

Key issues in ongoing contracts:

a practical guide

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Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

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1 BACKGROUND

Introduction

- 1.1 This document is intended as a practical guide for enforcement officers seeking to tackle problems faced by consumers arising from 'ongoing contractual relations'. By this we mean continuing contractual and other arrangements (often long-term) between consumers and business which involve repeat or regular supply of goods and services. Examples of such ongoing arrangements include (but are not limited to) club or scheme membership subscriptions, insurance contracts, telecoms and broadcast service packages, banking services and savings products, supply of utilities.
- 1.2 This guide builds on our 2010 report on Consumer Contracts¹ and the experience of enforcers working in this area who have shown a keen interest and contributed to its development. It collates work relating to some key issues with the aim of sharing our collective experience and helping to improve efficiency and consistency.
- 1.3 Our Consumer Contracts report looked largely at charges and price terms, which were also examined in our Advertising of Prices report.² In this guide we have looked at cancellation, rollover/renewal, variation and provision of information. These are all issues that have emerged frequently in complaints, have the potential to cause serious consumer detriment, could distort competition by limiting consumer switching, and are relevant across several different sectors. The issues are all inter-related, and also important to well-functioning competitive markets.
- 1.4 If information is incorrect, misleading, delayed, or limited, then consumers will find it more difficult to make informed choices and unscrupulous businesses may seek to exploit consumers through hidden charges or limitations in the contract. Variation during a contract may have the effect that businesses are less constrained by primary market competition, and may be incentivised to lure consumers in with more favourable, but short-lived, terms used as 'bait'. Limitations on cancellation, and automatic rollover, may raise search costs and/or make switching harder, and generally dampen competition.

¹ The OFT's *Consumer Contracts Market Study* provides a wider look at the whole range of problems that may be involved in all types of contract: www.of.gov.uk/OFTwork/markets-work/consumer-contracts

² <http://www.of.gov.uk/OFTwork/markets-work/advertising-prices>

- 1.5 This document will form part of the OFT's toolkit to assist with enforcement when considering potential unfair terms and other issues in areas where there is a long term relationship between consumers and businesses. Other enforcers and regulators may also find it useful as a guide when considering such cases, and we welcome feedback on the effectiveness of its practical application. We also hope that it will help to encourage more bodies to make use of all of their enforcement powers in relation to problems in contracts.
- 1.6 **NOTE:** This document does not seek to provide comprehensive guidance on unfair contract terms, or other relevant legislation, for which see our more detailed Guidance (see links in chapter 3). This document is not an exhaustive guide to issues that are potentially problematic, but contains useful hints and pointers to give enforcers a steer when considering this type of problem and assist with identifying issues and building cases alongside legal advice.

Context and change

Landscape changes

- 1.7 Following the consultation on the review of the consumer landscape, the government announced a number of changes to the way that consumer law will be enforced including changes to the responsibilities for the OFT (and its main successor body, the Competition and Markets Authority (CMA) and Trading Standards Services (TSS)).
- 1.8 The OFT and subsequently the CMA will retain the lead role for enforcement of unfair contract terms legislation, as well as providing business guidance in this area, together with a range consumer enforcement powers.

Legislative changes

- 1.9 Following the review of the consumer landscape, BIS has moved its focus to legal reform of existing consumer legislation. This reform (first proposed in the Consumer White Paper in 2009) will implement the EU's Consumer Rights Directive together with proposals on redress, remedies and investigation powers for enforcers. Elements of the existing unfair contract terms legislation are also under consideration within the proposals. The

main vehicle to be used to take forward the proposed changes is the Consumer Rights Bill, which is scheduled to be included in the 2013/2014 parliamentary timetable.

1.10 In July 2012, the Law Commission consulted on possible changes to unfair terms legislation for inclusion in the Consumer Rights Bill. The consultation focussed on reviewing and updating the Law Commissions' earlier recommendations made in their 2005 report. The consultation also considered the issue of terms excluded from review, in light of the UK bank charges litigation.

1.11 The Law Commission report, which contains summaries of unfair terms case law and analysis of the principles in the underlying Unfair Terms Directive, can be found here:

http://lawcommission.justice.gov.uk/areas/unfair_terms_in_contracts.htm

1.12 In March 2013 the Law Commission published its advice to BIS in which it recommended that:

- The exemption for main subject matter and price set out in Regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999 should be reformed so that it applies only to terms about price or main subject matter which are transparent and prominent.
- BIS should hold discussions with the OFT and other regulators about the mechanics of preparing guidance to which the courts might have regard.
- The legislation should specifically state that terms on the grey list are assessable for fairness. The price/main subject matter exemption should be read subject to this provision.

1.13 Following the consultation, BIS considered and took into account the Law Commission's advice when preparing the draft Consumer Rights Bill

1.14 Further detail on the Law Commission's recommendations can be found in the advice document here:

http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf

1.15 More information on BIS proposals in relation to the Consumer Rights Bill can be found here: www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers

2 PRACTICAL APPROACHES

Common problems in ongoing contracts

- 2.1 Consumers can experience a wide variety of problems in their ongoing contractual relations with businesses.³ The contracts involved in such longer-term relations are typically complex ones, based on standard terms. Consumers may sometimes enter into such contracts and remain in them for many years because of the real or perceived benefits of doing so. Such real or perceived benefits can act to increase consumers' tolerance of problems, but inertia or other barriers to switching can also keep consumers 'locked in' to unfavourable agreements.
- 2.2 In this document we have focused on four other (often interrelated) key areas in longer-term contractual relationships in which problems are very commonly experienced, with the potential to cause serious consumer detriment, and distort competition. These key areas all tend to have relevance across several different sectors.

Information

- 2.3 Adequate information that can easily be understood and processed should be provided to consumers before, during and after the contract. If information is incorrect or misleading, insufficiently clear or prominent, delayed, or limited then consumers will find it difficult to make informed choices and unscrupulous businesses may seek to exploit consumers through hidden charges or unexpected limitations in the contract. There are detailed legislative provisions regarding the information which must be given to consumers and the manner in which it must be provided (see chapter 3 below for key pieces of relevant legislation). Provision of adequate, and accurate, information in relation to the three problem areas described below is always particularly important.

Cancellation

- 2.4 Terms that create tie-ins or restrictions on cancelling or switching can give rise to problems. Examples include terms:

³ Annexe A provides a chart of problems by sector giving an indication of the sectors in which problems in long-term contracts can occur and provides a rough guide, where figures are available from the OFT's Consumer Contracts Market Study, to the incidence (by percentage) of such problems within each sector

- governing the minimum duration of contracts
- setting unduly high exit fees on cancellation
- setting onerous notice periods or procedures for cancellation

2.5 Such terms can be harmful for individual consumers, if they act to prevent or inhibit switching away from a poor provider or lock them in to buying a poor product. When combined with rollover elements (for example in gym contracts in respect of which the OFT has taken action in the Ashbourne Management case,⁴ or telecoms contracts⁵) this may further prevent or inhibit switching.

2.6 Limitations on cancellation, as well as making switching harder, increase switching costs and generally dampen competition by reducing levels of switching. Interaction between different elements of the contract that all relate to or affect cancellation may often be complex (as was the case with Ashbourne Management). Provisions relating to cancellation are particularly likely to be harmful where:

- consumers are not made sufficiently aware of small print terms and conditions
- tie-ins or other conditions are not sufficiently clear for them to be fully understood by consumers
- tie-ins are unreasonably onerous, or cancellation charges are unreasonably high (it is reasonable for cancellation fees to cover efficiently incurred administration costs, and reasonable compensation for the business's loss of bargain – subject to the legal requirement for the business to mitigate loss - but charges in excess of that are likely to be unfair)
- insufficient information is provided to consumers to enable them to accurately assess whether or not they are likely to want to switch with the result that consumers may not appreciate the importance to them of the cancellation terms and conditions to which they are agreeing.

⁴ See links in paragraph 4.6 below, and also the materials referenced in table 2.2 below in relation to the Ashbourne Management case.

⁵ As noted in table 2.3, Ofcom has introduced rules in the telecoms sector to prohibit rollover contracts in the fixed voice and broadband residential and small business sectors. These were introduced using sectoral powers under the Communications Act 2003.

Rollover

- 2.7 Automatic rollover or renewal is where consumers sign up to a minimum contract period (usually subject to an early termination charge) that is automatically renewed or continued unless the consumer explicitly tells their provider that they do not want this to happen. This is often seen in insurance or subscription contracts and may be a source of problems.
- 2.8 Automatic renewal is potentially detrimental to consumers where it results in a decrease in switching e.g. because of the limited 'windows' in which consumers have the opportunity to switch without incurring additional cost. The likelihood of switching may be decreased because of inertia and/or increased switching costs. This raises concerns about potential harm to individual consumers, as well as about potentially dampening competition. Automatic rollover is likely to be most harmful where there are additional problems associated with it, for example:
- it is not disclosed to consumers at the outset, or
 - the business uses small print to couple rollover with onerous cancellation, terms and conditions or procedures, or
 - the business adopts unduly awkward procedures for cancellation or opt-out (including unduly short periods in which to do so), or an unduly long minimum contract, or cancellation, period, or
 - the business fails to highlight, either at sign-up or at rollover (or both), that the subsequent tie-in period is on less favourable price or other terms than the first.
- 2.9 Rollover terms have caused particular concerns in both the energy and telecoms markets, which have been investigated by Ofgem and Ofcom. Ofcom issued a public consultation which led to it amending its rules, the General Conditions of Entitlement, to prohibit rollover contracts in the fixed voice and broadband residential and small business sectors (see Ofcom's public statement, which can be accessed via the link in table 2.3 below. Ofgem is consulting on the reforms of its rules to ban automatic rollover contracts (also linked in table 2.3 below)).
- 2.10 Consumers may also get 'rolled in' to a contract where they have signed up to a 'free trial' of a product, and are moved on to a full price service at the end of the trial. This can be harmful if, for example, consumers:

- are not made aware that they will be rolled into a contract, or
- are not provided with sufficient information about the contract, or
- cannot easily cancel or the tie-in/cancellation period is unduly long.

2.11 The OFT has intervened in such issues, for example in connection with the online discount scheme (Adaptive Affinity - see link in table 2.3). Consumers were offered a free trial membership of the discount club, but once accepted, if the consumer did not cancel during the free period they were charged monthly fees. The OFT secured undertakings under the CPRs to address our concern that the advertising and sign up process was unclear.

2.12 It should be recognised that automatic rollover can in some circumstances have benefits which may be seen as potentially offsetting the harm (e.g. ensuring that legal obligations to maintain car insurance are not accidentally breached by consumers). There would however need to be sufficient protections given to consumers through the information provided, the timing of the information and its prominence, and in the terms applicable to early termination or cancellation.

Variation

2.13 Terms permitting variation, especially of price, during the period of the contract (e.g. changing phone or other tariffs) can cause problems if they are not transparent and the consumer does not have the right to cancel. Contracts that permit variation during their terms may have a wider impact on the market because they may result in businesses being less constrained by primary market competition.

2.14 Variation by the business during a contract is more likely to be harmful where:

- Businesses are incentivised to lure consumers in with terms which are very favourable at the outset but for only a limited period before they change to being significantly less favourable e.g. digital broadcast subscription packages, and savings products offering favourable introductory terms as 'bait'.

- Variation cannot be clearly linked to factors beyond the business's control, and limited to variations that are proportionate.⁶
- Consumers are locked in to the contract (see paragraphs 2.4 to 2.6 on cancellation), which may be a problem even where variations are justified. Such harm may be mitigated if consumers are permitted to withdraw from the contract without penalty, where a justified variation is made.⁷
- Price variation is unexpected as a result of consumers not being provided with sufficient, or sufficiently clear, information.

2.15 Consumers demonstrate some behavioural biases which may make it more likely that they could fail to understand the likelihood of variation and its impact. For example, they may be over-optimistic when entering into a longer-term contract about the potential for future changes to their needs or circumstances. Such effects may be relevant when assessing whether or not consumers have been provided with adequate and sufficiently prominent information about terms relating to variation.

2.16 However, it is also worth noting that variation could also potentially have benefits if used as a means by which businesses pass on cost savings or other benefits⁸ that arise during the course of the contract to consumers.

Recent developments by enforcers

2.17 The tables below set out a summary of the main areas where there has been recent work, or consideration, by different enforcers and other bodies in relation to the four key areas identified above. It is intended to make it easier for case officers to check other relevant information which may help them with their cases, analysis or strategy. We consulted with Ofcom, FCA (formerly FSA), Ofgem, Ofwat,⁹ ORR, CAA, ICO, Trading Standards, OFT, CitA, Which?, PpP, and ASA in order identify what content would be most useful to include in these tables. It should be noted, however, that whilst

⁶In the telecoms sector Ofcom is currently consulting on mid-contract price changes, as noted in table 2.4, and will consider possible changes to the rules around price variation in light of responses.

⁷ See link in paragraph 4.11 to Peabody Trust Governors v Reeves and paragraph 4.13 to Du Plessis v Fontgary Leisure Parks Ltd

⁸ See link in paragraph 4.12 to Rochdale Borough Council and Dixon

⁹ Water is supplied under statute for most water customers, however with opening up of competition for non-households in 2017, customers who opt to change supplier will be supplied under contract, so Ofwat will be monitoring for this sort of problem area. More information about Ofwat's consumer policy can be found here:

www.ofwat.gov.uk/regulating/tools/consumerpolicy/

we have tried to capture as complete a picture as possible as at June 2013, when this guide was prepared, work may be ongoing and users may want to check websites and other sources for further more up-to-date information.

Table 2.1 Information

	Information
Ofcom	<p>Statement on additional charges 2010: http://stakeholders.ofcom.org.uk/consultations/addcharges/pes_statement</p> <p>Work on consumer information remedies. See: http://stakeholders.ofcom.org.uk/market-data-research/other/research-publications/consumer-information-remedies/</p> <p>A number of information related sector-specific rules are set out in the general conditions, some of which relate to European Framework Directive requirements – see for example: http://stakeholders.ofcom.org.uk/binaries/consultations/gc-usc/statement/Statement.pdf</p>
Ofwat	<p>Water is supplied under statute for most water customers, however with opening up of competition for non-households in 2017, customers who opt to change supplier will be supplied under contract. More information about Ofwat’s consumer policy can be found here: www.ofwat.gov.uk/regulating/tools/consumerpolicy/</p>
Ofgem	<p>Ofgem’s energy supply probe (www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Pages/Energysupplyprobe.aspx) identified various issues which led to the introduction of measures such as its guidance on Transparency requirements on suppliers in respect of domestic customers (16/07/2010)</p> <p>Ofgem’s Retail Market Review sets out a range of new requirements on information provision and also includes some consumer insight research on the provision of information: www.ofgem.gov.uk/Markets/RetMkts/rmr/Pages/rmr.aspx</p>
CitA	<p>Advice on consumer contracts generally: www.adviceguide.org.uk/england/consumer_e/consumer_protection_for_the_consumer_e</p> <p>Gym contracts ruling: /consumer_contracts_e.htm</p>
FCA	<p>FCA has published guidance entitled ‘Unfair contract terms: improving standards in consumer contracts’ (please note that this document may be subject to review in due course): www.fsa.gov.uk/static/pubs/guidance/fg12_02.pdf</p> <p>FCA has also published a number of undertakings from individual businesses under the UTCCRs. Notices of undertakings together with a wider FCA library</p>

	<p>are accessible via the following link: www.fsa.gov.uk/portal/site/fsa/menuitem.cf48810545916eaac4a69810a0a0a0a0/?vgnextoid=62a59e7efc8f2310VgnVCM10000013c110acRCRD&vgnnextfmt=default</p>
PpP	<p>PhonepayPlus Code of Practice – especially Part 2.2 of the Code dealing with Transparency and Pricing: http://code.phonepayplus.org.uk/pdf/PhonepayPlusCOP2011.pdf</p> <p>Guidance:</p> <ul style="list-style-type: none"> General guidance on promotions and promotional material (including pricing information) Service-Specific Guidance on Advice services Service-Specific Guidance on Employment, employment information and business opportunity services Service-Specific Guidance on Public information services: http://code.phonepayplus.org.uk/pdf/PhonepayPlusCOP2011Guidance.pdf
OFT	<p>Consumer Contracts market study report: www.of.gov.uk/OFTwork/markets-work/consumer-contracts</p> <p>Advertising of Prices report: www.of.gov.uk/OFTwork/markets-work/advertising-prices</p> <p>Gym contracts ruling: www.of.gov.uk/news-and-updates/press/2011/60-11</p> <p>Guidance on CPRs and UTCCRs (see section on Legislation below)</p>

Table 2.2 Cancellation

	Cancellation
Ofcom	<p>The additional charges guidance (published in 2008, and updated in 2010 in light of the bank charges case) sets out how the UTCCRs apply to certain terms in the communication sector including: minimum contract periods, early termination charges, minimum notice periods and cease charges. See http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/addchargestatement.pdf.</p> <p>Statement on additional charges 2010: http://stakeholders.ofcom.org.uk/consultations/addcharges/pes_statement</p> <p>Minimum contract periods are capped at 24 months in the telecoms sector with providers also required to offer MCPs of no longer 12 months. See: http://stakeholders.ofcom.org.uk/binaries/consultations/gc-usc/statement/Statement.pdf (25/5/2011)</p>
Ofgem	<p>Ofgem’s energy supply probe: (www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Pages/Energysupplyprobe.aspx) identified various in relation to consumer switching. See, for example, Ofgem’s Update on Probe Monitoring: tariff differentials and consumer switching (79/10), (1 July 2010): www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=273&refer=Markets/RetMkts/ensuppro</p> <p>Ofgem Guidance on notification of price increases deals with termination and cancellation rights following price increases: www.ofgem.gov.uk/Markets/RetMkts/Compl/pricechange/Documents1/Guidance%20letter%20on%20SLC%2023.pdf</p> <p>Ofgem Retail Market Review - Final domestic proposals contains analysis of existing provisions and proposals for new requirements on cancellation (including a maximum notice period for evergreen contracts: www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/The%20Retail%20Market%20Review%20-%20Final%20domestic%20proposals.pdf</p> <p>Ofgem investigation into EDF price rises and termination fees: www.ofgem.gov.uk/Media/PressRel/Documents1/20121127_EON_Press_Release.pdf</p>
FCA	<p>FCA has published guidance on unfair cancellation terms, which is included in the document entitled ‘Unfair contract terms: improving standards in consumer contracts’. This document is accessible via the following link: www.fsa.gov.uk/static/pubs/guidance/fg12_02.pdf</p>

OFT	Gym contracts ruling: www.ofcom.gov.uk/news-and-updates/press/2011/60-11 Guidance on CPRs and UTCCRs (see section on Legislation below)
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Table 2.3 Rollover contracts

	Rollover
Ofcom	Rollover contracts are prohibited in the fixed voice and broadband residential and small business sectors. ¹⁰ See Ofcom’s decision statement on rollovers/automatically renewable contracts (ARCS) published Sept 2011: http://stakeholders.ofcom.org.uk/binaries/consultations/arcs/statement/ARCS_statement.pdf (Note: this was done using sectoral powers under the Communications Act 2003 as terms that were being used at the time by specific providers were considered likely to be fair under the UTCCRs).
Ofgem	Statement on rollover contracts: www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=111&refer=Markets/RetMkts/Compet%20 (published 9/5/2011) Retail Market Review - Final non-domestic proposals contains proposals re auto-rollover: www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/The%20Retail%20Market%20Review%20-%20Final%20non%20domestic%20proposals_22%20March_FINAL.pdf
OFT	OFT intervention in relation to an online discount scheme, Adaptive Affinity: www.ofcom.gov.uk/news-and-updates/press/2009/75-09 and on gyms contracts, Ashbourne Management Services, : www.ofcom.gov.uk/news-and-updates/press/2011/60-11 Guidance on CPRs and UTCCRs (see section on Legislation below)

¹⁰ Ofcom concluded that there was no evidence to suggest that these types of contracts were being used in the mobile or pay TV sectors.

Table 2.4 Variation

	Variation
Ofcom	<p>Current rules (March 2013) allow suppliers to vary contracts provided they give consumers one month notice of any variations likely to be of ‘material detriment’ and allow the consumer to exit the contract penalty free). Recently, providers have started to raise prices for consumers tied into fixed term contracts by retail price index (‘RPI’) but have not allowed consumers to exit without penalty because the CP does not consider that this results in material detriment. Ofcom has consulted on a range of options, and plans to issue a decision in summer 2013. See http://stakeholders.ofcom.org.uk/consultations/price-rises-fixed-contracts/?a=0</p>
Ofgem	<p>Ofgem’s energy supply probe: (www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Pages/Energysupplyprobe.aspx) identified various in relation to the transparency of initial and fixed-price offers. See, for example, Ofgem’s Update on Probe Monitoring: tariff differentials and consumer switching (79/10), (1 July 2010): www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=273&refer=Markets/RetMkts/ensuppro</p>
OFT	<p>Guidance on CPRs and UTCCRs (see section on Legislation below)</p> <p>See, for example, the discussion in the UTCCRs guidance in relation to Group 12 of the Annexes: www.ofcom.gov.uk/shared_ofcom/reports/unfair_contract_terms/ofcom311annexes.pdf)</p>
Other	<p>Some useful discussion is contained in the Law Commission’s recent report on unfair terms (search, e.g., for ‘price escalation’: http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf)</p>

3 LEGAL FRAMEWORK

Summary of key relevant legislation

3.1 The following legislation may be relevant depending on the circumstances and facts of individual cases. In many situations more than one piece of legislation will apply, and the available tools may be used in parallel with each other where appropriate. It is beyond the scope of this document to give advice on the choice and application of legislative tool to individual issues and cases.

Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs)

3.2 The UTCCRs implement EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts.¹¹ They apply to what is commonly called ‘the small print’ of standard form consumer contracts. They protect consumers against unfair standard terms in contracts they make with businesses. A term which has not been individually negotiated is unfair if it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. The regulations also apply a transparency test, which focuses on clarity of language more broadly, requiring all standard terms to be expressed in plain and intelligible language such as to enable consumers to fully understand their meaning. Certain terms (those that set the price or define the product or service being supplied) are exempt from the test of fairness as long as they meet the plain language requirement.

3.3 Detailed information on the UTCCRs can be found in the OFT's published guidelines: Unfair contract terms guidance (OFT311), along with OFT-published guidance on potentially unfair terms in various sectors, and introductory guidance on what the OFT thinks are unfair standard terms. These can all be found here www.of.gov.uk/about-the-of/legal-powers/legal/unfair-terms/guidance¹²

¹¹ For the text of the Directive, see:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>

¹² For the main UTCCRs Guidance, and link to Annexes (containing a list of the practices ‘grey listed’ under the UTCCRs, see:

www.of.gov.uk/shared_of/reports/unfair_contract_terms/of311.pdf

www.of.gov.uk/shared_of/reports/unfair_contract_terms/of311annexes.pdf

Links to a suite of UTCCRs Guidance, including the main guidance, and sectoral guidance, documents and associated materials on: Calculating fair default charges in credit card contracts, unfair terms in: home improvements contracts, holiday caravan agreements, package holiday contracts, consumer entertainment contracts, health and fitness club agreements, care home contracts, and tenancy agreements, as well as Guidance, for consumer advisers, on unfair standard terms, Unfair contract terms bulletins, and Unfair Contract terms case reports, can all be found here: www.of.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/

- 3.4 A guide to the main considerations involved in assessing contractual terms under the UTCCRs is provided at paragraph 3.21 below. It should be noted, however, that this quick guide should not be treated as a substitute for the full guidance but merely as a helpful overview and introduction to the regulations.
- 3.5 **Note:** it is anticipated that changes to the current UTCCRs provisions will be introduced by means of the Consumer Rights Bill as referred to in paragraph 1.9 above.

Consumer Protection from Unfair Trading Regulations 2008 (the CPRs)

- 3.6 The CPRs implement EC Directive 2005/29/EC on Unfair Commercial Practices.¹³ They prohibit unfair commercial practices relating to transactions between consumers and businesses. Broadly speaking, if a business misleads, behaves aggressively or otherwise acts unfairly towards consumers, then the business is likely to be in breach of the CPRs and may face action by enforcement authorities. The CPRs consist of
- a general prohibition of unfair commercial practices (subject to a materiality test which reflects the actual or likely effect on consumers' decisions), and
 - prohibitions of misleading and aggressive practices (subject to a similar materiality test), and
 - 31 specified practices which are prohibited in all circumstances.
- 3.7 The OFT's published guidance on the CPRs: *Consumer protection from unfair trading* (OFT1008) can be found here:
www.of.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf
- 3.8 A list of the 31 specific practices which are banned in all circumstances, as well as being covered in the guidance, can be found here:
www.legislation.gov.uk/ukdsi/2008/9780110811574/schedule/1

¹³ For the text of the Directive, see:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:NOT>

- 3.9 The guidance contains illustrative examples of practices that would be likely to breach the CPRs - at pp. 21-27 in the case of the 31 specified practices, and in Annex A at pp. 72-76 (as well as in shorter examples provided throughout the guidance itself) in respect of the other prohibitions.
- 3.10 A quick guide to the main considerations involved in assessing a business's practices for potential breach under the CPRs is provided at paragraph 3.21 below. It should be noted, however, that this quick guide should not be treated as a substitute for the full guidance but merely as an overview and introduction to the regulations.

Business Protection from Misleading Marketing Regulations 2008 (the BPRs)

- 3.11 Where transactions between businesses are misleading this may involve a breach of the BPRs. The BPRs implement the EC Directive 2006/114/EC¹⁴ on misleading advertising and marketing. The OFT's published guidance on the BPRs: *Business to business promotions and comparative advertisements - A quick guide to the Business Protection from Misleading Marketing Regulations 2008* (OFT1056) can be found here: www.of.gov.uk/shared_of/business_leaflets/general/of1056.pdf
- 3.12 Both the UTCCRs and CPRs can be enforced using the civil enforcement mechanisms in Part 8 of the Enterprise Act 2002. The UTCCRs and the BPRs also contain a stand-alone civil enforcement mechanism. The CPRs and the BPRs can also be enforced through criminal prosecution.

Other Potentially Relevant Laws¹⁵

The Enterprise Act 2002

- 3.13 As referred to above, the Enterprise Act 2002 provides a civil enforcement mechanism for the UTCCRs and the CPRs, as well as several other potentially relevant laws including those relating, for example, to distance

¹⁴ For the text of the Directive, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0114:EN:NOT>

¹⁵ Note that this is not intended to be an exhaustive list

selling, doorstep selling, sale of goods and services, and provision of credit. The Enterprise Act Guidance can be found here:
www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

- 3.14 NB: Readers should note that, because the CPRs were implemented after the Part 8 Guidance was published, the Guidance does not refer to them. However, the CPRs have been specified by the Secretary of State as falling within the Community infringement provisions contained in Part 8 of the Enterprise Act. Thus the CPRs are enforceable via the Part 8 civil enforcement mechanism.

The Consumer Protection (Distance Selling) Regulations 2000 (DSRs)

- 3.15 These give consumers extended rights of cooling-off, cancellation and reimbursement (beyond normal statutory rights) in any contract entered at a distance (such as online or by home shopping) to compensate for the greater difficulty in assessing goods and services compared to in store. They also require certain key information to be provided to consumers.

The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (the Doorstep Selling Regulations)

- 3.16 These give consumers extended rights of cooling-off, cancellation and reimbursement when they contract with a business in certain circumstances away from that business's own business premises. These regulations help prevent contracts being signed in haste or under pressure, especially where consumers may not be able or prepared for negotiations.

The Consumer Credit Act 1974 (CCA)

- 3.17 The CCA lays down detailed rules about how agreements for consumer credit and hire purchase must be documented and what information is required pre- and post-contract, as well as on practices including early settlement by consumers and repossession by businesses. The CCA provides a general cancellation right, and allows consumers to challenge credit agreements because of an 'unfair relationship' between them and the creditor. Under the CCA the OFT also currently licences and monitors businesses involved in activities related to credit, including businesses that lend money directly and those selling goods and services on credit.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

3.18 These provide cooling-off rights for consumers and information requirements for businesses involved in sale and resale of timeshares and holiday clubs.

The Supply of Goods (Implied Terms) Act 1973, The Sale of Goods Act 1979 and The Supply of Goods and Services Act 1982

3.19 These, amongst other things, specify terms that should be implied for the benefit of consumers in hire-purchase agreements, hire contracts, contracts for the sale of goods and contracts for the supply of goods and services, respectively, as well as setting out the remedies available to consumers if the terms are breached.

The Unfair Contract Terms Act 1977

3.20 This regulates the use of terms which seek to restrict or exclude a business's liability in various areas (for example liability for death, personal injury or breach of the Sale of Goods Act).

UTCCRs - quick guide

3.21 The main considerations, when assessing whether or not a contract term may be unfair under the UTCCRs, may be summarised as follows:

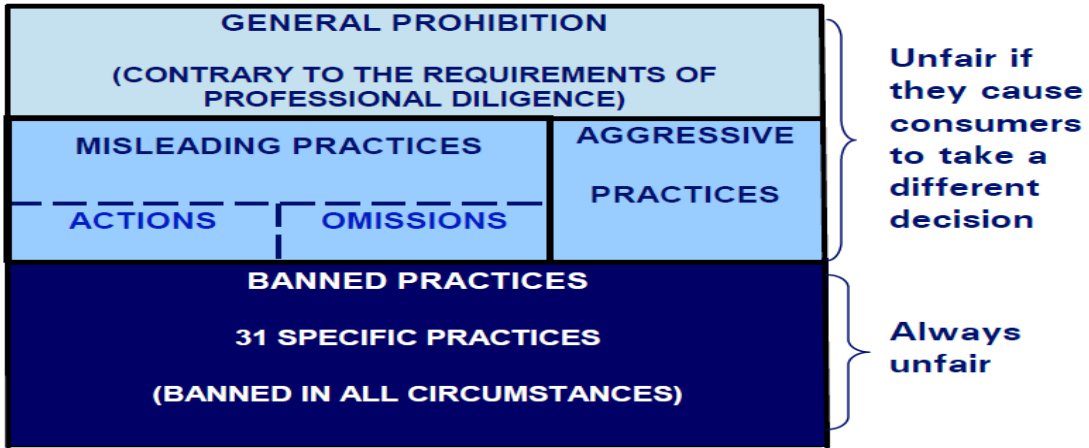
- Is a provision in 'the small print' of a business's standard form consumer contract (i.e. a non-negotiated term) unfair under the UTCCRs?
- Are terms in question expressed fully, clearly and legibly? Are any terms unintelligible or misleading?
- Are any terms that might disadvantage the consumer given appropriate prominence?
- Is it contrary to the requirement of good faith in that it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer?

- Consider:
 - Does it appear to comply with general principles of fair and open dealing?
 - Do the terms in question seek to enable the supplier to take advantage of consumers' weaker bargaining position or lack of experience?
 - Do the terms in question respect consumers' legitimate interests? E.g. do the terms reduce consumers' statutory or common law rights, or seek to impose unfair burdens on consumers over and above the obligations of ordinary rules of law?
- Do terms in question fall within the 'core terms' exemption in Regulation 6(2) (if so, they are exempt from the test of unfairness provided they meet the plain language requirement)?
- Consider:
 - Are they terms that set the price, or part of the price, paid by consumers, or
 - Are they terms that define the main subject matter of the contract (that is, the product or service being supplied).
- **Note:** There is controversy over the interpretation of Regulation 6(2), particularly around terms specifying consumers' payment obligations and whether they can be considered as terms setting the 'price'. Likewise, the case law on the main subject matter of the contract is not entirely clear. Advice should therefore be sought where this is in any doubt.
- Do any of the terms in question have the same purpose or might they produce the same result as any of the terms that are listed in Schedule 2 of the UTCCRs? (If so, they are under suspicion for unfairness, although not necessarily unfair - each must be considered on its merits.)

CPRs - quick guide

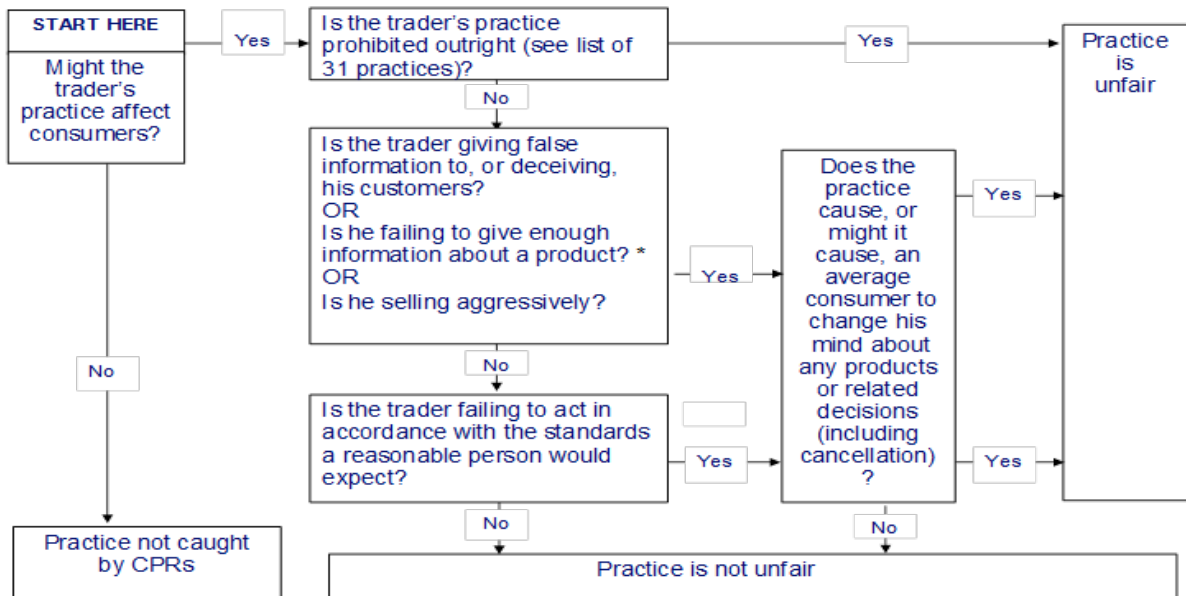
3.22 The diagram below illustrates the structure of the CPRs, and its key provisions.

Chart 3.1 CPRs structure



3.23 The main considerations, when assessing whether or not a business's practice may breach the CPRs, are summarised in the following flow chart:

Chart 3.2 Is a business practice unfair under the CPRs?



*In certain situations (where an invitation to purchase is made) certain specified information must always be provided.

Contracts involving businesses based in Europe

3.24 The EC Regulation on Consumer Protection Cooperation (2006/2004) (CPC)¹⁶ creates a network of public consumer protection enforcers (competent authorities) throughout the European Community.¹⁷

3.25 Within the European Community unfair practices should be dealt with by enforcers in the jurisdiction where the business responsible for the practice is situated. The Regulation allows Member States to share information and to request enforcement action to be taken to stop breaches of Community consumer protection rules. This could result in cross-border referrals both to and from the UK.

3.26 In the UK, the OFT is the single liaison office, responsible for co-ordinating initial requests for information and referrals of cases.¹⁸

3.27 See the European Commission's website for more information on the CPC network. http://ec.europa.eu/consumers/enforcement/index_en.htm

Referrals

3.28 Ofcom, FCA (formerly FSA), Ofgem, Ofwat, ORR, CAA, ICO, Trading Standards Services, OFT, CitA, Which?, PpP, and ASA all have an interest in the issues which are focused on in this report, and may have:

- enforcement powers which can be used to tackle them, and/or
- compliance mechanisms which may be effective in tackling them
- knowledge or experience which would help to ensure that steps taken by others to achieve compliance are effective

3.29 Enforcers should always, therefore, consider whether or not it may be appropriate to refer cases to other bodies which may be in a better position to take effective action, or to consult appropriately in order to ensure that thinking, and any action that is taken, is joined up.

Consumer Contracts Market Study - Assessment of Economic Harm

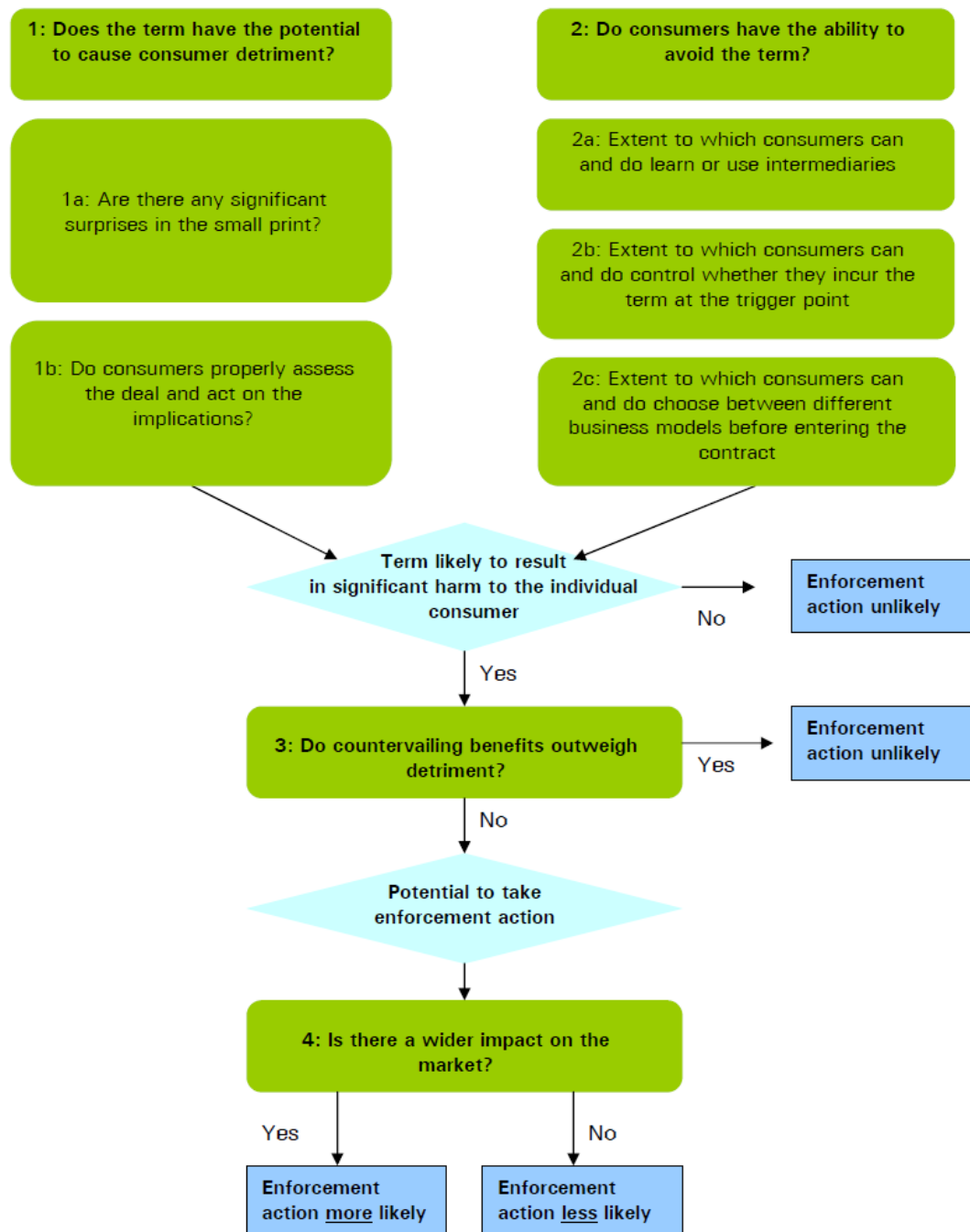
¹⁶ Regulation (EC) No. 2006/2004 of the European Parliament and the Council of 27 October 2004.

¹⁷ See OFT Guidance: The EU Regulation on Consumer Protection Cooperation (the CPC) – on-site inspection powers OFT858.

¹⁸ A complete list of UK enforcers for the CPC can be found at: www.of.gov.uk/news/press/2007/3-07

3.30 The framework below, taken from our 2010 report, is a tool to assist with making an economic assessment of whether and how contract terms may harm consumers. The economic impact analysis can be used alongside a legal analysis of potential breaches in order to inform prioritisation processes.

Chart 3.3 Assessment framework of whether and how contract terms may harm consumers



4 OTHER USEFUL REFERENCES

European case law

- 4.1 When seeking to interpret the provisions of the UTCCRs, regard must be had to the European Directive which they implement¹⁹ (the Unfair Terms Directive). Because the Unfair Terms Directive is made under European law, the European Court of Justice (ECJ) can decide how it should be interpreted. Interpretative decisions of the ECJ will be of particular importance when interpreting the provisions of the UTCCRs, the provisions of which follow the underlying Directive very closely. Although the application of the UTCCRs remains a matter for the UK courts, they must take into account the ECJ's decisions. A list of cases relating to the Directive can be found on the EUR-Lex website.²⁰
- 4.2 Some useful examples of cases where the ECJ has considered the issue of fairness under the Unfair Terms Directive are given below.
- 4.3 In *Jana Pereničová and another v SOS financ spol. s r. o.*²¹ the ECJ stated that the system of protection established by the Unfair Terms Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.
- 4.4 In *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*²² the ECJ considered how national courts should assess the fairness of a term that allows for a unilateral variation of fees without setting out the method of calculating those fees or providing a valid reason for the variation. The ECJ stated that national courts should take into account the fact that consumers must be given the opportunity to examine the terms and conditions of a contract and their consequences, and the terms and conditions must be drafted in plain and intelligible language.

¹⁹ EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts. For the text of the Directive, see:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>

²⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>

²¹ The full text of the judgment can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0453:EN:NOT>

²² The full text of the judgment can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0472:EN:HTML>

4.5 In *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*²³ the ECJ considered how national courts should assess the fairness of a term which allows a business to unilaterally vary the price, but which does not indicate the grounds, conditions or scope of such a variation, but which also provides that the consumer will be informed of the price variation in good time and will then have the right to terminate the contract if they do not wish to accept the variations. The ECJ stated that the national court should:

- consider whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation
- consider whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances, and
- have regard to all the circumstances of the particular case, including all the other terms and conditions of the contract.

List of key UK cases

Ashbourne Management Services Limited

4.6 The High Court ruled that Ashbourne's minimum contract length terms, and various other key terms (including terms on payments due from consumers in the event of early termination by them), in a number of their standard gym membership were unfair and therefore unenforceable. The Court also found that a number of Ashbourne's techniques for collecting the arrears of consumers who had stopped making payments were unlawful, including its practice of reporting the arrears to credit reference agencies. The use of these practices has now been prohibited under the order: www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/ashbourne/ Further information is available here:

²³ The full text of the judgment can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0472:EN:HTML>

www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/ashbourne/ams-qanda

Abbey National / Unauthorised Overdraft / Bank Charges case

- 4.7 The Supreme Court found that certain charging terms relating to unarranged overdraft charges in a number of banks' standard form contracts are not assessable in full for unfairness under the Unfair Terms in Consumer Contract Regulations 1999 ('UTCCRs').
- www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/UTCCRs/

Foxtons

- 4.8 The High Court made a landmark ruling that certain terms and conditions used in a letting agency's agreements with landlords were unfair. These included terms:
- requiring ongoing payment of commission by the landlord, in respect of occupation by a tenant, after expiration of the original tenancy period even where the agent played no continuing role
 - requiring landlords to pay ongoing letting commission to Foxtons even after the property had been sold by the landlord, and
 - allowing the agency to receive a full estate agents' commission for sale of the property to a tenant www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons/
- 4.9 Further information is available here: www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons/qandas

Other UK cases

- 4.10 Whilst many key cases are brought by enforcers, a growing body of case law is developing out of privately litigated disputes between businesses and consumers, and such cases are equally important to an understanding of the way in which the UK courts approach the issue of fairness under the UTCCRs. Some useful cases are listed below.

Peabody Trust Governors v Reeve²⁴

4.11 The fact that a term falls within paragraph 2 of the Schedule of the UTCCRs does not mean it is automatically unfair, and all the circumstances of the contract should still be considered. A term which gives a supplier the right to unilaterally vary the price generally causes a significant imbalance in the parties' rights and obligations to the detriment of the tenant, although this could be offset if the consumer has the right to terminate the contract. However, the term should not be too broadly drafted and must provide a genuine right to cancel in the circumstances.

Rochdale Borough Council v Dixon²⁵

4.12 A variation clause may be fair if it is set out in a statutory scheme, and

- the variation works in the best interests of consumers generally
- the variation has been consulted on and consumers have actually agreed to it
- the consumer gets something of value in exchange for the new term and
- there are safeguards in place to protect consumers who do not agree with the term.

Du Plessis v Fontgary Leisure Parks Ltd²⁶

4.13 A price variation clause was held to be fair because:

- the consumer had to be given three months notice of the increase, together with a clear explanation of the reasons, and the increase had to be for a valid reason
- the legality of the increase could be challenged in the courts
- the consumer was able to become acquainted with the terms of the licence agreement before they entered into it, and was free to terminate the contract if they found it unacceptable, and

²⁴ The full text of the judgment can be found at: www.bailii.org/ew/cases/EWHC/Ch/2008/1432.html

²⁵ The full text of the judgment can be found at: www.bailii.org/ew/cases/EWCA/Civ/2011/1173.html

²⁶ The full text of the judgment can be found at: www.bailii.org/ew/cases/EWCA/Civ/2012/409.html

- the business sought to alleviate the hardship caused by the price increase by offering a cheaper alternative.

***Alfred Overy v Paypal (Europe) Limited*²⁷**

4.14 In this case HHJ Hegarty QC summarised a number of European and UK cases relating to unfair terms. Although the Court was primarily considering the definition of consumer under the UTCCRs, the case nonetheless provides a useful list of relevant case law.

***Spreadex Limited v Colin Cochrane*²⁸**

4.15 When assessing the fairness of a term under the UTCCRs, the Court took into account the fact that it was incorporated into a document (one of four the consumer was directed to read) which had 49 pages of closely printed and complex paragraphs. The Court held that as a result it was irrational to assume that the consumer would have read and understood the implications of the term in question.

Recent and ongoing work illustrating further practical approaches

Retirement homes

4.16 We published a report on 1 February 2013 on the findings of our investigation into retirement home transfer fee terms. The report sets out a number of general principles the OFT would expect all landlords to abide by when enforcing transfer fee terms in existing leases. Further information can be found here: www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/retirement-homes/

Lettings

4.17 We published a report on 14 February 2013 that identifies several consumer protection issues in the lettings markets, and sets out our

²⁷ The full text of judgment can be found at: www.bailii.org/ew/cases/EWHC/QB/2012/2659.html

²⁸ The full text of the judgment can be found at: www.bailii.org/ew/cases/EWHC/Comm/2012/1290.html

recommendations on how to tackle these issues. Further information can be found here: www.offt.gov.uk/news-and-updates/press/2013/15-13

Gyms

- 4.18 Information on further work being done by the OFT on gyms can be found here: www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/health-contracts/

Travel Agents

- 4.19 Information on work being done by the OFT in relation to travel agents can be found here: www.offt.gov.uk/OFTwork/consultations/travel-agents-guidance

ANNEXE A: PROBLEMS BY SECTOR

Contracts for Outcomes (% of purchases resulting in a problem)	Contracts for risk (% of purchases resulting in a problem)	Rentals and licences (% of purchases resulting in a problem)	Subscriptions /Memberships (% of purchases resulting in a problem)	Necessities (% of purchases resulting in a problem)
Package Holidays 5.1%	Car warranties and insurance 2.4%	Rental goods 3.2%	Car clubs 2.2%	Home entertainment packages 9.1%
Family events 1.5%	Car breakdown Cover 1.6%	Car or van hire 5.1%	Holiday clubs 4.9%	Telecoms and Internet 10.3%
Home Improvements 8.5%	Travel Insurance 2.0%	Digital Downloads 2.9%	Gyms 3.7%	Gas, water and Electricity 5.9%
Travel (not package) 7.3%	Travel Assistance 2.0%	Software Purchases 3.2%	Film/wine/book clubs 3.5%	Mobile phones 6.9%
Hotel (not package) 4.2%	Insurance for goods purchased 2.5%		Season tickets and pre-paid deals 1.7%	Software Subscriptions 4.1%
In home Services/ repairs 6.3%	Personal Insurance 2.0%		Loyalty Schemes 2.0%	

Goods delivered to your home	Card protection			
9.0%	2.7%			
Other package Events	Home insurance			
2.4%	1.8%			
	Other warranties or guarantees			
	3.6%			

Source: The information is taken from the YouGov Survey detailed in the OFT's Consumer Contracts Market Study, and covers a 12 month period up to February 2011
www.oft.gov.uk/OFTwork/markets-work/consumer-contracts