

## 'The Consumer Rights Bill: best practice in supporting vulnerable and disadvantaged consumers'

I've been asked to examine the draft Consumer Rights Bill in relation to best practice in supporting vulnerable and disadvantaged consumers. The Consumer Panel's remit is to represent the interests of consumers in relation to financial services<sup>1</sup>, and therefore I will address my comments to **consumer rights in the context of UK financial services** as opposed to the sale of goods and services generally.

In order to secure better outcomes for vulnerable or disadvantaged consumers, the Consumer Panel has argued for **clarity in identifying and communicating different risks of consumer detriment**. For example, the terms '*vulnerability*' and '*disadvantage*' themselves are used interchangeably to imply a **general risk of consumer detriment**, and are frequently applied in an unsophisticated way.

As a result, they become a blunt tool, which reduces their impact in identifying the most appropriate solutions – whether that is a particular form of regulatory intervention, enforcement and redress, a competition law solution, changes on the supply side, or a personal legal remedy for customers.

In particular, use of the terms vulnerability and disadvantage tend to focus heavily on **the personal characteristics and circumstances of particular groups of consumers**. Being vulnerable or disadvantaged is often seen as being synonymous with having a lower income when, in practice, **consumers at all income levels are**

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<sup>1</sup> Section 1Q of the Financial Services and Markets Act 2000, as inserted by section 6 of the Financial Services Act 2012: <http://www.legislation.gov.uk/ukpga/2012/21/section/6/enacted>

**exposed to the risk of detriment at one time or another.** I can give a few examples to illustrate this point.

**With-profit savings policies** are held by 25 million policyholders in the UK as a savings vehicle for retirement or to pay off a mortgage. Yet they are now both opaque and inflexible, and have locked consumers into a product that no longer meets their needs. A customer wishing to surrender a with-profit policy will likely incur charges through a Market Value Reduction (MVR).

Many **older consumers shopping for travel insurance** face a limited choice in the market because of their particular circumstances, as the policies available either have age restrictions or include significant age related premiums loadings making them unaffordable. Indeed some insurers refuse to provide cover for particular groups of consumers.

Earlier this week the Consumer Panel published its research findings into **the operation of the annuities market.**<sup>2</sup> 400,000 annuities are sold each year when people retire to draw an income from their pension savings. But as our research shows, **many consumers are getting less income than they could reasonable obtain**, with some providers making excessive profits. And with a shift to ‘non-advised sales’ in this market, consumer protection is significantly reduced when things go wrong.

Accordingly, with the introduction of the new Financial Conduct Authority (FCA) earlier this year<sup>3</sup>, the Panel saw **an opportunity to develop a more effective framework to help identify and communicate the risk of consumer detriment to the FCA and other stakeholders.**

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<sup>2</sup> <http://www.fs-cp.org.uk/newsroom/2013/244.shtml>

<sup>3</sup> The Financial Conduct Authority (FCA), and Prudential Regulation Authority (PRA) replaced the Financial Services Agency (FSA) on 1 April 2013: [http://www.fsa.gov.uk/about/what/reg\\_reform](http://www.fsa.gov.uk/about/what/reg_reform)

We published a position paper ‘**Defining consumer vulnerability and disadvantage**’<sup>4</sup> to disentangle the different types of risk that consumers experience, facilitating greater consistency in the language used to describe them, and **clarity about the most appropriate regulatory action required to mitigate the risks in each case.**

The three concepts we developed to identify the different risks of consumer detriment were ‘**Vulnerability**’, ‘**At a Disadvantage**’, and ‘**Consumer Disadvantage**’. If I can give a brief explanation of our approach:

‘**Vulnerability**’ means there is a higher risk of consumer detriment but does not mean that the risk actually has, or will, crystallise. We would use this term to highlight issues presenting **a potential risk of consumer detriment that requires proactive engagement by the FCA**, without waiting for evidence of actual detriment to materialise.

‘**At a disadvantage**’ highlights the extent to which consumers can be put ‘*at a disadvantage*’ by the actions of firms in the financial sector. We would use this term to inform the FCA of cases **where the activities of regulated firms can significantly increase the risk of detriment for consumers.**

Finally, ‘**consumer disadvantage**’ refers to real, material disadvantage of some kind. We would use this term **to urge the FCA to take speedy action to address risk that has or is about to crystallise causing actual detriment to consumers.** I want to return to role of the FCA later in relation to the interaction and overlap between consumer rights and regulatory law.

**Turning to the draft Consumer Rights Bill.** There is no doubt consolidating and streamlining a myriad of separate consumer law statutes and statutory instruments

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<sup>4</sup> [http://www.fs-cp.org.uk/publications/pdf/Defining\\_disadvantage\\_&\\_vulnerability.%2020%20December%202012.pdf](http://www.fs-cp.org.uk/publications/pdf/Defining_disadvantage_&_vulnerability.%2020%20December%202012.pdf)

into one Act of Parliament is a very good thing. Access to justice and empowering consumers requires the law itself to be clear, concise and accessible.

One of the core principles of the Bill is **the right to clear and honest information before you buy**. This principle was first championed as a new ‘consumer right’ by President Kennedy in his seminal speech to the US Congress on ‘*Protecting the Consumer Interest*’ in 1962.<sup>5</sup>

JFK’s essential message was that the march of sophisticated technology had rendered many consumer laws obsolete, and that it was necessary to protect consumers with new rights: including **the right to be informed** – to be protected against misleading information and to be given the plain facts to make an informed choice.

The **principles of disclosure and transparency** are well established in UK consumer credit and financial services law, and of course these requirements often implement EU directives. **The draft Bill seeks to promote the need for key contractual terms to be ‘prominent and transparent’.**<sup>6</sup> This is good practice as key terms should not be buried in the small print.

### **How many consumers read all of the small print of pre-printed contracts?**

Moreover how feasible is it for them to do so before signing? For example, take HSBC’s standard current account terms and conditions – they match Charles Dickens’ ‘A Christmas Carol’ in length, running to twenty-nine thousand and six words.<sup>7</sup> Which? estimated it would take one hour and 37 minutes to read those terms and conditions – and this length of contract is not unusual in the financial services world.

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<sup>5</sup> <http://www.presidency.ucsb.edu/ws/index.php?pid=9108#axzz1oFBmlXcW>; <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHP-AR7096-A.aspx>

<sup>6</sup> Clause 67: <http://www.official-documents.gov.uk/document/cm86/8657/8657.pdf>

<sup>7</sup> <http://www.thisismoney.co.uk/money/saving/article-2235822/Banks-baffle-customers-small-print--HSBC-current-accounts-29-000-words.html>

The incentive in the Bill for key terms to be prominent and transparent is found in clause 67, which provides that **terms relating to the price or main subject matter of the contract are exempt from the ‘fairness test’ if they are prominent and transparent.**

### **How will this benefit consumers?**

First, it is fair to say that the consolidation of the **Unfair Contract Terms Act 1977**<sup>8</sup> and **Unfair Terms in Consumer Contract Regulations 1999**<sup>9</sup> (UTCCR) within the Bill is helpful, and is designed to remove inconsistencies and overlapping provisions.<sup>10</sup> And Part 2 of the Bill goes further than the UTCCR **by extending its application not just to pre-printed contracts but also all negotiated terms** – which is a progressive development.

And yet, **isn’t exempting key contractual terms from the ‘fairness test’ a missed opportunity?** Isn’t there a danger that Part 2 of the Bill **will be rendered obsolete if firms can simply make all of the main subject matter of their contracts prominent and transparent?** Certainly, the Office of Fair Trading (OFT) in their response to the Law Commission’s Issues Paper argued for the scrapping of the price/main subject matter exemption all together.<sup>11</sup> The overriding objective of the OFT’s approach was to ensure that all terms were open to scrutiny. The OFT was particularly concerned about excessive contingency charges which operate like penalty provisions, as well as the use of disguised penalties.

There is also a concern that the test for whether a contractual term is ‘prominent’ is defined in clause 67(5) by **whether the ‘average consumer’ would be aware of the term.** The ‘average consumer’ is a EU law concept and has been interpreted by the

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<sup>8</sup> <http://www.legislation.gov.uk/ukpga/1977/50>

<sup>9</sup> <http://www.legislation.gov.uk/uksi/1999/2083/introduction/made>

<sup>10</sup> Page 9: <http://www.parliament.uk/business/publications/research/briefing-papers/SN06588/draft-consumer-rights-bill>

<sup>11</sup> See 5.15 et seq., at page 31: [http://www.offt.gov.uk/shared\\_offt/reports/oft\\_response\\_to\\_consultations/OFT1502.pdf](http://www.offt.gov.uk/shared_offt/reports/oft_response_to_consultations/OFT1502.pdf)

European Court of Justice, as someone who is “**reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors**”.<sup>12</sup>

However, the Bill **does not utilise the classic flexible EU definition** of an ‘average consumer’<sup>13</sup>. Instead clause 67(5) provides that an “*average consumer means a consumer who is reasonably well-informed, observant and circumspect*”. This is considerably **narrower than the EU definition**<sup>14</sup> which ensures that if a commercial practice is **directed at a particular group of consumers, then an average member of that group is the benchmark**. The fairness or unfairness of a commercial practice is then assessed against this benchmark”.

How would the Bill’s current definition of an average consumer fit with particular groups of consumers who may be vulnerable or experiencing a real disadvantage in the UK? What about products that are specifically targeted at consumers who may be under severe financial pressure, and trying to cope with debt and stress? **There are 5.2m adults in England who are ‘functionally illiterate’ with readability levels at or below a child aged 11.**<sup>15</sup> Other parts of the UK have similar statistics – **how well does the Bill’s narrower ‘average consumer’ test serve this group of consumers?**<sup>16</sup>

Another problem with the price and subject matter of a contract being exempt from the fairness test is **the scope for complex legal disputes as to what falls within these terms**. We saw this in the OFT’s bank charges test case back in 2009<sup>17</sup> where ultimately overdraft charges were found to be part of the ‘price’ of a personal current

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<sup>12</sup> Page 10: [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/ucp\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_en.pdf)

<sup>13</sup> See 2.3 et seq for a discussion of how EU law approaches vulnerable consumers:

[http://ec.europa.eu/eahc/documents/consumers/tenders/2013/EAHC-2013-CP-08\\_Tender\\_specifications\\_EN.pdf](http://ec.europa.eu/eahc/documents/consumers/tenders/2013/EAHC-2013-CP-08_Tender_specifications_EN.pdf)

<sup>14</sup> See page 24: [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf)

<sup>15</sup> [http://www.literacytrust.org.uk/adult\\_literacy/illiterate\\_adults\\_in\\_england](http://www.literacytrust.org.uk/adult_literacy/illiterate_adults_in_england)

<sup>16</sup> The OFT has expressed concerns about the ‘average consumer’ test, see para 5.19, page 33:

[http://www.offt.gov.uk/shared\\_offt/reports/oft\\_response\\_to\\_consultations/OFT1502.pdf](http://www.offt.gov.uk/shared_offt/reports/oft_response_to_consultations/OFT1502.pdf)

<sup>17</sup> [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2009\\_0070\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0070_Judgment.pdf)

account after many days of legal argument in three different courts. **Can we really expect consumers to have to risk cost and expense arguing over such technicalities?** Much better to have a straight-forward application of a fairness test as the OFT suggest.

In the context of price, we have seen some **very significant developments over the last few weeks with an amendment to the Financial Services (Banking Reform) Bill** which is nearing completion of its parliamentary process. The FCA already had the power to introduce **rules to regulate the total cost of credit for ‘high-cost short-term’ consumer credit agreements from section 137C of the Financial Services and Markets Act 2000** – this new power had been introduced by the Financial Services Act 2012.<sup>18</sup> However, they will now be required to do so no later than 2 January 2015.

In other words, we are seeing **new price regulation powers in financial services** - with the Treasury expecting a total cost of credit cap in relation to the UK payday loan market. The Consumer Panel would argue that **there is no reason in principle not to tackle the equivalent excessive cost of credit charges in relation to bank overdrafts and credit cards.**

All of which brings me to a key proposition that I would like to suggest in relation to **both preventing and addressing consumer disadvantage and vulnerability.**

Prevention is always better than cure. And the FCA has new competition, enforcement and early intervention powers. I would **argue individual consumer rights in the draft Consumer Rights Bill are essential to protect consumers who may need to litigate to protect their own unique factual circumstances.**

The ability to access the courts to seek redress is a constitutional right at common law, and indeed a right protected by the European Convention on Human Rights.<sup>19</sup>

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<sup>18</sup> Section 24: [http://www.legislation.gov.uk/ukpga/2012/21/pdfs/ukpga\\_20120021\\_en.pdf](http://www.legislation.gov.uk/ukpga/2012/21/pdfs/ukpga_20120021_en.pdf)

<sup>19</sup> Incorporated into UK domestic law by the Human Rights Act 1998; and protected by article 6 of the ECHR:

However, in the context of consumer detriment in the financial services market there are many examples where it is **either impossible to obtain legal redress using individual consumer rights or unfeasible for most people to do so.**

For example, redress from from PPI (payment protection insurance) misselling has seen **£11.5bn refunded to consumers since January 2011.** Consumers are unable to directly rely on the FCA's Principles of Business, but it was ultimately the FCA's Principles, **including the 'Treating Customers Fairly' principle, that brokered the way for mass consumer redress.**

The industry challenge to the non-actionability of the Principles was correct in relation to individual consumers raising court actions, **but irrelevant to the Principles giving rise to obligations between firms and customers in the judgment of the High Court.**<sup>20</sup> **And the Financial Ombudsman Service (Ombudsman) was entitled to have regard to the Principles when deciding what was 'fair and reasonable in all the circumstances of a case'.**

The role of the Ombudsman to provide redress and act as a deterrent to consumer detriment cannot be underestimated in the context of financial services. **The role of the FCA in preventing consumer detriment occurring in the first instance, and using its power to provide collective redress for consumers is ultimately the most important source of consumer protection in relation to financial services.**

**The draft Consumer Rights Bill adds to the existing infrastructure of UK consumer protection** by providing a welcome consolidation of the law, as well as clarification and enhancement particularly in relation to the enhanced consumer measures in Part 3 of the Bill. **In relation to the Bill's provisions on unfair terms of consumer contract, there remains an important opportunity to strengthen the**

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<sup>20</sup> <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1>  
<http://www.bailii.org/ew/cases/EWHC/Admin/2011/999.html>



**Bill further, and simplify the application of the ‘fairness test’ in the interests of both consumers and firms.**

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