Law Commission and Scottish Law Commission

UNFAIR TERMS IN CONSUMER CONTRACTS

RESPONSE TO QUESTIONS

YOUR DETAILS

This document lists the provisional proposals and questions, as set out in Part 10 of the Issues Paper. It is designed to help you to respond.

Name of respondent: **Financial Services Authority (FSA)**

Type (for example business, Enforcement body, lawyer or academic): **Enforcement Body**

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☐ *I wish to keep this response confidential for the following reasons:*

Please return this form by **25 October 2012** to:

commercialandcommon@lawcommission.gsi.gov.uk.

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: ☐ Disagree: ☒ Other: ☐

Comment:

We do not agree that the current law is unduly uncertain. We consider that it could instead be argued that the Supreme Court judgment of 2009 in *Office of Fair Trading v Abbey National plc [2009] UKSC 6, [2012] 1 AC 696* (the '*Abbey*' case) has in some ways made the position clearer. Following the case, it is generally clear that the level of any payment cannot be assessed for fairness if it is made in exchange for the provision of a service, i.e. it is clear that most charging terms fall within the 'price exemption provision' in Regulation 6(2)(b). Exceptions to this are likely to include charges that fall within paragraphs 1(d), (e), (f) and (l) of Schedule 2 to the UTCCR and default charges. Whilst in certain specific cases it may be difficult to determine whether the level of charges should be exempt from an assessment of fairness, on balance, we do not consider that the UTCCR are unduly uncertain.

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

Agree: ☐ Disagree: ☐ Other: ☒

Comment:

We note that the UTCCR may not be the most appropriate tool for dealing with unfair charges in respect of activities regulated by the FSA, as there may be more effective means of dealing with this issue. Whilst, as the regulator, we are able to challenge firms as to the fairness of their terms under the UTCCR, ultimately only a court can determine whether or not a term is fair. Working out whether a term is assessable for fairness is only the first step; we would then still have to work out whether the term is actually fair, which requires the application of the fairness test. How that fairness test would operate in respect of assessing the level of charges is unclear (and was an issue that was not resolved in the *Abbey* case as the terms were ultimately held not to be assessable at all in this respect).

This inevitably causes a degree of uncertainty, which could lead to protracted discussions with firms. If the FSA wished to be able to challenge the level of particular charges, we could instead use our rule-making power to create a rule or guidance to this effect, which could be a more effective solution that would

provide more certainty. We already have rules that apply to the level of some charges[1] and we also have a number of existing measures[2] which require disclosure of the level of charges (the effectiveness of these measures is dependent on how much the disclosure documents are used and understood by consumers when making decisions – see response to Question 3(1) below).

We also note that changing the UTCCR could mean that we may lose the benefit of relevant EU case law and previous UK case law and practice (see also our response to Question 9 below). Any changes could also affect existing contracts that have been drafted on the basis of the current law, which might then need to be amended to reflect these changes.

Given the above points, we query whether it would be beneficial to amend the

[1] For example, MCOB 2.6A.11G(5A), MCOB 12.3.1R, MCOB 12.3.2G,MCOB 12.4.1R, MCOB 12.5.1R, MCOB 12.5.2R, COBS 14.2.14R, COBS 20.4.1R, COBS 20.4.5R, BCOBS 4.2.1R (2) and (4) and BCOBS 5.1.15R(3).

[2] For example, there are requirements flowing from Principle 7 in COBS 4 and 6 that require firms to ensure that the overall impression of the fees and charges and financial benefits of a product is balanced and not misleading in their client communications. There are similar disclosure requirements in ICOBS, MCOB and BCOBS.

UTCCR to deal with the issue of unfair charges.

In amending the UTCCR, the requirements of the Directive would have to be properly implemented. So care would need to be taken to ensure that the level of protection provided by the amended UTCCR was at least an equivalent level of protection to that provided by the current law. Also, in our view, any new law should not be any less certain than the existing law. We consider that clarity and certainty when applying the price exemption provision are key. In our view, a test that attempts to distinguish different categories of charges, where some are assessable and some are not, could result in a lack of certainty, and we query whether it is useful to draw a distinction in this manner. We note that this was one of the Supreme Court's concerns in the *Abbey* case. For the avoidance of doubt, please note that we are not, however, suggesting that any charges that would currently not be assessable for fairness (e.g. the exceptions listed in our response to Question 1(1) above) should now be assessable for fairness.

Having said the above, if the Government did decide to amend the UTCCR, our ability to assess charging terms for fairness would be affected, and we therefore comment on the Law Commission's proposals below.

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)

Comment:

The Supreme Court decision has given the price exemption provision in the UTCCR potentially very wide scope. Previously, we considered the price exemption provision to cover only the level of charges that were considered to be 'core', such as premiums in insurance contracts. After the Supreme Court judgment, the level of any charge that is levied in exchange for a service is exempt from being assessable for fairness.

We have, however, continued to assess price terms for issues other than the *level* of the charge or price, such as whether they provide the firm with too much discretion to determine what the charge should be, as we do not consider that this is inconsistent with the Supreme Court decision.

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: ☐

As set out in our response to Question 1(2) above, we consider that a test that

distinguishes between types of charges could result in uncertainty. We consider that clarity and certainty when applying the price exemption provision are of key importance.

Transparency and prominence

We do not agree that a price term should be excluded from review merely because it is transparent and prominent, as we disagree with the presumption that transparency and prominence are in themselves sufficient to ensure fair consumer outcomes. Whilst these are undeniably relevant factors (the FSA itself has many rules relating to disclosure) we do not consider that they are the only issues to consider.

Consumer behaviour

The summary document provided by the Law Commission states at paragraph S.54 that '*where consumers know about the terms, they are able to take them into account in making decisions. If the information is available, the law should not seek to protect consumers from the consequences of their own decisions*'.

We query whether this statement accurately reflects consumer behaviour.

We are concerned that consumers in practice do not take the level of all charges into account in making their decision to purchase a particular product, even if they are aware of the terms setting out the charges. In the context of financial services, we are aware that, whilst consumers may take into account the headline price of a product (for example, the level of the premium in an insurance product and the rate of interest on a mortgage), they may not necessarily look at all the charges that could possibly apply during the life of that product. We are concerned that many charges, despite being 'transparent' and 'prominent', are in reality not subject to competitive pressures. By underestimating their future circumstances, consumers often do not pay due attention to charges, however transparent or prominent they may be. For example, when consumers enter into a car insurance contract, they do not necessarily consider the probability of their moving house and being required to pay a change of address administration fee. This would be the case even if the charge was prominently displayed at the outset. We do not therefore agree with the view set out at paragraph 8.3 of the Paper, which states that '*if a term is*

transparent and prominent, a consumer should be aware of it'.

We consider that transparency and prominence do not necessarily afford sufficient protection to consumers, particularly when what is disclosed is not related to the primary purpose of the customer in the transaction[3].

Fair treatment of consumers

We are concerned that an approach that focuses on transparency and prominence may encourage suppliers to produce a long and detailed list of every cost and charge applicable under the contract, making them as transparent and prominent as possible, with the intention of making such terms excluded from an assessment for fairness. We are concerned by paragraph 8.41 of the Issues Paper, which states that '*a trader may ensure that a price is exempt from review by making it prominent'*, as this paragraph seems to endorse this approach. In our view, setting out a term clearly should not be

[3] See the FSA Discussion Paper on Product Intervention, published in January 2011, http://www.fsa.gov.uk/pubs/discussion/dp11_01.pdf and chapter 3 of the FSA Consultation Paper on the Mortgage Market Review, published in November 2010, http://www.fsa.gov.uk/pubs/cp/cp10_28.pdf

sufficient, and the approach set out in the Paper may discourage firms from considering properly whether their charges are in fact fair. The proposed approach could result in high fees being charged, and we are concerned that competitive forces will not result in such fees being pushed down, as, in our experience, consumers do not focus on them and properly take them into account in their decision-making process.

Challenging the value-for-money of products

In our October 2012 publication, 'Journey to the FCA'[4], we say that it is likely that the FCA will go further than the FSA has previously done in challenging providers on the value-for-money of their products and checking that charging structures can still ensure good outcomes for consumers. We may therefore, in the future, wish to challenge what we believe to be poor value products, so as a general principle do not favour an approach that suggests that, provided there is prominence and transparency, then either individual terms or the whole product

[4] http://www.fsa.gov.uk/static/pubs/other/journey-to-the-fca-standard.pdf

itself should not be challenged.

Equality and diversity

As a further point, with an approach based on the assumption that, where charging terms are transparent and prominent, they should be exempt from an assessment for fairness, in our view, consideration needs to be given to consumers' ability to take account of that information. For example, those with learning difficulties, visual impairments and impairments that hinder the assimilation of written information, and those for whom English is not a first language, may have difficulties in processing large amounts of information. The greater the importance that is given to people being provided with information in advance in large amounts, the higher the negative impact is likely to be on these groups.

(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: ☒

Comment:

Please note our response to Question 3(1) above. Our response below should be read as subject to our overriding comments set out in that section.

We consider that it could be clearer whether the above definition relates to an obligation on the consumer to pay money at any time during the life of the contract, or just at the beginning of the contract when the consumer buys the product.

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

(a) in plain, intelligible language;

(b) legible;

(c) readily available to the consumer?

Agree: ☐ Disagree: ☐ Other: ☒

Comment:

Please note our response to Question 3(1) above. Our response below should be read as subject to our overriding comments set out in that section.

We consider that this is a sensible definition of the word 'transparent'. It makes

it clear that plain and intelligible language is not enough; the term also needs to be easy to read and available to consumers. This is wider than the current requirement to draft in plain, intelligible language, and we are in favour of this approach. It might also be advisable to expand on the concept of 'intelligibility' to explain what this means, for example, does it mean that long words should be avoided, or that legal jargon should not be used, or is it to do with clear sentence structure etc.? In addition, the definition could also usefully make it clear that the level of detail provided must be sufficient for the consumer to understand the charge. Explanations of this nature could be provided in the UTCCR themselves, or perhaps in any accompanying material or guidance.

As an additional point, we consider that it may be worth making it clear in the legislation that the current level of the 'price' or 'charge' should be available to a consumer at any time during the life of the contract, rather than just at the point of sale.

As a more general point, we query, however, whether introducing the concept of transparency in this way goes towards increasing certainty in this area.

(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)

Agree: ☐ Disagree: ☐ Other: ☒

Comment:

We consider that terms that appear on the grey list are not excluded from review and are therefore assessable for fairness. In our view, an amendment made to state explicitly that such terms are assessable, should however also make it clear that terms that are not on the grey list may also be assessable for fairness.

In our view, however, the proposed 'transparency/prominence' test does not sit comfortably with the grey list. We think it was clear in the *Abbey* judgment that the Supreme Court considered that terms on the grey list (e.g. penalties) were not excluded from an assessment for fairness, as they did not relate to the adequacy of the price in exchange for a service. However, as the proposed new test states that if a term is transparent and prominent, it is excluded from an assessment for fairness, this could mean that e.g. a penalty clause would not be assessable for fairness, as long as the term was transparent and prominent. It may be because of this that the Law Commission is suggesting that the legislation now explicitly state that terms on the grey list are assessable for fairness. In our view, the need to do this highlights the fact that the grey list does not sit particularly well with the new proposed test of 'transparent and

prominent'.

We note that paragraph 8.46 of the Issues Paper refers to price escalation clauses and the *Nemzeti* case that states that the price exemption provision cannot apply to a term relating to a mechanism for amending the prices of the services provided to the customer. This reflects the approach we have taken to date, as we have considered such escalation clauses to be assessable for fairness. Similarly, we also have considered that default charges are assessable for fairness.

We consider that adding early termination charges to the grey list would be a positive step. On a termination, it can be difficult to see what service is being supplied in exchange for the price, and therefore stating explicitly that such a charge is indicatively unfair is a welcome development.

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?

Yes: ☐ No: ☐ Other: ☒

Please explain your answer:

Please note our response to Question 3(1) above. Our response below should be read as subject to our overriding comments set out in that section.

We disagree that prominence (together with transparency) is sufficient to exclude a term from an assessment for fairness. However, our comments on the 'average consumer' test are set out below.

In financial services, it is quite common for certain financial products to be targeted at particular consumer groups. We therefore consider it important that the 'average consumer' test take into account evidence about the typical consumer who acquires the relevant financial product, so that what the court views as a 'reasonably well informed, reasonably observant and circumspect' consumer relates to the real consumer of that product. This average consumer should be an average consumer in the target market for that product. We consider that the particular nature of financial services products means that the type of consumer group targeted should be taken into account.

As with transparency above, we, however, do query whether introducing the concept of prominence will increase certainty in this area.

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

Yes: ☐ No: ☒ Other: ☐

Please explain your answer:

Please note our response to Question 3(1) above. Our response below should be read as subject to our overriding comments set out in that section.

For the purposes of this question, we assume that the reference to statutory guidance is a reference to guidance issued by regulatory bodies such as the FSA. We do not favour an approach that contemplates us publishing detailed checklist-style guidance as to transparency and prominence (e.g. setting out what font type and size should be used, or where particular terms should appear in a contract) as we consider that there is a risk that such guidance may be used in a 'tick-box' way. Firms may consider it sufficient just to go through the checklist to ensure that they have complied with its requirements and therefore can avoid their terms being assessable for fairness, rather than taking a wider look at the fairness of their charges.

(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: ☒ No: ☐ Other: ☐

Please note our response to Question 3(1) above. Our response below should be read as subject to our overriding comments set out in that section.

We would currently challenge terms such as this under Regulation 5, and do not consider them to be excluded by the price exemption provision. For avoidance of doubt, however, we consider that it would be helpful to have an explanation that the exemption did not apply to such terms.

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: ☒ No: ☐ Other: ☐

Please explain your answer:

We consider that the above statement reflects the current situation. If a term falls within the price exemption provision, we consider that we are still able to assess such a term for issues other than the adequacy of the price as against the goods or services supplied in exchange, for example, whether the term reserves excessive discretion to a firm. In our view, this should remain the case

in any amendment to the UTCCR.

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: ☐ Disagree: ☒ Other: ☐

Comment:

We consider that transparency and prominence should not be sufficient to render a term relating to the main subject matter of the contract exempt from review. We disagree with the presumption that transparency and prominence are in themselves sufficient to ensure fair consumer outcomes.

Please see our response to Question 3(1) above for more information on our views.

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: ☐ Disagree: ☐ Other: ☒

Comment:

This reflects the approach that we currently take. However, please see our response to Question 3(4) above.

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: ☒ No: ☐ Other: ☐

Please explain your answer:

This reflects the approach that we currently take. We would assess such a term under Regulation 5.

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: ☐

Comment:

Generally, the FSA's approach to transposition of directives has been 'intelligent copy-out', where the words of a directive are used unless there is a reason to depart from them. We consider that this approach should be taken to transposition of the Unfair Terms Directive. Departing from the current language of the UTCCR could result in the loss of the precedent value of material relating to the current UTCCR, including existing domestic case law, undertakings and guidance. Also, in rewriting the Directive, care would need to be taken to ensure that the UK legislation provided the same or a higher degree of consumer protection than that provided by the Unfair Terms Directive, so that the provisions of the Directive were properly implemented.

There do not appear to be any significant benefits to rewriting the Unfair Terms Directive to make it clearer and more accessible. In our view, much of the current UTCCR is written in a way that is relatively easy to understand, so whilst there may be arguments for clarifying aspects of the UTCCR, a complete rewrite does not seem necessary.

If, however, a decision is taken to rewrite the Unfair Terms Directive, we consider that any draft Bill or Regulations produced as part of such a process should be separately consulted on.

Our responses to the questions in this paper should be read as subject to our response to this question.

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: ☒ Disagree: ☐ Other: ☐

Comment:

We consider that the new definition would allow consumer contracts with a secondary business element to be assessable under the UTCCR, which is currently not the case. We consider that there are advantages to the definition being amended in this way. Some consumers enter into contracts for services that are primarily for personal use, but that also involve a business element. We consider that such consumers should also have the protection of the legislation, as the main purpose of the contracts they enter into is not in a business capacity.

For example, we can envisage a situation where a consumer who is a hairdresser uses a car for their personal use, but where they also sometimes visit consumers' homes for their hair appointments; in such cases, it is questionable whether the consumer's car insurance contract should be prevented from being assessable under the UTCCR.

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: ☒

Please explain your answer:

Not relevant to the scope of the FSA's regulation.

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: ☐ Disagree: ☐ Other: ☒

Comment:

Not relevant to the scope of the FSA's regulation.

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: ☒ Disagree: ☐ Other: ☐

Comment:

It seems appropriate that, when proceedings are brought by individual consumers, the burden of showing that a term is fair should lie on the business. This is particularly important given the consumer's weaker position and inability to negotiate the terms of the contract when they enter into it. We note, however, that we would expect consumers to have to initially set out some basis for why they think that a term is unfair.

(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: ☒ Disagree: ☐ Other: ☐

Comment:

It seems appropriate that, in proceedings brought by an authorised body under its preventive powers, the burden of showing that a term is unfair should lie with the authorised body. This is consistent with our current practice.

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: ☒ Disagree: ☐ Other: ☐

Comment:

We consider that, whilst the Unfair Terms Directive is aimed at situations where the consumer is not in a position to negotiate the terms of their contract and therefore requires greater protection than a consumer who has negotiated their contract, consumers in the latter category may also require protection, as they may have felt pressured to accept certain provisions. It is questionable how much influence a consumer actually has when negotiating a financial services contract.

We rarely receive referrals about individually negotiated contracts, as few financial services contracts are individually negotiated.

We note that, if individually negotiated terms were to be within the scope of the UTCCR, it may not be appropriate for the FSA to be under an obligation to deal with complaints about such terms, as the resolution of such individual disputes properly falls to the Financial Ombudsman Service. If the FSA took action in

respect of such terms, we would in effect be taking action on behalf of the particular consumer who had complained about the terms, which may not be proportionate for the FSA to do as a regulator. The situation is different with respect to standard form terms which generally have the potential to affect a number of consumers.

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: ☐ Disagree: ☒ Other: ☐

Comment:

We consider that the fairness test should not be amended as above and that we should instead retain the concepts of a 'significant imbalance' and 'consumer detriment', as there do not appear to be any significant benefits to amending the fairness test in this way.

The replacement of the existing fairness test with a 'fair and reasonable' test would seem likely to create uncertainty about whether existing terms drafted with the old test in mind are fair or not under the new test. In our view, the new test may be too broad and could be difficult to apply with sufficient certainty.

The current test of fairness in the UTCCR reflects that set out in the Unfair Terms Directive, while the new test would be a departure from that. So the benefit of consistency with other European markets and the relevance of judgments from European courts could be lost, as could the precedent value of existing materials relating to the UTCCR (please see our response to Question 9 above). It may also raise the question of whether the Directive had been properly implemented if the new test did not always provide the same or a higher degree of consumer protection.

In addition, we are concerned that the reference to transparency both in the proposed fairness test and the proposed price exemption provision could be confusing.

We are unclear from the Issues Paper whether all the factors referred to in the relevant provision in the draft Bill of 2005 would be included in any new Bill produced. In any case, we consider that, if a decision is taken to amend the fairness test in a new Bill, this provision should be consulted on again.

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: ☐

Please explain your answer:

As mentioned in our response to Question 9 above, we consider that directives should be 'copied out' where possible, and therefore we query whether the Appendix should be reformulated in this manner.

However, we set out below our specific (non-exhaustive) comments on Appendix B, should a decision be taken to redraft the grey list:

(i) We note that some of the terms in Appendix B, e.g. Term 2 and Term 8, seem wider than the equivalent provisions in the UTCCR.

(ii) Term 4 appears to be intended to replace paragraph 1(d) of Schedule 2. However, term 4 relates to B retaining an unreasonable amount of money when A cancels a contract, whereas paragraph 1(d) applies where B retains sums without the consumer having an equivalent right to receive compensation, should B cancel the contract. We are unclear as to where the provisions in 1(d) in relation to the equivalent right are intended to appear in Appendix B. The issue of retaining an 'unreasonable' amount of money seems to be a different issue – the amount retained could be reasonable in level, but the term may be unfair under the existing paragraph (1)(d), as the consumer may not have an equivalent right to cancel.

(iii) Term 7 seems to cover the issues set out in the second part of paragraph 1(f). However, we note that paragraph 1(f) refers to B cancelling the contract, whereas Term 7 relates to A cancelling the contract. We therefore are concerned that this does not seem to reflect the provisions of the Unfair Terms Directive.

(iv) Term 8 refers to '*except in an urgent case*'. We prefer the original wording of the grey list, which refers to terms enabling the seller to terminate the contract without reasonable notice, '*except where there are serious grounds*', as it is unclear whether the new wording reflects the provisions of the Directive and whether it provides at least an equivalent level of protection to that provided by the Directive.

(v) We consider that Term 10 could be reworded to make it clearer that terms that set out B's obligations are covered, as well as terms that set out A's obligations. We acknowledge that the Unfair Terms Directive

does not make this point particularly clear, but we consider that Term 10 could usefully be amended in this way.

(vi) Paragraphs 11, 12, 22(1), (2), (3), (4) and 23 of Appendix B refer to '*good*' reason, replacing the previous reference to '*valid*' reason. We believe that the reference to '*valid*' reasons should be retained, as it is unclear whether the new wording reflects the provisions of the Directive and whether the reference to a 'good' reason provides at least an equivalent level of protection to that provided by the Directive.

(vii) Term 14 seems inconsistent with the rest of Appendix B, as it refers to '*the business*' instead of '*B*';

(viii) Terms 22 (1), (2), (3) and (4) of Appendix B are rather confusing, as sub-paragraphs (1) and (3) set out the circumstances in which sub-paragraphs (2) and (4) will apply respectively. We believe that the structure of term 22 is not clear and that it could cause uncertainty. We consider that the provisions in the Directive relating to variation terms are complicated and that particular care needs to be taken in any redrafting of the provisions.

(ix) In addition, we are unclear as to what 'relatively short advance notice' means in paragraph 22(1)(a) and what provisions of Schedule 2 it is intending to replicate. We are also uncertain as to how this paragraph interacts with paragraph 22(2) which refers to B 'immediately' informing A.

(x) Similarly, we are unclear as to what 'relatively short advance notice' means in paragraph 22(3)(a) and what provisions of Schedule 2 it is intending to replicate. We are uncertain as to how this paragraph interacts with paragraph 22(4) which refers to B informing A as soon as practicable.

(xi) Paragraphs 22(4)(b) and 23(b) of Appendix B refer to B's '*liability*'. We believe the word '*liability*' may create uncertainty. We consider that the phrase 'without incurring liability' could indicate a future liability, whereas we consider that the wording in Appendix B should make it clear that the provision just relates to current barriers to exiting the contract, such as an early repayment charge. It would be helpful if it could be made clearer what 'without incurring liability' means. For example, does it mean that consumers should just be able to exit their contracts, or does it mean that they should be able to exit without paying any charges, or able to exit without paying certain specific charges? In our view, further clarity is required.

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:

We do not come across the types of notice (car-park notices and end user licence agreements) that appear to be envisaged here. Therefore, this question does not seem relevant to the FSA's work.

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: ☐ Disagree: ☒ Other: ☐

Comment:

We do not consider that this exclusion should be rewritten in this manner, as the word 'reflect' seems vague and we are concerned that it could cause uncertainty. Also, it does not appear that the word 'law' includes 'regulatory provisions' as per the existing definition, which could cause difficulties, as provisions of the FSA Handbook etc might not fall within the definition. However, we consider that there is scope to improve the drafting of the existing section. For example, we do not consider that the word 'mandatory' adds much to the definition and consider that it could helpfully be deleted.

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: ☐ Disagree: ☐ Other: ☒

Comment:

Not relevant to the scope of the FSA's regulation.

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)

Yes:	☐	No:	☐	Other:	☒

If "yes", please explain your answer:

Not relevant to the scope of the FSA's regulation.

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?

Yes:	☐	No:	☐	Other:	☐

Comment:

We have no comments on this section.

(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.

We have no comments on this section.

(3) *Operational risks*. How much management time is involved in responding to complaints concerning the fairness of terms?

Comment:

We have no comments on this section.

(4) *Reputational risks*. What effect does an unfair term challenge have on the reputation of the business?

Comment:

We have no comments on this section.

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

Yes: ☐ No: ☐ Other: ☐ Please explain your answer: We have no comments on this section.

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

Comment: We have no comments on this section.

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.

Evidence of likely transitional costs: We have no comments on this section. Comments on the tentative estimate: We have no comments on this section.

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: ☐ Disagree: ☐ Other: ☐ If “no”, please explain your answer : We have no comments on this section.

26. We invite comments on the following tentative estimates:

(1) That enforcing unfair terms legislation costs the public purse around £4 million per year;

Comment:
We have no comments on this section.

(2) That the reforms may reduce these costs by around £1 million.

Comment:
We have no comments on this section.