



Bar Council response to the Terms and Conditions and Consumer Protection Fining Powers consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Business, Innovation and Skills consultation paper entitled Terms and Conditions and Consumer Protection Fining Powers.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to respond at an early stage to the proposed developments in this area. As this document is primarily a call for evidence from businesses and consumers, upon which we cannot offer assistance, we consider that it is appropriate to respond in narrative form on the issue of 'consumer protection enforcement and fines'. We recognise that these proposals are in a development stage and that further consultation is likely in due course, to which we will respond in greater detail, but we hope that it will be helpful for our views on the area to be set out in outline at this stage.
5. We consider that there may be a rationale for the imposition of civil monetary penalties in situations where a business has caused widespread detriment to consumers by the use of unfair terms. However, we wonder whether sufficient consideration has been given to the impact on businesses of the existing consumer protection provisions which

¹ Business, Innovation and Skills (2016) [Terms and Conditions and Consumer Protection Fining Powers](#)

apply. For example, whilst it is correct to say that existing civil enforcement measures (such as an injunction under Part 2 of the CRA) do not have any explicit punitive or retroactive impact, the implications for a business which uses the same terms in a standard form contract will in practice be very significant, since all such terms will be thereby rendered unenforceable against consumers.

6. The greatest barrier to effective enforcement, in our experience, is the difficulty of application of the test of unfairness – the two leading cases on unfair terms in consumer contracts² demonstrate the scope for disagreement amongst regulators, businesses and even the appellate courts in this area. If many different enforcement agencies were to have the power to impose penalties there would be a considerable risk of inconsistent approaches being taken.

7. It is for these reasons that our preliminary view is that any power to impose civil monetary penalties should be:

- i. restricted to applications by the CMA (and potentially other national regulators);
- ii. apply only where there is serious consumer detriment; and
- iii. available only by reference to the Court.

8. The civil monetary penalties would therefore only be imposed by the civil courts which are currently responsible for determining unfairness, rather than leaving this to be determined by the relevant regulator. For the same reason we consider that the best jurisdiction would be as an adjunct to Part 8 of the Enterprise Act 2002. If, contrary to our principle contention powers are to be vested in the relevant regulator then there should be a right of appeal to the Court against any order made.

Bar Council
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For further information please contact
Sarah Richardson, Head of Policy, Regulatory Matters and Law Reform
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 0207 611 1316
Email: SRichardson@barcouncil.org.uk

² *Director General of Fair Trading v First National Bank* [2001] UKHL 52; *Office of Fair Trading v Abbey National plc* [2009] UKSC 6.