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Consumer Bill Team
Consumer & Competition Policy
Department of Business, Innovation & Skills
1 Victoria Street
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23 July 2013

By email: ConsumerBill@Bis.gsi.gov.uk

Dear Sir/Madam

Re: Consumer Rights Bill – Application to Price Escalation Clauses

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This letter has been prepared by the Commercial Law Committee (the "Committee") and is in respect of the proposed Consumer Rights Bill ("the Bill").

Jonathan Bartley, a Partner at Manches LLP and a Committee member, noticed an issue in connection with price escalation clauses under the Bill and drew it to the attention of my colleagues on the Committee, who agreed that we should notify BIS.

The relevant issue relates to the unfair terms provisions where there appears to be a potential conflict in terms of how the Bill addresses price escalation clauses in on-going services contracts. Whilst it seems clear that price indexation clauses will not be assessable for fairness provided that the method by which prices vary is explicitly described and the provision is transparent and prominent, the position in relation to price escalation clauses (even if they are transparent and prominent) is rendered uncertain by the re-structuring of the grey list.

Price Indexation Clauses

In relation to price indexation clauses (i.e. where prices are increased by reference to an external index such as RPI), the position appears clear. Provided the method by which the price will vary is explicitly described in the contract term, the clause will be an exception to schedule 2¹. As a price-related term, it should therefore be exempt from the assessment of fairness provided that the term is drafted in a transparent and prominent way².

Price Escalation Clauses

Price escalation terms fall within the scope of a number of the potentially unfair terms contained in Part 1 of Schedule 2 (the grey list). These include paragraph 11 (right to alter terms unilaterally without a valid reason specified in the contract), paragraph 14 (right to determine the price payable after the consumer is bound) and paragraph 15 (right to increase the price without giving the consumer a right to cancel).

In relation to paragraphs 11 and 15, a supplier should be able to ensure that his term is not assessable for fairness (assuming the term is transparent and prominent) by including in the contract an obligation to provide the consumer with reasonable notice of a price variation and a right for the consumer to terminate the contract in response to the price increase. In relation to paragraph 11, this would invoke the exception in paragraph 24, and in relation to paragraph 15 the inclusion of a right to cancel would take the provision out of the grey list altogether.

The problem is therefore with paragraph 14, the scope of which would include price escalation clauses, but in relation to which there is no exception in Part 2. Given that grey list terms are always assessable for fairness, irrespective of how transparent or prominent they are³, this suggests that all price escalation clauses will be assessable for fairness. However, given the position taken in relation to paragraphs 11 and 15, we assume that this is not the intention.

The problem appears to have arisen from the restructuring and amending of Paragraph 14 which, under the 1999 Regulations, does not include price escalation clauses within its scope.

Law Commission Report

In its March 2013 Report to BIS on unfair terms, the Law Commission acknowledged the "complexity" of the inter-play between the grey list and its exceptions⁴. We note the Law Commission's view that price escalation clauses should not be exempted from a fairness assessment⁵ and should be treated differently from price indexation clauses⁶. However, we do not feel that the call from the Law Commission to clarify the "possible confusion on this issue"⁷ has been adequately addressed by the Bill.

¹ Paragraph 26, Part 2 of Schedule 2.

² Section 66(2) and Section 67(1) and (2).

³ Section 67(7).

⁴ Paragraph 5.62.

⁵ Paragraph 5.10.

⁶ Paragraph 5.27.

⁷ Paragraph 5.28.

The change to Paragraph 14 arises from the Law Commission's recommendation⁸ and, although from their report it appears that the intention is to catch initial price setting rather than price escalation clauses, the scope of the paragraph is wide enough to include price variation clauses. This interpretation is reinforced by the fact that price indexation clauses have been specifically exempted from Paragraph 14. We also note that some respondents to the Law Commission considered the proposal for Paragraph 14 in the context of price variation for long term contracts.⁹

Conclusion

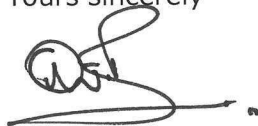
If our interpretation of these provisions is correct, there is a real risk of uncertainty for suppliers of ongoing services. On the one hand the Bill suggests that price escalation clauses will not be assessable for fairness provided they are transparent and prominent and provide a right to cancel (paragraphs 11 and 15), and on the other hand it suggests that they will always be assessable for fairness (paragraph 14).

We wonder whether the potential confusion could be resolved by amending the second paragraph of Paragraph 14 as follows: "This is subject to Paragraph 24 (contracts which last indefinitely), Paragraph 25 (contracts for sale of securities, foreign currency etc) and Paragraph 26 (price index clauses)".

Paragraph 24 of Schedule 2 would also need to be amended to cross refer to Paragraph 14.

We hope that the above observations are helpful to your on-going review and consideration of the Bill, and we would be very happy to discuss the above thoughts if that would be useful.

Yours sincerely



Oliver Bray

Chair, Commercial Law Committee

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⁸ Paragraph 8.18 of Part 8.

⁹ Paragraph 5.96.

**THE CITY OF LONDON LAW SOCIETY
COMMERCIAL LAW COMMITTEE**

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