

# **Guidance on unfair terms in package holiday contracts**

March 2004

OFT668

## 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 guidance, please write to:

Contract Regulation Unit, OFT, Fleetbank House, 2-6 Salisbury Sq, London EC4Y 8JX  
email [cru@oft.gov.uk](mailto:cru@oft.gov.uk)

## Unfair contract terms bulletins

Copies of bulletins, the explanatory OFT briefing note *Unfair Standard Terms* (ref: OFT143), the comprehensive *Unfair Contract Terms Guidance* (ref: OFT311) and other OFT publications are available, free of charge, from:

EC Logistics, Swallowfield Way, Hayes, Middlesex UB3 1DQ

tel 0870 60 60 321 fax 0870 60 70 321 email [oft@eclogistics.co.uk](mailto:oft@eclogistics.co.uk)

The OFT is moving to electronic distribution, and back issues of earlier bulletins will not always be available. If you have received a paper copy of bulletins but have electronic access, you are invited to send us your email address for future issues.

## The Regulations

Copies of the *Unfair Terms in Consumer Contracts Regulations 1999* (ref: SI 1999/2083) can be purchased, current price £2, 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.hmsso.gov.uk/si/si1999/19992083.htm](http://www.hmsso.gov.uk/si/si1999/19992083.htm)

Copies of the *Unfair Terms in Consumer Contracts (Amendment) Regulations 2001* (ref: SI 2001/1186) are also available from the Stationery Office as above, current price £1.50, or on the internet at: [www.hmsso.gov.uk/si/si2001/20011186.htm](http://www.hmsso.gov.uk/si/si2001/20011186.htm)

Copies of the *Package Travel, Package Holidays and Package Tours Regulations 1992* (ref: SI 1992/3288) can be purchased, current price £6, from Stationery Office bookshops, or by post as above. Copies are available on the internet at:

[www.hmsso.gov.uk/si/si1992/Uksi\\_19923288\\_en\\_1.htm](http://www.hmsso.gov.uk/si/si1992/Uksi_19923288_en_1.htm)

The OFT has published guidance to the Enterprise Act 2002 at [www.oft.gov.uk/enterpriseact.htm](http://www.oft.gov.uk/enterpriseact.htm)

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# 1 INTRODUCTION

- 1.1 The Office of Fair Trading (OFT) has drawn up this guidance to explain why it considers some standard contract terms used in booking conditions for package holidays to be potentially unfair under the *Unfair Terms in Consumer Contracts Regulations 1999* ('the UTCCRs'). The guidance supersedes guidance on this subject issued by the OFT in December 1998 and April 2001. It represents the OFT's views and explains the basis on which we are likely to take enforcement action. It also offers suggestions for achieving fairness. Ultimately it is for the courts to decide whether any term is unfair

## Aim of guidance

- 1.2 The aim of the guidance is to help ensure that the standard contract terms used in booking conditions for package holidays are fair and clear. Its purpose is to encourage suppliers to revise their contracts to comply with the UTCCRs. The UTCCRs set a minimum standard not only of fairness but of transparency.
- 1.3 The guidance deals primarily with potential unfairness of standard contract terms used in booking conditions for package holidays. The guidance may be applied to other holiday contracts, such as accommodation-only lettings, except where reference is made to the *Package Travel, Package Holidays and Package Tours Regulations 1992* ('PTRs') discussed below.

## The UTCCRs

- 1.4 All suppliers using standard contract terms with consumers must comply with the UTCCRs. The UTCCRs implement EC Directive 93/13 on unfair terms in consumer contracts. The UTCCRs came into force on 1 July 1995 and were re-enacted in 1999 (coming into force on 1 October 1999). Chapter 2 of the guidance explains the test of fairness set out in the UTCCRs.
- 1.5 The OFT has issued extensive guidance on the UTCCRs, in particular its Briefing Note *Unfair Standard Terms* (OFT143, published 2000), and the comprehensive *Unfair Contract Terms Guidance* (OFT311, published 2001). These documents give a fuller explanation of certain points made below about the UTCCRs and consumer contract terms in general.

## The PTRs

1.6 Suppliers of package holidays must also comply with the PTRs. The PTRs implement EC directive 90/314 and control the sale and performance of packages offered for sale in the UK. The PTRs define a package as:

'the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation:

- a) transport
- b) accommodation
- c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, and
  - i. submission of separate accounts for different components shall not cause the arrangement to be other than a package;
  - ii. the fact that a combination is arranged at the request of the consumer in accordance with his specific instructions (whether modified or not) shall not of itself cause it to be treated as other than pre-arranged.'

1.7 Among other things the PTRs:

- set out what information must be given to the consumer before the contract is concluded and then before the package starts
- require certain terms to be included in the contract
- set out the steps that the tour operator must take where there is, before departure, a significant alteration to an essential term of the contract and the steps to be taken where, after departure, a significant proportion of the services contracted for cannot be provided
- prescribe the circumstances in which price revisions may be made
- entitle the consumer to transfer the booking to another person, in certain circumstances, when the consumer is prevented from proceeding with the package
- make the tour operator liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether they are to be performed by the tour operator or other suppliers of services.

- 1.8 The OFT considers that terms that do not accurately reflect the requirements of the PTRs are potentially unfair under the UTCCRs. This is not only a matter of avoiding explicit conflict with the provisions of the PTRs. Consumers will generally be unaware of their rights under the PTRs, and we consider that a term may be unfair if, by not reflecting the PTRs, it could mislead or confuse consumers.
- 1.9 This guidance is designed to give full consideration to those aspects of the PTRs that have implications for contract terms. Our detailed views on particular provisions are in Chapter 3, the arrangement of which reflects the structure of the PTRs.
- 1.10 However, this guidance is not a full account of the requirements of the PTRs. They are the subject of separate guidance issued by the Department of Trade and Industry (available on its website: [www.dti.gov.uk](http://www.dti.gov.uk)). Provisions of the PTRs which have no bearing on contractual drafting are not considered. Further, the scope of this guidance does not extend to other consumer protection legislation – for instance the legislation dealing with trade descriptions and misleading prices. It is not intended to provide a complete guide to compliance with all aspects of the law in the drafting of package holiday contracts, or to serve as a substitute for independent legal advice.

## **Enforcement**

- 1.11 Under the UTCCRs the OFT has a duty to consider any complaint it receives about unfair terms. Since 1999 the OFT has shared powers with a range of other enforcers known as 'Qualifying Bodies'. These include most of the main national regulatory bodies, all local authorities providing a trading standards service, and the Consumers' Association.
- 1.12 The provisions of the Enterprise Act 2002 relating to the enforcement of consumer law came into force on 20 June 2003. The enforcement procedure is based on the Stop Now Orders Regulations 2001 and replaced those Regulations and Part III of the Fair Trading Act 1973. Enforcement action can be taken against infringements of both 'domestic' and 'community' law. 'Community' include infringements of the UTCCRs and PTRs. The OFT and trading standards departments have powers to act against all types of infringement.
- 1.13 Enforcers may apply to the courts for an 'enforcement order' to stop the infringement but the OFT must first consult the business committing the infringement with a view to getting it stopped without the need to go to court.

The OFT may decide to accept undertakings from the business that it will stop the infringing conduct. After a two-week consultation period and if the business will not give undertakings, the OFT can apply to the courts for an enforcement order requiring the business to stop and not repeat the infringing conduct. In urgent cases interim orders can be made, in which case the prior consultation period is reduced to one week. In certain very urgent cases action can be taken without consultation, although where this is to be done by an enforcer other than the OFT, the OFT must authorise this.

## **Use of the guidance**

- 1.14 This guidance is designed to help suppliers of package holidays and their advisers to meet the requirements of the UTCCRs. It will also assist other bodies with powers to enforce the UTCCRs. The OFT expects those using or recommending standard pre-formulated booking conditions for package holidays to review their conditions in the light of the guidance and amend or remove any unfair terms from their contracts.
- 1.15 Consumers also have private rights under the UTCCRs, in that unfair terms are legally unenforceable against them. It is therefore in suppliers' interests as well as consumers' that terms should be fair. Ultimately only a court may decide whether a term is unfair. However, the OFT believes that, by applying the principles set out in this guidance including that referred to in 1.5, businesses should be able to produce terms that are less likely to be found unfair by a court.

## 2 THE TEST OF FAIRNESS

- 2.1 The Regulations apply a test of fairness to most standard terms (terms that have not been individually negotiated) in contracts used by businesses with consumers. Unfair terms are not enforceable against the consumer. The test does not apply to terms that set the price or describe the main subject matter of the contract (usually referred to as 'core terms') provided they are in plain and intelligible language. For example, terms in a package holiday contract stating the accommodation to be provided, meals provided, transfer arrangements and the associated costs are likely to be considered core terms.
- 2.2 Regulation 5(1) provides that a standard term is unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.
- 2.3 The requirement of 'good faith' embodies a general principle of fair and open dealing. It means not only that terms should not be used in bad faith, but also that they should be drawn up in a way that respects consumers' legitimate interests. Therefore in assessing fairness, the OFT takes note of how a term **could** be used. A term is open to challenge if it is drafted so widely that it could be used in a way that harms consumers. Protest that the term is not used unfairly in practice is therefore not enough to persuade the OFT that it is immune from challenge under the Regulations. Claims like this usually show that the supplier could redraft the term more precisely both to reflect its intentions and to achieve fairness.
- 2.4 Transparency is also fundamental to fairness. Regulation 7 says that standard terms must use **plain** and **intelligible** language. This does not mean only that terms should be clear for legal purposes. When the OFT assesses fairness, it also has to consider what a consumer is **likely** to understand by the wording of a clause. Even if a clause would be clear to a lawyer, the OFT will probably conclude that it has potential for unfairness if it is likely to mislead, or be unintelligible to consumers. Those buying package holidays do not normally seek legal advice, so contracts should use language that is plain and intelligible to ordinary people
- 2.5 The example terms given in Chapter 3 are taken from standard package holiday contracts referred to the OFT by complainants, including the contracts of large tour operators, to which the OFT secured many changes in 2002. The OFT considers these terms to have potential for unfairness. Where possible, we have

included revised terms. The OFT takes the view that these were sufficiently improved to require no further OFT action, on the evidence available at the time. But the OFT has a statutory duty to consider complaints about **any** terms brought to its attention, including the revised terms or those with a similar effect.

- 2.6 New complaints and other evidence can and do shed new light on the potential for unfairness of terms that were formerly reviewed by the OFT. The assessment of fairness, under the Regulations, requires consideration of **all** the circumstances and of the effect of other terms in the contract – Regulation 6(1). A form of words considered acceptable in one agreement is not necessarily fair in another.
- 2.7 Furthermore, the OFT is no longer the sole authority with powers to enforce the Regulations. Several Qualifying Bodies enforce the Regulations and they are legally entitled to form their own views on what is fair and unfair and to take action accordingly. Provision is made within the legislation to ensure co-ordination of enforcement action, but the court is the ultimate arbiter of whether a term is unfair.

### **3 COMMON UNFAIR TERMS IN PACKAGE HOLIDAY CONTRACTS**

- 3.1 This chapter sets out the OFT's views on terms in holiday contracts that we have commonly challenged as unfair. It refers to the part of the UTCCRs under which we consider that terms of these types are potentially unfair and also, where appropriate, to the protection given to consumers under the PTRs. Examples are given of the unfair terms and the term as revised following the OFT's intervention (see 2.5). The terms are discussed broadly in the order in which the consumer is likely to encounter them - before departure (Part 1), during the holiday (Part 2), and after return (Part 3) - which is how the PTRs are structured.
- 3.2 Following discussion with the OFT, the Association of British Travel Agents published in October 2002 a revision of the Model Contract it recommends to its members. Members are urged to make full use of that model when drafting their standard contracts.

#### **Before departure (Part 1)**

##### **Acceptance of responsibility for errors and changes in invoices or brochures**

- 3.3 We accept that because brochures are published many months in advance, there may have to be changes during the 'life' of the brochure. However, if that is the case, the consumer should be informed of the new details at the time of booking, and before entering into the contract. Terms that exclude or limit a supplier's liability for changes made to the brochure's description of the holiday by, for example, failing to provide adequately for notification of changes pre-contractually, are likely to be considered unfair under the UTCCRs. See page 30 of the *Unfair Contract Terms Guidance* (referred in 1.5 and abbreviated in the rest of this chapter as 'OFT311'), and schedule 2(1)(k) of the UTCCRs.
- 3.4 Similarly, a term should not limit or exclude liability for a failure to supply the holiday as described in the brochure. Such a term is objectionable under the UTCCRs (see schedule 2(1)(b)), and conflicts with Regulation 6 of the PTRs, which provides that the particulars in the brochure are usually implied terms for the purposes of the package holiday contract. It also conflicts with Regulation 15(5) of the PTRs, which provides that liability for the proper performance of the contract cannot be excluded by any contractual term.

3.5 We also accept that errors may be made on confirmation invoices. We have no objection to terms which advise the consumer to check the invoice and notify the supplier of any discrepancy as soon as possible. However, terms that seek to exclude or limit liability for errors on invoices by, for example, placing all the responsibility for checking their accuracy on the consumer, or imposing short deadlines for notification of errors, are likely to be unfair (see schedule 2(1)(b) of the UTCCRs).

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## EXAMPLES

### Old term

'It is important to check the details on the invoice when you get it, .... [The supplier's] responsibility is to supply you with the holiday as booked and confirmed to you.'

### New term

'It is important to check the details on the invoice when you get it... In the event of any discrepancy, please contact us or your travel agent immediately.'

### Old term

'This brochure is prepared many months before the holiday season to which it relates. If any significant changes occur before you have booked, [the supplier] will endeavour to tell you at the time of booking or to pass the necessary information to your travel agent.'

### New term

'In view of [...] the fact that brochures are necessarily prepared some time in advance, advertised facilities [...] may [...] be changed. Therefore changes may be made to the particulars contained in this brochure at any time before the contract with you is made. In these circumstances we will notify you of such changes prior to confirmation of your booking.'

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## **Acceptance of responsibility for statements of agents, employees and representatives**

- 3.6 Consumers decide whether or not to enter into a contract for a holiday on the basis of information and promises made to them at the time of booking. With holiday contracts, the supplier's agent may make statements about, for example, the availability of childcare facilities, whether rooms will have a view, the distance of the hotel from a beach and so on, that induce the consumer to accept the holiday. Terms excluding or limiting a supplier's obligation to respect either oral or written commitments made by their agents have the potential to be unfair (see schedule 2(1)(n) of the UTCCRs). For more information about the OFT's concerns with such terms, and advice on how to meet them, see pages 35-6 of OFT311.
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### **EXAMPLE**

#### **Old term**

'Representatives and agents are not entitled without [the supplier's] express authority to alter itineraries, cancel arrangements or tickets, make or promise refunds on our behalf or obtain loans or services or incur telecommunication expenses on your behalf.'

This term was deleted.

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## **Consumer's right to transfer the holiday if prevented from travelling**

- 3.7 Regulation 10 of the PTRs gives consumers the right, where they are prevented from proceeding with the package holiday, and where they give reasonable notice, to transfer their participation in the holiday booked to a substitute who satisfies the conditions (if any) that apply to the package. The PTRs do not specify the kinds of event that would qualify the consumer as 'prevented from proceeding' but the OFT considers that they would include illness, death of a close relative, jury service and so on. The person transferring the holiday and the substitute are individually and jointly responsible for paying the full amount due, namely the price of the holiday, together with any additional costs arising from the transfer. This is an important practical means by which consumers who are prevented from travelling can transfer their holiday.

- 3.8 The OFT will regard a term restricting the consumer's freedom to cancel as misleading and objectionable under the UTCCRs if it is liable to cause consumers to believe that cancellation without paying cancellation charges is always impossible. Such a term is much more likely to be acceptable if it acknowledges the consumer's right of transfer under the PTRs. Further information about the OFT's concerns with unbalanced cancellation clauses in general appears in the commentary on schedule 2(1)(f) of the UTCCRs at pages 23-24 of OFT311.
- 3.9 The PTRs require consumers to give 'reasonable notice' before exercising this right. They do not define 'reasonable notice' but terms requiring the consumer to give an unduly long period of notice of the transfer, or preventing the consumer from exercising the right within a reasonable period before the departure date, are also highly likely to be considered unfair. Whatever notice is given, the supplier should be able to explain why, if that is the case, the notice is too short to allow the supplier to make the change.
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## EXAMPLE

### Old term

'Amendments cannot be made less than 30 days prior to departure.'

### New term

'If any person on a package holiday is prevented from travelling, the company will agree to that person's booking being transferred to another person who satisfies all the conditions applicable to the package, subject to both persons accepting joint and several liability for full payment of the package price and the company's charge for confirming the transfer and any additional costs arising from the transfer. The company must be given reasonable notice of the transfer request, which is considered to be at least 14 days prior to the outward departure date.'

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### Price revision clauses

- 3.10 Regulation 11 of the PTRs allows suppliers to surcharge after the holiday has been booked only in limited circumstances. Terms that provide for surcharges beyond those allowed by the PTRs are therefore highly likely to be considered unfair and indeed are void and of no effect by virtue of Regulation 11(1).

The OFT is firmly of the view that terms providing for price revisions are void under the PTRs unless they provide for both upward and downward revision. We also consider that a term that allows for an upward revision only will cause a significant contractual imbalance to the consumer's detriment for the purposes of Regulation 5 of the UTCCRs (see 2.2). We will therefore object to any term that does this. The OFT's concerns with unbalanced price variation clauses in general are explained in the commentary on schedule 2(1)(l) of the UTCCRs at pages 32-3 of OFT311.

- 3.11 Regulation 11(2) defines the circumstances in which price revisions are allowed. These are restricted to changes in (i) transport costs including the cost of fuel, (ii) dues, taxes or fees chargeable for services such as landing taxes or embarkation or disembarkation fees at ports and airports, or (iii) exchange rates applied to the particular package. Terms that provide for increases to take account of cost variations not specified in Regulation 11(2) will be void.
- 3.12 Regulation 11(3) provides that no increase may be made within a specified period, which may not be less than 30 days before departure. Regulation 11(3) also requires a supplier to absorb part of any increase, equivalent to at least two per cent of the original cost of the holiday.
- 3.13 A term that conflicts with Regulation 11 of the PTRs is likely to be open to successful challenge (see schedule 2(1)(l) of the UTCCRs). Note also that Regulation 12 of the PTRs makes the price of a holiday an essential term of the contract. (See 3.14 for consumers' rights in the event of a significant change in such a term.) The OFT takes the view that an increase of 10 per cent or more is likely to be considered 'significant', although a smaller increase might also be considered significant, for example if the holiday is expensive.
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## EXAMPLES

### Old term

'As soon as you have paid your deposit or full payment and your holiday arrangements have been confirmed we guarantee the price of your holiday will not be subject to any surcharges except for those resulting from the supplier e.g. an airline increasing its rates.'

Comment: This term fails to allow for a downward revision in price, and allows for impermissible variations in costs, as well as a price increase less than 30 days before departure and of less than two per cent.

## **New term**

'We guarantee that up until 30 days before your departure date the price of your holiday will not be subject to surcharges excepting for:

- (i) variations in transportation costs, including the cost of fuel;
- (ii) variations in dues, taxes or fees chargeable for services such as landing taxes or embarkation or disembarkation fees at ports and airports; and

that within 30 days of your departure date ... the price of your holiday will not be subject to any surcharges.

Should the above mentioned price variations be downward then the price of your holiday will be accordingly reduced and any refund due paid to you.

If the above price variations mean that the cost of your holiday goes up, we will absorb and you will not be charged for any increase equal to up to 2% on your holiday price. You will only have to pay the amount over and above that 2% of the holiday price.'

## **Old term**

'The price of your holiday is subject to surcharges on the following items for increases in transportation costs eg scheduled airfares and any other airline charges which are part of the contract between airlines and their agents and the tour operator/organiser, Government action such as increases in VAT or any other Government imposed increases.'

Comment: This term fails to allow for a downward revision in price and would allow a price increase less than 30 days before departure and of less than two per cent.

## **New term**

'We guarantee that once you have booked your holiday, the price will not be changed.'

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## Consumers' rights on pre-departure change or cancellation by the supplier

3.14 When suppliers have to cancel the holiday or make significant changes to essential aspects of it (such as the price) before departure, consumers are given a number of specific rights, over and above their common law rights, under Regulations 12 and 13 of the PTRs.

- **Regulation 12** provides that the supplier must notify the consumer as quickly as possible to enable him to take appropriate decisions and, in particular, to withdraw from the contract without penalty or to accept the alterations. The consumer is to inform the supplier of his decision as soon as possible.
- **Regulation 13** sets out the options available to the consumer when the supplier cancels or the consumer cancels following a significant change to an essential term of the contract. What is a significant change or an essential term will depend on the circumstances of the case but the following are examples that we have seen and that we would generally view as amounting to a significant change in holiday contracts: a reduction in the stay in resort of more than 12 hours, accommodation of lower standard, change to a different resort, change of UK airport, change of flight time by more than 12 hours, change of a day flight (unless very late in the day) to a flight the following night.

The options available to the consumer under Regulation 13 are:

- i. take a substitute package of equivalent or superior quality if the supplier can offer one, or
- ii. take a substitute package of lower quality if the supplier can offer one and to be refunded the difference in price, or
- iii. a full refund of all monies paid under the contract.

Regulation 13(3) entitles consumers, if appropriate, to compensation for non-performance of the contract, except in the circumstances set out in Regulation 13(3) (see 3.18).

3.15 Terms that conflict with these Regulations are very likely to be unfair (see pages 23-26 of OFT311, and schedule 2(1)(f) and (g) of the UTCCRs). Note that where a substitute package of superior quality is taken under option i., the PTRs do not, in our view, allow the supplier to require an additional payment from the consumer. At the same time the supplier is not expected to offer a

holiday which is so far superior as not to be a genuine substitute. Nor is the supplier required to offer a superior substitute if it is able to offer one of equivalent quality. If the supplier offers a substitute of genuinely equivalent quality, it may offer a substitute of superior quality at additional cost.

- 3.16 As noted in 1.8, consumers will generally be unaware of their rights under the PTRs, and we consider that a term may be unfair if, by not reflecting the PTRs, it could mislead or confuse consumers. Contracts which adequately reflect the PTRs are much more likely to be considered acceptable.

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## EXAMPLES

### Old term

'If we are unable to provide the booked travel arrangements you can either have a refund of all monies paid or accept an offer of alternative travel arrangements of comparable standard from us, if available.'

### New term

'If we are unable to provide the booked travel arrangements you can either have a refund of all monies paid or accept an offer of alternative travel arrangements of equivalent or superior standard from us, if available, or a choice of specified travel arrangements of a lower standard to the travel arrangements booked together with a refund of the difference in price.'

### Old term

'We reserve the right to cancel your holiday in any circumstances. If we cancel your holiday, you can either have a refund or buy another available holiday from us.'

### New term

'We reserve the right to cancel your holiday in any circumstances. If we cancel your holiday, you can either have a refund or accept a replacement holiday from us of equivalent or closely similar standard and price, if one is available...we will always refund the difference in price if the replacement holiday is of a lower standard and price.'

3.17 The nature of significant changes will vary but will normally include travel dates, resort locations, departure or arrival points and surcharges of 10 per cent or more (see 3.14). Exhaustive lists of potentially significant alterations are likely to be considered unfair if they leave out ones that consumers could reasonably consider fundamental. Some alterations, though not generally considered fundamental by some consumers, may be important to others, eg crèche facilities. Exhaustive lists are therefore especially vulnerable to a charge of unfairness and terms seeking to exclude liability for all 'minor' changes are also likely to be considered unfair.

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## EXAMPLE

### Old term

"Major change" means:

- (a) an alteration to your scheduled time of departure or return of 12 hours or more; and/or
- (b) a change of UK departure airport (excluding change of London Airports); and/or
- (c) a change of hotel or apartment to a materially lower rating; and or
- (d) a significant change of resort area.'

### New term

"Major change" includes:-' etc, as above.

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## Compensation

3.18 Where the supplier cancels the holiday, or the consumer does so following a significant change to an essential term by the supplier, Regulation 13(3) of the PTRs entitles the consumer to compensation, if appropriate, except where:

- there are 'unusual and unforeseeable circumstances beyond the control of the [supplier], the consequences of which could not have been avoided even if all due care had been exercised' (a term that lists such events should not include those that may in certain circumstances be within the control of the supplier, such as 'technical problems with transport'); and/or

- the supplier notifies the consumer in writing, within a stated period indicated within the description of the package, of a failure to achieve minimum numbers for the holiday.

3.19 A term excluding compensation in wider circumstances than those stipulated in the PTRs is likely to be considered an unfair exclusion of liability. See page 15 of OFT311 on exclusions of liability for 'force majeure', and schedule 2(1)(b) of the UTCCRs.

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## EXAMPLES

### Old term

'Under certain circumstances beyond our control it may prove necessary for us to cancel your holiday arrangements, e.g. lack of support making the holiday non-viable...It may also prove necessary on occasion to make a major alteration to the holiday booking....in no case will we pay compensation ...if the change is due to an event listed in the following note:

#### IMPORTANT

We cannot accept responsibility for changes or cancellation caused by reason of war or threat of war, riots, civil strife, terrorist activity, fire, adverse weather conditions, natural disasters, strikes or other industrial action, or other circumstances demonstrably beyond our control.'

### New term

'You are entitled, if appropriate, to be compensated by the company for the non-performance of the contract except where:

- (a) the package is cancelled because the number of persons who agreed to take it is less than the minimum number required, and you are informed of the cancellation in writing within the period indicated in the description of the package.
- (b) the package is cancelled by reason of unusual and unforeseeable circumstances beyond our control, the consequences of which could not have been avoided even if all due care had been exercised.'

## Old term

"Force majeure" means unforeseeable or unusual circumstances beyond our control, the circumstances of which could not have been avoided even if all due care had been exercised. Such circumstances include.....technical problems with transport...'

## New term

'...Such circumstances include.....unavoidable technical problems with transport...'

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## Compensation amounts

- 3.20 Many package holiday contracts limit compensation for cancellation and changes before departure to a set sliding scale. We do not object in principle to terms that offer compensation by reference to such scales because this gives both supplier and consumer the benefit of a degree of certainty. However, compensation terms are more likely to be considered fair if they do not prevent the consumer from seeking more compensation where appropriate. Such terms should not oblige the consumer to take less compensation than the common law would provide. Accordingly a term that excludes or gives the impression of excluding liability for more compensation than provided for in the scale, even where the consumer can prove a greater loss, is open to challenge as being unfair. See pages 10-11 of OFT311 on limitations of liability generally, and schedule 2(1)(b) of the UTCCRs.
- 3.21 Terms providing for compensation, even if they have a scale as a yardstick, should allow for payments that reflect the actual loss of the consumer resulting from cancellation or change made by the supplier. A term may be acceptable if it provides for adequate set amounts to be payable, and acknowledges that in particular cases the consumer may be entitled to claim more (through arbitration or the courts for example).
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## EXAMPLES

### Old term

'If we make a major change, you may accept that change and receive compensation, or cancel your holiday and receive a full refund with compensation. The compensation we will pay is shown in the scale below...'

### New term

'...a full refund with compensation. The compensation we will pay is shown in the scale below. Please note that the figures quoted are by way of guideline only, and may in appropriate circumstances be increased...'

### Old term

'Where [the supplier] cancels your holiday or makes a material change to your holiday [the supplier] will pay to you as compensation the amount shown in the table below...'

### New term

'...we will pay to you minimum compensation as set out below.'

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3.22 A term that excludes repayment of an insurance premium paid by the consumer to the supplier when the supplier has cancelled the holiday or the consumer has cancelled following a significant change by the supplier to an essential term is inconsistent with one or both of Regulation 13(2)(c) and 13(3) of the PTRs. This is because the consumer will often be unable to transfer or re-use the policy. Such a term is also likely to be considered unfair. It would be fairer if the exclusion applied only to policies that can be re-used or transferred without penalty. In our view a term that excludes refund of the premium is also likely to be considered unfair where the supplier has made it a condition of the contract that the consumer should be insured and the consumer has obtained that insurance not from the supplier but from an independent third party. A term that excludes the refund of the premium even where the supplier does not require the consumer to purchase insurance through the supplier, or at all, is still open to challenge as unfair because in our view it would be inconsistent with Regulation 13(3). Again such a term would be fairer if the exclusion applied only to policies that can be re-used or transferred without penalty.

## **Cancellation by the consumer**

- 3.23 Suppliers' contracts usually include a term providing expressly for the cancellation of bookings by consumers. Such a term will often set out a scale of cancellation charges that imposes a fee for cancellation that rises with the approach of the departure date.
- 3.24 The OFT does not object in principle to the use of such sliding scales since they provide consumers with the certainty of knowing precisely how much they are liable to lose by cancelling at any given point.
- 3.25 However, fairness must not be sacrificed to simplicity. The test the OFT applies in assessing the fairness of sliding scales is that, at the time the contract is made, they should represent a genuine pre-estimate of the supplier's loss from cancellations. The law does not allow suppliers whose customers cancel their contracts to reclaim losses that they could have avoided had they taken reasonable steps to do so. In setting cancellation charge scales, therefore, suppliers must take into account the likelihood that they will be able to limit their losses when holidays are cancelled. The main steps suppliers will be able to take are to try to resell cancelled holidays, to withdraw from obligations to buy transport and accommodation from third parties (subject to contract terms), to repackage travel and accommodation elements and/or to resell travel and accommodation separately. The scope for limiting loss through resale and cost reduction clearly diminishes as the date of departure approaches, but the extent and level depend on each supplier's circumstances.
- 3.26 Because suppliers' cost structures will differ, the OFT cannot recommend a particular level of charges or particular scale which it believes to be fair. However, we believe there to be components that must be present in any fair assessment of the cost of cancellation. These core components are summarised in Annexe C, and do not for example include the loss of the expectation of profit from optional excursions. The consumer is under no obligation to take optional excursions. There may be more than one way of quantifying the individual components. Whatever method is chosen for arriving at the charges, it must accord with generally accepted accounting principles. A separate assessment should be performed for each of the time bands on the scale to ensure fairness throughout.

- 3.27 Terms providing for cancellation do not have to contain a scale of charges. They may alternatively simply state that the supplier is entitled to charge the consumer an amount that reflects the losses it has incurred and that it could recover in law (which would also exclude losses that it could have avoided had it taken reasonable steps to do so - see 3.25).
- 3.28 Terms that allow the supplier to seek a disproportionately high sum from consumers who fail to fulfil their obligations under the contract by, for example, cancelling are very likely to be unfair. See pages 21-22 of OFT311 and schedule 2(1)(e) of the UTCCRs.
- 

## EXAMPLE

### Old term

'If the [consumer's] withdrawal from the expedition or cancellation is due to events which are the [consumer's] own fault or wilful decision, the [consumer] shall not be entitled to recover any of the payments he or she has made under the contract.'

### New term

'If withdrawal...or cancellation is due to events which are the fault or wilful decision of the [consumer], [the supplier] shall be entitled to retain as much of the deposit or other payment as is needed to cover its reasonable costs and losses caused by withdrawal. [The supplier] shall take all reasonable steps to keep its costs and losses to a minimum.'

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### **Cancellation charge for failure to pay the deposit or balance by the due date**

- 3.29 A term will generally be unfair (see schedule 2(1)(e) of the UTCCRs) if it could allow the supplier to make a cancellation charge greater than the deposit where the consumer has not paid the deposit by the due date. Similarly, where the consumer has not paid the balance by the due date, a term is likely to be unfair if it could allow the supplier to make a cancellation charge greater than would have been payable if the consumer had cancelled the holiday on that date. An exception will be when the supplier has granted a request from the consumer to

defer payment to a later date and the consumer has failed to pay by that date. In that case a term treating the holiday as cancelled on the deferred date for payment and providing for the payment of a charge that is greater than the deposit is unlikely to be considered unfair, provided that the charge is consistent with the principles for the calculation of fair charges set out above.

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## EXAMPLE

### Old term

'If unconditional payment of the balance of the price of the holiday is not received by [the supplier] by the due date, [the supplier] reserves the right to cancel the booking for the holiday in which case [the supplier] will be entitled to keep all deposits paid in respect of the holiday and you will have to pay a cancellation charge as though there had been a cancellation...'

### New term

'If the balance is not paid on time we shall cancel your booking and retain your deposit.'

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## During the holiday (Part 2)

### Consumers' rights if services not supplied after departure

3.30 The PTRs protect the consumer when, after departure, the supplier does not provide a significant part of the services it agreed to supply. Regulation 14 requires the supplier to make suitable alternative arrangements for the continuation of the holiday at no extra cost to the consumer and, where appropriate, to compensate the consumer. If the supplier cannot make alternative arrangements, or the consumer does not accept them for good reason, the supplier is required to return the consumer to the place of departure, or another place agreed by the consumer, and pay compensation if appropriate. Terms that seek to limit the supplier's liability when the consumer does not receive a significant part of the contract conflict with the rights provided under Regulation 14 of the PTRs and are very likely to be considered unfair. See pages 3-17 of OFT311 on exclusion and limitation clauses generally, and schedule 2(1)(b) of the UTCCRs.

3.31 This is an example of an area where consumers will generally be unaware of their rights under the PTRs unless the contract tells them (see 1.8).

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## EXAMPLES

### Old term

The original term was silent on the consumer's rights under Regulation 14.

### New term

'If after departure we are unable to provide a significant proportion of the services we had agreed to provide as part of our contract with you, we will do our very best to make suitable alternative arrangements. If we cannot do so or you refuse to accept these for good reasons, we will arrange to fly you back to your UK departure airport (if the arrangements we agreed to provide included flights) or to transport you to the point our contracted services commenced (if elsewhere than your hotel) as soon as we reasonably can.'

### Old term

'All itineraries that involve the use of riverboats or coastal cruisers are subject to amendment according to river or sea conditions at the time... '

This term was deleted.

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## **Exclusions of liability for occurrences between departure and return**

3.32 Generally speaking contract terms cannot be used to exclude or restrict a supplier's liability for death or personal injury caused by its negligence. They are void for that purpose under the Unfair Contract Terms Act 1977 except where their use is authorised by law. If an exclusion of liability like this cannot be legally enforced, we consider it misleading, without any legitimate purpose and therefore open to objection as unfair. The UTCCRs themselves make an exception for terms whose use is authorised by law, and do not apply to terms that reflect relevant international conventions. The PTRs also allow compensation to be limited in accordance with certain conventions (see 3.35).

3.33 That apart, the UTCCRs go beyond the 1977 Act in their coverage of exclusion and limitation clauses. Schedule 2(1)(a) applies not only to terms which would apply where the supplier was negligent, but to exclusions of liability for death or personal injury caused by the supplier's act or failure to act. We therefore do not consider that terms which exclude or limit liability for death or injury can be made safe from challenge by accepting liability for loss or damage caused by negligence alone. See page 5 of OFT311 for our views on terms of this kind in general.

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## EXAMPLES

### Old term

'Some activities and pursuits carry inherent risks to the client's safety and wellbeing.....A client wishing to participate in activities which carry an inherent risk may be asked to sign an additional waiver form by the local supplier.'

This term was deleted.

### Old term

'For those who participate in sports, water sports and winter sports whilst on holiday, it should be understood that participation is at the individual's own risk and it is your own responsibility to obtain the relevant insurance.'

### New term

'For those who participate in sports, water sports and winter sports whilst on holiday that have been organised and arranged completely independently of [the supplier], it should be understood that participation is at the individual's own risk and it is your own responsibility to obtain the relevant insurance.'

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## **Other exclusions of liability, including exclusions of liability for other suppliers of services**

3.34 Regulations 15(1) and 15(5) of the PTRs do not allow the supplier, except for reasons properly attributable to force majeure (as defined in Regulation 15(2)(c)), to exclude or limit liability for services it has contracted to supply. This is the case whether it supplies these services direct or through other

suppliers. Terms that seek to exclude or limit liability more widely than the PTRs allow will be open to challenge as being unfair. See also pages 3-17 of OFT311 on exclusion and limitation clauses generally and schedule 2(1)(b) of the UTCCRs.

- 3.35 Regulation 15(3) of the PTRs allows the supplier to limit compensation in the case of damage arising from the non-performance or improper performance of the contract to that which would be payable under international conventions that cover such services. The UTCCRs do not apply to terms that limit liability in ways permitted by law or by international agreements, such as the Warsaw Convention. Care must be taken, however, to ensure that terms do not go further than is strictly permissible, and any convention provisions must be embodied or reflected accurately and intelligibly if this exemption is to apply. The courts have indicated that failure to incorporate conventions into contracts effectively may prevent a supplier benefiting from limitations on compensation that they contain. Terms that go beyond the conventions are likely to be considered unfair in the same way as terms which seek to exclude or limit liability more widely than the PTRs allow.
- 3.36 Suppliers should make copies of the conventions available to consumers who wish to see them. Failure to do so could be seen as unfair in the way that the use of hidden terms is unfair. See page 28 of OFT311 on binding consumers to hidden terms, and schedule 2(1)(i) of the UTCCRs.
- 

## EXAMPLES

### Old term

'Delays sometimes occur. We do not accept responsibility for any delay.'

This term was deleted.

### Old term

'The company books all onward flights in good faith but has no direct control over the manner in which these services are provided and we therefore accept no liability for airline schedule changes et cetera'

### New term

'The company books all onward flights in good faith but has no direct control over the manner in which these services are provided and we therefore accept

no liability for airline schedule changes et cetera where the flights do not form part of a package holiday.'

### **Old term**

'You will appreciate that many people and companies are involved in the planning and provision of your holiday. We accept our liability to you for loss or damage sustained by you as a result of the negligence of our employees. However we do not accept any responsibility for the acts or omissions of those involved in your holiday arrangements over whom we have no direct control and are not employed by us or our employees.'

### **New term**

'[The supplier] accepts responsibility under these terms and conditions for its commitments to you. It also accepts responsibility by its duly authorised agents. We accept our liability to you for loss or damage sustained by you as a result of the negligence of our employees or our suppliers.'

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### **Unreasonable compensation limits**

- 3.37 Regulation 15(4) of the PTRs allows a supplier to limit the compensation it will pay for failure to supply services it has contracted to supply (except for personal injury), provided that the limitation is 'not unreasonable'. The PTRs do not define 'not unreasonable' but we consider that terms that could leave the consumer with less compensation than the common law and statute would otherwise allow will not usually meet this standard. We therefore regard them as potentially unfair. See pages 8-9 of OFT311 and schedule 2(1)(b) of the UTCCRs.
- 3.38 Note that ABTA recommends to its members that compensation should not be limited to less than three times the cost of the holiday and the OFT has generally not challenged terms that use this yardstick.
- 3.39 Note also the OFT considers that the availability of insurance to cover certain losses cannot, of itself, make it fair for a contract term to limit or exclude liability for these losses, since such a term may in effect require the consumer to pay for cover against the supplier's negligence.

## EXAMPLE

### Old term

'Our liability in all cases shall be limited to a maximum of the cost of your travel arrangements.'

### New term

'...our liability in all cases shall be limited to a maximum of three times the cost of your travel arrangements...'

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## After return (Part 3)

### Reporting of complaints by consumers

3.40 Regulation 15(9) of the PTRs stipulates that package contracts should oblige the consumer to communicate any complaint at the earliest opportunity. This gives the supplier more chance to put matters right and limit any harm or distress caused to the consumer. In the OFT's opinion, however, this does not mean that the supplier is entitled to exclude all liability if the consumer does not in fact do so. A delay by the consumer in reporting a complaint may affect the supplier's ability to put things right and reduce the consumer's entitlement. There is no objection to a term that simply reflects this reality. But a term that excludes liability for complaints not made in the resort or within a specified period after return (often 28 days), or that includes detailed notification procedures the failure to comply with which will result in rejection of the complaint, is highly likely to be unfair. See also page 12 of OFT311 for a discussion of time limits on claims generally, and schedule 2(1)(b) and (n) of the UTCCRs.

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## EXAMPLE

### Old term

'If we cannot sort out your problem, ... you should contact our UK Customer Service Department with 28 days of returning home. We cannot accept liability for claims you do not tell us about in that period...'

### New term

'If we cannot sort out your problem, ... you should contact our UK Customer Service Department with 28 days of returning home. In the event that you do not tell us in that period....this may affect the company's ability to investigate complaints and may impact on the way that your complaint is dealt with.'

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## Miscellaneous

### 'Read and understood' declarations

- 3.41 Declarations that the consumer has read and understood the contract give rise to concern because they require the consumer to make a declaration regardless of whether it is true and may mislead consumers into believing that they cannot subsequently object to terms that are unfair. Declarations of this nature are potentially subject to challenge as being unfair contrary to Regulation 5.
- 3.42 Much more acceptable is a clear and prominent warning that the consumer should read the terms before signing the contract. See page 47 of OFT311 for an explanation of our view on consumer declarations generally.
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## EXAMPLE

### Old term

'On behalf of all the persons named above by whom I am authorised to make this booking, I declare that I/We have read and agree to the Booking Conditions and that my/our booking is made subject to these conditions '

This term was deleted.

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## **Jurisdiction**

3.43 Terms that exclude or hinder the consumer's right to take legal action or exercise any other legal remedy are very likely to be considered unfair (see schedule 2(1)(q) of the UTCCRs). Consumers should not be prevented from starting legal proceedings in their local courts – for instance by a term requiring resort to the courts of England and Wales when the contract may be used in another part of the UK having its own laws and courts. It is not fair for the aggrieved consumer to be forced to travel long distances and use unfamiliar procedures. European and UK law lay down rules on this. Terms that conflict with these rules are likely to be unfair.

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## **EXAMPLES**

### **Old term**

'Finally you should note that all disputes between us will be governed by English law and are subject to the exclusive jurisdiction of the English Courts.'

### **New term**

'Any dispute between us will be governed by the non-exclusive law and jurisdiction of the English or Scottish Courts.'

### **Old term**

'The construction, validity and performance of this contract is governed by the Law of Scotland and any action which may arise under, out of, or in connection with, or in relation to it, shall be brought only in Courts of Scotland.'

### **New term**

'The construction, validity and performance of this contract is governed by the Law of Scotland and any action which may arise under, out of, or in connection with, or in relation to it, shall be brought only in the Courts of Scotland but not exclusively so if you are domiciled elsewhere in the UK...when the Courts of England, Wales or Northern Ireland also have jurisdiction.'

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## **Plain English and avoidance of jargon**

3.44 Regulation 7 of the UTCCRs requires contracts to be written in plain and intelligible language that the ordinary consumer can readily understand.

Contracts must be intelligible to ordinary consumers without the need for legal advice. This means using words in their normal sense and avoiding jargon such as 'assign' 'indemnify', 'mitigate' and 'tort', which are common in package holiday contracts. If there are occasions when language likely to be unfamiliar to the consumer is unavoidable, the contract should explain its meaning. Such occasions will be rare.

- 3.45 In addition, sentences should be short, and the text broken up with sub-headings that are easily understood. Statutory references, elaborate definitions and extensive cross-referencing should be avoided (see pages 52-54 of OFT311 for a detailed discussion of the UTCCRs' requirement for plain and intelligible language).
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## EXAMPLE

### Old term

'[The customer] shall indemnify [the supplier] against any loss or expense which [the supplier] may incur...'

### New term

'[The customer] shall pay [the supplier] for any loss or expense [the supplier] may incur...'

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## Misleading headings

- 3.46 We have seen package holiday contracts with headings such as 'Fair Trading Charter' or 'Fair Trading Agreement'. We object to descriptions like this because they may give the misleading impression that the contracts have the approval of some independent body. Following our intervention suppliers have replaced them with straightforward headings such as 'Booking conditions' or 'Our Agreement'.

# ANNEXES

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## **A EXTRACTS FROM THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999 (REGULATIONS 5 AND 7; SCHEDULE 2(1))<sup>1</sup>**

### **Regulation 5**

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non exhaustive list of the terms which may be regarded as unfair.

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<sup>1</sup> Copies of the complete regulations are available from the Stationery Office (both online and in hard copy) – see the publications page opposite the contents page for full details.

## Regulation 7

### Written contracts

7. - (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 but this rule shall not apply in proceedings brought under regulation 12.

## Schedule 2(1)

### Regulation 5(5) - Indicative and non-exhaustive list of terms which may be regarded as unfair

#### 1. Terms which have the object or effect of

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

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

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

- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

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

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

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

## 2. Scope of paragraphs 1(g), (j) and (l)

(a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Paragraphs 1(g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock

exchange quotation or index or a financial market rate that the seller or supplier does not control;

- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

## **B    EXTRACTS FROM THE PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS REGULATIONS 1992 (REGULATIONS 5 – 15; SCHEDULES 1 AND 2)<sup>2</sup>**

### **Regulations 5 -15**

#### **Requirements as to brochures**

5.—(1) Subject to paragraph (4) below, no organiser shall make available a brochure to a possible consumer unless it indicates in a legible, comprehensible and accurate manner the price and adequate information about the matters specified in Schedule 1 to these Regulations in respect of the packages offered for sale in the brochure to the extent that those matters are relevant to the packages so offered.

(2) Subject to paragraph (4) below, no retailer shall make available to a possible consumer a brochure which he knows or has reasonable cause to believe does not comply with the requirements of paragraph (1).

(3) An organiser who contravenes paragraph (1) of this regulation and a retailer who contravenes paragraph (2) thereof shall be guilty of an offence and liable:—

(a) on summary conviction, to a fine not exceeding level 5 on the standard scale; and

(b) on conviction on indictment, to a fine.

(4) Where a brochure was first made available to consumers generally before 31st December 1992 no liability shall arise under this regulation in respect of an identical brochure being made available to a consumer at any time.

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<sup>2</sup> Copies of the complete regulations are available from the Stationery Office (both online and in hard copy) – see the publications page opposite the contents page for full details.

### **Circumstances in which particulars in brochure are to be binding**

6.—(1) Subject to paragraphs (2) and (3) of this regulation, the particulars in the brochure (whether or not they are required by regulation 5(1) above to be included in the brochure) shall constitute implied warranties (or, as regards Scotland, implied terms) for the purposes of any contract to which the particulars relate.

(2) Paragraph (1) of this regulation does not apply—

(a) in relation to information required to be included by virtue of paragraph 9 of Schedule 1 to these Regulations; or

(b) where the brochure contains an express statement that changes may be made in the particulars contained in it before a contract is concluded and changes in the particulars so contained are clearly communicated to the consumer before a contract is concluded.

(3) Paragraph (1) of this regulation does not apply when the consumer and the other party to the contract agree after the contract has been made that the particulars in the brochure, or some of those particulars, should not form part of the contract.

### **Information to be provided before contract is concluded**

7.—(1) Before a contract is concluded, the other party to the contract shall provide the intending consumer with the information specified in paragraph (2) below in writing or in some other appropriate form.

(2) The information referred to in paragraph (1) is:—

(a) general information about passport and visa requirements which apply to British Citizens who purchase the package in question, including information about the length of time it is likely to take to obtain the appropriate passports and visas;

(b) information about health formalities required for the journey and the stay; and

(c) the arrangements for security for the money paid over and (where applicable) for the repatriation of the consumer in the event of insolvency.

(3) If the intending consumer is not provided with the information required by paragraph (1) in accordance with that paragraph the other party to the contract shall be guilty of an offence and liable:—

(a) on summary conviction, to a fine not exceeding level 5 on the standard scale; and

(b) on conviction on indictment, to a fine.

### **Information to be provided in good time**

8.—(1) The other party to the contract shall in good time before the start of the journey provide the consumer with the information specified in paragraph (2) below in writing or in some other appropriate form.

(2) The information referred to in paragraph (1) is the following:—

(a) the times and places of intermediate stops and transport connections and particulars of the place to be occupied by the traveller (for example, cabin or berth on ship, sleeper compartment on train);

(b) the name, address and telephone number—

(i) of the representative of the other party to the contract in the locality where the consumer is to stay,

or, if there is no such representative,

(ii) of an agency in that locality on whose assistance a consumer in difficulty would be able to call,

or, if there is no such representative or agency, a telephone number or other information which will enable the consumer to contact the other party to the contract during the stay; and

(c) in the case of a journey or stay abroad by a child under the age of 16 on the day when the journey or stay is due to start, information enabling direct contact to be made with the child or the person responsible at the place where he is to stay; and

(d) except where the consumer is required as a term of the contract to take out an insurance policy in order to cover the cost of cancellation by the consumer or the cost of assistance, including

repatriation, in the event of accident or illness, information about an insurance policy which the consumer may, if he wishes, take out in respect of the risk of those costs being incurred.

(3) If the consumer is not provided with the information required by paragraph (1) in accordance with that paragraph the other party to the contract shall be guilty of an offence and liable:—

(a) on summary conviction, to a fine not exceeding level 5 on the standard scale; and

(b) on conviction on indictment, to a fine.

### **Contents and form of contract**

9.—(1) The other party to the contract shall ensure that—

(a) depending on the nature of the package being purchased, the contract contains at least the elements specified in Schedule 2 to these Regulations;

(b) subject to paragraph (2) below, all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and are communicated to the consumer before the contract is made; and

(c) a written copy of these terms is supplied to the consumer.

(2) Paragraph (1)(b) above does not apply when the interval between the time when the consumer approaches the other party to the contract with a view to entering into a contract and the time of departure under the proposed contract is so short that it is impracticable to comply with the subparagraph.

(3) It is an implied condition (or, as regards Scotland, an implied term) of the contract that the other party to the contract complies with the provisions of paragraph (1).

(4) In Scotland, any breach of the condition implied by paragraph (3) above shall be deemed to be a material breach justifying rescission of the contract.

## **Transfer of bookings**

10.—(1) In every contract there is an implied term that where the consumer is prevented from proceeding with the package the consumer may transfer his booking to a person who satisfies all the conditions applicable to the package, provided that the consumer gives reasonable notice to the other party to the contract of his intention to transfer before the date when departure is due to take place.

(2) Where a transfer is made in accordance with the implied term set out in paragraph (1) above, the transferor and the transferee shall be jointly and severally liable to the other party to the contract for payment of the price of the package (or, if part of the price has been paid, for payment of the balance) and for any additional costs arising from such transfer.

## **Price revision**

11.—(1) Any term in a contract to the effect that the prices laid down in the contract may be revised shall be void and of no effect unless the contract provides for the possibility of upward or downward revision and satisfies the conditions laid down in paragraph (2) below.

(2) The conditions mentioned in paragraph (1) are that—

- (a) the contract states precisely how the revised price is to be calculated;
- (b) the contract provides that price revisions are to be made solely to allow for variations in:—
  - (i) transportation costs, including the cost of fuel,
  - (ii) dues, taxes or fees chargeable for services such as landing taxes or embarkation or disembarkation fees at ports and airports, or
  - (iii) the exchange rates applied to the particular package; and

(3) Notwithstanding any terms of a contract,

- (i) no price increase may be made in a specified period which may not be less than 30 days before the departure date stipulated; and
- (ii) as against an individual consumer liable under the contract, no price increase may be made in respect of variations which would produce an increase of less than 2%, or such greater percentage as

the contract may specify, ("non-eligible variations") and that the non-eligible variations shall be left out of account in the calculation.

### **Significant alterations to essential terms**

12. In every contract there are implied terms to the effect that—

(a) where the organiser is constrained before the departure to alter significantly an essential term of the contract, such as the price (so far as regulation 11 permits him to do so), he will notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular to withdraw from the contract without penalty or to accept a rider to the contract specifying the alterations made and their impact on the price; and

(b) the consumer will inform the organiser or the retailer of his decision as soon as possible.

### **Withdrawal by consumer pursuant to regulation 12 and cancellation by organiser**

13.—(1) The terms set out in paragraphs (2) and (3) below are implied in every contract and apply where the consumer withdraws from the contract pursuant to the term in it implied by virtue of regulation 12(a), or where the organiser, for any reason other than the fault of the consumer, cancels the package before the agreed date of departure.

(2) The consumer is entitled—

(a) to take a substitute package of equivalent or superior quality if the other party to the contract is able to offer him such a substitute; or

(b) to take a substitute package of lower quality if the other party to the contract is able to offer him one and to recover from the organiser the difference in price between the price of the package purchased and that of the substitute package; or

(c) to have repaid to him as soon as possible all the monies paid by him under the contract.

(3) The consumer is entitled, if appropriate, to be compensated by the organiser for non-performance of the contract except where—

(a) the package is cancelled because the number of persons who

agree to take it is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the description of the package; or  
(b) the package is cancelled by reason of unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.

(4) Overbooking shall not be regarded as a circumstance falling within the provisions of sub-paragraph (b) of paragraph (3) above.

### **Significant proportion of services not provided**

14.—(1) The terms set out in paragraphs (2) and (3) below are implied in every contract and apply where, after departure, a significant proportion of the services contracted for is not provided or the organiser becomes aware that he will be unable to procure a significant proportion of the services to be provided.

(2) The organiser will make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package and will, where appropriate, compensate the consumer for the difference between the services to be supplied under the contract and those supplied.

(3) If it is impossible to make arrangements as described in paragraph (2), or these are not accepted by the consumer for good reasons, the organiser will, where appropriate, provide the consumer with equivalent transport back to the place of departure or to another place to which the consumer has agreed and will, where appropriate, compensate the consumer.

### **Liability of other party to the contract for proper performance of obligations under contract**

15.—(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because—

- (a) the failures which occur in the performance of the contract are attributable to the consumer;
- (b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or
- (c) such failures are due to—
  - (i) unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or
  - (ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

(3) In the case of damage arising from the non-performance or improper performance of the services involved in the package, the contract may provide for compensation to be limited in accordance with the international conventions which govern such services.

(4) In the case of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the contract may include a term limiting the amount of compensation which will be paid to the consumer, provided that the limitation is not unreasonable.

(5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term.

(6) The terms set out in paragraphs (7) and (8) below are implied in every contract.

(7) In the circumstances described in paragraph (2)(b) and (c) of this regulation, the other party to the contract will give prompt assistance to a consumer in difficulty.

(8) If the consumer complains about a defect in the performance of the contract, the other party to the contract, or his local representative, if there is one, will make prompt efforts to find appropriate solutions.

(9) The contract must clearly and explicitly oblige the consumer to communicate at the earliest opportunity, in writing or any other appropriate form, to the supplier of the services concerned and to the other party to the contract any failure which he perceives at the place where the services concerned are supplied.

## **Schedule 1**

### **Regulation 5 - Information to be included (in addition to the price) in brochures where relevant to packages offered**

1. The destination and the means, characteristics and categories of transport used.
2. The type of accommodation, its location, category or degree of comfort and its main features and, where the accommodation is to be provided in a member State, its approval or tourist classification under the rules of that member State.
3. The meals which are included in the package.
4. The itinerary.
5. General information about passport and visa requirements which apply for nationals of the member State or States in which the brochure is made available and health formalities required for the journey and the stay.
6. Either the monetary amount or the percentage of the price which is to be paid on account and the timetable for payment of the balance.
7. Whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.
8. The arrangements (if any) which apply if consumers are delayed at the outward or homeward points of departure.
9. The arrangements for security for money paid over and for the repatriation of the consumer in the event of insolvency.

## Schedule 2

### **Regulation 9 - Elements to be included in the contract if relevant to the particular package**

1. The travel destination(s) and, where periods of stay are involved, the relevant periods, with dates.
2. The means, characteristics and categories of transport to be used and the dates, times and points of departure and return.
3. Where the package includes accommodation, its location, its tourist category or degree of comfort, its main features and, where the accommodation is to be provided in a member State, its compliance with the rules of that member State.
4. The meals which are included in the package.
5. Whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.
6. The itinerary.
7. Visits, excursions or other services which are included in the total price agreed for the package.
8. The name and address of the organiser, the retailer and, where appropriate, the insurer.
9. The price of the package, if the price may be revised in accordance with the term which may be included in the contract under regulation 11, an indication of the possibility of such price revisions, and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at ports and airports and tourist taxes) where such costs are not included in the package.
10. The payment schedule and method of payment.
11. Special requirements which the consumer has communicated to the organiser or retailer when making the booking and which both have accepted.
12. The periods within which the consumer must make any complaint about the failure to perform or the inadequate performance of the contract.

## C ASSESSMENT OF COST OF CANCELLATION

- C.1 The following is based on analysis produced by Deloitte & Touche, from whom we obtained advice when assessing tour operators' cancellation charges.
- C.2 Because suppliers' cost structures will differ, the OFT cannot recommend a particular level of charges or particular scale which it believes will pass the test of fairness. However, we believe there to be components that must be present in any fair assessment of the cost of cancellation. These core components are summarised here.
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**Table C.1 - core components of a fair assessment of cost of cancellation**

Start with:	revenue that would have been received on cancelled holidays (A)
Subtract:	costs saved as a result of cancellation (B)
Add:	costs of processing cancellations (C)
Add:	costs associated with the resale of holidays (D)
Subtract:	revenue received on resold holidays (E)

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These components are discussed in more detail below.

### **(A) Revenue that would have been received on cancelled holidays**

- C.3 This figure should represent the price of the cancelled holidays, taking account, where appropriate, of any discounts. It should not include expenditure to which the consumer was not committed under the contract (optional activities or excursions, for example).

### **(B) Costs saved as a result of cancellation**

- C.4 It is important here to distinguish between fixed and variable costs. Fixed costs, such as rent and rates, do not vary as a result of individual cancellations. Cancellations do not therefore yield significant savings in fixed costs. Variable costs will fall with decreases in revenue. Travel agents' commissions are an example (albeit that the agent will receive a commission on the cancellation revenue received from the cancelling customer).

- C.5 Suppliers' two principal cost headings (accommodation and flight costs) will have both fixed and variable elements. In each case the supplier may have committed itself to paying for a minimum number of customers and will therefore incur a base level of cost even if cancellations cause the actual number of customers to fall below the minimum number. Above the minimum number, however, the supplier may have the opportunity to save costs, provided it can give sufficient notice to the hotelier or airline.
- C.6 In the case of accommodation, a distinction is commonly drawn between 'allocation contracts' and 'guaranteed contracts'. Allocation contracts entitle the supplier to reserve a certain number of beds and require it to tell the hotelier by a specified date how many beds it wishes to take up. The beds not taken up would be released back to the supplier. If the accommodation is cancelled by the specified date, the supplier has the resulting opportunity to save the accommodation cost. With guaranteed contracts, however, the supplier is committed to the bed as soon as it makes the booking, and so has little opportunity to save the accommodation cost.

### **(C) Cost of processing cancellations**

- C.7 The cost added for processing cancelled holidays should be the incremental cost (if any) incurred over and above the processing cost that would have been incurred had the holiday proceeded.

### **(D) Costs associated with the resale of holidays**

- C.8 Variable costs incurred in providing resold holidays should be added, as should any costs incurred in specific efforts to resell the cancelled holidays (direct marketing costs, for example).

## **(E) Revenue from re-sold holidays**

- C.9 Re-sale of the cancelled holiday will be the main means by which the supplier can limit the cost of cancellation<sup>3</sup>. Ideally, it would be possible to track what happens to a particular cancelled holiday and its individual elements. However, it may be difficult to achieve this in practice and it may therefore be appropriate to take a less precise approach to the assessment of income from cancelled holidays. In that case, and in order to identify which cancelled holidays have been resold, it may be necessary to make an assumption about which holidays that are sold after the date of cancellation were previously unsold holidays and which are cancelled holidays being resold. There will no doubt be a number of different approaches to this.

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<sup>3</sup> If a customer transfers his booking to another person, the holiday does not have to be resold, in which case the only cost to the supplier is the cost of transfer. That should represent the charge to the transferring customer in this event.