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

The Institute of Legal Executives

The Institute of Legal Executives (ILEX) is the professional and leadership body representing Legal Executive lawyers and has a membership of 22,000 students and practitioners.

Alongside Barristers and Solicitors, Legal Executive lawyers are recognised under the Legal Services Act 2007 as qualified lawyers. Recent developments also mean that Legal Executive lawyers are eligible for prescribed judicial appointments, including eligibility as first tier judges of tribunals.

Moreover, Government legislation has recognised Legal Executive lawyers' significance in the legal system and has given them the right to run their own businesses in partnership with other lawyers and in future with other commercial legal services providers.

Legal Executives lawyers are able to undertake many of the legal activities that solicitors do. They will have their own caseload and can represent clients in court where necessary.

Legal Executive lawyers must adhere to a code of conduct and, like solicitors, are required to continue training throughout their careers in order to keep themselves abreast of the latest developments in the law.

ILEX provides policy responses to Government consultations in order to represent its members and the public interest.

Consultation Response

1. This response represents the views of ILEX as an Approved Regulator under the Legal Services Act 2007 (the 2007 Act hereinafter).

Executive Summary

2. The proposed European Consumer Directive must balance the highest level of consumer protection with the businesses' need for legal certainty in an open market.

3. ILEX is not convinced that the Commission's intention of full harmonisation of the relevant unfair contract terms provisions is the best way to maintain the highest protection for UK consumers. Full harmonisation of these cross-border rights means that some EU countries, including the UK may have to adjust some national rules that go further than the proposal. Moreover, ILEX is of the view that that full harmonisation makes consumer protection inflexible and curtails the national legislators' ability to react quickly and appropriately to new market developments. However, ILEX does not object in principle to the consolidation of the current law (Directives) into one Consumer Directive.

4. ILEX agrees with the Government's view that the proposed wording of *Article 32 (3*) does not add anything to the present wording of *regulation 6 (2) of The Unfair Terms in Consumer Contracts Regulations 1999 (Hereinafter ''UTCCRs''*). We also agree that the proposed wording in its present form would not permit determination of a substantially wider range of terms.

5. It would be, for example, in the consumer interest for the courts to have a wider power conferred on them to be able to assess the fairness or otherwise of charges, which from the consumer perspective, do not form part of the ''essential bargain'' between the business and the consumer.

6. Subject to the above, we address the issues in the order that they are raised in the consultation.

Question 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?

7. Charges that may be less recognisable or not wholly transparent to the consumer would not be subject to free market conditions that ordinarily reflect competitive pressures. In view of this, ILEX agrees with the Government premise as outlined in Question 1 above.

8. For example, the headline price would be what consumers look at when deciding whether or not to pay for services or goods and this would be driven by competition. Anything other than that which may not be reasonably foreseeable should be fair, transparent and proportionate. Notwithstanding this, however, ILEX is concerned that greater transparency may not offer a complete solution in this area.

Question 2

Should any exclusion form the price exception 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 contact – and or**

- **charges that are not transparent to the consumer for the reasons going beyond the clarity of the language used, for instance in terms of presentation; or all three above?**

9. In the interest of consumers, all of the above should be subject to fairness and thus be excluded from the exemption provisions, particularly the non transparent charges or those not reasonably foreseeable to a consumer when entering into a contract.

Question 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?

10. The terms need to be better defined. An example is the term ‘’contingent’’: you can, of course, have contingent terms which form part of the core terms of a contract, or part of the "bargain" that is perfectly normal and usual.

11. However, it is the nature of those contingent terms which is the important issue. As ILEX understands, the Supreme Court decision focussed on really narrow issues and the case was decided on its particular facts and did not lay down any clear guidelines between excempt and non-exempt price terms. ILEX would like to see the Government take this opportunity to review the core terms being used in UTCCRs with a view to providing better clarity.

12. Australian law has gone some way in resolving the problem in respect of what it calls ‘’upfront price’’ which is exempt from the contingent and unfairness issues in Section 5 of the Trade Practices Amendment (Australian Consumer Law) Act No. 1 2009 (the ‘’Australian Act 2009’’) by defining upfront as follows:

‘’5 Terms that define main subject matter of consumer contracts etc. 22 are unaffected

(1) Section 2 does not apply to a term of a consumer contract to the 24 extent that, but only to the extent that, the term:

(a) defines the main subject matter of the contract; or

(b) sets the upfront price payable under the contract; or

(c) is a term required, or expressly permitted, by a law of the 28 Commonwealth or a State or Territory.

13. The ***upfront price*** payable under a consumer contract is the consideration that:

(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event’’.

14. ILEX feels that there is clarity in the Australian model.

Question 4

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

15. As pointed out above, it is striking the right balance between consumer protection and businesses’ need for legal certainty dictated by market forces.

16. However, if the market forces have little impact in the sense of not being subjected to competitive pressures, ILEX can see no reason why the terms should not be assessable even where they are at the forefront of a consumer’s mind. For example, it does not prevent the terms being

excessive or unfair. As such, it would be in consumer interest for the courts to have a wider power conferred on them to be able to assess the fairness or otherwise of charges, which from the consumer perspective, do not form part of the ‘’essential bargain’’ between the business and the consumer.

17. That said, ILEX believes that there must be an element of discretion having regard to all the circumstances of a case. They must be suitably flexible, but examples of the terms that are assessable would be beneficial for consumers businesses, an indeed the courts. This would adopt the Australian model in the *Australian Act 2009 Section 5* which uses example of unfair terms.

Question 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 consumer and trader? Would further conditions need to be applied?

18. For this to work ILEX believes it is essential to examine what is meant from the ‘‘consumer's perspective’’. Would it be a reasonable consumer adding an element of objectivity to the assessment? Or a subjective test? The former would not take into account vulnerable consumers, while the latter would take into account vulnerability, lack of English or mental illness. ILEX is of the view that vulnerable clients would need greater protection from such terms.

Question 6 and 7

19. ILEX believes that some of the areas of concern are as follows:

- A common area is where hidden charges come to light is in shipping in respect of internet. Sellers sometimes reduce their prices well below those of the competition, but then add back costs for shipping that are well in excess of their expenses.

- The escalating fees seemingly charged at random by letting agents defy the law of economics. The terms ‘’justifying’’ the fee are as creative as terms.

- Budget Airlines – The ancillary charges seen to defy the law of economics. It is all too common for passengers to complain about hidden charges or so called ‘’added extras’’ when booking a flight via the budget airlines. For example, consumers pay more just to pay. ILEX understands that one airline uses a premium line number for passenger enquires. These contingent charges should be susceptible to principles of fairness. The consumer appears to be at the mercy of budget airlines in term of the extra charges with little or no equality of bargaining power.

Question 8 and 9

20. No Comment.