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GOVERNMENT RESPONSE TO THE CALL FOR EVIDENCE ON THE CONSUMER RIGHTS DIRECTIVE: ALLOWING CONTINGENT OR ANCILLARY CHARGES TO BE ASSESSED FOR UNFAIRNESS

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Introduction

The Department for Business, Innovation and Skills issued a Call for Evidence on 8 July 2010 to inform the UK's negotiating position on the Consumer Rights Directive as to whether contingent or ancillary charges should be assessed for unfairness under the unfair contract terms provisions.

2 The Supreme Court judgement in the OFT v Abbey National plc case has led to concern in some quarters as to how UK legislation on unfair terms in consumer contracts applies to charges that are "contingent", or "ancillary" to the core of the contract. The EU Consumer Rights Directive is currently being negotiated, and will replace four existing Directives including the Unfair Contract Terms Directive, which forms the basis of the UK law on unfair contract terms. The Commission or Members of the European Parliament may seek to address the issue when the proposal comes up for debate later in the Autumn. The UK Government therefore needs a negotiating line to take for discussions in the Council of Ministers as to whether contingent or ancillary charges should be assessed for unfairness, and invited views on a number of specific issues to help inform the development of the negotiating position.

Consultation

3 Due to the time constraints inherent in the European legislative procedure, Ministers approved a six week period for the Call for Evidence, as opposed to the normal period of 3 months for Government consultations. The closing date for responses was 23 August 2010 and the Government received 32 responses in total. It is very grateful to everyone who took the time to comment.

4 Of the responses, 15 were from businesses or business representatives, 4 from enforcement and regulatory bodies, 4 from consumer bodies, 3 from legal organisations, and 6 from individuals. A list of the respondents is attached at Annex A.

Summary of responses

5 The responses provided a broad split of opinion. Respondents from business were opposed to any change in the unfair contract terms provisions relating to price and "core terms". Conversely the consumer groups and the regulators/enforcement bodies argued that charges outside of the essential bargain should be assessable for unfairness as contingent charges are largely unanticipated by consumers and poorly understood, and therefore not subject to competitive pressure.

6 Respondents were invited to comment on the following questions:

1. Do you agree with the Government premise that because charges are contingent, ancillary or not transparent, or otherwise, not part of what a typical consumer would understand as "the essential bargain", competition may not drive down the level of such charges as it ordinarily would?

Consumer and regulatory/enforcement respondents were broadly in agreement of the Government premise. They said that consumers are influenced greatly by "headline" charges and less so by contingent charges. This is particularly the case when charges are far removed in time from the initial transaction, and when the consumer has very little power to influence events which may result in a charge being levied. Even when they are considered before purchase, the true cost to the consumer is very difficult to calculate. Consumers only take contingent charges into account when deciding whether to discontinue a service, by which time the damage to the consumer has been done. One respondent claimed that the key problem with contingent and ancillary charges for financial services is that such products may be very long lasting, and it, therefore, may be years before the onset of the charge.

The business respondents did not agree with the Government premise; they said that the premise is a generalisation and does not reflect the individual competitive nature of many markets. Many of the business respondents argued that the UTCCRs are about unfairness rather than price and that there is no evidence that if a charge is contingent or ancillary it is less subject to competition between businesses. They do not believe that the power to subject charges to an assessment of unfairness is necessary to drive competition, rather it will be driven by the requirement for transparency which will assist consumers to make informed decisions in the light of relevant information. Many business respondents also argued that financial services, in particular, is already well

regulated, and that existing competition law and structures are capable of effectively regulating contingent and ancillary charges to deal with situations in which competition may not drive down the level of such charges. It is therefore inappropriate for Government regulators to be able to force companies to charge responsible customers for the ills of irresponsible customers.

2. Should any exclusion from the price exemption provision in the UTCCRs (Paragraph 6(2) focus on:

- **Contingent charges – made only on the occurrence or non-occurrence of a particular event – and/or:**
- **Ancillary charges which require the consumer to pay additional sums for matters outside the ordinary and expected performance of the contract – and/or:**
- **Charges that are not transparent to the consumer for reason going beyond the clarity of the language used, for instance in terms of presentation; or all three of the above?**

Business respondents were not in favour of contingent or ancillary charges being excluded from the price exemption under the UTCCRs. They consider that the most effective way to ensure consumer choice and competition is to provide transparency of information relating to charges. There was general uncertainty about the third category of charges – many of the business respondents argued that if the charges are not transparent or not set out in plain and intelligible language they are already subject to the test of unfairness. Generally, the business respondents felt that the terms of the charges are not adequately defined and will create difficulty in application in practice, and legal uncertainty. One respondent argued that if there is to be any revision in the law, it must be drafted in such a way that the policy intention is clear, to avoid any uncertainty in the definition of the charges. The terms, at present, would introduce an unworkable degree of uncertainty for businesses.

Consumer, regulatory and legal respondents argued that all three types of charges should be exempt from the price exclusion provisions. One consumer organisation said it would be inappropriate to define the exemption by reference to specific charging structures and favoured a more “principles-based “approach supported by guidance. The key factors to be taken into consideration would be the remoteness of the charges – how far consumers are able and likely in practice to factor the charges into their initial decision to enter the contract – and the perspective and circumstances of the typical or average consumer, and whether consumers do actually factor these charges into their initial purchase decision.

3. Are there matters the Government should consider in terms of the interpretation of concepts such a contingent, ancillary, non-transparent terms or “essential bargain” or other terms which are relevant?

Many of the business respondents felt that it would be difficult to identify which charges fall within each of the categories, and the lack of clarity in definitions and interpretations will lead to unwelcome uncertainty and confusion. It would be particularly difficult to define the concepts in the context of composite pricing structures. There was concern that the uncertainty could lead to a deluge of litigation. They felt that the explanations provided in the Call for Evidence are vague and unless they are tightly defined could inadvertently catch a host of legitimate pricing practices. Business respondents also argued that the new regulations could impede the healthy functioning of a competitive marketplace which benefits consumer choice.

Consumer groups expressed concern that businesses will seek to set the broadest definition of the "essential bargain" and include all possible eventualities within that definition in contrast to consumers who will take a narrow view. As a result the contingent charges set by business will apply to events or circumstances to which consumers pay little attention. Therefore, the focus should be on outcomes rather than technical terms and concepts.

4. Should all contingent price terms be assessable even where they are likely to be in the forefront of consumer's minds when contracting, e.g estate agency sale fees? If not, what other criteria should be involved?

An enforcement group responded that the charges need not be assessable provided that they meet plain language requirements as consumers are generally likely to factor them into their initial purchase decision. Some consumer group respondents said that all contingent price terms should be assessable as they are unlikely to be part of the essential bargain and may not be negotiated nor subject to competitive forces. One consumer group respondent said that charges applied at the time of the transaction, which are contingent on the essential bargain operating as expected, should not be assessable for fairness. Consumer are already well placed to calculate and control such charges. However, charges that are contingent on the essential bargain not operating in the way the consumer anticipated are likely to be overlooked by consumers who don't see them as part of the "essential bargain".

Business respondents said it should not be difficult to establish which part of the contract was at the forefront of the consumer's mind when agreeing to the contract. And where charges are at forefront of customer's mind, competitive drivers would impact upon price and the charging structure. The key issue for the consumer is transparency so that the consumer is given the appropriate level of information to make informed decisions.

5. Would you support a provision which would simply allow charges to be assessed for unfairness if they were not, from the consumer's

perspective, part of the "essential bargain" between the consumer and the trader? Would further conditions need to be applied?

Enforcement and consumer group respondents strongly supported this suggested provision. The non-negotiable nature of many of the charges, the timing of them and the methods by which they are disclosed put the consumer at a significant disadvantage.

The business respondents were not in favour of such a provision, and argued that it would cause considerable uncertainty and lead to vexatious claims. One respondent argued that if such an approach were to be applied, then the scope must be clearly determined through clear definitions of relevant charges. A blanket approach would create confusion and complexity. Many respondents said there would need to be an objective test to establish what a reasonable consumer would see as being the "essential bargain". It is not for industry or Government to determine what may form the essential bargain.

6. Do you have any evidence of contingent, ancillary or non-transparent charges arising in other sectors beyond personal current accounts which, in your view, would be assessable for unfairness in relation to the level of the charge if the law was changed?

Many respondents provided examples of charges which could fall under the headings of contingent or ancillary charges, from both the financial and non-financial sectors. For example, in the non financial sectors: cancellation fees, re-fuelling charges in car hire contracts, delivery charges for anything bought online, handling fees of online payments, luggage fees, residential letting fees, retirement home fees, season ticket clauses, fees for not paying services through direct debit for utilities, holiday clubs, package holiday surcharges, mobile phone and gym contracts, and clamping and towing charges. And, in the financial services sectors: market value adjustments, early surrender charges, mid term alteration charges, exit charges, itemised/paper billing charges and non-direct debit charges.

7. If so, do you think any of these charges are unfair and if so, why?

Consumer group respondents argued that many of these charges may well be unfair because they create a significant imbalance of power between the consumer and the business. The charges exploit the consumers' inability or failure to fully understand the terms of their contract. Some also argued that there is a proliferation of charges that are about making additional money out of contracts in a less than transparent way.

8. What would be the impact on your sector or your business in terms of its pricing policy if the law was changed to allow the level of all

contingent, ancillary or non-transparent charges to be assessed by the Courts for fairness?

Some businesses were unclear as to what the impact would be on their business, and urged BIS to undertake an adequate study and impact assessment of any proposed changes. Many business respondents anticipated that pricing models would need to be re-evaluated to avoid the uncertainty of not knowing if any of the charges might be subject to a claim for unfairness. They argued that the "Waterbed" effect – where suppliers seek to recover lost revenues from all consumers through, for example, higher retail prices - could lead to increases in headline prices to cover all contingent costs. They also claimed that additional regulation could restrict competition and opportunities for innovation.

9. Are there any other potential consequences or wider impacts of allowing the assessment of contingent, ancillary or non transparent charges for fairness?

Business respondents argued that there would be a significant impact on innovation, and businesses' willingness to develop and offer additional services to consumers. They also said that there could be a rise in headline prices, a likely move to a "package" approach, and a reduction in the number of ancillary charges. Concern was also expressed that Courts would be given an increasingly large role as price regulators, and that legal uncertainty could open a floodgate of legal action resulting in significant costs. One business respondent expressed concern that if a minimum harmonisation approach is adopted on the unfair contract terms provisions, the UK could introduce stricter regulations in this area which would put UK businesses at a competitive disadvantage. They urged BIS to consider this further.

The consumer, regulatory and legal respondents argued that a change would result in clearer, fairer pricing policy for consumers and would allow proper market pressures to be brought to bear. Even if the "waterbedding" effect led to the restructuring of certain prices and the competitively constrained price rose slightly, this would not necessarily be a bad outcome for consumers as it would lead to more transparency and therefore more competition and pricing of ancillary items would have to more closely reflects costs.

Other Issues Raised

7 Some business respondents argued that the Supreme Court judgement in the OFT v Abbey National case did not create legal uncertainty as to how UK legislation on unfair terms in consumer contracts applies to charges that are contingent or ancillary.

8 Many of the business respondents also argued that financial services firms, in particular, are already subject to an extensive regulatory regime, and that the UTCCRs should not be used as a price control mechanism. There was also a general feeling amongst the business respondents that evidence of problems in specific sectors (i.e. unauthorised overdrafts) is not sufficient to justify wide ranging legislative action which could have far reaching implications well beyond the financial services sector.

Government response and Next Steps

9 The Government has carefully considered the information it has received through the Call for Evidence, and has decided not to put forward an amendment to the Consumer Rights Directive at this stage to enable charges outside of the "essential bargain" from the perspective of the consumer, to be assessed for unfairness. It is clear from the evidence provided from business, and consumer, legal and regulatory bodies that the case for tabling an amendment is very finely balanced, and the Government prefers to give itself more time to consider this issue. In particular, the Government will take note of the outcome of the Credit and Personal Insolvency Review (which includes the issue of bank charges) issued on 15 October 2010.

10 As noted in the Call for Evidence, it is likely that only parts of the Consumer Rights Directive will be adopted on a full harmonisation basis. Recent discussions have indicated that the relevant provisions on unfair contract terms will be adopted on a minimum harmonisation basis which would enable Member States to apply their own rules This means that the UK would still be free to regulate this matter internally in domestic law, even if the present text of the Directive remains unchanged. The new Directive (when agreed) is likely to be adopted in 2011, and an opportunity to bring in domestic provisions would arise when the Directive is implemented into UK law some time after that. Since the new Directive is likely, in any event, to contain different wording from the current law, there is likely to be a need to clarify the issue at this point. The UK Government will therefore revisit the issue at this time. Waiting to decide on a possible change to the legislation at a domestic level will allow more time to decide on whether the change is desirable, and more time to assess the potential impact of the change. A full public consultation on the Directive will take place prior to implementation.

11 Should the level of harmonisation of the relevant provisions change during the process of negotiations, the Government will revisit the issue.

ANNEX A

ABI
Owen Ashcroft
Association of Private Client Investment Managers and Stockbrokers
Barclays
Bar Council of England and Wales
British Bankers Association
British Vehicle Rental and Leasing
Building Societies Association
CBI
Citizens Advice Bureau
Chris Coles
Competition Commission
Consumer Focus
Bob Egerton
Dr Jesse Elvin
Anna Geddes
Institute of Legal Executives
Legal and General
Legal Beagles
Lloyds TSB
Local Government Regulation
Money Saving Expert
Nationwide
OFCOM
OFT
Sharon Quigley
Royal Bank of Scotland
Royal Institute of Chartered Surveyors
Santander (Alliance and Leicester)
Virgin Media
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