



The Law Society

Unfair terms in consumer contracts: a new approach? Issues paper

October 2012



Unfair consumer contract terms: a new approach?

Response by the Law Society

Introduction

1. The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession and makes representations to regulatory and government bodies in both the domestic and European arena. Solicitors represent and advise a number of groups that are likely to have an interest in the present consultation; notably consumers, businesses and regulatory organisations. This response has been prepared on behalf of the Law Society by members of our Consumer Law Reform Reference Group (CLRRG). The reference group is comprised of senior and specialist lawyers (both in-house and private practice) with expertise in consumer contract law, regulatory compliance and litigation (defence and prosecution), consumer product safety law, competition, e: commerce and IP law.
2. The Law Society welcomes the Law Commission consultation on reforming the current law on unfair consumer contract terms.
3. We set out our answers to the specific questions in the consultation below. However, there are a number of general points to make at this stage, which will inform our responses to the consultation questions and offer a framework for understanding our answers.

General Comments

Consumer contracts

4. Consumer contracts diverge significantly from traditional contract law in a number of ways¹:
 - a. they are pre-drafted by one party;
 - b. they cannot be altered or re-negotiated;
 - c. they are executed between unfamiliar parties with unequal market power and sophistication;
 - d. they are often offered by agents who act on behalf of the seller.
5. In light of such factors statute law has stepped in. Part of the role of statute is to ensure that contracting parties are entering the contractual relationship freely and on a transparent basis.
6. Transparency in consumer contracts has an important role to play in ensuring that markets operate effectively and that both parties in a business to consumer transaction can have an element of trust in each other. It should be seen as a vital element in ensuring that free exchange and party autonomy (which traditionally underpin English contract law) are sustainable principles in the context of complex modern consumer markets.
7. Rules on unfair consumer contract terms are an important policy tool. They help reinforce these overarching and enduring principles of freedom of contract, exchange and party autonomy. They help ensure that consumers are not unfairly treated through the exploitation of small print or complicated terms, which some less scrupulous businesses use to avoid responsibility to their customers or unexpectedly leverage further revenue from them. The use of unfair contract terms undermines those businesses that compete openly and honestly and treat their customers properly. Therefore a strong regime which protects consumers from unfair terms also underpins good business practice and well functioning consumer markets.

Guiding principles

8. In our responses to the numerous consumer law reform consultations published this year by the Government and the Law Commission we have emphasised that law reform needs to be underpinned by a number of important principles² and we believe all reform proposals relating to business to consumer contracts should reflect these principles in order to be effective. These principles include:
 - a. maximum transparency in consumer contracts. This has the practical benefit of helping the market to function better³ and sustains key English legal principles in the area of contract law⁴.
 - b. adherence to the fundamentals of contract law and wider principles of English law. Deviations and innovations should be justified by strong evidence.

¹ Bechar, S.I. (2009). 'A 'Fair Contracts' approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law', pub: Social Science Research Network.

² Law Society (2012). 'Enhancing consumer confidence by clarifying consumer law: consultation response', pub: Law Society of England and Wales: London.

³ Consumers are making better informed choices and thus are increasing their welfare.

⁴ These principles encompass the fundamental idea of freedom of contract, free exchange and party autonomy i.e. contracting parties need to be genuinely acting autonomously and engaging in contractual relations freely. The Law Society believes this requires as much of the core contractual information as possible to be available to the consumer in an understandable way. It also means that unfair terms hidden away in small print should not be subject wholly to the doctrine of *caveat emptor*. It is in that context that the reform of the rules on unfair consumer contract terms needs to be made.

- c. consumer law is relatively old. There is over a hundred years worth of case-law and legal experience bound in up in the current body of law in this area. This should not be disregarded lightly and should inform the new law, where it is sensible to do so. The changes should therefore look to work with the grain of the consumer – merchant (service provider) contract and not deviate significantly from the underlying principles of the current consumer law framework⁵i.e. help correct some of the inherent imbalances in the consumer – merchant relationship.
 - d. The law should be technology and business model neutral as far as is practicable. This will ensure the law is as future-proof as possible and remains relevant across a long period of time⁶; and it will not have to be constantly amended in light of technological innovations and will not impede the emergence of new business models.
 - e. Simplicity can sometimes conflict with the peculiarities of individual cases. This may mean ‘rough justice’ on occasion. This is an inherent tension and one that the proposals need to balance carefully. In managing that tension the principle of proportionality should guide policy makers. In other words, where simplicity may lead to a disproportionate or unreasonable number of cases being unfairly dealt with, the reforms should aim to minimise the number of those cases.
9. One of the implications of the above set of principles is that the reforms to unfair consumer contracts should be focused solely on consumer contracts. Issues in relation to business contracts for example, should be investigated and researched separately and (if deemed necessary) legislated for separately. We understand the intention of BIS is to separate out the consumer and business rules, where currently there may be overlap e.g. Sale of Goods Act 1979 and UTCCRs (Unfair Terms in Consumer Contracts Regulations 1999). We support this. The regime for consumers should be doctrinally distinct from that of business and we urge that the business relevant clauses of the Law Commissions draft bill be left out of this reform to the UTCCRs.

Enforcement

- 10. Despite some high profile cases, we consider that there is a lack of enforcement in relation to unfair contract terms, by regulators. We would like to see better enforcement of the current law and encourage rigorous and proportionate enforcement of any new rules by the authorities.
- 11. There is often a lack of up-to-date guidance for regulators on enforcement issues. By publishing such guidance consistency in enforcement would improve and cooperation between regulatory bodies would increase, as they would have information to enable to take a uniform approach.
- 12. Therefore, while change to the rules themselves is important, wider complementary changes are needed to bring about a significant improvement in outcomes for consumers and a fairer market for that large majority of businesses who try to do their best by their customers but can be undermined by a minority of businesses who are less diligent.
- 13. Part of better enforcement is a clear and practical regulatory regime. Therefore we agree with the broad policy thrust of the proposals. Contract terms which are core should meet rigorous transparency criteria. All other non-core terms should be testable for fairness.

⁵ The objective of consumer law is to re-balance what is essentially an asymmetric relationship between businesses selling consumer goods or providing consumer services and consumers.

⁶ Professor Chris Reed has argued persuasively that behaviour based and technology neutral models of regulation are the only sustainable ones in a world of rapidly changing technology. Source: Reed, C. (2012). ‘*Making Laws for Cyberspace*’, pub: OUP.

14. To further improve enforcement we believe that the list of qualifying bodies, which can bring complaints about contract terms under the UTCCRs, should be expanded⁷. Currently only one is approved⁸. This places an unrealistic burden on that organisation. In turn justice is denied to groups of consumers whom the public authorities and the current approved private organisations do not have resources to represent. It would make better sense to allow other bodies to bring complaints on behalf of groups of consumers.

EU law, minimum harmonisation and the UTCCRs

15. While we consider there is scope for reform of the UTCCR broadly along the lines outlined by the Law Commission, we believe a note of caution needs to be raised. The UTCCD (Unfair Terms in Consumer Contracts Directive)⁹ requires member states to give effect to its provisions, while leaving room for states to go beyond the Directive's requirements, if appropriate¹⁰. Interpretation of the Directive remains with the Court of Justice of the European Union (CJEU). Therefore any reform has to be undertaken carefully, in order to make sure the original provisions of the Directive are given effect and EU law is not breached. The existence of the latter will risk time consuming litigation in the CJEU.
16. The Law Commission paper stakes out a credible position as to why the proposals do not undermine the original Directive i.e. that transparency and prominence are consistent with the relevant provisions of the Directive. We have no evidence to suggest that they are not, at this stage. However, we would counsel care when taking the proposals forward to ensure that the exact wording that finally emerges cannot be accused of diluting the meaning of the original Directive.
17. We also note that the UTCCRs currently apply irrespective of other special regulations which may also apply to particular types of products/services. Therefore thought needs to be given as to how proposed requirements such as 'prominence' might interact with any specific requirements placed on certain types of products/ services e.g. in terms of the forms and manner in which certain information is provided.

⁷ Schedule 1 of the UTCCR lists the bodies that can bring complaints under the Regulation. Source: Unfair Terms in Consumer Contracts Regulations 1999, accessed at: <http://www.legislation.gov.uk/ukxi/1999/2083/contents/made>

⁸ Currently, Schedule 1, Part 2 of the UTCCR, only has the Consumers Association listed as the only non-state organisation that can bring such a complaint. Source: Unfair terms in Consumer Contracts Regulations 1999, accessed at: <http://www.legislation.gov.uk/ukxi/1999/2083/contents/made>

⁹ Unfair Terms in Contracts Directive, Council Directive 93/13/EEC, accessed at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:095:0029:0034:EN:PDF>

¹⁰ The UTCCD is a minimum harmonisation Directive.

Questions: The Exemption for the Main Subject Matter and Practice

Do consultees agree that the current law on which terms should be exempt from the assessment of fairness under the Unfair Terms Directive is unduly uncertain; and the UTCCR should be reformed?

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”?

18. The Law Society agrees that the current rules on which terms should be exempt from an assessment for fairness under the UTCCR are to some extent uncertain and that there is a case for further reform. Reform should be aimed at achieving greater clarity and certainty (transparency). The first priority of any new law is to be very clear on what is assessable and what is not and on what basis. Therefore:
- the new rules should make it unambiguously clear which terms and conditions are core and which are not and thus which have to be transparent and unambiguous to the consumer.
 - further, the definition of what constitutes ‘clear’ and ‘unambiguous’ needs to be explicit in the law.
 - finally, there is a good case for allowing core terms to be assessable for fairness if they do not meet the transparency standards proposed in the Issues Paper.

Do consultees agree that a price term should be excluded from review, but only if it is transparent and prominent?

19. It is vital that price terms are transparent and prominent. We believe that it is unfair for consumers not to be presented with a price that is transparent and prominent.
20. Transparency and openness is important for a well functioning system of contract law. This is particularly true in relation to consumer contracts given their fixed and non-negotiable nature. The consumer should be free to enter into any contract they feel is appropriate, but only on the condition that they do so in full knowledge of the key facts and terms. It is only on the basis of up-front and open contractual obligations that the autonomy of the contracting parties can be upheld.
21. Further, it is our understanding that, under the original Directive the adequacy of the price and remuneration are not generally assessed, irrespective of whether they are transparent or prominent. However, utilising the freedom to go further than the Directive, this appears to be a sensible policy reform. Therefore, we consider that, subject to the requirements on openness and clarity, the price should not be reviewable for fairness.

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?

22. The proposed definition for price term seems sensible and is one we would not oppose.

Transparent should be defined as: in plain, intelligible language; legible; readily available to the consumer?

23. The proposed definition of transparent appears to be neutral and universal and is thus likely to be insulated from the danger of becoming outdated through technological and other developments.

24. However, we would suggest adding an additional word to the definition. We consider that the word 'easily' should be added to 'legible'. The addition of this word to the definition would further emphasise the importance of transparency and ensure that individuals entering into contracts were doing so with full knowledge of their key contractual obligations and those of the merchant/ service provider.
25. Small changes like the one we suggest can act as an additional impetus to those selling goods and services to ensure they make the core terms of the contract as clear to consumers as is practicable.
26. In addition, the definition of 'prominent' should carry its ordinary meaning for the moment.
27. Further, thought should be given to the extent to which some of the definitions in this area (for example the prominence and transparency definitions) may through case law become more nuanced and therefore whether there is an argument for anticipating potential developments in this area. For example, we would support further discussion as to whether there might be a need to narrow (or qualify) the broad exemption for core terms and conditions. In other words, should the prominence and transparency tests be enough - in all circumstances - to exempt all core terms? For example, some might consider there to be a good argument for allowing some core terms to be reviewable in situations where significant charges are incurred by the consumer in circumstances not reasonably anticipated at the time of purchase¹¹. With a rigorously applied transparency and prominence test in place this may become less of a concern. However, even where core terms, such as prices, are displayed prominently it doesn't always mean a consumer will take them into account as they focus on the main aspects of the deal.
28. When trying to define 'transparent' or to improve some of the other definitions for the purposes of any future legislation, adherence to the meaning of the original Directive has to be kept in mind. We note for example that the Directive requires the terms to be in 'plain intelligible language'. However, it does not require 'legibility' or for terms to be 'readily available to the consumer'. Therefore, while there are good policy reasons for such refinements, if they are to be introduced it must be done carefully and in a considered manner.

The exclusion from review should not apply to terms on the grey list, which should include the following: price escalation clauses; early termination charges; and default charges?

29. The Law Society agrees that terms on the 'grey list' should be assessable for fairness.
30. If terms such as those described are not transparent they should be subject to the test for fairness. Further, even where they may be transparent terms relating to charges for early termination or price escalation can be difficult to understand. The consumer needs to have the confidence that if such terms are in a contract they are not going to be unfair.
31. One point to note however, is that there is a risk that making price escalation clauses, early termination charges and default charges etc subject to the assessment of unfairness could lead to courts either:
 - a. *de facto* assessing some aspects of the 'main subject matter' of the contract for fairness; or

¹¹ For instance a consumer may purchase a new mobile phone package, however the call charges for using the phone in a particular foreign country are unlikely to form part of the consumer's consideration of the package, unless they know they will be using the phone a lot in that foreign country, at the time of purchase. Yet if they go to that country at a later date they may find themselves paying significant charges.

- b. ignore potentially important contextual information by only concentrating on the particular 'charge' or 'clause' and eschew the wider terms and circumstances of the contract.
32. Some ancillary charges (such as early termination charges) may be intimately linked to the main subject matter of the contract. For example, different pricing applies because different terms apply to parts of the service or services provided. In such a context the Court might be unable to avoid straying into issues related to the main subject matter and passing judgement on the main subject matter as well as the particular term at issue. This is a danger when trying to draw distinctions between what are sometimes closely interwoven elements of the contract.
33. However, our position is not that such terms should be prohibited. Their usage is a business decision. However, we do believe there is an argument to be made that the consumer should have the confidence that, if for example they do have to pay an early termination charge, it is going to be fair and reasonable. While we acknowledge the difficulties likely to arise in some cases, we do not believe these are insurmountable.
34. A judge will always be likely to look at a potentially unfair term in the round. At the same time it is not a paradox to then focus the decision on the narrow issue of the term itself.

Would it be helpful to explain that:

- **a term is prominent if it was presented in a way that the average consumer would be aware of the term?**
 - **in deciding whether a term is transparent and prominent, the court should have regard to statutory guidance?**
 - **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?**
35. We agree that it would be helpful for the new law to set out the standard by which transparency and prominence will be judged.
 36. We support the production of clear guidance for the regulatory authorities and business regarding compliance. Such guidance would aid implementation.
 37. The new law should also make clear that the fairness test applies to terms which give the merchant/ service provider discretion over the price, after the consumer has become bound by the contract. However, this should be subject to some degree of flexibility. It should be acknowledged that in some cases it may not be possible for the merchant/ service provider to know the full cost of the service ahead of time. It may be inherent, in the nature of the service being provided that external factors beyond the control of the merchant/ service provider result in increases in the cost of the service, which mean it becomes uneconomic not to try and recoup, or at least minimise losses. Therefore it might be necessary to ensure the new law allows a defendant to utilise this as a defence, or at least a partial defence. If drafting such a defence is considered too difficult, alternatively it could be a factor a judge is able to take into account when deciding on remedies.
 38. We suggest that if it does become a basis for a defence then it should only be allowed if the merchant/ service provider can show that (in a transparent and prominent manner) they explained to the customer, before the contract was concluded:
 - a. why discretion is needed;
 - b. on what basis any discretion will be exercised; and

- c. an estimate (based on professional judgement) of the size and scope of any future discretionary changes.

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?

- 39. The Law Society agrees that terms relating to the main subject matter of the contract should in general be exempt from review. This exemption has to be subject to the contract meeting the tests for transparency and prominence.
- 40. As the OFT has noted, the consumer is likely to be engaged directly with the main subject matter of the contract, when looking to transact¹². Therefore the room for consumer detriment in relation to the main subject matter is limited¹³ compared to the non-core terms, which consumers take much less, if any, note of¹⁴. It means the consumer is freely entering into the terms of the contract relating to the main subject matter in full knowledge of the relationship and consequent obligations they are undertaking.
- 41. Therefore, provided the merchant/ service provider is making an open and clear representation or invitation to the consumer (regarding the terms which relate to the main subject matter of the transaction) there appears little need to make such terms reviewable for reasonableness and fairness.
- 42. This is consistent with the principles of freedom of contract and party autonomy we outlined in the General Comments section and the means of upholding these principles i.e. maximum transparency in contractual relationships.

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?

- 43. We agree that a term on the grey list should not be considered as relating to the main subject matter. For doctrinal simplicity it does not make sense to classify some grey list terms as relating to the main subject matter when they can be reviewed for fairness.

Do consultees agree that it would 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?

- 44. The Law Society supports this proposal because it will ensure clarity and, therefore, improved understanding of the law.

¹² OFT (2011). 'Consumer Contracts', pub: Office of Fair Trading : London, accessed at: http://www.offt.gov.uk/shared_offt/market-studies/consumercontracts/oft1312.pdf

¹³ The OFT note that the main subject matter of a consumer contract is the focus for consumers and business compete on the basis of these main subject matter elements. The OFT consider that a large number of consumer markets work relatively well in this respect. Source: OFT (2011). 'Consumer Contracts', pub: Office of Fair Trading: London.

¹⁴ The OFT describe that it is in the area of non-core or ancillary terms that businesses make extra rents out of customers because consumers do not focus on these elements of the contract when making purchasing decisions. Therefore there is little impetus for competition in relation to these aspects of the consumer contract. Source: OFT (2011). 'Consumer Contracts', pub: Office of Fair Trading : London

Questions: Other Issues

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?

45. The Law Society strongly urges the Government to re-write the UTCCD so that it fits easily with:
- a. the new consumer framework, which will emerge out of the current BIS consultations which are either open or recently have closed;
 - b. English law more generally, which tends to be drafted in a more detailed way.
46. The broad and vague terminology of the UTCCD does not mean clarity. It often increases ambiguity. Certainty is an important legal principle that should be encouraged as much as possible, especially where currently it is compromised by unclear law. Therefore we support the proposal to draft a more tightly worded statute.

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”?

47. The Law Society believes that the definition of consumer should be uniform across all consumer legislation. This is a sensible simplifying measure.
48. The Government can do nothing about EU definitions of the consumer because EU law is superior to domestic law. As long as that remains the case it makes sense to harmonise the domestic law definition of consumer with that of the EU definition, in order to get consistency across all consumer legislation. Therefore the definition of consumer in the new unfair contract terms legislation should therefore be the same as in the proposed new laws on the supply of goods, services and digital content, the Consumer Rights Directive¹⁵ and Consumer Protection Regulations 2008 etc. This should be the EU definition¹⁶.

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?

49. We believe that it should be made clear that the definition of consumer in the new legislation excludes employees, for the avoidance of doubt. Although the uncertainty that exists under UCTA (Unfair Contract Terms Act 1977) was largely resolved by the Court of Appeal decision in *Commerzbank AG v Keen* [2006]¹⁷, this left open the possibility for an employee to bring himself within the meaning of ‘consumer’ where an employment contract provides for an employer to supply goods or services to the employee for his use.
50. If the new legislation simply relied on the wording ‘wholly or mainly unrelated to their business, trade or profession’, depending on the nature of the provision in question and the construction of the word ‘profession’, it could be arguable that this possibility remains outstanding.

¹⁵ Consumer Rights Directive 2011, Directive 2011/83/EU of the European parliament and Council, accessed at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

¹⁶ This is to found in Article 17 of the Consumer Rights Directive 2011.

¹⁷ *Commerzbank AG v Keen* [2006] EWCA Civ 1536

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?

51. We support this proposal.

Do consultees agree that 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?

Do consultees agree that in proceedings brought by an authorised body under its preventive powers, the authorised body should be required to show that a term is unfair?

52. We support the burden of proof outlined in the Issues Paper. In the context of consumer contracts (i.e. take it or leave it contracts), there is sense in making the business justify their inclusion of a particular term. If it is fair, the business will have no problems showing that this is the case. If it is not, then it should not be in the contract and the reverse burden of proof is a pragmatic way of helping correct the power asymmetry in merchant – consumer relationship, in relation to contract terms.

53. We support the burden of proof being on the accuser, when the proceedings are brought by a regulator. Where the power of the state is concerned, it is an important principle that the state should have to prove liability, with a presumption of innocence. The powers and resources of a regulatory authority far outweigh those of a private individual, so there is no case based on a power asymmetry for there to anything other than the burden of proof sitting with the regulator.

Do consultees agree that the new legislation should cover terms in consumer contracts, whether or not they are individually negotiated?

54. There will be very few instances of a fully individually negotiated consumer contracts. Even where there is individual negotiation this is likely to be in relation to the core terms, such as price. The other terms associated with a contractual agreement (e.g. to provide a service) are likely to come in a standardised form and be accepted by the consumer, on a take it or leave it basis.

55. However, in the small number of cases of wholly individually negotiated contracts the contract should be subject to the same framework as all other merchant/ service provider – consumer contracts. This will lead to a clearer and simpler law. Therefore the core terms should not be reviewable for fairness if they are transparent and prominent i.e. if they have been negotiated clearly and explicitly then there should be no reason for them to be subject to the fairness test.

56. Other terms, which are not core, should generally be reviewable. However, in the context of the entirely individually negotiated contract this 'rule' should be subject to a narrow test of 'explicit negotiation'. This would be a rule whereby a business could show that the purchaser agreed explicitly to a particular non-core term. Showing this had taken place would be a successful defence to a consumer's case for unfairness in relation to that clause.

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?

57. We consider that the test as to whether a term is 'fair and reasonable' should be an objective test.

58. The arguments made originally by the Law Commission in 2002 were sensible and we concur with them. We agree a term should be capable of being unfair on both substantive and procedural grounds. Further, the unfairness test in UCTA and in the UTCCRs appears, to all intents and purposes, to be the same. Therefore, using the UCTA terminology of fair and reasonable makes sense and is likely to aid interpretation and implementation in the UK.
59. However, we are concerned as to how 'circumstances at the time' might be interpreted. This could cause some uncertainty as it may be hard to judge at what point terms can begin to be considered 'fair and reasonable'.
60. We believe greater clarity is needed on where the line gets drawn between what is defined as 'existing conditions' for the purposes of the fair and reasonable test and what part of the pre-contractual activity falls outside the 'existing condition' standard? Will the term 'existing condition' include the negotiations and representation up to the formation of the contract? If so, how will this interact with the rules on misrepresentation and the reforms proposed in that area?

Do consulters agree that the indicative list should be reformulated in the way set out in Appendix B; or alternatively would it be preferable to reproduce the list annexed to the Unfair Terms Directive in its original form?

61. We consider that the indicative list should be set out as proposed in Appendix B of the consultation.
62. This is consistent with the point we argued in relation to the proposal to re-write the UCTD so that it is more consistent with English statute and the forthcoming wider consumer reform proposals. We consider that principle applies to the indicative list too. Therefore we support the proposed re-drafting.

Do consulters agree that enforcement bodies should be able to bring enforcement action against unfair notices which purport to exclude the business's liability?

63. In line with our call for better enforcement in the area of unfair consumer contracts we believe that regulatory authorities should be able to bring actions against unfair notices which purport to exclude a business's liability.
64. These notices could in practice deny consumers their protections under the law, as some consumers might take notice of them and be deterred from bringing an action, when in fact they would be entitled to do so.

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?

65. We agree that the exclusion in Regulation 4(2) should be re-written as suggested in the Law Commission report from 2005. However, we would like to add one note of caution. The definition of 'substantially the same' needs to be carefully considered. It would be counter-productive if it left room for a diminution in mandatory provisions (even at the margins) if a merchant or rights holder were offering a term that was similar but slightly less protective of the consumer than the statutory rules require, but nevertheless met the test for 'substantially the same'.
66. It may be necessary to make it absolutely clear that 'substantially the same' means that the term has to:

- a. have the equivalent function of the existing law;
- b. be applied in an equivalent way; and
- c. achieve equivalent results.

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?

67. We agree that the current evidence is that, in principle, the current law does appear to apply to end user licence agreements adequately. However, there is evidence that in practice consumers are still signing up to end user licence agreements, which do not always meet the requirements of the law¹⁸. We would urge the situation to be monitored closely to ensure:
- a. technological developments do not outstrip the capacity of the UTCCRs to keep up;
 - b. merchant/ rights-holder behaviour actually complies with the law; and
 - c. regulators are taking these issues seriously and taking action to remedy problems.
68. Research should be undertaken into existing terms and practices by merchants/ rights-holders to ensure important terms in the contract are transparent and prominent. The current evidence base is too limited. Consumers are notoriously unaware of some of the restrictions on their usage contained in licence agreements¹⁹. In relation to digital content this might include the ability of a rights-holder or merchant to suspend access to or retrieve remotely the licensed material, for example from the purchaser's e-reader. It is important that such terms meet the requirements of the law, in terms of transparency.
69. Further, we support the proposed clarifications of the law in relation to end user licence agreements proposed in the Law Commission draft bill. We note, for example, the fact that the use of plain language is not the norm in some sectors, such as the software industry²⁰. Therefore questions have to be raised (and perhaps cases investigated) regarding the extent to which some licence agreements meet the requirements of the law e.g. in terms of transparency. If evidence emerges that there is not conformity, then we urge enforcement action to correct this problem.
70. The application of the UTCCRs to end user licence agreements is a first step, but they need to be enforced lest they fall into disrepute and as a result the rule of law is undermined.

¹⁸ A National Consumer Council study of EULAs for software products (anti-virus, office suites, games & educational) found widespread use of potentially unfair terms including: complex wording/legal jargon; legal uncertainty; ambiguous references to statutory rights; and the law of other countries; rights for the provider to remove; services/terminate contracts without notice and excessive exclusion of liability. Source: Belgrove, C. (2008). *'Whose licence is it anyway? A study of end user licence agreements for computer software'*, pub: National Consumer Council: London.

¹⁹ Consumer Focus surveyed 2,026 British consumers aged 15+. Source: CF (2010). *'Time to change the tune: consumer research briefing on copyright'*, pub: Consumer Focus: London.

²⁰ Appendix C. Source: Law Commission (2012). *'Unfair terms on consumer contracts: new approach? Issues paper'*, pub: SO: London.