

# Unfair standard terms

This leaflet provides general guidance on the Unfair Terms in Consumer Contracts Regulations 1999. These came into force on 1 October 1999 and replaced the 1994 Regulations. The main aim of the Regulations is to protect consumers against one-sided contracts favouring businesses. The Office of Fair Trading (OFT) shares powers with other enforcers known as qualifying bodies. These include most of the main national regulatory bodies, all local authorities providing a trading standards service, and Which? (see Annex A).

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## Introduction

Enforcement action can be taken by OFT or other enforcers using the Regulations or Part 8 of the Enterprise Act to stop businesses from using unfair terms. Results of enforcement action taken by other enforcers are published on the OFT website ([www.offt.gov.uk](http://www.offt.gov.uk)) together with other guidance material about Part 8 of the Enterprise Act 2002.

This guidance is not a substitute for the Regulations or a full interpretation of them. The Regulations should be read together with the EU Directive to which they give effect since the Directive contains additional explanatory material.

As well as this introductory guidance, we produce comprehensive general guidance on types of term that are unfair, and for specific trade sectors. For details of how to obtain copies of OFT publications, the Regulations and the EU Directive, see page 6.

## Contacting the OFT

If you think that any of the standard terms in a consumer contract are unfair you should contact Consumer Direct in the first instance at the address below. The OFT cannot provide advice or assistance to individual consumers or traders.

For consumer advice, information on specific consumer rights, to make a complaint against a trader or to contact your Local Authority Trading Standards Service, please call the Consumer Direct advice service on 08454 04 05 06 or visit the Consumer Direct website [www.consumerdirect.gov.uk](http://www.consumerdirect.gov.uk)

## Summary and key words

Under the Regulations, a **consumer** is not bound by a standard term in a contract with a **seller or supplier** if that term is **unfair**. Under the Regulations and the Enterprise Act we, and other named enforcers, have powers to stop businesses using unfair standard terms and anyone from recommending the use of such terms in contracts with consumers.

A **consumer** is an individual not acting for the purposes of his or her trade, business or profession.

**Standard terms** are those devised by a business in advance, not individually negotiated with the consumer. They do not have to be in writing but typically they are found in the 'small print' on the back of order forms and bills and so on. While the Regulations do not apply to any term that can be shown to have been individually negotiated, they do apply to any standard terms in the same contract.

**Seller or supplier** means any person or organisation acting for the purposes of their business. This includes any trade or profession, and the activities of government and other public bodies.

## What terms are not covered by the Regulations?

### ■ Price-setting terms

These are one of two kinds of **core term**, which are exempt provided they are in plain and intelligible language.

A term is not unfair simply because it puts too high a price on what you want to buy. What might be unfair is a term that allows the supplier to change the price after it has been agreed.

### ■ Terms defining the product

These terms tell you about the main subject matter of the contract. They tell you what you are (and are not) getting for your money. This is the other kind of core term.

It is not unfair for suppliers to offer goods or services that are not exactly what you require. For instance, an insurer can limit the cover offered by including an 'excess' that you have to pay – as long as this is made clear when you are deciding whether to buy the policy.

### ■ Terms reflecting the law

These are terms that must be included in the contract by law, or that the law explicitly says are allowed. For instance, international treaties set limits on the compensation airlines have to pay for loss or injury caused to passengers, and these limits are incorporated into UK law. But these terms must reflect the law adequately, not in a misleading way, and can be unfair if they give an advantage to the business beyond the minimum that the law allows.

### ■ Specially-negotiated terms

These are terms that are not laid down in advance by the business.

### ■ Terms in business-to-business agreements

### ■ Terms in sales by private individuals

### ■ Terms in non-consumer contracts

Such as employment contracts; agreements dealing with succession rights (such as inheritance); family law (such as maintenance payments); and the setting-up and running of businesses.

## What is unfair?

A standard term is unfair if it creates a significant **imbalance** in the parties' rights and obligations under the contract, to the **detriment** of the consumer, contrary to the **requirement of good faith**.

What this means is illustrated by examples of types of unfair term listed in Schedule 2 of the Regulations (see Annexe B). The terms in Schedule 2 all have the aim or effect of reducing the consumer's rights under the ordinary rules of contract or the general law. They either stop consumers from making certain sorts of legal claim against the business which they could otherwise have made, or give the business rights against the consumer that it would not otherwise have had. This is how a term is most likely to cause an **imbalance** – by altering the balance in rights and obligations that the law would have struck if left to itself.

But of course, a term is not automatically unfair just because it has this effect. The imbalance must be significant in practical terms. This does not mean it must be proved to have caused actual harm. But the term must, taken together with the other terms in the contract, be capable of causing **detriment** to consumers.

The **requirement of good faith** is explained in the Directive. It is based upon the idea that businesses should deal fairly and equitably with consumers, respecting their legitimate interests. It means more than not being deceitful in the way a term is used. It sets a high standard, and it requires consideration of whether a term should properly have been included in the contract at all, not just of the way it is presented or whether it is exploited.

A standard term may satisfy the requirement of good faith where the business could show that the consumer was in a strong enough bargaining position to negotiate over it, yet accepted it freely, with a full understanding of what it entailed. Evidence of this might be that other standard terms in the contract were deleted or changed to suit him or her. It might also be relevant if the business gave a discount to the consumer expressly in return for acceptance of such a term, or if the business provided the goods or services to the special order of the consumer.

A special case has to be made where it is claimed that a standard term meets the good faith test despite putting the consumer at a significant disadvantage in terms of rights and obligations. In ordinary commercial circumstances, consumers cannot and do not negotiate freely over the detail of contractual small print. A fundamental aim of the Directive and the Regulations is to recognise this reality, and to ensure that contract terms strike a fair balance between consumers and suppliers.

A term is less likely to be considered unfair if it is written in clear language, and highlighted and explained before the contract is entered. But 'transparency' alone cannot satisfy the requirement of good faith because it cannot guarantee that the consumer has made a free choice as well as a well-informed one.

### The requirement of plain language

Regulation 7 requires that plain and intelligible language is used in consumer contracts. A term is open to challenge as unfair if it could put the consumer at a disadvantage because he or she is not clear about its meaning – even if its meaning could be worked out by a lawyer. Core terms, that is those setting the price or defining the product, are exempt from the general test of fairness only if they comply with the plain language rule.

Jargon-free language is of no value to consumers unless it is in legible print and they have the opportunity to read it when they need to. As the Directive makes clear, the plain language rule is part of a wider requirement that consumers should be able to read and understand terms before becoming bound by them.

### Terms that may be unfair

Schedule 2 to the Regulations lists some types of standard term that may be found unfair. The list is only illustrative, not a blacklist. It is not exhaustive, and a term is not necessarily unfair just because it appears in it. We have identified as unfair a number of other commonly occurring terms that do not directly correspond to those in the Schedule. The

types of term in the Schedule overlap with each other, but can all be seen as being likely to cause one or more of the following common problems:

- consumers being misled about the contract, or their legal rights
- consumers being denied full redress if things go wrong
- consumers being tied into the contract unfairly
- the business not having to perform its obligations
- consumers unfairly losing prepayments if the contract is cancelled
- the business varying the terms after they have been agreed, for instance, so as to supply a different product, raise the price, or reduce consumers' rights; or
- consumers being subject to unfair penalties.

For more information about Schedule 2, and other terms that may be considered unfair, see Annexe B.

### The effect of unfairness on the contract

If a term is unfair, it is not legally binding on the consumer. If an unfair term requires consumers to do something, they cannot be made to do it.

For instance, a business is not entitled to obtain a court order to enforce a demand for payment based on an unfair term. Similarly, if an unfair term seeks to **stop** the consumer from doing something, such as seeking redress, it will not be upheld in court. If an unfair term excludes or limits liability for unsatisfactory goods or poor workmanship, the consumer can sue for compensation regardless of it. The fact that an unfair term is unenforceable does not mean that the rest of

the contract is void, unless it is unworkable without the unfair term.

### Other relevant laws relating to unfair terms

The Regulations add to, and do not replace, other protection for consumers, in particular the Unfair Contract Terms Act 1977. This Act covers a narrower range of types of contract term than the Regulations. It deals only with exclusion and limitation clauses. Insurance contracts, contracts for interests in land<sup>1</sup> and auction sale contracts are outside its scope but are within the scope of the Regulations.

However, taken together with the Sale of Goods Act 1979, the 1977 Act gives stronger protection than the Regulations against certain uses of some types of unfair term. It makes some forms of exclusion clause not binding in all circumstances, without applying any test of fairness.

### The Consumer Protection from Unfair Trading Regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008, or CPRs, came into force on 26 May 2008, transposing the Unfair Commercial Practices Directive into UK law. They introduce a general duty not to trade unfairly and ban certain specified practices. The OFT and the Department for Business, Enterprise and Regulatory Reform have jointly issued guidance on the CPRs.<sup>2</sup>

The CPRs repeal a range of earlier UK consumer protection laws, replacing them with the general duty and prohibitions referred to above. The legislation that has been replaced includes the Consumer Transactions (Restrictions on Statements) Order 1976. This statutory instrument made it an offence to use certain kinds of unfair contract term or notice.

<sup>1</sup> The Court of Appeal has confirmed that the Directive and Regulations apply to land contracts (the London Borough of Newham v Khatun, Zeb, Iqbal and the Office of Fair Trading [2004] EWCA Civ 55).

<sup>2</sup> OFT1008 is available from [www.offt.gov.uk/publications](http://www.offt.gov.uk/publications)

The CPRs can apply to the use of unfair contract terms. They are intended to provide broad protection for consumers, and business practices which are likely to distort consumers' decisions regarding their purchases generally fall within their scope. Certain kinds of unfair term can have that distorting effect, for instance through misleading consumers about their rights. The use of such terms could give rise to enforcement action under the CPRs as well as, or instead of, the Regulations.

### **How the Regulations protect consumers**

For the individual consumer, the Regulations mean that if a business refuses to accept that a term is unfair, the consumer can ask for the help of the court. If the court agrees with the consumer, the business will not be allowed to rely on that term against the consumer. It is essential for the consumer to seek legal advice before becoming involved in a dispute that could lead to court proceedings.

We, with the other bodies listed in Annexe A, have enforcement powers under the Regulations and the Enterprise Act. We can act to protect consumers in general by seeking to prevent the continued use or recommendation of unfair terms. But we do not have the power to take up consumers' individual cases for them, or to give them advice about how best to seek compensation or other redress in a private dispute.

### **The role of enforcement bodies**

Under Regulation 10, we (unlike any other enforcer) have a duty to consider any complaint made to us that a contract term drawn up for general use is unfair, unless one of the qualifying bodies notifies us that it will do so. If we consider that a standard term is unfair, we have the power to seek an injunction (in Scotland, an interdict) against anyone who appears to be using that term, or recommending the use of it, in consumer contracts.

We can apply for an injunction under the Regulations or an enforcement order under the Enterprise Act in any county court or the

High Court (or, in Scotland, in any sheriff court or the Court of Session). We can also seek a temporary order to prevent further use of the unfair term until the case can be fully argued in court. Both we, and the qualifying bodies, have powers under the Regulations to require suppliers to provide copies of their contracts and other information necessary to identify whether unfair terms are in use, particularly if they are still in use after an undertaking to drop them has been given.

OFT and enforcers named under the Enterprise Act have additional investigation powers.

### **Undertakings in lieu of court proceedings**

Both the Regulations and the Enterprise Act permit enforcement authorities to consider appropriate undertakings by businesses about the use of contract terms with consumers. If a business gives a satisfactory undertaking to stop using a term, or to revise it so that it is no longer unfair, court action will be unnecessary provided, of course, that the undertaking is honoured.

### **Duty to give reasons**

Those who have legitimate interest in the outcome of a complaint about an unfair term are entitled to be given reasons for any decision as to whether an injunction against the use of the term will or will not be sought. When and how we give reasons will depend on the circumstances of the case. We will also explain to suppliers why we consider any terms that we challenge to be unfair.

### **Enterprise Act 2002**

Under the Enterprise Act 2002, enforcers may apply to the court for an order to stop an infringement but, generally, we must first consult the business committing the infringement with a view to getting it stopped without the need to go to court. We will normally consult with the trader for a minimum period of 14 days. We may decide to accept an undertaking from the business that it will stop the infringing conduct.



However, if the business will not give a suitable undertaking, we can apply to the court for an enforcement order requiring the business to stop and not repeat the infringing conduct. For further guidance on the Enterprise Act, see Enforcement of consumer protection legislation OFT512.

### **Coordination of enforcement action**

Other bodies taking action to enforce the Regulations are required to notify us of their intention to apply for an injunction or an enforcement order, of the outcome of any court case they bring, and of the details of any undertaking they accept in lieu of court proceedings. These requirements are supplemented by voluntary arrangements designed to ensure effective enforcement and avoid duplication of action under the Regulations.

### **Information and advice**

We can disclose complaint details or other information we receive to another organisation only where permitted by law, in particular the relevant provisions of the Enterprise Act.

We publish details of the court orders and undertakings obtained by us and of those notified to us on the Consumer Regulations Website ([www.oft.gov.uk](http://www.oft.gov.uk)). Publicity will be accurate, balanced and fair.

We also issue information and advice concerning the operation of the Regulations. However, no enforcement body has the power to 'clear' terms: only a court can say definitely whether they are fair or not.

### **Contacting other enforcement bodies**

Names and contact details of other bodies capable of taking enforcement action are listed in Annexe A.

## **OFT publications on unfair terms**

### **Main guidance**

- Unfair contract terms guidance OFT311

### **Guidance for market sectors**

- Guidance on unfair terms in tenancy agreements OFT356
- Guidance on unfair terms in health and fitness club agreements OFT373
- Guidance on unfair terms in care home contracts OFT635
- Guidance on unfair terms in consumer entertainment contracts OFT667
- Guidance on unfair terms in package holiday contracts OFT668
- Guidance on unfair terms in holiday caravan agreements OFT 734. Also 'Unfair terms in holiday caravan agreements, consultation response'.
- Guidance on unfair terms in IT consumer contracts made at a distance OFT 672
- Guidance on unfair terms in home improvements contracts OFT 737
- Calculating fair default charges in credit card contracts OFT 842 . Also 'Consumer summary credit card default charges'.

### **Consumer leaflets**

- Unfair tenancy terms – don't get caught out OFT381
- Are they fit to join – a guide to health club membership terms OFT380
- Fair terms for care – a guide to unfair terms in privately funded care home contracts OFT688
- Unfair terms in consumer entertainment contracts OFT691

## Obtaining copies of publications

OFT publications are available to download or order from [www.oft.gov.uk/publications](http://www.oft.gov.uk/publications)

You can access the Regulations at [www.opsi.gov.uk](http://www.opsi.gov.uk) and the Directive at [www.ec.europa.eu/consumers/rights/gen\\_rights\\_en.print.htm](http://www.ec.europa.eu/consumers/rights/gen_rights_en.print.htm)

## Looking up the law

- The Unfair Terms in Consumer Contracts Regulations 1999  
SI 1999/2083  
current price £6.00
- Unfair Terms in Consumer Contracts (Amendment) Regulations 2001  
SI 2001/1186  
current price £6.00
- Council Directive 93/13/EEC in Official Journal of the European Communities  
Vol. 36. L95. 21 April 1993  
ISBN 0119119862  
current price £10.25

Available from:

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

Tel: 0870 600 5522  
Fax: 0870 600 5533  
Website: [www.tso.co.uk/bookshop/](http://www.tso.co.uk/bookshop/)

# Annexe A

## Qualifying bodies and Enterprise Act enforcers

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### Part 1

The following bodies (qualifying bodies) are listed in Schedule 1 to the Regulations (as amended) as having power to enforce the Regulations alongside the Office of Fair Trading. They also have powers to take action against unfair terms under Part 8 of the Enterprise Act 2002.

#### Information Commissioner

Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF

Info line: 01625 545 745  
Switchboard: 01625 545 700  
Fax: 01625 524 510  
Email: [mail@ico.gsi.gov.uk](mailto:mail@ico.gsi.gov.uk)  
Website:  
[www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)

#### Office of Gas and Electricity Markets (OFGEM)

OFGEM  
Head Office  
9 Millbank  
London SW1P 3GE

Tel: 020 7901 7000  
Fax: 020 7901 7066  
Website: [www.ofgem.gov.uk](http://www.ofgem.gov.uk)

#### OFGEM Scotland

Regents Court  
70 West Regent Street  
Glasgow G2 2QZ

Tel: 0141 331 2678  
Fax: 0141 331 2777

#### The Northern Ireland Authority for Utility Regulation (Formerly NIAER)/OFREG

Brookmount Buildings  
42 Fountain Street  
Belfast BT1 5EE

Tel: 028 9031 1575  
Fax: 028 9031 1740  
Email: [ofreg@nics.gov.uk](mailto:ofreg@nics.gov.uk)  
Website: [www.ofreg.nics.gov.uk](http://www.ofreg.nics.gov.uk)

#### Office of Communications (OFCOM)

Ofcom Contact Centre  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 0845 456 3000  
Fax: 0845 455 3333  
Email: [contact@ofcom.org.uk](mailto:contact@ofcom.org.uk)  
Website: [www.ofcom.org.uk](http://www.ofcom.org.uk)

#### Water Services Regulation Authority (OFWAT)

Centre City Tower  
7 Hill Street  
Birmingham B5 4UA

Tel: 0121 625 1300  
Fax: 0121 625 1400  
Email: [enquiries@ofwat.gsi.gov.uk](mailto:enquiries@ofwat.gsi.gov.uk)  
Website: [www.ofwat.gov.uk](http://www.ofwat.gov.uk)

#### Office of Rail Regulation (ORR)

1 Waterhouse Square  
138-142 Holborn  
London EC1N 2TQ

Tel: 020 7282 2000  
Fax: 020 7282 2040  
Email: [contact.cct@orr.gsi.gov.uk](mailto:contact.cct@orr.gsi.gov.uk)  
Website: [www.rail-reg.gov.uk](http://www.rail-reg.gov.uk)



**The Department of Enterprise, Trade and Investment in Northern Ireland**

Netherleigh  
Massey Avenue  
Belfast BT4 2JP

Tel: 028 9052 9900  
Fax: 028 9052 9545  
Email: [information@detini.gov.uk](mailto:information@detini.gov.uk)  
Website: [www.detini.gov.uk](http://www.detini.gov.uk)

**The Financial Services Authority (FSA)**

25 The North Colonnade  
Canary Wharf  
London E14 5HS

Tel: 020 7066 1000  
Helpline: 0845 606 1234  
Fax: 020 7066 1099  
Email: [consumerhelp@fsa.gov.uk](mailto:consumerhelp@fsa.gov.uk)  
Website: [www.fsa.gov.uk](http://www.fsa.gov.uk)

Every weights and measures authority in Great Britain, that is, every local authority operating a trading standards service. For addresses see your local phone book or [www.tradingstandards.gov.uk](http://www.tradingstandards.gov.uk)

**Which?**

(designated as Consumers' Association)  
2 Marylebone Road  
London NW1 4DF

Tel: 020 7770 7000  
Fax: 020 7770 7600  
Website: [www.which.net](http://www.which.net)

**Part 2**

The following are enforcers under the Enterprise Act but not qualifying bodies under the Regulations (that is, they can only enforce the Regulations by means of the Enterprise Act).

**The Civil Aviation Authority (CAA)**

CAA House  
45-59 Kingsway  
London WC2B 6TE

Tel: 020 7379 7311  
Website: [www.caa.co.uk](http://www.caa.co.uk)

**PhonepayPlus**

Clove Building  
4 Maguire Street  
London SE1 2NQ

Tel: 0800 500 212  
Website: [www.PhonepayPlus.org.uk](http://www.PhonepayPlus.org.uk)

**The Secretary of State for Health**

The Department of Health  
Richmond House  
79 Whitehall  
London SW1A 2NS

Website: <http://www.dh.gov.uk/en/ContactUs/>

**Department of Health, Social Services and Public Safety in Northern Ireland**

Castle Buildings  
Stormont  
BELFAST  
BT4 3SJ

Tel: 028 90520500  
Email: [webmaster@dhsspsni.gov.uk](mailto:webmaster@dhsspsni.gov.uk)

## Annexe B

### Terms that may be considered unfair

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Please note that the following list of terms is closely based on the one in Schedule 2 to the Regulations. It includes some additional terms that the OFT has indicated in its Unfair Contract Terms Bulletins<sup>3</sup> that it considers may be unfair. But the system of categories is slightly simpler and shorter than that used in the bulletins.<sup>4</sup> It does not miss out any type of term listed in Schedule 2 but some similar types of term are dealt with together to avoid unnecessary duplication. References to Schedule 2 itself are shown wherever possible in bold print.

Like Schedule 2, this is not a blacklist. A term like one of those described may be unfair in some circumstances, but not unfair in others. Also like Schedule 2, it is non-exhaustive. A term may bear no resemblance to any of the terms listed below, and yet be unfair. Usually, unfair terms have a similar aim, or produce a similar effect to terms in the list. But a term that is completely different may also be unfair, if it meets the criteria described above, that is, if it weights the contract against the consumer contrary to the requirement of good faith.

#### Terms excluding or limiting liability

##### **paragraph 1(a) and (b) of Schedule 2**

Fairness and balance require that both parties to a contract are equally bound by it, and equally liable to pay compensation for failure to abide by it. A term which could be used – even if that is not the intention – to prevent or hinder customers from seeking redress when the supplier is in default tends to upset the balance of the contract to the consumer's disadvantage.

Disclaimers which deny or limit liability for negligence are particularly liable to be considered unfair. They can leave consumers without redress for problems which are the supplier's fault. And such disclaimers undermine the incentive for suppliers to take reasonable care.

Many different kinds of term serve as disclaimers. Some common types are illustrated below:

##### **(i) Disclaimers of liability for death or injury caused by the business**

For example, equipment is used entirely at customers' own risk.

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<sup>3</sup> Copies of all OFT publications are also available at: [www.of.gov.uk/publications](http://www.of.gov.uk/publications)  
Examples of fair and unfair terms were published in OFT bulletins until February 2005 and individual case summaries can now be found on the Consumer Regulations Website (CRW) at [www.of.gov.uk/advice\\_and\\_resources/publications/guidance/unfair-terms-consumer/](http://www.of.gov.uk/advice_and_resources/publications/guidance/unfair-terms-consumer/)

<sup>4</sup> See Part 6 of any Bulletin from No 6 onwards for a full list of types of term that the OFT considers unfair.

Any attempt to escape or reduce liability for death or injury where the business is at fault, in any way, is very likely to be considered unfair under the Regulations. Terms which purport to exclude such liability where it is caused by negligence are, in any case, always void and unenforceable, under other legislation.<sup>5</sup> Their use is potentially misleading and harmful.

**(ii) Disclaimers relating to faulty or misdescribed goods, unsatisfactory services**

For example, goods are sold as seen: we accept no liability for faults discovered after purchase.

Claims will not be entertained for 'sale' goods.

No liability is accepted for damage to decor caused during installation.

Any business which sells goods or services to consumers has to accept certain contractual obligations. These are the consumer's 'statutory rights'.<sup>6</sup> Goods must match the description given to them, be of satisfactory quality and fit for their purposes. Work should be carried out to a reasonable standard. Contract terms which deny consumers the right to full compensation where the supplier breaks these obligations are liable to be considered unfair. Terms which deny or restrict liability if goods prove to be defective are also prohibited by other legislation. They are void and unenforceable, so their use may be misleading and give rise to prosecution as an offence.<sup>7</sup>

**(iii) Disclaimers of liability for delay by the business**

Consumers have a statutory right to expect work to be carried out, and goods to be supplied, in a reasonable time. It may be

acceptable to exclude liability for delays caused by outside circumstances, beyond the control of the business, but a business should not be able to ignore the convenience of its customers and break promises about deadlines.

**(iv) Disclaimers of liability for failure to do what was agreed**

For example, management reserves the right to suspend services without liability.

Non-delivery of an instalment does not give the customer a right to cancel the contract.

A term which could have the effect of allowing a business to opt out of its obligations – without giving appropriate redress – is highly likely to be considered unfair, especially if consumers remain bound to fulfil their promises – as also indicated by **paragraphs 1(c) and (o) of Schedule 2**.

**(v) Disclaimers reducing the amount or availability of redress**

For example, liability accepted up to the value of the goods only.

If goods are returned, customer must pay for carriage and packaging.

No liability is accepted for consequential or indirect loss.

Terms which limit a supplier's liability, or make consumers pay certain costs whether or not they are at fault, or exclude certain types of redress altogether, all have an effect similar to exclusion clauses. This applies to exclusions of 'consequential loss'. The phrase itself is legal jargon and misleading to non-lawyers.

**(vi) Terms erecting barriers to seeking redress**

For example, complaints cannot be accepted unless notified in writing within three days of delivery.

<sup>5</sup> The Unfair Contract Terms Act 1977 – see 'Other Laws relating to unfair terms' in the main text.

<sup>6</sup> Under the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, as amended.

<sup>7</sup> In England and Wales under the Consumer Protection from Unfair Trading Regulations 2008

Notice of cancellation must be sent by recorded delivery.

Terms which make the right to redress subject to conditions can operate as unfair exclusion clauses, for instance, if a time-limit on claims is too short, or a formality requirement is unreasonable. Such a term is not necessarily fair just because what it requires is sensible. The penalty for non-compliance must also be reasonable. If it lets the supplier escape his obligations it is likely to be unfair – see also **paragraphs 1(n) and (q) of Schedule 2**.

**(vii) Terms excluding the consumer's right of set-off**

For example, payment may not be withheld because of any alleged defect.

Payment must be received in full before installation can commence.

Benefit of the guarantee is lost if payment in full is not received on due date.

Terms are open to objection if they force the consumer to pay in full for goods or services regardless of whether there may be a legitimate complaint about them. Such terms can allow a business to take money to which it has no good claim, forcing the consumer unnecessarily to go to court to get it back, with all the costs, delays and uncertainties that involves.

The same objection does not apply to terms which allow consumers to set-off only a reasonable amount – as the law would allow – or which require payment in stages, allowing the consumer to hold a reasonable amount until completion.

**(viii) Terms disclaiming liability by conferring unsatisfactory guarantee rights**

For example, we will repair or replace (at our option) any item found faulty within three months.

A guarantee can have the effect of an unfair exclusion clause if it gives the consumer fewer or weaker rights than the ordinary law. Fairness requires that consumers have, and understand they have, their full legal rights in relation to faulty or misdescribed goods and services.

A guarantee which tends to exclude liability cannot, in the OFT's view, be made fair merely by adding a standard 'statutory rights unaffected' provision. This may partially contradict the guarantee for legal purposes, but unless some explanation is given it is more likely to confuse ordinary consumers than make them better informed.

**Non-returnable consumer prepayments**

**paragraph 1(d) of Schedule 2**

For example, in the event of an order being cancelled no refunds can be given.

When a contract is cancelled consumers should not generally end up paying for something they have not received. This is especially true where the contract is ended by the supplier. Where the consumer causes the cancellation, prepayments should not be retained beyond what is needed to cover losses and costs which the business suffers as a direct result, and cannot reasonably reduce by, for instance, selling to someone else.

Note that a 'deposit' is not a prepayment, and may fairly be non-refundable if it is just a small charge for reserving the goods or services.

**Penalties**

For example, interest will be charged at ten per cent per month on any payment outstanding.

If the equipment suffers any damage, a repair charge will be made at our discretion. In default of payment we may enter any premises at any time to repossess the goods.

Consumers should not have to pay more compensation than is really needed to cover the damage they have caused. As well as being potentially unfair – see **Schedule 2 paragraph 1(e)** – excessive penalties are unenforceable under the general law.

Penalty terms can also be unfair if they could mislead the consumer into thinking the supplier is entitled to more compensation than is really the case, or if they leave the supplier to make a charge at a level he himself determines.

Over-severe sanctions of other kinds are also likely to be considered unfair, for instance, enforcement methods which could involve violation of rights to privacy and property.

### Unfair cancellation terms

#### paragraphs 1(f), (g), and (h) of Schedule 2

For example, we reserve the right to cancel any order at any time by refunding all monies paid.

This contract is not subject to cancellation by the customer.

After expiry of the initial term, three months notice of cancellation is required.

The law generally makes each party continue with a contract unless the other is in serious default. Wide cancellation rights for suppliers are liable to be considered unfair unless consumers have equal freedom to opt out of the agreement. A term which in effect means the supplier can cancel to suit its own financial advantage, or for trivial reasons, is open to particular objection if the consumer is likely to suffer loss or inconvenience. If the supplier can cancel without notice, except on serious grounds, there is also potential unfairness.<sup>8</sup>

The balance of the contract can be upset in the other direction by terms which deny

consumers any right to cancel, or hinder them from ending contracts when they properly have a right to do so. Termination charges and over-long notice periods can have this effect, tending to force consumers to continue with contracts, or renew them, when they have no wish to do so.

### Binding the consumer to hidden terms

#### paragraph 1(i) of Schedule 2

For example, all orders are subject to our standard terms, which will be supplied with the goods.

Consumers should always have an opportunity to read and understand contracts before becoming bound by them. Terms that make them accept provisions they have not seen are liable to be considered unfair. Where a short document cannot include all relevant terms, or the contract is made by phone, other means such as promotional literature may be used to give consumers advance information. If this cannot cover all significant features of the agreement, using of a 'cooling-off' period allows the consumer to read the full contract documentation.

### Variation clauses

#### paragraph 1(j), (k), and (l) of Schedule 2

For example, the company may at any time vary or add to these conditions as it deems necessary.

All materials used may vary in colour and finish.

The price may be adjusted if costs relating to the order increase prior to delivery.

When a contract is made, obligations are accepted in return for benefits. If one party can unilaterally change agreed terms, to its advantage, the balance of the transaction is lost. So a term is likely to be unfair if it gives the supplier the right at its discretion to force the consumer to accept changes to the bargain. A right to change any term in the

<sup>8</sup> Except in financial services contracts, provided the right to cancel without notice can only be exercised for a valid reason and as long as consumers are notified as soon as possible.



contract, or to vary its core terms – the price or description of the product – is particularly open to objection.

Fairness, and the law, require that consumers get what they agreed to buy. Goods, in particular, must be of the agreed description and purpose, not just of 'equivalent quality'. A right to raise prices at discretion, where consumers are locked into the contract, is also highly suspect.

Where the supplier's freedom to vary is more restricted, there may be no unfairness. Terms which allow only technical product modifications of no significance to the consumer are usually acceptable. Even a right to make more substantial variations may be unobjectionable if the changes permitted are precisely specified, so consumers do effectively know what they are agreeing to. Alternatively, a variation clause that confers no real discretion, for instance, a right to raise prices in line with a published price index,<sup>9</sup> may be fair.

Finally, and most importantly, any right to vary may be fair if the consumers can exit from the contract before being affected – but obviously adequate advance notice of the variation must be given<sup>10</sup> and the consumer must not suffer any loss or significant inconvenience by cancelling.

### Right of final decision

For example, the company will repair or replace any part as it deems necessary.

The customer agrees to work being carried out at a time convenient to the company.

A clause which allows the business to define the meaning of terms, or to decide whether or

not there has been a breach of them, upsets the balance of a contract. If there is no effective requirement to act reasonably, the business can vary the contract to suit itself and ensure it never has to give redress – see **Schedule 2 paragraph 1(m)**. The same applies to terms which allow the supplier too much freedom to ignore the convenience of the customer in performing the contract.

### Denying liability for statements made by agents and employees

#### paragraph 1(n) of Schedule 2

For example, all terms of the contract are contained in this document.

No employee has authority to make statements inconsistent with these terms.

Any variation to these terms must be in writing and signed by a director.

Consumers buying goods and services naturally tend to rely on what is said to them by salesmen and employees. If, after a contract has been entered, the supplier can repudiate claims and promises made on his behalf simply on the basis that the contract contains a clause which says (in effect) that only written terms will be honoured, there is obvious scope for abuse.

Such terms are often said to be needed to avoid disputes over the terms of the contract. Certainty is desirable but cannot fairly be achieved by denying all liability for statements regardless of considerations of good faith. Suppliers should try to ensure that disputes do not arise, not that the consumer can never win them. The best approach is to make the contract easily understandable, give consumers the opportunity to read it, and take steps to ensure that they fully understand the importance of getting clear agreement to anything that does not appear in it.

### Unbalanced assignment clauses

For example, the company may at any time assign this agreement to any third party.

<sup>9</sup> This applies particularly to terms in a range of specialised financial transactions: terms allowing price variations due to fluctuations in an independent index, or published market rates, or currency values.

<sup>10</sup> In financial service contracts, a right to alter charges or interest rates without notice may be fair, if such action can be taken only for a valid reason and provided consumers are informed as soon as possible and can immediately cancel the contract if they choose.



This guarantee is personal to the customer and may not be transferred to anyone else.

A term which allows the supplier freedom to sell on to anyone, without consulting the customer, may mean that consumers end up dealing with someone less reliable, and thus getting a worse deal than they bargained for. **Schedule 2 paragraph 1(p)** indicates that terms having this effect are suspect.

Terms denying the consumer any freedom to assign at all, even subject to conditions, raise similar doubts. There are usually fairer and less restrictive ways of protecting the supplier's interest.

### **Hindering or preventing the consumer going to court**

#### **paragraph 1(q) of Schedule 2**

For example, any dispute that cannot be resolved will be referred to arbitration.

This contract is subject to the exclusive jurisdiction of the courts of the Isle of Man.

Terms are liable to challenge if they tend to prevent consumers taking disputes to court, or require them to go to remote or inappropriate courts. Compulsory arbitration clauses are, in any case, outlawed by other legislation<sup>11</sup> for the purposes of most consumer disputes.

### **Allowing excessive burdens or requirements to be imposed on the consumer**

For example, we may at any time require payment of such security deposit as is deemed necessary.

The college will at its discretion make an additional charge for cleaning rooms.

Terms allowing suppliers to impose indefinite financial burdens on consumers, in addition to

the agreed price, are open to the same objection as variation clauses (see previous page). This does not prevent consumers agreeing to pay specified sums in specified circumstances. Alternatively, there may be no unfairness if they have the right to cancel it without penalty before becoming subject to the additional burden.

### **Requiring the consumer to bear inappropriate risks**

For example, the customer indemnifies the company against all third party claims.

The customer will pay for damage caused to the company's equipment by adverse weather conditions.

Consumers should not be forced to bear liability for the supplier's negligence, or risks that the supplier is better able to insure against. 'Indemnity' clauses are open to particular objection, and may be unenforceable under other legislation.<sup>12</sup> They use legal jargon, and imply that the supplier can simply pass on to the consumer any costs incurred whether reasonable or not.

### **Requiring the consumer to make disadvantageous declarations**

For example, I have read and understood the conditions of sale overleaf.

No oral representation was made to me as to the vehicle's condition or mileage.

If a declaration is written into the contract, in practice consumers are forced to make it, whether it is true or not. They may think it is just a formality, but it means they can in future be told they have 'signed away their right' to argue that the facts were not as the declaration indicates.

<sup>11</sup> See section 91 of the Arbitration Act 1996, which states that a compulsory arbitration requirement is automatically unfair if it relates to disputes under a specified limit currently £5,000 (£2,000 in Northern Ireland).

<sup>12</sup> Section 18 of the Unfair Contract Terms Act 1977 says they are void if not fair and reasonable.

## **Excluding non-contractual rights**

For example, this contract is deemed to have been signed on the company's business premises.

The customer agrees to allow any personal data to be communicated to third parties.

Consumers have various legal rights outside of contract law, for instance, to a cooling-off period in doorstep sales, and to the confidentiality of personal information. A contract term which makes them waive such rights is open to objection as unfair, whether or not it is legally effective.

## **Unreasonable obligations and restrictions**

For example, the tenant shall not keep any inflammable materials on the property.

Failure to comply with a contract term gives rise to a risk of incurring contractual penalties. Where the term is wholly unreasonable, any penalty must be unfair, whatever its extent or nature. The problem in such a case is not in the penalty, but the term itself, and the solution is to remove the term, or limit its scope so that it goes no further than is necessary to achieve a legitimate purpose.