BIS Department for Business Innovation & Skills

Call for Evidence

Consumer Rights Directive : Allowing Contingent or Ancillary Charges to be Assessed for Unfairness

July 2010

Consumer Rights Directive : Allowing Contingent or Ancillary Charges to be Assessed for Unfairness

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Executive Summary

The Supreme Court judgement in the OFT v Abbey National plc case in November 2009 held that charges in relation to unauthorised overdrafts were part of the price for the provision of the whole package of banking services received by a personal current account customer, and thus excluded from assessment under legislation on unfair terms in standard form contracts. As a result there is uncertainty 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 decision of the Supreme Court has led to calls for the Government to bring forward legislative change, especially to address perceived unfairness in certain bank charges. The Coalition Agreement includes a commitment to "introduce stronger consumer protections, including measures to end unfair bank and financial transaction charges."

2. 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 for the relevant UK law on unfair contract terms, the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). The 2008 Commission proposal does not specifically address the point of ancillary or contingent charges in a way that clearly engages with the Supreme Court ruling (which came afterwards), but the Commission is aware of the ruling and may seek to address its outcome in any revised proposal. Members of the European Parliament may also seek to address the issue when the proposal comes up for debate in the Autumn. The UK Government therefore needs a negotiating line to take for subsequent discussions in the Council of Ministers. Either way, it will be highly desirable to tighten the drafting of the proposed Directive to make the policy intention clearer.

3. However, increasing the scope for applying regulatory control to prices, even ancillary or contingent charges, raises issues of economic policy. Successive Governments have taken the view that prices are best set by the market without interference, relying on competition to ensure that prices are driven down and that consumers are not exploited by firms charging excessively. Any exceptions to this policy need to be based on clear economic rationale and the impact on business pricing policies needs to be understood, as far as is possible, in advance.

4. This call for evidence is not about how to deal with charges that are straightforwardly concealed from the consumer at the time the contract is concluded, or with charges that are in unintelligible jargon. The former are not enforceable under ordinary English contract law in any event, and charging terms which are not in plain language are specifically said by the UTCCRs to fall within the scope of the test of fairness. The CRD's transparency provision also already

provides that express consent must be given for additional charges that the consumer might not notice, and the UK Government does not at this stage plan to oppose this proposal.

5. This call for evidence is instead about charges which are – because of the way they are presented, or the way the contract works – objectively difficult for an ordinary person in practice to assess effectively when reaching their decision as to whether to enter a contract.

6. The Government believes in principle that an economic case may exist to regulate charges which, from the consumer's perspective, do not form part of the "essential bargain" between the trader and the consumer. If such charges are not actively considered by the consumer when electing to enter into a contract, they will not be subject to normal competitive pressures, even if they are formally referred to in the contract. It could be argued, therefore, that the level of these charges should be able to be assessed for unfairness under the relevant law.

7. But the Government needs a more informed position before taking up its negotiating position. This Call for Evidence therefore invites views on a number of specific issues on which we would particularly welcome information and views. Your views will be used to help inform the development of the UK Government's negotiating position in advance of discussions in the EU's Council of Ministers later this year.

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?

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 reasons going beyond the clarity of the language used, for instance in terms of presentation; or all three of the above?

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?

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?

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?

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?

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

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?

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

Your Views

8. We welcome views from all interested parties including, consumers, enforcement bodies, the banking and other financial service industries, and other businesses who could be affected by a change in the current legislation. A list of those organisations and individuals consulted is at Annex A. Please tell us if you know of other parties who would be interested in receiving this consultation.

How to Respond

9. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

10. The responses must be submitted by **Monday 23 August** and can be submitted via letter, fax or email to:

David Evans
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Additional copies

11. Additional copies of this document may be made without seeking permission. Further printed copies of the consultation document can be obtained from:

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12. Electronic versions may be viewed on the BIS website at:

http://www.bis.gov.uk/Consultations

Confidentiality and Data Protection

13. Information provided in response to this Call for Evidence, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

14. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Current Legislation

15. As the law currently stands, there are two major pieces of UK legislation governing unfair contract terms:

- The Unfair Contract Terms Act 1977 (UCTA) deals with exclusion clauses and covers both consumer and business contracts.
- The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) (S.I. 1999/2083) implement the Directive on Unfair Terms in Consumer Contracts (93/13/EEC) and deal with all unfair terms, but only in relation to consumer contracts.

16. The Unfair Terms in Consumer Contracts Regulations protect consumers against unfair standard terms in contracts they make with traders. An unfair term is defined as one which, contrary to the requirements of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer (Regulation 5, UTCCRs). The Office of Fair Trading and other approved bodies can take action to prevent the use of such terms.

17. A term will be regarded as unfair if:

- It has not been individually negotiated;
- It is contrary to the requirement of good faith;
- It causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer;
- Schedule 2 of the Regulations contains an indicative but not exhaustive list of what may be regarded as unfair.

18. The fairness of a term shall be assessed with reference to:

- The nature of the goods and services;

- All circumstances attending to the conclusion of the contract, and;
- All other terms of the contract or any other relevant contract.

19. Under Regulation 6 of the UTCCRs, an assessment for fairness of the "definition of the main subject matter of the contract" or "the adequacy of the price as against the goods or services supplied in exchange") is not allowed providing the relevant terms are in plain and intelligible language.

Price exemption provision in UTCCRs:

> Assessment of unfair terms
>
> 6. - (1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate –
>
> (a) to the definition of the main subject matter of the contract, or
>
> (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange

Supreme Court Judgement

20. In March 2007 the OFT announced an investigation under the UTCCRs into the fairness of the charging terms for unarranged overdrafts in personal current account agreements. It agreed to bring a test case with seven banks and one building society - Abbey National plc, Barclays Bank plc, Clydesdale Bank plc, HSBC Bank plc, Lloyds Banking Group plc (including HBOS), Royal Bank of Scotland Group plc and Nationwide Building Society - on whether the level of unarranged overdraft charges was assessable for fairness under the UTCCRs (and if so, whether the level was unfair). The High Court and Court of Appeal found in favour of the OFT and held that the level of the charges could be assessed for fairness.

21. However, on 25 November 2009 the Supreme Court overturned these previous judgements and ruled that charges for unauthorised overdrafts form part of the price in exchange for of the package of services provided to a personal current account customer. Provided that the banks' terms were set out in plain intelligible language, the court decided that it was not open to the OFT to assess the level of the charges for fairness under the UTCCRs. The OFT had argued among other things that the essential bargain constitutes only so much of the contract as the consumer can be said to have consented to freely. The charges at issue in the case were ancillary payment obligations and were not incurred in the normal performance of the contract. The typical consumer would not clearly recognise them as the price of services supplied by the banks in exchange ([2009] UKSC 6, paragraph 27.).

22. The Supreme Court's judgement unanimously rejected the OFT's arguments that unarranged overdraft charges payable under a particular kind of retail bank account could be assessable for the fairness of the price. It did not reject the possibility of reviewing such terms on other grounds, nor did it reject the potential assessment of ancillary payment obligations generally. It took account of the particular factual circumstances connected with "free if in credit" accounts. It therefore focused on the case in hand and did not lay down a clear line under the UTCCRs between exempt and non-exempt price terms more generally. It did not explicitly reverse an earlier House of Lords decision which said the UTCCRs price exemption was to be construed narrowly, but, in the case in hand, gave a rather wide interpretation.

23. A High Court decision just before the bank charges case found certain charging terms in letting agency agreements used by Foxtons to be unfair, accepting the relevance of arguments of the kind used by the OFT in that case. The High Court expressly left open the possibility of an appeal if the judgment on bank charges supported a contrary view, but no appeal was made.

24. There is thus uncertainty, following the Supreme Court judgment, as to how far the scope of the Regulation 6 price exemption extends.

<u>Government Response to the Judgement</u>

25. The Government at the time encouraged the OFT to enter into discussions with the banks to see whether voluntary action could be taken to address outstanding concerns around unarranged overdrafts. In March 2010, the OFT announced that it had received new industry commitments which addressed some of these. The OFT expects further developments in the market over the next two years and continues to monitor the banks' charging policies.

26. The Coalition Agreement includes a commitment to "introduce stronger consumer protections, including measures to end unfair bank and financial

transaction charges". The Government is considering how best to implement this commitment and may bring forward specific proposals in due course.

27. However, the Supreme Court's decision on the price exemption provision in the UTCCRs has raised potential uncertainties with regard to the scope of the UTCCRs core exemption in other sectors. The Government does have some sympathy with considering a distinction between the main price or "essential bargain" that consumers can recognise, and other contractual terms allowing for charges that may be less recognised by consumers and therefore not subject to competitive pressures.

28. Even if all payment terms meet transparency requirements and consumers read them, consumers will not necessarily consider remuneration terms that (for instance) apply only in certain circumstances - especially eventualities that are remote - or which are likely to seem remote to the consumer at the time of contracting. These charges may be contingent or presented within the contract in such a way as to be effectively "hidden" even if they are explicitly mentioned. The Government notes that the Australian Parliament has recently enacted a new consumer law including provisions on unfair terms (plus a separate law including the same provisions for financial services contracts), which uses the idea of the upfront price which cannot be assessed for unfairness versus hidden and contingent charges which can be assessed for unfairness (Trade Practices Amendment (Australian Consumer Law) Act No.1 2009 and amendments to the Australian Securities and Investment Commission Act 2001).

29. If the UK were to follow the same path and legislate across the economy as a whole, this would ensure that consumer detriment arising from contingent or ancillary charges in all sectors can be addressed if such charges are deemed unfair. In the UK an opportunity to amend legislation to take effect across all sectors would arise through the implementation of the Consumer Rights Directive.

Consumer Rights Directive

30. In October 2008 the European Commission published a proposal for a new Consumer Rights Directive (CRD) [1]. The CRD will replace four existing EU consumer directives including the Unfair Contract Terms Directive (1993/13/EEC). Unlike the Directives it will replace, the Commission proposed the CRD as a full harmonisation measure. This means that in areas within the scope of the CRD, Member States would not be able to maintain or adopt provisions that diverge from those set out in the Directive, including provisions providing a higher level of consumer protection.

[1] http://ec.europa.eu/consumers/rights/docs/Directive_final_EN.pdf

31. The CRD presently excludes an assessment of “the main subject matter of the contract or the adequacy of the remuneration foreseen for the trader’s main contractual obligation” (providing the relevant terms comply with the Directive’s plain language requirements).

32. The Government considers that the CRD’s current wording explicitly highlights that the exemption is not concerned with all payments payable under the contract but rather those that relate to the essential or core bargain between the parties, yet it still leaves scope for argument. If the text remained as it is, this would prevent the UK making different provisions and therefore we consider that, particularly in light of the Supreme Court Judgement, it is important that the scope of the exemption in the CRD is clarified.

33. The Commission proposal may well be amended before final consideration of the draft Directive in the Council of Ministers and the European Parliament. European Commissioner Reding has indicated in a recent speech that one of the Commission’s concerns in future will be to tackle “hidden charges”.

34. The CRD is still being negotiated. There has been much debate about the appropriate level of harmonisation. Whilst it remains the Commission’s intention for the relevant unfair contract terms provisions to be adopted on a full harmonisation basis, it is possible that the European Parliament and Member States in the Council will insist on minimum harmonisation in this area, allowing individual countries to maintain stricter domestic laws if they wish.

35. The relevant provision of the CRD is Article 32 on ‘General Principles’ on the assessment of contract terms. Article 32(3) sets out the exception in respect of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader's main contractual obligation. The proposed wording in Article 32(3) is similar to, but not the same as, the price exemption provision in the UTCCRs. In relation to price, the UTCCRs presently say “assessment of a term shall not relate to … to the adequacy of the price or remuneration as against the goods or services supplied in exchange”. While the wording in Article 32(3) is different from the present wording we are not convinced that it would permit assessment of a substantially wider range of terms. For example, we doubt it would have changed the outcome of the bank charges case in the Supreme Court.

Article 32
General principles

1. Where a contract term is not included in Annex II or III, Member States shall ensure that it is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. Without prejudice to Articles 34 and 38, the unfairness of a contract term shall be assessed, taking into account the nature of the products for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion and to all the other terms of the contract or of another contract on which the former is dependent. When assessing the fairness of a contract term, the competent national authority shall also take into account the manner in which the contract was drafted and communicated to the consumer by the trader in accordance with Article 31.

3. Paragraphs 1 and 2 shall not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader's main contractual obligation, provided that the trader fully complies with Article 31.

Recital 49
"For the purposes of this Directive, neither the fairness of terms which describe the main subject matter of the contract, nor the quality/price ratio of the goods or services supplied should be assessed unless these terms did not meet transparency requirements".

36. Council Working Group discussions on the Directive are ongoing and proposed changes to Chapter 5 of the Directive will start to be discussed in September. This Directive is subject to the ordinary legislative procedure between the Council and the European Parliament and the Internal Market and Consumer Protection Committee (IMCO) of the European Parliament is currently considering proposed amendments to the Directive. The deadline for tabling amendments in the IMCO Committee is presently set for 9 September with a vote on these amendments expected in late October. The European Parliament intends to hold its plenary vote on the Directive at the end of this year, at which time it is anticipated that the Council will also have a near final position on the proposal.

37. If the UK wishes to secure an amendment to the proposed text to put beyond doubt that the assessment for unfairness is intended to cover charges outside the "essential bargain" from the consumer's perspective, the Government will need to be in a position to put forward proposals for amendment in

September or October at the latest. However, before deciding whether to seek an amendment, and developing a negotiating line in Brussels, the Government needs to gather evidence to inform its policy assumptions. There are potentially significant impacts that could arise from this form of regulation and the Government needs as much evidence as it can gather before proceeding with such a course.

Issues to be Addressed

Is Competition failing to drive down prices?

38. The Government has a long standing policy of not regulating prices, instead relying on competition to drive prices down to a fair market level. The regulators' main task is to ensure that competition in markets is allowed to work to this effect. The regulation of prices therefore needs careful consideration and must be exceptional - justified by a failure of the market to perform its normal function of driving down prices. The Government would certainly not want to see pricing distortions or supply constraints as a result of its intervention.

39. Evidence suggests that consumers can find contracts for some products and services, such as many financial services, confusing. Increasing transparency by providing more information can sometimes be ineffective if consumers feel they are faced with too much choice or information.[2] For example, previous research has shown that a good deal of regulated information provided on credit contracts does not reach its target audience, often because there is too much information, or the way that it is provided tends to dissuade consumers from reading it.[3]

40. Where there is a lot of information to process, consumers may rely on short-cuts or 'heuristics' (rules of thumb) to help them make a decision, which can lead to consumers focussing on a narrow range of features in making their choice. This can lessen the incentive for firms to price competitively on all aspects of the contract.

41. Insights from behavioural economics suggest that consumers can be overly optimistic and underestimate their probability of suffering an adverse event. This 'overconfidence' may extend to the likelihood of incurring a contingent or ancillary charge. Therefore, contingent or ancillary charges may be one of the features on which suppliers have less of an incentive to price competitively. This can be reinforced if consumers heavily discount the future

[2] The phenomenon of 'choice overload' has been documented by Schwartz (2005) and Iyengar et al (2003) test the 'choice overload leads to inaction' theory in a financial decision-making setting.
[3] Better Regulation Executive & National Consumer Council (2007)

and behave as if they only care about the 'here-and-now'.[4] For example, in the bank charges case the OFT put forward a strong case that consumers do not foresee that they will pay charges for exceeding overdraft limits, so this element of a consumer contract is not one on which banks compete to attract business. In addition, an OFT-commissioned consumer survey showed that customers did not consider some ancillary charges relevant even when they had paid them in the past. This suggests that neither competition policy nor greater transparency may offer a complete solution in this area.

42. A similar justification was available to the European Commission to justify an intervention in the market for mobile roaming charges across EU frontiers. Consumers did not consider mobile roaming charges across borders when deciding which mobile phone operator to choose, since they would only use their phone overseas for a couple of weeks every year. Companies had targeted this absence of consumer focus and maintained very high charges for cross-border calls, whilst competing hard to drive down prices for local and national calls.

43. Where contracts are complex and especially where they last a long time, or are bought infrequently (and as such there is little impact through learning effects over time), there is plenty of scope for contingent and ancillary charges to escape the notice of the consumer. When unconstrained by competitive pressures, businesses may then seek to raise such charges to levels which may be perceived to be unfair. This may result in a minority of users cross-subsidising others or in abnormally high profits across the sector.

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?

What should the price exemption cover?

44. The Government will need to consider what limits it wishes to place on the scope of the price exemption provision, and would welcome views on the proposition that the price exemption provision should be clarified to put beyond doubt that it only covers payments that are likely to have been directly considered by the consumer at the time the contract was entered into – i.e. form part of the "essential bargain" from the consumer's perspective. The Government does have sympathy with the view that consumers are unlikely to focus on the small print or additional charges hidden in terms and conditions. Ancillary charging terms and especially those charges payable on a contingency, which

[4] See for example Stewart, 'The psychology of personal current accounts' (Annex E of OFT Market Study on Current Accounts, 2008)

the consumer may not consider at all likely when entering into the contract, are not likely to be foreseen by the consumer and should not benefit from the price exemption provision. We would therefore welcome views on:

2 Should any exclusion from the price exemption provisions 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 reasons going beyond the clarity of the language used, for instance in terms of presentation; or all three of the above?

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

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 applied?

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?

Evidence of Contingent, Ancillary and Non-transparent Charges

45. Informal discussions with the OFT and the Financial Services Authority (FSA) would indicate that a range of potential contingent/ancillary/non-transparent charges may arise in both financial, and non-financial sectors.

46. An illustrative list can be found below. Please note that only a court can decide whether terms fall within or outside the test of fairness under the Regulations, and whether, if the test applies, a term is fair, having regard to all the circumstances of the case.

Financial Sectors

Insurance Sector – Exit Charges; Compulsory secondary expenses; Unexpected revision charges (mid-term).

Investment Sector – Inactivity Fees (fees payable by customer if they do not carry out any transactions on an account during a 12 month period); Cash account charge.

Banking Sector – Unauthorised overdraft charges; Transaction charges (e.g. bounced cheque); Copy of Statement fee.

Mortgage Sector – Post completion administration fees (e.g. deeds production fee), mortgage exit administration fee, breakdown of account fee.

Non Financial Sectors

Gym Contracts (termination charges) – overly long termination notice periods and large termination charges.

Book Clubs/Film Clubs – Buying less than minimum purchase commitments, returning items late.

Car Clubs – Charges for dropping cars off in locations other than agreed.

Car Hire - Penalty charges incurred for punctures, hire, theft of car, but not clearly defined in rental agreement where consumer's liability starts.

Service Contracts – Charges for fixing unexpected problems in home improvements, or charging extra for cases that are hard to fix, e.g. cars.

Retirement Homes – Transfer fees or "exit fees" paid by consumers when they sell or rent their purpose built retirement apartment.

47. It is unlikely that this is an exhaustive list. The Government would welcome evidence on the type of charges - across all sectors – the level of which could be assessed for fairness if the price exemption provision was restricted in the manner described above.

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?

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

Impact

48. Outside of the personal current account sector, the Government does not have a robust evidence base on contingent and ancillary charges. It is therefore not yet in a position to produce a full impact assessment on the issue. However, we have set out below in broad terms the currently available data relating to contingent or ancillary charges. Given that this is a call for evidence, the information received will be used in the analysis that will inform the Government's negotiating position.

Costs

49. The costs associated with a potential amendment are likely to fall primarily on business, which will incur initial compliance costs to adapt their terms and conditions. Survey evidence suggests that doorstep sellers would pay higher costs than distance sellers, with retail sellers falling in-between.[5]

50. The business model in certain sectors may also be significantly affected. For example, it is estimated that retail banks earn more than £8 billion in revenue from personal current accounts, one-third of which is generated from contingent and ancillary fees such as unarranged overdraft maintenance, paid and unpaid item charges.[6] Subjecting these to unfairness assessments may result in lower revenues and profits for banks or to a rise in charges for core elements of the relevant contracts (fees for current accounts).

51. Other sectors may also be affected, as discussed above. Any rental or license agreement where there are penalties for misuse or damage may be difficult to understand at sign-up and surprising when they occur. This could be relevant in car hire, hardware (e.g. DVDs, electronics) and software and digital content (e.g. copying and sharing). In contracts for services, charges for adjustments can be made when certain issues arise or if the service provider judges that extra service is required. This could affect services such as home

[5] European Commission, 'Accompanying document to the Proposal for a directive on consumer rights: Annexes', http://ec.europa.eu/consumers/rights/docs/proposal_annex_en.pdf
[6] OFT, 'Personal Current Accounts in the UK: A Market Study' (2008)

improvements, care plans or warranties for durable goods, professional services and package holidays.

52. Of course if the majority of firms currently set their contingent and ancillary charges at a level that is deemed fair by regulators, then the potential amendment to the CRD will have limited impact.

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

53. In the event that the Directive affects the revenue that certain businesses generate, there may be potential 'waterbed' effects as firms make up for their losses. For example, in the banking sector lower charges for unauthorised overdrafts may lead to the introduction of account keeping fees.

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

Benefits

54. If the Directive was to allow the assessment of contingent and ancillary charges for unfairness, the associated benefits would be largely expected to accrue to consumers. Survey evidence suggests that one in ten European consumers come across what they regard as unfair contract terms per year (the proportion is similar in the UK, though almost all claims are against sellers within the country rather elsewhere in the EU).[7] They are particularly prevalent in the sectors of financial services (18%), real estate (18%) and basic services (11%) such as utilities.

55. A separate survey of retailers indicated that more than a tenth (13%) thought that their competitors had used unfair consumer contract terms in the previous 12 months; the proportion was slightly less (8%) in the UK. On the other hand, UK businesses indicated that contract terms or guarantees accounted for 8% of the main issues that consumers complained about, compared to 3% for EU27.[8]

56. If contingent and ancillary charges were assessable on the grounds of unfairness, this could not only have the impact of enhancing customer protection but firms may then be subject to greater competitive pressures on all prices, including those that consumers possibly pay less attention to. This enhanced

[7] Eurobarometer, 'Consumer protection in the Internal Market' (2006)
[8] Eurobarometer, 'Business attitudes towards enforcement and redress in the internal market' (Flash Eurobarometer 278, November 2009)

competitive incentive could have a number of potential beneficial effects for consumers, such as exerting downward pressure on overall prices and charges, boosting innovation and improving productivity, thereby contributing towards increased economic growth. If the cumulative impact of these effects are sufficient to offset the aforementioned "waterbed" effects, this could potentially lead to an overall increase in consumer welfare.

57. Therefore, if, as a result of the Call for Evidence, the UK put forward an amendment to the Consumer Rights Directive (such that contingent/ancillary/non-transparent charges that are not considered to be part of the essential bargain would be assessable for unfairness), we would welcome your views and any further evidence you may have on the possible impact such an amendment would have. The Government inclines to the view that putting beyond doubt that "contingent" and "ancillary" charges are outside the scope of the core provision exemption would make markets more transparent and therefore more efficient and competitive, but there may be unpredictable impacts.

Next Steps

58. The outcome of this Call for Evidence will help inform the UK's negotiating position when discussions on the Directive continue in September. The deadline for tabling amendments in the IMCO Committee is presently set for 9 September, with a vote on the amendments expected in October.

59. Because of the time constraints inherent in the European legislative procedure, this Call for Evidence carries a time limitation of 6 weeks, as opposed to the normal period of 3 months for Government consultations. We will publish a brief summary of the responses to the Call for Evidence, together with our proposed negotiating line.

60. The new Directive (when agreed) is likely to be adopted in 2011. A formal UK consultation exercise will take place on the proposed new Regulations when transposing the new Directive into UK legislation.

Annex A – List of consultees

Association of British Insurers
Association of Independent Financial Advisers
APACS' Card Payments Group
Advertising Association
Advertising Standards Association
Age Concern
Barclaycard
Barclays
Bar Council
British Bankers Association
British Chambers of Commerce
British Cheque and Credit Association
British Gas
British Retail Consortium
British Vehicle Rental and Leasing Association
BSI
BSkyB
BT
Building Societies Association
Cattles plc
CBI
Citizens Advice
Citizens Advice Scotland
City of London Law Society
Competition Appeals Tribunal
Competition Commission
Consumer Council for Northern Ireland
Consumer Credit Association
Consumer Finance Association
Consumer Focus
Council of Mortgage Lenders
Credit Services Association
Direct Marketing Association
Direct Selling Association
Federation of Small Businesses
Finance and Leasing Association
Financial Ombudsman Service
Financial Services Consumers Panel
FSA
HBOS

HMT
HSBC
ILEX
LACORS
Law Society
Lloyd’s of London
Lloyds TSB
Local Better Regulation Office
Lovells
National Association of Funeral Directors
National Consumer Federation
Nationwide
Newspaper Society
Northern Ireland Assembly Government
Northern Ireland Office
Northern Rock
OFCOM
OFT
Periodical Publishers Association
Retail Motor Industry Federation
Royal Institution of Chartered Surveyors
Royal Bank of Scotland
Santander Cards
Scottish and Southern Energy
Scotland Office
Scottish Government
Society of Chief Trading Standards Officers
The National Federation of Property Professionals
T-Mobile
Trades Union Congress
Trading Standards Institute
UK Cards Association
Wales Office
Welsh Assembly Government
Which?
Wine and Spirit Trade Association

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