



**Important information relevant to the Report by the Competition and Markets
Authority:**

**Disposal of Timeshares and Other Long-term Holiday Products – a Report for BIS
and the European Commission**

The purpose of the CMA's report was to provide their findings in relation to the complexities and difficulties with timeshare disposal in the UK to BIS and to inform the European Commission. Any recommendations made in the report are entirely subject to further, detailed research.

The report should be read as the CMA's current, provisional views on the legal issues surrounding timeshare disposal and its provisional thoughts on a possible remedy, should one be required. It looks only at consumers' experiences when they wish to end their timeshare ownership. It is not a judgement on the industry as a whole, nor is not a criticism of the industry's representative bodies.

The report was intended only to set out the main legal issues concerning consumers and timeshare exit, providing the CMA's current, provisional views on the relevant legal provisions, including those it can enforce, for the purpose of considering whether the market is working well for consumers. It does not provide guidance and should not be relied upon or represented as such.

The views set out in the report are provided in general terms and are not a substitute for independent legal advice on the issues concerned. Individual businesses and consumers are recommended to take their own legal advice on any of the issues discussed or arising.

**Disposal of
timeshares and other
long-term holiday
products – a report
for BIS and the
European
Commission**

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1. Introduction, key findings and recommendations

Introduction

What we did

- 1.1 Partly in response to a request from the Department for Business, Innovation & Skills (BIS), we have carried out a narrowly focused project examining the legal issues that surround timeshare and long-term holiday product (LTHP) disposal and the difficulties that UK owners and members may have selling or divesting their timeshare and LTHP rights.¹
- 1.2 We reviewed public sources of information; looked at consumer complaints and examples of contracts and constitutions; engaged with the Timeshare Association (TATOC) and the Resort Development Organisation (RDO), which represent consumers and developers respectively; liaised with several other organisations;² and drew on previous OFT cases and analysis.

The limitations of our project

- 1.3 We must stress that the main focus of our project was on the legal issues. For the context in which the legal questions must be considered, we relied heavily on available information. We did not seek new information from owners / members, owner committees and developers (although we did receive some such information). In particular, we did not gather data that would enable us to quantify the scale of the exit problems or the potential detriment arising. For that reason, our conclusions are provisional and this is reflected in our recommendations that further work should be undertaken.

Our report

- 1.4 Our report is divided into four parts:
 - 'Introduction, key findings and recommendations'
 - 'Setting the scene', which provides the context for the later sections
 - 'Discussion of relevant legal issues', focusing on the key 'exit issues' and what the law requires of businesses, including our views on potential uncertainties and limitations of existing law

¹ The project was begun by the Office of Fair Trading (OFT) and completed by the Competition and Markets Authority (CMA) (the successor to the OFT from 1 April 2014).

² Citizens Advice, Citizens Advice Scotland, Age UK, Which?, the UK European Consumer Centre, the Ministry of Justice, the Treasury Solicitors' Department, and several Trading Standards Services.

- 'Potential benefits of a legal right to exit', where we offer a preliminary view of the merits of this possible remedy

The purpose of the report

- 1.5 The purpose of the report is to provide our findings to BIS and to inform the European Commission (which is currently reviewing the Timeshare Directive 2008).
- 1.6 The report should be read as the CMA's current views on the legal issues surrounding timeshare disposal and our provisional thoughts on a possible remedy, should one be required. It looks only at consumers' experiences when they wish to end their timeshare ownership. It is not a judgement on the industry as a whole. It is not a criticism of the industry's representative bodies: the Resort Development Organisation (RDO) and the Timeshare Association (Timeshare Owners and Committees) (TATOC).³ Indeed, the CMA acknowledges the encouraging efforts these bodies are making to address exit issues.

The CMA's next steps

- 1.7 In addition to advocacy with Government and the European Commission, we are also sharing this report with consumer authorities in other EU member states. Given that our analysis is relevant to whether intra-community infringements are taking place, it is consistent with Article 7(1) of the CPC Regulation to send our report to them. They will be able to consider their own interpretation of the law and determine whether they wish to make their own recommendations to the European Commission for remedial action. It also allows them to explore the possibility of coordinated action at the international level.
- 1.8 Although we are not publishing the report at this time, we are sending tailored letters and checklists of key points to:
- all UK Trading Standards Services, where our analysis may assist them to apply consumer legislation in circumstances where enforcement against specific traders is a priority

³ RDO is a trade association for businesses offering timeshare and other vacation ownership across Europe. TATOC represents timeshare owners and owner committees; it also runs a consumer helpline and operates an affiliate membership scheme for businesses.

- RDO and TATOC, where we hope our analysis will, indirectly, encourage businesses to speed up their own efforts to deal with exit issues proactively
- some consumer bodies, where our analysis may be helpful to consumer advisors, especially to the ECC network (which has a current project aimed at raising consumer awareness on timeshare)

Key findings

What are the 'exit issues'?

1.9 We have focused, in particular, on the following 'exit issues':

- agreements that purport to last 'in-perpetuity' (that is, forever), for an indefinite period, or far into the future (for example, 70 years) with little or no provision for the owner or member to end the agreement
- restrictions on **which** owners or members can exit the timeshare or LTHP agreement
- restrictions on **how** owners or members can exit the timeshare or LTHP agreement
- inheritance, in particular whether the product and the obligation to pay ongoing management fees⁴ passes to the deceased owner's or member's heirs
- probate / administration of estates, specifically the clauses that purport to bind the deceased owner's or member's estate to the terms of the contract so that management fees must still be paid

1.10 We have also considered:

- the damages that a business may try to claim when owners or members breach the contract, for example when they stop paying management fees
- exit payments and notice periods

⁴ By 'management fee', we mean any annual fee or charge that the owner or member is required to pay to help maintain the resort's facilities and services, to help administer the timeshare or LTHP scheme, and/or for club membership.

- the sale of exchange or 'upgrade' products to owners or members in lieu of exit options
- misrepresentation and other vitiating factors which might cause a contract to be made void

What is the harm to consumers?

- 1.11 As time passes, consumers who acquired their timeshare or LTHP many years ago may find that they can no longer use it or afford to keep it. They may discover, however, that their contract makes little or no provision for withdrawal and that they appear to remain liable to pay management fees for the duration of the agreement (which, in some cases, may seem to be forever). They can try to sell their timeshare or LTHP or give it away, but the secondary market is largely dormant: some owners or members have spent years trying to sell without success.
- 1.12 Given the longevity of timeshare ownership and LTHP membership, and the ageing demographics (at present, the average age of an owner or member is 50 to 60 years old), it is not surprising that people's circumstances change. For example, some owners or members may no longer be able to travel for health or mobility reasons; some may be living on reduced incomes following retirement from work or separation from a partner; some may have died. However, whatever their change in circumstances, they may still not be able to exit their timeshare or LTHP agreement.
- 1.13 The resulting harms may include:
- financial harm – paying annual management fees but, where they cannot use their timeshare or LTHP, not getting any benefit in return
 - frustration and anxiety – for example trying to sell on the open market or hand back to the resort without success, or worrying that the problem will be passed on to their children
 - an inability to exercise choice, either because the contract does not allow withdrawal or because exit is at the developer's or owner committee's discretion and is refused
 - susceptibility to scams that purport to assist owners or members to divest themselves of their timeshare or LTHP, leading to further financial loss and a sense of hurt and shame at having been scammed
- 1.14 We also note that the difficulty exiting may have other consequences for the industry. It is probably one reason why some people distrust timeshares or

LTHPs and are unwilling to buy on the secondary market. Some consumers may be missing out on a product that they might enjoy and which might suit their requirements well.

How is the industry addressing the issues?

- 1.15 The industry appears to recognise, and RDO and TATOC certainly recognise, that timeshare exit has become a major issue. Changes have been made and initiatives are underway. For example, in-perpetuity clauses are rare in contracts being entered into today; TATOC has had some success negotiating exit solutions with a few owner-run resorts; and RDO now requires all of its members to have an exit policy / strategy.
- 1.16 These industry actions are encouraging, but it is unclear how widely they are available, how quickly they are being introduced and whether they go far enough.
- 1.17 In practice, available exit routes may come with restrictions (for example the owner may need to be aged 75 or over in order to qualify). Exchange or upgrade products are not cost-free and may only provide for exit many years down the line (if at all). Commitments to allow exit are not always written into existing contracts or constitutions; the owner's or member's ability to exit may be entirely at the developer's or owner committee's discretion. It is unclear to what extent the recent changes have freed up the secondary market. Also, we have concerns that some businesses may be continuing to use contractual terms that we would consider to be potentially unfair to consumers.

How does existing UK law help consumers who wish to exit?⁵

- 1.18 As a general starting point, timeshare owners and LTHP members agreed the terms and conditions (and the rules) when they entered into the contract (and joined the club). In general, they are likely to be bound by those terms (and rules).
- 1.19 However, businesses cannot argue that their obligations to consumers are dictated solely by what it says in the contract. In particular, there may be scope for challenging terms under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), particularly where the terms place onerous restrictions on the consumer. For example, the UTCCRs are likely to apply

⁵ The Regulations that we refer to in these paragraphs have been transposed into UK law from EU-wide Directives. Consequently, substantially similar Regulations are in place in other European Economic Area Countries.

the statutory test of fairness to terms that: purport to be estate-binding, require excessive notice periods from owners, place unduly high barriers to exit, or unfairly penalise owners for exiting timeshare.

1.20 In addition, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibit businesses from engaging in unfair commercial practices before, during and after a contract is made with the consumer.

1.21 In the context of timeshare, the CPRs will be applicable where, for example, businesses:

- mislead consumers,⁶ such as where they provide a potential beneficiary with inaccurate information as to the benefits and obligations associated with timeshare when that person is considering whether or not to accept a bequest, or where they fail to provide the required information altogether
- adopt aggressive practices,⁷ such as where they apply pressure on a timeshare owner by threatening court action for outstanding maintenance fees and force that owner to accept liabilities connected with timeshare that they did not lawfully incur or that they dispute
- use, recommend or enforce unfair contract terms as against consumers, contravening the general prohibition on unfair commercial practices.⁸ These practices may also be misleading

1.22 However, the UTCCRs and CPRs are principles based, meaning that it is not always clear how a court would decide a particular case. Every timeshare agreement is likely to be construed in the light of all the circumstances attending the conclusion of the particular contract. Further, while we express a view in this report as to the factors we think a court would consider relevant, ultimately only a court can rule a term or a practice unfair. We cannot therefore definitively state the law as it relates to timeshare, only the CMA's view of how the law is to be interpreted.

⁶ A business will mislead a consumer if it gives false or inaccurate information, or omits information the average consumer needs to take an informed decision, or provides that information in a manner which is unclear, unintelligible, ambiguous or untimely, where this causes or would be likely to cause the average consumer to take a decision that they would not have taken otherwise. Note that consumers' decisions are not limited to decisions about whether or not to purchase a product or service; they cover a wide range of decisions that may be taken in relation to the product, including decisions concerning disposal of timeshare.

⁷ That is, practices that, through harassment, coercion or undue influence, significantly restrict, or would be likely to significantly restrict, the average consumers' ability to make free or informed choices, where this causes or would be likely to cause the average consumer to take a decision they would not have taken otherwise.

⁸ Businesses must exercise the reasonable standard of care and skill that is in accordance with honest market practice and in good faith, so as not to materially distort or be likely to materially distort the economic behaviour of the average consumer.

- 1.23 There may also be complications surrounding applicable governing law and court jurisdiction in relation to agreements. For example, standard terms may state that the law of another country, rather than UK law, applies to the agreement. However, in relation to consumer contracts, EU law provides some protection here, for example allowing consumers to exercise and enforce their legal rights against businesses in their own local courts.
- 1.24 It is the CMA's view that, in the UK, a deceased owner's or member's heirs (for example, their children) do **not** become liable for the timeshare's or LTHP's management fees **unless they choose to accept the timeshare or LTHP**. In UK law, they have a right to 'disclaim' a gift or an inheritance – that is, they can reject it.
- 1.25 However, there appear to be a couple of complications:
- first, the way the will is written may be important: if the deceased has left the timeshare or LTHP **and** other property as a **single** gift, then the beneficiary may have to accept the whole gift or none of it⁹
 - second, under some contracts, the owner's or member's estate may be said to continue to be liable for payment of the management fees after their death. (In such cases there is an 'estate-binding' clause). This could have unfortunate consequences for settling the estate and dividing its assets amongst beneficiaries

In practice, it may be possible for the deceased's personal representative (for example the executor of the will) to apply to a court for direction. However, this does not seem a very satisfactory way to exit timeshare and adds further uncertainty.

- 1.26 Finally, there may be instances where, in lieu of an outright exit, a consumer is instead offered a new timeshare product or LTHP. In this event it is likely that the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 will be applicable, meaning that the consumer must be provided with specific statutory pre-contract information, including the existence of the mandatory 14 day withdrawal period (which may be extended in certain circumstances).
- 1.27 Where that consumer subsequently exercises the right of withdrawal under these Regulations, it is likely to be unlawful for the business to insist that the previous contract is re-instated where the parties have agreed that the new

⁹ For example, 'I leave all my property in Malta to X' may be interpreted as a single gift, whereas 'I leave my timeshare in Malta to X. I leave my residential home in Malta to X' may be interpreted as two gifts. In the latter case, X can pick and choose: they can accept one gift and refuse the other.

product will replace the old one. Where the parties have agreed a new contract, the old ceases to exist.

What are our principal concerns?

1.28 Our conclusion is that, in certain important regards, existing law appears to be, at best, unclear as to how it may be of assistance to owners who no longer wish to keep their timeshare or LTHP. We consider that perhaps the law is inadequate in this area and may require examination and clarification.

1.29 We are particularly concerned about

- the longevity of contracts where there is no provision for exit even when the owner's circumstances change materially
- the risk to estates on the owner's death where there is an estate-binding clause in the contract
- the potential for harm to fall to a significant extent upon consumers who may be vulnerable as a consequence of old age, health problems and/or financial distress – for example, where they are physically or financially unable to travel to the resort, yet still cannot exit the timeshare agreement
- the relatively weak incentives for developers and owner committees to respond to consumer choices. In the timeshare or LTHP sector the number of owners or members cannot easily come down¹⁰ since the owner or member often cannot leave without finding a replacement. Thus, the incentives, for example, to offer market resale opportunities to new customers, diversify into the rental market or reduce the number of units at the resort, are not as strong as they might be

How might the exit issues be fixed?

1.30 Finding remedies to address each exit issue is likely to be difficult. Industry initiatives may help. However, the legal complexities, jurisdictional issues, and the need to take court action mean that there is little scope for consumers to help themselves, in addition to creating a significant degree of uncertainty as to the protection consumers have when trying to exit timeshare.

¹⁰ In some cases, it seems that numbers can only go down where the owner / member is declared bankrupt or where they die and their estate is or becomes insolvent.

- 1.31 There is, however, a potential remedy that appears to cut through the complexity and uncertainty: the introduction of some form of legal, mandatory, right to exit. We have formed a tentative view – only tentative due to the limitations of our project (paragraph 1.3) – that this may provide a solution to the exit problems found in this industry. To be effective, a legal right to exit would need to have retrospective effect, applying to **all** existing agreements, not just new ones. Preferably, due to the cross-border and multi-jurisdictional nature of the product, it should apply EU-wide.
- 1.32 Where resorts are popular, and the resale market is healthy, owners or members would be unlikely to seek to exercise a right to exit. If they wish to leave, they would be best to try to find a buyer. However, for others, where resale prospects are poor, a legal right to exit would potentially:
- allow them to exercise freedom of choice
 - deal with the most serious exit issues (such as perpetuity and estate-binding), without the need to find individual solutions for each issue
 - provide clearer rights, so exit would not depend on very specific individual circumstances, subjective criteria, or someone's sole discretion, reducing the likelihood of disputes going to court
 - improve the competitiveness of the market and incentivise developers and owner committees to adapt to changing market conditions: to compete to attract new consumers and retain existing ones if they wish to remain in operation
 - increase confidence in the product and reinvigorate the secondary market (by reducing the risk associated with timeshare ownership or LTHP membership)
 - reduce the opportunity for resale scams that take advantage of consumer desperation
- 1.33 The main objection to a right to exit is that the remaining owners might face higher management fees if the pool of owners were to shrink. However, this would likely only occur at resorts where a significant proportion of owners exited and where developers or owner committees were slow or unable to fill vacant units / weeks.
- 1.34 These remaining owners, though, would also be able to exercise the right to exit. Developers and owner committees would thus have strong incentives to fill vacancies or to take other action to make their resorts more attractive to

consumers and to adapt to market conditions (for example offering shorter-term products or making units / weeks available to the rental market).

1.35 We also question the cross-subsidisation that appears to occur in the market: currently consumers who are enjoying the product are being subsidised by consumers who get no usage from it and would dispose of it if they could. It is our view that a right to exit would lead to a more efficient, competitive market through a better matching of the costs and benefits of usage of the product, particularly if associated with more flexible, active marketing of the released capacity.

1.36 Further consideration, though, would have to be given to the detail of what a legal right to exit would look like, in what circumstances it could be exercised and whom it is intended to benefit. For example

- whether it would allow for notice periods, exit payments, and/or break points
- how much of a contract might elapse before the right to exit could be exercised, and/or whether short-term contracts (for example up to ten years) would be excluded
- whether there should be enhanced exit rights for owners or members in particular circumstances (perhaps where they have died, or have serious ill health or financial difficulties)
- which types of owner or member would be entitled to exercise the exit rights (for example, only **consumers**, not businesses)
- whether the exit right should be completely unfettered – in particular because the owner would generally have already paid a substantial sum as capital outlay in order to take up ownership in the first place

Getting these details right would be essential in order to strike the right balance between the interests of different owners or members (and businesses) and ensure that a legal change did not, inadvertently, bring about a net reduction in total consumer welfare.

1.37 Late in the project, we became aware that another jurisdiction has, this year, taken this path. Israel has introduced a legal right to exit for all existing as well as new timeshare owners. The Israeli law, which will come into force on 24 September 2014, prohibits the charging of a cancellation fee but requires the timeshare owner to pay the next year's management fee.

- 1.38 It is also the CMA's view that, either as part of a new 'legal right to exit' or as a new standalone measure, no UK consumer's estate should be bound by an ongoing liability for a timeshare or other LTHP beyond death, where all beneficiaries have disclaimed. In these circumstances the executor of the will or administrator of the estate should be able to disclaim the liability and distribute the remaining estate without restriction or challenge.

Recommendations

- 1.39 For BIS and the European Commission, we have the following recommendations:

- They should consider commissioning further research, ideally at the European-wide level, for example:
 - a survey of owners, to understand better how their timeshares were sold to them, if they have considered exiting timeshare, any barriers that they encountered when trying to exit, how many of them are affected already by exit issues, how many might become affected over the coming years, and what the owners' attitudes to exit issues are or would be in certain scenarios, and
 - a survey of developers and owner committees, to better understand what they are doing already to address the issues, how they have responded to date to consumer requests to exit, any constraints on supply-side substitution (especially diversification into the rental sector), the limitations to reform that developers and owner committees may impose on each other, how discretionary exit schemes have been applied, and how many owners have exited using these schemes and how many have been refused

Further research would help to quantify the harms, and so help to inform a decision on the appropriate and proportionate remedy and its expected impact.

- Subject to the findings of that further research, they should give further consideration to the idea of introducing some form of legal right to exit. In particular, they should explore further the part that the matters at paragraph 1.36 might play in ensuring that the legal right to exit is workable, that the interests of different owners are balanced, and that the overall effect on total consumer welfare is not negative. This work should also examine Israel's experience introducing a legal right to exit that is open to all existing owners.

- BIS may wish to seek Leading Counsel's opinion on estate-binding clauses and, in particular, the question of how a personal representative extricates the estate from the contract's obligations when no beneficiary wants the timeshare or LTHP and it cannot be sold or given away. If necessary, the law should be clarified to ensure that no UK consumer's estate is bound by an ongoing liability for a timeshare or other LTHP beyond death, where all beneficiaries have disclaimed.
- The European Commission should consider providing detailed guidance on its position on whether the Timeshare Directive's cancellation and other rights apply (a) when a consumer inherits and agrees to accept a timeshare following the death of the original owner and (b) when an owner agrees with a business to surrender their existing timeshare in favour of taking on a new, replacement product.

2. Setting the scene

What do we mean by 'timeshare' and 'long-term holiday product'?

- 2.1 We use the term 'timeshare' to mean any consumer product that enables the purchaser to use one or more places of overnight accommodation for more than one occupational period under a contract that lasts for more than one year. The product does not have to be called a 'timeshare' to come within this definition.
- 2.2 A 'long-term holiday product' (LTHP) gives the purchaser certain discounts or benefits in respect of accommodation under a contract that lasts for more than one year. A holiday club, for example, may give its members access to reduced price holidays at the resorts which participate in its scheme.
- 2.3 An important distinction can be made with timeshare ownership between 'deeded ownership' and 'right to use':
- deeded ownership is where legal ownership of real property is conveyed from vendor to buyer via deed
 - with right to use, the purchaser acquires the right to use property in accordance with the contract, but gains no legal title to that property

The basic timeshare model

- 2.4 In practice, timeshare may be legally structured in different ways. However, our understanding is that in a typical resort:
- A professional developer makes the initial investment to build the resort and makes the initial sales of timeshare products to consumers.
 - A professional trustee is appointed to hold the real estate on trust for the owners to ensure that the occupation rights are adequately protected for the life of the product.
 - An owner association / committee is formed, comprising representatives from the owners and the developer. This committee assumes ultimate responsibility for running the resort, setting management fees, determining future investments and making further sales and resales.
 - The committee employs a management company to assist it. This management company may be a subsidiary of the original developer. The management company will also be represented on the committee.

- The terms or rules of timeshare ownership are found in the original contract and, if applicable, in an associated constitution of the resort or club which is intended to be binding on the consumer.

2.5 Consumers may purchase the use of their timeshare in the form of:

- 'weeks', for example a fixed week at the same unit or resort every year or for a floating week within a certain time band each year (the actual week being booked in advance subject to availability), or
- 'points', which are used as a currency to book holidays; the more points the consumer has, the greater the choice of resorts, accommodation, length of stay and time of stay.

General observations on the sector¹¹

2.6 We have not carried out new research on the state of the market. From the information available to us,¹² our understanding is as follows:

- There are between 500,000 and 600,000 UK timeshare owners: almost a half of them have timeshares in Spain, 20% in the UK and 25% outside of Europe.
- The average age of these owners is around 50 to 60 years old and likely to be rising each year. Many of these owners bought their timeshares in the 1980s or 1990s.
- As time passes, some of these owners may no longer be able to enjoy their timeshare and/or may find it less affordable to keep paying management fees. They may find, though, that their contracts make little or no provision for them to exit their timeshare. Many old agreements contain in-perpetuity clauses, adding the further worry that the owner's liabilities may pass on to their children when they die. To exit their timeshare, owners often need to find someone who is willing to acquire it.
- The popularity of different resorts, and hence the marketability and value of different timeshares, varies. Overall, however, timeshare supply far exceeds demand: the number of weeks for sale is much greater than the number of weeks being bought each year. It is this difficulty exiting

¹¹ Hereafter, for ease of reading, unless otherwise specified, we use 'timeshare' to mean 'timeshare or LTHP', and 'owner' to mean 'owner or member'.

¹² Obtained from public sources, from consumer complaints and enquiries, and following correspondence with RDO and TATOC.

timeshare that presents the opportunity for resale scams,¹³ a perennial source of complaints to consumer bodies and helplines.

- Some owners have stopped paying their management fees. Consequently, some of these owners have been threatened with, or have faced, legal action for non-payment pursuant to the terms of their contracts.
- Economic conditions since 2008 – and notably the general collapse in the Spanish property market – have presumably had an adverse impact on the industry. However, the issues around perpetuity and timeshare exit pre-date the economic downturn and will likely persist regardless of improvements in the economy.
- Helping owners to exit timeshare may create difficulties for the owners who remain: unless new owners are brought in, there will be a smaller pool of owners left to pay the management fees. Possible remedies need to balance the interests both of owners who wish to exit and those who want to stay in.

What are the possible ways out of ownership?

- 2.7 Current European-wide legislation¹⁴ provides cancellation rights for consumers who have acquired their timeshare on or after 23 February 2011. Consumers are generally entitled to cancel and withdraw from the contract within 14 days of the agreement. If the trader fails to provide the consumer with a standard withdrawal form, then this 'cooling-off' period can be extended to one year and 14 days.¹⁵ However, these regulations will not assist owners who wish to exit after these cancellation rights have expired.
- 2.8 For these owners, much may depend on the specific terms of the contract that they signed when they acquired their timeshare. However, there may be some circumstances in which existing legislation provides a means for exit even where the contract (or the rules) is silent on the issue – for example, if a court finds that the contract is voidable and not binding because the developer misrepresented facts about the product at the time of sale.

¹³ There are two main types of resale scam. In the first, the scammers (acting as resellers) claim to have interested buyers for the timeshare rights. In the second, they claim to be able to get the owner out of the timeshare agreement. In both cases, the owner pays a fee for the 'service'. However, there are no buyers and the owner is not freed from the agreement. The fee is not refunded: the owner has been scammed.

¹⁴ Directive 2008/122/EC of the European Parliament and Council, implemented in the UK by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.

¹⁵ As part of the contract, consumers must also be provided with information on the conditions for terminating the contract, the consequences of termination and any liability on the consumer for any costs which might result from termination.

2.9 More generally, exit options **may** be written into the contract (and hence form a contractual right) or **may** be available at the developer's or owner committee's discretion (but with no obligation on them to accede to requests). Typical exit routes may include:

- sale of the timeshare back to the timeshare developer or owner committee
- payment of an exit fee or other sum to the developer or owner committee to take the timeshare back
- hand over (or surrender) of the rights to the developer or owner committee at no cost to either party
- resale via a third party
- private resale (where the owner finds a buyer themselves)

2.10 Where each of these exit routes is available, there **may** however be restrictions:

- on who can exit, for example only owners who: have reached a certain age (for example over-75), or are infirm, or are unable to obtain insurance, or are bankrupt or suffering financial hardship, or have become sole owner following the death of a dual owner¹⁶
- on who the owner can sell to or through, for example only to the developer, or to existing members, or to the owner's family, or through a resale company specified by the developer or owner committee
- on how the exit can be achieved, for example only by applying to leave within a set time period each year, by filling out the correct paperwork, by applying in writing, and/or by using a notary

2.11 Owners who wish to exit timeshare are sometimes offered exchange, transfer or 'upgrade' products as an alternative.¹⁷ For example, for a fee, they may exchange their timeshare weeks for points, or an overseas resort for a UK one, or their existing agreement for a short-term one. Such products may be good for owners who want a more flexible product, or one that fits their current circumstances better, or which allows them to ease out of timeshare ownership in a few years' time. They may also be more attractive

¹⁶ We are not aware of these types of restrictions applying to private or third party resale.

¹⁷ These products typically involve consumers pooling their weeks and so increasing their range of holiday options. Exchange systems are usually operated by a third party provider.

to new owners and so easier to sell.¹⁸ However, timeshare exchange and other similar products are not timeshare exit. As a result, such products are not suitable for owners who are no longer using their timeshare and want to exit now.

2.12 If a significant number of owners want to exit the timeshare scheme, and if the constitution allows, there may be an option to voluntarily close down the scheme (so all the owners exit at the same time).

2.13 Finally, a number of other potential ways to exit timeshare have been suggested on web forums, for example:

- walk away from the contract, stop paying the yearly management fees and ignore letters asking for payment
- create a limited company, transfer ownership of the timeshare to it, and then dissolve the company
- bequeath the timeshare to the developer in one's will

Each of these examples has shortcomings and may be ineffective. In the first, the owner risks facing litigation and may not escape liability for fees. In the second, the timeshare scheme may not allow, or the developer or owner committee may block, the transfer.¹⁹ With the third, as we explain later, the bequest may be declined.

How is the industry responding to calls for better exit routes?

2.14 The industry appears to recognise, and RDO and TATOC certainly recognise, that timeshare exit has become a major issue:

- The Timeshare Association (Timeshare Owners and Committees), or TATOC, and the Resort Development Organisation (RDO) set up an expert panel in 2011 to look into exit routes.
- TATOC has committed, in its five-year strategic plan 2013-2017, to discuss the issue of timeshare exit with committees and resorts and to work with them to develop solutions. It has had some success in its negotiations with a few owner-run resorts. In particular, it has secured an agreement with one developer to end the use of perpetuity clauses and

¹⁸ These products must also comply with Timeshare Directive requirements, for example regarding provision of documentation and cooling off periods.

¹⁹ However, if a standard contractual term, this would be assessable for fairness under the Unfair Terms in Consumer Contracts Regulations 1999.

to secure exit rights when financial hardship, ill health, the death of one dual owner or an inability to get insurance are an issue.

- The RDO requires all of its members to have an exit policy / strategy that ensures that cases in which factors such as age or ill-health are an issue are dealt with sympathetically. In June 2013, RDO introduced a further amendment to ensure that an individual inheriting a timeshare will be able to surrender it without facing a financial penalty and that an owner can relinquish their ownership on proof of bankruptcy.
- Some developers have also been introducing a variety of products in an attempt to attract new owners and broaden the appeal of timeshare. For example, short-term products with terms for three to ten years have been launched and points systems and exchange schemes have been introduced and expanded.
- TATOC's affiliation scheme and RDO's membership scheme try to help consumers identify trustworthy resale companies. TATOC also provides information about cold-callers who should be avoided.
- In response to market demand, developers are rarely using perpetuity in today's contracts.

2.15 Overall, these developments (which are ongoing) are encouraging. However:

- In many cases there seem to be restrictions on who can exit and some products may make timeshare more attractive but only address the issue of exit indirectly.
- Exchange products are not cost-free and may only provide for an exit route many years down the line, which will be of no benefit to owners who can no longer use a timeshare now.
- Commitments are not always written into existing contracts or constitutions and hence the consumer is reliant on the developer's or owner committee's discretionary policy.
- The expert panel, while helping to raise awareness and improve understanding, did not produce concrete proposals that all sides of the industry could agree on.
- TATOC's and RDO's signposting to trustworthy resale companies apart, we are not aware of any other efforts which might free up the secondary market to make it easier to dispose of timeshare through resale.

- We cannot comment on how widely available the initiatives are or on how quickly they are being introduced. We are aware of a developer and an owner committee acknowledging that their changes will not satisfy the likely demand for exit.
- As we explain in the section on legal issues, we have concerns that some businesses may be continuing to use contractual terms that the CMA would consider potentially unfair to consumers.

3. Discussion of relevant legal issues

Note:

- **The legal issues that we discuss in this section of the report are particularly complex. The section is intended only to set out the main legal issues concerning consumers and timeshare exit, providing the CMA's current, provisional views on the relevant legal provisions, including those it can enforce, for the purpose of considering whether the market is working well for consumers. It does not provide guidance.**
- **The section is provided in general terms and is not a substitute for independent legal advice. Individual businesses and consumers are recommended to take their own legal advice on any of the issues arising.**

Overview of relevant law

Relevant UK consumer protection law²⁰

3.1 We have focussed on the following key areas of law:

- Consumer protection law, in particular
 - **The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).**²¹ Under the UTCCRs, a contractual term (which has not been individually negotiated) may be unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. For example, a term may be unfair where it has the potential to inappropriately exclude or limit a consumer's legal rights or remedies in relation to a contract. Where a term is found to be unfair, that term is not binding on the consumer.

The UTCCRs apply the test of fairness to contractual terms in existence on or after the date that the Unfair Terms in Consumer Contracts Regulation came into force in the UK (1 July 1995). The

²⁰ In the analysis that follows, we focus on UK law unless otherwise specified. The Regulations that we refer to, however, have been transposed from EU Directives. Substantially similar Regulations are therefore in place in other European Economic Area countries.

²¹ Under the proposed provisions of the Consumer Rights Bill, the UTCCRs will be revoked and the rules on unfair terms in consumer contracts will form part of the new Act. The Bill re-implements the EU Unfair Terms Directive (93/13/EEC) into UK law, with some new content, clarifying the legal approach to unfair terms.

UTCCRs do not have retrospective application. However, the CMA considers that, where a business²² continues to enforce or rely upon a contractual term **after** that date, it may be arguable that the test of fairness still applies, irrespective of the date the contract was agreed.²³

It is **possible** therefore that the UTCCRs could apply where consumers bought their timeshare or long-term holiday product (LTHP) in the 1980s or early 1990s (or before), where the business continues to enforce or rely upon the relevant contractual terms post-commencement of the UTCCRs. However, the assessment of unfair terms will take into account the specific nature of the product in question and all the circumstances existing at the time the contract was concluded, in addition to all other terms of that contract.

- **The Consumer Protection from Unfair Trading Regulations 2008 (CPRs).**²⁴ The CPRs prohibit unfair commercial practices before, during and after a contract is made between a consumer and business.²⁵ The CPRs apply to commercial practices occurring after the CPRs came into force (26 May 2008). In other words, there is no retrospective application (although the CPRs will apply to **conduct** occurring after that date, regardless of when any underlying contract was entered into).

Where a business is using and/or recommending standard contractual terms that are likely to be considered unfair under the UTCCRs, this may potentially be generally prohibited as an unfair commercial practice under the CPRs.²⁶

- **The Unfair Contract Terms Act 1977 (UCTA).**²⁷ UCTA applies to contractual terms that purport to restrict or exclude liability. UCTA limits the extent to which liability for breach of contract, negligence or other legal breaches can be avoided by means of contractual

²² In the UTCCRs, businesses are referred to as 'seller or supplier', meaning any natural or legal person who, in contracts covered by the Regulations, is acting for purposes relating to their trade, business or profession, whether publically or privately owned.

²³ This is one potential interpretation of the UTCCRs. There are several alternative outcomes that a court could conclude and the question can only be finally settled by a judgment of the court. However, our view is that the date of the original agreement cannot on its own make terms immune from challenge for as long as the agreement remains in force.

²⁴ These Regulations implement the EU Unfair Commercial Practices Directive (2005/29/EC).

²⁵ In the CPRs, businesses are referred to as 'traders', meaning any natural or legal person who in relation to a commercial practice is acting for purposes relating to their trade, craft, business or profession. The regulations also apply to anyone acting on their behalf.

²⁶ CPRs, regulation 3(3).

²⁷ Under the proposed provisions of the Consumer Rights Bill, UCTA will be partially amended and its rules relating to consumer contracts will form part of the new Act, as merged with those in the UTCCRs.

provisions. Certain types of liability may be excluded or limited in a consumer contract, but only in so far as this satisfies the test of 'reasonableness' in the Act.

UCTA will therefore likely apply to: terms allowing the business to perform the contract in a way that is substantially different to what the consumer reasonably expected; exclusive governing law / jurisdiction clauses; and terms that seek to exclude statutory remedies for breach of contract, where those terms have the effect of hindering the consumer's ability to exercise their legal rights.

UCTA came into force on 1 February 1978 and will not apply to contracts made before that date.²⁸ In addition, where a timeshare agreement creates, transfers or terminates an interest in land (for example, a leasehold interest), UCTA will not apply to the contract.²⁹

- **The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010** (the 'Timeshare Regulations').³⁰ They apply primarily to contracts made in the UK, but may still apply if the business³¹ is selling timeshare to consumers in the UK or even if, strictly, the contract was entered into with a UK consumer abroad.

In summary, the Regulations require businesses to give consumers specified pre-contractual information and a 14 day unconditional right of withdrawal, beginning on the later of the date the contract is concluded or the date on which the consumer receives a copy of the contract (although this period may be extended to up to one year and 14 days if a 'standard withdrawal form' is not provided to the consumer).³² Payments cannot be requested by businesses during this 'cooling off' period. Should the business fail to provide the consumer with the specified information or draw the attention of the consumer to their right of withdrawal before entering the contract, the agreement may be unenforceable against the consumer. Outside the cooling-off period, where the agreement is for a LTHP, these Regulations allow the consumer to terminate by giving notice no later than 14 days after the date on which they receive a request for payment of an instalment towards the cost of the holiday product.³³

²⁸ UCTA, section 31.

²⁹ UCTA, Schedule 1, paragraph 1(b).

³⁰ These Regulations implement European Directive 2008/122/EC.

³¹ In the Timeshare Regulations, businesses are referred to as 'traders', meaning any person acting for purposes relating to their trade, craft, business or profession. The regulations also apply to anyone acting on their behalf.

³² Timeshare Regulations, regulation 21.

³³ Timeshare Regulations, regulations 24 and 26.

The Regulations apply to contracts entered into on or after 23 February 2011.³⁴

- General contract and common law.
- 3.2 Examining the law as it applies to timeshares and LTHPs is, however, subject to 'conflict of laws' issues. Given that the business and consumer may reside in different countries, and the resort may even be located in a third country, there may be questions around which law governs the contract and which courts have jurisdiction to hear disputes arising from it.
- 3.3 In addition, given that the legal structures of different products may vary, there may be questions around how the law treats the underlying product – for example, it may be that a timeshare or LTHP is in fact a tenancy agreement, an unincorporated association, a purpose trust, or a purely contractual arrangement.³⁵ In each case, the law may treat the timeshare or LTHP product differently.

Governing law and jurisdiction

- 3.4 European law places significant limitations on the governing law and jurisdiction that businesses can apply to consumer agreements such as timeshare.
- 3.5 In relation to **governing law**, under the Rome I Regulation, parties can expressly choose which law applies to the contract for contracts concluded on or after 17 December 2009. However, in consumer contracts, as the consumer is considered the weaker party, choice is limited. A choice of law term cannot generally deprive consumers of the protection afforded to them by mandatory provisions of the law of the country where the consumer has their 'habitual residence' (that is, where they live most of the time). For example, where a Spanish company sells timeshares to UK consumers on holiday in Spain, where that company pursues or directs business activity in/to the UK, it is arguable that the contract cannot deprive consumers of the mandatory consumer protection rights they have under UK law. If no choice of law is made by the parties, the consumer contract will be governed by the law of the country where the consumer lives most of the time, provided the business pursues commercial or professional activities in that country or

³⁴ Where UK consumers have agreed contracts from 12 October 1992 and before 23 February 2011, the Timeshare Act 1992 (as amended) will likely apply.

³⁵ This is only an indicative list and is not intended to be a comprehensive list of all the legal structures that timeshare may possibly take.

directs such activities to that country.³⁶ A choice of law term will be assessable for fairness under the UTCCRs (see paragraph 3.9).

3.6 Note that, for contracts concluded after 1 April 1991 but before 17 December 2009, the Rome Convention will determine governing law. Broadly speaking, under the Convention, the parties to a consumer contract have freedom of choice as to governing law, but that choice should not deprive a consumer of the mandatory legal protection of his country of habitual residence. Where no choice is made, the governing law shall be that of the consumer's country of habitual residence (instead of the country with which the contract is most 'closely connected' for non-consumer contracts).³⁷

3.7 In relation to **jurisdiction**, the Brussels Regulation allows the consumer to bring proceedings before the courts of the EU member state where he lives and to be sued **only** in those courts when specific conditions are satisfied. Articles 15(1)(c) and 16 of the Regulation provide that a consumer may sue a business with whom he has concluded a contract in his national courts, and be sued only in those courts, even if the business is domiciled in another EU Member State. This is subject to the condition that the business pursues commercial activities in the consumer's home state or directs such activities to that state (that is, objectively speaking, the business envisages doing business and concluding contracts with consumers in that state) and the contract at issue falls within the scope of such activities.³⁸ This is likely be the case where a business is selling timeshare to EU consumers.

3.8 Where a contractual term purports to apply the law of a country outside the UK, UCTA will also apply a test of reasonableness to that contract term where:

- in forming that contract, the consumer was habitually resident in the UK and the essential steps necessary for making that contract were taken there (whether by the consumer or by someone else on their behalf), and/or
- if it would appear to the court that the term has been imposed wholly or mainly for the purpose of evading UCTA.³⁹

³⁶ Note that where a service is provided exclusively in a country that is not the consumer's habitual residence, these provisions will not apply and governing law will be determined in accordance with the parties' choice.

³⁷ However, these provisions will not apply where a service is being provided exclusively in a country that is not the consumer's habitual residence.

³⁸ See *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09).

³⁹ UCTA, section 27(2).

Therefore, where, for example, a Spanish company concludes a contract with a UK-based consumer, if the purpose of a foreign governing law term is mainly to deprive the consumer of his UK law rights, UCTA may still apply to the contract.⁴⁰

- 3.9 In any event, where contractual terms stipulating foreign governing law and jurisdiction over consumers purport to be exclusive, there is also significant potential for unfairness under the UTCCRs.⁴¹ The effect of such a term is that the consumer will be hindered from exercising their legal rights in their local courts where disputes arise. This may be the case even where governing law or jurisdiction is confined to the UK, for example, where a consumer based in England is bound by Scottish governing law and jurisdiction. Consumers must be free to exercise their legal rights and remedies without unlawful obstacles. The UTCCRs apply notwithstanding any contract term that purports to apply the law of a non-member state, if the agreement has a close connection with a member state.⁴²
- 3.10 In summary, governing law and jurisdiction clauses and their purported effects should be treated with great caution by businesses intending to rely on them and consumers who may be able to argue that such terms are unenforceable. It is our view that businesses would be wise to treat (a) the law of the consumer's country of residence as applicable and (b) that country's courts as having jurisdiction over the agreement.

Key 'exit issues' and the legal requirements on timeshare businesses

In-perpetuity agreements and long-term agreements

- 3.11 An agreement 'in perpetuity' is one that does not have a specified end-date and is therefore capable of continuing indefinitely, or alternatively contains a term that expressly provides for this effect.
- 3.12 Other agreements we have seen are stated to last for a specified number of years (for example 80 years) or until a specified future date (for example, 1 June 2050). We have also seen contracts that allow for an extension – for example, a timeshare right may last until 1 June 2050 and then, if a minimum proportion of owners in a timeshare 'club' agree (for example at least 75% of them), will continue for another 80 years.

⁴⁰ Note that the provisions in UCTA relating to contractual liability to consumers do not extend to contracts relating to the creation, transfer or termination of interests in land (but will still apply where the consumer's right to use timeshare arises from, for example, a club membership),

⁴¹ UTCCRs, Schedule 2, paragraph 1(q).

⁴² UTCCRs, regulation 9.

- 3.13 As a general starting point, there is no clear rule under UK contract law that prevents a contract from continuing in perpetuity, or for any particular length of time, if that is actually what the parties have agreed.
- 3.14 However, it does not appear to be the modern approach of the courts to treat contracts of indefinite duration as being perpetual in nature. Using the twin techniques of construction and implication, the courts may cut down perpetual contracts and find instead that they are contracts for indefinite periods, albeit terminable upon notice being given. For example, the Court of Appeal has held that a contract for the supply of lamp oil as needed was terminable on notice because it might be the case that no oil was needed at all at a particular time.⁴³
- 3.15 A significant question is whether a court would agree that a consumer may withdraw from a timeshare agreement that does not expressly provide for this eventuality:
- If, as a matter of construction, the parties have intentionally and expressly set up a contract to last in perpetuity, or for a very long period, then a court may be unwilling to imply a term that permits one of the parties to terminate the contract on notice. However, in such a situation there is likely to be a robust argument (in particular given the nature of timeshare) that a perpetuity clause is unfair (see paragraph 3.16). For example, in the absence of adequate pre-contract explanation from businesses (as required by the CPRs), consumers may not fully understand the serious implications of what they are agreeing to.
 - Where the contract is silent on duration, a court may well imply a term allowing termination on notice (unless there is clearly no basis for such an implication given the circumstances and other express contractual terms).⁴⁴
- 3.16 Regardless of whether or not the parties have made a positive decision to make the agreement perpetual or long-term, the relevant term may still be considered unfair under the UTCCRs. For example, where consumers take on obligations that will last very far into the future, it may be difficult for them to assess when they enter into the agreement what the whole-life costs and benefits will be; also, their circumstances may change in unforeseen ways, rendering continued use of the product / service burdensome.

⁴³ Crediton Gas Co v Crediton Urban Council [1928] Ch 447.

⁴⁴ See Staffordshire AHA v South Staffordshire Water Works [1978] 1 W.L.R. 1387.

- 3.17 It may also be the case that the consumer is already elderly when they enter into the agreement, making it potentially unfair for the consumer to be bound to such a lengthy term. Furthermore, the court is likely to have regard to such factors as: whether the consumer has already paid a substantial sum for their timeshare, whether the business that drew up the contract has exploited consumers' behavioural biases, or even mis-sold the contract, and all of the other terms and circumstances of the contract which may lead to the conclusion that the consumer, if properly advised, would not have agreed to the perpetuity / long-term clause if given the choice.

In summary, it is our view that there may be scope for in-perpetuity and long-term clauses to be challenged for unfairness under the UTCCRs, particularly where the end-date is open-ended or where the agreement is likely to expire after the consumer's own death. In our view, recommendation of or reliance on unfair terms may also be an unfair commercial practice under the CPRs.

Restrictions on which owners can leave

- 3.18 Some timeshare schemes, either as a contractual right or at the developer's or owner committee's discretion, may allow owners to exit, but only in very limited, narrow circumstances. The key question is whether a court would allow the consumer to exit the contract in a **wider** range of circumstances and if the relevant contractual terms create a significant imbalance between parties' rights and obligations under the contract, to the detriment of consumers.
- 3.19 It is our view that these sorts of restrictions may be open to challenge under the UTCCRs not least because, when agreeing to potentially long-term contracts such as timeshare, consumers tend to overestimate how often, or for how long, they will derive benefit from that product / agreement. Unforeseen circumstances may also make continued use of the product impractical or unaffordable.⁴⁵ For example, a court is likely to consider it relevant that, over time, people are highly likely to eventually face circumstances such as illness, injury, loss of livelihood, financial hardship or old age, which makes travelling to the property impractical or even impossible (for instance some people are no longer able to travel or obtain insurance due to ill health). There are therefore likely to be other

⁴⁵ See, in particular, paragraphs 164, 171, 174 and 175 of the Court's judgment in *Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch) at www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2011/1237.html&query=ashbourne&method=boolean.

circumstances in which a consumer ought to be able to exit the contract, that are not reflected in terms which restrict exit to very specific circumstances.

- 3.20 Further, consumers ought not to be prevented from exiting the contract (and suing for damages, if relevant) where the business commits a fundamental breach of the contract. Terms which restrict consumers' termination rights in these circumstances are likely to be considered unfair under the UTCCRs and not enforceable against the consumer.
- 3.21 Where a contract term is 'unfair' under the UTCCRs because it unfairly restricts the circumstances in which the consumer can exit the contract, then businesses that purport to rely on it (making consumers continue to pay management fees for instance) may commit an aggressive, misleading or otherwise unfair commercial practice under the CPRs.⁴⁶
- 3.22 Where a business has signed a consumer up to a significantly long-term or perpetual agreement with no clear termination provision, failure to have in place at least a discretionary exit policy may, in some circumstances, be considered unfair under the CPRs, as an aggressive and/or generally unfair commercial practice. In the context of timeshare, given the age base of consumers and the often significantly long length of agreements, we would consider it potentially unfair for businesses⁴⁷ not to give proper consideration to reasonable exit requests where a change in circumstances makes it impossible or impractical for the consumer to continue to enjoy their timeshare.
- 3.23 A contractual term will also be assessable for unfairness under the UTCCRs where it gives businesses the right to dissolve the contract on a discretionary basis, where the same facility is not granted to the consumer.⁴⁸

In summary, it is our view that narrow restrictions on which owners can leave timeshare may be open to challenge under the UTCCRs and CPRs.

⁴⁶ Office of Fair Trading v Ashbourne Management Services Ltd and others [2011] EWHC 1237 (Ch).

⁴⁷ We recognise that there may be situations where a consumer's inability to exit timeshare stems from a refusal by the owner committee in an owner-run resort. However, this does not mean that consumers lose their statutory protection in these circumstances. Where owner committees are acting in accordance with rules and conditions placed upon them by developers or management companies (or where those parties sit on or influence the decisions of the owner committee), then consumer protection law will still be applicable. It is also arguable that the owners sitting on the committee are in fact acting for business purposes themselves (that is, running the resort), or, are acting on behalf of the developer (and are therefore a 'trader' for the purposes of consumer protection legislation).

⁴⁸ UTCCRs, Schedule 2, paragraph 1(f).

Restrictions on how owners can leave

- 3.24 Some timeshare schemes, either as a contractual right or at the developer's or owner committee's discretion, allow owners to exit, but only if specific conditions are met (for example, if the timeshare is sold through a particular resale company of the business's choice or if the owner uses a notary).
- 3.25 It is our view that terms that restrict **how** owners can resell or dispose of their timeshare have significant potential for unfairness under the UTCCRs and may therefore not be binding on the consumer.
- 3.26 In considering whether such a term is unfair, a court is likely to have regard to whether the term:
- requires the owner to sell their rights through a single resale company. Businesses may, of course, **recommend** a particular service provider, but **insisting** that one provider is used may put the consumer at a considerable disadvantage and limit the likelihood of disposal
 - requires the owner to sell / transfer their rights **only** to a narrow pool of potential buyers, for example only to other existing owners and/or family members and/or the developer. Given the current state of market, this may put consumers at considerable disadvantage
- 3.27 In the situation where restrictions are not expressly written in the contract or any associated club / resort constitution, but have been introduced as the business's standard policy when dealing with owners' requests to exit (for example, where this is done over the telephone), the UTCCRs may still apply to those oral policy terms.⁴⁹
- 3.28 Further, the business's practices may be considered 'aggressive' under the CPRs, in that the business exploits their position of power over the consumer to pressure them into selling through a particular party or to a particular type of buyer.⁵⁰ In these circumstances the consumer may be pressured to take a decision to sell on unattractive terms or on conditions that they would not otherwise have agreed to.
- 3.29 Finally, the business's commercial practice may also be considered generally unfair under the CPRs if it contravenes the requirements of professional diligence and materially distorts the behaviour of the average consumer.⁵¹ This could be the case where, contrary to the principle of good

⁴⁹ See Unfair Terms Directive, recital 11.

⁵⁰ See CPRs, regulation 7.

⁵¹ CPRs, regulation 3(3).

faith, the business's unduly restrictive discretionary exit policy (or contractual term to that effect) pressures consumers on perpetual or long-term agreements into staying or appreciably impairs the consumer's freedom of choice as to whether, or on what terms, to dispose of their timeshare.

In summary, it is our view that restrictions on how owners can leave timeshare are readily open to challenge under the UTCCRs and CPRs.

Inheritance

What happens to a timeshare upon death?

- 3.30 As we discussed in Section 2, timeshare may take different legal forms. In broad terms, timeshare may be either deeded (where the consumer owns a legal interest in the property, for example a leasehold interest) or a contractual right to use, without any legal title to the property.
- 3.31 Upon death, we understand a deeded leasehold interest is considered to be personal property, and as such, will form part of the deceased's estate.
- 3.32 However, the position for contractual timeshare rights is not so straightforward. The starting point of any analysis here is the common law position that contractual liabilities may not necessarily terminate on death.
- 3.33 In considering whether a timeshare agreement expires on the death of the consumer, a court is likely to consider whether it is in some way a 'personal contract', which will be subject to the implied condition that the contract ends on the death of the party due to perform it.⁵² The classic example of such a contract is where an artist is contracted to paint a portrait, but then dies before it is started. In such a case the artist's estate is unlikely to be bound to complete the commission. It is arguable that a timeshare, because it is a contract to use a particular resort to suit the personal tastes of **that** consumer, is also a personal contract and the death of that consumer may lead to the end of the contract. However, there is no decided case on this and consideration will be given to the express terms and circumstances attending the conclusion of the contract. There is academic opinion to suggest that, in relation to a contract to go on holiday, the death of the traveller may frustrate the contract.⁵³
- 3.34 Where a contract **does** remain in force after death, the contractual rights and obligations of the deceased pass to their estate. In these circumstances, it

⁵² See *Hall v Wright* (1858) E.B. & E.746, 793.

⁵³ G.H. Treitel, *Frustration and Force Majeure*, Sweet & Maxwell, 1994.

falls to the executor of the will or administrator of the estate (hereafter, we call both 'personal representatives' or 'PRs') to perform the contract on behalf of the estate (they are not **personally** liable, though).⁵⁴ We will return to this at paragraph 3.51.

Will beneficiaries be liable for the timeshare upon the death of the owner?

- 3.35 The important point to note here is that the responsibility for a timeshare (or to fulfil the terms of the contract) does **not** pass automatically from the deceased to the beneficiaries of the will or heirs to the estate (hereafter, 'beneficiaries').
- 3.36 As stated above, a deeded leasehold interest is considered to be personal property, and as such, will form part of the deceased estate. It can therefore be inherited, should the beneficiary elect to accept the gift and its associated obligations. In relation to contractual right to use timeshares, however, the position is more complicated.
- 3.37 The **benefit** of a contract is a 'chose in action' and, as such, may also be inherited. However, there is the common law 'rule against assigning contractual obligations'. Here, the law is clear that the **burden** of a contract **cannot** be assigned.⁵⁵ The courts will simply hold that this cannot be done.
- 3.38 The rule against assigning contractual obligations is sometimes confused with the rule that the burden of the contract may not be transferred without the consent of the other party. They are, in fact, different rules. At law, assignment is the term used to describe the transfer of a **right**. There can be no 'assignment' of obligations / burdens. The transfer of contractual obligations is actually a '**novation**'. Rather than transfer obligations, a novation replaces the old contract between the outgoing party and the remaining party with an identical new one between the new, incoming party and the remaining party. A novation is usually effected by preparing and executing a formal novation agreement, but can in fact be made without writing (that is, by the conduct of the parties).
- 3.39 However, whilst contractual obligations cannot be assigned in a strict legal sense, one must also consider the contractual **principle of 'mutual benefit and burden'**, whereby one cannot take the benefit of a contract without assuming responsibility for a connected burdensome obligation. Therefore, as a matter of legal principle, it is arguable that, should a consumer choose

⁵⁴ *Wentworth v Cock* (1839) 10 A. & E. 42.

⁵⁵ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] UKHL 4.

to take the benefit of a right to use timeshare (that is, they start to use it), they will not be able to evade the obligation to pay for it.

3.40 In summary, in the light of the rule against assigning contractual obligations, we do not see how the timeshare agreement can both survive after the death of the original party and transfer its obligations to the deceased's beneficiaries, without a new agreement at the point the beneficiary elects to accept it from the PRs and the business agrees to accept the new party as a suitable member of the scheme or club. If there is no new agreement, assuming the beneficiary has not chosen to start enjoying the benefit of the timeshare, the existing agreement would be unlikely to bind the beneficiary, since the person who had the right to use the timeshare is deceased (subject to the terms of the contract, which will generally be assessable for fairness under the UTCCRs). In this case (and if no other party could be found to assume responsibility) it may be that it would continue and remain the responsibility of the PRs, in the deceased's estate.

3.41 It is our view that, in relation to contracts, parties cannot contract to burden third parties and pass the burden of a contract onto third parties (subject to the principle of mutual benefit and burden). Fulfilment of the contract may only become a beneficiary's responsibility if they agree to accept the gift or inheritance of the timeshare (and its obligations) or if they take on the benefit of the timeshare (for example they use the weeks or points). In such a situation it seems likely that the beneficiary will be taken to have accepted the obligation to pay management fees. However, in the light of this analysis, it is our view that the burden of a contract cannot be transferred without the creation of a **new** timeshare contract.⁵⁶ This will be important when determining the rights of the new owner (see paragraph 3.49 and 3.50).

Beneficiaries and the right to 'disclaim' an inheritance

3.42 Under UK law, we understand no person can be compelled to take a gift under a will or to inherit property from an estate where there is no valid will. It is always open to a person to 'disclaim' a gift or property – in other words, to refuse it.

3.43 However, a beneficiary cannot accept part of a single gift and refuse the rest. For example, if a bequest is for 'all my property in Malta', and that comprises a holiday home and a timeshare apartment, then it appears that the

⁵⁶ In which case the 14 day statutory right of withdrawal provided by the Timeshare Regulations will be available to the consumer.

beneficiary must take both or neither.⁵⁷ If, on the other hand, the will is constructed in such a way that the two properties are bequeathed as separate gifts, then the beneficiary can accept one and reject the other.⁵⁸ In the event of disputes, the courts would ultimately decide on the correct interpretation of the will or the application of the rules of intestacy.

- 3.44 A developer that tried to force a beneficiary to accept the bequest of a timeshare, or misled them to believe that they had no choice but to accept it, or who downplayed the financial liabilities that come with a timeshare, would likely be breaching consumer law (for example, the CPRs).

The CPRs requirement not to omit material information

- 3.45 When a beneficiary is considering whether or not to accept the inheritance of a timeshare, they may have dealings with the timeshare company (solicited or unsolicited), for example to find out more about the product and its rights and obligations (to inform their decision whether to accept).

- 3.46 In these circumstances, the CPRs are highly relevant. Under the CPRs, businesses are prohibited from engaging in unfair commercial practices and this includes any act, omission, course of conduct or representation that is directly connected with the promotion, sale or supply of a product to or from consumers.

- 3.47 In the circumstances at paragraph 3.45, a timeshare business would likely be breaching the CPRs if it:

- provided the beneficiary with misleading information, and/or
- omitted or hid the material information that the beneficiary would need to take an informed decision, and/or
- provided the beneficiary with information in an unclear or untimely manner

in each case, where the act or omission causes, or is likely to cause, the average consumer to take a decision that they would not have taken otherwise (CPRs regulations 5 and 6 breaches).⁵⁹

⁵⁷ Similarly, a beneficiary who was bequeathed two weeks' use of a timeshare would not be able to accept one week but disclaim the other – they must take both or neither.

⁵⁸ *Guthrie v Walrond* (1883) 22 Ch D 573.

⁵⁹ Further, if the timeshare business engaged in aggressive practices or failed to show professional diligence, there might be regulation 7 and 3 breaches, respectively.

3.48 In the context of timeshare, the CMA considers that relevant material information is likely to include (but is not limited to) clear and comprehensive information about

- responsibility for ongoing management fees, their frequency, how they are calculated and the likelihood of future increases
- the requirement for membership of any connected corporation, club or association and the rights and obligations of membership
- the nature of the interest that the consumer would be acquiring and any conditions upon how they would be able to use the timeshare
- how the consumer would be able to divest themselves of the timeshare and any conditions or practical restrictions that may hinder their ability to do so

The Timeshare Regulations

3.49 As stated above, where a beneficiary elects to accept the timeshare and the rights **and** obligations relating to it, we would consider that this would require the formation of a new contract (which should generally be confirmed by a formal written agreement). Strictly speaking, this novation should replace the old contract between the outgoing party and the continuing party with an identical new one between the incoming party and the continuing party.

3.50 If a novation takes place, a new timeshare contract has been formed between the parties, and so the rights and obligations of the Timeshare Regulations (and, critically, the consumer's right of withdrawal) are likely to apply – see paragraph 3.1.

In summary, inheritors of timeshares may choose whether or not to accept them. A business that forces or pressures an inheritor to accept the timeshare, or misleads them into thinking that they have no choice in the matter, would likely be in breach of the CPRs. The Timeshare Regulations will likely apply to the new contract where the inheritor accepts a right to use timeshare.

Probate / administration of estates

The personal representative's responsibility

3.51 As stated above, contractual liabilities relating to the timeshare (for example payment of ongoing management fees) may not end with the death of the

owner and, should the agreement survive the death of the owner, the personal representatives (PRs) may be liable to perform the contract. This does not mean that the PR would be personally liable (for example they do not have to pay management fees out of their own assets), but rather that they must see to the contract's obligations from the deceased's estate.

- 3.52 Debtors of an estate have priority over beneficiaries. The PRs must therefore ensure that the estate's debts are paid before distributing its assets to beneficiaries, and breaching this duty may make them personally liable.
- 3.53 We understand future or contingent liabilities are treated the same as accrued ones,⁶⁰ so the PRs must ensure that, where a contractual entitlement can be proved, provision is made for the future liabilities. If the assets of the estate are insufficient to cover all its liabilities, this may render the estate insolvent. If there is any doubt about whether an estate will be solvent (that is, whether the assets of the estate will be enough to cover its liabilities), we understand the PRs should follow the statutory order of payment in the Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999). Each category of debts (for example, costs of bankruptcy and preferential debts) should be paid **in full** before any of the lower categories are paid. If the debts in a category can be paid partly but not in full, those debts abate (reduce) in equal proportions.
- 3.54 Secured creditors (that is, a creditor who has the benefit of a security interest over some or all of the debtor's assets) will be satisfied first. Following this, bankruptcy and funeral expenses will be paid, followed by preferential debts (for example debts due to HM Revenue and Customs). Once these categories have been paid in full, payment will be made to ordinary unsecured debtors, which, in most circumstances, will include the timeshare business.
- 3.55 It may therefore be that an unsecured debt owed to a timeshare business forms part of the 'shortfall' and is not completely satisfied since there are no assets left to pay the debtor and no-one else is responsible to pay the debts. Of course, this would also mean that there are no assets left to distribute to beneficiaries.

Estate-binding clauses in timeshare contracts

- 3.56 Some timeshare contracts may contain estate-binding clauses (however, such a term will be subject to an assessment for unfairness – see paragraph

⁶⁰ See Re. Yorke [1997] 4 ALL E.R. 907.

- 3.63). If no beneficiary wants the timeshare, the PRs may, subject to obtaining a court directions order (see paragraph 3.58), need to ensure that provision is made from the estate to meet current and future liabilities – liabilities that, with timeshares, may last far into the future or even, supposedly, forever.
- 3.57 A PR faced with this situation would presumably attempt to sell or give away the timeshare. However, if the attempt is unsuccessful, there may be difficulties settling the estate (and distributing the assets).⁶¹
- 3.58 Due to the significant potential for unfairness and uncertainty that this situation creates, PRs would, in practice, be well-advised to make an application to a court for directions (and then act in accordance with them). This may result in an order for a sensible cap on future liability, or a ruling that the relevant term is not fair, and therefore not binding on the consumer's estate in any event.⁶² For example, if the future liability is quite speculative, the court may give directions requiring no, or little, retention in relation to them,⁶³ especially given that the business can try to resell or let the vacant weeks. PRs may also take out insurance to protect them against, for example, a claim that the estate has been incorrectly or prematurely distributed.
- 3.59 Finally, there is also the statutory procedure by which PRs may protect against personal liability to creditors in relation to unknown liabilities (for example, where the PRs have had no notice of the deceased's timeshare and/or associated future liabilities). Section 27 of the Trustee Act 1925 gives protection to PRs who give notice of the intention to distribute a deceased's estate. The notice requires anyone who has a claim against the estate to provide details within two months from the date of the notice. The notice is published in the London Gazette and in a newspaper local to any land in the estate that forms part of the distribution. In order to benefit from the protection provided by section 27, a PR should also conduct a HM Land Registry search and make local land and bankruptcy searches.
- 3.60 This does not appear to be a satisfactory way to secure the end of liability under a timeshare agreement and, we suspect, few non-professional PRs would know how to proceed without obtaining legal advice; they would also

⁶¹ This situation illustrates the inadequacy / lack of clarity in the law in this regard. In these circumstances, the beneficiaries may in fact be better off accepting a timeshare that they do not want. While they will become liable for the ongoing annual management fees, at least the remaining assets of the estate will not be exhausted to meet the future/contingent timeshare liabilities. This is a completely unsatisfactory choice for consumers.

⁶² Note that the court has the power to evaluate terms itself and determine whether a term of a contract brought before it is unfair. See the European Court of Justice's judgment in *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) at <http://curia.europa.eu/juris/liste.jsf?num=C-240/98>.

⁶³ See *Re. Yorke* [1997] 4 All E.R. 907.

incur costs applying to court for directions. This is also a reason why we think that a court, faced with a term that appears to have this effect on a consumer's estate, would be likely to rule that it is unfair.

- 3.61 Where PRs have any doubts about the correct distribution of estate assets, it is generally considered best practice for them to seek independent legal advice and apply to court for directions before acting.

Does consumer law provide any protection?

- 3.62 Whilst there is no decided case on this issue, the CMA's view is that there is a strong argument that, in the context of purely contractual arrangements (for example, right to use agreements or club memberships), timeshares are personal contracts, and as such, may end on the consumer's death.
- 3.63 It is also our view that estate-binding terms are open to challenge under the UTCCRs and therefore potentially unenforceable. Under the UTCCRs, the unfairness of a contractual term shall be assessed taking into account the nature of the product and all the circumstances attending the conclusion of that contract. Each case will therefore turn on its facts and the CMA cannot say for certain that a court would find a particular term to be unfair.
- 3.64 Further, it is our view that a timeshare business may be engaging in a prohibited aggressive commercial practice (under the CPRs) where they apply pressure on PRs to deplete the estate in the way described above, or require the PRs to have to go to court to unburden an estate and settle purported outstanding debts. Contractual terms with this effect would also have significant potential for unfairness under the UTCCRs.
- 3.65 In the light of this, unless the consumer expressly requests otherwise, we consider it fair for businesses to agree with consumers that the agreement ends on the death of the consumer.⁶⁴

In summary, it is possible that right to use timeshares may be regarded as 'personal contracts' and so will end on the consumer's death. Regardless of this, estate-binding terms are open to challenge under the UTCCRs and a business that applied pressure on PRs could be in breach of the CPRs.

⁶⁴ It is our view that this should be the accepted standard across the entire industry. We note here that the RDO Board adopted a rule in June 2013 that, in the event of the death of an owner, RDO members will give the deceased's beneficiaries the option either to take on the timeshare ownership or to surrender it without any form of penalty.

Damages for breach of a contract (including a failure to pay management fees)

3.66 Where an owner decides to stop paying management fees, we understand that timeshare businesses may claim that the owner is in breach of contract. In such circumstances businesses may try to:

- hold the consumer to the agreement and refuse to accept the repudiatory breach, allowing the agreement to continue unaffected and the outstanding debt to grow, or
- accept that the consumer has fundamentally breached the contract and treat it as at an end, suing for damages

3.67 Consequently, the CMA does not consider simply 'walking away' from contractual obligations to be a suitable remedy for consumers in these circumstances. In a contractual claim for damages, the measure of loss will begin with the business's loss of income from the consumer from the date of breach. Damages for breach of contract are **compensation** to the claimant for the damage or loss they have suffered through that breach. If the claimant cannot establish an actual loss they are entitled only to nominal damages.

3.68 Where the parties have agreed that, in the event of a breach, the contract-breaker shall pay to the other a **specified** sum of money, the CMA considers that such a payment may be classified as an unfair 'penalty'. Penalties are irrecoverable by law (in addition to being unfair under the UTCCRs). A payment of this type is likely to be a penalty where it exceeds a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question.

3.69 Note, however, that claimants are under a duty to take all reasonable steps to minimise and mitigate losses and are debarred from claiming for anything which is due to their neglect to take such steps. In the context of timeshare, mitigation could be achieved by the business taking active steps to re-sell or to let the timeshare to someone else.

3.70 Consideration must also be given to whether the term that the business claims to have been breached is enforceable against the consumer. For example, terms that allow the business an unfettered discretion to raise management fees to unexpected levels without a valid and transparent reason, or which require consumers to keep paying fees even after the business cancels their membership for non-payment, may give rise to a significant imbalance between the rights and obligations of the parties and may be unfair (and unenforceable) under the UTCCRs.

- 3.71 Where a precise amount cannot be stated in advance, terms must make clear to consumers how it will be set. Merely stating that rises will be 'reasonable' may not be enough; it must be obvious to the consumer what would normally be thought reasonable (for example, identifiable and verifiable costs that have to be covered, but which should not be exceeded). Any such term may be fair, though, if consumers are free to escape its effects by ending the contract without suffering any penalty or otherwise being left worse off.

In summary, businesses should be mindful that the damages they can claim from owners who are in breach of contract are compensatory, not punitive. There cannot be a breach of contract by a consumer where the relevant term is unfair and unenforceable under the UTCCRs.

Exit payments and notice periods

- 3.72 In some timeshare agreements, there may be terms that provide for an exit payment to be paid by an owner to the developer or owner committee to release the owner from the contract (and all its rights and obligations). In some situations, there may be a notice period which runs from when the owner gives notice of their wish to be released from the contract to the time when that release takes effect.
- 3.73 In principle while these could be fair terms, they would require careful assessment for fairness under the UTCCRs. The factors that a court may have regard to are likely to include:
- the circumstances in which the term was concluded and the way it is being used
 - whether the payment is excessive and more than a reasonable pre-estimate of the loss. It is our view that any payment representing more than a fair and reasonable notice period would have significant potential for unfairness, as it is the company's responsibility to mitigate losses by trying to resell or rent out the returned weeks
 - whether the term allows the consumer to cancel the agreement at any time, but leaves the consumer liable for future payments. We would consider such terms to be unfair, as the consumer is substantially deprived of the benefit of cancellation
 - whether the term includes an over-long cancellation notice period in a contract which otherwise continues indefinitely. Consumers entering such contracts normally expect to be able to end it a reasonable time

after they decide they no longer want or can no longer afford what is provided under it

- 3.74 The UTCCRs are concerned with the intention and effects of terms, not just their mechanism. If a term has the effect of an unfair penalty, it will be regarded as such, and not as a 'core term' (which may be assessed for fairness only in a limited way).⁶⁵ Therefore a penalty is unlikely to be capable of being made fair by transforming it into a provision requiring payment of a fee for exercising a contractual option.
- 3.75 Similarly, we consider that, where businesses seek payment of excessive or punitive cancellation fees in reliance on unfair terms, this may be aggressive and/or in contravention of the requirements of professional diligence and materially distorting the behaviour of the average consumer (namely, by pressuring them to agree to the unfair payments)⁶⁶ – potential CPRs breaches under regulations 7 and 3(3) respectively.
- 3.76 Finally, in some circumstances, a business's use of a discretionary exit policy may be considered an aggressive practice under the CPRs and/or to contravene the requirements of professional diligence and materially distort the behaviour of the average consumer. For example, this could be the case where, having tied the consumer into a long-term agreement with no clear termination provision, the business offers a very limited or specific exit policy. Where the business makes excessive or unreasonable demands for payment or notice in return for exit, putting pressure on the consumer to retain a timeshare they do not want or cannot afford, or dispose of it on unfavourable terms that they would not otherwise have agreed to, this practice may be unfair.

In summary, while exit payments and notice periods can be fair in certain circumstances, businesses should check that their terms do not have potential for unfairness (under the UTCCRs) and that their conduct towards consumers is not unfair (CPRs).

Exchange products in lieu of exit

- 3.77 Owners who wish to exit timeshare are sometimes offered exchange, transfer or 'upgrade' products. For example, for a fee, they can enter a new agreement, which replaces their old one.

⁶⁵ UTCCRs, Regulation 6(2).

⁶⁶ See *Ashbourne Management Services Ltd and others* [2011] EWHC 1237.

- 3.78 While this practice may be in the interests of some consumers, it is important that businesses do not engage in practices that infringe the CPRs when offering these products. For example, where the consumer may have the right to exit timeshare, it is likely to be misleading to give the consumer the impression that the only way they can exit the contract is by purchasing or accepting a replacement product.
- 3.79 Further, there may be a risk that a court would consider this business practice to be aggressive or otherwise unfair under the CPRs. For example, where a business is perfectly capable of granting the consumer the right to exit the contract, even for a modest fee, it could be considered aggressive to insist that the consumer buys a new product at a high price, in order to exit the existing timeshare. It may also be aggressive if the consumer is pressured by a business into accepting an exchange product (for example, by threatening to pursue the consumer for outstanding management fees) when they could otherwise have cancelled the agreement altogether.⁶⁷
- 3.80 There may be a benefit to a consumer in moving to a short-term timeshare product, but the consumer must be able to take an informed decision having been provided with all material information. This may include information about any transfer fee and the terms of any subsequent contract (including the new product's exit opportunities). Failing to provide this information would likely constitute an unfair misleading practice under the CPRs.
- 3.81 Where a consumer does decide to agree to or accept a new timeshare product, it is likely that the Timeshare Regulations will be applicable, meaning that the consumer must be provided with the required statutory pre-contract information, including the existence of the mandatory withdrawal period.
- 3.82 In circumstances where the consumer subsequently exercises the right of withdrawal under these Regulations, it is likely to be unlawful for the business to insist that the previous contractual obligations are re-instated where the parties have agreed that the new product has been offered as a **replacement** for the old one (that is, a new contract). It is therefore necessary to distinguish between the formation of a new contract and a mere variation which qualifies the **existing** rights and obligations. If a new contract

⁶⁷ The Office of Fair Trading took action against companies and individuals that claimed they could help consumers dispose of their timeshares, but then pressured them into buying new and expensive holiday club memberships which they could not cancel. See <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.off.gov.uk/news-and-updates/press/2011/58-11>.

has been formed, the old contract is extinguished; if only a variation, the contract **continues** to exist, albeit in an altered form.

- 3.83 Subject to any express terms, it is always open to the parties to mutually agree a variation to an existing contract. However, a rescission (that is, an extinguishing) of the contract will be implied where the parties have changed the terms of the agreement in such a way as to clearly enter into a new, substituted contract.⁶⁸ This will be the case where, for example, the parties enter into a 'new' agreement which is inconsistent with the old to a fundamental extent, reflecting the clear intention of the parties to rescind / substitute the old agreement. For example it would seem likely that a change to the resort or apartment that the consumer has chosen and is entitled to use, as specified in the original agreement, would give rise to a new agreement. Whether or not the parties have intended to replace the old contract or merely vary the existing contract is therefore a question of fact. In the event of a dispute this will be determined from an examination of the terms of the new agreement and all the surrounding circumstances attending its conclusion.
- 3.84 Should the business mislead the consumer about the nature of the exchange/replacement product offered, whether by action or omission, they will commit a breach of the CPRs.⁶⁹

In summary, businesses should be careful not to breach the CPRs when offering exchange, transfer or upgrade products to existing timeshare owners. Where the new product replaces the old one, rather than varies the existing contract, the Timeshare Regulations and its cancellation rights are likely to apply.

Circumstances that may make contracts void or cancellable

- 3.85 It may be possible for some owners to challenge the legality of their timeshare contracts and to argue successfully that their contracts are void for that reason.
- 3.86 It may be possible for a consumer to challenge the legality of a contract where they are the victim of breaches of consumer protection legislation that are also criminal offences, which may render the contract void. Other

⁶⁸ See *Thornhill v Neats* (1860) 8 C.B. (N.S.) 831

⁶⁹ See CPRs, regulations 5 and 6.

vitiating factors that may void a contract include a mistake,⁷⁰ duress (for example, where the business has pressured the consumer into entering an agreement) or undue influence. In such cases the contract may be set aside, returning the parties to their original pre-contract positions and returning the benefits each has received from the other. However, traditionally, the courts have been very reluctant to allow a party to avoid a contract simply for these reasons.

3.87 Misrepresentation would be relevant where the consumer argued that they were induced into agreeing to the contract by an untrue statement of fact or law made by the business upon which the consumer relied. If a consumer can prove they entered into the contract because of a misrepresentation and that they have suffered loss as a result, the contract is voidable by the injured party and may be rescinded (returning the parties to their original, pre-contractual positions). The consumer may also be able to seek damages for their losses where the misrepresentation can be shown to be fraudulent or negligent (a court cannot award both rescission and damages in cases of innocent misrepresentations).

3.88 We consider that examples of untrue statements by a business that may constitute a misrepresentation include:

- that the purchase of the timeshare is an investment that will appreciate in value over time (if this view is not honestly held)⁷¹
- that timeshare rights can be freely and easily exchanged, transferred and sold (if this is not the case)
- that the owner will be able to sell their timeshare back to the developer at any time and/or without penalty (if this is not the case)
- that the timeshare accommodation is 'five-star' when it is not
- that the management fees associated with the timeshare will only ever rise in line with changes in inflation (if this is not true or if the statement is a partial non-disclosure, for example, where changes in other variables will also affect fees)⁷²

⁷⁰ By 'mistake' we mean, broadly, an erroneous belief that may have been held by the consumer at the time the contract was formed. This could be, for example, where the consumer thinks that he is getting a specific benefit under the contract that he is not, and the business knows of this mistake (or must be taken to know) but concludes the contract anyway.

⁷¹ See *Smith v Land and House Property Corporation* (1884) 28 Ch. D. 7.

⁷² See *Hudson* (1969) 85 L.Q.R 524.

- that the consumer is buying a legal interest in land if in fact they are buying a 'right to use' only
- 3.89 The misrepresentation argument may be used by a consumer as a defence to a claim by the business (for example, for unpaid fees) or as a claim brought by the consumer to end the contract. However, if the consumer wants to bring a claim, they can only do so within six years of the date of the misrepresentation (due to limitation periods applying to these types of claim).⁷³ If a consumer relies on misrepresentation as a defence to a claim by the business, a defence is not a cause of action, so limitation periods are unlikely to apply to it, provided the consumer is not making a cross-claim.⁷⁴
- 3.90 However, these defences may only be used on a case-by-case basis and provided that the consumer has not 'affirmed' the breach.⁷⁵
- 3.91 Broadly speaking, where a party can show that they have entered into an agreement with another party on the basis of fraud (for example the business's deceit), the contract may be voidable and set aside by the injured party and they can claim for their losses. Such claims carry a very high burden of proof and are therefore difficult to establish.
- 3.92 However, in circumstances where a contract may be voidable and set aside by the injured party, this remedy may be lost, for example: if the injured party has chosen to affirm the agreement and continue, if there has been a considerable lapse in time since the conclusion of the contract, or where it is practically impossible to restore the parties to their original, pre-contract positions.
- 3.93 Finally, it may be the case that the business has committed a serious breach of contract that is so fundamental to the agreement that it permits the consumer to terminate, in addition to seeking damages. The consumer must elect to terminate the contract and make their decision known to the business in good time, otherwise they may be taken to have waived the breach and affirmed the contract. However, wrongly treating a contract as terminated could itself be a breach of contract, entitling the business to sue the consumer for damages. Ultimately, in the event of a dispute, the courts will decide whether or not the business's breach was sufficiently serious to justify termination.

⁷³ Green v Eadie and others [2011] EWHC B24 (Ch).

⁷⁴ Henriksens Rederi A/S v T.H.Z. Rolimpex [1974] Q.B. 233.

⁷⁵ By 'affirmed' we mean where, in response to a fundamental breach of contract by one party, the other decides to treat the contract as continuing, rather than treating it as terminated and suing for damages (as is the innocent party's right in such circumstances).

3.94 Examples of acts by a business that may constitute a fundamental breach of contract include:

- failing to provide the consumer with a reasonable standard of accommodation or the standard stipulated in the contract
- moving the consumer to a different unit or resort where the consumer has a right to use a specific unit or a specific resort

In summary, a consumer may be able to void or terminate their contract in limited circumstances. However, such claims are difficult to prove and establish. Businesses must ensure they do not induce consumers into entering contracts through untrue statements or commit fundamental breaches of their agreement with the consumer.

4. Potential benefits of a legal right to exit

Introduction

- 4.1 Timeshare and long-term holiday product (LTHP) exit issues are very complex. The legal position is uncertain and much will depend on the specific circumstances of each case. This is not helpful to owners or members who possess a product they no longer want or get any value from. Finding remedies to address each exit issue is likely to be difficult. There is, however, a potential solution that may cut through the complexity and uncertainty: the introduction of a legal right to exit. In this part of our report, we offer a preliminary view on the merits of this idea. This is only a preliminary view because further research is required on [insert cross-ref or details] to assess the need and viability of the idea.
- 4.2 By a 'right to exit', we mean the owner or member would be entitled to exercise a right to leave the timeshare or LTHP scheme, thereby giving up the benefits of ownership or membership and ceasing to be liable for any future fees or contractual obligations.⁷⁶ To be effective, the right to exit would need to apply to all existing contracts, not just to new ones. Preferably, due to the cross-border and multi-jurisdictional nature of the product, it should apply EU-wide.
- 4.3 There are, however, important matters of detail that are likely to be crucial in ensuring that a legal right to exit is workable, that the interests of different owners / members (and businesses) are balanced and that the overall effect on consumer welfare is not negative. These matters include:
- whether owners or members should be required to have had the timeshare for a minimum period before the right could be exercised (for example, for ten years from the start of the agreement)
 - whether short-term contracts (for example up to ten years) would be excluded
 - whether owners should give a reasonable notice period and, if so, what that might be
 - whether exit opportunities would become available at 'break points' during the life of the contract (for example, every three years)

⁷⁶ They would, of course, still be liable to pay all outstanding fees up to the point at which they leave.

- whether the exit would be achieved by surrendering the timeshare or LTHP at no cost or by paying a reasonable exit fee
- whether particular circumstances (for example the owner's or member's death, serious ill health or financial hardship) should trigger enhanced exit rights
- whether the entitlement to exit rights would be available only to consumer owners and members (and not business ones)
- whether the exit right should be completely unfettered – in particular because the owner would generally have already paid a substantial sum as capital outlay in order to take up ownership in the first place

For the rest of this section, we look at the basic principle of a legal right to exit, not the detail of what it might look like in practice. If the idea of a legal right to exit is developed further, then consideration should be given to the matters listed above.

Benefits to owners who wish to leave

- 4.4 A right to exit would help owners who are no longer able to enjoy their timeshare, cannot find anyone willing and able to take it off their hands, and must pay annual management fees to the end of the agreement (in some cases, indefinitely). They would benefit financially and in terms of reduced anxiety and frustration.
- 4.5 At present, some of these owners may be able to give up their ownership at the developer's or owner committee's discretion. However, these discretionary policies are resort- or scheme-specific; only apply in very specific, limited circumstances; and do not always guarantee that the request to exit will be accepted. Nor is it always clear how owners are assessed against the more subjective criteria, for example financial hardship. A right to exit would remove the uncertainty: there would be a clear, fair and reasonable exit route available to all.
- 4.6 With a legal right to exit, owners would no longer face the dilemma of being in perpetual or very long-term agreements with no viable means to exit, even when their personal circumstances change or deteriorate (for example due to ill health, financial difficulties or the death of their partner) and they can no longer use the timeshare or derive real benefit from the agreement.
- 4.7 Similarly, the estate-binding issue would disappear. On the owner's death, if no beneficiary or heir wanted the timeshare and it could not be sold or otherwise disposed of, the personal representative would simply exercise the

right to exit and return the timeshare to the developer or owner committee. All the worry that owners feel about how the timeshare might affect their loved ones or estate after their death would be lifted.

- 4.8 If a business obstructed an owner from exercising the right to exit (for example by holding up the processing of the request or by giving false or misleading information), then existing law (for example, the CPRs) would afford protection.
- 4.9 Additionally, the current difficulties involved in timeshare disposal have left some consumers desperate to escape, creating a fertile environment for resale scams. A right to exit would reduce this exposure to such scams.

Effects on the new sale and resale market

- 4.10 The CMA considers that a right to exit would probably make timeshares more attractive in the current market: consumers may well be more willing to acquire a timeshare knowing that there is a clear legal exit route available should they wish to leave in future.
- 4.11 If confidence in timeshares grows, existing owners may also benefit from a stronger secondary market, making private resale a more viable option. This might enable some owners to sell rather than surrender their timeshare, or to give it away rather than pay the developer or owner committee to take it back.

Effects on supply-side incentives

- 4.12 In normal markets, traders respond to consumer choices. Where demand is weak, traders may offer new products and/or inducements to try to increase demand, and/or scale back their operations or close down thereby reducing supply. A concern with the timeshare sector is that, because many owners are effectively locked-in, the consumer signals do not work as they should: the incentives for suppliers to make changes to their product offerings are not as strong as they could be.⁷⁷
- 4.13 A right to exit would allow consumers to exercise choice; owners would be able to surrender their contractual rights and commitments (subject to any reasonable and justifiable restrictions based on the factors discussed at paragraph 4.3). This would create incentives for developers and owner

⁷⁷ This is not to say that there are no incentives. The need to deal with unhappy owners, restore reputation after adverse media reports, and pursue growing numbers of non-payers may encourage developers and owner committees to open up exit routes. However, the incentives seen in most markets, where suppliers can lose customers, are often absent (because the timeshare owner must usually find a replacement before they can exit).

committees to respond to market conditions and to innovate. They may be forced to compete for new consumers and to retain existing ones.

- 4.14 Examples of innovations would include improvements to existing resorts, the introduction of new products such as shorter-term contracts, consolidation of resorts into a smaller number of units (downsizing), diversification into the rental market, and more marketing to attract new customers.
- 4.15 Of course, making such adjustments will not be cost-free and easy. For example, in some resorts, downsizing may require other owners to agree to move units. This may be where allowance for a reasonable notice period and exit fee would provide developers and owner committees with the breathing space to adapt.

Counter-arguments (and their strengths and weaknesses)

Effects on owners who wish to stay

- 4.16 The obvious objection to a right to exit is that the remaining owners (which may, of course, be the majority of owners) might face higher management fees and/or cuts in the resort's services.⁷⁸ In the worst case scenario, this could generate a vicious circle of spiralling fees spread across a shrinking ownership base.
- 4.17 We cannot say how many owners would be affected. Management fees are most likely to rise significantly at resorts where both a substantial proportion of owners want to exit and developers or owner committees are slow or unable to fill vacant units / weeks. Owners would be incentivised to encourage their developers or owner committees to deal with these vacant units / weeks.
- 4.18 Currently, with fees / costs for a given resort or scheme spread across all owners, those who use and enjoy the product are effectively being cross-subsidised by those who are unable to use it fully and/or wish to leave. Indeed, some owners who wish to leave continue to pay their fees but are not able to get any benefit from the product at all.
- 4.19 In this case, we question why one group of consumers should be placed under a considerable burden (that is, an ongoing liability to pay, without receiving any enjoyment) primarily for the benefit of others. In our view, it

⁷⁸ Many of a resort's costs are fixed costs which have to be covered regardless of the number of owners. For example, the costs involved in maintaining the grounds and shared resources such as leisure centres or swimming pools. These costs do not vary proportionately with the number of owners. Therefore, if owners leave, those who remain would need to pay a higher per-person fee to cover these fixed costs.

does not seem unreasonable to suggest that the cost of timeshare should fall, primarily, upon those owners who continue to benefit from it. A right to exit should reduce the extent of cross-subsidisation, leading to a better matching of the costs and benefits of timeshare usage. If management fees rose so steeply as to become unaffordable for remaining owners, they too could choose to exercise the right to exit and/or transfer to another provider's timeshare product or an alternative holiday product. As discussed above, the availability of exit may also generate supply-side incentives to fill resort capacity more flexibly, which would tend to mitigate the cost impacts on remaining owners and, potentially, create a more competitive market.

- 4.20 Of course, the owners who wish to stay today may, if their personal circumstances change, become the owners who want to leave tomorrow – a right to exit would protect their longer-term interests.

Effects on schemes that may no longer be viable

- 4.21 If enough owners exited, some timeshare schemes might face closure. These would be the schemes that cannot attract new customers, retain existing ones or otherwise make changes to adapt to market conditions. These are also likely to be the resorts in which the cross-subsidisation issue is greatest. They survive now because they have 'captive consumers' who believe that they have no choice but to continue paying annual fees, but get no enjoyment from the product.
- 4.22 In a normal functioning market where customers are able to move their custom, these businesses would likely close down or need to adapt their offer.

Effects on employment and local economies

- 4.23 If schemes closed, there might be implications for staff employed at the resorts and for the local economies.
- 4.24 This is not a foregone conclusion. It seems feasible that resorts could engage in supply-side substitution and transfer units / weeks to the rental market. This is particularly true of resorts where the developer or management company has experience in the rental market. We are also aware of one owner committee that has employed a third party specialist to handle rentals.

Why treat timeshare any differently to residential property?

4.25 If a consumer buys, say, a flat with a 99-year lease, they are likely to be committed to paying management fees and ground rent for those 99 years. If they no longer wish to own the flat, they have to find someone who will buy it from them. The ease with which they can find a buyer will depend on market conditions. Is a timeshare essentially any different?

4.26 In our view, the crucial difference is that home owners continue to gain enjoyment or benefit from ownership of the property, whereas the timeshare owner (who wants to exit) may not:

- Where an owner cannot sell their home, they can usually continue to live in it. The timeshare owner who cannot afford to go on holiday or cannot travel for health reasons is not able to use their timeshare.
- Where the homeowner cannot continue to dwell in the unsold home, perhaps due to infirmity or mobility issues, they can still derive a benefit from their ownership:
 - First, the property is an asset with financial value. Historically, certainly in the UK, residential properties have risen in value over time. Timeshares, in the current market, would appear to depreciate in value once purchased. Indeed, some timeshares appear to have no value at all: no-one is willing to take them even for free.⁷⁹ This problem may be more acute where the timeshare represents only a right to use property subject to various restrictions on use (for example, rules in a club constitution) and not a valuable, long term legal interest in land (that is, a freehold or leasehold).
 - Second, the home may be let for its rental value. In many parts of the UK, residential property can readily be offered to the lettings market and there are numerous letting agents competing for business who can assist landlords. Timeshare rental appears to be much harder.⁸⁰

⁷⁹ Hence, timeshare owners who have fully paid for their timeshare may well be willing, nonetheless, to surrender ownership or even pay an exit fee to divest themselves of it, but a leaseholder who has fully paid for their home is most unlikely to do so.

⁸⁰ We have not explored in depth why this should be so. It seems the infrastructure is lacking and it may be hard for an individual to market the rental opportunity efficiently unless through a specialist intermediary. In addition, individuals who only have one week (or a small number of weeks) to rent may not find it worthwhile to incur the fixed costs involved in identifying and contracting with an intermediary. In contrast, those letting a residential home might be letting for at least six months and will easily cover the same fixed costs.

- 4.27 If the property in question is a holiday home, then not all of these arguments will stand, but some will. In particular, a holiday home owner may find it easier to enter and to benefit from the rental market. This is because there are fixed costs involved in entering the rental market, for example the costs of setting up advertisements, contracting with intermediaries and so forth. A holiday home owner, with multiple weeks to rent, is more likely to earn sufficient income to cover these fixed costs than a timeshare owner, who only has a few weeks available.
- 4.28 A further difference is that homeowners who are unable to sell their property on the open market have other options, such as auctions or quick house sales.⁸¹ With a timeshare, unless the developer or owner committee is willing to take the weeks or points, the timeshare owner has no additional options: they are left with the timeshare and its ongoing financial obligations.

Owners have a right to sell or transfer already: they do not need extra protection

- 4.29 This argument ignores the reality of the market. With many schemes, it seems that owners have little or no reasonable prospect of selling their weeks or points.⁸² The legal right to exit would likely help these owners.
- 4.30 Moreover, where individual owners cannot sell or give away their timeshare, and the resort is unwilling or unable to offer a way for them to exit, they are powerless to change their situation. However, developers or owner committees with vacant units and weeks do have more scope to change things. While making changes is unlikely to be easy, developers or owner committees do at least have options to move units into the short term rental market, market for new customers (for resales), and/or make arrangements for the resort to be downsized or closed down.⁸³

Owners knew what they were signing up to when they bought their timeshare

- 4.31 Businesses may argue that purchasers of timeshares were given comprehensive terms and conditions, which they agreed to and, consequently, they are bound by those terms. However, there are other considerations such as:

⁸¹ In the UK, there are businesses – quick house sale companies – that are willing to buy any property for the right price. See www.ofc.gov.uk/OFTwork/markets-work/quick-house-sales/.

⁸² We have heard of, and from, owners who have been trying to sell their timeshare for many years without success.

⁸³ They can also set up the necessary infrastructure and market more efficiently than a single owner: there are likely to be economies of scale and lower average costs.

- whether specific contractual terms that have not been individually negotiated (for example, estate-binding or excessive notice clauses) may be unenforceable against a consumer under unfair contract terms legislation
- whether businesses may have engaged in unfair commercial practices before, during or after a contract is made with a consumer (for which they may face civil enforcement action and/or criminal prosecution)
- whether misrepresentations may have been committed, or the consumer may have been pressured into entering the contract through undue influence

We consider these possibilities in detail in section 3 on Legal Issues.

4.32 We also have additional concerns:

- It is known that consumers tend to have behavioural biases which affect their assessment of a long-term product.⁸⁴ For example, individuals may have a present bias which leads them to be overly optimistic about the extent to which they will use their timeshare and to underestimate the costs involved. In practice, they may find that they will use their timeshare less than they had predicted and/or it will cost more than they expected. Such biases mean that, when a consumer enters the agreement, their focus is on the enjoyment they will get in the next few years and not on what might happen in a few decades when they may no longer want the product or be able to use it.
- Consumers can also have trouble assessing the terms of the contract. For example, consumers are known to have trouble evaluating fees which are deferred or contingent, especially when placed under time pressure.⁸⁵ This is especially so when: (a) the contract's presentation makes it difficult to understand the implications and (b) learning effects are limited, perhaps because the purchase is infrequent. Such issues may well be the case with timeshare and firms can potentially exploit such biases to, in effect, 'hide unfair terms in plain view'.⁸⁶
- We find it difficult to accept the view that any informed consumer would willingly agree to an estate-binding clause (particularly where the timeshare is a right to use contract and not a legal interest in land) if they

⁸⁴ OFT, *Consumer Behavioural Biases in Competition. A Survey*, May 2011 (oft1324). Pages 22-32 discuss these biases and their implications in detail.

⁸⁵ OFT, *Consumer Contracts*, February 2011 (oft1312). Pages 6-8 provide an overview of these issues.

⁸⁶ OFT, *Consumer Contracts*, February 2011 (oft1312) page 7.

understood (a) the realities of the resale market and (b) the possible consequences of this clause.

Owners may be giving up rights that have a future financial value

4.33 Where ownership conveys an interest in land, this argument may be true in some cases. It will depend on the specific provisions of the timeshare scheme, for example whether it provides for the scheme's closure, the sale of the land and the division of assets amongst the owners; and, crucially, when this would happen. If an owner is struggling to afford management fees now, the fact that the scheme **might** yield a financial benefit (of an unknown amount) in, say, 50 years' time is unlikely to be much comfort.

4.34 Provided the owner is given the information they need in order to make an informed decision whether to stay and keep paying the fees in the hope of future reward or whether to leave now, then they should be able to decide for themselves what is in their best interests.

Owner-run resorts do not have the capability to make business changes

4.35 This may well be true in some cases. However, a right to exit would incentivise the owner committees to adapt, for example to try to market for new customers themselves or to contract a third party specialist to do it for them. As shown by its current five-year plan, TATOC may be willing and able to provide assistance.

Unintended consequences and the risk of exploitation

4.36 Clearly, any framing of a legal right to exit would need to guard against unintended consequences and the risk that unscrupulous businesses might use it for their own dishonest gain. For example, without appropriate protections, a right to exit might offer an unscrupulous developer with a useful vehicle with which to engineer the collapse of a timeshare resort (so they can sell off the land or use it for another purpose).

Conclusions

4.37 A legal right to exit is not, of course, a panacea for every problem in the sector. The scammers will not give up easily and new mischief might arise, for example disreputable developers and owner committees might encourage owners to surrender timeshares that in fact have a resale value. However, existing law provides protection in these areas.

4.38 It is possible that developers and owner committees would default to a position where they require owners who want to leave to pay an exit fee. However, certainly in UK law, the fee could not be an unfair one.

4.39 Overall, however, we have formed the provisional view that the introduction of some form of legal right to exit has potential to address the harms in this sector caused by the various exit issues. Potentially, it would:

- allow consumers to exercise choice
- deal with the most serious exit issues (such as perpetuity and estate-binding), without the need to find individual solutions for each issue
- provide clearer rights, so exit would not depend on very specific individual circumstances, subjective criteria, or someone's discretion
- improve the competitiveness of the market and incentivise developers and owner committees to adapt to changing market conditions: to compete to attract new consumers and retain existing ones if they wish to remain in operation
- increase confidence in timeshares and reinvigorate the secondary market (by reducing the risk associated with timeshare ownership)
- reduce the opportunity for resale scams

It would not stop owners from trying to sell or let their rights if they wish, nor would it stop developers and owner committees from offering exchange products if they wished to do so.

4.40 Our conclusion, however, is qualified in two respects. First, within the limits of our project, we have not gathered data that would enable us to quantify the exit problems and their harms. Such data would help to establish the extent to which this potential remedy is appropriate and proportionate. Second, we have not explored the detail of what a legal right to exit would look like in practice, for example the role of the matters listed at paragraph 4.3. Getting these details right would be essential in order to strike the right balance between the interests of different owners or members (and businesses) and ensure that a legal change did not, inadvertently, bring about a net reduction in total consumer welfare.

4.41 Finally, we note that another jurisdiction has, this year, taken this path. Israel's Parliament has passed an amendment to the Israeli Consumer Protection Law to allow both existing and new timeshare owners a right to exit long-term agreements. It will come into force on 24 September 2014. For

timeshares agreed before 24 March 2014, the consumer may cancel the agreement by simply sending the business a written notice. The cancellation will come into effect at the end of the next annual period. The business cannot charge a cancellation fee. There is also an unrestricted right of exit for agreements entered into on or after 24 March 2014, albeit subject to different payment conditions. According to Israeli jurisprudence the right acquired by a purchase of a timeshare is a contractual right and not a proprietary right. The law, of course, only applies to timeshare in Israel, but it will be available to non-Israeli nationals who own timeshare there.