

Statement regarding 'have read and understood' declarations

On 22 January 2009, we published [an undertaking by The On-Line Partnership Limited](#) on our website. The undertaking related to a term in its contract, *ABOUT US Our Fees, Services and Client Agreement terms of business 2007 version*.

The term stated:

'I confirm that I have received, read and understood this agreement and agree to the terms set out within'.

We considered that the term was unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'Regulations'). We stated: 'Firms should draft contracts in plain and intelligible language and must also give consumers a proper opportunity to read all the terms of the contract. Consumers should check the details of the contracts they enter into. But a contract term requiring consumers to declare that they have read and understood the terms of the contract is likely to be unfair because it binds customers to terms which, in practice, they may not have any real awareness of'.

In line with the Office of Fair Trading ('OFT') publication, *Unfair Contract Terms Guidance* (the 'OFT Guidance'), The On-Line Partnership Limited undertook to amend the term in its contracts to give a clear warning to consumers that they should read and understand the terms before signing them and that consumers should ask questions if they do not understand the terms.

The new term reads:

'This is our standard client agreement upon which we intend to rely. For your own benefit and protection you should read these terms carefully before signing them. If you do not understand any point please ask for further information.'

Our views

The following offers further explanation of our views on the undertaking and the approach that firms should take when drafting or relying on consumer declarations of this type. Whether any declaration is in fact fair will depend on how it is drafted and how it is used in practice.

Care must be taken to **draft** any terms, including declarations, fairly. Firms should make sure that any declarations they draft could not have an unfair effect in the future, even if they have no immediate intention of using them unfairly. The mere fact that a term could potentially be used to the detriment of a consumer can make it an unfair term under the Regulations. Firms should also be aware that they should not **use**

declarations in an unfair way. In particular, firms should not rely on declarations as a way to avoid their obligations to consumers.

We set out below (for illustration purposes only) examples of declarations that we may regard as fair or unfair. Please note that these are examples only and that the action we take will always depend on the nature of the goods or services involved and all the relevant circumstances. This list is not exhaustive.

Declarations that we may regard as fair – declarations about matters within the consumer's knowledge

The OFT Guidance states at paragraph 18.5.4, 'Declarations can be acceptable if they are of matters wholly and necessarily within the consumer's knowledge (for example, their age), and a free choice is given as to what to say...'

Consumers are in the best position to know personal information such as their age, gender or address. They are also best placed to know facts such as whether or not they have had any insurance claims refused before, or whether they have any pre-existing medical conditions. Because the consumers know this information, we may well regard it as acceptable for consumers to sign declarations in respect of it.

Declarations that we may regard as unfair

1. Declarations where a firm does not give the consumer an opportunity to read and ask questions about a contract before signing it

Firms should provide consumers with an opportunity to read a contract, understand it and ask questions about any aspects of the contract that they are unsure of.

However, a declaration requiring consumers to **agree** that they have read and understood a contract is, in our view, unfair. This is because the statement may not be true and may not reflect what has actually happened. Consumers may not have either read or understood the contract and so are not in a position to declare that they have in fact done so. In this instance, the declaration is effectively meaningless and does not reflect the circumstances in which the particular consumer signs their contract.

The law requires consumers to be given an opportunity to examine all the terms in a contract. A declaration of this nature could be used by a firm to claim that it gave customers an opportunity to read a contract when it did not actually do so. The firm could argue that because a consumer has signed to say that they have read and understood a contract, this means the firm has fulfilled its obligation to allow the consumer to examine all the terms. This may not in fact be true. Therefore the use of a declaration in this way is unfair.

It is preferable for 'have read and understood declarations' instead to give a **clear warning** to consumers that they should read and understand terms before signing them and that consumers should ask questions if they do not understand any terms.

2. Declarations that are used by a firm to reject complaints

A key concern is that firms should not rely on a 'have read and understood declaration' to reject a consumer's complaint.

A consumer may, for example, complain about a particular contract term, claiming that it is unfair. The firm should then investigate the consumer's complaint and decide whether or not the term is unfair, and if so take appropriate action to deal with any detriment suffered by the consumer.

The firm should not argue that, since the consumer has signed a declaration to say that they have read and understood the contract, they are therefore not now entitled to complain about the fairness of a term in the contract or how it is applied.

Action to be taken by firms

Each individual firm should assess its own declarations in light of this article, existing guidance and undertakings, and exercise its judgement about whether the declarations require amending. We suggest that any such amendments are made at the first available opportunity, i.e. on the next re-print, assuming that this occurs within a reasonable timeframe. In the interim, firms should demonstrate that the potential for consumer detriment is removed by not seeking to rely on the declaration in a potentially unfair manner.

Further information

Firms are encouraged to look at the OFT Guidance for more information on how to draft consumer declarations fairly. The Annex, *Group 18(e) Consumer declarations*, is particularly relevant.