



Ofcom Response to Law Commission  
consultation: Unfair Terms in Consumer  
Contracts: a new approach?

Publication date: 25<sup>th</sup> October 2012

## Introduction

1. Ofcom welcomes the opportunity to respond to the Law Commission consultation on unfair terms in consumer contracts. We have a particular interest in the issues raised in the consultation as the independent regulator and competition authority for the UK communications industries and as one of the bodies responsible, through Part 8 of the Enterprise Act 2002, for enforcing the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCRs').
2. In compiling our response, we have drawn on our experiences of monitoring compliance with and enforcing the UTCCRs in the communications sector. Likewise in connection with the General Conditions of Entitlement<sup>1</sup> that communications providers need to comply with in order generally to be authorised to act as such providers (which include some specific provisions relating to contract terms and conditions).
3. Our principal duty under Section 3(1) of the Communications Act 2003 is to further the interests of citizens in relations to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In performing this duty, we seek to ensure that communications markets work well both for consumers and for businesses that operate fairly and responsibly towards consumers.
4. Effective competition delivers choice, better service, lower prices and innovation. In order to benefit from competition, consumers must have confidence that they are able to exercise informed choice and assert their rights when things go wrong. This means consumers need to have access to and be able to process information about the services and offers available from different providers and not be subject to unfair surprises (e.g. in relation to contract terms and conditions). Responsible providers that seek to treat their customers fairly should also be able to prosper at the expense of providers that exploit the asymmetries that exist between providers and consumers (e.g. in relation to bargaining power, knowledge and needs).
5. It is important that the law on unfair contract terms is as clear and simple as possible, so that:
  - Consumers are empowered, can make decisions armed with appropriate information about the goods and services they are buying and how much they cost and, where necessary, can protect their own individual interests.
  - Businesses have certainty about their legal responsibilities and understand where their terms stand in relation to the law, thereby reducing costs related to compliance, training and dealing with disputes arising out of unclear or uncertain laws.
  - Businesses which respond best, and in fair ways, to appropriately informed and protected consumers, prosper and can be confident that unfairly dealing businesses will not be able to exploit uncertainty or other flaws in the law in order to prosper at the expense of consumers and those who deal fairly.
  - We and other regulators/enforcement bodies can efficiently and effectively protect the interests of consumers at the collective level.

---

<sup>1</sup> <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/>

In practice, as far as the UTCCRs' exemption from the fairness test, in particular, is concerned, these principles mean this (in our view): the "*essential bargain*" – what the trader is supplying and what the consumer will pay for it – must be clear and understood as such by both parties to the contract, and is exempt from the fairness test (only) where this is the case. This principle guides our response to this consultation.

6. We would welcome the opportunity to review and comment on any draft set of regulations that are developed in light of this consultation.

### Summary of response

7. Following the principles above, a summary of the key points of our detailed response to the Commission's questions is as follows:
  - a. If the exemption relating to price terms is retained, it should, at the very least,<sup>2</sup> exempt from the fairness assessment such terms only if they are transparent and prominent. The same requirements should apply to terms defining the main subject matter of the contract.
  - b. The definition of price terms should be refined further as shown by the ***emphasised*** words:

"... where the consumer buys goods or services, it means an obligation on the consumer to pay money ***in exchange for those goods and services***; where the consumer sells or supplies goods or services, it means an obligation on the trader to pay money ***in exchange for those goods and services***."
  - c. Price and main subject matter terms should be regarded as "prominent" within the meaning of the exemption only where they are, at the very least, presented such that the average consumer would be aware of them. We also suggest an additional requirement to the effect that the presentation must also be such as to mean both parties to the contract would be likely in fact to regard the term(s) as part of the essential bargain.
  - d. The position more likely consistent, in our view with (i) the idea of exempting the essential bargain from a fairness assessment; (ii) the Unfair Terms Directive; and (iii) the Supreme Court's judgment in the *Bank Charges* case, is that the exemption should remove from the fairness assessment only consideration of "the adequacy of the price as against the goods or services supplied in exchange," not all aspects of a relevant price term.
  - e. The new law should make expressly clear that terms on the *Grey List* are not within the exemption.
  - f. The *Grey List* should include terms providing for:
    - i. default charges;

---

<sup>2</sup> In other words, we suggest additional requirements may need to be met for the exemption to apply.

- ii. early contract termination charges (“ETCs”) the amounts of which, or the periods in respect of which they are payable, are excessive or unreasonable (see response to question 3(3) below);
  - iii. non-refund of lump-sum payments in contracts terminated before performance in full; and
  - iv. traders to escalate or set prices after the consumer becomes bound by the contract (price escalation and discretion terms).
- g. The new law should also be clear that terms:
- i. falling outside the exemption because they do not relate to price or the main subject matter of the contract; and
  - ii. not on the *Grey List*,
- may still be assessed for fairness even if they are transparent and prominent.
- h. The fairness test should be to the effect that terms assessable for fairness must be both fair and reasonable (in procedure and substance) and may fail the fairness test in respect of either requirement.

## THE EXEMPTION FOR THE MAIN SUBJECT MATTER AND PRICE

### *The case for reform*

#### 1. Do consultees agree that:

**(1) the current law on which terms should be exempt from the assessment of fairness under the Unfair Terms Directive is unduly uncertain;**

Agree: X      Disagree:       Other:

Comment:

We agree that the current law on which terms are exempt from review under the UTCCRs is unduly uncertain, particularly in relation to the exemption as concerns price. Uncertainties in the law create additional costs for providers and put consumers at a disadvantage, undermining their ability to protect their own interests effectively.

We note the difference of opinion concerning the Supreme Court ('SC') judgment in *Office of Fair Trading vs Abbey National plc* (the *Bank Charges* case). We agree the judgement contains statements that might be read as meaning different things. Whilst lawyers and those familiar with the relevant law are likely to be able to reconcile and understand those statements (so it is clear that default payments and early termination charges ('ETCs') are outside the exemption, for example), the implications of the judgement may not be clear to consumers, smaller businesses and others who do not have the benefit of legal advice. If the basic legal points were clear and simple, we would expect that the need for legal advice would be significantly reduced.

With this in mind, we think that certain matters might benefit from greater certainty, including that:

- Terms providing for ETCs and no-refund terms (which say that services provided over a fixed period must be paid for up-front with no repayment of any amount in the event that the consumer terminates early) are outside the exemption. This would be in line with the apparent effects of the SC judgement.
- The position as to whether price terms may be challenged on grounds other than the appropriateness of their amount as against the goods and services supplied in exchange is clarified one way or another (see further in response to question 5 below). The SC's *Bank Charges* judgment refers to there being grounds for such challenge, but offers little indication of when or how they arise. This creates uncertainty for businesses and enforcers whilst offering little protection for consumers.

We think consideration should also be given to terms that appear, in light of the SC judgement, to fall within the exemption but that may be causing consumer harm. We submit that consideration should go to whether measures are in place to ensure consumers have an appropriate level of protection in respect of such terms.

For example, terms relating to certain ancillary charges (e.g. charges for certain means of payment, charges for services not included in bundled packages and other contingent charges), which may not be at the forefronts of consumers' minds when they enter contracts, appear to fall within the exemption on the basis of the SC judgment, provided they are in plain, intelligible language. It is not clear, however, to what extent this is the case and when such terms might in practice not fall within

the exemption. Nor, accordingly, is it clear whether consumers are adequately protected against unfair surprise from these terms.

In particular, it is debateable how far the requirement for plain, intelligible language protects consumers from unfair surprise in respect of these terms and charges. It may be possible for the language requirements to be met without the average consumer<sup>3</sup> having these terms and charges sufficiently in mind as not to need the protection of the fairness test (i.e. so as to justify application of the exemption). We note that the Law Commission's proposal that the exemption apply in respect of transparent and prominent price terms would go some way to address this concern (see our response to questions 3 and 4).

## **(2) The UTCCR should be reformed? (Issues Paper 8.14)**

Agree:     X     Disagree:          Other:     

Comment:

We agree that the UTCCRs would benefit from reform. Simplifying and clarifying the law should provide greater certainty for both businesses and consumers, help to ensure that consumers are adequately protected and empowered, and benefit fair dealing businesses.

## **2. We welcome evidence on the effect of the Supreme Court decision in *Office of Fair Trading v Abbey National plc* on your organisation, business or consumer experience. (Issues Paper 8.15)**

Through our Additional Charges Programme, we set out how we considered the UTCCRs apply to some standard terms and charges in contracts for communications services.<sup>4</sup>

We considered and issued guidance concerning terms providing for:

- Non-direct debit charges (charges for payment by means other than DD);<sup>5</sup>
- Late payment charges/payment failure charges and charges to restore service;
- Minimum contract periods<sup>6</sup> and subsequent minimum contract periods<sup>7</sup>;
- Early termination charges (ETCs) and charges for ceasing a service;

---

<sup>3</sup> For ease of reference, given that it is the term proposed by the Law Commission, we have used the phrase *average consumer* throughout this response. We attach a caveat to that use in response to question 4(2) below. That caveat applies to each of our uses of the term.

<sup>4</sup> <http://stakeholders.ofcom.org.uk/consultations/addcharges/?a=0>

<sup>5</sup> We note that Article 19 of the Consumer Rights Directive (due to take effect from 13 June 2014) will 'prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the costs borne by the trader for the use of such means'. The Department for Business, Innovation and Skills (BIS) recently consulted on this.

<sup>6</sup> Following the implementation in May 2011 of revisions to the Framework Directive 2002/21/EC, communications providers are effectively prohibited from agreeing contracts of longer than 24 months with 'residential' consumers and must give them the option of contracting for a period of no more than 12 months. See General Condition 9.4 and 9.5 at

<http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf>.

<sup>7</sup> Subsequent to the publication of our Statement on the Additional Charges Programme, we published our Statement on Automatically Renewable Contracts (ARCs) – a form of Subsequent Minimum Contract Period – prohibiting their use. See General Condition 9.3 at

<http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf>. Ofgem and the OFT have considered ARCs in relation to the energy and other sectors respectively.

- Minimum notice periods; and
- Itemised/paper bills (charges for itemised and/or paper bills).

We revisited and updated our guidance in light of the SC judgement on bank charges.<sup>8</sup> We published a paper<sup>9</sup> explaining what we did following the judgement (including an overview of the judgment's effects on our views of the terms and charges we were concerned with) alongside our updated guidance.<sup>10</sup>

There are specific areas of uncertainty in the law that we have needed to deal with in light of the SC judgment, which we think would benefit from greater clarity and certainty. In our enforcement actions, it has been put to us that ETCs and no-refund terms are within the exemption. This is despite the effect of the SC judgment to the contrary and demonstrates possible misunderstanding and confusion in the law. This is unhelpful to both consumers and businesses (e.g. if a business proceeds to use such terms on the erroneous basis that they are immune from challenge because they are exempt).

### Price Terms

#### 3. Do consultees agree that:

**(1) A price term should be excluded from review, but only if it is *transparent* and *prominent*?**

Agree:  Disagree:  Other: X

Comment:

We agree<sup>11</sup> that, at the very least,<sup>12</sup> price terms should only be exempt from review if they are transparent and prominent. This reflects the importance for consumers and fair dealing businesses that consumers are able to make informed decisions and are protected against unfair surprise, particularly terms giving rise to surprise charges.

At the very least, terms that provide for elements of a price which are not transparent and prominent are inconsistent with consumers making informed decisions. Such terms are liable to cause surprise. The terms should not have the benefit of the exemption. Rather, consumers and fair dealing businesses should have the protection of the fairness requirement in respect of them.

We would suggest, however, that, in any event, transparency and prominence alone may not be enough to warrant the application of the exemption from the fairness requirement. It appears to us to be part of a fair balance between consumers and businesses to recognise, at least, two other points:

- In entering contracts, the average consumer is likely only to have a limited number of matters at the forefront of their mind. This is so no matter how many terms are presented to them

<sup>8</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Ofcom\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Ofcom_statement.pdf)

<sup>9</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Ofcom\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Ofcom_statement.pdf)

<sup>10</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Guidance.pdf>

<sup>11</sup> If the exemption relating to price is retained

<sup>12</sup> Again, in other words, we suggest additional requirements may need to be met for the exemption to apply.

transparently and prominently. Indeed, the more terms so presented, the less transparent and prominent each becomes.

- The UTCCRs are not, in any event, concerned solely with unfair surprise. They are also concerned, in order to protect consumers and fair dealing businesses alike, with unfair imbalances of power between consumers and traders that are unlikely adequately to be resolved by transparency and prominence alone. These include terms that seek to exploit inequalities between traders and consumers in matters such as knowledge, need and/or bargaining power, no matter how transparent and prominent those terms are.

In particular, transparency and prominence are only (or most) likely to protect the average consumer in respect of matters in which that consumer makes active considerations and actively exercises choice over their purchasing decisions. Transparency and prominence are not (or less) likely to protect the average consumer in respect of matters that they do not (or are unlikely to) take into account in making decisions (even if presented transparently and prominently).

This reasoning appears to be clear from the *Grey List* of potentially unfair terms in the Schedule to the UTCCRs. There are terms on that *List* that are capable of being transparent and prominent. We would agree with the Law Commission that they are, nonetheless, by virtue of their presence on the *List*, outside the exemption.

By way of example, terms providing for ETCs may be perfectly transparent and prominent. If they require a consumer terminating a fixed term contract early to pay the total outstanding retail payments they may appear, superficially, to be fair. However, the term puts the consumer in a worse position than they would be in, in ordinary contract law, were it not in the contract (and on that basis it is likely unfair). The ordinary consumer is unlikely to appreciate this. Moreover, they are contingent charges which, at the time an average consumer enters the contract, he has no (or is unlikely to have any) contemplation of paying. So, despite knowing about them, the average consumer is more likely to ignore the term, or at least not exercise active choice in relation to it.

On these bases, it would seem to leave the average consumer under-protected if any terms providing for the payment of money, like that in the previous paragraph, were not subject to the fairness requirement just because they are transparent and prominent.

We would argue, therefore, that the exemption needs to be refined further than proposed.<sup>13</sup> One way in which the ETC issue referred to here could be resolved would be by including relevant terms in the *Grey List*. Another, more fundamental, way is by ensuring that the terms which the law recognises as comprising the exempt 'price' must be clear, precise and limited as set out in response to the following question.

**(2) A price term should be defined as follows: where the consumer buys goods or services, it means an obligation on the consumer to pay money; where the consumer sells or supplies goods or services, it means an obligation on the trader to pay money?**

Agree:  Disagree:  Other: X

Comment:

---

<sup>13</sup> Again, if it is retained.

On the bases set out in response to question 3(1) above, we welcome the enhanced clarity that the proposed definition of a price term provides. However, we would propose, at least, the following amendments to the definition (added words in *italics*):

“... where the consumer buys goods or services, it means an obligation on the consumer to pay money ***in exchange for those goods and services***; where the consumer sells or supplies goods or services, it means an obligation on the trader to pay money ***in exchange for those goods and services***.”

Without these additions, we think there is unnecessary uncertainty about whether the definition would catch any payment under a contract for goods and services. This would risk including payments such as ETCs and default payments which we believe should not be within the exemption for the kinds of reasons given in response to question 3(1). We would also note that such a position would not be consistent with the Unfair Terms Directive (making the UK exemption wider than the terms of the Directive), nor with certain parts of the SC’s *Bank Charges* judgment which indicate that these terms are not covered by the present exemption (a point with which paragraph 8.47 of the Law Commission’s consultation document is consistent).

For example, on the one hand, The Court said identifying, ‘... *the price or remuneration .... is a matter of objective interpretation .....*’, and that (our ***emphasis***):

‘..... *If it is possible to identify such price or remuneration as being paid ***in exchange for services***, even if the services are fringe or optional extras, reg 6(2) will preclude an attack on the price or remuneration in question if it is based on the contention that it was excessive by comparison with the services ***for which it was exchanged*** ....’*

The Court also said, on the other hand, that not every charge or payment under a contract is part of the price and within the exemption: (again, our ***emphasis***)

‘*This House’s decision in the First National Bank case shows that not every term that is in some way linked to monetary consideration falls within reg 6(2)(b).....*’<sup>11</sup>

‘..... *There can be payments which do not constitute either “price or remuneration” of goods or services ***supplied in exchange***....*’<sup>12</sup> and

‘... *A contract may of course require ancillary payments to be made which are not part of the price or remuneration for goods or services to be supplied under its terms. The First National Bank and Bairstow Eves cases illustrate the distinction by reference to default terms.*’<sup>13</sup>

The Court also gave examples of the kinds of payment that fall outside the exemption. It referred to payments made under the terms set out in paragraphs 1(d), (e), (f) and (l) of Schedule 2 to the Regulations. These include, in paragraph 1(e), terms which have the aim or effect of, ‘... *requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.*’ It also referred in this connection to charges payable for breach of contract (‘default charges’) and what might be called ‘quasi-default’ charges. That is, charges payable on what would be some sort of default were the relevant term not drafted so as to avoid a breach of contract arising.

A linked point is this. The Consumer Rights Directive (‘CRD’) will prohibit excessive payment surcharges (i.e. the charges for means of payment must not exceed the trader’s costs in using that

means). A term that purported to achieve that unlawful effect should be unfair. On its face, however, such a term may fall within the proposed exemption. We do not think it should. To that end, we agree the effect of any new unfair contract law should be that a term is outside the exemption and is unfair if it is void or otherwise falls for illegality.

**(3) *Transparent* should be defined as:**

- (a) in plain, intelligible language;**
- (b) legible;**
- (c) readily available to the consumer?**

Agree:  Disagree:  Other:

Comment:

If it adopts its proposed overall approach,<sup>14</sup> we agree with the Law Commission's proposals on how transparency might be defined. But, we would highlight our view that the term must also, at least, be prominent in a way that means it would:

- a. come to the attention of the average consumer; and
- b. be likely in fact to be regarded by both parties to the contract as part of the essential bargain.

Otherwise, in practice, the term would retain the essential characteristic of small print: that the average consumer is not properly aware of it and would not have the ability to act on it. It is that knowledge and ability which should justify the exemption from the protection that would otherwise be given by the fairness test.

**(4) The exclusion from review should not apply to terms on the grey list, which should include the following:**

- (a) price escalation clauses;**
- (b) early termination charges; and**
- (c) default charges? (Issues Paper 8.67)**

Yes:  No:  Other:

We agree that the legislation should state expressly that the exemption should not apply to terms on the Grey List. The list includes terms that may be unfair whilst the exemption covers terms that may not.

---

<sup>14</sup> Retaining, rather than removing, an exemption relating to price, for example

We agree that the Grey List should expressly include price escalation, ETCs and default charge terms. In line with the analysis set out above, these are examples of terms that should fall outside an exemption for transparent and prominent terms providing for the price paid in exchange for goods and services.

We believe these changes would provide greater clarity and certainty for consumers and fair dealing businesses.

In relation to ETC terms specifically, we make a number of points.

First, we would re-iterate that, as the excerpts quoted above demonstrate, the SC's judgment seeks to make clear that these were not intended to fall within the exemption. We note again that the Commission's view in paragraph 8.47 of the consultation document is consistent with this position.

Second, such terms would (clearly) not fall within the exemption if the new law makes clear that what is exempt from the fairness test are transparent and prominent terms providing for the price paid *in exchange for goods and services*. It would however be consistent with the idea of an easily understood, clear and simple law, that the point should be made explicit by also including these terms on the Grey List.

Third, we are slightly concerned at what might be suggestions in paragraphs 8.51 and 8.52 of the consultation document about the scope of ETC and equivalent terms outside the exemption and the fairness of certain such terms.

In paragraph 8.51, the Law Commission says (our **emphasis**):

*"As discussed above, the grey list includes some terms which impose early termination charges but not others. We cannot see any reason to say that a term which allows the trader to retain money paid up-front may be assessed for fairness, but a term which requires the consumer to continue monthly payments following cancellation may not be assessed. **We think it would be helpful to say explicitly that a term may be assessed for fairness if it commits the consumer to pay for services for an unreasonably long time; or if, once the consumer has attempted to cancel the contract, it permits a trader to retain or claim payments for services which have not been supplied.**"*

We would be concerned if the suggestion is that ETC terms (and terms to equivalent effects) should only be, "**....be assessed for fairness if it commits the consumer to pay for services for an unreasonably long time...**" (but other ETC terms may be exempt). We agree such terms are *examples* of terms outside the exemption. And, such terms may be more likely, or more, unfair the longer the period for which the relevant charges are payable (and the higher their amount). But, any new law that was to the effect, or suggested, that they are *only* reviewable for fairness if the period they cover is unreasonably long would not be consistent with the Supreme Court's *Bank Charges judgment*, the requirements of the Unfair Terms Directive or the Law Commission's position in earlier paragraphs (e.g. 8.47 – 8.49). Such terms should be assessable for fairness (even if not unfair) in any event. We assume this is what the Law Commission intended and would welcome clarification to that effect.

We would, on similar bases, also have strong reservations about amendments to the *Grey List* (in line with Appendix B to the consultation document) that indicated only that ETC terms may be assessed for fairness if covering an unreasonably long period. Likewise, if such amendments suggested such terms are only likely unfair if covering such a period. This may be the effect if the *List* only referred to, "A term requiring A, *when in breach of contract*, to pay B a sum significantly

above the likely loss to B,” and to terms providing for ETCs covering an unreasonably long period. This may leave a gap into which fall *other* ETCs (which do not arise, technically, in breach of contract).

Our (strong) view is that such terms are likely unfair if they seek to put a trader in a better position than had the consumer performed what would otherwise have been his (minimum) contractual obligations. In other words, very broadly, such terms should only provide for charges that give the trader the lost net-profit he would have derived from such performance. There appears to us no fair reason why a trader should get more from a contract that ends early than had it been performed in line with the consumer’s obligations (but no more). This would fairly reflect the contractual damages rules that would apply in the absence of ETC terms. This position is reflected in our Additional Charges guidance and in the enforcement actions we have successfully taken in the communications sector.

Our submission is that any *Grey List* should clearly reflect this position (by limiting the amount of ETCs as well as the period for which they are payable). To do otherwise would, we think, be a retrograde step not in line with the requirements of the Unfair Terms Directive.

Fourth, and in a similar connection, we note that paragraph 8.52 says:

*“This is not to suggest that all price escalation clauses, default charges or early termination charges are unfair. Many are fair. In order to decide whether they are fair, however, it is necessary to consider the amount of the charge in relation to the goods or services supplied. An early termination charge in a mobile phone contract, for example, might be quite fair if it simply recouped the cost of the handset supplied.”*

We agree, of course, with the first two sentences: the terms referred to, though assessable for fairness, may well be fair. We question, however, the third. An assessment of the fairness of a term providing for an ETC or a default charge is not an assessment of the charge against the goods or services provided. It is an assessment of the appropriateness of the amount as compensation for ending the contract early or defaulting in its performance.

As to the fourth sentence, we assume this was not intended to suggest that a term providing for such a charge would necessarily be fair, since it is not possible to say in the abstract. The fairness of such a term would, of course, depend on the terms of the contract – the amount of the charge, whether or not the handset was provided “free” and would or would not be paid for by a consumer who did not end the contract early and whether any other ETCs are payable, for example – and whether the term placed the trader in a better position than had the contract been performed rather than ended early. We would welcome clarification to this effect in any final statement by the Law Commission.

We also agree that the *Grey List* should expressly include non-refund terms (as defined in response to question 1 above) and other terms providing for charges having similar effect to ETCs. Non-refund terms are not terms providing for charges in exchange for goods and services, nor terms which, if transparent and prominent, would justify non-application of the fairness test. They are another example of terms which are not necessarily unfair, but whose apparent fairness could be used to exploit the average consumer’s lack of knowledge of contract law. We would argue therefore that they should not benefit from the fairness test exemption. Again, we note the consistency of this proposal with comments made by the Supreme Court in the *Bank Charges case* (quoted by the Law Commission in paragraph 8.49).

Again, each of the changes we support would be consistent with the operation of a market working well for both consumers and fair-dealing businesses, in line with the underlying principles in our introductory comments above. Consumers would have clarity and due protection against unfair abuses. Fair-dealing businesses would have certainty and protection against the effects of unfair dealing by less scrupulous competitors.

#### 4. Would it be helpful to explain that:

**(1) A term is prominent if it was presented in a way that the *average consumer* would be aware of the term?**

**(2) In deciding whether a term is transparent and prominent, the court should have regard to statutory guidance?**

Yes:    X        No:            Other:   

Subject to the following, we consider that, at the very least, it would be helpful for the amended law expressly to state that a term is prominent if:

- it is presented in a way that the average consumer would be aware of it; and
- in deciding whether a term is transparent and prominent, the court should have regard to statutory guidance.

The first of these would be a requirement that helps remove from terms the characteristics of *small print*. This helps justify their exemption from the fairness requirement. And, both of these provisions combined would add to the certainty of the amended law.

In particular, we are considering here, as far as Ofcom and the services we regulate are concerned, terms providing for charges that may be very important, but nonetheless not right at the forefront of the [average] consumer's mind when contracting. For example, charges for services outside the inclusive bundles of services provided under a contract and charges for certain means of payment. It is important these terms have a prominence that gives the average consumer an understanding of them in practice. That way, the consumer and fair dealing businesses have a degree of protection commensurate with the point that, because they are exempt, consumers could not challenge them for unfairness.

One caveat we would attach to this relates to the use of the concept of the *average consumer*. We note that this was a significant issue considered in the bank charges case, in the lower courts in particular. It is a concept that is widely recognised and understood term within European jurisprudence. But, some concerns have been raised around what the average consumer should be expected to be aware of and understand based on the information provided by traders.

We suggest that it may be worth giving further consideration to the concept in light of recognised behavioural biases that consumers exhibit, the difficulties they can face in terms of processing and assessing information and how the concept might be interpreted by the UK courts, to ensure an appropriate standard is adopted for the assessment of a term. An appropriate formulation may be one reflecting, at least, that a price term is only prominent within the meaning of the exemption if it is presented in a way that:

- a. the average consumer would be aware of the term; and
- b. both parties to the contract would be likely in fact to regard it as part of the essential bargain.

As to statutory guidance, the objective here is to make the law clear and certain. It would be beneficial to minimise the extent to which one set of words (transparent and prominent) in any new law simply replaces or is added to others (plain, intelligible language). Any steps that can be taken to help bring the legislative language to life and make it easier to understand would be welcome. Such steps would allow for easier application by businesses and regulators which in turn would bring benefits to consumers and fair dealing businesses. We therefore welcome the proposal in relation to statutory guidance.

**(3) The exemption does not apply to any term which purports to give the trader discretion to decide the amount of the price after the consumer has become bound by the contract? (Issues Paper 8.68)**

Yes:     X           No:            Other:   

We agree the exemption does not (and should not) apply to any term purporting to give the trader discretion to decide the amount of the price after the consumer has become bound by the contract. We agree this should be confirmed by the inclusion of terms to such effect on the *Grey List*.

Such terms do not fall within the essential bargain – the price to be paid for the goods and services provided – the consumer’s knowledge of which should be the trigger for the proper application of the exemption and which justifies non-exposure to the fairness test. If the exemption did apply, the consumer is at risk of undue exposure to the risk of, for example, his need for goods and services being exploited by traders. This would not meet any requirement of good faith, or to be fair and reasonable but, were the exemption to apply, this could not be addressed.

In our view, exposing such a term to the fairness test, rather than shielding it with the exemption, cannot be impugned with the suggestion that a fairness assessment would involve an (exempt) assessment of the adequacy of goods and services against their price. Properly characterised, the assessment would be of the extent of a trader’s ability to set the price, which is a different matter.<sup>15</sup> It appears to us perfectly possible that a fair dealing trader could use fair price setting terms in appropriate cases. Terms which, for example, properly and fairly describe and limit price setting mechanisms and provide consumers with corresponding rights.

**5. In order to implement the Unfair Terms Directive fully, is it necessary to specify that even transparent, prominent price terms may be assessed for matters other than “the adequacy of the price as against the goods or services supplied in exchange”? (Issues Paper 8.69)**

Yes:     X (but see below)       No:            Other:   

---

<sup>15</sup> It is, to quote the CJEU in *Nemzeti*, “... a term relating to a mechanism for amending the prices ....” rather than itself a term setting the price.

In our view, this question presents some challenge. We agree that if a term providing for a charge that falls outside the exemption is assessable for fairness, that assessment may include a consideration of the amount of any charge. We also agree that there is simplicity in a position that prominent and transparent price terms should be exempt in all aspects, not just their amount.

In particular, if they satisfy meaningful prominence and transparency requirements, there is at least an abstract basis for the view that such terms will, in all aspects, be part of the essential bargain at the forefront of the consumer's mind when he enters the contract. On that basis, there may be a case that the term need not be exposed to the fairness test in any aspect and should be exempt. That case could be characterized as benefitting both consumers and fair-dealing businesses in a market that works well.

We would also welcome clarity on this point, the *SC's Bank Charges* judgment appearing to have created some uncertainty around it. Our concerns, however, relate to whether the abstract case described in the previous paragraph is really made out and is consistent with the Unfair Terms Directive, for these reasons.

First, it does not necessarily follow that, since terms outside the exemption may be assessed for fairness in all aspects, including their amount, those within it should be exempt in all aspects. Terms like price escalation clauses, given as an example in paragraph 8.61 of the consultation document, relate principally to the trader's ability to vary the price, rather than the price itself.<sup>16</sup> An assessment of their fairness, even if it includes consideration of the amount of a price escalation apparently permitted by the term, goes principally to the extent of the trader's ability to change one of the most important terms in the contract, contrary to what the consumer thought he had agreed, and not to the adequacy of the amount of the price as against the goods or services supplied (which on any analysis is exempt).

In other words, there is no question of such a term coming within the exemption since it is not a price term, as such. It is quite proper that it is outside the exemption and may be assessed for fairness in all aspects, including as to the amount of an escalated price charge (and this is consistent with Recital 19 of the Directive – see below). But, it is not clear that that has any great bearing on the question of whether terms within the exemption should be exempt in all such aspects.

Second, we wonder whether, even if transparent and prominent, all aspects of the term could properly be said to be at the forefront of the [average] consumer's mind, such that the protection of the fairness test should not apply and the exemption should. It would appear to us, for example, that the amount of a price for goods and service is a matter that the average consumer could be assumed always to take into account. It is less clear that, for example, the consumer might reasonably and properly take into account aspects of a price term such as the circumstances in which part of a price may become payable.

---

<sup>16</sup> Again, to quote Court of Justice of the European Union (CJEU) in *Nemzeti*, it is “... a term relating to a mechanism for amending the prices ....,” rather than itself a term setting the price.

Third, it appears to us there is a reasonable argument that the Unfair Terms Directive recognizes the foregoing point and, accordingly, provides only for an exemption, as far as price is concerned, against an assessment of the adequacy or appropriateness of the price for the goods and services provided in exchange. In particular, Recital 19 and Article 4(2) of the Directive provide respectively that:

*“..... assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms;.....”* and

*“Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other .....”*

Whilst the first of these is, perhaps, ambiguous as to the nature of the exemption, the latter on its face appears to resolve that ambiguity (in favour of the exemption applying only to the adequacy of the price as against the goods or services supplied in exchange, but allowing a fairness assessment for other aspects of price terms). This is consistent with the comments of the Advocate General in *Caja de Ahorros* at paragraph 8.63 of the consultation.

It is not wholly clear to us, therefore, that “On balance, ... the proposals meet the minimum standards required by EU law” as set out in paragraph 8.65 of the consultation. An exemption limited to assessment of the adequacy of price might also be characterized as benefitting both consumers and fair-dealing businesses in a market that works well. A fair dealing business, for example, would suffer no harm from a requirement for certain aspects of price terms to be fair.

We are also a little puzzled by other parts of paragraph 8.65. On one, literal, reading it seems to suggest terms are only assessable for fairness if they are not transparent and prominent (i.e. within the exemption) or are on the *Grey List*. However, in line with the Directive, the transparency and prominence requirements (i.e. the exemption) would only apply (at most) to terms relating to price and the main subject matter of the contract. Similarly, the *List* would be indicative of terms that *may* be unfair. There nonetheless may be other terms which are neither (a) within the exemption (even if transparent and prominent) because they do not relate to price or main subject matter; nor (b) on the *Grey List*. Such terms are still assessable for fairness in accordance with the Directive. We assume paragraph 8.65 is not intended to suggest otherwise.

#### **Questions on the main subject matter**

**6. Do consultees agree that a term relating to the main subject matter of the contract should be exempt from review, but only if it is *transparent* and *prominent*? (Issues Paper 8.81)**

Agree:    X    Disagree:        Other:   

Comment:

We agree that the *Ashbourne*<sup>17</sup> case leaves uncertain the law relating to the main subject matter part of the fairness exemption. Similar to the position outlined above with respect to exemptions relating to the price, we agree that terms defining the main subject matter should only be exempt if they are, at least, transparent and prominent.

**7. Do consultees agree that a term does not relate to the main subject matter of the contract if it is included in the grey list? (Issues Paper 8.82)**

Agree: X      Disagree:       Other:

Comment:

For similar reasons to those set out above with respect to exemptions relating to price, we agree that terms on the *Grey List* do not relate to the main subject matter of the contract for the purposes of the exemption.

**8. Would it be helpful to state that the exemption does not apply to any term which purports to give the trader discretion to decide the subject matter after the consumer has become bound by the contract? (Issues Paper 8.83)**

Yes: X      No:       Other:

Please explain your answer:

We agree the exemption should not apply to terms giving the trader discretion to decide the subject matter after the consumer is bound by the contract. Such terms lack the transparency that means the average consumer can make clear choices and so need not have the protection of the fairness test.

**OTHER ISSUES**

**Copy out or rewrite?**

**9. Do consultees agree that the Unfair Terms Directive should not be “copied out” into the law of the UK, but should be rewritten in a clearer, more accessible way? (Issues Paper 9.11)**

Agree:       Disagree:       Other: X

Comment:

Subject to the following, we agree that there would be benefits from writing the UK law in clear language, using terminology familiar in the UK, rather than copying out the Unfair Terms Directive. This would be broadly consistent with promoting clarity and empowerment, to the benefit of consumers and fair dealing businesses.

---

<sup>17</sup> Office of Fair Trading v *Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch)

However, we do note that it also has the potential risk of creating inconsistency with the Directive and uncertainty in the legal interpretation of the new UK law. That is, the UK law would have to be interpreted in light of the Directive. That may be less straightforward where the two differ. Particular care would need to be taken where differences between the Directive and the UK law might lead to unintended interpretations of apparently straightforward UK drafting.

### **The definition of a “consumer”**

#### **10. Do consultees agree that the new legislation should define a consumer by reference to whether an individual’s actions are “wholly or mainly unrelated to their business, trade or profession”? (Issues Paper 9.17)**

Agree:    X    Disagree:        Other:   

Comment:

We agree that it would be helpful if a consistent definition of ‘consumer’ was applied across all UK consumer legislation and in line with the definition set out in the consultation. As we have noted in our response to the BIS consultation on the supply of goods, services and digital content, where it set out its proposal to adopt this approach, we noted that the proposed definition differs slightly from that currently in Part 8 of the Enterprise Act 2002 and the Consumer Protection Regulations 2008. We also noted that we would support the use of a harmonised definition in order to increase clarity and certainty.

#### **11. Should it also be made clear that the definition of “consumer” in the new legislation excludes employees, or is the wording “wholly or mainly unrelated to their business, trade or profession” adequate? (Issues Paper 9.19)**

Yes:        No:        Other:    X

Please explain your answer:

We do not have a particularly strong view on this point, but we consider that the proposed definition of consumer is sufficiently clear without express statement that it excludes ‘employees’.

### **Terms of no effect**

#### **12. Do consultees agree that terms which purport to exclude or restrict a business’s liability to a consumer for death or personal injury should continue to be ineffective? (Issues Paper 9.22)**

Agree:    X    Disagree:        Other:   

Comment:

We would agree that terms which purport to exclude or restrict a business’s liability to a consumer for death or personal injury should continue to be ineffective.

### **The burden of showing that a term is fair**

**13. Do consultees agree that:**

**(1) In proceedings brought by individual consumers, where an issue is raised about the fairness of a term, the business should be required to show that the term is fair?**

Agree: X Disagree:  Other:

Comment:

We agree that where individual consumers challenge the fairness of a term, the burden of proving fairness should lie on the relevant business. This reflects the disparity in resources between individual consumers and businesses. It would be consistent with the promotion of consumer empowerment, which is good for consumers and fair dealing businesses (which, by contrast with unfairly dealing businesses, should not face undue difficulty in defending their terms as fair).

We note that this reverses the general principle that the party who accuses must prove their case. However, this would not be inconsistent with the European Court of Justice case law about national courts considering fairness of their own motion.

**(2) In proceedings brought by an authorised body under its preventive powers, the authorised body should be required to show that a term is unfair? (Issues Paper 9.30)**

Agree: X Disagree:  Other:

Comment:

We agree that the burden of proof should be on enforcers, such as Ofcom, to prove unfairness where they bring actions. This reflects the current principle and we do not think there is a strong case to reverse this.

**Negotiated terms**

**14. Do consultees agree that the new legislation should cover terms in consumer contracts, whether or not they are individually negotiated? (Issues Paper 9.36)**

Agree: X Disagree:  Other:

Comment:

We agree that the new law should apply to all terms, including those which are individually negotiated and that this should help make the law simpler.

**The fairness test**

**15. Do consultees agree that the court should consider whether a term is “fair and reasonable”, looking at: the extent to which it was transparent; the substance and effect of the term; and all the circumstances existing at the time it was agreed? (Issues Paper 9.50)**

Agree: X Disagree:  Other:

Comment:

Subject to the fuller consideration of the implications of formulating the new UK law using terminology familiar in the UK, rather than copying out the Unfair Terms Directive (question 9 above), we agree that a re-formulation of the fairness test, so that terms must be 'fair and reasonable', would be beneficial. It would provide greater clarity and certainty for consumers and fair dealing businesses.

We also agree that terms may be unfair either:

- in substance, however presented to a consumer (i.e. whatever the procedural fairness); or
- in their presentation to a consumer (i.e. procedurally), whatever their effect in substance (if, for example, they have the effect of surprise affecting a consumer's rights).

The fairness requirements should be considered cumulatively. This means that:

- a. for a term to meet the fairness test, it would need to be both fair *and* reasonable (fair in substance *and* procedure) and would be unfair if it failed in either respect; rather than
- b. to be unfair, a term must be shown to be unfair *and* unreasonable (unfair in substance *and* procedure).

We think a cumulative approach is necessary to provide an appropriate level of protection for consumers, along with appropriate clarity and certainty which benefits fair dealing businesses (who should have no interest in treating consumers unfairly in substance or procedure).

We would also note our view that it would be beneficial for any reformed law to reflect the helpful guidance on fairness which can be derived from existing case law. For example, the Lords ruling on the *First National Bank* case commented on issues relating to 'fair and open dealing' by businesses (which goes to procedural fairness) and terms tilting the parties rights and obligations significantly in one party's favour (which goes to substantive fairness).

### Re-writing the grey list

**16. Do consultees agree that the indicative list should be reformulated in the way set out in Appendix B? Alternatively would it be preferable to reproduce the list annexed to the Unfair Terms Directive in its original form? (Issues Paper 9.53)**

Reformulate as set out in Appendix B:

Reproduce the list annexed to the UTD in original form:

Other: X

Please explain your answer:

We agree that there would be benefits from re-writing the Grey List in clear language, using terminology familiar in the UK. This would be consistent with promoting clarity and empowerment to the benefit of consumers and fair dealing businesses. However, as noted above in response to question 9, this has the potential risk of creating inconsistency with the Directive and uncertainty in the legal interpretation of the new UK law. That is, again the UK law would have to be interpreted in

light of the Directive. That may be less straightforward where the two differ. Particular care would need to be taken where differences between the Directive and the UK law might lead to unintended interpretations of apparently straightforward UK drafting.

## Notices

### 17. Do consultees agree that enforcement bodies should be able to bring enforcement action against unfair notices which purport to exclude the business's liability? (Issues Paper 9.57)

Agree:  Disagree:  Other:

Comment:

Although this is not a matter on which Ofcom is in any particular position to comment, we would support this reform as a measure bringing consistency and clarity to the law, for the benefit of consumers and fair-dealing businesses alike.

## Terms which reflect the existing law

### 18. Do consultees agree that the exclusion of "mandatory statutory or regulatory provisions" in Regulation 4(2) should be rewritten to include terms which reflect the existing law? (Issues Paper 9.62)

Agree: X Disagree:  Other:

Comment:

We agree that the exclusion (from the application of the new law) of 'mandatory statutory or regulatory provisions' in Regulation 4(2) should be rewritten to include terms which reflect the existing law.

## End user licence agreements

### 19. Do consultees agree that the Unfair Terms Directive applies to end user licence agreements in a satisfactory way, and that it does not require any special adaptation? (Issues Paper 9.65)

Agree: X Disagree:  Other:

Comment:

On the basis that the new unfair terms law would (1) apply to non-contractual notices as well as contractual terms; but (2) not to terms which merely reproduce mandatory provisions of copyright law, Ofcom broadly agrees that the UTD would apply to end-user licence agreements in a satisfactory way.

## The remaining role of UCTA

20. Do consultees think that the removal of controls in relation to non-standard form employment contracts, resulting from our proposals, would be problematic in practice? If so, please provide evidence. (Issues Paper 9.71)

Agree:  Disagree:  Other:

Comment:

This is not a matter on which Ofcom is in a position to comment.

## IMPACT ASSESSMENT

21. We invite comments on the costs involved in the following:

- (1) **Legal risks.** Is it reasonable to estimate that a major court case may cost a business over £1 million in legal fees?
- (2) **Prudential risks.** Please provide examples of the types of prudential risk and the likely costs a business would face if its charging structure was held to be unfair.
- (3) **Operational risks.** How much management time is involved in responding to complaints concerning the fairness of terms?
- (4) **Reputational risks.** What effect does an unfair term challenge have on the reputation of the business?

22. We ask whether consultees agree that these risks would be reduced by the proposed clarification of the exemption.

23. We welcome views from consultees on whether our proposals will reduce the administrative burden on businesses.

24. We welcome evidence about the likely transitional costs of the proposed reforms. We invite comments on the tentative estimate that the costs to businesses of familiarising themselves with the changes may be in the region of £1 to £2 million.

Yes:  No:  Other: X

Comment:

We are unable to comment on the specific costs to businesses relating to current unfair terms law or the costs of transition. However, as indicated in our opening statement, we would expect the costs to businesses (and ultimately consumers) to be lower if the law is clarified and made more certain. This should help to reduce the numbers of possible claims and the administrative burden on businesses and enforcers.

25. We ask whether consultees agree that the reforms would not increase the number of complaints about unfair terms. We ask consultees to give reasons if they do not agree.

Agree: X Disagree:  Other:

If "no", please explain your answer:

We would not expect there to be an increase in the number of complaints about unfair terms as a result of the proposed changes. The changes are intended to make the law simpler and clearer rather than radically change the terms that would be subject to a fairness test. We think this should make it easier for fair dealing businesses to comply with the law and in turn reduce the numbers of spurious or flawed complaints.

**26. We invite comments on the following tentative estimates:**

- (1) That enforcing unfair terms legislation costs the public purse around £4 million per year;**
- (2) That the reforms may reduce these costs by around £1m.**

Comment:

**It is difficult to provide a firm estimate of the costs of our unfair terms enforcement work due to the way in which we have recorded this data over time. During our intense periods of work on unfair terms, there were 3 lawyers and 3 policy staff involved in our unfair terms/additional charges policy and/or enforcement/consumer protection projects. This is estimated to be around 2 full time equivalents ('FTEs'). Less intense periods of work on unfair terms are estimated to have involved around 0.5 FTE.**

**We would note that some of the costs incurred were a result of the scope for uncertainty about the exemption from the fairness requirement in current law (e.g. responding to traders' arguments that ETCs and no-refund terms are exempt). We also spent some time re-writing our guidance in light of changes to the understanding of the legal position, and uncertainties, arising out of the SC judgment in the *Bank Charges* case.**

**If unfair terms law was changed as proposed, we estimate we might incur some additional costs e.g. to review and amend our Additional Charges Guidance and carry out some internal staff training.**