I Introduction

This Guidance explains why the Office of Fair Trading (OFT) considers certain standard contract terms used with consumers to be potentially unfair under the **Unfair Terms in Consumer Contracts Regulations 1999** (the Regulations). This Guidance states the OFT's views, but the courts have the final decision as to whether any term is unfair.

The Regulations came into force on 1 July 1995, but were re-enacted on 1 October 1999, mainly in order to allow other bodies to share the task of enforcement with the OFT. These agencies currently include local authorities, utility regulators and the Consumers' Association. Some drafting changes were also made, bringing the Regulations more closely into line with the provisions of the EC Directive on Unfair Contract Terms.

The guidance is arranged according to the categories of unfair term listed in Schedule 2 to the Regulations, with two additional categories covering other types of unfairness (Parts III and IV). For ease of cross-referencing, each type of term is given the same group number as it has in the listing of sample fair and unfair terms included at Annexe A. The intention is also to publish this Annexe A listing as a free-standing *Specimen terms listing*.

The guidance explains what may be considered fair and unfair about particular types of term. For a general introduction to the Regulations, what they cover, and how they are enforced, see the Briefing Note, *Unfair Standard Terms*, published by the OFT (OFT143). Consumer rights under other legislation are described in the OFT's *A Shoppers' Guide* (OFT002).

The test of fairness

The Regulations apply a test of fairness to standard terms (terms that have not been individually negotiated) in contracts used by businesses with consumers. There is an exemption for terms which 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 apply to what is commonly called 'the small print'.

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).

The requirement of good faith embodies a general 'principle of fair and open dealing'.[1] It does not simply mean that a term should not be used in a deceitful way. Suppliers are expected to respect consumers' legitimate interests in drafting contracts, as well as negotiating and carrying them out. Contractual imbalance may arise, to the detriment of the consumer, wherever a term gives powers or safeguards to the supplier which could put the consumer at a disadvantage, whether or not actual harm is currently being caused.

1 Words from the Court of Appeal in deciding the first case brought by the OFT under the Regulations, against First National Bank on 24 May 2000, paragraph 27 (reported at [2000] 2 AU ER 759, 768h-769a).

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 plain and intelligible language must be used in drafting. Taking account of the Directive the Regulations implement, this needs to be seen as part of a wider requirement that (in the words of the Court of Appeal) 'the consumer in choosing whether to enter into a contract should be put in a position where he can make an informed choice'[2] (see Part IV). Thus terms may be considered unfair if the language used could mislead an ordinary person even though it might be clear to a lawyer, or if consumers are not given an adequate chance to read them before becoming bound by them.

2 ibid, paragraph 29.