



Consultation Document

Unfair Terms in Consumer Contracts: a new approach?

Response from:

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Response to The Law Commission

Executive Summary

The BVRLA welcomes the opportunity to comment on the Law Commission's proposal relating to unfair contract terms in consumer contracts.

Our members who provide financial services are already subject to a spectrum of regulation where legislative aims are largely geared towards supporting consumer protection and fairness principles, which we note are being proposed in the consultation paper.

It is on this basis that we wish to raise our serious concerns with the potential overlap and disproportionate regulatory burden on a sector which already satisfies the key principles outlined in the consultation paper.

Moreover, we remain concerned that the proposed set of generic consumer rights, which we note are largely designed to correct imbalances in sectors, where for example the consumer has no other protection, will simply duplicate and dilute the existing rights available in the financial sector. We therefore recommend that the financial sector is exempt from the changes being proposed.

BVRLA members have advised us that the costs of introducing these changes including: contracts, websites, promotional material and staff training will impose disproportionate cost, which we believe would threaten jobs and growth, and reduce consumer choice.

BVRLA members, as a condition of their membership, are required to adhere to our mandatory Code of Conduct. This Code stipulates the requirement for members to be transparent on all aspects of their pricing and charges. The level of complaints that the BVRLA receives for breaches of the code are 0.000014% of all rental and leasing transactions. We therefore fail to see why there is a need for change when there is clearly no consumer harm within our sector.

Response to The Law Commission

Specific Comments

The following responses deal with the questions raised in the consultation paper that are most applicable to our industry.

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

We do not believe the law on unfair terms is uncertain and are not supportive of any change to the current regulation.

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

We are not supportive of a review of the Unfair Terms in Consumer Contract Regulations as we believe the estimated cost of compliance of £3.8 million for our members far outweigh the benefits that would be delivered from any reform and will damage consumer choice.

In addition, our members have expressed concerns with how any reform would fit with the regulations which introduced the Consumer Credit Directive (CCD) in 2010/11. The CCD was a maximum harmonisation directive, it did not make any requirements as to prominence in consumer credit agreements.

We remain concerned that if prominence requirements are imposed on consumer credit agreements by these new proposals, this would mean that there would not be a level playing field across Europe in the market for consumer credit, which was the original purpose of the CCD.

Price Terms

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

We believe that transparent and prominent are very subjective terms and therefore we do not agree with the above statement.

Whilst it is possible, and desirable, to make everything transparent, it is impossible really to make everything prominent as this is a very relative term. For example, it may not be possible or logical for a company to ensure that all their pricing terms are prominent.

Response to The Law Commission

We would therefore propose that a price terms should be excluded from review but only if it is “clear, legible and transparent” as a more appropriate requirement. This would help to remove the uncertainty and improve clarity on the Law Commission’s proposal.

Questions on the main subject matter

- (4) 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)**

We believe that there should be an exemption from the unfair test within the proposals for terms that are already subject to statutory requirements. This type of exemption would ensure that areas such as, early settlement calculations for consumer credit, which are strictly governed by regulations especially with regards to how they are calculated are not required to be considered for fairness.

The burden of showing that a term is fair

- (5) Do consultees agree that:**
- a) 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?**

In general we support the proposal as outlined above as it is not substantially different to the current regulation where the burden of proof rests with the party that has to establish a potentially unfair term satisfies the test of “reasonableness”.

However, we would suggest that the consumer should be required to articulate why they believe certain terms are unfair and relate this to the average consumer before the burden of proof shifts to the business. This is in line with case law around Unfair Relationships under the Consumer Credit Act.

We would also propose that claims arising under the regulations ought to be limited to the Courts, rather than the Financial Ombudsman Service, given that any claim is likely to have wider implications and these are legal tests requiring judicial consideration.

- (6) 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)**

Response to The Law Commission

Concerns have been expressed by our members that the proposal for the new fairness test is more uncertain and ambiguous than the present test as there is no longer reference to a significant imbalance in the parties' rights. As an alternative we would suggest that the existing definition could simply be amended to delete the reference to "good faith" as this is not a generally accepted concept in English law.

Re-writing the grey list

- (7) 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)**

We are unclear as to what the benefits are in re-writing the grey list and what problem the Commission is trying to solve in re-writing it. Our preferred approach would be to see the list stay as it is.

Impact Assessment

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

We do not believe that the exemption as it is currently worded would reduce any risks for businesses. Given the subjective nature of the prominence test, to ensure compliance, businesses will be forced to ensure all pricing terms are clear early in the contractual process. Therefore the flow of the contract will not necessarily always make sense which could result in a real risk that the consumer may be unclear as to what they have actually contracted or agreed to.

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

We do not believe that administrative burdens would be reduced on businesses, especially as we think the concept of prominence is subjective and would cause more confusion for consumers.

We also think there is a risk that the changes may inhibit the use of technology with the difficulties in providing prominence when consumers are using tablets and mobile devices. This would place further burdens on businesses who would have to try and find a way to ensure that these devices were not being used by consumers when contracts are being read.

Response to The Law Commission

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.

Our view is that the transitional costs estimated by The Law Commission considerably underestimate the likely costs for UK businesses to familiarise themselves with the changes.

The BVRLA believes the reforms to unfair contract term regulations would mean a great deal of additional cost in new documentation, printing, new processes being implemented, staff training, redesign of websites etc.

It is important to point out that any new regulatory and compliance cost arising as a consequence of the Law Commission's proposal will ultimately be a borne by consumers as business will be forced to pass such costs on. It is fair to also add that under the current challenging economic conditions such additional costs will have to be carefully considered and fully justified through detailed cost benefit analysis, which we note the Law Commission's paper fails to address satisfactorily.

Having reviewed the likely potential cost implications of the proposals our members have estimated the following as a case study for one member to implement the proposals outlined in the consultation:

Sample cost implication case study

Contract changes (legal counsel) 3 days @ £300

Briefing notes for managers on changes 2 days @ £300

Website changes 2 days @ £250

Management team presentation of briefing notes ½ day @ £100 per manager (30 managers)

Printing costs (contracts and promotional material) - £1,000

Wider staff training £50 per staff member (500 staff)

Total costs - £31,000

When this is calculated across our entire rental and leasing industry we believe the costs to be in the region of £3.5 million to implement the changes just within our own sector.



Response to The Law Commission

There is also the threat that this would make UK firms less competitive than the rest of the EU and move the UK away from the objectives set out in Europe of creating a level playing field for businesses and consumers.

It is not clear from the consultation whether any changes will apply to existing contracts, we would urge the Commission to make it clear that any changes do not apply retrospectively and only apply to new agreements (with no requirement to set new terms for existing agreements) due to the cost impact that the changes would otherwise have.

Closing Comments

We hope our comments go some way to adding value to the Law Commission's review of the unfair consumer contract term regulations and that the commission recognises the implications of its proposed changes on UK Plc.

Leasing Members

In general, vehicle leasing is an arrangement where the user simply hires the use of the vehicle and assumes operational responsibility for a predetermined period and mileage at fixed monthly rental from the owner (the leasing company). Legal ownership is, in the majority of cases, retained by the leasing company.

Short Term Rental Members

Rental Members offer hourly, daily, weekly and monthly rental of vehicles to corporate customers and consumers. As explained above, rental members are the owners of the vehicle.



Response to The Law Commission

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Bona-fides **BVRLA, the industry and its members**

- The BVRLA is the trade body for companies engaged in the leasing and rental of cars and commercial vehicles. Its members provide rental, leasing and fleet management services to corporate users and consumers. They operate a combined fleet of 2.5 million cars, vans and trucks, buying nearly half of all new vehicles sold in the UK.
- Through its members and their customers, the BVRLA represents the interests of more than two million business car drivers and the millions of people who use a rental vehicle each year. As well as lobbying the Government on key issues affecting the sector, the BVRLA regulates the industry through a mandatory code of conduct.
www.bvrla.co.uk