

Guidance on unfair terms in home improvements contracts

This document issued by the Office of Fair Trading (OFT) has been withdrawn.

This document did not take account of developments in case law, legislation, or practices since its original publication. It should not be relied on either as a statement of the law or CMA policy.

Current CMA Guidance on unfair contract terms can be found at [Unfair contract terms: CMA37](#), which replaced all previous OFT / CMA guidance on unfair contract terms when the Consumer Rights Act came into force on 1st October 2015. Other information on the CMA's consumer powers can be found in [Consumer protection enforcement guidance: CMA58](#).

The Regulations

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

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

Copies of the Regulations may be downloaded, without charge, from:
www.hmso.gov.uk/si/si1999/19992083.htm

Copies of the amendments to the *Unfair Terms in Consumer Contracts (Amendment) Regulations 2001* (ref: SI 2001/1186) are also available from the Stationery Office as above, current price £1.50, and free via the internet at: www.hmso.gov.uk/si/si2001/20011186.htm

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1 Executive summary

Overview

- 1.1 This is the Office of Fair Trading's ('the OFT') guidance on how to avoid unfairness in standard consumer contracts for home improvements (it does not apply to business-to-business contract terms). It explains why contracts must be revised to remove unfair terms and it provides help and examples as to how fairness might be achieved. It is based on a review of many contracts and our experience of enforcing the Unfair Terms in Consumer Contracts Regulations 1999 ('the Regulations') and in doing so it identifies concerns that are typical of the sector. In addition it provides summaries of other legislation and some relevant industry developments.
- 1.2 The home improvements sector is substantial and covers a broad range of work and supply including double-glazing, kitchens and bathrooms, burglar alarms and landscape gardening.
- 1.3 The guidance supersedes earlier guidance on home improvements published by the OFT in March 1997 and January 1998. It represents our views in the light of recent complaints and explains the basis on which we are likely to take enforcement action. While it also offers suggestions for achieving fairness, it is ultimately for the courts to decide whether any term is unfair.

Our aim

- 1.4 We want standard contract terms used by businesses in the sector in their contracts with consumers to be fair and clear. Our aim is to encourage suppliers to revise their contracts to comply with the Regulations, which set a minimum standard for fairness and transparency. There is no exemption from compliance with the Regulations for businesses dealing with consumers on standard terms.
- 1.5 Suppliers can greatly reduce the risk of a legal challenge by regularly reviewing their agreements. But compliance has important benefits for suppliers. The use of clear and fair terms by suppliers will enhance consumer confidence and increase the likelihood that consumers will want to do business with them.

Using the guidance

- 1.6 This guidance is designed to help suppliers in the sector to meet the requirements of the Regulations. It will also assist our partners in consumer law enforcement, particularly trading standards services in their role as consumer advisers and regulators. We expect those using or recommending standard pre-formulated agreements for goods and services in the sector to review their terms in the light of this new guidance and amend or remove any unfair terms from their contracts.

Layout of the guidance

- 1.7 Information about the Regulations and their enforcement is in Chapter 2 with an explanation of the test of fairness required by the Regulations in Chapter 3. Details about the scope of the guidance are in Chapter 4.
- 1.8 Chapter 5 deals with issues affecting contracts in the sector including, as at 5.2, the common types of unfair term found in the sector (eg exclusion or restriction of liability for breach of contract, unfair cancellation rights, exclusion of liability for oral statements, unfair financial penalties and exclusion of the consumer's right to set off), full payment in advance, and door-step selling.
- 1.9 Chapter 6 sets out our views on the types of contract term in the sector that we have commonly challenged as unfair. Our advice contained in the guidance is based on a sample of existing contracts and may not identify all potentially unfair terms in this area. Comprehensive general advice on unfairness in consumer contracts can be found in our *Unfair Contract Terms Guidance* (OFT311), and the briefing note, *Unfair Standard Terms* (OFT143). For ease of reference and consistency the guidance follows the structure and groups used in OFT311.

2 The regulations on unfair contract terms

- 2.1 All suppliers using standard contract terms with consumers must comply with the Unfair Terms in Consumer Contracts Regulations 1999 that implement EC Directive 93/13/EEC on unfair terms in consumer contracts. The Regulations came into force on 1 July 1995 and were re-enacted in October 1999. They do not apply to business-to-business contracts. Chapter 3 explains the test of fairness set out in the Regulations. Please note that this guidance is not a substitute for the Regulations and should be read alongside them.

Enforcement of the Regulations

- 2.2 Under the Regulations, the OFT has a duty to consider any complaint received about unfair terms. Since October 1999 this enforcement role has been shared with other 'Qualifying Bodies', including most of the main national regulatory bodies, all local authorities providing a trading standards service, including the Department of Enterprise, Trade and Investment in Northern Ireland, and Which? (formerly the Consumers' Association).
- 2.3 The OFT has the power, where it considers a term to be unfair, to take action on behalf of consumers in general to stop its continued use, if necessary by seeking a court injunction in England and Wales or an interdict in Scotland. The OFT cannot take action on behalf of nor seek redress for individuals. However, the Regulations do give individual consumers certain legal rights in respect of unfair terms, independent of any action by the OFT or other Qualifying Bodies. A term found by a court to be unfair is not binding on consumers.
- 2.4 In addition, Part 8 of the Enterprise Act 2002, which came into force on 20 June 2003, gives the OFT and certain other bodies a new enforcement mechanism against traders that breach consumer legislation.
- 2.5 Under the new legal framework introduced by Part 8 (as under the Stop Now Orders (EC Directive) Regulations 2001 which it replaces), the OFT and other enforcers can seek enforcement orders against businesses that breach UK laws giving effect to EC Directives listed in Schedule 13, where the collective interests of consumers are harmed. These include EU Directive 93/13/EEC on unfair terms in consumer contracts. In addition, the Enterprise Act formalises the OFT's coordinating role to ensure that action is taken by the most appropriate enforcement body in each case. More information on the Enterprise Act can be found on OFT's website: www.offt.gov.uk
- 2.6 In exercising our powers, whether under the Regulations or the Enterprise Act, the OFT and other enforcers work to general enforcement principles of an Enforcement Concordat promoted by the Cabinet Office in partnership with the Scottish Administration and various local authority associations. For example, we take account of the level of actual or potential consumer detriment and take only necessary and proportionate action, having given businesses a reasonable opportunity to put things right. We will normally consult with the business for a minimum of 14 days. Any publicity will be accurate, balanced and fair.

- 2.7 The OFT and enforcers may take action against unfair terms under either the Regulations or the Enterprise Act (or both) and may accept an undertaking from the business that it will stop the infringing conduct, e.g. using or relying on unfair terms. However, if our concerns are not satisfactorily addressed we can apply to the courts and seek an enforcement order. We will usually consult with the business for 14 days but if the infringement needs to be tackled urgently the court may make an interim enforcement order. In these circumstances, the prior consultation period is reduced to a minimum of one week. In very urgent cases, where we think that an enforcement order should be sought immediately, an enforcer can start court proceedings without entering into consultation. If an enforcer other than the OFT proposes to take such action, we must authorise it.

3 Test of fairness

- 3.1 The Regulations apply a test of fairness to most standard terms (terms that have not been individually negotiated) in contracts used by businesses with consumers. **Unfair terms are not enforceable against the consumer.** The test does not apply to terms that set the price or describe the main subject matter of the contract (usually referred to as 'core terms') provided they are in plain and intelligible language (see paragraph 6.146 in Chapter 6).
- 3.2 Regulation 5(1) provides that a standard term is unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.
- 3.3 The requirement of 'good faith' embodies a general principle of fair and open dealing. It means not only that terms should not be used in bad faith, but also that they should be drawn up in a way that respects consumers' legitimate interests. Therefore, in assessing fairness, we take note of how a term **could** be used. A term is open to challenge if it is drafted so widely that it could be used in a way that harms consumers. Suppliers may protest that a particular term is not used unfairly in practice. However, such protests will not be enough to persuade us that the term should not be challenged under the Regulations. Claims like this usually indicate that the supplier could redraft the term more precisely both to reflect its intentions and to achieve fairness.
- 3.4 Transparency is also fundamental to fairness. The consumer should have the chance to read all the terms before agreeing to the contract. Regulation 7 says that standard terms must use **plain** and **intelligible** language. Terms should not just be clear for legal purposes. When we assess fairness, we also have to consider what a consumer is **likely** to understand by the wording of a clause. Even if a clause would be clear to a lawyer, we will probably conclude that it has potential for unfairness if it is likely to mislead, or be unintelligible to consumers.
- 3.5 The examples of unfair terms – 'original term' – and revisions – 'new term' – in Chapter 6 are generally drawn from standard contracts in the sector, referred to us by complainants. However, the text of terms included has been edited in order to help readers see more easily what the OFT considers to be fair or unfair. In particular, unnecessary wording is frequently omitted. Terms challenged by OFT often contain redundant wording, as would be expected, since the lack of clarity often causes or contributes to contractual unfairness. Some text has also been omitted because what a supplier originally printed as a single term in fact deals with several issues, of which only one is relevant to any particular aspect of fairness. Where there are omissions within the text, the symbol for ellipsis (...) is used. Where any additional words are inserted to preserve the sense eg following omissions or to replace names [] will be used.
- 3.6 We consider the original terms to have potential for unfairness. Where possible, we have included the new term that we considered was sufficiently improved to require no further action by us, on the evidence available at the time. However, we have a statutory duty to consider complaints about any terms brought to our attention, including any complaints against terms that have been revised as a result of our

action or terms with a similar effect. The revised examples we use should not be seen as having OFT approval or as OFT agreement that the term is fair in all circumstances or as binding on the views of other enforcers. The revisions are our assessment of what we think a court would be likely to consider fair in the particular contract under consideration.

- 3.7 New complaints and other evidence can and do shed new light on the potential for unfairness of terms that were formerly reviewed by the OFT. The assessment of fairness, under the Regulations, requires consideration of all the circumstances and of the effect of other terms in the contract – Regulation 6(1). A term considered acceptable in one agreement is not necessarily fair in another.
- 3.8 In addition, as pointed out at 2.5 above, the OFT shares powers to enforce the Regulations with several other agencies (see the *Unfair Terms in Consumer Contracts (Amendment) Regulations 2001* (ref: SI 2001/1186 for details). Enforcement powers under the Enterprise Act are also shared, in this case with a range of designated bodies. These agencies are legally entitled to form their own views on what is fair and unfair and to take action accordingly. Provision is made within the legislation to ensure co-ordination of enforcement action. In addition, consumers are able to use the Regulations to protect themselves from unfairness and to take action to challenge terms. The court is the ultimate arbiter of whether a term is unfair.

4 What is covered by this guidance?

- 4.1 'Home improvements' encompass all kinds of supply of work and materials to alter existing buildings and gardens. It divides roughly into do-it-yourself (DIY) and work by traders. This guidance is intended to apply primarily to a trader who contracts with a consumer either to **supply and fit goods, supply only, or to fit only**.
- 4.2 The guidance does not cover the supply of goods and services by one business to another. That is because the Regulations do not apply to business-to-business contracts.

What type of home improvements are covered by this guidance?

- 4.3 Generally speaking the guidance covers any cosmetic, remedial or installation work that may be carried out by a supplier to the interior or exterior of a property commissioned by a consumer including:
- building extensions and conservatories
 - loft conversions
 - painting and decorating
- 4.4 It is also relevant to rewiring, plumbing work, erection of garden buildings or garages, driveway installation, roof repairs and guttering, landscaping, and the fitting of burglar alarms or other security systems, and other improvements.
- 4.5 The examples of original terms and new terms that appear in Chapter 6 are drawn from a variety of contracts. The majority are from suppliers in this sector but we have also used examples from other sectors where these are relevant to home improvements contracts.

5 Issues affecting contracts in the sector

Areas of concern

- 5.1 The Regulations came into force on 1 July 1995 and were re-issued in October 1999. Since 1 July 1995, OFT has reviewed around 500 standard contracts used by suppliers in this sector, including some model contracts recommended by trade associations. Further information about our discussions with trade associations and major industry firms, together with some information about developments within the industry, is in Annexe E.
- 5.2 Many of the contracts we reviewed contained a variety of unfair terms and the most common types of unfair terms were those that were unclear and sought to:
- exclude or restrict liability for breach of contract or negligence (such as providing unsatisfactory goods and poor services, delays and loss or damage to consumers' property)
 - exclude liability for breach of contract by placing time limits on claims
 - exclude the consumer's right of set-off (by requiring full payment in advance – see below)
 - impose harsh financial penalties when the consumer wants to cancel a contract
 - permit or enable the supplier to cancel the contract, following an adverse survey report, without providing any explanation to the consumer
 - undermine a consumer's right to cancel, and
 - exclude the supplier's liability for oral statements made by its staff

Our objections to these terms are discussed in detail in Chapter 6.

Full payment in advance

- 5.3 Terms requiring full payment in advance are still being used by some suppliers of fitted kitchens, bathrooms and bedrooms where installation is part of the contract. Consumers are asked to pay in full before their goods have been installed, or even before they have been delivered to their homes. Our view is that terms which require full payment in advance are potentially unfair as they may exclude the consumer's right of 'set-off'.
- 5.4 By '**right of set-off**' we mean that consumers who have a claim arising out of the supply of goods and/or services, and have not already paid for them, are legally entitled to withhold part of the price, so long as the claim is genuine, and the amount withheld is proportionate to the fault. This avoids unnecessary legal proceedings – first one party going to court to force the other to pay a sum of money, and then the other going back to court to recover what he should not have had to pay in the first place.
- 5.5 If payment is made in full in advance of work being properly completed the consumer is at risk of being left with unsatisfactory work and no means of redress other than going to court, which is expensive and difficult. Full payment in advance

terms therefore cause a significant imbalance in the rights of the parties to the detriment of the consumer and are therefore likely to be unfair in light of Regulation 5. The potential unfairness of terms which have the object or effect of excluding the consumer's right of set-off is also expressly highlighted in Schedule 2 to the Regulations.

Undertakings given by B&Q plc, Magnet Ltd, MFI Furniture Group Ltd and the HomeForm Group Ltd

- 5.6 In the late 1990s, the OFT took action against use of 'full payment in advance' clauses, as used by a number of major home improvement companies. These included businesses in the Limelight Group plc (now HomeForm Group Ltd) including Dolphin Showers, Moben Kitchens and Portland Conservatories. Magnet Kitchens, B&Q and MFI were also approached. This action led to proposals to protect consumers from the scope for unfairness inherent in full payment in advance clauses without the need for OFT to ask the court to stop the use of full payment in advance clauses. The companies proposed to join the Qualitas payment protection scheme (details of which are in Annexe D). Under this scheme, in the event of any dispute arising over quality of goods or service, a substantial proportion of the purchase price is removed from the control of the company, and is held in deposit until the consumer's complaint is dealt with through an independent dispute resolution procedure. If the consumer's complaint is upheld then he or she is reimbursed or compensated. OFT agreed in return to discontinue enforcement action.
- 5.7 However, we continue to monitor the effectiveness of the scheme in protecting consumers and will consider the need for further enforcement action in the light of any further complaints about full payment terms (see paragraph D.3 of Annexe D).

Doorstep Selling

- 5.8 The OFT market study into doorstep selling (see below) reported a perception that home improvements salesmen tended to use high-pressure selling techniques in the consumer's home. Consumers are protected to some extent by The Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987 as amended, also known as the Doorstep Selling Regulations (DoSRs). The DoSRs apply to contracts that are signed in a consumer's home following an unsolicited telephone call or visit by a supplier. See Annexe C for information about the DoSRs. Standard terms that purport to cut away the consumer's rights under the DoSRs are likely to be considered unfair under the Regulations.

Doorstep Selling – a report on the market study

- 5.9 The OFT report *Doorstep Selling – A report on the market study*, May 2004 (OFT716) is available free of charge: see **Getting further copies** for further details. The OFT recommends suppliers using doorstep selling to read and note the report's 'Summary and Recommendations'.

The level of complaints reported by Trading Standards Services

- 5.10 Figures compiled by Trading Standards Services throughout the UK show that complaints about home improvements continue to increase each year, with more complaints in this category than any other for the past three years. About 1000 of these complaints each year are about unfair terms and conditions and restrictions of liability.

6 Analysis of unfair terms

- 6.1 This Chapter sets out our views on the types of contract term that we have commonly challenged as unfair in home improvement contracts. Comprehensive general guidance on all types of unfair term is published separately in the *Unfair Contract Terms Guidance* OFT311. For ease of reference we have used the group numbers used in that guidance – e.g. Group 2(a) – in the section headings etc in this Chapter.

Groups 1 and 2: Exclusion and limitation terms in general

Schedule 2, paragraph 1(a), states that terms may be unfair if they have the object or effect of: excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier

Schedule 2, paragraph 1(b), states that terms may be unfair if they have the object or effect of: inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.

- 6.2 We are concerned with the *effect* of terms, and not just the object or intention behind them. Terms that seek to exclude or limit a supplier's liability may be unfair, particularly if they try to prevent consumers from seeking redress from a supplier who has not complied with its obligations. Other legislation makes the use of many disclaimers invalid or illegal. We object to disclaimers that could be used to defeat the legitimate claims of consumers even though such disclaimers may have been introduced to deal with unjustified demands.

Group 1: Terms that seek to exclude or restrict the supplier's liability for death or personal injury

- 6.3 Terms that seek to exclude or restrict liability for death or personal injury caused by a supplier's negligence are always void for that purpose under section 2 of the Unfair Contract Terms Act 1977 (although it does not prohibit their use). In any event, the Regulations go beyond the 1977 Act. Paragraph 1(a) of Schedule 2 applies not only to terms which seek to exclude liability for death or personal injury where caused by the supplier's negligence, but to terms which seek to exclude liability for such consequences where caused by any act or omission of the supplier. For example, in addition to negligence this can include breaches of statutory duty. Though uncommon, we have seen explicit exclusions such as:

'The supplier shall not be liable for damage, injury, death, loss, expense to or in connection with any property, persons, animals or other living creatures, or produce howsoever caused...'

Examples

Original term	New term
<p>'No responsibility is accepted by [the Supplier] for any loss, theft, injury or damage...even when such loss, theft, injury, or damage is attributed to any negligence on the part of [the Supplier] or its servants.'</p> <p>'The supplier shall in no circumstances be liable for any loss, damage, cost or expense ... except in respect of death or personal injury from negligence of the supplier...'</p>	<p>'In absence of any negligence or other breach of duty by [the Supplier] or its servants and agents, you will be responsible for any loss, theft, injury or damage...'</p> <p>'...the supplier [shall be] liable for any loss, damage, cost or expense... in respect of death or personal injury resulting from any act or omission on the part of the supplier.'</p>
<p>'The Company shall not be responsible for any...damage or personal injury or other loss, howsoever caused directly or indirectly by the Goods.'</p>	<p>The term was deleted.</p>

- 6.4 More commonly we find wide exclusions of liability that unintentionally but implicitly exclude liability for death or personal injury, such as the following term:

'The use of any of the Company's equipment or machinery or the facilities ...is entirely at [your] own risk.'

- 6.5 Terms like this may mislead consumers and discourage legitimate claims. Such terms should make it clear that the supplier does not seek to exclude liability for death or personal injury where caused by its negligence or other kinds of act or omission. The following example was also drafted so widely that it appears to exclude liability for death or personal injury:

Example

Original term	New term
<p>'...We will always exercise great care and consideration whilst on your property, but we cannot accept liability for any occurrences that may take place thereon...'</p>	<p>The term was deleted.</p>

- 6.6 We also object to terms that seek to limit the amount payable for death or personal injury. Limitations of liability are dealt with below under Group 2(c).

Group 2: Other exclusion and limitation terms

Exclusion of liability for breach of contract

Disclaimers reducing the amount or availability of redress

- 6.7 Fair contracts entitle both supplier and consumer to compensation if the other fails to honour its obligations. We are likely to consider disclaimers that deny or limit liability for breach of contract to be unfair, particularly if they seek to allow suppliers to carry out the service without reasonable care and skill. We object equally to terms that limit liability and to those that exclude liability altogether.

Group 2(a): Exclusion of liability for faulty or misdescribed goods

- 6.8 Any business selling goods to consumers is legally bound to accept certain implied obligations, whatever the contract says. These are the consumer's 'statutory rights'. Goods must match the description given to them, be of satisfactory quality and fit for their purpose.
- 6.9 Consumers can reject faulty goods and ask for a refund as long as they are not legally considered to have 'accepted' the goods – for instance, by treating them as if they own them (eg having them fitted for home improvement purposes) or keeping them longer than reasonably necessary for examining them. We **do object** to terms that:
- exclude liability for the quality, condition or fitness for purpose of the goods
 - require the consumer to sign that the goods are acceptable before they have had a reasonable opportunity to examine them.
- 6.10 A contract term cannot be used to exclude or restrict these rights where a person is dealing as a consumer¹ and use of such a term may be an offence². Consumers now have new rights³ if they are sold faulty goods, see Annexe G for further details.
- 6.11 We **do object** to terms which have the object or effect of protecting the supplier from claims for redress for defective or misdescribed goods whatever the form of words used, or the legal mechanism involved. For example, we object to terms that:
- say that the goods must be (or that they have been) examined by the consumer, or by someone on his behalf
 - say goods only have the description and/or purpose stated on the invoice
 - require that the goods are accepted as 'satisfactory' on delivery
 - disclaim liability for sales goods.
- 6.12 Simply adding a statement that 'This does not affect your statutory rights', without any explanation, cannot make such terms **less** unfair and such statements are misleading where the exclusion does purport to undermine statutory rights. Inclusion of such statements may often be a legal requirement under the Consumer Transactions (Restrictions on Statements) Order 1976 but this does not make them fair when they are used without explanation.

¹ See S6 (2) of the Unfair Contract Terms Act 1977

² Consumer Transactions (Restrictions on Statements) Order 1976, as amended.

³ Part 5A of the Sale of Goods Act 1979, and the Supply of Goods and Services Act 1982 (as amended), as amended by the Sale and Supply of Goods to Consumers Regulations 2002

6.13 The OFT has seen terms like this in several contracts. The following examples offer little benefit to consumers unless a further explanation is included.

Examples

Original term	New term
'Nothing herein contained shall be deemed to limit or restrict the statutory or common law rights of the customer.'	'Nothing in these conditions will reduce your statutory rights relating to faulty or misdescribed goods. For further information about your statutory rights contact your local authority Trading Standards Department or Citizens Advice Bureau.'
'This agreement does not affect your statutory rights as a consumer.'	'This agreement does not affect your statutory rights as a consumer. The goods we supply must: <ul style="list-style-type: none"> ● match the description we gave them; ● be of satisfactory quality; and ● be fit for their purpose.' Work should be carried out to a reasonable standard. You should contact your local authority Trading Standards Service or Citizens Advice Bureau if you need any more information about your statutory rights.

Satisfactory goods

6.14 We are **less likely to object** to terms recommending that consumers should check that the goods are satisfactory and tell the supplier as soon as possible about any faults. We are also **less likely** to object to terms that allow for minor imperfections within manufacturing tolerances, for example in glass, provided the wording could not be relied upon to exclude liability for poor quality goods.

Examples

Original term	New term
'All glass used is the best commercially obtainable but the Company cannot guarantee against any imperfection or variation inherent in the glass making process.'	'All glass used is the best commercially obtainable but the Company cannot guarantee against any imperfection or variation inherent in the glass making process. Our Company complies with the visual standard of the Glass and Glazing Federation of which our Company is a member.'

Group 2(b): Exclusion of liability for poor services

- 6.15 A business that sells services to consumers accepts certain contractual obligations as a matter of law. In particular, consumers can normally expect services to be carried out to a reasonable standard and within a reasonable time. This not only applies to the main tasks the supplier agrees to do, but to everything that is or should be done, by him or any employee, subcontractor or agent, as part of the transaction.
- 6.16 We **do object** to terms which could relieve a supplier of services of the obligation to take reasonable care in any of its dealings with consumers. Where goods or materials are supplied along with a service, the same requirements about their description and quality apply as described in paragraph 6.9.
- 6.17 As already explained, the mere addition of a statement that 'statutory rights are unaffected', without an explanation, cannot make such a term acceptable. See paragraph 6.12.
- 6.18 We are unlikely to have objections under the Regulations to terms which exclude liability for business losses, or to terms that exclude liability for any losses to customers buying services in the course of business. We **do not object** to terms which exclude or limit the liability for circumstances outside the supplier's reasonable control. Terms containing wide disclaimers should be redrafted more narrowly so that they exclude liability **only** for losses where the supplier is not at fault, or which were not foreseeable when the contract was entered into.
- 6.19 We **do object** to terms that exclude suppliers' liability for damage caused to consumers' property, resulting from the suppliers' own negligence or other breach of duty. Terms which disclaim liability for loss or damage that are the consumer's own fault may be acceptable. But even where consumers might be partly at fault, they should have some redress for loss or damage that the supplier contributed to by failing to take reasonable precautions.
- 6.20 We are **likely to object** to terms that could deprive the consumer of all redress in the event of a trivial or technical breach, or where the supplier may be partly responsible for loss or harm suffered by the consumer. For instance, failure to take specified precautions against the risk of damage or theft by third parties should **not** be a basis on which the supplier can escape all liability where he, or any employee of his, is negligent or dishonest. That is especially so if the precautions consumers are required to take are unusual or unreasonable, or not clear.
- 6.21 '**Free services**'. Contracts sometimes say that certain services are not provided – such as how to use a product, help with installation, giving advice on planning or structural issues – but then go on to exclude liability for them all the same, in case an employee provides them informally. Alternatively, contracts say that such services may be provided but only on a 'no payment, no liability' basis. We consider such terms unfair. Even if a service is 'free' it should still be carried out with reasonable skill and care. We **object** to terms that disclaim liability for negligence in providing them.
- 6.22 Suppliers who do not take reasonable steps to stop employees doing what they are unqualified to do cannot then deny consumers redress for any harm caused as a result.

- 6.23 It is preferable for suppliers to warn consumers where necessary to rely on external specialist skills rather than consult their staff for advice. We do **not object** to terms that clearly specify when the consumer needs, for example, to consult a surveyor or engineer, provided these terms do not purport to exclude liability.

Examples

Original term	New term
'Whilst every care will be taken by [the Supplier], it accepts no responsibility for any damage to plaster work, decorations, flooring, etc, necessarily consequent upon the execution of the work unless specifically provided for in this quotation. Cuts or holes made to allow for equipment will be made good but not permanently finished or decorated. Floor boards will be replaced but special flooring will not be permanently refixed.'	'If we agree to make good any damage caused in the course of our work to plaster, floors or brickwork etc we will do so to a standard which will accept redecoration. Where damage is deemed to be caused by negligence of the company's operative, we will make good, or offer compensation, or pass details to our insurers. Cuts or holes made to allow for equipment will, where possible, be made good. Floor boards removed will be refitted where possible.'
'Quotations for water heating installations are based on the assumption that the existing plumbing system is in a satisfactory condition. No responsibility is accepted for defects arising in water tanks, pipes, etc, during or subsequent to installation work by [the Supplier].'	'Where we agree to carry out work to part of a system, we assume that the rest of the system is in good condition. We cannot be held responsible for any damage caused or extra work required if this is not so.'

Group 2(c): Limitations of liability

- 6.24 Under the ordinary rules of contract law each party to a contract – supplier and consumer – is entitled to compensation where the other fails to honour its obligations. This includes compensation for consequential loss or damage that the parties themselves could have reasonably foreseen when entering into the contract.
- 6.25 We challenge terms that limit liability. Such limitations take three basic forms, those that limit:
- liability for damage caused by faulty goods or poor service
 - the kind of loss for which compensation is paid, for example, consequential loss, or
 - the amount or type of compensation.
- 6.26 We **do object** to terms that:
- limit liability to the value of the goods sold,
 - allow the supplier to choose the form of redress – such as a credit note
 - exclude or limit liability if the consumer has not paid
 - limit the liability to the extent that the supplier can claim against the manufacturer.

- 6.27 Denying liability for ‘consequential’ loss can allow a supplier to escape liability for negligently causing a serious problem for the consumer, even if, for instance, the consumer actually told a supplier about it and asked the supplier to take care to avoid causing it. An example would be where the supplier of a service has been told that if it is not performed on time, the consumer will suffer loss under another contract.
- 6.28 We are **less likely to object** to terms that allow the supplier to exclude liability for:
- losses that were not reasonably foreseeable to both parties when the contract was formed
 - losses that were not caused by any breach on the part of the supplier
 - business losses.
- 6.29 We **also object** to the use of the phrase ‘consequential loss’ because its technical meaning is unknown to most people. Its use in standard contracts can lead to consumers thinking – and being told – that they have no claim for any loss consequent on a supplier’s breach of contract. This may effectively deprive them of any compensation at all.

Examples of terms excluding liability for consequential loss

Original term	New term
<p>‘The Company shall not be liable for any consequential loss howsoever arising.’</p>	<p>‘The Company will not be liable under this contract for any loss or damage caused by them, their employees or agents in circumstances where:</p> <ul style="list-style-type: none"> ● there is no breach of a legal duty of care owed to you by the Company or by any of the Company’s employees or agents; or ● such loss or damage is not a reasonably foreseeable result of any such breach; ● [the] loss or damage result(s) from breach by you of any term of this contract.’
<p>‘The Company shall not be liable for any consequential loss howsoever arising.’</p>	<p>‘The Company shall not be liable for losses that were actually unforeseeable to the parties when the contract was formed, for losses not caused by the Company’s breach of the contract or for any business losses...’</p>

Group 2(d): Time limits on claims

- 6.30 The law allows parties to a contract a reasonable time for making claims where the parties have not agreed a definite period between themselves.
- 6.31 We **do object** to terms that free suppliers from their responsibilities towards the consumer when the consumer does not make a complaint immediately or within an unduly short period of time. For example, we **object** to terms that impose a short time limit because:
- ordinary people could inadvertently miss it or miss it because of circumstances outside their control
 - some faults, for which the supplier is responsible, may only become apparent after a time limit has expired.
- 6.32 The sanction – loss of statutory rights to redress – is over-severe and inappropriate. In supply-only contracts in England and Wales use of such a term could result in prosecution by a local authority Trading Standards Service under the Consumer Transactions (Restrictions on Statements) Order 1976.
- 6.33 We **do not** object to:
- terms that request prompt notification of complaints – because that increases the chances of successful resolution. What is prompt will depend on the circumstances, but there should be no scope for consumers thinking they will automatically lose their rights if notification is not considered prompt.
 - terms that warn consumers of the need to check, to the best of their ability and at the earliest opportunity, for any defects or discrepancies, and to take prompt action as soon as they become aware of any problem. There must be no suggestion, however, that the supplier disclaims liability for problems that consumers fail to notice.
- 6.34 A statement that ‘statutory rights are unaffected’, without explanation, will not make such a term acceptable to the OFT – see paragraph 6.12. A better approach is to insist on prompt notification in a way that does not restrict consumers’ legal rights. For example, to require notice of a complaint within a ‘reasonable’ time of, or promptly after, the discovery of a problem. Alternatively, a period may be set which takes proper account of the fact that consumers may be ill or absent from home for short periods after making a purchase.

Example

Original term	New term
‘Any defects attributable to bad workmanship or faulty materials supplied by the Company must be notified in writing by the customer to the Company within 7 days of completion of the work.’	‘Any claim by the Customer for faulty or poor workmanship must be notified to the Company as soon as reasonably practical after the fault/damage is discovered. In order to avoid any confusion or delay notification should be made to the Company in writing or confirmed in writing.’

Group 2(e): Terms excluding the right to set-off

- 6.35 We mention our concerns about the exclusion of the right to set-off in Chapter 5 at paragraphs 5.3 – 5.7 above. If consumers have a claim about goods and/or services, and they have not already paid for them, they are legally entitled to withhold part of the price, so long as the claim is genuine, and the amount withheld is proportionate to the fault. This helps prevent unnecessary legal proceedings.
- 6.36 We **do object** to terms which exclude the right to set-off because such terms have the indirect effect of excluding the supplier's liability and mislead consumers into believing that they have no choice but to pay in full, even when there is something wrong with their purchase.
- 6.37 Terms requiring **full payment in advance** effectively remove the consumer's opportunity to set off a claim for faulty goods or work. We **object** to such terms because once the supplier has received full payment, the incentive to complete the work or to perform it with reasonable skill and care is reduced or removed. This is a particular problem in contracts with a substantial installation element and where the quality of installation or fitting is critical. It also leaves consumers exposed if the supplier becomes insolvent.
- 6.38 We **do not object** to 'stage payment' arrangements which:
- fairly reflect the supplier's expenditure in carrying out the contract
 - leave consumers holding an amount of the payment until completion, sufficient to enable them to exercise an effective right of set-off.
- 6.39 We have reserved our position on terms which require full payment in advance but where a retention amount is held under secure arrangements, such as the Qualitas payment protection scheme (see Annexe D). This is because there is a guarantee that funds will not be released until any dispute is resolved by independent adjudication.
- 6.40 We **do not object** to terms which merely:
- state that the consumer has a legal obligation to pay promptly and in full what is properly owing: that is, the full price on satisfactory completion of the contract
 - deter consumers from withholding amounts that are disproportionate to the fault in the goods or services.
- 6.41 We **do object** to terms that penalise set-off. We are particularly likely to have concerns, whatever the subject matter of the contract, where consumers are subject to an immediately effective penalty if they do not pay the whole contract price when demanded – for instance, where there is a permanent loss of guarantee rights, or of right to a price discount. For more details about our views on terms that exclude the right to set-off and terms that require full payment in advance, please refer to pages 13-14 of the *Unfair Contract Terms Guidance* (OFT311).

Examples

Original term	New term
'The balance outstanding of the purchase price becomes payable at the time of delivery or completion of the installation or as specified [above]...'	'The balance outstanding of the purchase price is due on completion of the installation. The Customer shall not be entitled by reason of any alleged minor defect to withhold more than a proportionate amount of the sum due.'
'In the event of non-completion of minor works the Customer shall not be entitled to withhold payment greater than 5% of the Contract price.'	'In the event of any alleged minor defect, the Customer shall not be entitled to withhold more than a proportionate amount of the sum due.'
'The balance referred to overleaf shall be paid to the company upon delivery or installation. The purchaser shall not be entitled to withhold payment by reason of any alleged minor defects. The company will investigate any alleged defect after payment in full...'	'The client...will pay the balance of the contract price after the items have been installed to the satisfaction of the client.'

6.42 We **do object** to accelerated payment terms ie terms that require the consumer to pay earlier than would otherwise have been the case, e.g. for failing either to do something or to allow the supplier to do something. These terms have the same effect as full payment in advance terms. The new term below recognises that the supplier is entitled to receive payment for fulfilling his obligation whilst protecting a consumer's right to set-off. A fair percentage would depend on the individual circumstances – 60% may be unfair in some situations.

Example

Original term	New term
'The Company reserves the right to invoice and enforce payment of the contract price if an appointment for the installation has not been agreed within a period of twenty eight days of request by the Company for such an appointment.'	'The Customer will allow installation to start within 21 days of being informed by the Company that the materials are ready. If within a further 21 days the Customer has not permitted installation, 60% of the price shall be immediately payable. The balance of the contract sum being payable once the installation is complete.'

Group 2(f): Exclusion of liability for delay

- 6.43 Suppliers are required by law to supply goods and services when agreed, or, if no date is fixed, within a reasonable time.
- 6.44 We **do object** to terms that:
- exclude liability for delay
 - allow long periods for delivery or completion of work, or excessive margins of delay after an agreed date.
- 6.45 In both cases the effect is to allow the supplier to ignore the convenience of customers and to disregard their commitments on deadlines, including verbal promises. The fact that delays may be caused by circumstances genuinely beyond the supplier's control does not make it fair to exclude liability for all delays however caused. We object to such terms because they protect the supplier whether or not he is at fault.
- 6.46 We **do not** object to terms that exclude liability for delay restricted to circumstances that are *genuinely* beyond the supplier's control. Shortage of stock and labour problems for instance can be the fault of the supplier. We also take account of whether the terms provide a right for the consumer to cancel without penalty, even where the delay is caused by circumstances beyond the supplier's control.

Examples

Original term	New term
'Every effort will be made to meet the requirements of the Customer but no guarantee can be given of the date of commencement or completion of the work. [The Supplier] accepts no responsibility for any delay in the execution of the work or damage or inconvenience caused, due to labour disputes, fire, accident, non-delivery or shortage of materials or other causes beyond [the Supplier's] control.'	'We will make every effort to complete the work by any time agreed with you. You must appreciate, however, that sometimes delays may occur for reasons beyond our control and we cannot be held responsible for those delays. If such delays occur we will complete the work as soon as possible.'
'...The Company will do its best to meet installation dates, but will only accept this contract on the strict understanding that no guarantee whatsoever can be given regarding the delivery dates.'	'...The Company will do all it reasonably can to meet dates given for delivery and/or installation. In the case of unforeseen circumstances, beyond the reasonable control of the Company, the Company will contact the Customer and agree an alternative date.'

Group 2(h): Guarantees operating as exclusion clauses

- 6.47 We consider guarantees which fall a long way short of the consumer's ordinary rights to be seriously objectionable in any form. Regulation 15(1) of the Sale and Supply of Goods to Consumers Regulations 2002 provides that a guarantee takes effect when the goods are delivered (see also Annexe F for further details about the effect of the 2002 Regulations on existing consumer legislation). More particularly we think that restrictive guarantees **cannot** be made fair by being coupled with a statement that 'statutory rights are unaffected'. This simply contradicts the effect of the restrictive guarantee, making it worthless and confusing to the consumer.
- 6.48 Guarantees that offer real additional benefits but include certain limitations or conditions which do not apply to consumers' statutory and other rights (for instance strict time limits for making claims, specific requirements as to maintenance etc) are regarded differently.
- 6.49 We think they may be made fairer by including in the guarantee itself, a statement making it clear that the consumer's legal rights in relation to the quality and description of the goods and services are unaffected. Note that, in our view, even in these cases, the phrase 'statutory rights' should not be used without some indication as to which rights are being referred to.
- 6.50 In some cases involving guarantees that offer real benefits, suppliers have met our objections by revising guarantee terms to say not only that consumer's rights in law are unaffected but that these rights relate to the quality and description of goods and services, and that if the consumer is in any doubt about them advice can be sought from local authority Trading Standards Services and Citizens Advice Bureaux.

Examples

Original term	New term
'[The Supplier] offers a 12 month guarantee on all new parts fitted... and a 2 month guarantee on labour... A maximum of three free return visits will be made only during our period of guarantee, if any problem still arises the customer will be referred to the manufacturers...'	This term was deleted.
'All equipment materials and workmanship provided by the Company ...are guaranteed for a period of six months from the date of their provision. The Company's liability under this guarantee is strictly limited to the replacement of parts of or repairs to the system.'	This term was deleted.

Group 4: Retaining prepayments on consumer cancellation

Schedule 2, paragraph 1(d), states that terms may be unfair if they have the object or effect of: permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract

- 6.51 If the supplier is in serious breach, consumers have a basic right to cancel a contract without penalty (a full refund of any prepayments and possibly compensation as well).
- 6.52 We **do object** to terms that do not recognise this and deprive consumers of prepayments when they cancel. In certain circumstances consumers are entitled to a refund even when it is they who bring the contract to an end (see Group 6(a) and Annexe C).
- 6.53 We **also object** to terms that provide that consumers, although at fault, always lose everything they have paid in advance, regardless of the amount of any costs or losses caused to the supplier by the cancellation. The law allows suppliers to keep only as much of any prepayments as is needed to cover its reasonable net costs, reasonably incurred, or the net loss of profit (but not both where it would lead to double counting) that is suffered as a result of the consumer's breach of the agreement. See also our comments about financial penalties and the duty to mitigate loss at Group 5.
- 6.54 We **do not** object to terms that fairly reflect this general contractual position. The risk of unfairness is likely to be reduced if the deposit is set low – to indicate the consumer's intention to proceed – and is negligible if it merely reflects the ordinary administrative expenses of a transaction.

Examples of unfair 'no refunds' terms

Original term	New term
'In the event of the customer purporting to cancel any order placed with the Company then the Company reserves the right to recover such costs as may have been incurred by them in addition to forfeiting any payment which may have been made by the customer to secure performance of the contract works.'	'The customer has the right to cancel any contract within 7 days of the date of signing of any contract without penalty.'

cont.

Examples of unfair 'no refunds' terms (cont.)

Original term	New term
'Should you cancel your order at any time prior to the commencement of the work [the Supplier] may retain the deposit as a contribution towards any costs which it has incurred.'	'We will permit you to cancel this contract by sending written notice...no later than 7 days after the date on which this contract has been signed. If you request cancellation at a later date, then unless we are in breach of contract, we have the right to refuse...[or] retain all or part of your deposit as a contribution towards any losses or costs we suffer as a result of the cancellation.'
'Cancellation of the Contract prior to manufacture may only be considered provided the Company is reimbursed for all expenses incurred to date, plus the gross profit anticipated upon installation.'	'The Customer may cancel this agreement within seven days following the making of this contract. If you cancel the agreement after the period referred to [above] you must pay any reasonable losses and costs the Company suffer because of the cancellation including loss of profit.'

Group 5: Financial penalties

Schedule 2, paragraph 1(e), states that terms may be unfair if they have the object or effect of: requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.

- 6.55 It is unfair to impose excessive sanctions for a breach of contract. A contract term is a penalty if it requires a consumer to pay **more** in compensation for a breach of contract than a **reasonable pre-estimate** of the loss caused to the supplier. Under common law this type of term would normally be void as a penalty. Such terms deter consumers from exercising their right to cancel. For more details about our views on financial penalties please refer to pages 21-22 of the *Unfair Contract Terms Guidance* (OFT311).
- 6.56 Suppliers have a duty to take reasonable steps to reduce ('mitigate') their loss, for example where a contract does not go ahead by selling the goods or services to someone else. This duty applies even where termination is the consumer's fault.
- 6.57 We **particularly object** to terms that:
- seek to impose excessive penalties for minor or technical breaches. Consumers should be given the opportunity to remedy such breaches
 - require consumers to pay an unreasonable rate of interest on outstanding payments, for instance at a rate excessively above the clearing banks' base rates. Consumers should not be required to pay more than the cost of making up the deficit caused to the supplier by their default

- impose or could allow excessive storage or similar charges where the consumer fails to take delivery as agreed
- give the supplier discretion to impose vague and unspecified penalties.

6.58 We are **unlikely to object** to terms that:

- require the consumer to pay, where they are in breach, a stated sum which represents a real and fair pre-estimate of the net costs or net loss of profit the supplier is likely to suffer
- state simply that, where the consumer is in breach, they can be expected to pay reasonable compensation – reasonable costs or losses reasonably incurred – or compensation according to law
- do not impose penalties for minor and technical breaches
- provide for an annual rate of interest on overdue accounts linked to a named clearing bank's interest rate. Any margin above the named bank's base rate should not be excessive and should take account of the rates and charges incurred as a result of the consumer's late payment. A margin of up to 3% is unlikely to be challenged.

Examples

Original term	New term
'In the event of legal action ...for breach of payment, the customer shall be responsible for all costs and disbursements incurred by [the Supplier] on a full indemnity basis'.	'In the event of legal action ...for breach of payment, the customer shall be responsible for all costs allowable by the courts if an award is made in [the Supplier's] favour'.
'Without prejudice to its right to claim damages for breach of contract the company may in its sole discretion agree to the cancellation of an order which a purchaser has no right to cancel, upon payment to the company of all expenses incurred.'	'If the purchaser cancels this agreement otherwise than in accordance with these provisions, the seller may be entitled to claim damages in accordance with the general rules of English law.'
'In the event of cancellation of orders we reserve the right to make a cancellation charge sufficient to cover all expenses for handling charges and in any event a minimum of 20 per cent of the total order values will be charged.'	'If you cancel an order, we lose the time we have spent on your order up to the time at which you cancel and so we reserve the right to charge you a cancellation fee which is sufficient to cover our lost expenses and handling charges.'
'Failure to comply with the payment of the balance on the due date ...will entitle the company to charge interest on the balance outstanding at the rate of 7% compound interest above bank base rate.'	'Failure to pay the balance outstanding will... entitle the company to charge interest on the balance at the rate of 3% interest above Barclays Bank base rate.'

6.59 We also **object** to terms that contain **disguised penalties** including any term which requires excessive payment in the event of early termination, or an act by the consumer which the supplier wants to deter. We would object to such terms even if this was not the intended effect of the term, and even where it is drafted as a 'core term'. Thus, for example, a penalty cannot be made fair by transforming it into a requirement to pay a fee for exercising a contractual option. The following is an example of a term that contained a disguised penalty:

Examples

Original term	New term
'In the event the customer cannot accept delivery of the goods within 14 days of the Company receiving said goods, the Company reserve the right to request payment in full or levy interest and warehouse charges where appropriate.'	'In the event the customer cannot accept delivery of the goods within 14 days of the Company receiving said goods, the Company reserve the right to request payment of the 60% balance...on receipt of this payment the goods will be stored up to 26 weeks without further charge.'

Group 6(a): Unequal cancellation rights

Schedule 2, paragraph 1(f), states that terms may be unfair if they have the object or effect of: authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer.

- 6.60 Fairness and balance require that consumers and suppliers should be on an equal footing in terms of rights to end or withdraw from a contract. The supplier's rights should not be excessive, nor should the consumer's be over-restricted. This does not, however, mean a merely formal equivalence in rights to cancel, but rather that both parties should enjoy rights of equal extent and value.
- 6.61 In law, each party has a right to end the contract if the other commits a serious breach of it and may be entitled to compensation. Consumers may face considerable inconvenience, not to mention costs or other problems, if the supplier cancels even where the terms provide for the refund of all prepayments. We **do object** to terms relating to cancellation rights which give the supplier too much freedom to cancel or the consumer too little.

Supplier's rights to cancel

- 6.62 Home improvement contracts commonly allow the supplier to cancel the contract, either at its discretion at any time or after survey, and limit its liability to pay anything to the consumer when it does so. Consumers frequently have no comparable rights, or they must compensate the supplier fully if they do cancel. This seems to us to be unbalanced and potentially unfair.
- 6.63 For obvious reasons, we **do object** to terms that allow a right for the supplier to cancel at its discretion, without liability of any kind, particularly with no duty to

return prepayments. We **also** object if the right to cancel is qualified *only* by a duty to return prepayments, excluding any other right of redress. Cancellation late in the day seriously inconveniences consumers who have made arrangements for installation, and it often leaves them facing costs without having gained any benefit. They should not be deprived of the chance of seeking redress for those costs caused by the fault of the supplier.

- 6.64 There is normally no objection to terms which reflect the ordinary law, by allowing the supplier to end the contract if the consumer is in serious breach. There is also less risk of unfairness where the supplier's right to cancel is balanced with an equally extensive right for the consumer to cancel, without penalty, for a period after signing the contract. This would amount to a 'cooling-off period' but to avoid imbalance the consumer's right to cancel must last as long as the supplier's.

Cancellation after a survey

- 6.65 We **also** object to terms that provide the right to cancel after a survey, whether it is a right for the supplier, or a right for the consumer where the supplier has retained and exercised a right to increase the price. Our objections apply even where there is provision for repayment of the customer's deposit.
- 6.66 We object to these terms where they allow suppliers to use them as a cover for increasing prices after giving an unrealistically low quote to secure the contract. There is no justification for a price increase when a survey does not actually reveal any adverse conditions that could not reasonably have been foreseen and taken into account in giving the initial quote. Consumers are unfairly inconvenienced by this sort of unfair sales tactic even if they suffer no financial loss.
- 6.67 We recognise that it maybe reasonable for suppliers not to be required to proceed with installations where there is a genuinely adverse survey report but such terms should be drafted so that consumers are not at risk of abuse. Such terms can be acceptable if they make it clear that:
- the supplier's freedom to cancel is not unrestricted. For instance, the supplier might promise to carry out the survey within a specified short period, so as to minimize inconvenience to the consumer, and
 - the supplier is committed to giving the consumer a valid reason for cancellation – an explanation of the adverse structural conditions encountered – and preferably in writing.
- 6.68 Where a surveyor is employed, it is in our view clearly not fair for the contract to make the customer responsible for assessing whether the property is suitable for the works to be undertaken. **We object** to terms that give the supplier:
- a right to cancel without liability, on the grounds of structural unsuitability when a survey had taken place earlier and problems that could have been identified then were overlooked, and
 - an unrestricted right to raise prices where structural problems emerge that the survey failed to identify.

Consumer cancellation rights

- 6.69 Contracts often state (incorrectly) that the consumer cannot cancel the contract without the supplier's agreement. We object to such terms because, as stated in paragraph 6.61, both parties have legal rights to cancel if the other commits a serious breach of the contract.
- 6.70 Where 'doorstep selling' takes place following an unsolicited visit, consumers will generally have a legal right to cancel, without penalty, for seven days after a contract is signed (see Annexe C for further details). The contract should not in any way undermine this right. A number of suppliers extend this right to all customers, regardless of whether a visit was solicited or unsolicited, which simplifies the contract, and increases the chances of its terms generally being considered fair. The law requires that to exercise this cancellation right a consumer must give written notice but makes no other formal requirements. We therefore object to terms that require the use of registered post.

Examples

Original term	New term
'This contract is NOT subject to cancellation.'	'As all orders are made to the Customer's individual requirements, this order cannot be cancelled unless the Company is in breach of its obligations to the Customer.'
'The Company reserves the right to cancel this contract if, after consultation with the Customer, the surveyor's report recommends the installation cannot be successfully carried out.'	'Subsequent to signing the contract the Company will carry out a survey for the proposed work within 14 days or a mutual time subject to agreement. In the event of an unsatisfactory survey report the Company reserve the right to cancel the contract, after having given you a full written explanation of the adverse structural conditions encountered. The Company will also refund all money deposited by you.'
'We reserve the right to cancel an order and refund all monies deposited in respect thereof in the case of either an unsatisfactory surveyor's report or unsatisfactory installation price check on the property at which the installation is to be made.'	'Subsequent to signing the contract we will carry out a survey for the proposed work within 10 days or a mutual time subject to agreement. In the event of an unsatisfactory survey report we will reserve the right to cancel the contract, after having given you a full written explanation of the adverse structural conditions encountered. We will also refund all money deposited by you.'

6.71 **Service Contracts:** Cancellation rights should also be fair and balanced in service contracts associated with any installation such as a burglar alarm or a central heating system.

Examples

Original term	New term
<p>'We will provide the service for 36 months from the date shown at the start of this agreement and for any extra period that we agree to. During the first 36 months you cannot end this agreement, but we may end it at any time under [see other term]. After the first 36 months, you or we may end it by giving three months' notice.'</p>	<p>'We will provide the service for 36 months from the date shown at the start of this agreement and for any extra period that we agree to. You or we may end this agreement at any time under [see other term]. Or, you or we may give two months' notice which will apply at any time after 36 months from the date of this agreement.'</p>

Group 8: Excessive notice periods for consumer cancellation

Schedule 2, paragraph 1(h), states that terms may be unfair if they have the object or effect of: automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early.

6.72 A term clearly defining the duration of a contract is likely to be a 'core' term (see paragraph 6.146 on core terms). Terms that would not be regarded as 'core' terms and liable to be considered unfair include those automatically extending the contract period beyond the consumer's normal expectation, or that require early notice by the consumer to cancel and benefit from the consumer's inertia or oversight to extend themselves.

6.73 We **are likely to object** to such terms. They are to be found in ongoing service and maintenance agreements associated with home improvement contracts such as for burglar alarms. Consumers should not be required to make cancellation decisions unnecessarily far in advance since they are more likely to overlook the key date or to estimate their future needs wrongly.

6.74 We are **not likely to object** to terms that:

- give reasonably short notice periods
- do not state or imply that the contract cannot be cancelled during any initial fixed term where the supplier is in breach or that any notice period applies in such circumstances.

Examples

Original term	New term
'This Agreement shall following the completion of the installation and the payment of the cost of this installation in full by the customer to the Company terminate at the expiration of 12 months written notice given by either party to the other to such effect.'	'This Agreement shall commence on the commencement date and shall continue in force for the term unless either party gives twenty one days written notice to the other party of its intention to terminate this Agreement, or if this Agreement is terminated by either party pursuant to...'
'This agreement ...shall continue for the minimum period of 12 months and thereafter until terminated by no less than three months' notice in writing given by either party to the other. Such notice to be given not before the expiry of the minimum period.'	'This agreement is for a minimum period of 12 months...it may be terminated by giving one month's notice, which commences on or after the end of the initial 11 months.'

Group 9: Binding consumers to hidden terms⁴

Schedule 2, paragraph 1(i), states that terms may be unfair if they have the object or effect of: irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract

- 6.75 Consumers should always have an opportunity to read and understand terms before entering into a contract. We **object** to terms that seek to bind consumers to unknown provisions. We also object to terms that bind consumers to terms in other related documents, particularly where failure to comply could result in the loss of benefits for consumers, for example terms in a guarantee or related maintenance contract.
- 6.76 If, for any reason, suppliers cannot communicate important details of the contract to the consumer, they could consider offering a '**cooling off period**' (even where the consumer has no statutory right, for example following a solicited visit under the DoSRs – see Annex C) giving consumers time to read the terms and withdraw if they do not wish to proceed without penalty or loss of prepayments.
- 6.77 We **are less likely to object** to terms that:
- clearly present important information
 - make available the related documents prior to signature of the contract or, where appropriate, include a summary either in the terms or separately.

⁴ It is not 'hidden terms' themselves that are indicated to be unfair, but any term which binds the consumer to accept or comply with them-or, in legal jargon, 'incorporates' them 'by reference'. However, terms of whose existence and content the consumer has no adequate notice at the time of entering the contract may not be binding under the general law, in any case, especially if they are onerous in character.

Example

Original term	New term
'Any claim under the Company guarantee must be made in accordance with the conditions of the Guarantee, a copy of which is available upon request.'	This term was deleted.
'In the case of disputes, the Glass and Glazing Federation Standards for Glass Quality will apply.'	This term was deleted.

Group 10: Supplier's right to vary terms generally

Schedule 2, paragraph 1(j), states that terms may be unfair if they have the object or effect of: enabling the seller or supplier to alter the terms of the contract without a valid reason

- 6.78 A right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party, is likely to be regarded as unfair. A contract can be considered imbalanced only if both parties are bound by their obligations as agreed.
- 6.79 We **do object** to terms that could be used to force the consumer to accept increased costs or penalties, new requirements, or reduced benefits whether or not they are meant to be used in that way. Such a 'variation' clause can distort the balance of rights and obligations in the contract even though it was intended solely to facilitate minor adjustments, if its wording means it could be used to impose more substantial changes. This applies to terms giving the supplier the right to make corrections to contracts at its discretion and without liability.
- 6.80 The more general type of variation clause is not common in this sector. It is more usual for the variation clauses here to be of two particular types – the right to vary what is supplied and the right to vary the price (see Groups 11 and 12 respectively, below).
- 6.81 We **are less likely to object** to terms that allow for variation that:
- are narrowed in effect, so that they cannot be used to change the balance of advantage under the contract – for instance, allowing variations to reflect changes in the law
 - can be exercised only for reasons stated in the contract which are clear and specific enough to ensure the power to vary cannot be used at will to suit the interests of the supplier, or with unexpected effects on consumers (see for example paragraphs 6.66 and 6.67)
 - places a duty on the supplier to give notice of any variation, and a right for the consumer to cancel before being affected by it, without penalty or otherwise being worse off for having entered the contract.

6.82 A term which merely says that variations will only be ‘reasonable’ or will only be made ‘reasonably’, is unlikely to be any fairer than one which contains no such a qualification, unless there can be little doubt in a consumer’s mind as to what sort of variation, broadly speaking, such wording allows, and in what circumstances.⁵

Examples

Original term	New term
‘Any typographical, clerical or other error or omission in any sales literature, quotation, price list, acceptance of offer, invoice or other document or information issued by the seller shall be subject to correction without any liability on the part of the seller.’	‘Any error or omission in any information or document issued by us shall be subject to correction provided that the correction does not materially affect the contract.’
‘[The Supplier] may at any time vary or add to these Conditions as it deems necessary.’	‘[The Supplier] may change or add to Conditions...for security, legal or regulatory reasons...We will give you at least one month’s notice of any changes or additions. We will not use this right to vary the terms of any special offer which applies to you...you may end this contract at any time.....by giving one month’s notice, if we tell you...we are going to change these conditions.’

Group 11: Right to change what is supplied

Schedule 2, paragraph 1(k), states that terms may be unfair if they have the object or effect of: enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.

6.83 Wide discretionary clauses of this type are a common source of unfairness in home improvement contracts. They give the supplier an unqualified right to change products, often linked to a vague justification in terms of ‘product development’ or ‘a policy of continuous improvement of products’. Such terms conflict with consumers’ statutory rights. Under these rights, consumers are entitled to goods or services that are, in all important respects, the same as they agreed to buy and not merely ‘similar’. This not only includes the goods but how the service – for example, the installation – is to be provided. Consumers are legally entitled to expect satisfactory quality in goods and services, but that does not mean it is fair to reserve the right to

⁵ Where the criteria of reasonableness are vague, or clearly meant to include the best commercial interests of the business, there will be scope for the supplier to change the bargain unfairly to the detriment of consumers, simply on the basis that he needs to protect his profit margins. A reasonableness requirement is most likely to be acceptable where fair-minded persons in the position of the consumer and supplier would be likely to share a common view as to what would be “reasonable” – for instance, where a “reasonable charge” clearly means a charge sufficient to meet specific open-market costs.

supply something that is not what was agreed but is of equivalent standard or value. Terms should respect **both** the right to receive products that are as described **and** the right to satisfactory quality, **not** one or the other. Goods are not of the same description just because they are of the same quality.

- 6.84 We therefore **do object** to terms that state the consumer's right is only for goods of the same or similar quality. We take account of the fact that products in this sector, for example bathroom fittings or double-glazed windows, are frequently chosen because of their appearance, not just for quality or effectiveness.
- 6.85 We **do object** to such variation clauses particularly when they are coupled with a right to increase prices. These two types of clauses together can be a means of forcing consumers to buy and pay more for different products from those they actually ordered.
- 6.86 We **do object** to terms that allow suppliers to provide something different to what was agreed the supplier would supply. We do **not object** to terms that provide for minor or technically unavoidable changes that will be of no real significance to the consumer – for example, minor changes to specifications required for safety reasons – or changes in the law.
- 6.87 Similarly, we do **not object** to terms saying that suppliers can vary the specification of products featured in their brochures, advertising or demonstrations, provided customers are told before the point of purchase how what they are buying differs from what was advertised or demonstrated.⁶
- 6.88 We also do **not object** to terms that permit more significant changes, provided that they are limited and clearly defined in scope, with genuine **valid reasons** as to why the change is necessary and provided that the consumer fully understands and agrees to the change in advance. The inclusion of valid reasons, however, cannot justify making consumers pay for a product substantially different from what they agreed to buy.
- 6.89 The consumer should be able to cancel the contract and receive a refund of prepayments where they cannot receive the agreed goods or services or an alternative that is acceptable to them. But we **do object** to terms that allow the supplier to vary what is supplied at will, even when there is a cancellation right.

⁶ Consumers (and businesses) are protected against misleading advertising by the Control of Misleading Advertisements Regulations 1988 (CMARs). CMARs define an advertisement as 'any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations' and they provide that an advertisement is misleading 'if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to effect their economic behaviour or, for those reasons, injures or is likely to injure a competitor or the person whose interests the advertisement seeks to promote'.

Examples

Original term	New term
<p>'Sample windows are intended to demonstrate the workings of a typical window and the materials to be used. The windows to fulfil this order will be manufactured in the way [the Supplier] consider most suitable, after inspection and measuring by its Installation Department. The Company's policy is one of continuous improvement and the Company reserves the right to incorporate modifications in its products without prior notice.'</p>	<p>'Sample windows are intended to demonstrate the workings of a typical window and the materials to be used. The windows manufactured to complete an installation may have minor and technical changes, which are unavoidable deviations from original specification.'</p>
<p>'If, for any reason, the Company is unable to supply a particular item of furniture or a particular appliance, the Company will notify the Customer. The Company will normally replace it with an item of equivalent or superior standard and value.'</p>	<p>'If, for any reason beyond the Company's reasonable control, the Company is unable to supply a particular item of furniture or a particular appliance, the Company will notify the Customer. With the agreement of the Customer the Company will replace it with an item of superior standard and value.'</p>

Group 12: Price variation clauses

Schedule 2, paragraph 1(l), states that terms may be unfair if they have the object or effect of: providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel if the final price is too high in relation to the price agreed when the contract was concluded.

- 6.90 We **object** to terms that allow suppliers the right to increase at will the price quoted for the goods or services when ordered, without giving the consumer the right to cancel. Price increases are a particular risk in this sector when structural problems may come to light during the works or installation. It is also possible that manufacturers will increase their prices-for example, of kitchen units. We **object** to such terms because they can lure the consumer into contracting at a low price which is then increased.
- 6.91 We **also object** to terms that allow the supplier to set a time limit after which the price will be increased. Such terms give the supplier an incentive to delay the work.

6.92 We do **not object to**:

- terms that narrowly define the reasons for any price increases – for example, limiting a price increase to any extra work that arises from structural problems discovered during the installation but which could not be found during the survey – alerting the consumer to the risk and agreeing to give a written explanation of the need for any such increases.
- price variation terms – for example, in continuing service agreements linked to an installation (eg for burglar alarms) – that permit increases at stated reasonable intervals, linked to a relevant published price index such as the RPI, again provided that these details are drawn to the consumer’s attention.

6.93 In assessing whether price variation terms are fair, we take account of any terms that give the consumer the right to cancel the contract in the event of price increases. But such terms may provide suppliers with a cost-free means to squeeze out a consumer whose contract is less profitable than a subsequent one, and cancellation may be of little value to a consumer who is left without the goods or services that he contracted for. Cancellation terms therefore have to be of real value to the consumer by providing for compensation for any loss as well as the refund of any prepayments. Without this the right, increasing the price could be used as a means of escaping from liability for defective work, for example, or damage done to the consumer’s property.

Examples

Original term	New term
<p>‘Parts, rubbish and scrap will normally be removed from the Customer’s premises free of charge during and on completion of the work, unless bulky or heavy and likely to cause additional disposal costs, whereupon the Customer shall be liable to pay such additional costs immediately upon receiving written notification thereof.’</p>	<p>‘Parts, rubbish and scrap will normally be removed from the Customer’s premises free of charge during and on completion of the work, unless bulky or heavy and likely to cause additional disposal costs, as specified in quotation/estimate.’</p>
<p>‘The company reserves the right to increase the amount of the maintenance charge or any other charge in the case of increased costs, expenses and out-goings by giving the customer one months notice in writing...’</p>	<p>‘We may need to increase our prices. The increases will not be more than the change in the Retail Price Index since the last increase.’</p>

Group 13: Supplier's right of final decision

Schedule 2, paragraph 1(m), states that terms may be unfair if they have the object or effect of: giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.

- 6.94 We **do object** to terms that allow suppliers unilaterally to take themselves outside the normal rules of law. Disputes over the meaning and application of contract terms can normally be referred to the courts if either party so chooses. This unfairness is found in two kinds of term:
- those that allow the supplier to decide if he is in breach; and
 - those that allow the supplier to decide **the meaning of terms**.
- 6.95 In the first, if a supplier reserves the right to decide whether he has performed his contractual obligations properly, he can unfairly refuse to acknowledge that he has broken them, and deny redress to the consumer. Such terms are quite common and are typically found in terms that state that the existence of a defect must be proved to the supplier's satisfaction.
- 6.96 We **do object** to such terms because they allow the supplier to deny the consumer redress at his discretion. The consumer is led to believe that they have to accept the supplier's decision and therefore be left with unsatisfactory goods or installation. These terms have a similar effect to those that exclude liability for unsatisfactory goods and services.
- 6.97 In the second, if a supplier reserves the right to decide what a term in a contract means, then he is effectively in a position to alter the way it works to suit himself. We **do object** to such terms because they distort the balance of the contract. They have the same effect as the right to vary terms (see Group 10) because by imposing his interpretation on the contract, the supplier could introduce changes that the consumer believes he is forced to accept.
- 6.98 We do **not object** to terms that:
- allow for, but do not insist on, independent arbitration in event of a dispute. Compulsory arbitration terms are always unfair (see Group 17).
 - provide for independent testing, provided that consumers are not required to meet the costs of this when it turns out that their complaint is well-founded.

Examples

Original term	New term
'The company's decision that the installation has been completed will be accepted and be binding on the Purchaser.'	This term was deleted.
'The Company undertakes to repair or replace, at their discretion, any of the goods which are shown by the purchaser to the Company's satisfaction to be defective...'	'The Company undertakes to repair or replace any of the goods as a result of defective materials or manufacture.' ⁷
'Such defects will be investigated by the Company and if liability for same is accepted will be rectified at the Company's expense.'	This term was deleted.

⁷ The revision to this term predates the SSGCRs 2002 which affords new remedies including a full or partial refund as well as repair or replacement (see Annexe F).

Group 14: Entire agreement clauses and formality requirements

Schedule 2, paragraph 1(n), states that terms may be unfair if they have the object or effect of: limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality.

Group 14 (a): Entire agreement clauses

6.99 Consumers rely on what is said to them when they are entering a contract. If they can be induced to part with money by claims and promises, and the supplier can then simply disclaim responsibility on the basis of such a legal technicality, the scope for bad faith is clear. We therefore **do object** to terms that:

- exclude liability for any promises that are not in the written contract
- provide that all the binding terms and conditions are contained in the standard written contracts and supersede any oral statements or representations.

We object to such terms because they have the effect of denying consumers their right to redress for misrepresentation.

6.100 Many contracts in this sector are signed in the home, often following lengthy visits from sales representatives who may make promises that influence the consumer's decision. It is particularly important, therefore, that the terms do **not** allow the supplier to attempt to escape responsibility for statements made by their employees or agents on the strength of a technicality (see also Group 14(b) below).

6.101 We **do object** to terms that:

- state that all additions and variations must be in writing; and
- deprive employees of authority to vary the contract.

We object to such terms because they are capable of allowing a supplier to dishonour an oral promise made on his behalf, even if it were made by an apparently authorised person, and relied on by the consumer in good faith.

6.102 We do **not object** to prominent notices in the agreement to warn consumers that they should read the contract carefully to ensure the terms contain everything they want to be in the contract, and exclude everything they are not prepared to agree to. The effect of such a warning may be further reinforced if the consumer is explicitly encouraged to ask questions and clarify uncertainties. Provision of a telephone number to ring and a 'cooling-off' period to allow for questions may also be helpful.

6.103 We **do object** to terms that say that:

- changes to the contract are permitted only if agreed in writing, or
- variations should be signed by a director of the company, or
- no employee has authority to vary the contract.

6.104 We do **not object** to terms that provide that the supplier's consent is needed for alterations or additions, state this will not be withheld unreasonably; and will be confirmed in writing.

Examples

Original term	New term
<p>'These conditions shall apply to all contracts for the sale of goods by the Seller or its authorised distributor or agent to the Buyer to the exclusion of all other terms and conditions.'</p>	<p>'The Company intends to rely upon the written terms set out here and on the other side of this document. If you require any changes, please make sure you ask for these to be put in writing. In that way, we can avoid any problems surrounding what the Company and you the customer is expected to do.'</p>
<p>'The placing of an order with the company will be deemed to bind the customer to the following terms and conditions and no oral representation shall bind the company. Any variation or alteration in the following terms and conditions shall only be binding upon the company if made in writing and signed by a director of the company.'</p>	<p>'To protect your own interests please read the conditions carefully before signing them. ...If you are uncertain as to your rights under them or you want any explanation about them please write or telephone to our customer queries department, at the address and telephone number set out above.'</p>
<p>'Any and all amendments or variations to the written contract overleaf shall and must be in writing on an official contract variation form duly signed by the customer and authorised representative of the Company.'</p>	<p>'If any amendments to this contract are required it is preferable that they be confirmed in writing by the customer and an authorised representative of the Company.'</p>

Group 14(b): Formality requirements

- 6.105 It is often administratively convenient if the consumer complies with formalities – for instance, procedures involving paperwork – and may even be sensible from the consumer's own point of view. But we do not think this justifies a supplier opting out of important obligations when the consumer commits a technical breach.
- 6.106 We **do object** to terms that require consumers to comply with formalities in order to obtain or protect their rights under the contract, for example to send letters by recorded delivery when ordinary post would suffice; require the use of official paperwork or signature by specified company members. Consumers should only be required to do what is reasonably necessary and any sanctions for failure to comply should be proportionate. For example, they should not lose the right to redress because they fail to use a particular method of communication.

Examples

Original term	New term
'...during the cooling off period...any postal cancellations must be by recorded delivery or registered post and receipt of post will be required should there be doubt as to when the contract was cancelled.'	'...during the cooling off period...any cancellations must be given by written notice by either party.'
'...written notice of cancellations is sent by recorded delivery to the company's head office...'	'We recommend that you send any notice of cancellation by recorded delivery post.'

Group 15: Binding consumers where the supplier defaults

Schedule 2, paragraph 1(o), states that terms may be unfair if they have the object or effect of: obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.

- 6.107 We **do object** to terms that require the consumer to pay or continue to make continuing payments when the goods or services are not provided. An example of this would be if the supplier fails to make delivery where goods are being supplied by instalment, or in a continuing service contract, for burglar alarms, for instance, where the supplier is allowed to suspend or significantly modify the service.
- 6.108 We **do not object** to terms in continuing service contracts that allow for suspension of the service in strictly limited and necessary circumstances particularly if the consumer may cancel, suspend or reduce payment during the affected period. Alternatively, where services are suspended, we **do not object** where the term provides for an extension of the period, without additional cost, to ensure that the consumer receives all the services and benefits contracted for.

Examples

Original term	New term
'The company will use its best endeavours to ensure that all equipment...is maintained in full working order but the company shall be under no liability to the [consumer] in respect of any failure or breakdown of any equipment...and such failure...shall not relieve the [consumer] of the obligation to make payments...'	This term was deleted.

Original term	New term
'If through circumstances beyond the control of [the Supplier] it is unable to provide the full range of services...[the consumer] shall remain liable for all...fees.'	This term was deleted.

Group 16: Supplier's right to assign without consent

Schedule 2, paragraph 1(p), states that terms may be unfair if they have the object or effect of: giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement.

- 6.109 We **do object** to terms: that allow a supplier to sell ('assign') his business without providing any assurance to or protection for the consumer against poorer service.
- 6.110 We do **not object** to terms that:
- require the supplier to consult the consumer and assign only if they agree
 - provide a penalty-free right to exit if they disagree
 - allow the supplier to assign only in circumstances which ensure that the consumer's rights under the contract will not be prejudiced.
- 6.111 Terms that deprive the consumer of the right to assign are dealt with separately in Group 18(d) as paragraph 1(p) only mentions the supplier's right to assign. The example below is also open to challenge under Group 18(d) as it excludes the consumer's right to assign what they have bought to someone else.

Example

Original term	New term
'This agreement and the benefits ...are personal to [the consumer]...but the Company's obligations may be performed by the Company's agents or assigns and the Company may assign the benefit of this agreement.'	This term was deleted.

Group 17: Restricting the consumer's remedies

Schedule 2, paragraph 1(q), states that terms may be unfair if they have the object or effect of: excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to applicable law, should lie with another party to the contract.

- 6.112 We **do object** to terms that could be used to prevent or hinder consumers from seeking redress when the supplier is in default.
- 6.113 Section 91 of the Arbitration Act 1996, makes a **compulsory arbitration clause** automatically unfair if it relates to claims of £5000 or less in England, Scotland and Wales or £3000 in Northern Ireland⁸. Under the Regulations, such terms are always unfair, regardless of circumstances. A compulsory arbitration clause forbidden by the 1996 Act is both legally ineffective or 'blacklisted' and open to regulatory action in all cases.
- 6.114 We **do not object** to terms that make it clear that both parties are free to decide whether to go to arbitration or not. Arbitration in the UK is fully covered by legal provisions so we **do not object** to voluntary arbitration terms, provided they are in clear language and not misleading.
- 6.115 We also **do object** to terms that seek to hinder consumers' right to redress by preventing them from starting legal proceedings in their local courts, by requiring **exclusive jurisdiction** of specified courts. For instance, it is unfair to require a consumer to use the courts of England and Wales if the consumer concerned lives in Scotland which has its own laws and courts. Consumers should not be forced to travel long distances or use unfamiliar procedures. They are protected by International Conventions on the issue, which are part of UK law.

Examples

Original term	New term
'Any dispute arising out of or in connection with this contract shall be referred to and finally resolved by arbitration under the Rules of the Chartered Institute of Arbitrators ⁹ , which Rules are deemed to be incorporated by reference into this clause and whose binding judgement must be available within 6 months of the initiation of the dispute procedure by either party.'	This term was deleted.
'This agreement is governed by English law and the English courts.'	'This agreement is governed by English law & the English courts or by the law and the courts governing where your property is if this is outside England or Wales.'

⁸ Section 91 of the Arbitration Act 1996 "relates to a claim for pecuniary remedy". It applies to claims for modest amounts ie the small claims upper limit.

⁹ None of the schemes provided by the Chartered Institute of Arbitrators make arbitration compulsory.

Regulation 5: other types of unfair term

6.116 The list in Schedule 2 illustrates the types of unfair term commonly found. The list is not only 'illustrative' but expressly indicative and 'non-exhaustive'. Other terms used in this sector in the UK are similar in type to those listed in Schedule 2, with a comparable potential for unfairness, but operate differently. The most common such terms are discussed here. Those that breach the plain language and transparency requirements of the Regulations are discussed at Regulation 7 below.

Group 18(a): Allowing the supplier to impose unfair financial burdens

6.117 We **do object** to terms that allow suppliers to impose an unexpected financial burden on the consumer. Such terms have a similar effect as price variation terms (see Group 12) and also are not regarded as 'exempt' core terms. We equally object to terms that:

- demand payment of unspecified amounts at the supplier's discretion
- are merely unclear about what will be payable.

6.118 For instance, we would object to a term that allowed the supplier to demand an advance payment, at his discretion, after the contract has been agreed. We would also object to a term that allowed the supplier to charge what he chose for something the consumer has to accept, such as a survey.

6.119 We also object to terms, no matter how clear and prominent, that are 'disguised penalties', designed to make consumers pay excessively for doing something that would not normally be a breach of contract or a default by the consumer.

6.120 Where a precise amount cannot be stated, it should be clear how the charge will be set. The basis of the charge, where there are identifiable and verifiable costs that have to be covered, should not be exceeded. In some exceptional circumstances it may be enough merely to say that the amount will be reasonable.

Example

Original term	New term
'Advance payments. The Company shall reserve the right for whatever reason to require advance payments, stage payments or deposits before or during the work.'	This term was deleted.

Group 18(b): Transferring inappropriate risks to consumers

- 6.121 We **do object** to terms that make consumers carry risks that are more appropriate for the supplier to bear, such as where the risk lies within the supplier's control, or is one which the consumer cannot be expected to be aware of or insure against. For example, the consumer should not be expected to bear the risk of damage to materials, equipment that the supplier operates, or the risk of encountering foreseeable structural problems in installation work for which they were not responsible.
- 6.122 We **do object** to 'indemnity' terms' for example, terms that require the consumer to 'indemnify' the supplier:
- for costs that could arise through no fault of the consumer, particularly where the suppliers themselves could be at fault
 - against all legal costs arising from actions, proceedings, and claims by third parties since we consider these to be too wide in scope. It is for the court to determine the award of costs.
- 6.123 The word 'indemnify' itself is legal jargon that, if understood at all, is liable to be taken as a threat to pass on legal and other costs incurred without regard to reasonableness. We consider that where the consumer is at fault and the supplier incurs costs which they seek to recover, then such costs should be reasonable costs and be reasonably incurred.
- 6.124 We **do not object** to terms that make consumers responsible for losses caused by their own fault or are narrowed in scope, so as to relate only to risks against which consumers are likely to be already insured, or can easily insure against, for instance, the risk of loss or damage to goods while they are in the consumer's home. Where the risk is transferred, it must be prominent and the consumer must be aware of the steps they need to take to protect their interests.

Examples

Original term	New term
'Notwithstanding the provisions of this clause risk in all goods supplied shall pass to the customer on delivery whereupon the customer shall be liable for the insurance of such goods.'	This term was deleted.
'...any goods delivered to the customer's premises shall be entirely at the purchaser's risk and he will indemnify the company for any loss or damage thereto.'	'After delivery of any units to be installed...you will be responsible for their safe keeping and you should make sure that you are adequately insured against any damage or loss which may occur to those units.'

Group 18(c): Unfair enforcement powers

- 6.125 We **do object** to terms that allow suppliers to impose disproportionately severe penalties on consumers, or misleadingly threaten sanctions over and above those that can actually be imposed. The same principles apply as in relation to financial penalties (see Group 5)¹⁰. Suppliers may choose to cancel a contract if consumers are in serious breach but the supplier may **not** cancel if the consumer commits only a minor breach – that is, a breach of a less important term that does not go to the root of the contract. The consumer should have the opportunity to remedy a breach, and should not be subject to such sanctions unless there has been a serious irremediable breach of the agreement.
- 6.126 In much of this sector, unfair enforcement is found in contract terms that allow a supplier to enter a consumer's property to repossess goods it has supplied in the event of the consumer not paying on time. Ripping out installed products could amount to an offence of criminal damage. Terms such as this attempt to bypass the function of the courts to adjudicate upon disputes. We **do object** to terms that:
- purport to allow suppliers to enter private residential property without the owners' consent
 - allow the supplier to rip out products that have been installed.

Examples

Original term	New term
'Until such time as the property in the [Goods] passes to the Buyer, the Seller shall be entitled at any time to require the Buyer to deliver up the [Goods] and if the Buyer fails to do so forthwith, to enter upon any premises of the Buyer ...where the [Goods] are stored to repossess [them].'	'Until such time as the property in the [Goods] passes to the Buyer, the Seller shall be entitled at any time to require the Buyer to deliver up the [Goods].'
'[In the event of cancellation] We may require the customer to deliver up the goods to us failing which we shall be entitled to remove the goods from the customer's premises and for such purpose may enter those premises without being liable for any damage caused by such removal.'	'We may require the customer upon reasonable notice to return and deliver up the goods to us failing which we shall take legal proceedings to recover the goods or their value.'

¹⁰ As with Group 5, Group 18(c) is only relevant where the problem is that a penalty is, or can be, too severe. Where it is that the supplier can impose a penalty when the consumer is not at fault at all, the term belongs in Group 18(g).

Group 18(d): Excluding the consumer's right to assign

- 6.127 The law ordinarily allows purchasers to sell on (or 'assign') to someone else what they have bought. We object to terms that seek to restrict this right.
- 6.128 Although not common in this sector, restrictions on a consumer's right to assign are typically found in terms that make guarantees non-transferable. The ability to transfer guarantees is essential if consumers are to obtain value for home improvements when they come to sell their property: in relation to damp-proofing, for example. If consumers cannot transfer ownership of an item still under guarantee with the benefit of that guarantee, they are effectively deprived of part of what they have paid for.
- 6.129 We **do not object** to terms that protect suppliers by requiring the purchaser (or 'assignee') of goods to have a properly assigned guarantee to be entitled to claim under it, providing that any procedural requirements involved are reasonable. Where transfer of the guarantee is subject to the supplier's consent, the term should provide that the consent cannot be unreasonably withheld.

Examples

Original term	New term
'We can transfer our rights and responsibilities under this agreement but you cannot transfer yours... If we transfer this agreement, references to we or us will cover any person or company we have transferred our rights and responsibilities to.'	'You or we can transfer our rights and responsibilities under this agreement... If you or we transfer this agreement, references to you, we or us will cover any person or company to which you or we have transferred rights and responsibilities to.'
'This guarantee shall not be assigned to any other person, firm or company without the prior written consent of [the Supplier].'	'[The Supplier] will not accept any liability under such guarantee unless the person seeking to rely on it is the original Purchaser or can produce a letter...from the original Purchaser...transferring the benefit of the guarantee to the new owner of the property...'

Group 18(e): Consumer declarations

- 6.130 We **do object** to terms that require a consumer to make declarations particularly to the effect that they have read and understood the terms of the contract or have had the terms explained. The consumer may be required to agree to such a declaration for the contract to go ahead, whether or not the declarations reflect the facts and the true position and whether or not the consumer fully understands their significance. Consumers may believe the declaration to be a mere formality and may well be unable to foresee the possible later disadvantage of making such a declaration.
- 6.131 We also **do object** to terms that include a declaration that the consumer has inspected their purchase and found it to be free from faults. If they then subsequently discover defects, they are at risk of being told they have ‘signed away their right’ to make any claim. Comparable problems can be caused by any enforced declaration indicating that the consumer has been dealt with fairly and properly. Declarations as to facts that could be established with certainty only by an expert – such as the condition of a property – are particularly open to objection.
- 6.132 We do **not object** to terms that:
- require declarations about matters that are wholly within the consumer’s knowledge
 - give a clear and prominent warning that the consumer should read and understand the terms before signing them
 - encourage consumers to ask questions if there is anything with which they do not understand or agree.

Examples

Original term	New term
‘I have read and fully understood the terms and conditions of this document including those printed overleaf and I accept the plan, quotation and specifications.’	‘Please ensure that you read the Terms and Conditions set out on the reverse of this order before signing it. By signing this agreement, [the Supplier] will take this as your confirmation that you understand the terms of this agreement and have had the opportunity to raise any queries about the terms with [the Supplier] before you sign.’
‘I/We have read the Conditions of Sale overleaf and agree to be bound by them.’	‘Before signing this order, the customer should carefully read the terms and conditions set out on the other side of this agreement.’

Group 18(f): Exclusions and reservations of special rights

- 6.133 We **do object** to terms that seek to deprive consumers of their protection under any law: for example, the Data Protection Act and “door-step selling” legislation (see Annexe C).
- 6.134 Although not common in the home improvements sector, such terms may, for instance, deny consumers their rights under the “door-step selling” legislation by providing that the contract was made at the supplier’s place of business because this would be a means of denying the consumer the right to a ‘cooling off’ period. This is potentially a serious problem as home improvements contracts are often made in the consumer’s home. They may also deprive the consumer of their rights under this legislation by requiring that the cancellation notice is sent by recorded delivery, contrary to the legislation.
- 6.135 Another type of exclusion of special rights is one that permits the supplier to pass on information about the consumer more widely or freely than is otherwise provided under data protection legislation. We would **not object** to terms that allow for the use of the information, provided that the consumer:
- has a free choice as to whether or not to agree to the terms, preferably via an option separate from the contract
 - has to take positive action to ‘opt in’ to lose their legal protection and that the significance of doing so is clearly drawn to the consumer’s attention.

Examples: Doorstep Selling

Original term	New term
‘Where contracts are negotiated away from business premises, if you are unhappy with your contract for any reason it can be cancelled and a refund of the deposit can be obtained by giving notice in writing addressed to [the Supplier] sent by recorded delivery within seven days of the date on which the contract was signed.’	‘If an order is placed at the customer’s home address, there is a seven day “cooling off” period, if the customer wishes to cancel that order.’
‘A customer may cancel the agreement without a penalty by notifying [the Supplier] in writing within seven days of the date on which the agreement was signed. Such a notice must be sent by recorded delivery or delivered by hand...’	‘A customer may cancel the agreement without a penalty by notifying [the Supplier] in writing within seven days of the date on which the agreement was signed. Such a notice must be sent or delivered by hand...’

Example: Data Protection Act

Original term	New term
‘I hereby waive my rights under the Data Protection Act...’	This term was deleted.

Group 18(g): Supplier's discretion in relation to obligations and restrictions

- 6.136 The discussion under Group 13 considers the potential unfairness of terms giving suppliers wide discretion in how they interpret and apply the contract. Other types of terms have a similar effect.
- 6.137 An example is **terms that allow the supplier the right to determine how its own obligations are performed**. The ordinary law allows suppliers reasonable flexibility as to how and when they carry out obligations, in the absence of specific promises. Unless the supplier is required to exercise his discretion reasonably, terms that give suppliers freedom to make arrangements, whether for the carrying out of services or delivery of goods, may allow the consumer's needs to be disregarded, and operate as an exclusion of liability for causing loss and inconvenience.
- 6.138 We **do object** to terms that give the supplier the right to deliver, and/or install, goods by stages, in as many or few consignments as the supplier thinks fit. We consider that this causes an unfair imbalance in the contract, by allowing the supplier at any time to change the way it proposes to perform the contract without any reference to the consumer's convenience. In supply-only contracts, the consumer needs to know when goods will be supplied, so that he or she can arrange for installation. In supply and fit contracts, all sorts of arrangements have to be made to facilitate installation. In our view, such things as the time and method of delivery should be a matter for individual agreement between the parties, not a standard term which allows the supplier freedom to do as it likes.
- 6.139 Another example of this type of unfairness is **terms that allow the supplier to determine whether the consumer is in breach**. We **would object** to any term that gave the supplier, or his agent, excessive power, for example, to decide whether, under the contract, the consumer should be subject to a penalty or deprived of any benefits.

Examples

Original term	New term
'The customer agrees to the work being carried out at a time convenient to [the Supplier] under the block installation plan.'	The term was deleted.
'The Company shall be entitled to make delivery of the goods by instalments.'	'Delivery of any units to be installed will be on a mutually agreed date.'

Group 19: Regulation 7 – plain and intelligible language

Regulation 7 provides that:

- 1) a seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and
- 2) if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail (save in respect of injunctive proceedings).

- 6.140 The purpose of the Regulations is to protect consumers from one-sided agreements. The EU Directive implemented by the Regulations requires that *'the consumer should actually be given an opportunity to examine all the terms'* (Recital 20). The Regulations therefore, demand 'transparency' in the full sense so that the consumer can make an informed choice. It is not sufficient for terms to be clear and precise for legal purposes, they must be intelligible to the consumer. We object to jargon in all its forms. We consider that a lack of clarity and openness may cause unfairness if they unbalance the contract to the consumer's disadvantage.
- 6.141 Suppliers sometimes argue that an unfair term is not unfair because it could have a fair meaning, and that the fairest interpretation is the operative one. However, the Directive makes clear that this 'most favourable interpretation' rule is intended to benefit consumers in private disputes, not to give suppliers a defence against regulatory action (see Article 5 of the Directive and Regulation 7(2) of the Regulations). We also challenge ambiguity in a term if it could disadvantage consumers, even if one of its possible meanings is fair.
- 6.142 We are **unlikely to object** to contracts under Regulation 7 if suppliers:
- use ordinary words as far as possible
 - use short sentences
 - clearly organise the contract, for example, the text of the contract should be divided into easily understood sub-headings covering recognisably similar issues
 - avoid statutory references, elaborate definitions, technical language, and extensive cross-referencing between terms
 - use legible print.
- 6.143 The legibility of print depends not only on the size of print used, but also its colour, that of the background, and the quality of the paper used. Plain language is of little value unless, as required by Recital 20 of the Directive, consumers are actually given an opportunity to examine all the terms.
- 6.144 Where an agreement is long or detailed, a 'cooling-off' period may be desirable to ensure compliance (see paragraph 6.64).
- 6.145 We **do object** to terms using legal jargon unless there is a clear explanation of the meaning of the phrase. We would challenge commonly used jargon such as 'joint and several liability', 'lien', 'time is of the essence', 'indemnity', 'liquidated damages', 'determine' or 'force majeure'.

6.146 **Core terms.** Terms which define what is being purchased under the contract, or set the price to be paid, are exempt from the test of fairness to the extent that the consumer is able to read and understand them. OFT does not consider that plain vocabulary alone meets this requirement. If a term is illegible, or hidden away in small print as if it were an unimportant term when in fact it is potentially burdensome, then it will be considered potentially unfair. See page 53 of the **Unfair Contract Terms Guidance** (OFT311) for further information about core terms.

Examples of terms that are unclear and contain legal jargon:

Original term	New term
'No omission by the Company whether by way of indulgence or otherwise or failure to enforce or delay in enforcing the Company's rights shall be construed as a waiver of any of the Company's rights.'	'If you break this agreement and we do not take action against you in connection with that breach at the time, this does not prevent us from taking action against you in the future for breach of this agreement.'
'Ensure that dependant upon the degree of difficulty of any type of installation that a level of competence commensurate with the installation work is employed.'	'We recommend that a competent qualified person carries out the installation of the goods supplied. Please ensure that the general guidelines supplied with the delivery for the fitting of the goods are read and understood before commencing the installation. If in doubt please contact the Company's offices.'
'Failure of the substrate to which our products are applied will nullify our guarantees.'	This term was deleted.
'The clauses of these Conditions and each sub-clause thereof are several and if any part of any clause or sub-clause shall be void, invalid or unenforceable then the remainder of such clauses shall nevertheless be valid and enforceable.'	This term was deleted.

Annexe A – Application of the Distance Selling Regulations

The Consumer Protection (Distance Selling Regulations) 2000: ('the DSRs')¹¹

A.1 The DSRs came into force on 31 October 2000, implementing the EC Directive on the protection of consumers in respect of distance contracts (97/7/EC) and giving additional rights to consumers when entering into contracts for goods and services concluded without face to face contact with a supplier. The legislation aims to give consumers confidence in purchasing goods and services where there is no face to face contact with the seller, and to ensure that all traders operating distance selling schemes meet the basic requirements laid down in the Regulations. Under the DSRs, consumers shopping for most goods and services by telephone, mail order, fax, interactive digital television and the internet and other types of distance communication have the right to:

- certain advance information
- a cooling off period
- protection against fraudulent use of a credit card

Performance of the contract

A.2 If the supplier is unable to carry out the contract within the contractual period or any such extension as agreed, because the goods or services ordered are not available within the time agreed, they should inform the consumer and refund any monies paid in relation to the contract. This refund should be made as soon as possible and in any event within 30 days from the day after the original contract should have been carried out. In effect the contract will be treated as if it had not been made, except for any rights or remedies that the consumer has as a result of the non-performance of the contract.

Substitute goods and services

A.3 Goods or services of equivalent value and price may be provided if this was conveyed to consumer in the contract in a clear and comprehensible manner appropriate to the form of distance communication used to conclude the contract. The consumer should also be advised that the costs of returning any such substitute goods to the supplier in the event of cancellation would be met by the supplier.

Payment card protection

A.4 A consumer whose payment card is used fraudulently for any type of distance contract by a person not acting as their agent or to be treated as such can now cancel the payment and have their account re-credited or the card issuer must refund all the money lost in this way.

¹¹ This Annexe sets out the current position but, as with all legislation, there is a possibility of subsequent amendment to take account of concerns and developments arising from consultation etc.

Inertia selling

- A.5 The DSRs also make it an offence to demand payment for the supply of unsolicited goods or services to consumers. A recipient of unsolicited goods may treat such goods as if they were an unconditional gift to him.

Enforcement

- A.6 Individual consumers can apply to the courts for a remedy if deprived of their rights under the DSRs. The OFT (and local authority Trading Standards Services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland) will consider any complaints to see if there has been a breach. The enforcement authorities have powers under the DSRs to apply to the courts for orders against suppliers who breach the DSRs.
- A.7 Part 8 of the Enterprise Act 2002 (EA) provides the OFT and certain designated bodies with additional powers, where there is harm to the collective interests of consumers, for enforcing consumer protection legislation through the civil courts. The OFT and other designated enforcement bodies are able to gather evidence in relation to compliance, secure undertakings from or take injunctive action against suppliers who breach the DSRs or the other listed consumer protection legislation. More information about Part 8 of the EA can be found at:
www.offt.gov.uk/enterpriseact.htm
- A.8 A Guide for Business on the DSRs can be found on the Department of Trade and Industry's website at: www.dti.gov.uk/ccp/topics1/pdf1/bus_guide.pdf More detailed guidance on the DSRs can be found in the OFT's consumer leaflet entitled 'Shopping from Home' at: <http://www.offt.gov.uk/Consumer/Your+Rights+When+Shopping+From+Home/default.htm>

Annexe B – Application of the Electronic Commerce Regulations

The Electronic Commerce (EC Directive) Regulations 2002

B.1 The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No.2013) ('the Regulations') transpose the main requirements of the E-Commerce Directive (2000/31/EC) into UK law. The Regulations seek to encourage consumer confidence in on-line trading.

Application of the regulations

B.2 The Regulations seek to govern any service normally provided for payment, at a distance, by means of electronic equipment at the individual request of a recipient of a service.

The Regulations may apply to you if you do any of the following:

- advertise goods or services online (i.e. via the Internet, interactive television or text message)
- sell goods or services to businesses or consumers online
- transmit or store electronic content or provide access to a communication network.

Key features of the regulations

B.3 The Regulations include provision for:

- the national law that will apply to online services
- the information an online service provider must give a consumer, including discounts and offers in online advertising and how to conclude contracts online
- limitations on service providers' liability for unlawful information they unwittingly carry or store.

Reference

The original official text of the Regulations is available in hard copy from normal suppliers and on the HMSO website at: <http://www.hmso.gov.uk/si/si2002/20022013.htm>

More substantive guidance on the Regulations is available on the DTI website at: www.dti.gov.uk/cii/ecommerce/europeanpolicy/ecommerce_directive.shtml

Non-compliance

B.4 Non-compliance with the Regulations could have serious implications for a business. Depending on the exact nature of the non-compliance, end users may

- cancel their order
- seek a court order against you
- sue you for damages for breach of statutory duty if they can demonstrate that they have suffered a loss as a result of your failure to comply with your obligations under the Regulations.

Enforcement

B.5 Regulation 16 allows the OFT and local authority Trading Standards Services ('TSSs') to take action against breaches of Regulations 6-9 and 11 of the Regulations. These breaches were added to the Enterprise Act regime. The OFT and TSSs can apply for an order under Part 8 of the Enterprise Act against the businesses responsible where the breach harms the collective interests of consumers.

The new information requirements

B.6 These requirements include providing your end users with:

- the full contact details of your business
- details of any relevant trade organisations to which you belong
- details of any authorisation scheme relevant to your online business
- your VAT number, if your online activities are subject to VAT
- clear indications of prices, if relevant, including any delivery or tax charges.

Annexe C – Application of the Doorstep Selling Regulations

What are they and what do they do¹²?

C.1 The Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987 came into force on 1 July 1988 and gave cancellation rights to consumers in the area of doorstep selling. The Regulations were amended in 1998 and the main thrust of the legislation is to give consumers cancellation rights when purchasing goods and services away from the trader's normal place of business, and to ensure that all traders operate proper cancellation procedures as laid down in the Regulations. They apply to contracts under which a trader supplies goods or services to a consumer and which are concluded during an unsolicited visit by a trader.

What is an unsolicited visit?

- a visit by a trader which takes place without the express request of the consumer and includes subsequent visits which followed an earlier unsolicited visit.
- a requested visit will be 'unsolicited' if the trader introduces 'new' goods or services during the visit.
- a visit agreed by the consumer subsequent to an unsolicited telephone call from the trader.

What is a solicited visit?

C.2 A visit where the consumer actively initiates the visit by the salesperson.

Excepted Contracts

C.3 There are exceptions for contracts that are for example:

- land
- food and drink
- catalogue sales
- insurance
- investment agreements
- goods or services worth less than £35 in total

¹² This Annexe sets out the current position but, as stated in Annexe A, with all legislation, there is a possibility of subsequent amendment to take account of concerns and developments arising from consultation and studies etc (see also paragraphs 5.8 and 5.9 of Chapter 5).

Consumers' rights under the Regulations

- C.4 For unsolicited visits, consumers are entitled to a 7 day cooling off period to cancel the contract by giving written notice of cancellation. The Regulations provide that if the consumer does not receive a written notice informing him of his right of cancellation the contract will not be enforceable against him and the trader may be committing a criminal offence by failing to provide such written notice.
- C.5 The written notice should contain the following information, along with a cancellation form set out in accordance with the Regulations:
- the name of the trader
 - the trader's reference number, code or other details to enable the contract or offer to be identified
 - a statement that the consumer has a right to cancel the contract if he wishes and that this right can be exercised by sending a written notice of cancellation to the person mentioned in paragraph C.4 within the period of 7 days following the making of the contract
 - the name and address of a person to whom the notice of cancellation may be given
 - a statement that the consumer can use the cancellation form provided if he wishes.

Note: If the information is incorporated into the contract it must be given at least equal prominence with other information in the document apart from the heading, the names of the parties to the contract plus any information provided in handwriting.

- C.6 The cancellation form should be set out in the following way:

Complete, detach and return this form ONLY IF YOU WISH TO CANCEL THE CONTRACT.)

To: (trader to insert name and address of person to whom notice may be given.)

I/We (delete as appropriate) hereby give notice that I/we (delete as appropriate) wish to cancel my/our (delete as appropriate) contract.. . . . (trader to insert reference number, code or other details to enable the contract or offer to be identified. He may also insert the name and address of the consumer.)

Signed

Date

- C.7 A cooling off period does not apply to sales made during solicited visits. The rationale for this is that the consumer, having invited the salesperson, is better prepared and consequently less susceptible to sales pressure.

Enforcement

- C.8 Local authority Trading Standards Services enforce the Regulations. The OFT and other enforcers designated for the purposes of Part 8 of the Enterprise Act have powers to take injunctive action against traders breaching the Regulations (see paragraphs 2.4 and 2.5 of Chapter 2).

Annexe D – The Qualitas Payment Protection Scheme ('the Scheme')

Background

- D.1 Qualitas was established in 1992 and is supported by members from all sectors of the furniture industry. Its aim is to improve the standards and service offered by suppliers of furniture and floor coverings, including retailers, manufacturers and other related businesses. Qualitas works closely with consumer and advice organisations as well as having access to expertise on all furniture and furnishings products. Qualitas is a division of the Furniture Industry Research Association (FIRA) International Ltd.

Overview

- D.2 Qualitas members follow its Code of Practice and submit to decisions of the Qualitas Conciliation Service, an alternative dispute resolution service. All Qualitas members will give consumers access to the conciliation and adjudication services of Qualitas if there are problems with the delivery or installation of their goods. While Qualitas is considering a complaint it will hold 20% of the contract sum in an independent trust account. This is released only when Qualitas has reached a decision. If Qualitas finds in favour of the consumer, it can order a member to put matters right, even if the cost is much more than the 20% already being held.

OFT review of the Qualitas Scheme

- D.3 We are monitoring the effectiveness of the Qualitas scheme, in relation to our concerns about full payment in advance clauses, in order to determine whether there is a need for any action by OFT, including enforcement action under the Regulations. Our initial findings (in March 2004) suggested that many consumers were still largely unaware of the scheme, but we are gathering further data from the participating companies, Qualitas and Trading Standards Services.

Dispute resolution

- D.4 The Qualitas conciliation service offers an independent low-cost means of resolving disputes between consumers and retailers that are members of Qualitas.
- D.5 Even if the retailer is not a member, Qualitas may still be able to assist with its Independent Inspection Service.
- D.6 The conciliation service looks at the history of the problem, and, if necessary examines samples. It may give advice to the consumer or the retailer (or to both) to help resolve the dispute. Conciliation essentially means reaching a conclusion that is acceptable to both parties. Qualitas is able to resolve 80% of cases referred to it at this stage, which is at no cost to the consumer. At this stage the advice and help is

always free where the retailer is a Qualitas member. However, where problems cannot be resolved by conciliation the consumer can have the case formally adjudicated for a fee, currently £45.00). The fee is refunded if the consumer's complaint is upheld.

- D.7 If a consumer thinks he has a valid dispute, and has done all he can to resolve it, but still remains dissatisfied then he can contact Qualitas.
Telephone number: 01438 777777, further information available from its website:
www.qualitas.uk.com/contact.htm

Annexe E – OFT liaison with trade associations and major firms, and developments within the industry

E.1 We have had discussions with several trade associations and many key firms in the sector in recent years about their terms and conditions. As a result we have achieved significant improvements to many agreements to secure compliance with the Regulations. We have no power though to approve terms and reference to the following model contracts and contracts used by some major industry firms should not be seen as OFT approval of the terms used or as OFT agreement that any particular term is fair in all circumstances or as binding on the views of other enforcers. Of course only the courts can decide if a term is fair.

The Glass and Glazing Federation (GGF)

E.2 Members of the GGF supply and install products such as windows, doors and conservatories, and number around 500. It first sought OFT views on its Model Contract in April 1995 and has sought OFT's views on subsequent revisions. The latest discussions in March 2004 resulted in the introduction of a new GGF Model Contract. The main improvements are described below.

Summary of main improvements of GGF Model contract

The survey process

- E.3 The GGF's old model terms did not deal adequately with the survey process. Some 'subject to survey' clauses are potentially unfair because they can be used by suppliers to get out of agreed contracts without proper justification. The new model terms limit the scope for unfair use by including the following safeguards:
- i) the supplier commits to carrying out a survey at the time agreed with the consumer, and no later than 14 days after signing the contract;
 - ii) full details of the survey findings are to be given to the consumer;
 - iii) both consumer and supplier have equal cancellation rights if the survey reveals unforeseen additional work at extra cost, or that the property is unsafe or unsuitable for the work to be carried out; and
 - iv) where the contract is cancelled following an adverse survey, any deposit will be returned to the consumer.
- E.4 If there is a dispute between the parties, the consumer can use the GGF's independent dispute resolution service.

Delay in commencement of the installation

- E.5 The old term provided that before being able to cancel without penalty, the consumer should allow the supplier a further six weeks after the date agreed in the contract to complete the installation. The consumer was also entitled to a refund for work paid for but not completed. The revised term now enables the consumer to require completion after the date agreed in the contract, within any shorter period that may have been agreed between the supplier or salesmen, either verbally or in writing. In addition, the revised term also provides that the consumer is entitled to recoup additional costs of getting another supplier to complete the work.
- E.6 Here too, the consumer is free to use the GGF's dispute resolution service if agreement can't be reached on how much is due to the consumer, or due to the supplier for work done.

Payment on satisfactory completion

- E.7 Previously the model contract required payment of the balance when the products had been properly installed in accordance with the contract. This term has been improved to ensure that the consumer is not restricted from withholding a proportionate amount until the installation is completed. The new term provides that payment of the remaining balance is now required only when the consumer is reasonably satisfied with the completed work.

Damage caused to property

- E.8 The supplier now accepts liability for any damage caused to property, over and above that necessary for the completion of the work, if it were caused by his lack of reasonable care and skill.

Cooling-off period

- E.9 The Doorstep Selling Regulations (DoSRs) (described in Annexee D) enable the consumer to serve a cancellation notice on the supplier within seven days from the day after the contract is made or signed. The old terms were open to the interpretation that the seven days began on the day on which the contract was made, thus depriving consumers of a day of their cooling-off period. The new terms remove the ambiguity and meet the cooling-off period provided in the DoSRs.

National Security Inspectorate ('NSI')

- E.10 In August 2002 we completed our review of the contract terms drafted by the National Approval Council for Security Systems ('NACOSS'). NACOSS recommended terms to a number of security companies and so the revision of the NACOSS terms has a widespread application throughout this part of the sector. NSI was established in 2001 from the merger of two of the security industry's inspectorates, (NACOSS) and the Inspectorate of the Security Industry (ISI).

The Kitchen, Bedroom and Bathroom Specialists Association ('the KBSA')

- E.11 The OFT completed its first review of KBSA Guidance Notes terms in 1999 since these are available for members to use when drafting terms and conditions and we consider them as recommended for that purpose and thus subject to the Regulations.
- E.12 Over 300 kitchen, bedroom and bathroom showrooms throughout the British Isles are run by KBSA members, who all follow a Code of Practice. The KBSA is also supported by over 80 of the industry's leading brands and distributors who joined as Corporate Members. KBSA was a member of Qualitas, but it left Qualitas and set up its own payment protection scheme called ConsumerCare. For further details about the KBSA see its website at: www.kbsa.org

The Plastics Window Federation

- E.13 The Plastics Window Federation members supply plastic and aluminium double glazing and conservatories. It offers insurance to protect guarantees on supplier insolvency. We completed our review of the model terms recommended by the Federation in 1998, and were involved in an exchange of correspondence with the Federation in 2000 and 2002.

Major Industry firms

- E.14 Following the original sector guidance we published in 1997, we took action under the Regulations to improve the fairness of the terms in the contracts of the large industry suppliers such as Anglian Windows, B&Q, Coldshield, Dolphin Bathrooms, Dolphin Kitchens, Everest, Magnet Ltd, MFI Furniture Group and Moben Kitchens, and many others. Numerous terms were revised or deleted with an emphasis on terms that were causing actual consumer detriment and others with potential to cause significant consumer detriment. As always we took account of the suppliers' views about why certain terms are included in contracts.

Other developments within the industry

FENSA

- E.15 The Fenestration Self-Assessment Scheme, or FENSA, was set up by the Glass and Glazing Federation with government approval, in response to the new Building Regulations for England and Wales. All replacement glazing in dwellings must now comply with improved thermal performance standards. Homeowners who replace windows or glazed doors must obtain a certificate from Local Authority Building or have the work completed by a FENSA Registered Company. For further details about FENSA see its website: www.fensa.co.uk
- E.16 FENSA does not apply to commercial premises or new build properties. Traders that join FENSA can self-certify their installations and can avoid the costs and potential delays of Building Control procedures. A small sample of their installations will be inspected by FENSA-appointed inspectors to ensure standards are being maintained. FENSA also informs local authorities of all completed FENSA installations, and issues certificates to householders confirming that the installer self certifies compliance.

Annexe F – Consumer protection legislation relating to goods and services

The Sale of Goods Act 1979

- F.1 The Sale of Goods Act 1979 ('the 1979 Act') (as amended by the Sale and Supply of Goods to Consumers Regulations 2002) gives consumers rights when they buy goods from a business.
- F.2 The 1979 Act provides that any contract for the sale of goods will include implied terms that the goods are:
- **of a satisfactory quality**, i.e. of a standard that a reasonable person would consider to be satisfactory, free from fault or defect, fit for their usual purpose, of a reasonable appearance and finish, safe, and durable. The price paid is an important consideration as a reasonable consumer should not expect top quality at rock bottom prices
 - **fit for the purpose**, i.e. as well as being fit for the purpose for which they are generally sold, goods should also be fit for any specific or particular purpose made known at the time of the agreement
 - **as described**, i.e. the goods should correspond with any description applied to them whether this be verbally, through words and pictures on a sign, on packaging, or on an advertisement. For example, a pair of trousers described on the label as being "100% pure cotton" should be just that.
- F.3 The 1979 Act also provides that:
- consumers are not deemed to have accepted the goods until they have had a reasonable opportunity to examine them and they have the right to reject goods that are in any way faulty
 - consumers have the same rights for second-hand goods although it may be difficult to prove that there is an inherent fault and standards may differ
 - where a supplier is in breach of the contract by supplying faulty goods, and the consumer requests repair or replacement, the supplier must bear any costs including labour, materials, postage and transport.

Consumer remedies

- F.4 Various remedies are available to the consumer if the trader fails to meet any of the above conditions. These include:
- where goods supplied to a consumer are in breach of an implied term, or otherwise not in conformity with the contract, he is entitled to reject them and claim a refund of the price provided if he acts before he is deemed to have accepted them. If this right to reject the goods has been lost because they have been accepted, the consumer may claim damages. This right exists for up to 6 years from the date of sale

- action against a trader for damages if he wrongfully neglects or refuses to deliver the goods to the consumer by an agreed date, or if no date is fixed, within a reasonable time.

Effect of The Sale and Supply of Goods to Consumers Regulations 2002

- F.5 The Sale and Supply of Goods to Consumers Regulations 2002 (SSGCRs) amended the 1979 Act to give the consumer additional statutory rights. The principal changes are that:
- consumers now have the statutory right to have goods that were faulty at the time of delivery repaired or replaced within a reasonable time (unless it is disproportionate for the trader to do so) or to require the seller to reduce the purchase price or make a full refund
 - if the goods are found to be faulty within 6 months, they are presumed to have been non-conforming at the time of delivery and the burden of proof shifts to the seller to prove otherwise
 - any **guarantee** offered by the seller is contractually binding (it takes effect when the goods are delivered) and must be written in plain language.
- F.6 These new rights to redress (repair, replacement, partial refund and full refund) apply where the supplier agrees that he or his agent will carry out the installation as part of the sale contract, where the installation does not conform to agreed plans. In these cases the consumer has the option of seeking a repair or replacement rather than pursuing cash compensation. Obviously, with some installations, there are practical considerations as to what is possible in terms of repair and replacement.

The Supply of Goods and Services Act 1982

- F.7 The Supply of Goods and Services Act 1982 ('the 1982 Act') (as amended by the Sale and Supply of Goods Act 1994) creates provision for terms to be implied into contracts for the supply of a service, e.g. the installation of a fixed kitchen. These implied terms¹³ are that the service:
- will be carried out with reasonable skill and care
 - where no time for the work has been agreed, will be provided within a reasonable time
 - where no price has been agreed, or where no method for determining price has been agreed, will be charged at a reasonable cost.
- G.8 The 1982 Act also applies to goods that are supplied during a service. For example, a dripping tap fitted by a plumber. The conditions broadly correspond with those set out in the 1979 Act, i.e. that the goods must be: **of a satisfactory quality; fit for the purpose; and as described (see above).**

¹³ In Scotland, these terms are implied in contracts for services under common law.

Consumer remedies

- F.9 In relation to the goods element of the 1982 Act, the rules on remedies are essentially the same as under the 1979 Act.
- F.10 In relation to the service element, the consumer would be able to claim for any losses caused directly by the breach of the contract, e.g. avoidable, unreasonable damage to surrounding furniture and decorations during installation say of a bathroom because the supplier has failed to exercise reasonable care and skill (although of course some "damage" will often be inevitable).
- F.11 The consumer could also claim the additional cost if he has to get someone else to repair poor workmanship that the trader has not managed to repair effectively. Equally, the same would apply if the consumer has had to employ another workman because of excessive delay.
- F.12 If problems cannot be sorted out by agreement then the consumer may need to take action themselves to obtain redress – eg small claim in the County court or Sheriff court.

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Contacting the OFT

If you think that any of the standard terms in a consumer contract are unfair you can contact the OFT at the address below or your local trading standards service (you may find their address by using the post code search facility on: www.tradingstandards.gov.uk).

If you have any comments on this guidance, please write or email:

The Contract Regulation Unit
Office of Fair Trading,
Fleetbank House,
2-6 Salisbury Square,
London
EC4Y 8JX
email: cru@oft.gsi.gov.uk

Unfair contract terms bulletins

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

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