on whether a term is unfair rests with the courts. The guidance cannot be a substitute for independent legal advice as to whether the court would consider a particular term fair or unfair.

## The Regulations

All suppliers using standard contract terms with consumers must comply with the Regulations, which implement EC Directive 93/13/EEC on unfair terms in consumer contracts (the Unfair Contract Terms Directive). The Regulations came into force on 1 July 1995 and were re-enacted on 1 October 1999, since when OFT's enforcement role has been shared with 'Qualifying Bodies', including all local authorities providing a trading standards service, specialist regulators and Which?. See Annexe C for a list of enforcers.

The Regulations themselves are set out for convenience at Annex B. This guidance does not otherwise state the law, only the OFT's view of how the law is to be interpreted. The Regulations should be consulted alongside this guidance.

## Enforcement

Under the Regulations the OFT has a duty to consider any complaint received about unfair terms. Where a term unfair is considered unfair, enforcement action may be taken on behalf of consumers to stop its use, if necessary by seeking a court injunction in England and Wales or an interdict in Scotland. The OFT cannot take action on behalf of or seek redress for individuals. However the Regulations do give consumers certain legal rights in respect of unfair terms, independent of any action taken by the OFT or the other agencies. A term found by a court to be unfair is not binding on consumers.

In addition, Part 8 of the **Enterprise Act 2002** which came into force on 20 June 2002, gives the OFT and certain other bodies ('enforcers') separate powers against traders who breach consumer legislation.

Under Part 8 (as under the Stop Now Orders (EC Directive) Regulations 2001 which it replaces) the OFT and other enforcers can seek enforcement orders against businesses that breach UK laws giving effect to specified EC Directives – including the unfair contract terms Directive - where there is a threat of harm to the collective interests of consumers. In addition, the Enterprise Act creates the legal framework enabling the OFT to perform a co-ordinating role to ensure that action is taken by the most appropriate body in each case.

More information on the action the OFT and enforcers may take against unfair terms under the Enterprise Act (or the Regulations) can be found on the OFT website at [www.offt.gov.uk](http://www.offt.gov.uk).

### **The test of fairness**

The Regulations apply a test of fairness to all standard terms (terms that have not been individually negotiated) in contracts used by businesses with consumers, subject to certain exceptions. The main exemption is for terms that set the price or describe the main subject matter of the contract (usually known as 'core terms') provided they are in plain and intelligible language – see Part IV. The Regulations thus apply to what is commonly called 'the small print' of standard form consumer contracts.

A standard term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' – Regulation 5(1). Unfair terms are not enforceable against the consumer.

The requirement of 'good' faith embodies a general 'principle of fair and open dealing'.<sup>1</sup> It means that terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer should be given appropriate prominence – see below. However transparency is not enough on its own, as good faith relates to the substance of terms as well as the way they are expressed and

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<sup>1</sup> Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 All ER 97,HL

used. It requires a supplier not to take advantage of consumers' weaker bargaining position, or lack of experience, in deciding what their rights and obligations shall be. Contracts should be drawn up in a way that respects consumers' legitimate interests.

In assessing fairness, we take note of how a term could be used. A term is open to challenge if it is drafted so widely that it could cause consumer detriment. It may be considered unfair if it could have an unfair effect, even if it is not at present being used unfairly in practice and there is no current intention to use it unfairly. In such cases fairness can generally be achieved by redrafting the term more precisely, so that it reflects the practice and current intentions of the supplier.

Schedule 2 to the Regulations illustrates the meaning of 'unfairness' by listing some types of terms which can be unfair. The 17 groups of terms covered in Part II correspond to the 17 headings used in paragraph 1 of Schedule 2. The terms listed are not necessarily unfair – it is a 'grey' not a 'black' 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 rights against the consumer that the supplier would not otherwise enjoy.

The OFT's starting point in assessing the fairness of a term is, therefore, normally to ask what would be the position for the consumer if it did not appear in the contract. The principle of freedom of contract can no longer be said to justify using standard terms to take away protection consumers would otherwise enjoy. The Regulations recognise that contractual small print is in no real sense freely agreed with consumers. Where a term changes the normal position seen by the law as striking a fair balance it is regarded with suspicion.

Transparency is also fundamental to fairness. Regulation 7 says that standard terms must use plain and intelligible language. Taking account of the Directive the Regulations implement, this needs to be seen as part of a wider requirement of putting the consumer into a position where he can make an informed choice (see below Part IV). Thus even though a term would be clear to a lawyer, we will probably conclude that it has the potential for unfairness if it is likely to mislead, or be unintelligible to consumers and thereby cause detriment. Moreover, consumers need adequate time to read terms before becoming bound by them, especially lengthy or complex terms, and this can also be a factor in assessing fairness.

### **Examples of unfair terms**

Annexe A provides examples of two kinds of terms – 'original terms', which are terms drawn from standard contracts referred to OFT by complainants and considered unfair, and 'new terms' which are revisions of the originals referred to us which we considered either fair, or sufficiently improved to require no further action on the evidence available to us at the time.

The way terms have been selected and edited for use in Annexe A and their significance is considered in more detail in the introduction to the Annexes. One point needs to be particularly stressed. The revised terms should not be seen 'cleared' by the OFT for general use. The revisions reflect our assessment of what a court would be likely to consider fair in the particular contract under consideration. Our view is not binding on the courts, or upon other enforcers, nor does it fetter

the freedom of the OFT itself to take future enforcement action in the interests of consumers. We have a statutory duty to consider complaints about any terms brought to our attention, including any terms that have been revised as a result of our actions.

## II ANALYSIS OF UNFAIR TERMS IN SCHEDULE 2

### Groups 1 and 2: Exclusion and limitation clauses – paragraph 1(a) and (b) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from the act or omission of that seller or supplier.
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier ... in the event of total or partial non-performance or inadequate performance ... of any of the contractual obligations ...

#### Exclusion and limitation clauses in general

- 1.1 Terms which serve to exclude or limit liability (also known as disclaimers, or exemption clauses) take many different forms. Detailed comments on particular types of disclaimer which may be unfair can be found in subsections 2(a) to 2(h) below. But some comments can be made which apply to all of them.
- 1.2 Rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their obligations under the contract and the general law. Suspicion of unfairness falls on any term that undermines the value of such obligations by preventing or hindering the consumer from seeking redress from a supplier who has not complied with them.

- 1.3** A disclaimer will often exclude or limit liability for breach of the 'implied' terms that the law **presumes** are included in a contract when nothing is expressly agreed on the issues involved. These help ensure agreements are workable, and generally reflect what the law considers a reasonable person would have agreed. Excluding them can have the effect of allowing one party to act unreasonably or negligently to the other with impunity. Any term which can have that effect in a consumer contract is particularly likely to be considered unfair.
- 1.4** Many disclaimers which have such an effect are the subjects of other legislation depriving them of legal validity. Exclusions or restrictions of liability for death or injury caused by negligence are always legally ineffective – see paragraphs 1.10 to 1.13. But the fact that a term is void under other legislation – and thus, if it comes before a court, cannot have the harmful effect intended – does not make it fair under the Regulations. Not only is such a term pointless, it is also potentially misleading.
- 1.5** Certain other arguments cannot be used to justify an over-extensive disclaimer.
- **That it is intended only to deal with unjustified demands.** If a disclaimer **could** be used to defeat legitimate claims it is likely to be unfair. The Regulations are concerned with the effect terms can have, not just with the intentions behind them. If the potential effect of a term goes further than is intended, it may be possible to make it fair by cutting back its scope (see Annexe A for examples showing how this can be done).
  - **That it does not actually operate by excluding liability.** If a term achieves the same **effect** as an unfair exemption clause, it will be unfair whatever its form or mechanism. This applies, for instance, to terms which 'deem' things to be the case, or get consumers to declare that they are – whether they really are or not – with the aim of ensuring no liability arises in the first place.
  - **That the customer's statutory rights are said not to be affected.** An unfair disclaimer is not made acceptable by being partially contradicted by an unexplained legal technicality whose effect only a lawyer is likely to understand. See below Part IV on the plain and intelligible language requirement, and particularly paragraph 19.4.

- 1.6** The fact that certain customers – even a majority – are not consumers does not justify exclusion of liability that could affect consumers. However, there is no objection under the Regulations to terms which cannot affect consumers, for instance those which exclude liability for business losses, or losses to business customers.
- 1.7** **Exclusions 'so far as the law permits'.** The purpose of the Regulations is to give consumers additional protection against terms which may be unfair even though the common law or statute permits their use. So terms which exclude liability 'as far as the law permits' are no more likely to be fair than those which contain no such wording. They are also objectionable as being unclear as to their practical effect to those without legal knowledge.
- 1.8** Disclaimers sometimes say that liability is excluded to the extent permitted by the Regulations. That is open to objection, because it is unclear and uncertain in effect. Deciding whether a term is fair or unfair requires consideration of a number of factors, including the circumstances in which it is used. This means it is impossible – at any rate, without expert legal advice – to know what liability could or could not be excluded in any particular situation, and thus what liability is meant to be excluded.
- 1.9** **Subcontractors.** A disclaimer covering problems caused by a trader's suppliers or subcontractors is regarded in the same way as one covering loss or damage caused directly by his own fault. The consumer has no choice as to whom they are, and has no contractual rights against them. The business has chosen to enter agreements with them, and therefore should not seek to disclaim responsibility for their defaults.

## Group 1: Exclusion of liability for death or personal injury

- 1.10** No contract term can legally have the effect of excluding liability for death or injury caused by negligence in the course of business, and such terms should not appear in consumer contracts.<sup>2</sup>
- 1.11** General disclaimers, for instance saying that customers use equipment or premises 'at their own risk', cover liability for death or personal injury even though the main concern of the supplier may be something else. It might, for instance, be intended to stop consumers trying to sue for loss of or damage to their clothes or other property which is really the result of their own carelessness. But the fact that the intention behind a term is more limited than its potential effects does not make it fair.
- 1.12** Disclaimers of this kind, like other exemption clauses, may be acceptable if they are qualified so that liability for loss or harm is not excluded or restricted where the supplier is at fault, or is disclaimed only where someone else – or a factor outside anyone's control – is to blame. Another possible route to fairness where a contract involves an inherently risky activity, is that of using warnings against hazards which provide information, and make clear the consumer needs to take sensible precautions, but do not have the effect of excluding or restricting liability. The OFT's specimen terms listing (see Annexe A, Group 1) provides examples of terms of this kind and of ways in which they have been revised to meet the OFT's concerns.
- 1.13** Note however that, as is clear from the excerpt from the Regulations in italics at the top of page 3, amending such terms so that liability is accepted only for negligence does **not** necessarily remove all risk of unfairness. Other kinds of misconduct involving breach of duty can also cause death or injury. The OFT does not consider it fair to seek to deprive consumers of compensation in any circumstances in which they would normally be entitled to it by law.

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<sup>2</sup> Section 2 of the Unfair Contract Terms Act states that such liability cannot be excluded by reference to any contract term. The Act does not apply to certain contracts listed in Schedule 1, including contracts for land and insurance. However, such contracts are, if made with consumers, covered by the Regulations, and standards terms of the kind described appearing in them are highly likely to be considered unfair.

## **Group 2(a): Exclusion of liability for faulty or misdescribed goods**

**2.1.1** Any business selling goods to consumers is legally bound to accept certain implied obligations, whatever the contract says. These are the consumer's 'statutory rights'. Goods must match the description given to them, and be of satisfactory quality and fit for their purposes. Contract terms which deny consumers the right to full compensation where goods are misdescribed or defective are liable to be considered unfair under the Regulations, and are void and unenforceable under other legislation. In contracts purely for the sale of goods, their use constitutes an offence potentially giving rise to local authority prosecution.<sup>3</sup>

**2.1.2** See Group 1 for the OFT's objections to disclaimers generally. Note that these apply to any term, whatever the form of words used, or the legal mechanism involved, which has the object or effect of protecting the supplier from claims for redress for defective or misdescribed goods. Note, too, that a statement that statutory rights are not affected, without explanation, cannot make such a term acceptable to the OFT.

**2.1.3** A variety of different types of wording can have the effect of excluding liability for unsatisfactory goods. Some are illustrated in the OFT's bulletins.

- Terms saying that the goods must be (or that they have been) examined by the consumer, or by someone on his behalf.

Consumers cannot be legally deprived of redress for faults in goods (except obvious faults) other than by having the faults specifically drawn to their attention before purchase.

- Terms saying that goods only have the description and/or purpose stated on the invoice.

Consumers cannot legally be deprived of redress where goods do not meet the description under which they were actually sold, nor if they are not reasonably fit for all the purposes for which goods of the kind are commonly supplied.

- Terms which seek to pass on the risk of damage or loss before the goods are actually delivered – for example, from when the

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<sup>3</sup> Under the Consumer Transactions (Restrictions on Statements) Order 1976.

seller notifies their availability.

It is not acceptable for the consumer to have no recourse where goods are destroyed, stolen or damaged while in the care of the supplier. The fact that such terms apply when the consumer fails to collect or take delivery as agreed does not make them fair. Depriving consumers of redress for negligence – as opposed to (say) making them liable for reasonable storage and insurance charges – is not an appropriate sanction with which to encourage punctuality.

- Terms requiring that the goods are accepted as satisfactory on delivery, or imposing unreasonable conditions on their return.

Consumers have a right to a reasonable opportunity to examine goods and reject them if faulty. In the case of complex goods, a reasonable opportunity to examine means a chance to try the goods out. Consumers cannot legally be deprived of this right by being required to sign 'satisfaction' notes on delivery, nor by being required to return goods in a way that may not be possible – for instance, in disposable packaging that they are likely to discard after opening.

- Terms disclaiming liability for sale goods or saying that they cannot be returned.

Consumers have the same rights whether they buy goods at a reduced price or non sale items.

- Terms which end rights to redress after the consumer has dealt with the goods in a particular way.

Even where goods have been legally 'accepted', for instance, by being used repeatedly or modified in some way, the supplier remains liable to provide redress if they subsequently prove to have been defective when sold.

- 2.1.4 Second-hand goods.** Disclaimers are just as likely to be considered unfair where they are restricted to second-quality or damaged goods, for instance using the phrase 'sold as seen'. It is appropriate to warn the consumer when the standard of quality that can reasonably be expected is lower, but the law forbids use of terms which disclaim responsibility for failure to meet **any** reasonable standard.

**2.1.5** The OFT's view of what makes terms of this kind fair and unfair is illustrated by examples published in Group 2(a) of the specimen terms listing (see Annexe A).

## Group 2(b): Exclusion of liability for poor service

- 2.2.1** A business that sells services to consumers accepts certain contractual obligations as a matter of law. In particular, consumers can normally expect services to be carried out to a reasonable standard. That applies not just to the main tasks the supplier agrees to perform, but to everything that is done, or should be done, as part of the transaction.
- 2.2.2** See paragraphs 1.1 to 1.9 for an explanation of the OFT's objections to disclaimers generally. A term which could – whether or not that is the intention – serve to relieve a supplier of services of the obligation to take reasonable care in any of its dealings with consumers is particularly liable to be considered unfair. Where goods or materials are supplied along with a service, the same requirements as to description and quality apply as are described in paragraph 2.1.1.<sup>4</sup>
- 2.2.3** As already explained, mere addition of a statement that statutory rights are unaffected, without explanation, cannot make such a term acceptable – see paragraph 1.5.
- 2.2.4** A more fruitful approach is to narrow the scope of the disclaimer, so that it excludes liability only for losses where the supplier is not at fault, or which were not foreseeable when the contract was entered into. There is also likely to be no objection under the Regulations to terms which exclude liability for business losses, or indeed any losses to customers buying services in the course of business. (Note, however, that under other legislation,<sup>5</sup> unreasonable exclusions in standard terms can be void and unenforceable even as between businesses).
- 2.2.5** For illustrative examples of disclaimers of this kind, and of terms which have been amended to meet the OFT's objections (see Annex A, Group 2(b)). Two kinds deserve more specific comment.
- 2.2.6** **Disclaiming liability where consumer is at fault.** Terms which disclaim liability for loss or damage (for instance, to the consumer's property) which is the consumer's own fault may be acceptable. But this does not mean that a disclaimer which operates only where the consumer is in breach of contract is necessarily fair.

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<sup>4</sup> But it is only an offence to exclude liability on these points in contracts **purely** for the sale of goods.

<sup>5</sup> Unfair Contract Terms Act 1977.

- 2.2.7** Such a term is unlikely to be acceptable if it could deprive the consumer of all redress in the event of a trivial or technical breach, or where the supplier may be partly responsible for loss or harm suffered by the consumer. For instance, failure to take specified precautions against the risk of damage or theft by third parties should not be a basis on which the supplier can escape all liability where he, or any employee of his, is negligent or dishonest. That is especially so if the precautions consumers are required to take are unusual or unreasonable in character, or not stated with sufficient clarity.
- 2.2.8 Gratuitous services.** Sometimes services are provided to consumers without charge alongside the main goods or services being sold – for instance, advice as to how to use a product, or help with installation. But even if a service is 'free' there should be no disclaimer that could cover negligence.
- 2.2.9** This is not to say that ordinary employees, trying to be helpful when asked to do things they are not trained to do, have to be infallible. There is no objection to wording which spells out that consumers need to employ appropriate specialists if they want an expert or professional standard of service. However, no term should shield a business from liability where its employees fail to provide as good a standard of service as they are reasonably able.
- 2.2.10** There may be no objection to the contract stating that such services are not provided, as long as that this is really the case. To ensure that it is, steps may need to be taken to ensure that employees know that they are not authorised to, and should not, provide additional services.

## Group 2(c): Limitations of liability

- 2.3.1** If a contract is to be fully and equally binding on both seller and buyer, each party should be entitled to full compensation where the other fails to honour its obligations. Clauses which limit liability are open to the same objections as those which exclude it altogether. See Group 1 for the OFT's objections to disclaimers generally.
- 2.3.2** In a contract for the sale of goods, use of a term either excluding or restricting consumers' statutory rights is always ineffective in law regardless of its fairness, and its use **is liable to constitute an offence**, in the same way as the use of a term which excludes such rights altogether.
- 2.3.3** Many types of contractual provision – not just terms which simply place an overall cap on available compensation – can have the effect of limiting a supplier's liability. They include, for instance, terms which:
- (a) require consumers to meet costs that in law might be for the supplier to pay – for example, by making call-out charges non-refundable, or obliging the consumer to meet the costs of returning faulty goods to the supplier;
  - (b) say the supplier is liable only to the extent that he can claim against the manufacturer;
  - (c) limit the **types** of redress that are available – for instance, allowing only credit notes, not cash refunds – or which give the supplier the choice as to what type of redress to give;
  - (d) limit the **kinds of loss** for which redress is given, for instance by excluding 'consequential' loss (see below).
- 2.3.4** The OFT's view of what makes terms of this kind fair and unfair is illustrated by examples published at Annexe A– see terms in Group 2(c). These show that the OFT has no objection to terms which, for instance, allow the supplier to charge reasonably for dealing with problems which arise owing to the consumer's fault (but see Group 5 on the need to avoid imposing any unfair penalty).
- 2.3.5** As already explained (paragraph 1.5), the mere addition of wording saying that the consumer's statutory rights are not affected, without explanation, cannot on its own make a limitation clause acceptable.

- 2.3.6 Consequential loss exclusions.**<sup>6</sup> Terms excluding claims for consequential loss are supposed to protect the supplier from remote or unforeseeable liability. But the OFT considers they can bar the consumer from seeking redress in certain circumstances when it ought to be available. Such a term effectively disclaims liability for any loss or damage resulting from any breach of contract by the supplier unless it would have been generally obvious to anyone that the breach in question would cause that loss or damage.
- 2.3.7** This can allow a supplier to escape liability for negligently causing a serious problem for the consumer, even if, for instance, the consumer actually told him about it and asked him to take care to avoid causing it. An instance would be where the supplier of a service has been told that if it is not performed on time, the consumer will incur a financial penalty or lose an advantage such as a discount under another contract. The supplier should not be able to escape liability for that loss, just because the risk of its happening would not have been obvious to the world at large.
- 2.3.8** Under the ordinary rules of law, compensation is awarded for loss or damage that the parties themselves could reasonably have been expected to foresee, at the time of entering the contract, even if no-one else could have foreseen it. The OFT considers consumers should not be deprived of the right to claim for damages on that basis.
- 2.3.9** In any case, the technical meaning of 'consequential loss' is unknown to most people. Its use in standard contracts can lead to consumers thinking – and being told – that they have no claim for any loss **consequent on** a supplier's breach of contract. This may effectively deprive them of any compensation at all. But, for the reasons just given, the OFT does not accept that this sort of term is fair even if it is put in plainer language.

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<sup>6</sup> These objections apply to exclusions of 'indirect' loss to the extent that their meaning is unclear to the consumer and that they are therefore open to being relied on by the supplier in the same circumstances as exclusions of consequential loss.

**2.3.10** Suppliers can protect their position in various ways which are in our view unlikely to be considered unfair under the Regulations – for instance, by excluding liability for:

- (a) losses that were not foreseeable to both parties when the contract was formed;
- (b) losses that were not caused by any breach on the part of the supplier;
- (c) business losses, and/or losses to non-consumers.

**2.3.11** See examples of terms considered by the OFT at Annexe A under the Group 2(c) 'consequential loss' subheading.

## **Group 2(d): Time limits on claims**

- 2.4.1** If a contract is to be considered balanced, each party's rights must remain enforceable against the other for as long as is reasonably necessary, as well as being adequate in other respects. The law allows a reasonable time for making claims where the parties have not agreed a definite period between themselves, and this may be regarded as the benchmark of fairness.
- 2.4.2** The OFT is likely to object to a term that frees the supplier from his responsibilities towards the consumer where the consumer does not make a complaint immediately or within an unduly short period of time. This applies particularly where:
- (a) a time limit is so short that ordinary persons could easily miss it through mere inadvertence, or because of circumstances outside their control; and
  - (b) faults for which the supplier is responsible which could only become apparent after a time limit has expired.
- 2.4.3** Prompt notification of complaints is desirable because it encourages successful resolution and is therefore to be encouraged. But taking away all rights to redress is liable to be considered an over-severe sanction for this purpose. Where goods are supplied, use of such a term is legally incapable of producing that effect and may amount to an offence, because it serves to restrict the consumer's statutory rights – see paragraph 2.1.1.
- 2.4.4** Recent legislation has strengthened consumers' remedies for faulty goods. Any fault found in goods within six months of the date of sale is assumed to be the supplier's responsibility unless he can prove otherwise. It is therefore particularly misleading for contract terms to seek to exclude or limit the consumer's right to redress for faulty goods during the first six months after purchase.
- 2.4.5** A statement that statutory rights are unaffected, without explanation, will not make such a term acceptable to the OFT– see paragraph 1.5. A better approach is to insist on prompt notification in such a way as not to restrict consumers' legal rights. One way to do this is to require notification of a complaint within a 'reasonable' time of (or promptly after) discovery of a problem.

- 2.4.6** There is similarly no objection to a term warning consumers of the need to check to the best of their ability for any defects or discrepancies at the earliest opportunity, and take prompt action as soon as they become aware of any problem. Concerns do not arise so long as there is no suggestion that the supplier disclaims liability for problems which consumers fail to notice.
- 2.4.7** Any kind of term which is designed to encourage consumers to act promptly is more likely to be fair, and to be effective, if clear language is used, and it is given any appropriate highlighting.
- 2.4.8** The OFT's view of what terms are fair and unfair is illustrated by examples of terms published at Annexe A under Group 2(d).

## Group 2(e): Terms excluding the right of set-off

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (b) *inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier ... including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;*

- 2.5.1** Terms which deprive the consumer of a route to redress, as well as those which actually disclaim liability, may be considered unfair. One legitimate way for the consumer to obtain compensation from a supplier is by exercising the right of set-off. Where a consumer has an arguable claim under the contract against a supplier, the law generally allows the amount of that claim to be deducted from anything the consumer has to pay. This helps prevent unnecessary legal proceedings.
- 2.5.2** If the right of set-off is excluded, consumers may have (or believe they have) no choice but to pay in full, even when there is something wrong with what they are buying. To obtain redress, they then have to go to court. The costs, delays, and uncertainties involved may in practice force them to give up their claim, and thus deprive them of their rights.
- 2.5.3** There is no objection to terms which state the consumer's normal legal obligation to pay promptly and in full what is properly owing – that is, full price, on satisfactory completion of the contract. But suspicion falls on terms which say, **or clearly imply**, that the consumer must in all cases complete his payment of the whole contract price, without any deduction, as soon as the supplier chooses to regard his side of the bargain as finished. They are likely to be seen as excluding the right of set-off even if they do not actually mention that right.

- 2.5.4** Exclusion of the right of set-off is particularly likely to be seen as harmful where the consumer is not fully protected by an effective right to 'reject'—that is, to return what has been supplied for a full refund if it is unsatisfactory (see paragraph 2.1.3). The right to reject can normally be exercised only in contracts which are wholly or mainly for the supply of goods. It does not apply in contracts for work alone, or where significant work has to be done, for instance, in installing goods.
- 2.5.5** Even where the consumer can reject goods, a term excluding the right of set-off may be considered unacceptable. It restricts the consumer's freedom to use other legitimate methods to exercise their statutory rights to redress, contrary to law (see paragraph 2.1.1). Rejection is usually the preferred recourse for consumers who receive unsatisfactory goods, but not always. The consumer may have no time to start looking again for a new car, or wait for delivery of a replacement computer. Where departures from the promised specification are minor, accepting the product but paying a reduced price for it may be a better option, and consumers should not have their right to exercise that option removed or reduced.
- 2.5.6 Clauses subjecting set-off to penalty.** Concerns are particularly likely, whatever the subject matter of the contract, where consumers are subject to an immediately effective penalty<sup>7</sup> if they do not pay the whole contract price when demanded – for instance, where there is a loss of guarantee rights, or of right to a price discount.<sup>8</sup>
- 2.5.7** The above objections do not apply to terms designed only to deter consumers from withholding amounts that are disproportionate to the fault in the goods or services. Other relevant examples of terms considered acceptable may be found at Annex A under Group 2(e).

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<sup>7</sup> The concern here relates to penalties that might take effect independently of any resolution of the dispute in the consumer's favour, and without intervention of the court. That is not true of interest rate penalties, since if the consumer is withholding part of the contract price, he is bound to withhold the interest on it too. While he does that, it is the supplier, not the consumer, who is in the position of having to take his claim to court.

<sup>8</sup> There is no serious objection to guarantee rights being suspended until due payment has been made – again, a problem occurs where the penalty is effective regardless of subsequent resolution of the dispute.

- 2.5.8 Full payment in advance.** The OFT objects to terms which have the indirect effect of excluding liability unfairly. For instance, the right of set-off is effectively removed where consumers are required to discharge their duty to pay in full (or nearly in full) before the supplier has finished carrying out his side of the contract. Such terms also leave consumers at risk of loss if the supplier becomes insolvent.
- 2.5.9** The OFT objects to such terms in contracts under which a substantial amount of work is carried out individually for the consumer after full, or nearly full, payment has been made. In such cases, the proper incentive to perform work with reasonable care and skill is weakened or removed. The OFT's objections also apply to 'accelerated payment' clauses, which demand all or most of the full contract price if the consumer breaks a contractual obligation – for instance, to allow work to start on or by a certain date.<sup>9</sup>
- 2.5.10** There is no objection to 'stage payment' arrangements which fairly reflect the supplier's expenditure in carrying out the contract, and which leave consumers holding until completion a 'retention' of an amount reasonably sufficient to enable them to exercise an effective right of set-off. Fairness may also be achieved, even if full payment is required in advance, if such an amount is held under secure arrangements which guarantee that it will not be released until any dispute is resolved by independent adjudication.

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<sup>9</sup> See paragraph 6.37 of the guidance on home improvements (OFT737).

## Group 2(f): Exclusion of liability for delay<sup>10</sup>

- 2.6.1** The law requires that goods should be delivered, and services carried out, when agreed, or, if no date is fixed, within a reasonable time. A term which allows the supplier to fail to meet this requirement upsets the balance of the contract. This applies not just to terms which simply exclude all liability for delay, but also to standard terms allowing unduly long periods for delivery or completion of work, or excessive margins of delay after an agreed date. The effect is the same – to allow the supplier to ignore the convenience of customers, and even verbal commitments as to deadlines.
- 2.6.2** Such a term is particularly likely to be considered unfair since, if the contract says nothing on the issue of timing, the obligation on the supplier is only to be reasonably prompt in carrying out his side of the bargain. In fact, the law is even more accommodating than this implies, since, if that requirement is not met, the consumer has no immediate right to cancel. He or she must set a deadline,<sup>11</sup> which allows the supplier a further reasonable time, and can then take action only if **that** date is missed.
- 2.6.3** The fact that delays can be caused by circumstances genuinely beyond the supplier's control does not make it fair to exclude liability for **all** delays however caused. Such terms protect the supplier indiscriminately, whether or not he is at fault.
- 2.6.4** Contracts sometimes say that 'every effort' will be made to honour agreed deadlines, yet still exclude all liability for any delay. This leaves the consumer with no right to redress if no effort is actually made. Guarantees of this kind are largely valueless.

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<sup>10</sup> The concern here is delayed completion. Terms which effectively allow the supplier to carry out interim stages of the contract (for instance, where delivery is by instalments), without the consent of the consumer, can cause inconvenience other than just delay, and are dealt with below – see paragraph 18.7.3.

<sup>11</sup> This is in order to make 'time of the essence' for legal purposes – which will enable the consumer to cancel the contract if the deadline is not adhered to and will not affect his right to sue for damages in any event.

- 2.6.5** Clauses excluding liability for delay may be acceptable where they are restricted in scope to delays unavoidably caused by factors beyond the supplier's control (see examples in Annexe A, Group 2(f)). But such terms should not enable the supplier to refuse redress where he is at fault, for instance in not taking reasonable steps to prevent or minimise delay. Where examples of such factors are stated, then, in order to be clearly fair, they should only be matters which are genuinely outside the supplier's control, not situations such as shortage of stock, labour problems, etc, which can be the fault of the supplier.
- 2.6.6** Where there is a risk of substantial delay, a right for the consumer to cancel without penalty may additionally help achieve fairness in relation to an exclusion of liability for delay caused by circumstances beyond the supplier's control. It will not make acceptable a term which allows the supplier to delay at will.
- 2.6.7** The term '**force majeure**' is sometimes used in clauses of this kind. It is legal jargon and best avoided, and should never be used without clear explanation. Plain language is required for consumer contracts by Regulation 7. See Annexe A, subgroup 19(b), for possible alternatives.

## **Group 2(g): Exclusion of liability for failure to perform contractual obligations<sup>12</sup>**

- 2.7.1** A term which could allow the supplier to refuse to carry out his side of the contract or any important obligation under it, at his discretion and without liability, has clear potential to upset the balance of the contract to the consumer's disadvantage. This applies not only to terms which allow the supplier to refuse to carry out his side of the bargain altogether, but also to those which permit him to suspend provision of any significant benefit under the contract – see paragraph 15.4.
- 2.7.2** The purpose of such terms may be unobjectionable – for instance, to enable the supplier to deal with technical problems or other circumstances outside his control, or to protect the interests of other innocent third parties, or even to enhance service to the customer. But the potential effect, as well as the intention behind, contract terms has to be considered. If an exclusion clause goes further than is strictly necessary to achieve a legitimate purpose it could be open to abuse, and is liable to be seen as unbalancing the contract.
- 2.7.3** Such a term is more likely to be considered fair if:
- (a) it is narrowed in effect, so that it cannot be used to change the balance of advantage under the contract;
  - (b) it is qualified in such a way – for instance, by specifying exactly the circumstances in which it can be used – that consumers will know when and how they are likely to be affected;
  - (c) there is a duty on the supplier to give notice of any proposal to rely on the term, and a right for the consumer to cancel before being affected by it, without penalty or otherwise being worse off for having entered the contract.

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<sup>12</sup> The 2(g) category relates exclusively to terms which exclude the supplier's liability to provide redress for failure to perform contractual obligations. Terms which bind the consumer to continue with a contract (i.e., to pay) regardless of whether the supplier defaults represent a different form of unfairness – see Groups 3 and 15.

- 2.7.4** Sometimes such terms operate in effect as penalties, allowing the supplier to deny consumers a benefit under the contract on the grounds that they are in breach of their obligations. In such a case, it is essential that undue discretion is not reserved to the supplier in making the decision, and that there is no scope to impose a disproportionate sanction – see Part III, Group 18(c).
- 2.7.5** See examples of terms considered by the OFT at Annexe A under Group 2(g).

## Group 2(h): Guarantees operating as exclusion clauses

- 2.8.1** If a guarantee leaves consumers less well able to seek redress, in the event of default by the supplier, than they would be under the ordinary law, the same concerns arise as in relation to an exclusion or limitation clause – see paragraphs 1.1 to 1.9.
- 2.8.2** There is no objection to guarantees that simply enlarge the scope of the consumer's ordinary legal rights – for instance, by offering refunds or exchanges on a no-fault basis, or repairs regardless of the cause of the problem. But sometimes guarantees offer more limited rights than are available under the law, either because the benefits are less, or because their availability is made subject to special conditions or restrictions. These guarantees can reduce legal protection for consumers.
- 2.8.3** Certain legal rights are 'implied' into all contracts by law, and some of these cannot be removed by any terms used by the supplier. But others can be lost if the guarantee conflicts with them, leaving the consumer worse off. Ordinary consumers cannot be expected to know which rights to redress remain legally unaffected, and so are at risk of losing any practical benefit from them.
- 2.8.4** Separate legislation makes it **an offence** in a sale of goods contract to give a guarantee which could mislead consumers into thinking that their statutory rights are prejudiced.<sup>13</sup> Statements that **statutory rights are unaffected** are often included with the intention of achieving minimum compliance with the letter of this law. They cannot be relied upon to achieve fairness under the Regulations. The OFT considers that adding an unexplained piece of legal jargon to contradict the effect of an unfair term does not result in fairness, and indeed is likely to involve a breach of the requirement to use plain and intelligible language – see Group 19.
- 2.8.5** If a guarantee is to be made fair by adding any kind of statement about the consumer's legal rights, the words used need to have some practical meaning for the ordinary consumer. This may be achieved by, for instance, giving an indication as to what sort of protection is involved and/or indicating where advice on it can be obtained. See examples given at Annexe A under Group 2(h) (guarantees) and under Group 19(b) ('statutory references').

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<sup>13</sup> Consumer Transactions (Restrictions on Statements) Order 1976.

**2.8.6** Any guarantee which gives consumers substantially less protection than their ordinary rights is unlikely to be made fair merely by addition of a qualifying statement of any kind. In the OFT's view, such a guarantee should be discontinued altogether, or its terms should be brought into line with the consumer's legal rights.

### Group 3: Binding consumers while allowing the supplier to provide no service<sup>14</sup> – paragraph 1(c) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (c) *making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone.*

- 3.1** A term binding customers to go on paying when services are not provided as agreed is clearly open to even stronger objection than the exemption clauses considered under the heading Group 2(g). That kind of term excludes the supplier's liability to provide compensation for breach of contract but does not prevent the consumer cancelling.
- 3.2** In general, clauses allowing a business some flexibility in the performance of its duties under the contract can in principle be acceptable where they specify the circumstances in which any contractual obligations may not be observed – see, for instance, paragraphs 2.7.2 and 2.7.3. But this does not apply where the circumstances in question are effectively under the control of the supplier.

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<sup>14</sup> This is a very narrowly defined form of unfairness. It applies (a) only in contracts for services, (b) only where the consumer is bound to go on paying (not where he or she is merely prevented from seeking compensation) in the event of the supplier's default, and (c) only where the supplier can get out of performing his obligations by quoting some circumstance which is in practice under his control. Group 15 has similar characteristics, but is less narrowly defined.

## Group 4: Retention of prepayments on consumer cancellation<sup>15</sup> – paragraph 1(d) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

(d) *permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.*

- 4.1** Terms are always likely to be considered unfair if they exclude the consumer's rights under contract law to the advantage of the supplier. A basic right of this kind is to receive a refund of prepayments made under a contract which does not go ahead, or which ends before any significant benefit is enjoyed. In certain circumstances consumers are entitled to a refund even where they themselves bring the contract to an end.
- 4.2** Any party to a contract normally has the right to cancel it and receive a full refund of any prepayments (possibly compensation as well) where the other breaks the contract in such a way as to threaten its whole value to him. A term which makes any substantial prepayment or deposit entirely non-refundable, whatever the circumstances, conflicts with this principle.
- 4.3** Where customers cancel without any such justification, and the supplier suffers loss as a result, they cannot expect a full refund of all prepayments<sup>16</sup>. But a term under which they always lose everything they have paid in advance, regardless of the amount of any costs and losses caused by the cancellation, is at clear risk of being considered an unfair penalty – see Group 5.

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<sup>15</sup> Note that retention of a prepayment is often a form of penalty, and so could be challenged by reference to subparagraph 1(e), but it is dealt with by reference to subparagraph 1(d) since that makes specific reference to it.

<sup>16</sup> What is said in these paragraphs assumes there are no special statutory provisions governing cancellation rights, such as apply under legislation relating to distance selling (see below paragraphs 18.6.6), consumer credit and other particular areas.

- 4.4** In principle, there may be no objection to a financial penalty for pulling out of the contract that applies equally to both parties. In practice whether or not such an apparently 'balanced' provision is fair depends on a number of factors, and in particular on whether it confers any real benefit on the consumer, comparable to that enjoyed by the supplier.<sup>17</sup>
- 4.5** A more promising way to improve the fairness of such a term is to ensure that it does not go beyond the ordinary legal position. Where cancellation is the fault of the consumer, the business is entitled to hold back from any refund of prepayments what is likely to be reasonably needed to cover his net costs or the net loss of profit resulting directly from the default.<sup>18</sup> There is no entitlement to any sum that could reasonably be saved by, for instance, finding another customer.
- 4.6** Alternatively, the prepayment may be set low enough that it merely reflects the ordinary expenses necessarily entailed for the supplier. A genuine 'deposit' – which is a reservation fee not an advance payment – can quite legitimately be kept in full, as payment for the reservation. But of course such a deposit will not normally be more than a small percentage of the price, otherwise it is liable to be seen as a disguised penalty (see paragraph 5.8).
- 4.7** The OFT's view of what terms are fair and unfair is illustrated by examples of terms published at Annexe A under Group 4.

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<sup>17</sup> A 'balanced' solution is likely to be acceptable only where there is a roughly equal risk to each party of losing out as a result of the other's cancelling. In many forms of contract, the supplier has no particular interest in being able to cancel, and therefore his agreeing to accept a severe penalty for doing so does not 'balance' fairly a term imposing a heavy penalty on the consumer for cancelling.

<sup>18</sup> See Group 5 on the need to avoid double counting.

## Group 5: Financial penalties – paragraph 1(e) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (e) *requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.*

- 5.1** It is unfair to impose disproportionate sanctions for breach of contract. A requirement to pay more in compensation for a breach than a reasonable pre-estimate of the loss caused to the supplier is one kind of excessive penalty. Such a requirement will, in any case, normally be void to the extent that it amounts to a penalty under English common law. Other types of disproportionate sanction are considered below – Part III, Group 18(c).
- 5.2** 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. It makes the consumer pay more than the cost of making up the deficit caused by the consumer's default. The same applies to a requirement to pay excessive storage or similar charges where the consumer fails to take delivery as agreed.
- 5.3** Other kinds of penal provisions which may be unfair are damages and costs clauses saying that the supplier can:
- claim **all** his costs and expenses, not just his net costs
  - claim **both** his costs **and** his loss of profit where this would lead to being compensated twice over for the same loss
  - claim his legal costs on an 'indemnity' basis, not just costs reasonably incurred. The words 'indemnity' and 'indemnify' are also objectionable as legal jargon – see below, Part IV, Group 19(b).
- 5.4** **Potentially excessive penalties.** A penalty that states a fixed or minimum sum, to be paid in all cases, will be open to challenge if the sum could be too high in some cases.

**5.5** Assessment of unfairness focuses on the effect terms could have, not just the purposes they are intended to serve. Thus a clause may be unfair if it allows the supplier excessive discretion to decide the level<sup>19</sup> of a penalty, or if it could have that effect through being vague, or unclear, or misleading about what consumers will be required to pay in the event of default. Consumers rarely know about technical issues such as 'mitigation' of loss, and so can easily be misled into thinking that the supplier can claim more than is really the case.

**5.6 Cancellation penalties and charges.** A term which says, or is calculated to suggest, that inflated sums could be claimed if the consumer cancels the contract is likely to be challenged as unfair. For instance, a penalty for wrongful cancellation that requires payment of the whole contract price, or a large part of it,<sup>20</sup> is likely to be unfair if in some cases the supplier could reasonably reduce ('mitigate') his loss. If, for instance, he could find another customer, the law would allow him to claim no more than the likely costs of doing so, together with any difference between the original price and the re-sale price.

**5.7** There is unlikely to be any objection to terms which fairly reflect, in plain language, the ordinary legal position – that is:

- requiring the consumer to pay a stated sum which represents a real and fair pre-estimate of the costs or loss of profit the supplier is likely to suffer, or
- stating simply that the consumer can be expected to pay reasonable compensation, or compensation according to law.

Note, however, that a term which purports to reflect the law on damages is open to challenge if it is potentially misleading.

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<sup>19</sup> Terms giving an excessive discretion as to whether a penalty should be imposed at all – that is, as to whether the consumer is in breach – involve an entirely different form of unfairness, and are dealt with in Group 18(g).

<sup>20</sup> This includes, of course, a substantial prepayment, but loss of prepayments is specifically mentioned by Schedule 2 at paragraphs 1(d) and (f), and therefore is covered under Groups 4 and 6(b).

- 5.8 Disguised penalties.** Objections under the Regulations to an unfair financial penalty can apply to any term which requires excessive payment in the event of early termination, or for doing anything else that the supplier has an interest in deterring the consumer from doing.<sup>21</sup> The Regulations are concerned with the intention and effects of terms, not just their mechanism. If a term has the effect of an unfair penalty, it will be regarded as such, and not as a 'core term'. Thus a penalty cannot be made fair by transforming it into provision requiring payment of a fee for exercising a contractual option.
- 5.9** Examples of both fair and unfair penalty clauses of various kinds can be found at Annexe A under Group 5.
- 5.10** More information about how the OFT has interpreted these principles as they apply to financial penalties in the holiday and financial services sectors can be found in OFT's *Guidance on unfair terms in package holiday contracts* (OFT 668, published March 2004 pp19-20 and Annexe C) and *Calculating fair default charges in credit card contracts, a statement of the OFT's position* (OFT842, published April 2006).

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<sup>21</sup> This includes terms in contracts under which consumers agree to make regular payments for services provided over a period of months or years, which state that they may cancel, but will remain liable to make all the payments agreed. The OFT considers such terms are particularly open to objection where they relate to a period of over one year. See 'disguised penalty' example in 'specimen terms', p100. Such terms are not core terms if they are disguised penalties, by definition. Their lack of core term status is particularly obvious where they are not in plain language nor adequately drawn to the consumer's attention, but clarity and highlighting cannot normally make a term acceptable where it has the effect of an unfair penalty.

## Group 6: Cancellation clauses – paragraph 1(f) of Schedule 2

### Group 6(a): Unequal cancellation rights

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (f) *authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer ...*

- 6.1.1** Fairness and balance require that consumers and suppliers should be on an equal footing as regards rights to end or withdraw from the contract. The supplier's rights should not be excessive, nor should the consumer's be over-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.
- 6.1.2 Excessive rights for the supplier.** Cancellation of a contract by the supplier can leave the consumer facing inconvenience at least, if not costs or other problems. Where that is so, a unilateral right for the supplier to cancel without any liability to do more than return prepayments is likely to be considered unfair (see Group 6(b), on terms which exclude even that liability).
- 6.1.3** This applies particularly to terms which explicitly say that the supplier can cancel at will, without having any valid reason. But it also applies to terms which permit cancellation for vaguely defined reasons,<sup>22</sup> or in response to any breach of contract (however trivial) by the consumer. Such terms may be intended to allow the supplier to do no more than protect himself legitimately from problems beyond his control, or from serious misconduct by the consumer. But the potential effect as well as the purpose of terms is relevant to fairness, and if wording is loosely drafted and open to abuse it is liable to be seen as unbalancing the contract.

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<sup>22</sup> See Group 18(g), on terms which allow the supplier too much freedom to decide if the consumer is in breach, as opposed to those which permit imposition of the specific penalty of cancellation.

**6.1.4** There is normally no objection to terms which reflect the ordinary law, by allowing the supplier to end the contract if the consumer is in serious breach. See Group 5 on what may fairly be said about claims in damages in such circumstances.

**6.1.5** A right to cancel where the consumer is not at fault, with liability only to return prepayments, may be acceptable if it is non-discretionary – that is, can operate exclusively where circumstances make it impossible or impractical to complete the contract. But certain other conditions may also need to be met.

- attention needs to be drawn to the risk of cancellation if it is a real possibility.
- the circumstances should be clearly and specifically described. There should be no listing of matters that could be within the supplier's control – for instance, industrial disputes with the supplier's own employees, equipment breakdown, or transportation difficulties.
- the supplier should be required to find out<sup>23</sup> and inform the consumer as soon as possible if such circumstances do apply, explaining the reasons for the proposed cancellation if they are not obvious.

**6.1.6 Inadequate rights for the consumer.** A term can also be unfair if it undermines the consumer's legitimate cancellation rights. Clauses frequently state or imply that the consumer cannot cancel the contract in any circumstances, or only with the supplier's agreement. In law, each party has a right to end the contract if the other commits a serious breach of it. A term that purports to rule out all possibility of cancellation by the consumer is potentially misleading and unfair.

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<sup>23</sup> In home improvement and similar contracts which provide that the supplier or his agent will carry out a survey and may cancel if structural problems are found that make work impracticable, the OFT considers that, if the term is to be fair, it should provide that the survey should be carried out within a stated reasonable time (for instance, 14 days) and that written reasons for cancellation should be given. See paragraphs 6.65 to 6.68 of the guidance on home improvements (OFT737).

- 6.1.7** Again, there is normally no objection to terms which merely reflect the ordinary law. A cancellation clause may fairly forbid consumer cancellation where the supplier is not in breach of the contract, and alert the consumer to his or her liability in damages for wrongful cancellation (see Groups 4 and 5 for what it is fair to say on that score).
- 6.1.8** Examples of both fair and unfair cancellation clauses of various kinds can be found at Annexe A under Group 6.

## Group 6(b): Supplier's right to cancel without refund

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (f) *... permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract.*

- 6.2.1** Cancellation clauses which allow the supplier to cancel without acknowledging any right on the part of consumers to a refund of prepayments can be particularly open to abuse. This applies equally to pre-contractual deposits and sums paid when (or after) the contract is entered into.
- 6.2.2** As with cancellation rights generally, concern arises particularly where such a term could be used at the discretion of the supplier. But even a more restricted right to cancel, for instance, along lines indicated in paragraph 6.1.5, is likely to be unfair if it could allow retention of prepayments for which the consumer has received no benefit.
- 6.2.3** Where a supplier cancels in response to a serious breach of the contract (see paragraph 6.1.4) by the consumer, he may be entitled to retain all or some monies pre-paid by the consumer by way of compensation for any loss directly caused by the breach. However, a term is likely to be unfair if it makes a substantial prepayment non-refundable in all cases of cancellation on consumer default, regardless of whether any such loss has occurred.

## Group 7: Supplier's right to cancel without notice – paragraph 1(g) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (g) *enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.*

- 7.1** In most kinds of contract, a sudden and unexpected cancellation by the supplier may cause inconvenience, and sometimes expense, for the consumer. Even in a 'continuing' contract, which either party is entitled to cancel at any time, the supplier should normally give reasonable notice of termination.
- 7.2** This point does not, of course, apply only to suppliers. Consumers can be fairly required to give notice of termination, provided the period of notice required is reasonable (see Group 8).
- 7.3** A right for the supplier to cancel a contract without notice may be fair if its use is effectively restricted to situations in which there are 'serious grounds' for immediate termination. These might be circumstances in which there is a real risk of loss or harm to the supplier or others if the contract continues for even a short period – for instance, where there is a reasonable suspicion of fraud or other abuse.
- 7.4** However, fairness is likely to require that some clear indication is given of the nature of any 'serious grounds' for cancellation without notice. If the consumer will be unaware whether an immediate cancellation is or is not contractually justified, he is in no position to seek redress if it is not, and the term will in practice be open to abuse.

**7.5** In contracts for financial services – for instance, banking and credit contracts – the Regulations indicate that there may be a need only for the supplier to have a 'valid reason' for cancellation without notice, and to inform the consumer of the decision to cancel as soon as possible.<sup>24</sup> Such a term should, however, not be drafted in such a way that it could in practice be used arbitrarily to suit the interests of the supplier – see paragraph 11.5, on what may be considered to constitute 'valid reasons'.

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<sup>24</sup> Paragraph 2 of Schedule 2. In a few stated specialised areas, there may be no need for notice at all. These are not exemptions from the control of the Regulations, but instances of circumstances in which there is unlikely to be risk of significant detriment to consumers. Any 'cancellation without notice' term may still be unfair if it satisfies the criteria of unfairness set out in Regulation 5.

## Group 8: Excessive notice periods for consumer cancellation – paragraph 1(h) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (h) *automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early.*

- 8.1** A clause which states how long a contract has to run is likely to be among its most important 'core' terms (see Introduction on core terms). If a lesser term in small print can be used, relying on customer inertia, to extend the contract period beyond what the consumer would normally expect, it is not a core term, and is liable to be considered unfair.
- 8.2** Particular suspicion attaches to a term in a contract for a fixed period which, if early notice to cancel is not given, automatically commits the consumer to a renewed fixed term.
- 8.3** The OFT considers that an over-long cancellation notice term may also be unfair in a contract which continues indefinitely rather than for a fixed term. Consumers entering such contracts normally expect to be able to end it a reasonable time after they decide they no longer want or can no longer afford what is provided under it. If they are required to make a cancellation decision too far ahead of time, they are liable either to forget to do so when they need to, or wrongly to anticipate their future needs. In either case, the effect of the term is the same as that of an 'automatic renewal' clause – they experience an unintended extension of their payment obligations.
- 8.4** Terms of this kind are illustrated at Annexe A under Group 8.

## Group 9: Binding consumers to hidden terms<sup>25</sup> – paragraph 1(i) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (i) *irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.*

- 9.1** Terms which have the effect of making consumers agree to accept obligations of which they can have no knowledge at the time of contracting are open to serious objection. It is a fundamental requirement of contractual fairness that consumers should always have an opportunity to read and understand terms before becoming bound by them (see Part IV).
- 9.2** This applies to terms which require consumers to accept that they are bound by the terms of other linked contracts (for instance, insurance contracts) or rules or regulations unless they are given an appropriate chance to read them.
- 9.3** This is not to say that every detail of information about an agreement must be included in a single contract document. Indeed, relying solely on lengthy terms and conditions to communicate with consumers is positively unhelpful. Face-to-face explanation serves a valuable purpose, as do brochures, executive summaries, and other forms of written guidance – particularly as a means of drawing attention to the more important terms. The overriding requirement is that consumers are effectively alerted – **before** committing themselves – to all contractual provisions that could significantly affect their legitimate interests.

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<sup>25</sup> It is not 'hidden terms' themselves that are indicated to be unfair, but any term which binds the consumer to accept or comply with them – or, in legal jargon, 'incorporates' them 'by reference'. However, terms of whose existence and content the consumer has no adequate notice at the time of entering the contract may not be binding under the general law, in any case, especially if they are onerous in character.

**9.4 Cooling off periods.** If important details of the agreement cannot be communicated, a 'cooling off' period needs to be allowed. This means a specified period of time in which consumers can read the terms and pull out without penalty or loss of prepayments if they find the agreement is not what they expected. This may be appropriate wherever a contract is lengthy or complex, or where it contains terms to which consumers need to give careful consideration. It is required by law in some situations, particularly where a contract is entered at a distance –that is, by post, telephone or internet.

**9.5** Terms of this kind are illustrated at Annexe A under Group 9.

## Group 10: Supplier's right to vary terms generally – paragraph 1(j) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (j) *enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract*

- 10.1** A right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party, is under strong suspicion of unfairness. A contract can be considered balanced only if both parties are bound by their obligations as agreed.
- 10.2** If a term could be used to force the consumer to accept increased costs or penalties, new requirements, or reduced benefits, it is likely to be considered unfair whether or not it is meant to be used in that way. A variation clause can upset the legal balance of the contract even though it was intended solely to facilitate minor adjustments, if its wording means it could be used to impose more substantial changes. This applies to terms giving the supplier the right to make corrections to contracts at its discretion and without liability.
- 10.3** Such a term is more likely to be found fair if:
- (a) it is narrowed in effect, so that it cannot be used to change the balance of advantage under the contract – for instance, allowing variations to reflect changes in the law
  - (b) it can be exercised only for reasons stated in the contract which are clear and specific enough to ensure the power to vary cannot be used at will to suit the interests of the supplier, or unexpectedly to consumers (see paragraph 11.5)
  - (c) there is a duty on the supplier to give notice of any variation, and a right for the consumer to cancel before being affected by it, without penalty or otherwise being worse off for having entered the contract.

- 10.4** A term which merely says that variations will only be 'reasonable' or will only be made 'reasonably', is unlikely to be any fairer than one which contains no such a qualification, unless there can be little doubt in a reasonable consumer's mind as to what sort of variation, broadly speaking, such wording allows, and in what circumstances.<sup>26</sup>
- 10.5** Examples of general variation clauses which have been considered unfair, and of acceptable amendments, are illustrated at Annexe A under Group 10.
- 10.6** Groups 11 and 12 below set out our objections to two more particular kinds of variation clause, and suggest ways in which they can be modified to achieve fairness.

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<sup>26</sup> Where the criteria of reasonableness are vague, or clearly meant to include the best commercial interests of the business, there will be scope for the supplier to change the bargain unfairly to the detriment of consumers, simply on the basis that he needs to protect his profit margins. A reasonableness requirement is most likely to be acceptable where fair-minded persons in the position of the consumer and supplier would be likely to share a common view as to what would be 'reasonable' – for instance, where a 'reasonable charge' clearly means a charge sufficient to meet specific open-market costs.

## Group 11: Right to change what is supplied – paragraph 1(k) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (k) *enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.*

- 11.1** The OFT's objections to variation clauses generally are set out under Group 10. A variation clause of the particular kind described in the italicised wording above allows a supplier to substitute something different for what he has actually agreed to supply. This conflicts with the consumer's legal right to receive something that is in all significant respects what he or she agreed to buy, not merely something similar or equivalent.
- 11.2** Consumers are legally entitled to expect satisfactory quality in goods and services, but that does not mean it is fair to reserve the right to supply something that is not what was agreed but is of equivalent standard or value. Terms should respect **both** the right to receive products that are as described **and** the right to satisfactory quality, **not** one or the other.
- 11.3** A clause which allows the supplier to vary what is supplied is most likely to be considered fair if it is clearly restricted to minor technical adjustments which can be of no real significance to the consumer, or changes required by law.
- 11.4** If the intention is to permit changes that are more significant, but still only limited in scope, another approach is possible. This is to ensure that the consumer fully understands and agrees to the change in advance. The contract will need to set out clearly what variation might be made, and in what circumstances, and define how far it can go, for instance if the consumer orders goods of a certain colour but agrees to accept one of a range of others if that is not available.

- 11.5 Valid reasons.** Stating a valid reason why a particular change may be necessary can also help if it serves to ensure the customer is aware of, and accepts the possibility of, the sort of change that may occur. But a reason can be considered 'valid' only if its inclusion in the contract offers real protection to the consumer against encountering unexpected and unacceptable changes in his or her position. Vague or unclear reasons are unlikely to be considered valid. In any case, no statement of reasons can justify making consumers pay for a product substantially different from what they agreed to buy.
- 11.6 Rights to cancel.** Where circumstances could prevent the supply of the goods or services agreed (or a version of them that the consumer has indicated is acceptable) then the consumer should be able to cancel the contract<sup>27</sup>, and receive a refund of prepayments. Where it is known that, for instance, a chosen item could be unavailable from the manufacturer, that risk should be drawn to the consumer's attention.
- 11.7** A term which could allow the supplier to vary what is supplied at will – rather than because of *bona fide* external circumstances – is unlikely to be fair even if customers have a right of cancellation and refund. The consumer should never have to choose between accepting a product that is not what was agreed, or suffering the inconvenience of unexpectedly **not** getting, for instance, goods for which he or she may have an immediate need, or a long-planned holiday, just because it suits the supplier not to supply what was promised.
- 11.8** The OFT's objections do not apply to terms saying that suppliers can vary the specification of products featured in their brochures or other advertising, provided customers are told at the point of purchase how what they are buying differs from what was advertised.<sup>28</sup>
- 11.9** For illustrative examples of terms allowing variation to what is supplied, both those considered unfair and amendments considered acceptable, see Annexe A under Group 11.

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<sup>27</sup> Note that cancellation rights existing independently of a variation clause may not suffice to make that clause fair if it could be used to remove or change them.

<sup>28</sup> For more information on this point see paragraphs 3.3 to 3.5 of the guidance on package holidays (OFT688).

## Group 12: Price variation clauses – paragraph 1(l) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (l) *providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.*

- 12.1** The OFT's objections to variation clauses generally are set out under Group 10. If a contract is to be considered balanced, each party should be sure of getting what they were promised in exchange for providing the 'consideration' they agreed to provide. A clause allowing the supplier to increase the price – varying the most important of all the consumer's contractual obligations – has clear potential for unfairness.
- 12.2** Any purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable. That applies particularly to terms allowing the supplier to charge a price on delivery of goods that is not what was quoted to the consumer when the order was placed. It also applies to rights to increase payments under continuing contracts where consumers are 'captive' – that is, they have no penalty-free right to cancel.
- 12.3** A price variation clause is not necessarily fair just because is not discretionary – for instance, a right to increase prices to cover increased costs experienced by the supplier. Suppliers are much better able to anticipate and control changes in their own costs than consumers can possibly be. In any case, such a clause is particularly open to abuse, because consumers can have no reasonable certainty that the increases imposed on them actually match net cost increases.<sup>29</sup>

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<sup>29</sup> A right to pass on VAT increases does not attract these objections, since such changes are (a) outside the supplier's control (b) publicly known and verifiable and (c) universally applicable, so that the consumer would not be any better off with a right to cancel.

**12.4** A degree of flexibility in pricing may be achieved fairly in the following ways.<sup>30</sup>

Where the level and timing of any price increases are specified (within narrow limits if not precisely) they effectively form part of the agreed price. As such they are acceptable, provided the details are clearly and adequately drawn to the consumer's attention.

- Terms which permit increases linked to a relevant published price index such as the RPI are likely to be acceptable, as paragraph 2 of Schedule 2 to the Regulations indicates, subject to the same proviso.
- Any kind of variation clause may in principle be fair if consumers are free to escape its effects by ending the contract. To be genuinely free to cancel, they must not be left worse off for having entered the contract, whether by experiencing financial loss (for instance, forfeiture of a prepayment) or serious inconvenience, or any other adverse consequences.<sup>31</sup>

**12.5** Terms of this kind, and acceptable amendments, are illustrated at Annexe A under Group 12.

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<sup>30</sup> Note the absence of a 'valid reasons' route to fairness. The OFT does not consider that use of 'valid reasons' normally justifies price increases, essentially on grounds stated in paragraph 12.3, that is, lack of verifiability.

<sup>31</sup> In home improvement contracts (guidance OFT737), discovery of 'structural problems' should not be a basis on which the consumer can be compelled to pay higher prices unless the term is qualified in the same way as a right to cancel on adverse survey – see paragraph 6.1.5 and note.

## Group 13: Supplier's right of final decision – paragraph 1(m) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (m) *giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.*

- 13.1** Terms are always likely to be considered unfair if they allow a supplier unilaterally to take himself outside the normal rules of law. Disputes over the meaning and application of contract terms can normally be referred to the courts if either party so chooses. Paragraph 1(m) illustrates two different kinds of term, which purport to take away this right from the consumer (for another, see Part III, Group 18(g)).
- 13.2** **Right for the supplier to determine whether he is himself in breach.** If a supplier reserves the right to decide whether he has performed his contractual obligations properly, then he can unfairly refuse to acknowledge that he has broken them, and deny redress to the consumer. Such terms can have an effect comparable to clauses unfairly excluding liability for unsatisfactory goods and services (see under Group 1 and 2).
- 13.3** An instance would be a term allowing the supplier or his agent, if the consumer complains that goods are faulty or work has not been properly carried out, to undertake his own test or inspection to determine whether the complaint is well-founded. Such a term is much more likely to be fair if it provides for independent inspection or testing – provided that consumers are not required to meet the costs of this where it turns out that their complaint is well-founded.
- 13.4** Terms allowing the supplier to decide when the consumer is in breach of his or her obligations are open to comparable objection – see Part III, Group 18(g).

- 13.5 Right to decide the meaning of terms.** Similarly, if a supplier reserves the right to decide what a term in a contract means, then he is effectively in a position to alter the way it works so as to suit himself. It is not sufficient to say that the supplier will act 'reasonably'. Such a term gives rise to the same objections as a right to vary terms generally, dealt with in Group 10.
- 13.6** This second kind of 'final decision' term, too, is more likely to be fair if an element of independent adjudication is introduced into it – if, that is, a consumer who is unhappy with the supplier's interpretation of the contract can refer the matter to an independent expert or arbitrator. Note, however, that **compulsory** arbitration clauses involving sums of less than £5,000 are unfair – see paragraphs 17.2 to 17.3.
- 13.7** Relevant examples of terms are listed at Annexe A in Group 13.

## Group 14: Entire agreement and formality clauses – paragraph 1(n) of Schedule 2

### Group 14(a): Entire agreement clauses

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

(n) *limiting the seller's or supplier's obligation to respect commitments undertaken by his agents ...*

- 14.1.1** Good faith demands that each party to a contract is bound by his or her promises and by any other statements which help secure the other party's agreement. If a standard-form contract excludes liability for words that do not appear in it, there is scope for consumers to be misled with impunity.
- 14.1.2** These objections apply equally to other types of wording which have the same effect. Examples are clauses saying that employees or agents have no authority to make binding statements or amendments to the contract, or that contract changes may only be made in writing, or that they must be signed by a Director. Such terms all enable the supplier to disclaim liability for oral promises even when they have been relied on by the consumer reasonably and in good faith.
- 14.1.3** Consumers commonly and naturally rely on what is said to them when they are entering a contract. If they can be induced to part with money by claims and promises, and the seller can then simply disclaim responsibility on the basis of such a legal technicality, the scope for bad faith is clear. Even if such a term is not deliberately abused, it weakens the seller's incentive to take care in what he says, and to ensure that his employees and agents do so.
- 14.1.4** Such terms are often defended on the grounds that they achieve 'certainty' as to what statements bind the parties. But they do so only at the unacceptable price of excluding the consumer's right to redress for misrepresentation and breach of obligation (see Groups 1 and 2 on unfair exclusion clauses).

- 14.1.5** The ordinary law of contract strikes a fairer balance. It respects the need for certainty, in that it assumes a coherent contractual document normally contains all the terms of the agreement.<sup>32</sup> But it allows for the possibility that the court may have to take other statements into account in order to work out the real intentions of the parties, and to prevent bad faith.
- 14.1.6** There is no objection to wording which warns the consumer that the law favours written terms, so long as it does not undermine the court's power to consider other statements where necessary. For instance, the contract may include an explanatory statement that it is a binding document, and advising consumers to read it carefully and ensure it contains everything they want and nothing they are not prepared to agree to.
- 14.1.7** Such a warning can, in fact, strengthen the effect of written terms, provided that consumers are genuinely likely to see, understand and act on it. If so, there is less scope for misunderstanding, and thus less likelihood of plausible allegations that oral statements were relied on. But that will not be so unless the warning is drawn to the attention of the consumer, for instance, by appropriate highlighting. Also, the agreement must be clearly drafted to be fully comprehensible to them, and they must get an adequate opportunity to read it before it is signed. That is, in any case, required by the legislation – see Part IV.
- 14.1.8** The effect of such a warning may be further reinforced if the consumer is explicitly encouraged to ask questions and clarify uncertainties. Giving a telephone number to ring and a 'cooling-off' period in which this can happen may also be helpful. The OFT's specimen terms listing provides examples of other ways in which terms of this kind which have been revised to meet objections under the Regulations – see Annexe A, under Group 14(a).

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<sup>32</sup> This is known to lawyers as the 'parol evidence' rule.

## Group 14(b): Formality requirements

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (n) *making [the seller's] commitments subject to compliance with a particular formality.*

- 14.2.1** If a contract is to be considered balanced, the rights it confers must be secure and enforceable, not vulnerable to being lost without good reason. Under the general law, contracts normally remain binding on both parties unless a breach by one of them threatens the whole value of it for the other.
- 14.2.2** It is often administratively convenient if the consumer complies with formalities – for instance, procedures involving paperwork – and may even be sensible from the consumer's own point of view. But that does not justify a business opting out of important obligations where the consumer commits a technical breach.
- 14.2.3** Unless the need to observe a formality is obvious and important, or is prominently drawn to the attention of consumers, they may overlook or forget it. That is particularly so if it has to be complied with some time in the future without any reminder. Terms imposing severe penalties for trivial breaches committed inadvertently are open to strong objection.
- 14.2.4** Obviously where compliance with a formality involves disproportionate costs or inconvenience, the potential for unfairness is even greater. An instance would be a requirement to use registered post for written notification when notification by ordinary post would be perfectly adequate.
- 14.2.5** It follows that a formality requirement may be considered fair if:
- (a) it requires a consumer to do nothing that is not reasonably necessary, **and**
  - (b) any sanction for non-compliance is proportionate and does not involve loss of important rights for the consumer, **and**
  - (c) the need to comply with the formality is adequately drawn to the consumer's attention as close as possible to the time

when it has to be complied with.

**14.2.6** The more severe the penalty, the more clear and prominent must be the information about how to avoid it.

**14.2.7** Terms of this kind, and acceptable amendments, are illustrated in Group 14(b) of Annexe A.

## Group 15: Binding consumers where the supplier defaults – paragraph 1(o) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (o) *obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.*

- 15.1** A term binding customers to go on paying when goods or services are not provided as agreed is clearly open to even stronger objection than the exemption clauses considered under Group 2(g), or terms allowing the supplier to cancel at will – see Group 6. Those terms exclude the supplier's liability to provide compensation for breach of contract, but do not require the consumer to continue to perform his side of the bargain.
- 15.2** An example of this type of provision is a clause in a contract for the supply of goods by instalments, which does not allow the consumer the right to cancel if the supplier fails to make delivery of an instalment.<sup>33</sup>
- 15.3** Similar objections are likely if consumers are tied in to a continuing contract for services despite the supplier exercising a power to suspend provision of some benefits under the contract, unless the circumstances in which suspension can take place are strictly limited and certain other conditions are met (the same as those set out in paragraphs 2.7.2 and 2.7.3).
- 15.4** The fairness of rights to suspend services may be improved where the consumer does not have to continue to pay during periods of suspension. Another possibility may be for the contract period to be extended without additional cost to ensure that the consumer receives all the services and benefits contracted for.
- 15.5** Terms of this kind, and acceptable amendments, are illustrated in Group 15 of Annexe A.

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<sup>33</sup> Not to be confused with a right to arrange a schedule of delivery to suit the supplier's convenience – dealt with in paragraph 18.7.2.

## Group 16: Supplier's right to assign without consent – paragraph 1(p) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (p) *giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement.*

- 16.1** If a supplier sells ('assigns') his business, consumers will find themselves dealing with someone else if the contract is a continuing one (like an insurance contract) or, when it is for a single transaction, if any problem arises with the goods or services supplied to them. Their legal position **should** be unaffected by the 'assignment'. A term is unlikely to be fair if it allows the supplier to sell on to someone else who offers a poorer service.
- 16.2** The last three words of the italicized quotation above point to one solution – for the consumer to be consulted and assignment to be permitted only if he or she consents. Where services are being provided, and payment is being made, on a continuing basis (as, for instance, with a club or a bank account) a more practicable approach may be for the consumer to have a penalty-free right of exit if he objects to an assignment. Alternatively, an assignment clause may be considered fair if it allows the supplier to assign only in circumstances which ensure that the consumer's rights under the contract will not be prejudiced.
- 16.3** Note that Schedule 2 mentions only suppliers' rights to assign. Terms which deprive the consumer of the right to assign are therefore dealt with separately in Part III, Group 18(d).
- 16.4** Group 16 of Annexe A illustrates one relevant term.

## Group 17: Restricting the consumer's remedies – paragraph 1(q) of Schedule 2

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (q) *excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to applicable law, should lie with another party to the contract.*

- 17.1** Such terms have an effect similar to that of exclusion and limitation clauses – see Groups 1 and 2. As noted there, any term which could be used – even if that is not the intention – to prevent or hinder customers from seeking redress when the supplier is in default tends to upset the balance of the contract to the consumer's disadvantage.

### Compulsory arbitration clauses

- 17.2** Under section 91 of the Arbitration Act 1996, a compulsory arbitration clause is automatically unfair if it relates to claims of £5000 or less. This is an exceptional instance of a term that is always unfair under the Regulations regardless of circumstances. A compulsory arbitration clause forbidden by the 1996 Act is both legally ineffective and open to regulatory action in all cases.
- 17.3** If an arbitration clause is to be used, it should be free from the element of compulsion. Such a clause can, for instance make clear that consumers (or both parties) have a free choice as to whether to go to arbitration or not. Arbitration in the UK is fully covered by legal provisions, and so non-compulsory arbitration clauses are unlikely to encounter objections provided they are in clear language and not misleading.

## **Exclusive jurisdiction and 'choice of law' clauses**

- 17.4** Consumers should not be prevented from starting legal proceedings in their local courts – for instance, by a term requiring resort to the courts of England and Wales despite the fact that the contract is being used in another part of the UK having its own laws and courts. It is not fair for the aggrieved consumer to be forced to travel long distances and use unfamiliar procedures. International Conventions lay down rules on this issue, which are part of UK law.<sup>34</sup> Terms which conflict with them are likely to be unenforceable for that reason, too.
- 17.5** The OFT's specimen terms listing indicates examples of terms dealing with arbitration and choice of law which the OFT has not considered to be unfair – see Annexe A, under Group 17.

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<sup>34</sup> The Brussels Convention, implemented by the Civil Jurisdiction and Judgments Act 1982, as amended, and the Rome Convention, implemented by the Contracts (Applicable Law) Act 1990. Terms which seek to make consumers contract under the law of a state where they have substantially less protection (for instance, a non-EU country) are particularly likely to be unfair, especially if they conflict with the Rome Convention rules.

### **III ANALYSIS OF OTHER TERMS CONSIDERED POTENTIALLY UNFAIR**

#### **Group 18: Other terms**

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 Annex 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 one 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 fairness comparable to that illustrated by items in Schedule 2, but which operate in different ways.

Some of the more commonly occurring kinds of term not obviously illustrated by examples in Schedule 2 are commented upon below. The same headings and subheadings are used as in Annex A, except for terms considered to breach the plain language and transparency requirements of the Regulations, which appear in Group 19. This type of term is also commented on below, in Part IV of this guidance.

## **Group 18(a): Allowing the supplier to impose unfair financial burdens**

- 18.1.1** If a contract is to be considered balanced, each party must be subject only to obligations which he or she has agreed to accept. Any kind of term which allows the supplier to impose an unexpected financial burden on the consumer gives rise to concern. It has an effect similar to a price variation clause (see Group 12) and, like such a clause, cannot be considered an exempt 'core term' because it does not clearly set an agreed price.
- 18.1.2** An explicit right to demand payment of unspecified amounts at the supplier's discretion – for instance, by way of security deposit – is particularly open to challenge. But the same objections may apply if terms are merely unclear about what will be payable. Their purpose may not, in fact, be to allow the supplier to make unexpected or excessive demands for money, but the focus of the Regulations is on the effect that terms can have, not just on the intentions behind them.
- 18.1.3** These objections are less likely to arise if a term is specific as to what must be paid and in what circumstances. In that case, it may be considered a 'core' term and exempt from consideration for fairness provided it is in clear language and properly drawn to consumers' attention – see Part IV, paragraph 19.12. (But note that this may not hold good if it is a 'disguised penalty', that is, a term calculated to make consumers pay excessively for doing something that would normally be a breach of contract – see paragraph 5.8).
- 18.1.4** Where a precise amount cannot be stated, it should be clear how it will be set. It may in some circumstances be enough merely to say that it will be reasonable, but only where it is fairly obvious what would normally be thought a reasonable sum – for instance, where there are identifiable and verifiable costs that have to be covered, but which should not be exceeded.<sup>35</sup>
- 18.1.5** Any such clause may, in any case, be fair if consumers are free to escape its effects by ending the contract without suffering any penalty (such as loss of prepayments) or otherwise being left worse off.
- 18.1.6** Annexe A gives relevant examples under heading Group 18(a).

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<sup>35</sup> See paragraph 10.4 and the footnote to it.

## Group 18(b): Transferring inappropriate risks to consumers

**18.2.1** A contract may be considered unbalanced if it contains a term the supplier is better able to bear. A risk lies more appropriately with the supplier if:

- It is within their control
- It is a risk the consumer cannot be expected to know about, or
- The supplier can insure against it more cheaply than the consumer.

**18.2.2** Particular suspicion falls on any term which makes the consumer bear a risk that the supplier could remove or at least reduce by taking reasonable care – for instance, of damage to equipment that he himself operates, or the risk of encountering **foreseeable** structural problems in installation work. Such a term effectively allows him to be negligent with impunity. As such, it is open to the objections to exclusion clauses which are set out under Groups 1 and 2.

**18.2.3** Objections are likely even where a risk is outside the supplier's control (for instance, weather damage) if the consumer cannot reasonably be expected to know about and deal with it. The supplier should not make the consumer his insurer. The argument that such a term enables prices to be kept down cannot be accepted unless suitable insurance is easily available to the consumer at reasonable cost. If it is not, the end result is that the consumer pays more overall, or goes unprotected against the risk in question.

**18.2.4** Such clauses can often be made fairer if consumers are merely made responsible for losses caused by their own fault (but see the comments under Group 5 on the need to avoid unfairness in penalty clauses). Alternatively, they can be narrowed in scope, so as to relate only to risks against which consumers are likely to be already insured, or can easily insure – for instance, the risk of loss or damage to goods while they are in the consumer's home.

- 18.2.5** If a risk is transferred to consumers on the basis that they can themselves reasonably control it or insure against it, such as loss or damage to goods in their possession, they need to be aware of what they are supposed to do. To be useful, provision along such lines must be adequately drawn to their attention. If the contract is short and simple, this may require only the use of bold print – otherwise warnings separate from the main body of the contract will be needed. Effective highlighting of such clauses is essential if they **require**, rather than merely advise, the consumer to do anything.
- 18.2.6 Advance payments.** One kind of risk that should not be unfairly imposed on the consumer is that of the supplier's own insolvency. This may occur where the purchase price of goods or services, or a large part of it, is demanded substantially earlier than is needed to cover the supplier's costs. Such a prepayment assists the cash-flow of the business, but is liable to be lost to the consumer if the business is wound up before completion of the contract.
- 18.2.7 Indemnities against risk.** Terms under which the supplier must be 'indemnified' for costs which could arise through no fault of the consumer's are open to comparable objections, particularly where the supplier could himself be at fault. The word 'indemnify' itself is legal jargon which, if understood at all, is liable to be taken as a threat to pass on legal and other costs incurred without regard to reasonableness. Clearer and fairer wording to replace legal jargon of this kind is illustrated in Group 19(b) of Annexe A.
- 18.2.8** Annexe A gives relevant examples under heading Group 18(b).

## Group 18(c): Unfair enforcement powers

- 18.3.1** A contract cannot be considered fair and balanced if it gives one party the power to impose disproportionately severe penalties on the other, or if it misleadingly threatens sanctions over and above those that can really be imposed. The same principles apply as in relation to financial penalties (see Group 5).<sup>36</sup>
- 18.3.2 Rights of entry.** An instance is a term which purports to give the right of entry without consent to private property, whether to repossess goods for which consumers have not paid on time, to evict the consumer, or for any other purpose. Such a term seeks to permit direct resort to a sanction that can normally and properly only be authorised by court order.
- 18.3.3** There is even less justification for terms which purport to exclude liability for causing property damage in the course of exercising such rights. Such a term would appear to be designed to permit wilful or even criminal damage and does not, in the OFT's view, have any place in a consumer contract.
- 18.3.4 Sale of the consumer's goods ('lien').** Similar principles apply in relation to other kinds of term, which purport to allow suppliers to take direct action to secure redress that the court would not necessarily allow. An instance would be a term permitting the sale of goods belonging to the consumer which the supplier has in his possession.
- 18.3.5** The law<sup>37</sup> makes detailed provision as to how such goods should normally be treated. A contract need not reflect these rules in detail provided it does not override or contradict them. Terms are unlikely to be considered fair if they indicate that goods may be sold immediately, or without adequate notice of the date and place of the sale, and particularly if they exclude the duties to obtain the best price that can reasonably be got and to refund any surplus obtained.
- 18.3.6** The term 'lien' itself is legal jargon, which should be avoided in consumer contracts. Clearer alternative wording is possible, see Group 19(b) in Annexe A. Examples of terms relevant to enforcement clauses generally may be found in Group 18(c) of Annexe A.

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<sup>36</sup> As with Group 5, Group 18(c) is only relevant where the problem is that a penalty is, or can be, too severe. Where it is that the supplier can impose a penalty when the consumer is not at fault at all, the term belongs in Group 18(g), part ii.

<sup>37</sup> In particular, the Torts (Interference with Goods) Act 1977, sections 12 and 13.

## **Group 18(d): Excluding the consumer's right to assign**

- 18.4.1** Contract law ordinarily allows purchasers to sell on (or 'assign') to someone else what they bought. Terms which seek to restrict this right are considered to be open to scrutiny as regards fairness.
- 18.4.2** The commonest restriction on the consumer's right to assign is one which makes guarantees non-transferable. Guarantees, while they remain current, can add substantial value to the main subject matter of the contract. If consumers cannot sell something still under guarantee with the benefit of that guarantee, they are effectively deprived of part of what they have paid for.
- 18.4.3** Suppliers have a legitimate interest in ensuring that they are not subject to baseless claims under guarantee. There is no objection to terms which require the purchaser (or 'assignee') of goods, if he or she wishes to rely on the guarantee, to establish that it was properly assigned, as long as the procedural requirements involved are reasonable. Alternatively, transfer of the guarantee can be made subject to the supplier's consent, provided that cannot be unreasonably withheld.
- 18.4.4** Examples may be found in Group 18(d) of Annexe A.

## Group 18(e): Consumer declarations

- 18.5.1** If a declaration is written into contract documents, it has to be made for the contract to go ahead, whether or not consumers fully understand its significance and know the facts stated to be true. They may regard it as a mere formality, yet it could put them at a disadvantage.
- 18.5.2** For instance, consumers are sometimes sold goods on printed terms which include a declaration that they have inspected their purchase and found it to be free from faults. If they then subsequently discover defects, they are at risk of being told, or may think they will be told, they have 'signed away their right' to make any claim. Comparable problems can be caused by any enforced declaration indicating that the consumer has been dealt with fairly and properly.<sup>38</sup> Declarations as to facts that could be established with certainty only by an expert – such as the condition of a property – are particularly open to objection.
- 18.5.3** Use of such declarations may be intended only to stop consumers making baseless allegations, but it could be used to bar legitimate as well as unfounded claims. Wording of this kind gives rise to the same objections as exclusion clauses (see Groups 1 and 2).
- 18.5.4** Declarations can be acceptable if they are of matters wholly and necessarily within the consumer's knowledge (for example, their age), and a free choice is given as to what to say. But whether any declaration is in fact fair will depend on how it is used. If consumers are routinely told or given to understand that they **must** say one thing for the contract to go ahead, the declaration is just as likely to be considered unfair and legally ineffectual as if the written words gave no apparent choice. The Regulations apply to unwritten as much as to written terms.

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<sup>38</sup> A good example is a declaration in a contract for used cars, which states that the odometer reading has been properly disclaimed.

- 18.5.5 'Have read and understood' declarations.** Declarations that the consumer has read and/or understood the agreement give rise to special concerns. The Regulations implement an EU Directive saying that terms must be clear and intelligible and that consumers must have a proper opportunity to read all of them (see Part IV). Including a declaration of this kind effectively requires consumers to say these conditions have been met, whether they have or not. This tends to defeat the purpose of the Directive, and as such is open to serious objection.
- 18.5.6** In practice consumers often do not read, and rarely understand **fully**, any but the shortest and simplest contracts. It might be better if they tried to do so, but that does not justify requiring them to say they have done so whether they have or not. The purpose of declarations of this kind is clearly to bind consumers to wording regardless of whether they have any real awareness of it. Such statements are thus open to the same objections as provisions binding consumers to terms they have not seen at all – see Group 9.
- 18.5.7** Much more likely to be acceptable is a clear and prominent warning that the consumer **should** read and understand the terms before signing them. The potential advantages such wording can confer are described, together with certain conditions that need to be met, in paragraphs 14.1.7 and 14.1.8. See Annexe A, Group 18(e), for illustrative examples of wording relevant to declarations in general.

## **Group 18(f): Exclusions and reservations of special rights**

- 18.6.1** Any contract wording which could have the effect of depriving consumers of protection normally afforded to them under the law is open to suspicion of unfairness. The Regulations indicate specifically that terms excluding rights to redress for breach of contract may be unfair (see Groups 1 and 2). But consumers also enjoy protection under legislation that operates separately from contract law.
- 18.6.2** An example is the law relating to data protection.<sup>39</sup> A term or statement which could be understood as permitting the supplier to pass on information about the consumer more freely or widely than would otherwise be allowed under the Data Protection Act is likely to be open to challenge. A term about the use of disclosure of personal information that does not inform consumers how their information may be processed is likely to be unfair too.
- 18.6.3** Provisions of this kind may be acceptable if they are modified so as not to diminish the protection offered by the law or where there is a free choice to agree to them or not – for instance, via an option separate from the rest of the contract. But note that fairness is much more likely if consumers have positively to 'opt in' to lose their legal protection. A chance to 'opt out' in small print may be missed or misunderstood. In any case the chances of fairness will be increased if the significance of the choice is indicated and drawn to the consumer's attention.
- 18.6.4** In mail order contracts, references to possible future offers can be misleading and potentially unfair if they are insufficiently clear and precise. Consumers have certain rights where they receive something that is 'unsolicited'. They can treat goods they have not asked to receive as a gift, and cannot be made to pay for them.<sup>40</sup>

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<sup>39</sup> It should be noted that the Information Commissioner has powers under the Regulations to take action against unfair terms.

<sup>40</sup> Regulation 24 of the Consumer Protection (Distance Selling) Regulations 2000 (see paragraph 18.6.6 below). Regulation 25 makes any contract term which is inconsistent with this void, regardless the fairness test.

There is unlikely to be any objection to consumers being given a clear option to request more items to be sent on approval, accompanied by appropriate explanation. But unclear wording can be used which looks to the consumer as if it merely indicates willingness to consider further purchases, but is capable of being treated by the supplier as a definite request for goods. Any term which could result in consumers being sent goods they were not expecting, and being denied legal protection in relation to unsolicited goods, is likely to be considered unfair.

**18.6.5** Another instance of non-contractual consumer protection is legislation relating to 'doorstep selling'.<sup>41</sup> This legislation gives the consumer a right to cancel a purchase after a "cooling off" period where the sale was made away from the supplier's business premises, for instance on the consumer's doorstep or in her home. The protection given may be undermined by use of standard wording.

An instance is a statement to the effect that the contract has been made at the supplier's place of business. Such a statement may, of course, be true, but there is no guarantee that it will be used only when justified. If it is not necessarily true, it is likely to be unfair, since it may have the effect, in practice, of unjustifiably depriving consumers of their rights.

Another form of wording that can undermine the protection conferred by this legislation is a term which says or seeks to give the impression that the consumer has to do something, for instance return a form by post, in order to enjoy a cancellation right. Such a term is also open to objection.

**18.6.6 Distance Sales.** Consumers entering contracts 'at a distance' – for instance by post, over the telephone or on the internet<sup>42</sup> – enjoy legal protection where the supplier's distance selling is being operated in an organised way. They have, in particular, a right to receive certain information before the contract is concluded and normally have a right to cancel during a 'cooling off' period. Further details on the rights conferred by this legislation are available at [www.offt.gov.uk](http://www.offt.gov.uk).

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<sup>41</sup> The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, as amended.

<sup>42</sup> The Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334), as amended.

Terms in 'distance selling' contracts which seek to exclude or restrict these rights, or which could have the practical effect of depriving consumers of the protection they are intended to confer, are likely to be unfair. Indeed, the legislation expressly states that contract terms inconsistent with it will be void. However, this provision does not, of course, make such terms acceptable, since they are likely to be accepted at face value by consumers and thus to mislead them: see above paragraph 1.4).

## **Group 18(g): Supplier's discretion in relation to obligations**

**18.7.1** This Guidance has already dealt (under Group 13) with the potential unfairness of terms which allow the supplier too wide a discretion in relation to two aspects of the interpretation and application of the contract. There are similar objections to other kinds of term giving the supplier the ability to free himself from compliance with what ought to be his obligations, or to penalise consumers for what he considers to be their breaches.

### **Rights to determine how the supplier's own obligations are performed**

**18.7.2** The ordinary law allows suppliers a reasonable degree of flexibility as to how and when they carry out obligations, where they have made no specific promises on the subject. A term giving complete freedom to make arrangements, whether for the carrying out of services or delivery of goods, allows the customer's needs to be disregarded, and has practically the same effect as an exclusion of liability for causing loss and inconvenience. Such provision is likely to be fair only if it is drafted so as not to allow the supplier to act unreasonably.

**18.7.3** An instance is a term allowing the supplier to deliver goods in such consignments as he thinks fit. Consumers may need to be able to make arrangements depending on when goods are due to arrive, and to be brought into use, which can be hindered by lack of clarity as to the schedule of delivery, or by changes made without consultation, especially at short notice. This is not to say that delivery terms either can or should reflect only the convenience of the consumer, but rather that they should strike a reasonable balance. Often, such issues as the timing of deliveries are best left to individual agreement rather than being made the subject of any kind of standard contractual provision.

## Rights to determine whether the consumer is in breach<sup>43</sup>

**18.7.4** Suspicion of unfairness falls on any term giving to the supplier, or his agent, excessive power to decide whether the consumer ought to be subject to a penalty, obliged to make reparation of any kind, or deprived of any benefits under the contract. An instance of this kind of unfairness is a term in a contract with a club giving the management undue freedom to suspend or expel a member for misconduct, especially if the criteria of misconduct are left unstated or are vaguely defined.<sup>44</sup>

**18.7.5** As with 'final decision' terms (Group 13), fairness is more likely where there is a clear procedure under which the consumer, if unhappy with the decision as to whether he or she is in breach, can refer the matter to an independent expert or arbitrator. Note, however, that **compulsory** arbitration clauses are unfair – see paragraphs 17.2 to 17.3.

**18.7.6** For relevant examples of terms, see Annexe A, Group 18(g).

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<sup>43</sup> The question of whether any penalty is excessive is entirely separate, and dealt with under Groups 5 (financial penalties) and 18(c) (other unfair enforcement powers).

<sup>44</sup> Strictly, a term giving excessive freedom to expel a club member could be defined as an excessive right to cancel – see, paragraph 6.1.3 – but is here considered to be separate from an ordinary commercial cancellation right. In any case, the right is usually reserved to impose other sanctions than just expulsion.

## **Group 18(h): Unreasonable ancillary obligations and restrictions**

- 18.8.1** There is a clear risk of unfairness where terms put consumers at risk of incurring contractual penalties that are more severe than is necessary to protect the real interest of the supplier. This form of unfairness most obviously arises where a term provides for an excessive penalty – see Groups 5 and 18(c). In such a case, fairness can normally be achieved by reducing the penalty to an appropriate level. But this form of unfairness can also arise in a different way.
- 18.8.2** Where contract terms impose requirements that are not required at all by any legitimate interest of the supplier, or which go beyond anything needed to protect his legitimate interests, the source of unfairness is not the level of the penalty. **Any** penalty entailed by a wholly unreasonable term must be considered potentially disproportionate. Since breach of a contract term always involves some risk of a sanction being applied to the consumer, the term itself is the source of unfairness, and fairness can only be achieved by removing or amending it.
- 18.8.3** The OFT therefore objects, on the grounds of disproportionate penal effect, to terms which impose obligations or restrictions that are or can be wholly unreasonable, or which give the supplier the power to make stipulations of that nature. The objection applies regardless of the level of penalty stipulated, and indeed whether or not any penalty is mentioned at all.
- 18.8.4** Terms of this kind, like excessive exclusion clauses, may be unreasonable on going beyond what is required to protect the supplier rather than in providing no justifiable protection at all. Where they merely go further than is necessary, fairness may be achieved by more precise targeting on the particular problem they are designed to prevent or resolve. For instance, we are less likely to object to a term that requires rooms to be properly ventilated than a term which requires all windows to be opened for a required period.
- 18.8.5** For relevant examples of terms, see Annexe A, Group 18(h).

## IV ANALYSIS OF TERMS BREACHING REGULATION 7 (PLAIN ENGLISH AND INTELLIGIBLE LANGUAGE)

### Group 19: Regulation 7 – plain and intelligible language

19.1 Regulation 7 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 ...*

19.2 Clarity in contractual language is widely recognised as desirable in itself, but the Regulations go beyond promoting that objective alone. In line with their purpose of protecting consumers from one-sided agreements, and the requirement of the underlying Directive that '*consumers should actually be given an opportunity to examine all the terms*' (Recital 20), they have to be understood as demanding 'transparency' in the full sense. The consumer, in choosing whether to enter into a contract should be put in a position where he can make an informed choice.

19.3 It follows that what is required is that terms are intelligible to ordinary members of the public, not just lawyers. It is not sufficient for terms to be clear and precise for legal purposes, except in contracts normally entered only on legal advice.

19.4 That is why, for instance, the OFT considers wide exclusion clauses, qualified by references to statute, liable to be unfair by reason of lack of clarity (Group 1) if not for other reasons, too. Such a term may not be unclear or uncertain in law, but if consumers cannot understand the statutory references, they may be prevented or deterred from pursuing legitimate claims.

19.5 The underlying purpose of Regulation 7 also explains why the OFT does not restrict its objections to obviously obscure jargon. Relatively straightforward technicalities, such as references to 'indemnity' (see paragraph 18.2.7), can have onerous implications of which consumers are likely to be unaware.

- 19.6 Ambiguity.** Where a term is ambiguous, 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 by reason of lack of clarity. However, the Directive makes clear that the 'most favourable interpretation' rule is intended to benefit consumers in private disputes, not to give suppliers a defence against regulatory action – see Regulation 7(2) (Annexe C). If a term's ambiguity could cause detriment to consumers it may be challenged as unfair even if one of its possible meanings is fair.
- 19.7 What is required to comply?** Ordinary words should be used as far as possible, and in their normal sense. Some alternatives to common legal jargon are illustrated under heading Group 19(b) of Annexe A. However, avoidance of technical vocabulary cannot on its own guarantee intelligibility. That also requires clarity in the way terms are organised. Sentences should be short, and the text of the contract broken up with easily understood subheadings covering recognisably similar issues. Statutory references, elaborate definitions, and extensive cross-referencing should be avoided.
- 19.8** Intelligibility also depends on how contracts are presented and used. Obviously, print must be legible. This depends not only on the size of print used but also its colour, that of the background and the quality of the paper used. And plain language is of little value unless, as required by Recital 20 of the Directive, consumers are actually given an opportunity to examine all the terms. Where a contract is long or detailed, a 'cooling-off period' may be necessary to ensure compliance (see Group 9, paragraphs 9.3 and 9.4).
- 19.9** Fairness is not a matter of rigid requirements. The effect of Regulation 7 is not to insist that all consumers can and do understand every word of every contract. Fairness requires that they have a real chance to learn, by the time the contract becomes binding, about terms whose effect might otherwise come as an unpleasant surprise. This can be achieved in various ways. Within the contract, significant points can be highlighted, and unavoidable technicalities explained. Explanatory material – for instance, a summary – can also be provided alongside the contract. And information can be conveyed earlier on, in brochures and even advertisements. Preferably, of course, more than one such means will be used.

- 19.10** If transparency can be achieved, all kinds of term are more likely to be fair. When consumers understand what they are agreeing to, there is less scope for doubting that the 'requirement of good faith', which is part of the test of fairness, has been met. (Note, however, that the requirement of good faith cannot be met solely by transparency – on its other aspects, see the OFT's *Unfair Standard Terms* briefing note, OFT143). There is also less likelihood of disputes arising between supplier and customer. Many companies and trade associations have seen potential commercial advantages in having clear and well-presented standard contract terms.
- 19.11** A number of organisations and some solicitors specialise in plain language drafting. In practice, contracts produced or revised with their assistance often give rise to relatively few concerns from the point of view of contractual fairness.
- 19.12** **Core terms.** Terms which define what is being purchased under the contract, or set the price to be paid, are exempt from the test of fairness to the extent that the consumer is able to read and understand them. As will be clear from the above, the OFT does not consider that plain vocabulary alone meets this requirement. If a term is illegible, or hidden away in small print as if it were an unimportant term when in fact it is potentially burdensome, then it will be considered as potentially unfair.
- 19.13** In the view of the OFT, the purpose of the exemption given to the two kinds of 'core' term described by Regulation 6(2) is to allow freedom of contract to prevail in relation to terms that are genuinely central to the bargain between consumer and supplier. As such, the 'core terms 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.
- 19.14** The concern of the Regulations is with the 'object or effect' of terms, not their form. A term that has the mechanism of a price term, or which purports to define what the consumer is buying, will not be treated as exempt if it is clearly calculated to produce the same effect as an unfair exclusion clause, penalty, variation clause or other objectionable term. This particularly applies to termination charges that have the effect of unfair cancellation penalties – see paragraph 5.8.
- 19.15** Annexe A contains an example of a non-transparent core term in Group 19(c).