

## 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 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, and such terms should not appear in consumer contracts.
- 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.

## 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' – see the OFT's *A Shopper's Guide* for fuller information. 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.<sup>3</sup> In contracts purely for the sale of goods, their use constitutes an offence potentially giving rise to local authority prosecution.<sup>4</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 – eg, from when the 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.

<sup>3</sup> See the OFT's *A Shoppers' Guide* (OFT002).

<sup>4</sup> Under the Consumer Transactions (Restrictions on Statements) Order 1976.

- 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 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 Discount or 'sale' 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>5</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>6</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 Annexe 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.
- 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.

<sup>5</sup> But it is only an offence to exclude liability on these points in contracts **purely** for the sale of goods.

<sup>6</sup> Unfair Contract Terms Act 1977.

- 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 – eg, 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>7</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.

<sup>7</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.

- 2.3.7** 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 lose money 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.
- 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:
- (a) for losses that were not foreseeable to both parties when the contract was formed;
  - (b) for losses that were not caused by any breach on the part of the supplier;
  - (c) for 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. Where one party can, through not making a claim quickly enough, lose all rights to redress long before they would normally lapse by law, a risk of unfairness is bound to arise.
- 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 and 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 give rise to local authority prosecution, because it serves to restrict the consumer's statutory rights – see paragraph 2.1.1.
- 2.4.4** 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. Alternatively, a period may be set which takes proper account of the fact that consumers may be ill or absent from home for short periods after making a purchase.
- 2.4.5** 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.
- 2.4.6** 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.
- 2.4.7** 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

- 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 – ie, 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' – ie, 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>8</sup> if they do not pay the whole contract price when demanded – for instance, where there is a permanent loss of guarantee rights, or of right to a price discount.<sup>9</sup>

<sup>8</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>9</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.

- 2.5.7** 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 Annexe A under Group 2(e).
- 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>10</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.

<sup>10</sup> See paragraph 4.3 of the guidance on home improvements produced by the Unfair Contract Terms Unit of the OFT, available only directly from the Unit (see page iv for contact details).

## Group 2(f): Exclusion of liability for delay<sup>11</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>12</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.
- 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.

11 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.

12 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.

## **Group 2(g): Exclusion of liability for failure to perform contractual obligations<sup>13</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.
- 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).

<sup>13</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 (ie, to pay) regardless of whether the supplier defaults represent a different form of unfairness – see Groups 3 and 15.

## 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>14</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').
- 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.

<sup>14</sup> Consumer Transactions (Restrictions on Statements) Order 1976.

### **Group 3: Binding consumers while allowing the supplier to provide no service<sup>15</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.

<sup>15</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>16</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 basic rights under contract law to the advantage of the supplier. One such basic right 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. 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.
- 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 **either** the 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.

<sup>16</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>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.

- 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.

## 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 as 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 'double counting'
  - 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.** Penalties do not have to be excessive in all cases to be unfair. 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.

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

**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.

**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.

20 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).

21 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.
- 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.

<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.

- 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.

**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.

<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 5.5 to 5.7 of the guidance on home improvements produced by the OFT's Unfair Contract Terms Unit and available only directly from the Unit – see page iv for contact details.

## 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'.

<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.
- 9.4** **Cooling off periods.** If a contract is entered over the phone, or for any other reason 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 – ie, by post, telephone or internet.
- 9.5** Terms of this kind are illustrated at Annexe A under Group 9.

<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.

## 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.

<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, 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>27</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.

<sup>27</sup> For more detail on this point see paragraph 2.5 of the guidance on package holidays produced by the OFT’s Unfair Contract Terms Unit and only available directly from the Unit – for contact details see page iv.

## 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>28</sup>
- 12.4** A degree of flexibility in pricing may be achieved fairly in the following ways.<sup>29</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.

<sup>28</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.

<sup>29</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, ie, lack of verifiability. For fuller details of the OFT's views see the OFT's guidance on interest rate variation clauses issued to banks and building societies (OFT297).

- 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>30</sup>

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

<sup>30</sup> In home improvement contracts, 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. Such a term gives rise 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 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, for instance clauses saying that employees or agents have no authority to make binding statements or amendments to the contract. They also 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>31</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 a statement that it is a binding document, and that consumers should read it carefully and ensure it contains everything they want and nothing they are not prepared to agree to.

<sup>31</sup> This is known to lawyers as the 'parol evidence' rule.

- 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).

## 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 – that is, 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>32</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.

<sup>32</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 legislation clearly suggests 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 currently the only 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 such a term is not to be deleted, the element of compulsion should be removed, for instance by making 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>33</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 Annex A, under Group 17.

<sup>33</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.