Terms & Conditions and Consumer Protection Fining Powers – Call for Evidence

ICAEW welcomes the opportunity to comment on the *Terms & Conditions and Consumer Protection Fining Powers – Call for Evidence* published by Department for Business Innovation & Skills on 1 March a copy of which is available from this link.

This ICAEW response of 3 May 2016 reflects consultation with the Business Law Committee. The Business Law Committee includes representatives from public practice and the business community and is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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Summary

1. We agree that the terms and conditions (T&Cs) underlying many consumer contracts can be over long, and drafted in terms that it is difficult for consumers to understand. Further, they are often accepted by consumers without having actually read them. We therefore support the current evidence gathering exercise being carried out by the Department for Business Innovations and Skills and would also support any non-mandatory action that could be taken by them, to encourage private sector entities to make their terms and conditions more accessible by consumers.

2. We would, however, consider mandatory action to force private sector entities to simplify their T&Cs either through regulation or legislation to be inappropriate. Such action would be unnecessary; difficult to implement with consistency and fairness; and inconsistent with the Government's stated policy of reducing burdens on business. A more appropriate way forward would be through continued work with those sectors where T&Cs are particularly obscure and encouraging existing means for consumers to ensure that they get the best value in purchasing decisions through the use, for example, of comparison sites and quality marks. The increased opportunities for consumers to draw attention through blogs and other electronic means have also recently drawn attention to some particularly undesirable T&Cs, with consequent change, again through non-mandatory means.

3. The introduction of mandatory requirements has the following specific additional disadvantages:

    - externally imposed (regulatory or legal) requirements are considerably more onerous than the same procedures carried out as a matter of good practice, due to the need to double check compliance and be able to demonstrate compliance;

    - duplicated obligations are particularly onerous and necessary – as will be the case for any entities that are already regulated for integrity and treating clients fairly, including solicitors, accountants and regulated financial services;

    - provisions that at first sight seem intuitively obvious and simple (like having T&Cs which are 'succinct, bold and upfront') tend to be the ones most difficult to implement and most likely to have unintended consequences.

Making T&Cs more user friendly

4. To the extent that BIS is simply seeking to explore ways to help businesses simplify T&Cs for the common good of businesses and consumers, we support that objective. There are various ways that this might be done, for instance by BIS holding roundtables to enable business to share good (and bad) practice, publication of guidance, perhaps with particular clauses as models that businesses may wish to adopt or avoid, hosting blogs or comparisons websites on specific clauses or even running a competition for 'T&Cs' of the year. Government might also lead the way by ensuring that its T&Cs (whether or not with consumers) always meet the criteria it wishes private businesses to adopt.

5. However, these sorts of initiative will clearly have limited and gradual impact and will not eliminate what might be considered to be 'bad' practice. Indeed, if good contractual practices lead in the long term to increased reputation and business success, there may be some reluctance within business to permit proprietorial material or confidential know how to be shared. Government may, therefore, consider that further regulation is required and this would be of concern.

6. While we would normally support specific regulatory changes demonstrated to be necessary and proportionate from reliable evidence provided, the Call for Evidence itself does not make a good case for further regulation and we doubt that answers to the questions raised would in themselves be sufficient to do so. If Government is contemplating further regulation in this area, we would, therefore urge that further consultation is undertaken first, supported by a considered and substantiated analysis, possibly with input from the Law Commission. In this context we would note, in particular:

    - The Government has committed to cutting red tape; the hurdle for introducing new regulation should, therefore be high.

    - We understand that Government seeks to avoid 'gold plating' EU directives. If the directives in this area are not concerned with boiler plate T&Cs, then it is unclear why the UK government should be concerned.

    - There is a high risk that new regulation in this area would be lengthy and prescriptive, given that there is already a general obligation regarding fairness. For instance, many might accept that, in an everyday non-legal sense, terms should be 'succinct, bold and upfront', but putting that into terminology suitable for regulation would be a challenge and lead to many questions, particularly as not all terms could possibly be 'upfront' and boldness loses its impact if overused. Similarly any suggestion as to limiting length of terms could lead to prescription of font size or even number of words. It is difficult to see how this would promote the sort of innovative environment for business that the UK aspires to.

    - There is a high risk of unintended consequences. For instance, the prescribed forms might not reflect the priorities of any given business and rather than promoting more imaginative use of terms and conditions, regulation might promote a box ticking culture. There is no shortage of examples of regulation and standard setting having this sort of effect.

7. As noted in the Call for Evidence, some terms and conditions are required by law or regulation or are included primarily as a result of the legal and regulatory environment in which business operates. An obvious example would be provisions relating to consumer credit where particular provisions are specified by law and data protection (including disclosures required on transfer overseas). Less obviously, the fear of being caught by regulatory requirements may lead businesses to including warnings or disclaimers that they might not otherwise include were a different regulatory approach to be adopted (for instance, that nothing in a relationship will require the provider to provide advice that might constitute regulated financial services advice). Similarly, the 'jargon' sometimes found in terms and conditions simply reflects regulatory or legal terminology. We would like to see any lessons learned from this exercise applied to legislative and regulatory drafting, because the themes raised - undue length, complexity and general incomprehensibility – are much the same. In particular, if businesses are to be encouraged to track changes to terms and conditions over time, the Government should most certainly lead the way by first producing on-line legislation that shows in the text prospective changes and links to all other relevant legislation so that citizens have easy access to the law of the land (even if it will remain incomprehensible to many).

8. Many sectors are already subject to requirements on terms and conditions. For instance professional bodies such as ICAEW have relevant standards of professional conduct and ethics and those engaged in regulated sectors such as financial services providers are subject to FCA requirements, for instance to treat customers fairly (or very prescriptive requirements on the contents of customer agreements) Any initiatives pursued by BIS on this issue will need to take due account of this to avoid imposing conflicting requirements or expectations or interfering with regimes that have, in fact, proved to be effective. For example, we have recommended that our members include provisions to deal with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 to ensure compliance,

even though the circumstances in which they could be relevant only rarely arise in practice nor would the remedies provided be helpful to clients. We would not like to see further generalised requirements for T&Cs similarly being imposed on the specialised professional services provided by our members.

9. The above comments are not intended to suggest that the issue does not merit further consideration. Like the Minister for State, the author of this representation and those consulted on it, have all had personal experience of accepting terms and conditions without reading them, clicking the wrong data protection box in error due to what can only be deliberate obfuscation on the part of the supplier. We would add to the list of frustrations the proliferation of multi-lingual documentation (such as instructions for printers or pharmaceuticals or guarantees). Why are we provided with foreign language terms that most of us could not read even if we wanted to in modern times where on-line translators would probably suffice? It is scarcely environmentally friendly. In general, however, this has not resulted in any great harm and we have some faith in the market reacting over time to consumer preference on some of the issues and believe that consumers have themselves to take some responsibility for their action (or inaction), which leads us to believe that this issued should be considered in a measured way as noted above.

Fining powers

10. Our concerns noted above about the risks of regulating further in this area apply similarly to imposing new sanctions for breach of existing regulations, in particular, we would expect to see concrete evidence that breaches are material in volume (compared to the stated 200 million transactions per week) and in harm caused. If there is widespread breach without substantial harm resulting, the Government might better consider repealing legislation than imposing sanctions merely to increase compliance. Concerns about overlap with bodies (such as ICAEW) which already have powers of enforcement would need to be considered.