

Unfair contract terms bulletin 16

Case reports April to June 2001

One of a series of bulletins giving details of cases where the OFT or another body has secured significant changes in contract terms.

The purpose of the bulletins is to enable consumer advisers and consumers to monitor whether businesses are honouring the changes they have agreed to make.

December 2001

Contacting the OFT

If you think that any of the standard terms in a consumer contract are unfair you may contact the OFT at the address below or your local trading standards department. If you have any comments on this bulletin, please write to:

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Unfair contract terms bulletins

Further copies of this bulletin, the explanatory OFT briefing note *Unfair Standard Terms* (ref: OFT 143), and other OFT publications are available, free of charge, from:

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The Regulations

Copies of the *Unfair Terms in Consumer Contracts Regulations* (ref: SI 1999/2083), which include the Schedules referred to in this bulletin, can be purchased, price £2.00, from Stationery Office bookshops, or by post from:

The Stationery Office Publications Centre
PO Box 29
Norwich NR3 1GN

Copies are also available on the internet at:
www.hmso.gov.uk/si/si1999/19992083.htm

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CONTENTS

<i>Chapter</i>		<i>Page</i>
1	Introduction	1
2	Case reports	3
3	Statistical breakdown of action on cases taken by the OFT	35
4	Alphabetical index of businesses approached indicating trading sectors	37
5	Geographical index of businesses by local authority	39
6	Categories of unfair term	41
<i>Annexe</i>		
A	Concordat between the OFT and the Financial Services Authority	43
B	Concordat between the OFT and the Information Commissioner	52
C	News release on HomeForm Group Ltd	60

1 INTRODUCTION

- 1.1 This is issue 16 of the quarterly *Unfair contract terms bulletin* in which the Director General of Fair Trading publishes reports of cases where standard contract terms have been changed or dropped as a result of his enforcement action under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). The bulletin also includes reports he has received of cases taken by the other bodies that have powers to enforce the Regulations. Where he considers that a term drawn up for general use is unfair he has power to seek an order forbidding any further use of it. However, cases are normally resolved informally when he accepts undertakings in lieu of court proceedings. He also has the power to publish information about the Regulations and the work of the OFT.
- 1.2 This bulletin nominally covers the period from April to June 2001. Part 2 contains reports of 17 cases completed in this period. Seventy-five contract terms were abandoned or amended as a result of enforcement action by the OFT under Regulation 10, in all cases by means of acceptance of undertakings. This bulletin also includes details of one case completed by another body.

Cases of note

- 1.3 There are three cases of note in this issue. Energis Squared Ltd/Freeserve (see case report 7) is significant because it is the first reported case by OFTEL. It involves an internet service provider.
- 1.4 Another significant case is Bowater Windows Ltd (Staybrite) – case report 3. It is notable for two reasons. The first is that there appeared to have been a breach of undertakings in the oral use of a term which the company had undertaken not to use. The second is that the company had referred to the OFT's previous action against its terms in a way which suggested that the terms had been 'cleared' and were thus immune from challenge under the Regulations. The OFT always objects to such statements because they are factually incorrect and could mislead consumers. The OFT remains under a duty to consider further complaints about standard terms which it has

previously considered and for this reason the OFT always advises suppliers to keep their contracts under review. Consumers are also free to complain to any of the Qualifying Bodies listed in the Regulations. Moreover, only a court has the power to decide that a term is fair, and consumers remain free to invoke the Regulations in any dispute arising out of the terms.

- 1.5 The third case of note is HomeForm Group Ltd (see case report 9). The OFT issued a news release about it on 10 May 2001 (see Annexe C). HomeForm Group Ltd has agreed to implement a scheme to protect consumers who make full payment in advance for fitted kitchens and bathrooms. The scheme is similar to the schemes already being operated by MFI and B&Q.
- 1.6 Threatened court action by the OFT resulted in HomeForm Group Ltd giving an undertaking to resolve a complaint within four weeks or pay 20 per cent of the contract sum to Qualitas, an industry trade body. Qualitas will hold the money while it attempts conciliation and, if necessary, adjudicates on the complaint. The advice is free to consumers unless Qualitas decides that a complaint is unreasonable and directs the complainant to pay a £45 fee. Where the complaint is upheld, Qualitas will instruct the company to carry out remedial work or pay compensation, not limited to the 20 per cent already held.

Concordats

- 1.7 Two further concordats, with the Financial Services Authority and the Information Commissioner, have been signed, and copies are included at Annexe A and B.

Tenancy guidance

- 1.8 The OFT's guidance on unfair standard terms in assured and assured shorthold tenancy agreements was published on 6 November 2001 (ref: OFT356). It is based on a sample of agreements in use and on the OFT's experience of enforcing the Unfair Terms in Consumer Contracts Regulations 1999. It is aimed at those who use or supply standard tenancy agreements and housing advisers.

2 CASE REPORTS

- 2.1 The purpose of the case reports is to give enough information about significant changes in terms secured by the OFT and Qualifying Bodies to enable consumers, consumer advisers, and other agencies to see whether undertakings to drop or amend terms in line with the Regulations are being honoured.
- 2.2 When a case ends in undertakings, formal or otherwise, the OFT invariably makes clear to the supplier that revised contracts, and even individual terms that have been revised, are not immune from future action. Only the courts have the power to determine whether a term is unfair. The Director General remains under a duty to consider complaints that any standard terms are unfair. In some cases, however, the OFT's willingness to consider future action in the light of the possibility of subsequent complaints may be more specifically indicated. This usually occurs where the OFT has concerns about the potential unfairness of a term, but lacks sufficient evidence of a real possibility of harm to the consumer to warrant pressing a demand for it to be dropped. The terms on which the Director General's position has been specifically reserved are identified in the case reports, so that consumers and other agencies can monitor their use and report any unfairness.
- 2.3 Any title of the contract is given under 'Contract identifier' together with any reference numbers. The number of any revised term is given as well as the original term, except in some cases where the contract has been so comprehensively redrafted that the replacement terms cannot be readily distinguished. Reasons why terms were considered unfair are indicated, and, where they were amended rather than simply deleted, the nature of the changes introduced is summarised. To avoid uncertainty, the date on which final revisions were agreed is also given in the case report. The intention is to say enough to enable monitoring authorities to check whether old terms are still in use or have been replaced.
- 2.4 Please note that it cannot be assumed that any term apparently matching the description of a revised term will necessarily be fair. The aim is to illustrate the OFT's line on the fairness of different kinds of terms as concisely as possible. For convenience, the reasons for considering terms unfair are

generally indicated by reference to the nearest example of unfair terms given in Schedule 2 to the Regulations – the so-called ‘grey list’. This is not a full explanation. Fairness is assessed by reference to the test embodied in Regulations 5 and 6, not just on the basis of establishing a correspondence with one of the types of term listed in the Schedule. Schedule 2 is non-exhaustive and simply illustrates a number of types of term which may be considered unfair in the light of all the circumstances. Items in the Schedule overlap, and terms often resemble more than one such item in different ways. Where this occurs, the most obviously appropriate illustrative term is selected for citation. In cases of particular interest, additional descriptive information is given in a separate part of the case report.

- 2.5 Often in small contracts, terms are not numbered and therefore no numbers appear in the side columns – headings or descriptions of the terms are used instead where possible.

1 Alliance & Leicester plc

Name of business	Alliance & Leicester plc	Lead TSD	Leicestershire County Council
Trading sector	Financial services: unsecured credit	Contract identifier	Visa/MasterCard Credit Card Conditions Of Use

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
7(f)	Regulation 7: the term stating that payments would only be credited to the account when received as 'cleared funds' lacked prominence and clarity.	New term is in bold print and refers consumers to the reverse of the card statement, which gives details of the time taken for payments to be credited to the account.	4.3

Other information	The original complaint also referred to the poor layout of the contract. The contract format had already been improved when the OFT contacted the supplier about this matter. The new format is clearer and contains a summary of the main provisions of the contract.
Specific reservations	The Director General's position was reserved on terms 4.2 and 4.3. A complaint indicated that these terms did not fully or accurately explain how interest was added to an account balance each month. The Director General's position was reserved on the understanding that Alliance & Leicester plc are currently in the process of revising procedures for the calculation of interest.
Undertakings accepted	28 June 2001 One term revised

Name of business	Ashburn Financial Services Ltd	Lead TSD	Leicestershire County Council
Trading sector	Financial services: credit facilities for health and fitness clubs	Contract identifier	Membership Agreement

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
3	1(e): provided for potentially unfair double penalty in that, if any instalment remained unpaid after 14 days, the membership would be terminated and the whole of the balance would become payable.	Revised to provide that if an instalment remains unpaid after 30 days, membership will be suspended. However, membership may be resumed if payments are brought up to date.	3
Section under term 3	Declaration that consumer had had an opportunity to read, agree to and understand the terms.	Revised so that consumer is advised to read the terms.	Section under term 3
4	1(k): unfairly allowed supplier to alter opening times and fitness class timetables.	Deleted.	
5	1(b): allowed supplier unfairly to exclude liability for breakdown in equipment.	Deleted.	
6	1(b) and Regulation 7: excluded liability for loss or damage to property, and was not written in plain language.	Deleted.	

7	1(b) and 1(n): potentially unfair exclusion of terms and conditions implied into the contract by law. Term required that contract could only be varied in writing when signed by owner and director.	Deleted.	
8	1(j): unfairly allowed supplier to vary terms after consumer had entered into agreement.	Deleted.	

Undertakings accepted	9 April 2001	Seven terms revised or deleted
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3 Bowater Windows Ltd t/a Staybrite Windows

Name of business	Bowater Windows Ltd t/a Staybrite Windows	Lead TSD	City of Coventry
Trading sector	Home improvements: double glazing	Contract identifier	Customer Purchase Order: Terms and Conditions

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
15	Regulation 7: inadequate reference to consumers' statutory rights.	Revised to explain that terms and conditions do not affect consumers' statutory rights including those relating to faulty goods or the supplier's failure to carry out its obligations. Also advises consumers where to seek further advice.	13

Continued on next page

<p>Other information</p>	<p>It was reported in <i>Bulletin 6</i> (pages 74-75) that Staybrite had given an undertaking in lieu of court action. One effect of the undertaking was that a term which required consumers who cancelled their contracts to reimburse all the supplier's expenses, together with its anticipated gross profit, would no longer appear in its contract. The OFT subsequently received complaints showing that, although the term had been deleted, Staybrite continued to tell consumers who cancelled that it was entitled at common law always to recover the full anticipated gross profit, without reference to mitigation. The supplier said the practice had been discontinued, as the result of a change of management.</p> <p>A complaint was also received showing that Staybrite had referred to the OFT's previous action against its terms in a way which suggested that the terms had been 'cleared' and were therefore immune from challenge under the Regulations. The supplier gave an undertaking that its employees would no longer make any statement associating the OFT with a defence of its terms' fairness.</p> <p>Staybrite's entire contract has been replaced by one already being used by Zenith Windows, another trading division of Bowater Windows Ltd.</p>
<p>Specific reservations</p>	<p>Term 7(b) of the original contract provided that if installation had not begun within the imprecise delivery period stated on the order form, consumers could require the supplier to complete work within a further six weeks. This allowed the supplier to override specific deadlines which had been agreed when the order was placed, and to restrict its liability for delay. Under the revised term 7(c) consumers must still give the supplier six weeks' notice. However, the front of the contract now has a box containing specific delivery periods, one of which must be ticked when the order is placed, and term 4 of the new contract commits the supplier to carrying out the survey within five days. The OFT took the view that the context in which the revised term was to be used should be capable of limiting the supplier's scope for overriding deadlines.</p>
<p>Undertakings accepted</p>	<p>22 June 2001 One term revised</p>

Name of business	Castle Bathrooms Ltd	Lead TSD	Royal Borough of Windsor & Maidenhead
Trading sector	Home improvements: fitted bathrooms	Contract identifier	Terms and conditions

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
2	1(l) and 1(k): allowed supplier to increase price and vary specification, without reference to consumer.	Revised so that price is increased only where changes to specification have been requested by consumer, and price will be agreed with consumer.	2
3	1(b): allowed supplier not to guarantee delivery dates.	Revised so that in the case of circumstances beyond its control the supplier will arrange an alternative delivery date with the consumer.	3
4	1(b) and Regulation 7: onerous enforcement clause restricted right of set-off by providing that if consumer did not pay in full, the goods had to be dismantled and returned to the supplier; also purported to give the supplier the right to enter consumer's premises for this purpose. Excessive use of legal jargon.	Revised to provide that the supplier will give reasonable notice to return goods before taking legal action and no longer has the right to enter consumer's premises. Legal jargon removed.	4

5	1(e): allowed supplier to charge interest on the balance due if consumer did not pay the total balance on completion or an amount proportionate to work actually carried out when the fitter was unable to complete the work in a single visit. Amount to be charged was not clear.	Revised to state more specific details of interest charged.	5
7 (and Receipt and Guarantee)	1(b): guarantee made no reference to consumer's statutory rights relating to faulty or misdescribed goods.	Revised to state that contract does not reduce consumer's statutory rights and that further information can be obtained from local Trading Standards Department or Citizens' Advice Bureau.	10
8	1(n): entire agreement clause stated that no representation, warranty or variation should have effect unless in writing and signed by a director of the company.	Revised to advise consumer to read conditions carefully before acceptance and to invite consumer to contact the supplier if an explanation is required.	11
9	1(e): the supplier set various charges if consumer cancelled.	Two of the charges were deleted. A handling charge for returning unwanted goods to manufacturer was limited to the amount charged by the manufacturer.	7

11	1(f): the supplier reserved the right to decline the contract subject to a surveyor's report.	Revised to specify that the supplier will cancel only in the case of a survey reporting adverse structural conditions, and that it will give a full written explanation and refund consumer's deposits.	9
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Intelligibility	Some legal jargon removed.		
Undertakings accepted	17 May 2001	Eight terms revised	

5

The College of Nutritional and Environmental Medicine

Name of Company	The College of Nutritional and Environmental Medicine	Lead TSD	Bolton Metropolitan Borough Council
Trading Sector	Education/distance learning: nutritional medicine training	Contract identifier	Prospectus

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Un-numbered term on reverse of application form	1(d): deposit and fees non-refundable if consumer did not complete studies.	Revised to allow for two payment options. Consumers paying in instalments would not be liable for future payments if they left the course. Those paying in full would receive all of the course material and a discount.	
Un-numbered term on reverse of application form	1(k): enabled the supplier to alter aspects of the course without prior consultation.	Revised so that fees, course structure and content will remain fixed during course duration. Other matters could be subject to change in specified circumstances and generally in circumstances beyond the supplier's control.	

Other information	A copy of the redrafted contract was not received and attempts to remedy this were frustrated as the supplier had ceased trading at the address given and could not be traced.
Specific reservations	The Director General reserved his position on this case as he considered that the proposed revisions to the terms went a long way to alleviating the areas of concern.
Undertakings accepted	1 May 2001 Two terms revised

6 County Kitchens Ltd

Name of business	County Kitchens Ltd	Lead TSD	Surrey County Council
Trading sector	Home improvements: supplier of fitted kitchens, bedrooms and bathrooms	Contract identifier	Conditions of Sale and Supply

Other information	<p>The OFT's original approach to County Kitchens secured revision to all but one of the terms challenged. The remaining issue was a term which required full (or, in some cases, almost full) payment in advance of completion of the work. County Kitchens was a member of the Kitchen Specialists Association, which wished to draft model terms for its members. Correspondence with County Kitchens was suspended while the KSA produced model guidance. Once the discussions with the KSA were concluded, the OFT re-opened its discussions with County Kitchens and was in discussion with the company about its terms at the time it went into receivership in April 2001. When the OFT learned that County Kitchens had gone into receivership it wrote to Showcom Ltd, which had bought some of County Kitchens' assets and will trade under the name of County Kitchens. It has told the OFT that its payment terms will be different, and that it will operate a payment protection scheme similar to the one now being operated by MFI and B&Q.</p>	
Specific reservations	<p>The Director General's position was reserved in respect of terms 1 (variations to be binding only if made in writing), 22 (express statement that electrical and gas appliances excluded from company guarantee qualified by statement that this does not affect statutory rights) and 27 (reference to force majeure).</p>	
Undertakings accepted	23 May 2001	Eight terms revised

7 Energis Squared Ltd (Energis²)/Freeserve
 (this case was taken by OFTEL and not by the OFT)

Name of business	Energis Squared Ltd (Energis ²)/Freeserve	Lead TSD	West Yorkshire Trading Standards Service
Trading sector	Telecommunications: internet access provider	Contract identifier	Unlimited Freeserve Time

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
1.2	1(j): allowed the supplier to vary terms on giving 21 days' notice.	Revised to state that the terms may only be altered (on giving 21 days' notice) for a valid reason such as legislative change or technical requirements.	1.2.2
1.3	1(b): allowed the suspension of service for maintenance reasons.	Revised to allow customers to terminate the contract immediately and without penalty if the supplier fails to provide service for more than 48 hours.	1.3
1.10 and 5.2	1(g): allowed the supplier to terminate the contract without notice.	Revised so that the supplier will only terminate without notice if customers fail to remedy a breach of contract within 14 days of written notification by the supplier or the breach is significant.	5.2.1
2.1	1(o): had potential to bind customers where the supplier defaulted, by stating that the contract ran from the time of e-mail notification of acceptance of the application.	Revised to state that the contract runs from the time the service is connected and an e-mail notification of acceptance of the application has been sent.	2.1

3.2	1(e): customers were liable to pay for all calls made on their accounts whether they made them or not.	Revised to enable customers to claim back costs due to third party fraud provided the supplier has been notified of the fraud. Customers are not liable for charges after they have notified the supplier of the fraud.	3.2
5.3	1(e): customers were liable to pay any minimum charge while the service was suspended under clause 5.2 unless and until the contract was terminated.	Revised so that the supplier has the right to suspend the contract during the 14-day period of notice in clause 5.2.1. During this time the monthly charge must be paid. Supplier may suspend service where it suspects fraud is taking place. Customers are not liable for the charge unless found to have used the service fraudulently.	5.3
6.2	1(b): excluded liability for indirect or consequential loss, or loss of data, business etc.	Deleted.	
6.3	1(b): limited liability to £500 in a 12-month period.	Revised to limit liability to £5,000 in respect of a single event and £10,000 in respect of events arising in any 12-month period.	6.2

Other information	Energis Squared Ltd provided an indirect access telephony service on behalf of Freeserve, through which customers could obtain free internet calls using the Unlimited Freeserve Time service.	
Undertakings accepted	9 March 2001	Nine terms revised or deleted

8

Galleria Carpets Ltd t/a Posners Carpets and Posners The Floor Store

Name of business	Galleria Carpets Ltd t/a Posners Carpets and Posners The Floor Store	Lead TSD	London Borough of Camden
Trading sector	Flooring: domestic carpets and secondary wooden flooring	Contract identifier	Terms of Business circa 98/99 as amended

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
1	1(e) and 1(o): permitted supplier to set price to be paid in event of part- or non-performance, creating potential for unfair penalties if either consumer or supplier defaulted.	Revised to remove ambiguous, open-ended reference to penalties arising from part- or non-performance.	2
2	1(j): sought to reserve the right to alter details or amounts owing when credit card details had been provided.	Revised to clarify payment arrangements for deposits and final, post-delivery balance. Includes provision for 48-hour inspection opportunity.	3 and 4
3	Regulation 7: use of legal jargon ('indemnify').	Revised to remove jargon.	3
4	1(b): sought to restrict liability for shortages and defective materials or installation.	Revised to remove restriction on liability, and allows flexibility in relation to payment and correction of faults.	4
5	1(b): sought to exclude liability for removal and replacement of furniture before and after fitting.	Deleted.	

6	1(b): sought to exclude liability for damage to pipes etc.	Revised to ask consumer to provide details of such matters and accepts liability if damage caused by supplier's negligence.	11
7	1(l): sought to reserve the right to levy an unspecified charge for some preparation work.	Revised to incorporate a reference to published prices, and allows the consumer to refuse in advance to have the additional preparation work done.	8
8	1(b): sought to exclude liability for delay.	Revised to limit exclusion of liability for delay to that caused by reasons beyond supplier's control.	6
10	1(l): sought to reserve the right to levy an unspecified charge in relation to the removal of old carpets etc.	Revised to incorporate a reference to published prices, and allows the consumer to refuse in advance to have the additional preparation work done.	8
12	Regulation 7: unclear description of permissible allowances in quoted measurements.	Deleted.	
13	1(l) and Regulation 7: sought to reserve the right to levy an unspecified charge for some preparation work. Also contained an unclear description using 'structural work'.	Revised to incorporate a reference to published prices, and allows the consumer to refuse in advance to have the additional preparation work done. Revised to remove unclear description.	8

Intelligibility	Generally improved.	
Undertakings accepted	28 March 2000	Eleven terms revised or deleted

9 HomeForm Group Ltd t/a Moben Kitchens, Kitchens Direct and Dolphin Bathrooms

Name of business	HomeForm Group Ltd t/a Dolphin Bathrooms, Moben Kitchens and Kitchens Direct	Lead TSD	Trafford Metropolitan Borough Council
Trading sector	Home improvements: fitted kitchens and bathrooms	Contract identifier	Terms of trading

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Oral	1(b): restriction of the right of set-off either by requiring payment in full on delivery of goods and before they had been installed or, where consumers were permitted to retain part of the contract sum, restricting this to less than 20%.	Payment in advance still required, but consumers are entitled to refer disputes over installation to Qualitas, whose decisions will be binding on supplier. Consumers retain right to go to court if dissatisfied with Qualitas's decision.	19
Front of contract	Regulation 7: phrase 'E.&O.E.' unintelligible to most consumers.	Deleted, and term dealing with variations to contract following survey amended to refer to possibility of contract being under-priced because of a significant calculation error by the agent.	5

Continued on next page.

<p>Other information</p>	<p>HomeForm Group Ltd was formerly known as Limelight Group plc: the change of name followed a management buy-out in September 2000. In <i>Bulletin 6</i> it was reported that Limelight had deleted from its contract a term requiring full payment in advance. The OFT subsequently received evidence indicating that Limelight was in breach of its undertaking by continuing to enforce an oral term requiring full, or nearly full, payment in advance. Limelight denied that it had breached its undertaking. It nevertheless offered the fresh undertaking summarised here. See OFT News Release 20/01 of 10 May 2001.</p>
<p>Specific reservations</p>	<p>The scheme outlined above appears to be capable of meeting the Director General's concerns about full payment in advance and he therefore agreed to it, but he intends to monitor its effectiveness as a method of remedying any detriment caused by the requirement to pay in full in advance.</p> <p>The Director General's position was also reserved on term 2, which provides that the supplier must notify consumers within 21 working days if the survey shows that the specification needs to be changed or the price increased. Taking into account a possible wait for the survey of ten working days, this could mean that consumers might have to wait for six weeks after placing their order for confirmation of the specification and price. The OFT accepted HomeForm's explanation that it might occasionally need to call in outside experts to deal with specific problems, but reserved the right to seek a revision of the term if it became apparent that consumers were regularly having to wait the full six weeks.</p>
<p>Undertakings accepted</p>	<p>25 April 2001 Two terms revised</p>

10 Medlams Valuers & Auctioneers

Name of business	Medlams Valuers & Auctioneers	Lead TSD	West Sussex County Council
Trading sector	Auctions	Contract identifier	Conditions of Sale

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
4, 6 and 7	1(b): all three terms had the potential to permit the supplier unfairly to exclude liability for deliberately misleading descriptions or statements and goods known to be damaged.	See below.	
5	1(n): had the potential to allow the supplier unfairly to exclude liability for verbal representations made by his staff or agents.	See below.	
9	1(b): had the potential to allow the supplier to fail to deliver up the goods to a consumer, even after a bid had been accepted.	See below.	

Other information	An undertaking was received from the supplier that he would no longer enforce the above terms.
Undertakings accepted	12 March 2001

Name of Company	Northern LPG Supplies Ltd	Lead TSD	North Yorkshire
Trading Sector	Supplier of liquid petroleum gas	Contract identifier	Conditions of Sale; General Conditions – Bulk Agreement

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Conditions of Sale:			
2	1(i): hidden terms (referred to Codes of Practice which the consumer would not have had the opportunity to read).	Deleted.	
5	1(b): excluded liability for short measures.	Deleted.	
8	1(b): excluded liability for shortfall in measurement and excluded consumer's rights to dispute measurement.	Deleted.	
11	Regulation 7: use of legal jargon ('indemnify').	Revised to remove jargon and to make the term's meaning clearer.	8
General Conditions - Bulk Agreement			
1	Regulation 7: poorly expressed and lacking in prominence.	Revised to express minimum agreement length and notice period more clearly.	2

3(b)	1(i) and 1(l): referred to a document not provided with the contract, and provided no remedy if the price rose significantly above that agreed.	See comments under Specific reservations.	4b
4(i)	1(i): referred to a document not provided with the contract.	Deleted.	
10(a)(i)	No indication of when a consumer might legitimately withdraw from the contract. Any minor breach of the contract by the consumer could trigger termination.	Revised so that only serious breaches by the consumer will trigger termination.	10(a)(i)
12	Regulation 7: not written in plain and intelligible language.	Revised so that meaning is clearer and easier to understand.	12

Specific reservations	The Director General's position has been reserved in relation to term 3(b) of the General Conditions – Bulk Agreement, as the supplier stated that it would do its utmost to absorb price increases.		
Undertakings accepted	3 April 2001	Eight terms revised or deleted	

Name of business	Prudential Banking plc t/a Egg	Lead TSD	Corporation of London
Trading sector	Financial services	Contract identifier	Egg Instant Access Account: Terms and Conditions

Other information	The OFT challenged term 5.7 under Regulation 7 as the words 'in exceptional circumstances' are not specific enough to make clear to consumers when the bank can suspend a consumer's right to withdraw funds, ie to run the business lawfully and with prudent liquidity levels.
Specific reservations	The OFT reserved the Director General's position in respect of term 5.7 detailed above. The bank informed the OFT that amendment of the term is subject to agreement of both the Financial Services Authority (FSA) and the bank's board. The FSA are currently discussing liquidity requirements for banks generally with a view to reviewing them for the banking industry in general. Prudential Banking plc will take into account any guidance that is given by the FSA in this matter when considering amendment of the term.
Undertakings accepted	30 April 2001

13 Richard Parkin & Co

Name of business	Richard Parkin & Co	Lead TSD	Derbyshire County Council
Trading sector	Letting agents	Contract identifier	Letting Agency Agreement; Agency Agreement; Residential Lettings Agreement

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Letting Agency Agreement:			
4	1(b): by seeking payment on consumer cancellation regardless of the reason, potentially excluded any claim the consumer might have had where the agreement was terminated where the supplier was at fault or if there was a dispute over charges.	Revised so that the term no longer refers to cancellation for 'whatever reason' and makes it clear that those costs already incurred are payable on cancellation. Details of the range of costs are included within the term.	4
10	1(b): unfairly excluded the agent's liability where he was in breach of duty. Regulation 7: use of jargon ('tort').	Revised so that the term no longer excludes liability for the agent's default in the provision of the service. Reference to 'tort' deleted.	10.1
10.2	Inappropriate transfer of risk: required the consumer to 'indemnify' the agent against third party claims.	Revised to provide that each party shall only be liable to the other for losses which are a reasonably foreseeable consequence of the breach of contract complained of.	10.2

10.3	<p>1(a) and 1(b): unfairly excluded the agent's liability to third parties for any injury, loss or damage, or legal or other expenses caused by his breach of duty.</p> <p>Regulation 7: used 'indemnity', which may not be readily understood by the consumer.</p>	<p>Revised so that (by cross-reference to term 10.1) it no longer unfairly excludes liability for the agent's default in the provision of the service.</p> <p>Revised to remove the word 'indemnity'.</p>	10.3
10.4	Regulation 7: confusing reference to clauses not being valid 'insofar as prohibited by statute'.	Deleted.	
10.5	1(a) and 1(b): unfairly excluded the agent's liability for consequential loss or damage and also for death or injury caused by breach of duty by the agent or his employees.	Deleted.	
16(b)	1(b): potentially excluded liability for agent's negligence or breach of duty.	Revised to remove specific exclusion of agent's liability.	16(b)
3.1 and all three contracts	Fees quoted net of VAT contrary to the requirement of the Consumer Protection Act 1987.	Revised to provide that fees are quoted inclusive of VAT.	3.1 and all three contracts

Agency Agreement:			
5	1(b): by seeking payment on consumer cancellation regardless of the reason, potentially excluded any claim the consumer might have had where the agreement was terminated where the supplier was at fault or if there was a dispute over charges.	Revised to remove reference to 'for whatever reason'.	5
15.3	Regulation 7; used 'indemnify' which may not be readily understood by the consumer.	Revised to remove the word 'indemnify'.	15.3
Residential Lettings Agreement:			
7	1(f): provided that the administration fee was not refundable even where the landlord decided to withdraw from the agreement.	Revised to remove reference to non-refundable fee.	7

Undertakings accepted	2 May 2001	Eleven terms revised or deleted
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Name of business	Thornley Groves Ltd	Lead TSD	Cheshire County Council
Trading sector	Letting agents	Contract identifier	Reservation fee form

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Reserva- tion Deposit Form	Regulation 7 and 1(d): allowed the supplier to retain pre-payments as term provided that the reservation fee was non-returnable in the event of the rental not proceeding unless at the instigation of the landlord. Meaning of the term unclear.	The form was withdrawn from use.	

Undertakings accepted	4 June 2001	One term withdrawn
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15 Vodafone Ltd

Name of business	Vodafone Ltd	Lead TSD	West Berkshire District Council
Trading sector	Telecommunications: mobile phones	Contract identifier	Airtime Contract (for Vodafone NI Ltd)

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
7.1	1(h): 90-day notice period to end contract was considered excessive. It also conflicted with 'Declaration by Subscriber' on front page of contract, which provided for 30 days' notice.	Contract revised to provide for one month's notice to end agreement, both in the terms and the 'Declaration by Customer'.	1

Undertakings accepted	5 December 2000	One term revised
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16 Vodafone Ltd

Name of business	Vodafone Ltd	Lead TSD	West Berkshire District Council
Trading sector	Telecommunications: mobile phones	Contract identifier	Pay As You Talk Equipment Repair Form (now Equipment Return Form)

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Customer Declaration	When a consumer's phone was submitted for repair, term permitted dealer to 'deal with uncollected phones in any way they see fit' if it was not collected within a specified period.	Deleted.	

Undertakings accepted	5 December 2000	One term deleted
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Name of Company	Wales National Ice Rink	Lead TSD	City & County of Cardiff
Trading Sector	Sports venue	Contract identifier	Terms and Conditions of Sale

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
	1(a): unfairly excluded liability for injury, even in the event of the promoter's negligence, by providing that admission was at ticket-holder's own risk.	Revised to accept liability for injuries caused by the promoter's negligence.	3
	1(a): unfair exclusion of liability for injury caused at an event.	Revised to accept liability for injury or distress resulting from the promoter's negligence.	2
	1(b): no liability to provide redress after purchase of tickets.	Revised to offer a refund where an event promoted by WNIR (Wales National Ice Rink) is cancelled. When WNIR acts as ticket agent a refund is offered when WNIR is at fault.	5
	1(k): right to alter the programme or seating without notification or refund.	Revised so that refunds will be made where alterations result from controllable factors, otherwise WNIR will endeavour to prevent consumer disadvantage.	10
	1(n): unreasonably prevented the replacement of lost tickets.	Revised so that lost tickets will be replaced upon proof of purchase, subject to a 20% administration fee.	11

Specific reservations	The Director General reserved his position on terms 5 and 10. Term 5 does not allow for a refund of the booking fee. Term 10 does not reflect the trader's policy of considering claims for refunds in the event of alterations to the programmes or seating.
Undertakings accepted	24 April 2001 Five terms revised

Name of business	Westcountry Security Group	Lead TSD	Plymouth City Council
Trading sector	Security alarm systems	Contract identifier	Terms and Conditions; Maintenance/Monitoring

Original term	Application of the Regulations (Schedule 2 paragraph or as indicated)	How changed	New term
Part II. The Customer:			
Defects (c)	1(n): requirement to confirm notification of defects in writing was an unnecessary formality. Also the need to notify 'forthwith' was unfair.	Requirement of notification in writing has been deleted and notification revised to be required 'within a reasonable time.'	Defects (c)
Authority Charges (d)	Requirement that consumer was liable for charges made by police or other authorities had potential for unfairness if the charges were due to fault of supplier.	Supplier agrees to reimburse these charges if it is deemed to be at fault.	Authority Charges (d)
Part III. Limits of Company's Liability:			
Statutory rights (j)	1(q) and Regulation 7: term referred to consumer's statutory rights without an explanation of what these entailed. Term also had potential unfairly to restrict consumer's remedies by making contract subject to the laws of England and Wales.	Revised so that consumer is advised where to obtain further information about statutory rights. Revised so that relevant United Kingdom law applies to the contract.	Statutory rights (j)

Maintenance/Monitoring:			
Third paragraph	Regulation 7: relevant British Standard not expressly specified.	Revised to state the British Standard clearly in the term.	Third paragraph
Fourth paragraph	1(h): requirement for three months' notice to terminate contract had potential to constitute an overlong cancellation period.	Notice period reduced to one month.	Fourth paragraph
Fifth paragraph	1(m): statement that company engineer's decision on cause of faults would be final and binding potentially allowed supplier unfair right of final determination.	Statement deleted.	Fifth paragraph
Sixth paragraph	1(b): clause allowing supplier to absolve itself from all liability if consumer attempted to reset the system was a disproportionate response.	Term replaced by the supplier clarifying that it is not required (inter alia) to repair a fault or damage caused by anyone who is not an employee of the company.	
Seventh paragraph	1(l): gave supplier potentially unfair right to increase the price without the consumer being able to cancel the contract without penalty.	Revised so that the consumer can cancel the contract without penalty if unhappy with the price rise.	Sixth paragraph

Undertakings accepted	6 June 2001	Eight terms revised or deleted
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3 STATISTICAL BREAKDOWN OF ACTION ON CASES TAKEN BY THE OFT

TABLE 3.1: BREAKDOWN OF CASES COMPLETED

Case outcome	Apr-June 2001	All cases to end June 2001
Advice or warning:	67	1,272
<i>advice to consumers/solicitors</i>	24	
<i>advice to TSOs and CABx</i>	13	
<i>advice to Qualifying Bodies</i>	7	
<i>advice to trade associations</i>	1	
<i>warning letter</i>	22	
'Core' terms	5	262
Defective cases	5	216
Duplicate cases	75	1,361
Enquiries	4	20
Excluded terms	15	347
'Formal' undertakings given	0	13
'Informal' undertakings given	17	605
Not about a contract term	20	188
Other legislation	14	315
Other reasons:	33	531
<i>approach made</i>	3	
<i>complex</i>	11	
<i>no approach made</i>	19	
Referred to Qualifying Bodies	37	134
Terms not considered unfair	5	552
Total	297	5,816

KEY TO TABLE 3.1

Advice or warning includes cases where another regulator (for example, a trading standards service) is able, on the basis of OFT advice, to deal with the matter in exercising its own powers, or where the seriousness of the problem does not warrant a full approach.

'Advice to TSOs and CABx' means that OFT letters to TSOs etc are used to advise consumers.

KEY TO TABLE 3.1 continued/...

	<i>'Advice to Qualifying Bodies'</i> means that OFT letters to TSOs etc are used to advise suppliers.
<i>'Core' terms</i>	refers to cases where the term at issue sets the price or defines the main subject matter of the contract. Core terms are not subject to the test of fairness provided they are in plain and intelligible language - see Regulation 6(2).
<i>Defective</i>	refers to incomplete complaints, eg a copy of the contract was not sent in when requested, or the consumer was uncontactable.
<i>Duplicate</i>	relates to terms already being dealt with.
<i>Excluded terms</i>	refers to contracts which are not between consumers and businesses, or to terms covered by Schedule 2(2).
<i>Other legislation</i>	refers to complaints where action under other legislation under which the OFT has powers or duties is more likely to be effective.
<i>Other reasons</i>	are cases where, for instance, the supplier has gone (or goes) out of business, or is no longer using the terms complained of.
	<i>'approach made'</i> means that the OFT was in negotiations with the supplier at the time the case was closed.
	<i>'no approach made'</i> means that the OFT had not yet entered into negotiations with the supplier at the time the case was closed.

TABLE 3.2: SUMMARY OF CURRENT CASE STATUS

Case status	Total at end last quarter (Mar 2001)	This quarter (Apr-June 2001)	Total at end this quarter (June 2001)
Cases received	6,328	318	6,646
Cases completed	5,519	297	5,816
Cases carried over to next quarter	809		830

4 ALPHABETICAL INDEX OF BUSINESSES APPROACHED INDICATING TRADING SECTORS

1	Alliance & Leicester plc	financial services: unsecured credit
2	Ashburn Financial Services Ltd	financial services: credit facilities for health and fitness clubs
3	Bowater Windows Ltd t/a Staybrite Windows	home improvements: double glazing
4	Castle Bathrooms Ltd	home improvements: fitted bathrooms
5	The College of Nutritional and Environmental Medicine	education/distance learning: nutritional medicine training
6	County Kitchens Ltd	home improvements: supplier of fitted kitchens, bedrooms and bathrooms
-	Egg - see Prudential Banking plc	
7	Energis Squared Ltd (Energis ²)/ Freeserve	telecommunications: internet access provider
8	Galleria Carpets t/a Posners Carpets and Posners The Floor Store	flooring: domestic carpets and secondary wooden flooring
9	HomeForm Group Ltd t/a Moben Kitchens, Kitchens Direct and Dolphin Bathrooms	home improvements: fitted kitchens and bathrooms
-	Limelight - see HomeForm	
10	Medlams Valuers & Auctioneers	auctions
-	Moben - see HomeForm	
11	Northern LPG Supplies Ltd	supplier of liquid petroleum gas
-	Posners - see Galleria Carpets	
12	Prudential Banking plc t/a Egg	financial services
13	Richard Parkin & Co	letting agents

- Staybrite - see Bowater Windows Ltd
- 14 Thornley Groves Ltd letting agents
- 15 Vodafone Ltd telecommunications: mobile phones
- 16 Vodafone Ltd telecommunications: mobile phones
- 17 Wales National Ice Rink sports venue
- 18 Westcountry Security Group security alarm systems

5 GEOGRAPHICAL INDEX OF BUSINESSES BY LOCAL AUTHORITY

BOLTON METROPOLITAN BOROUGH COUNCIL

The College of Nutritional and Environmental Medicine

CAMDEN, LONDON BOROUGH OF

Galleria Carpets Ltd t/a Posners Carpets and Posners The Floor Store

CARDIFF, CITY & COUNTY OF

Wales National Ice Rink

CHESHIRE COUNTY COUNCIL

Thornley Groves Ltd

COVENTRY, CITY OF

Bowater Windows Ltd t/a Staybrite Windows

DERBYSHIRE COUNTY COUNCIL

Richard Parkin & Co

LEICESTERSHIRE COUNTY COUNCIL

Alliance & Leicester plc
Ashburn Financial Services Ltd

LONDON, CORPORATION OF

Prudential Banking plc t/a Egg

NORTH YORKSHIRE

Northern LPG Supplies Ltd

PLYMOUTH CITY COUNCIL

Westcountry Security Group

SURREY COUNTY COUNCIL

County Kitchens Ltd

TRAFFORD METROPOLITAN BOROUGH COUNCIL

HomeForm Group Ltd t/a Moben Kitchens, Kitchens Direct and Dolphin Bathrooms

WEST BERKSHIRE DISTRICT COUNCIL

Vodafone Ltd x 2

WEST SUSSEX COUNTY COUNCIL

Medlams Valuers & Auctioneers

WEST YORKSHIRE TRADING STANDARDS SERVICE

Energis Squared Ltd (Energis²)/Freeserve

WINDSOR & MAIDENHEAD, ROYAL BOROUGH OF

Castle Bathrooms Ltd

6 CATEGORIES OF UNFAIR TERM

(on cases where action was taken by the OFT)

Schedule 2:	paragraph 1(a) - Excluding or restricting liability for death or injury	4
Schedule 2:	paragraph 1(b) - Excluding or restricting liability for breaches of contract	
	<i>a Excluding liability for defective or misdescribed goods</i>	1
	<i>b Excluding liability for poor services, or work and material</i>	9
	<i>c Restricting amount or type of liability</i>	5
	<i>d Time limits on claims</i>	0
	<i>e Excluding consumers' right of set-off</i>	5
	<i>f Excluding or restricting liability for delay</i>	3
	<i>g Excluding or restricting liability for a supplier's non-performance</i>	0
	<i>h Excluding or restricting liability via guarantee</i>	0
Schedule 2:	paragraph 1(c) – Binding consumers while allowing suppliers to opt out on a pretext	0
Schedule 2:	paragraph 1(d) - Non-return of prepayments on consumer cancellation	1
Schedule 2:	paragraph 1(e) - Financial penalties	4
Schedule 2:	paragraph 1(f) - Cancellation clauses	2
Schedule 2:	paragraph 1(g) - Supplier's right to cancel without notice	0
Schedule 2:	paragraph 1(h) - Excessive notice periods for consumer cancellation	2
Schedule 2:	paragraph 1(i) - Binding consumers to hidden terms	2
Schedule 2:	paragraph 1(j) - General variation clause	2
Schedule 2:	paragraph 1(k) - Right to change what is supplied	4
Schedule 2:	paragraph 1(l) - Right to increase the price	5
Schedule 2:	paragraph 1(m) - Supplier's right of final decision	1
Schedule 2:	paragraph 1(n) - Entire agreement and formality clauses	
	<i>a Clauses disclaiming liability for employees' statements</i>	2
	<i>b Formality requirements</i>	3

Schedule 2: paragraph 1(o) - Binding consumers where a supplier defaults	0
Schedule 2: paragraph 1(p) – Supplier’s right to assign without consent	0
Schedule 2: paragraph 1(q) - Restricting the consumer’s remedies	1
Other categories of unfair terms	
<i>a</i> Allowing a supplier to impose an unfair financial burden	1
<i>b</i> Transferring unfair risks (eg: by indemnities) to consumers	3
<i>c</i> Onerous enforcement clauses	0
<i>d</i> Excluding consumers’ right to assign	0
<i>e</i> Consumer declarations about contractual circumstances	2
<i>f</i> Excluding consumers’ non-contractual rights	0
<i>g</i> Delivery at supplier’s discretion	0
<i>h</i> Other	1
Regulation 7 - Plain and intelligible language	12
Total	75

Notes

The above is a list of commonly occurring types of unfairness identified by the OFT and an indication of the number of terms found during the reporting period which can be placed under these headings. It is based on the 17 items in paragraph 1 of Schedule 2 to the Regulations ('the grey list'). However, two of these headings are sub-divided to reflect the range of terms covered by that heading.

There are two additional groups of terms. One is a miscellaneous category for potential types of unfairness not obviously covered by the 17 headings. The final group is of cases involving possible breaches of the plain language requirement of Regulation 7.

The numbers of terms challenged are to be regarded as broadly indicative, not an exact account, for two reasons. First, in a number of cases unfairness was so extensive and interrelated, and revision of the contract was so comprehensive that it would be impracticable to list all the particular terms considered unfair and relate them to changes. Secondly, minor changes to wording, mainly designed to improve intelligibility, have generally been ignored.

Examples of the types of unfairness denoted by the headings above are also to be found in previous bulletins and in the *Unfair Contract Terms Guidance* (ref: OFT311).

ANNEXES

A CONCORDAT BETWEEN THE OFT AND THE FINANCIAL SERVICES AUTHORITY

THE UNFAIR TERMS IN CONSUMER CONTRACT REGULATIONS 1999 (The Regulations)

JOINT STATEMENT BY THE DIRECTOR GENERAL OF FAIR TRADING (DGFT) AND THE FINANCIAL SERVICES AUTHORITY (FSA)

INTRODUCTION

1. This joint statement sets out the framework within which the Director General of Fair Trading (DGFT) and the Financial Services Authority (FSA), in partnership with the other Qualifying Bodies named in Schedule 1 to the Regulations (as amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001), will enforce the Regulations. This framework will be kept under review by the DGFT and the FSA, and amended where necessary.

LEGAL POSITION

2. The Regulations came into force on 1 October 1999 and revoke the Unfair Terms in Consumer Contracts Regulations 1994. They give effect in the UK to EU Directive 93/13 on unfair contract terms, and have to be interpreted and applied to achieve the aims of the Directive. The principal aim of the Directive for the purposes of this concordat is to protect the consumer 'against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts' (Recital 9).

Requirements to consider complaints and give reasons

3. Regulation 10 places the DGFT under a duty to consider any complaint made to him that a contract term drawn up for general use is unfair unless (a) it appears frivolous or vexatious or (b) FSA, or another Qualifying Body, has notified him that it agrees to consider it.

4. Where FSA notifies the DGFT that it agrees to consider a complaint, it is under a duty to consider whether a contract term drawn up for general use is unfair

(according to the FSA's application of the Regulations to the complaint) (Regulation 11(1)).

5. Whether a communication can and should be regarded as a complaint is a question for the body which receives it. In general, it would not be consistent with the purposes of the Directive to reject an enquiry or other communication as not constituting a complaint for the purposes of the Regulations, if it gives any reason to believe that an unfair term, as set out by the Regulations and in the circumstances of the complaint, is being used with consumers.

6. Under Regulation 10(2) the DGFT is required to give reasons for any decision to apply or not to apply for an injunction. This specific duty applies to FSA only where it has agreed to consider a complaint and notified the DGFT to that effect. The general duty to act fairly and reasonably in exercising this statutory function may be considered to entail (inter alia) giving reasons to a complainant whose complaint is neither accepted for consideration nor referred to another agency having powers under the Regulations and to a supplier against whom injunctive action is proposed. However, questions as to whether, to whom, and in what form reasons should be given must be considered by the body which has received a complaint, in all the circumstances of each case.

Power to take injunctive action

7. Under Regulation 12, the parties to this concordat and the other Qualifying Bodies have, subject only to the notification requirements of Qualifying Bodies dealt with below, a power to apply for an injunction to prevent any person appearing to them to be doing so from using or recommending unfair standard terms in consumer contracts as defined in the Regulations.

8. No restriction is placed by the Regulations on the freedom to exercise this power. However where a contract is already the subject of an approach under the Regulations, it will not normally be advisable for another body separately to approach the same supplier about terms in the same contract. The courts have power not only to require similar injunctive proceedings to be joined, but also retrospectively to penalise, by means of an adverse costs order, action of any kind that has caused unnecessary expense to be incurred.

Requirements to notify the Director General

9. In connection with the exercise of the power to apply for an injunction under the Regulations, FSA is required to notify the DGFT in writing:

- of its intention to apply for an injunction at least 14 days before the application is made, unless the DGFT consents to the application being made within a shorter period (Regulation 12(2)(a));

- of any undertakings accepted in lieu of court proceedings under Regulation 11(2) (ie including informal assurances and undertakings) together with copies of amendments to the terms (Regulation 14(a));
- of the outcome of any application for an injunction including any undertakings given to the court, and any order made by the court (Regulation 14(b));
- the outcome of any application to enforce a previous order of the court (Regulation 14(c)).

Duties of the DGFT

10. Under the Regulation 15, the DGFT has the following functions in relation to the matters dealt with in paragraph 6:

- a duty to publish details of relevant court applications made by him, and of any undertakings or court orders obtained by him or notified to him by the Qualifying Bodies (Regulation 15(1));
- a duty to inform any person on request whether a term has been the subject of a court order or undertakings obtained by or notified to him, and to provide that person with a copy of the order or details of the undertaking together with a copy of any amendments to the term in question; and
- a power to publish information about the operation of the Regulations.

(The fact that the DGFT has the above powers does not exclude the right of Qualifying Bodies to publish details of their work under the Regulations.)

Ancillary power

11. Under Regulation 13, the DGFT and FSA have a power to require the production of documents and information to facilitate their consideration of complaints, and to ascertain whether undertakings and court orders obtained under the Regulations are being complied with. FSA can require documents and information only in relation to court orders and undertakings obtained by itself.

PRINCIPLES OF JOINT ENFORCEMENT

12. The parties to this concordat will observe the following principles in enforcing the Regulations:

- (i) **Autonomy:** each party acknowledges the general discretion of the other, subject only to the lead agency principle (see below), to interpret and apply the Regulations as it deems appropriate, including the right to reach a

reasonable decision as to whether action on its part is appropriate in relation to any complaint and in particular the right of FSA and other Qualifying Bodies to decline to consider a complaint for the purposes of Regulation 11.

- (ii) **The lead agency principle:** where either party receives a complaint about a contract which is already under consideration by a Qualifying Body other than FSA, it shall regard that body as the lead agency for that contract, and shall refer the complaint to it accordingly, unless that body agrees to give up its lead agency status. The lead agency principle may generally be set aside by agreement, provided that any such agreement shall not result in separate and uncoordinated action being taken in relation to the same contract.
- (iii) **Co-operation:** with a view to maximising the benefit of the Regulations to consumers and achieving certainty of process, each party will co-operate with the other and with the other Qualifying Bodies, particularly by sharing information relevant to enforcement, so as to
 - (a) ensure that all valid complaints are properly considered;
 - (b) maintain consistency in interpretation of the Regulations and application of procedures; and
 - (c) avoid duplication of action.

In addition, the DGFT will give all reasonable guidance based on his experience of enforcing the Regulations to FSA and any other Qualifying Body.

- (iv) **Confidentiality:** subject to any legal duty that exists or may arise each party will treat as confidential documents and information passed to it by the other, or by any other Qualifying Body, where their disclosure could harm the interests of either the body which provided them or any third party. The FSA may only disclose documents and/or information in its possession or control where it is permitted to do so according to the confidentiality constraints imposed upon it by the Financial Services and Markets Act 2000 (and predecessor legislation when applicable).
- (v) **Selectivity of action:** in considering whether to refer a complaint to another agency having powers under the Regulations each party shall fairly consider which such agency is best fitted to deal with the matter. The factors to be taken into account shall include the resources at disposal of agencies, their knowledge of or ability to obtain information about the circumstances in which the contract is being used, and/or whether any of them has an existing regulatory relationship with the business using the contract. Each party has discretion to make a reasonable decision in the light of these and any other relevant factors, but the following general areas of responsibility are identified:

- (a) complaints about terms used in transactions which fall within the special regulatory remit of a particular Qualifying Body shall (unless the contrary is demonstrated) be regarded as suitable to be dealt with by that body;
- (b) complaints about terms raising difficult or novel issues of law shall in general be regarded as the responsibility of the DGFT or of any Qualifying Body having relevant special knowledge or enforcement experience; and
- (c) complaints outside of the special regulatory remit of a Qualifying Body and not raising difficult or novel issues of law should be considered for referral to the appropriate trading standards authority under the 'home authority' principle (normally the home authority within whose borders the head office of the suppliers is located).

AGREED STRUCTURE AND PROCEDURES

13. The parties shall each nominate a liaison officer or unit for the purposes of co-ordinating enforcement action. The nominated liaison point within the Office of Fair Trading shall be the Unfair Contract Terms Unit (UCTU).

14. UCTU will serve as the focal point for co-ordination on the enforcement of the Regulations, maintaining a confidential central record accessible to all Qualifying Bodies of the following information:

- (i) details of each complaint which has been made or notified to the DGFT, sufficient to identify the contract involved, the name and location of the seller or supplier, and the Qualifying Body which is considering or has considered it; and
- (ii) details of all court proceedings currently being taken under the Regulations, sufficient to identify the parties and the contract involved.

15. Where one party is under a duty to notify another, the stated time period for written notifications may be altered by agreement. However, where delay could adversely affect consumers, or result in an enforcement body undertaking abortive work, notification should always take place as soon as possible. The following guidelines assume that a Qualifying Body will give any complaint initial consideration before deciding whether to deal with it (that is 'consider' it for the purposes of the Regulations):

- (i) **Where either party receives a complaint on which it appears action *cannot* be taken**, the recipient will inform the complainant, giving reasons. A complaint may be regarded as non-actionable if (for instance) it lacks necessary information, or the terms complained of are known to be no longer in use, or

if it is clear without need for enquiry that it falls outside the scope of the Regulations.

- (ii) **Where an actionable complaint is made to FSA,**
 - (a) **if FSA does not wish to deal with the complaint,** it will within ten working days of identifying a complaint as actionable under these Regulations refer it and any information on file that is likely to be of assistance in dealing with it to UCTU (or if it is clearly suitable for another Qualifying Body, to that body) and respond appropriately to the complainant; or
 - (b) **if FSA wishes to deal with the complaint,** it will within ten working days of identifying a complaint as potentially actionable under these Regulations notify the DGFT, providing sufficient information to identify the trader (including name and address) and the contract. UCTU will respond within ten working days. If it is able to confirm that no lead agency is recorded as dealing with a complaint about the contract it will provide FSA with guidance material and any other available information likely to be of assistance in dealing with the complaint. Otherwise, it will within a further ten working days duly refer the complaint to the lead agency (with such information as may be of use) and inform FSA accordingly, unless either FSA or the lead agency states that they have agreed to set aside the lead agency principle in relation to that contract.
- (iii) **Where an actionable complaint is made to the DGFT,**
 - (a) **if FSA or another Qualifying Body is recorded as already dealing with a complaint about the contract,** UCTU will duly refer the complaint within ten working days, together with such information as may be of use, or
 - (b) **if no such lead agency is on the record,** UCTU will within ten working days decide either to deal with the complaint or refer it to the most appropriate Qualifying Body with an offer to supply guidance and other information of possible assistance if the referral is accepted.
- (iv) **Where a complaint is referred to either party by another Qualifying Body,** the complaint will be treated in the same way, and observing the same time limits, as if it had been made directly, subject to the following provisos:
 - (a) Further referral to another Qualifying Body will not normally take place. (NB: This does not affect the freedom of FSA to decline to consider any referred complaint, subject to the lead agency principle, ie except a complaint relating to a contract with which it has agreed to deal and proposes to continue to deal).

- (b) The Qualifying Body to whom the complaint was originally made – not FSA or DGFT – remains responsible for informing the complainant of the referral.
- (v) If FSA, having agreed to deal with a complaint or complaints, subsequently wishes to abandon its consideration of the matter, for whatever reason, and in particular pursuant to any agreement to set aside the lead agency principle, it shall within ten working days of taking the decision, notify it to UCTU, refer the file accordingly, and respond appropriately to the complainant(s).
- (vi) **When a court order or undertakings have been obtained by either party**, that party will take all reasonable steps to ascertain that they have actually been complied with before final closure of the case, and in particular will use its power under Regulation 13 as appropriate for that purpose.
- (vii) **When a court order or undertakings have been obtained by FSA**, it will within ten working days notify the DGFT as required by the Regulations, and will in doing so supply such further information (ie in addition to the details identifying the trader and contract already notified to him) as is necessary to enable him to comply with his duty to publish information (in the Unfair Contract Terms Bulletin) under Regulation 15(1) and to provide full details under Regulation 15(2). This further information will consist of:
 - (a) a copy of the terms considered unfair
 - (b) a copy of any amended terms the seller or supplier has agreed to adopt
 - (c) details of any term or terms whose use was not discontinued, but whose use FSA considers to require monitoring for possible unfairness.
- (viii) **When enforcement action is finally concluded by FSA**, whether successfully or otherwise, the DGFT will be notified within ten working days of closure of the case. UCTU will then remove FSA from the record as the lead agency for dealing with that complaint, unless the following applies. The FSA is free to inform UCTU, if it remains concerned that the contract may still contain a term or terms of doubtful fairness, but lacks the evidence to pursue them, that it wishes to continue to have complaints about the terms forwarded to it so that it may consider whether it wishes to deal with them. Either party may, on this basis, continue to be recorded as lead agency in respect of a contract on which action has been (for the time being) concluded.

Signed by:
Elizabeth Hall, Head of Consumer Protection, Financial Services Authority
Date: 17.08.01

Signed by:.....
John Vickers, Director General of Fair Trading
Date: 17.10.01

ANNEX - SCOPE OF FSA's POWERS UNDER UTCCRs

FSA's scope for purposes enforcing the UTCC Regulations 1999 is "investment business" as defined in Schedule 1 of the Financial Services Act 1986. This scope may be extended once full powers are gained under the Financial Services and Markets Act.

Activities constituting Investment Business

- Dealing
- Arranging
- Managing
- Investment advice
- Custody services

Investment Business

- Investment bonds
- Personal Equity Plans (PEPs)
- Individual Savings Accounts (ISAs)
- Endowments
- Shares
- Investment trusts
- Open ended investment companies
- Gilts
- Options
- Futures
- Warrants
- United in a collective investment
- Debentures
- Equity release schemes

Pensions

- Personal pensions
- Free standing additional voluntary contributions (FSAVCs)
- Executive pension plans
- Annuities
- Income drawdown/pension fund withdrawal
- Retirement annuity contracts
- Section 32 buy out bonds
- Pension term assurance
- Stakeholder pensions

Protection Policies

- Term assurance
- Whole of life: with and without profit, unit-linked, universal, low cost

B CONCORDAT BETWEEN THE OFT AND THE INFORMATION COMMISSIONER

THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999 (The Regulations)

JOINT STATEMENT BY THE DIRECTOR GENERAL OF FAIR TRADING (DGFT) AND THE INFORMATION COMMISSIONER (IC)

INTRODUCTION

1. This joint statement sets out the framework within which the Director General of Fair Trading, the ('DGFT') and the Information Commissioner ('IC') in partnership with the other Qualifying Bodies named in Schedule 1, will enforce the Regulations. The concordat will be reviewed where circumstances dictate.

LEGAL BACKGROUND

2. The Regulations came into force on 1 October 1999 and revoke the Unfair Terms in Consumer Contracts Regulations 1994. They give effect in the UK to EU Directive 93/13 on unfair contract terms and have to be interpreted and applied to achieve the aims of the Directive. The principal aim of the Directive for the purposes of this concordat is to protect the consumer 'against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts' (Recital 9).

Requirements to consider complaints and give reasons

3. Regulation 10 places the DGFT under a duty to consider any complaints made to him that a contract term drawn up for general use is unfair unless (a) it appears frivolous or vexatious or (b) the IC or another Qualifying Body, has notified him of agreement to consider it.

4. Where the IC notifies the DGFT that she agrees to consider a complaint, she is under a duty to consider whether a contract term drawn up for general use is unfair (Regulation 11(1)).

5. Whether a communication can and should be regarded as constituting a complaint is a question for the body which receives it. The IC will treat as a complaint any enquiry or other communication from which it is immediately apparent that an unfair term may be being used, or from which it later becomes apparent that an unfair term may be being used. In general, it would not be consistent with the purposes of the Directive to reject an enquiry or other communication as not

constituting a complaint for the purposes of the Regulations if it is reasonable to believe that an unfair term is being used with consumers.

6. Under Regulation 10(2) the DGFT is required to give reasons for any decisions to apply or not to apply for an injunction. This specific duty applies to the IC only where she has agreed to consider a complaint and notified the DGFT to that effect. The general duty to act fairly and reasonably in exercising a statutory function may be considered to entail (inter alia) giving reasons to a complainant whose complaint is neither accepted for consideration nor referred to another agency having powers under the Regulations and to a supplier against whom injunctive action is proposed. However, questions as to whether, to whom, and in what form reasons should be given must be considered by the body which has received a complaint, in all the circumstances of each case.

Powers to take injunctive action

7. Under Regulation 12, the parties to this Concordat and the other Qualifying Bodies have, subject only to the notification requirements on Qualifying Bodies dealt with below, a power to apply for an injunction to prevent any person appearing to them to be doing so from using or recommending unfair standard terms in consumer contracts as defined in the Regulations.

8. No restriction is placed by the Regulations on the freedom to exercise this power. However, where a contract is already the subject of an approach under the Regulations; it will not normally be advisable for another Qualifying Body separately to approach the same supplier about terms in the same contract, the exception being where one or more of the terms may relate to data protection issues, in which cases the IC reserves the right to make a separate approach in relation to those terms only. The courts have power not only to require similar injunctive proceedings to be joined, but also retrospectively to penalise by means of an adverse cost order, action of any kind that has caused unnecessary expense to be incurred.

Requirements to notify the DGFT

9. In connection with the exercise of the power to apply for an injunction, the IC is required to notify the DGFT in writing (which includes fax):-

- of her intention to apply for an injunction at least 14 days before the application is made, unless the DGFT consents to the application being made within a shorter period (Regulation 12(2)(a));
- of any undertakings accepted in lieu of court proceedings under Regulation 11(2) (i.e. including informal assurances and undertakings) together with copies of amendments to the terms (Regulation 14(a));
- of the outcome of any application for an injunction including any undertakings given to the court, and any order made by the court (Regulation 14(b));

- the outcome of any application to enforce a previous order of the court (Regulation 14(c)).

Duties of the DGFT

10. Under Regulation 15, the DGFT has the following functions in relation to the matters dealt with in paragraph 6: -

- a duty to publish details of relevant court applications made by him, and of any undertakings or court orders obtained by him or notified to him by the Qualifying Bodies (Regulation 15(1)).
- a duty to inform any person on request whether a term has been the subject of a court order or undertakings obtained by or notified to him, and to provide that person with a copy of the order or details of the undertaking together with a copy of any amendments to the term in question, and.
- a power to publish information about the operation of the Regulations.

Ancillary Power

11. Under Regulation 13, the DGFT has power to require the production of documents and information to facilitate his consideration of complaints, and to ascertain whether undertakings and court orders obtained under the Regulations are being complied with. The IC can also require documents and information for the same purpose, but only in relation to court orders she has obtained and undertakings given to her.

The Regulations in Practice

12. All the Qualifying Bodies have agreed with DGFT, on a bilateral basis, to observe certain principles in exercising their functions under the Regulations. The two following sections of this Joint Statement, entitled respectively 'Principles of Joint Enforcement' and 'Agreed Structures and Procedures', set out how these principles will be applied and will operate in practice as between the DGFT and the IC. In these two sections, 'party' describes DGFT and IC.

PRINCIPLES OF JOINT ENFORCEMENT

13. DGFT and IC will observe the following principles in enforcing the Regulations.

- (i) **Autonomy:**
Each party acknowledges the general discretion of the other, subject only to the lead agency principle (see below), to reach a reasonable decision as to whether action on its part is appropriate in relation to any complaint and in particular, the right of the IC and other

Qualifying Bodies to decline to consider a complaint for the purposes of Regulation 11.

(ii) **The Lead Agency Principle:**

Where either party receives a complaint about a contract which is already under consideration by a Qualifying Body other than the IC it shall regard that body as the lead agency for that contract, and shall refer the complaint to it accordingly, unless that body agrees to give up the lead agency status. The lead agency principle may generally be set aside:

- where the IC acts under a statutory obligation to make an assessment in respect of the complaint by virtue of s.42(2) of the Data Protection Act 1998 (the 'DPA 1998'),
- or by agreement, provided any such agreement should not result in a separate and uncoordinated action being taken in relation to the same contract.

(iii) **Cooperation:**

With a view to maximising the benefit of the Regulations to consumers and achieving certainty of process, each party will cooperate with the other and with the other Qualifying Bodies, particularly by sharing information relevant to enforcement, so as to:

- a) ensure that all valid complaints are properly considered;
- b) maintain consistency in interpretation of the Regulations and application of procedures;
- c) avoid duplication of action.

In addition, the DGFT will give all reasonable guidance based on its experience of enforcing the Regulations to the IC and any other Qualifying Body.

(iv) **Confidentiality:**

Subject to any legal duties that exist or may arise, each party will treat as confidential documents and information passed to it by the other or by any other Qualifying Body, where their use or disclosure could harm the interests of either the body which provided them or any third party.

(v) **Selectivity of Action:**

In considering whether to refer a complaint to another agency having powers under the Regulations each party shall fairly consider which such agency is best fitted to deal with the matter. The factors to be taken into account shall include the resources at the disposal of agencies, their knowledge of or ability to obtain information about the circumstances in which the contract is being used, and/or whether

any of them is taking regulatory action against or currently has regulatory dealings with the business using the contract. Each party has discretion to make a reasonable decision in light of these factors and any other relevant considerations, subject to the obligations imposed on the IC by virtue of s.42(2) of the DPA 1998. The following general areas of responsibility are identified:

- a) Complaints about terms used in transactions which fall within the special regulatory remit of a particular Qualifying Body shall in general be regarded as suitable to be dealt with by that body. Contractual terms falling outside the regulatory remit of the IC will not be considered by her and will be referred to the DGFT or the most appropriate Qualifying Body.
- b) Complaints about terms raising difficult or novel areas of law shall in general be regarded as the responsibility of the DGFT or of any Qualifying Body having relevant specialist knowledge or enforcement experience; and
- c) Complaints outside of the special regulatory remit of a Qualifying Body and not raising difficult or novel areas of law should be considered for referral to the appropriate trading standards authority under the 'Home Authority Principle' (normally the home authority within whose borders the head office of the suppliers is located).

AGREED STRUCTURES AND PROCEDURES

14. Each party to the concordat shall nominate a liaison officer or unit for the purposes of coordinating enforcement action. The nominated liaison point within the Office of Fair Trading shall be the Unfair Contract Terms Unit (UCTU).

15. UCTU will serve as the focal point for coordination on the enforcement of the Regulations, maintaining a confidential central record accessible to all Qualifying Bodies of the following information:

- (a) details of each complaint which has been made or notified to the DGFT, sufficient to identify the contract involved, the name and location of the seller or supplier, and the Qualifying Body which is considering or has considered it;
- (b) details of all court proceedings currently being taken under the Regulations sufficient to identify the parties and contracts involved.

16. Where one party has agreed in accordance with the following guidelines to notify in writing another agency, the stated time for such notification may be altered by agreement. However, where delay could adversely affect consumers, or result in

an enforcement body undertaking abortive work, notification should always take place as soon as possible. The following procedural guidelines have been agreed by the parties to this concordat.

COMPLAINTS MADE TO THE IC

- (i) **Where a complaint is made to the IC**, she will within ten days of identifying a complaint potentially actionable under these Regulations, notify DGFT, providing sufficient information to identify the trader (including name and address) and the contract. The IC will subsequently consider whether the complaint is actionable.
- (ii) **Where the IC considers the complaint made to her is actionable**,
 - a) **If the IC does not wish to deal with the complaint**, she will within ten working days of identifying the complaint as actionable under these Regulations refer it and such information on file that she is authorised to disclose and that is likely to be of assistance in dealing with it, to UCTU (or if it is clearly suitable for another Qualifying Body, to that body) and respond appropriately to the complainant. For the avoidance of doubt, the IC will only disclose personal data relating to the complainant, if the complainant has consented to that disclosure.
 - b) **If the IC wishes to deal with the complaint**, she will within ten working days of identifying a complaint actionable under these Regulations;
 - notify UCTU accordingly, and
 - inform UCTU whether she is under a statutory obligation to make an assessment in relation to the complaint by virtue of s.42(2) of the DPA 1998.
 - UCTU will respond as soon as possible and in any case within ten working days. If UCTU is able to confirm that no lead agency is recorded as dealing with the complaint about the contract or if the IC has indicated that s.42(2) of the DPA 1998 will apply in respect of the complaint, UCTU will provide the IC with guidance material and any other available information likely to be of assistance in dealing with the complaint. Otherwise it will within a further ten working days duly refer the complaint to the lead agency (with such information as may be of use) and inform the IC accordingly, unless either the IC or the lead agency states they have agreed to set aside the lead agency principle in relation to that contract.
- (iii) **Where the IC considers the complaint made to her is not actionable**, she will inform the complainant, giving reasons. A complaint may be regarded as non-actionable if (for instance) it lacks necessary information, or the terms

complained of are known to be no longer in use, or if it is clear without need for enquiry that it falls outside the scope of the Regulations.

COMPLAINTS MADE TO DGFT

- (iv) **Where DGFT receives a complaint on which it appears action cannot be taken**, he will inform the complainant, giving reasons.
- (v) **Where an actionable complaint is made to the DGFT**,
 - a) **If the IC or another Qualifying Body is recorded as already dealing with a complaint about the same contract**, UCTU will duly refer the complaint within ten working days, together with such information that may be of use, or
 - b) **If no such lead agency is on the record**, UCTU will within ten working days decide either to deal with the complaint or refer it to the most appropriate Qualifying Body with an offer to supply guidance and other information of possible assistance if the referral is accepted

COMPLAINTS MADE TO OTHER QUALIFYING BODIES

- (vi) **Where a complaint is referred to either party by another Qualifying Body**, the complaint will be treated in the same way, and observing the same time – limits, as if it had been made directly, subject to the following provisos:
 - a) Further referral to another Qualifying Body will not normally take place. (N.B. This does not affect the freedom of the IC to decline to consider any referred complaint where either:
 - she is not already dealing with the contract or:
 - she is already dealing with the contract but the terms/clauses referred by the Qualifying Body fall outside her regulatory remit.)
 - b) The Qualifying Body to whom the complaints were originally made – not the IC or DGFT – remains responsible for informing the complainant of the referral.

IN ALL CASES

- (vii) **If the IC, having agreed to deal with the complaint or complaints, subsequently wishes to abandon her consideration of the matter**, for whatever reason, and in particular pursuant to any agreement to set aside the lead agency principle, she shall within ten working days of taking the decision, notify it to UCTU, refer the file accordingly, and respond appropriately to the complainant(s).

- (viii) **When a court order or undertaking has been obtained by either party**, that party will take all reasonable steps to ascertain that they have been actually complied with before final closure of the case, and in particular will use its power under Regulations 13 as appropriate for that purpose.
- (ix) **When a court order or undertakings have been obtained by the IC**, she will within ten working days notify the DGFT as required the Regulations, and will in doing so supply such further information (i.e. in addition to the details identifying the trader and the contractor already notified to him) as is necessary to enable him to comply with his duty to publish information (in the Unfair Contracts Terms Bulletin) under Regulation 15(1) and to provide full details under Regulation 15(2). This further information will consist of:-
 - a) a copy of the terms considered unfair;
 - b) a copy of any amended terms the seller or supplier has agreed to adopt;
 - c) details of any terms whose use was not discontinued, but whose use the IC considers to require monitoring for possible unfairness.
- (x) **When enforcement is finally concluded by the IC**, whether successfully or otherwise, the DGFT will be notified within ten working days of the closure of the case. UCTU will then remove the IC from the record as the lead agency dealing with that complaint, unless the following applies. The IC is free to inform the UCTU if she remains concerned that the contract may still contain a term or terms of doubtful fairness, but lacks the evidence to pursue them, that she wishes to continue to have complaints about the terms forwarded to her so that she may consider whether she wishes to deal with them. Either party may, on this basis, continue to be recorded as lead agency in respect of a contract on which action has been (for the time being) concluded.

Signed by:
 Elizabeth France, Information Commissioner

Signed by:
 John Vickers, Director General of Fair Trading

Dated: 18 July 2001

C NEWS RELEASE ON HOMEFORM GROUP LTD

HomeForm agrees to consumer protection

HomeForm Group Ltd, which owns the businesses formerly owned by Limelight Group plc, has agreed to implement a scheme to protect consumers who make full payment in advance for fitted kitchens and bathrooms.

The group owns several well-known home improvement companies including Moben and Kitchens Direct.

Threatened court action by the OFT has resulted in the group giving an undertaking to resolve a complaint within four weeks or pay 20 per cent of the contract sum to Qualitas, an industry trade body. Qualitas will hold the money while it attempts conciliation and, if necessary, adjudicates on the complaint. The service is free to consumers unless Qualitas decides that a complaint is unreasonable and directs the complainant to pay a £45 fee.

If the customer complaint is upheld, Qualitas will instruct the company to carry out remedial work or pay compensation, which is not limited to the 20 per cent already being held.

The OFT said today that it believed the scheme would resolve long-standing problems with the HomeForm Group's payment terms, but welcomed any evidence if this was not the case. The scheme is similar to ones already being operated by MFI and B&Q (and described in news release [48/00](#)).

NOTES

The OFT took action under the Unfair Terms in Consumer Contracts Regulations 1994 which came into force on 1 July 1995. These were superseded on 1 October 1999 by the Unfair Terms in Consumer Contracts Regulations 1999. The regulations implement an EC Directive (EC Directive 93/13) in the UK. They apply to standard contract terms used with customers in contracts made after 1 July 1995. The Regulations say that a consumer is not bound by a standard term in a contract with a seller or supplier if that term is unfair. They also give the Director General of Fair Trading and other Qualifying Bodies powers to stop the use of the standard term by businesses and prevent anyone recommending such terms, if necessary by obtaining a court injunction.