

## IV Analysis of terms breaching Regulation 7 (plain English and intelligible language)

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

19.1 Regulation 7 states:

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

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

19.2 Clarity in contractual language is widely recognised as desirable in itself, but the Regulations go beyond promoting that objective alone. In line with their purpose of protecting consumers from one-sided agreements, and the requirement of the underlying Directive that '*consumers should actually be given an opportunity to examine all the terms*' (Recital 20), they have to be understood as demanding 'transparency' in the full sense. In the words of the Court of Appeal, they require that 'the consumer, in choosing whether to enter into a contract should be put in a position where he can make an informed choice'.<sup>44</sup>

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

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

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

19.6 **Ambiguity.** Where a term is ambiguous, a court may be able to find at least one fair meaning in it, and enforce it on that basis, rather than declaring it unfair and void by reason of lack of clarity. However, the Directive makes clear that the 'most favourable interpretation' rule is intended to benefit consumers in private disputes, not to give suppliers a defence against regulatory action – see Regulation 7(2) (Annexe C). If a term's ambiguity could cause detriment to consumers it may be challenged as unfair even if one of its possible meanings is fair.

19.7 **What is required to comply?** Ordinary words should be used as far as possible, and in their normal sense. Some alternatives to common legal jargon are illustrated under heading Group 19(b) of Annexe A. However, avoidance of technical vocabulary cannot on its own guarantee intelligibility. That also requires clarity in the way terms are organised. Sentences should be short, and the text of the contract broken up with easily understood subheadings covering recognisably similar issues. Statutory references, elaborate definitions, and extensive cross-referencing should be avoided.

<sup>44</sup> Director-General of Fair Trading v. First National Bank, paragraph 29. See footnote 1 above.

- 19.8 Intelligibility also depends on how contracts are presented and used. Obviously, print must be legible. This depends not only on the size of print used but also its colour, that of the background and the quality of the paper used. And plain language is of little value unless, as required by Recital 20 of the Directive, consumers are actually given an opportunity to examine all the terms. Where a contract is long or detailed, a 'cooling-off period' may be necessary to ensure compliance (see Group 9, paragraphs 9.3 and 9.4).
- 19.9 Fairness is not a matter of rigid requirements. The effect of Regulation 7 is not to insist that all consumers can and do understand every word of every contract. Fairness requires that they have a real chance to learn, by the time the contract becomes binding, about terms whose effect might otherwise come as an unpleasant surprise. This can be achieved in various ways. Within the contract, significant points can be highlighted, and unavoidable technicalities explained. Explanatory material – for instance, a summary – can also be provided alongside the contract. And information can be conveyed earlier on, in brochures and even advertisements. Preferably, of course, more than one such means will be used.
- 19.10 If transparency can be achieved, all kinds of term are more likely to be fair. When consumers understand what they are agreeing to, there is less scope for doubting that the 'requirement of good faith', which is part of the test of fairness, has been met. (Note, however, that the requirement of good faith cannot be met solely by transparency – on its other aspects, see the OFT's *Unfair Standard Terms* briefing note, OFT143). There is also less likelihood of disputes arising between supplier and customer. Many companies and trade associations have seen potential commercial advantages in having clear and well-presented standard contract terms.
- 19.11 A number of organisations and some solicitors specialise in plain language drafting. In practice, contracts produced or revised with their assistance often give rise to relatively few concerns from the point of view of contractual fairness.
- 19.12 **Core terms.** Terms which define what is being purchased under the contract, or set the price to be paid, are exempt from the test of fairness to the extent that the consumer is able to read and understand them. As will be clear from the above, the OFT does not consider that plain vocabulary alone meets this requirement. If a term is illegible, or hidden away in small print as if it were an unimportant term when in fact it is potentially burdensome, then it will be considered as potentially unfair.
- 19.13 In the view of the OFT, the purpose of the exemption given to the two kinds of 'core' term described by Regulation 6(2) is to allow freedom of contract to prevail in relation to terms that are genuinely central to the bargain between consumer and supplier. As such, the 'core terms exemption' is seen as conditional upon such terms being expressed and presented in such a way as to ensure that they are, or at least are capable of being, at the forefront of the consumer's mind in deciding whether to enter the contract.
- 19.14 The concern of the Regulations is with the 'object or effect' of terms, not their form. A term that has the mechanism of a price term, or which purports to define what the consumer is buying, will not be treated as exempt if it is clearly calculated to produce the same effect as an unfair exclusion clause, penalty, variation clause or other objectionable term. This particularly applies to termination charges that have the effect of unfair cancellation penalties – see paragraph 5.8.
- 19.15 Annexe A contains an example of a non-transparent core term in Group 19(c).