



Isle of Man Office of Fair Trading

CONSULTATION ON THE IMPLEMENTATION OF LEGISLATION IN RELATION TO UNFAIR TERMS IN CONSUMER CONTRACTS



Isle of Man
Government

Reiltys Ellan Vannin

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INTRODUCTION BY THE CHAIRMAN



The Fair Trading (Amendment) Act 2001 represented a major upgrade of the legislative framework surrounding the issue of fair trading in the Island. Although the majority of the Act was brought into operation straight away, a decision was taken to delay the implementation of the provisions of the Act, namely Sections 4 to 7 and Schedule 1, which related to unfair terms in consumer contracts.

It is now over ten years since the Legislature decided that Isle of Man consumers should have the benefit of protection against the inclusion of unfair terms in contracts but the relevant parts of the 2001 Act have not been brought into operation. The responsibility for making the necessary Appointed Day Order now rests with the Minister for Community, Culture and Leisure and the Office of Fair Trading is considering formally requesting the Minister to make an Order bringing into force the remaining provisions of the Fair Trading (Amendment) Act 2001.

Prior to considering making such a request to the Minister, the OFT has decided that it would be appropriate, in all of the circumstances, to undertake a formal consultation exercise. It is, of course, very unusual to consult regarding an Appointed Day Order because the proper consultation will already have taken place prior to the Bill having been drafted and introduced into the Branches. The OFT is, however, mindful that it is a considerable time since that original consultation took place and clearly business practices will have evolved over that period. Although the provisions of the Fair Trading (Amendment) Act 2001 in relation to unfair terms in consumer contracts were a significant element of the legislation, the main purpose of the legislation was to introduce the Financial Services Ombudsman Scheme. Looking back that certainly overshadowed the provisions relating to unfair contract terms during the original consultation.

The consultation is open until **30th September 2013** and we look forward to hearing your views. It can be completed using the appended [response form](#). Alternatively paper copies are available from the OFT.

David Quirk MHK
Chairman, Office of Fair Trading

THE LEGISLATION

The provisions of the Fair Trading (Amendment) Act 2001 which are not currently in force relate solely to unfair contract terms in consumer contracts. Sections 4 to 7 of and Schedule 1 to the Act provide:

4 Unfair contract terms in consumer contracts

(1) For the heading to Part V of the [Consumer Protection Act 1991](#) substitute-

'PART V
UNFAIR CONTRACT TERMS IN CONSUMER CONTRACTS'.

(2) For sections 38 to 40 of that Act substitute-

38 Contracts to which this Part applies

(1) Subject to subsection (2), this Part applies to contracts concluded between a seller or supplier and a consumer.

(2) The Board may by order exclude from the application of this Part contracts of a description specified in the order.

(3) This Part applies to a contract notwithstanding any contract term which applies or purports to apply the law of a country or territory outside the Island, unless the contract has a close connection with that country or territory.

39 Unfair terms

(1) A contract term which has not been individually negotiated shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, which is to the detriment of the consumer and cannot be justified.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Even though a specific term or certain aspects of it in a contract has been individually negotiated, this Part applies to the rest of the contract if, taken as a whole, it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2A contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

(6) Without prejudice to subsections (1) to (5), a contract term which constitutes an arbitration agreement shall be regarded as unfair so far as it relates to a claim for a pecuniary remedy which does not exceed £5,000.

(7) The Board may by order vary the amount specified in subsection (6) (or the amount substituted for it by a previous order under this subsection).

40 Assessment of unfair terms

(1) Without prejudice to section 40C, the unfairness of a contract term shall be assessed having regard to the following matters (as at the time the contract was concluded)-

- (a) the nature of the goods or services to be supplied;
- (b) all the circumstances attending the conclusion of the contract; and
- (c) all the other terms of the contract and of any other 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 have regard to-

- (a) the definition of the main subject matter of the contract, or
- (b) the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

(3) Except in proceedings under section 40C, if there is doubt about the meaning of a written term of a contract, it shall be interpreted in such a way as is most favourable to the consumer.'

(3) After Schedule 2 to that Act insert (as Schedule 2A) the provisions set out in Schedule 1 to this Act.

[S 4 not yet in operation.]

5 Effect of unfair term

After section 40 of the Consumer Protection Act 1991 insert-

'40A Effect of unfair term

(1) Subject to subsection (2), an unfair term in a contract to which this Part applies shall not be binding on the consumer.

(2) Subsection (1) does not apply to contract terms which-

- (a) are required by any statutory provision to be included in the contract; or
- (b) reflect any provision or principle of an international convention which extends to the Island.

(3) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.'

[S 5 not yet in operation.]

6 Enforcement

After section 40A of the Consumer Protection Act 1991 insert-

'40B Complaints - consideration by Board

(1) It shall be the duty of the Board to consider any complaint made to it that any contract term drawn up for general use is unfair, unless the complaint appears to the Board to be frivolous or vexatious.

(2) The Board shall notify a person who makes a complaint to it under subsection (1)-

- (a) what action (if any) it proposes to take under this Part with regard to the subject matter of the complaint; and
- (b) if it proposes not to take any action, its reasons for not doing so.

(3) In deciding whether or not to take action under this Part in respect of a term which the Board considers to be unfair, it may, if it considers it appropriate to do so, have regard to any undertakings given to it by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

40C Injunctions to prevent continued use of unfair terms

(1) The Attorney General, at the request of the Board, may apply to the High Court for an injunction (including an interim injunction) against any person appearing to him to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers.

(2) The High Court on an application under this section may grant an injunction on such terms as it thinks fit.

(3) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.

40D Powers to obtain documents and information

(1) The Board may exercise the power conferred by this section for the purpose of-

- (a) facilitating its consideration of a complaint that a contract term drawn up for general use is unfair; or
- (b) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(2) The Board may require any person to supply to it-

- (a) a copy of any document which that person has used or recommended for use, at the time the notice referred to in subsection (3) is given, as a pre-formulated standard contract in dealings with consumers;
- (b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.

(3) The power conferred by this section is to be exercised by a notice in writing which may-

- (a) specify the way in which and the time within which it is to be complied with; and
- (b) be varied or revoked by a subsequent notice.

(4) Nothing in this section compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the High Court.

(5) If a person makes default in complying with a notice under this section, the High Court may, on the application of the Attorney General, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other body who are responsible for its default.'

[S 6 not yet in operation.]

7 Supplemental provisions

After section 40D of the [Consumer Protection Act 1991](#) insert-

'40E Publication, information and advice

(1) The Board shall arrange for the publication, in such form and manner as it considers appropriate, of details of-

- (a) any undertaking given to it by or on behalf of any person as to the continued use of a term which the Board considers to be unfair in contracts concluded with consumers;
- (b) any application made under section 40C, and the terms of any undertaking given to, or order made by, the High Court;
- (c) any application made by the Attorney General under section 40D(5) to enforce a previous order of the High Court.

(2) The Board shall inform any person on request whether a particular term to which this Part applies has been-

- (a) the subject of an undertaking given to the Board; or
- (b) the subject of an order of the High Court under section 40C;

and shall give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question.

(3) The Board may arrange for the dissemination in such form and manner as it considers appropriate of such information and advice concerning the operation of this Part as may appear to it to be expedient to give to the public and to all persons likely to be affected by this Part.

40F Interpretation etc.

(1) In this Part-

"arbitration agreement" means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual);

"consumer" means any person who, in contracts to which this Part applies, is acting for purposes which are outside his trade, business or profession;

"notified" means notified in writing;

"seller or supplier" means any person who, in contracts to which this Part applies, is acting for purposes relating to his trade, business or profession, whether publicly or privately owned;

"unfair", in relation to contract terms, has the meaning given by section 39.

(2) If it appears to the Department of Community, Culture and Leisure that, in relation to contracts of any description, the functions of the Board under sections 40B to 40E would more appropriately be exercised by another public authority, it may, after consulting the Board and with the consent of that authority, by order-

- (a) provide that those functions shall be exercised by that authority in relation to contracts of that description;
- (b) provide that references to the Board in those sections shall, in relation to such contracts, be construed as references to that authority; and
- (c) make such consequential, incidental, supplemental and transitional provisions as appear to that Department to be necessary or expedient for the purposes of the order.!

[Subs (2) amended by SD155/10 Sch 1.]

[S 7 not yet operative.]

Schedule 1 New Schedule Inserted in Consumer Protection Act 1991

[Sch 1 not yet in force.]

Schedule 2A List of Terms Which may be Regarded as Unfair

1. Terms which have the object or effect of-

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) unreasonably excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, where the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration which is not legally binding, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. (1) Paragraph 1(g) is without prejudice to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(2) Paragraph 1(j) is without prejudice to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

(3) Paragraph 1(j) is also without prejudice to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(4) Paragraphs 1(g), (j) and (i) do not apply to-

- (a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

(5) Paragraph 1(l) is without prejudice to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.'

REASONS FOR DELAYED INTRODUCTION

Looking back to 2001 there were a number of reasons why the implementation of the provisions of the Fair Trading (Amendment) Act 2001 was delayed including:

- The primary concern of the legislation was to bring about the Financial Services Ombudsman Scheme and few respondents to the consultation exercise chose to comment on this provision of the Act. Consequently little was known about the public/industry reaction to this point.
- The Island's finance sector, in particular the insurance industry, expressed concern and asked to be granted a temporary exemption from the provisions of the legislation.
- Known problems experienced by the UK in endeavouring to enforce their legislation (upon which our legislation was based) where complaint turnaround time was close to two years and several high profile, high cost appeals were launched against their attempted enforcement action. Even with considerable expenditure on staff and resources the UK OFT could not cope with the number of referrals received at that time.
- Lack of staffing resources within the OFT.

CURRENT SITUATION

Whilst it was clear that, at the time, there were good reasons for delaying the introduction of these provisions the OFT considers that it is unsatisfactory that legislation approved by the Branches which was designed to protect the consumer has still not been brought into full effect. Whilst the OFT remains satisfied that the vast majority of traders operate fairly there is still a need to protect the public against those who trade unfairly. Equally the legislation should act as discouragement to anyone who is tempted to do so.

From an OFT perspective the concerns regarding the resource implications of the provisions are no longer valid. The whole situation has moved on considerably in that:

- Our legislation is directly based upon United Kingdom legislation and there is now a considerable body of precedent flowing from actions, successful and otherwise, taken by the United Kingdom Office of Fair Trading.
- A large proportion of the contracts in use in the Island by reputable traders tend to be developed in the United Kingdom market, either directly by bodies trading in both jurisdictions or through United Kingdom trade bodies and are thus designed to be compliant with unfair contract terms legislation.
- There is no evidence of a substantial level of public concern and unfair contract terms are not a major feature of complaints to the Office. Indeed where they are a feature in complaints they often sit alongside other unfair trading practices so implementation of the unfair contract terms legislation may actually have a positive impact on OFT workloads by making it simpler to deal with existing complaints.
- Whilst there are not currently any major problems, Manx consumers are exposed to a significant risk from unscrupulous traders.

The OFT does not have a clear understanding of the potential implications of the legislation for the finance industry and one of the key objectives of this consultation is to identify whether the concerns expressed in 2001 are still valid.

CONCLUDING REMARKS

The OFT is keen to hear the views of both the business community and the general public. A list of Direct Consultees can be found at [Appendix 1](#); if there is anyone not on the list who you think should be consulted please contact the officer named below.

Please fill in the questions on the appended [response form](#) and click 'Submit Form'. Alternatively, you may send your response to:

Nina Lowney
Legislation & Finance Officer
Office of Fair Trading
Government Building
Lord Street
Douglas
Isle of Man
IM1 1LE

Email: nina.lowney@gov.im

Hard copies of this consultation and response form are available from the OFT's counter, at the above address or by telephoning (01624) 686507. Electronic copies of this document are also available at www.gov.im/oft.

The closing date for submissions is **30th September 2013**.

APPENDIX 1 - LIST OF DIRECT CONSULTEES

- Tynwald Members
- Attorney General
- Local Authorities
- Chief Officers of Government Departments, Boards and Offices
- Isle of Man Chamber of Commerce
- Isle of Man Law Society
- Isle of Man Trade Union Council
- Isle of Man Bankers Association
- Manx Insurance Association
- Isle of Man Association of Corporate Service Providers

The OFT has also asked the Financial Supervision Commission and the Insurance and Pensions Authority to bring this consultation to the attention of their licence holders.



Isle of Man Office of Fair Trading

APPENDIX 2

CONSULTATION ON THE IMPLEMENTATION OF LEGISLATION IN RELATION TO UNFAIR TERMS IN CONSUMER CONTRACTS

RESPONSE FORM



July 2013

Isle of Man
Government

INTRODUCTION

The OFT is keen to hear the views of both the business community and the general public.

Please fill in the questions and click 'Submit Form'. Alternatively, you may send your response to:

Nina Lowney
Legislation & Finance Officer
Office of Fair Trading
Government Building
Lord Street
Douglas
Isle of Man
IM1 1LE

Email: nina.lowney@gov.im

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The closing date for submissions is **30th September 2013**.

When submitting your views please indicate if you are responding on behalf of an organisation. A list of Direct Consultees can be found at [Appendix 1](#). If there is anyone not on the list who you think should be consulted please contact the above-named officer.

To ensure that the process is open and honest and in line with the Government's [Code of Practice on Consultations](#), responses can only be accepted if you provide your name with your response.

Unless specifically requested otherwise, any responses received may be published either in part or in their entirety. **Please mark your response clearly if you wish your response and name to be kept confidential.** Confidential responses will be included in any statistical summary and numbers of comments received.

A summary of responses will be published within three months of the closing date for this consultation and will be available on the Isle of Man Office of Fair Trading website (www.gov.im/oft) or by contacting the above-named officer.

The purpose of consultation is not to be a referendum but an information, views and evidence gathering exercise from which to make an informed decision on competition policy. In any consultation exercise the responses received do not guarantee changes will be made to what has been proposed.

By completing this survey, you are agreeing to the collection and use of any personal information sent to the Isle of Man Government in accordance with our [privacy statement](#). Personal data that you provide to us will be processed in accordance with the Data Protection Act 2002 of the Isle of Man and will be kept no longer than is necessary.

CONSULTATION RESPONSE

Your information

Name:

Address:

Telephone
Number:

Email:

Please select box if you wish your
submission to remain confidential:

Is your submission representing your
personal views or that of a business? Please state:
(if personal, please go to the next page)

If your submission is representing that
of a business, please indicate the name of the
organisation:

Please describe the nature of the organisation:

Question 1

Do you agree with the OFT that, in principle, the delayed provisions relating to unfair terms in consumer contracts should be brought into force as soon as possible? (please only select one answer)

Yes

No

If no, please give reasons:

*[*if you run out of space there is an additional page at the end of this response form](#)*

Question 2

Are you aware of any consumer contracts currently being issued in the Isle of Man which are NOT compliant with the provisions of Schedule 1 (Schedule 2A of the 1991 Act once amended – see [pages 7 & 8](#))? (please only select one answer)

Yes

No

If yes, please send a copy of the contract to the OFT and explain which provision(s) it fails to comply with:

One of the provisions introduced by the 2001 Act (the new section 38(2) of the 1991 Act) enables the Board of the OFT to grant exemptions from the unfair contract terms in relation to certain types of contract. These could be permanent exemptions or they could potentially be temporary exemptions which would, for example, give a period to enable new compliant contracts to be prepared.

Question 3

Do you believe that any types of contract would need to be permanently exempted from the provisions relating to unfair terms in consumer contracts? (please only select one answer)

Yes

No

If yes, please specify the type of contract and give reasons for exemption:

Question 4

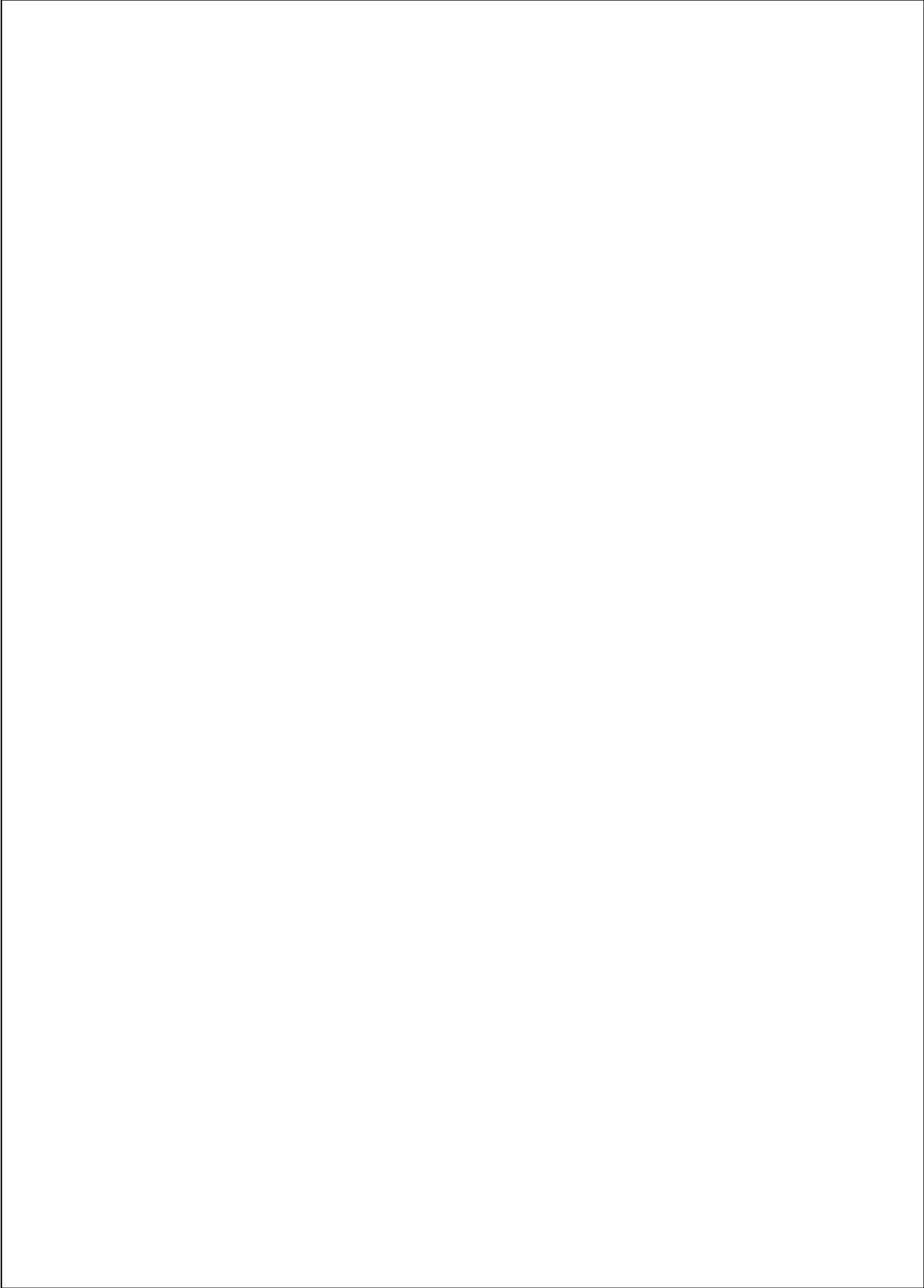
Assuming that the Appointed Day order would be 1st April 2014, are there any types of contract that would need to be temporarily exempted from the provisions relating to unfair terms in consumer contracts? (please only select one answer)

Yes

No

If yes, please specify the type of contract, give reasons for exemption and state the period required:

If you have any further comments to make, please do so below:

A large, empty rectangular box with a thin black border, intended for users to provide further comments or feedback. The box occupies most of the page's vertical space below the instruction.

Thank you for taking the time to complete this response form.

By completing this survey, you are agreeing to the collection and use of any personal information sent to the Isle of Man Government in accordance with our privacy statement. Personal data that you provide to us will be processed in accordance with the Data Protection Act 2002 of the Isle of Man and will be kept no longer than is necessary.

**Office of Fair Trading, Government Building, Lord Street,
Douglas, Isle of Man, IM1 1LE**

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