Annex B: Expert legal review of home and travel insurance policies

1. Which? commissioned a detailed review by an expert external barrister to examine the policy booklets and Insurance Product Information Documents ('IPIDs') of five home insurance and four travel insurance providers.

2. Where available, additional materials were also examined, including Financial Ombudsman Service ('FOS') decisions, sample policy schedules, renewal terms and general terms of business.

3. Which? chose its sample of insurers for legal analysis based on a number of key factors, including: significant market share, average or lower-than-average claim acceptance rates, and a large number of reported problems with complaints and claims handling.

B1 Summary findings

4. Five home insurance and four travel insurance providers were assessed. In summary, the external legal analysis found:

- With the disclaimer that terms may not in fact always be applied strictly, various terms examined improperly derogate from regulatory and statutory materials offering key protections and rights for consumers.
- Some of the terms were, in practice, likely to operate harshly or unexpectedly against consumers' interests.

5. In addition, there were three main themes which appeared repeatedly from the documentation reviewed:

- Deviation from statutory and regulatory requirements for the protection of consumers in the insurance market.
- Lack of transparency and/or clarity as to terms and exclusions.
- Use of unfair terms under Part 2 of the Consumer Rights Act 2015 ('CRA').

B2 Deviation from statutory and regulatory provisions

6. A number of statutory and regulatory provisions were potentially relevant to each of the providers considered. As explained further below, all of the providers' documentation purports to deviate from those provisions to some extent.

7. Non-compliance with, or deviation from, rules of the FCA Handbook may have both private law and regulatory consequences for providers. As regards any individual customer, it may render the provider liable for damages for breach of statutory duty under Section 138D Financial Services and Markets Act 2000 ('FSMA'). Non-compliance with FCA rules and guidance is also relevant to the FCA's on-going assessment of a provider as a 'fit and proper person' having regard to threshold condition 5 ('Suitability') and the matters in paragraph 2E of Schedule 6 to FSMA.

8. In particular, whether a provider's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers…' (paragraph 2E(c)) and whether it 'has complied and is complying with the requirements imposed by the FCA in the exercise of its functions… and… the manner of that compliance' (paragraph 2E(d)).

9. In other cases, however, the relevant statute expressly prohibits 'contracting-out'. Thus, any term which is, in effect, inconsistent with the position mandated by the statute will be void to that effect. As described further below, that is the position in relation to consumers' duties of disclosure and insurers' consequential remedies under the Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA').

10. Which?'s review identified three main areas of potential derogation from mandatory regulatory and statutory obligations: (i) cancellation rights, (ii) claims-handling obligations, and (iii) disclosure obligations.

B2.1 Cancellation rights

B2.1.1 The law

11. Sections 6.2 and 7 of the FCA's Insurance Conduct of Business Sourcebook ('ICOBS') govern customers' cancellation rights and what they must be told about them.

12. A consumer 'has a right to cancel, without penalty and without giving any reason' within 14 days of any general contract of insurance or distance contract (ICOBS 7.1.1R). The relevant 14-day period begins either on 'the day of the conclusion of the contract' or, if later, 'the day on which the consumer receives the contractual terms and conditions and any other pre-contractual information required…' (ICOBS 7.1.5R).

13. A consumer is deemed to have exercised his/her right if written notice of cancellation 'is dispatched before the deadline expires' (ICOBS 7.1.6R). Thus, if the notice is sent on day 13 but does not reach the firm until day 15, the right will still have been validly exercised in the 14-day period.

14. Of particular importance is that in the event of cancellation a consumer 'may only be required to pay… for the service provided by the firm in accordance with the contract' (ICOBS 7.2.2R(1)). Such amount 'must not… exceed an amount which is in proportion to the extent of the service already provided' and/or which 'could be construed as a penalty' (ICOBS 7.2.2R(2)). Thus, if the contract is for six months and the consumer cancels after 14 days, they can be made to pay only one twelfth of the total premium.

15. In any event a consumer should not be required to pay any amount unless the firm 'duly informed' the consumer of it and/or the contract 'commenced… before the expiry of the of the cancellation period' at the consumer's request (ICOBS 7.2.2R(3)). The amount payable may include sums the firm has 'reasonably incurred in concluding the contract, but should not include any element of profit', 'an amount for cover provided' and/or certain commissions and fees paid to or charged by insurance intermediaries (ICOBS 7.2.3G).

16. Rules also apply to what information on those rights must be provided to consumers and how and when firms are to do so. The information to be given is (ICOBS 6.2.5R(2)(a)-(f)):

(i) the existence and duration of the cancellation right;
(ii) conditions for exercising it;
(iii) information on the amount he 'may be required to pay if he exercises it';
(iv) the 'consequences of not exercising it'; and
(v) 'practical instructions for exercising it'.

Each of those matters 'must be provided in good time before conclusion of the contract and in writing or another durable medium' (ICOBS 6.2.5R(3)).

B2.2 Analysis

17. The majority of the policies reviewed include terms which do not appear to correctly reflect the requirements of ICOBS 7.1 and 7.2. For example:

- In some instances, the terms require the customer to pay fixed-sum 'administration' charges in order to cancel, whereas ICOBS 7.1.1R requires consumers to be given the right to cancel 'without penalty' (ie without negative financial consequences)
- In some policies, contrary to ICOBS 7.6.1R, the 14-day cancellation period is wrongly applied by reference to the date on which the notice of cancellation is received by the provider. That means consumers will not be afforded their full 14-day cancellation period. On policies where the consumer is not entitled to any premium refund outside the 14 days, such an approach will have a significant adverse financial impact.
- Other policies suggest that the consumer is only entitled a premium refund within the 14 days if they have not yet made use of the policy. For example, by taking a trip on a travel insurance policy or making a claim. That is contrary to ICOBS 7.2 which makes clear that use of the policy during the 14-day period should be reflected by a discount to the refund 'in proportion to the extent of the service already provided'. The conclusion of our review is that any other approach would properly be 'construed as a penalty' for the purposes of ICOBS 7.2.2R(2).

18. To the extent that providers are giving misinformation we consider it unlikely that they can be properly communicating information on 'the right to cancel' (being that provided for by ICOBS 7.1.1R) pursuant to ICOBS 6.2.5R.

19. The cancellation provisions in ICOB 7 are straightforward. A systemic inability by one or more providers to properly embed them into policy terms suggests a failure to conduct business with 'due skill, care and diligence' under Principle 4, as well as a failure to 'deliver good outcomes for retail customers' under Principle 12.

B2.3 Claims handling

B2.3.1 The law

20. Some of the policy documents reviewed include terms permitting providers to handle claims in a manner inconsistent with the requirements of the Insurance Act 2015 ('IA') and/or ICOBS 8.

21. S.11 IA restricts an insurer's ability to 'exclude, limit or discharge' liability for losses on the basis of the insured's non-compliance with a contract term tending to 'reduce the risk of' loss of 'a particular kind', 'at a particular location' or 'at a particular time' (Section 11(1)). It may not do so if the insured can show that his/her non-compliance 'could not have increased the risk of the loss which actually occurred' (Section 11(3)). The Explanatory Notes to the IA give the example of a claim in respect of a property damaged by flooding. In such a case 'it is expected that an insured could show that a failure to use the required type of lock on a window could not have increased the risk of that loss. In this case the insurer should pay out on the flood claim' (paragraph 95).

22. Thus, s.11 'removes the automatic right of an insurer to rely upon a condition precedent where the condition relates to a risk and there is no link between the purpose of the condition and the loss'.[1]

23. ICOBS 8 deals with general claims-handling obligations. Amongst other matters it requires insurers to 'handle claims promptly and fairly' and to 'not unreasonably reject a claim (including by terminating or avoiding a policy)' (ICOBS 8.1.1R(1) & (3)). Those broad requirements would include failures to comply with both s.11 IA and the requirements of CIDRA (ICOBS 8.1.2AG & 8.1.3R).

24. The rules of ICOBS 8.1 necessarily inform the potential fairness (or unfairness) of related contract terms. Our review gives the example of a term which purports to allow the provider to reject a claim upon discovery of a non-qualifying misrepresentation and so necessarily seeks to permit the unreasonable rejection of a claim. Such a term is, therefore, also very likely to be considered unfair under the CRA, as well as being void to that extent under s.10 of CIDRA.

B2.4 Analysis

25. We gathered anecdotal evidence as to how, in practice, providers apply their terms during the claims process. This supports concerns flagged by our external review as to whether claims are likely to be handled in compliance with Section 11 IA and/or fairly and reasonably as required by ICOBS 8.1.1R. In particular:

- Terms which suggest that a failure to adhere to a particular requirement entitles the insurer to refuse all claims, whether or not related to the failure. For example, one of the travel policy documents considered within this review permits the provider to refuse a claim on the basis of non-disclosure of a pre-existing medical condition

[1] *Lonham Group Ltd v Scotbeef Ltd* [2025] EWCA Civ 203, at [63].

'even if a claim is not related to' such non-disclosure. Thus, a consumer's failure to disclose high blood pressure could be used to refuse a claim for a stolen laptop. There are also other more subtle examples. For example, one home policy implicitly permits the provider to reduce the amount payable on a claim if the insured buildings were not 'in a good state of repair' whether or not that is relevant to the claim. Such terms are plainly contrary to s.11A of the IA.

- Terms requiring consumers to provide very extensive or highly specific evidence of losses. Our review suggests that these types of 'unreasonable proof' clauses are particularly prevalent in the travel insurance sector. For example, one policy reviewed requires written evidence from 'the Highways Agency' as to the 'length… and reason for' any traffic congestion, and (ii) an 'appropriate authority' of 'when and the length' of a customer hijacking on a trip within scope. As to each:

    i. The reference to the Highways Agency is unclear and misleading since it no longer exists. Moreover, it is not clear that it would be willing or able to provide the requisite written evidence to policyholders. In any event, as a purely domestic agency, it could not assist with traffic congestion outside the UK.

    ii. Our review considered that the evidence required for hijacking claims is particularly problematic. It is reasonable to suppose that anyone who has suffered such an incident is likely to be vulnerable, the experience having been a traumatic one. In those circumstances the type and level of proof required to process the claim is very probably unreasonable. In any event, no detail is provided as to what constitutes an 'appropriate authority' and/or how any dispute in that regard is to be resolved.

- Further, almost all the home policies include definitions of 'storm' and 'flood' which are likely to make it difficult for consumers to establish that damage has been suffered in consequence of the specifically prescribed conditions. For example, they apply the highly specific definition of 'storm' used by the Association of British Insurers or go further still, eg hailstones which 'exceed 20mm in diameter'. Read literally, the strict application of those definitions would entitle the providers to reject a claim on the basis that the consumer cannot evidence, for example, the diameter of the hailstones which caused damage. The result is a contractual justification for the possible rejection of a large number of legitimate and meritorious claims. To that end, we note the concerns flagged by the FCA in the 2025 claims-handling Report that some firms 'didn't show they had an appropriate basis when considering whether to accept or reject claims'. These concerns are also apparent from FOS decisions which uphold complaints arising from rejected storm claims.

- Terms which give the provider a discretion to offer a cash settlement in lieu of arranging for the repair or replacement of damaged or lost goods. In particular, several of those reviewed give an apparently unfettered discretion: they do not set out any factors which may be used to make a determination one way or the other, nor do they offer the consumer any right of challenge to such a decision. Moreover, cash settlements by insurers can often lead to poor outcomes for the insured party. As noted in the 2025 FCA claims-handling report, the use of cash settlements 'may not

result in good customer outcomes in complex and higher value claims' and 'is of particular concern where the customer may be vulnerable'. It may result in the consumer receiving a pay-out from their claim which is insufficient to cover their loss since cash settlements can be set according to 'discounted rates from a firm's suppliers and contractors that will not be available to customers'. We therefore consider that a provider's apparently unfettered right to offer a cash settlement risks unfairness in the claims-handling process.

26. Our review concluded that many of the terms touching upon claims-handling appear to be formulated largely to suit the convenience of the provider. Again, the result is likely to be a failure to adhere to Principle 12 to 'deliver good outcomes for retail customers'. Further, Principle 9 may be also relevant: 'A firm must take reasonable care to ensure the suitability of its… discretionary decisions for any customer who is entitled to rely upon its judgment'.

B2.5 Disclosure obligations

B2.5.1 The law

27. CIDRA modifies the usual obligation on an insured of utmost good faith in respect of consumer insurance contracts (see Section 2(5)). Its purpose 'is to reset the balance between fairness in the insurance industry, with overly technical, historical and potentially harsh rules that had far outlived their usefulness'.[2]

28. Instead, CIDRA imposes on consumers an obligation 'to take reasonable care not to make a misrepresentation to the insurer' (Section 2(2)). That includes a failure 'to comply with the insurer's request to confirm or amend particulars previously given' (Section 2(3)), i.e. to update any material details either in the day-to-day operation of the policy or in the event of renewal/variation. What constitutes 'reasonable care' for that purpose 'is to be determined in the light of all the relevant circumstances' (Section 3(1)).

29. Schedule 1 to CIDRA sets out the remedies available to an insurer where a consumer fails in his or her duty of 'reasonable care' under Section 2(2). However, such remedies are available to an insurer only in respect of a so-called 'qualifying misrepresentation' being one where 'without the misrepresentation, the insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms' (Section 4(1)(b)).

30. In turn, a 'qualifying misrepresentation' can be either 'deliberate or reckless' or 'careless' as defined (Sections 5(1)-(3)).

31. The insurer bears the onus of proving: (i) that a misrepresentation has been made within the meaning of Section 2(2); (ii) that it was a 'qualifying misrepresentation' within the meaning of Section 4; and (iii) if so, whether it was 'deliberate or reckless' on the one hand, or merely 'careless'.

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[2] *Lonham Group Ltd v Scotbeef Ltd* [2025] EWCA Civ 203, at [36].

32. In broad terms, an insurer's remedy depends upon whether the qualifying misrepresentation was 'deliberate or reckless' or merely 'careless':

- If 'deliberate or reckless', the insurer may 'avoid the contract and refuse all claims' and 'need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them' (Schedule 1, paragraph 2).

- If merely 'careless':

    i. If the insurer would 'not have entered into the… contract on any terms', it 'may avoid the contract and refuse all claims, but must return the premiums paid' (Schedule 1, paragraph 5);

    ii. If the insurer would 'have entered into the… contract, but on different terms', then 'the contract is to be treated as if it had been entered into on those different terms if the insurer so requires' (Schedule 1, paragraph 6). It may give the consumer notice to that effect (Schedule 1, paragraph 9(4)(a)), in response to which the consumer 'may terminate the contract by giving reasonable notice to the insurer' (Schedule 1, paragraph 9(6)). Alternatively, the insurer may 'terminate the contract by giving reasonable notice to the consumer' (Schedule 1, paragraph 9(4)(b)).

    iii. If the insurer would have entered into the contract 'but would have charged a higher premium, the insurer may reduce proportionately[3] the amount to be paid on a claim' (Schedule 1, paragraph 7). It may give the consumer notice to that effect (Schedule 1, paragraph 9(4)(a)), in response to which the consumer 'may terminate the contract by giving reasonable notice to the insurer' (Schedule 1, paragraph 9(6)). Alternatively, the insurer may 'terminate the contract by giving reasonable notice to the consumer' (Schedule 1, paragraph 9(4)(b)).

- If either party exercises their right to terminate on reasonable notice, the 'insurer must refund any premiums paid for the terminated cover in respect of the balance of the contract term' (Schedule 1, paragraph 9(7)). Further, such termination 'does not affect the treatment of any claim arising under the contract in the period before termination' (Schedule 1, paragraph 9(8)).

- Crucially, contracting out is forbidden. Any term which puts the consumer in a 'worse position' than provided for by CIDRA in relation to 'disclosure and representations by the consumer to the insurer before the contract is entered into or varied' and/or 'remedies for qualifying misrepresentations' is 'to that extent of no effect' (Sections 10(1)-(2)). Thus, terms imposed by any of the providers which require customers to go beyond 'reasonable care' in providing material information and/or purporting to allow the provider remedies beyond those permitted by Schedule 1 would be unenforceable.

[3] By reference to the formula specified by Schedule 1, paragraph 8.

B2.6 Analysis

33. All of the policies address the requirements of CIDRA to some extent. However, our review concluded that several suffer from one or more of the following failings:

- They purport to impose on customers a standard of disclosure exceeding 'reasonable care'. For example, they refer to an absolute obligation to make disclosure of all material circumstances or suggest that any inaccuracies in information provided could have adverse consequences.

- They make no distinction between 'qualifying' and other misrepresentations. They therefore seek to permit the provider to avail itself of the statutory remedies, whether or not relevant to its decision to offer insurance and, if so, on what terms. For example, one of the home policies seeks to exclude claims where a mistake by the customer means 'we are no longer willing to cover you'. However, the question posed by s.4(1)(b) CIDRA is what the insurer would have done at the time of contracting had it known the truth, rather than its reaction to discovery of the true position. As currently framed, the term would permit the insurer wrongly to treat many misrepresentations as 'qualifying' when, as a matter of law, they are not.

- They purport to allow the provider remedies beyond those respectively allocated to 'deliberate or reckless' and 'careless' qualifying misrepresentations. For example, one home policy reserves a right to 'void the policy' if the consumer has provided 'any inaccurate information'. In fact, Schedule 1 to CIDRA would only justify such a step where the misrepresentation in question is a 'deliberate or reckless' 'qualifying' one.

34. In consequence such terms are likely to be, at least in part, 'of no effect' pursuant to Section 10(1) CIDRA. In practice the result may be that providers are seeking to enforce remedies against consumers for misrepresentations which do not properly entitle them to the same. Our review concluded that to be indicative of failures under Principles 4 and 12: to conduct business with 'due skill, care and diligence' and to 'act to deliver good outcomes for retail customers'.

B3 Lack of transparency

B3.1 The law

35. As in any consumer contract, transparency and fairness govern the providers' documentation and communications with customers. It is well-established that: '…terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position…'[4]

[4] *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481, at [17].

36. The key modern regulatory and legislative sources for requirements of transparency in this context are the PRIN and ICOBS sections of the FCA Handbook, s. 68 CRA, and s.230 of the Digital Markets, Competition and Consumers Act 2024 (‘DMCCA’).

B3.2 ICOBS 2 and 6

37. Two parts of the ICOBS rules are particularly relevant under this theme:

- ICOBS 2.2.2R requires a firm’s communications with its customers to be 'clear, fair and not misleading'. It imposes three distinct but related obligations: clarity, fairness and honesty. This necessarily engages questions of whether communications are in suitable language and whether they have been presented in a legible and user-friendly manner. Contractual terms which contain legal jargon, limitations buried in the small print and/or are ambiguously drafted may all fall foul of the obligation.

- ICOBS 6 ('Product Information') requires firms to give customers 'appropriate information about a policy in good time and in comprehensible form so that the customer can make an informed decision about the arrangements proposed' (ICOBS 6.1.5R). The obligation includes the provision of an IPID and applies at 'all different stages of a contract', including pre- and post-contract and in the event of renewal/variation (ICOBS 6.1.6G). Thus, both in terms of content and presentation, policy documentation must be easily comprehensible to customers. Our review was conducted taking into account that the consumer context means the vast majority of customers will not have studied the contractual materials in detail prior to committing to the policy. Rather, they are most likely to pay close attention to particular terms only in the event of having to make a claim. The IPID and any other summary material is therefore likely to be of particular significance in highlighting key terms and exclusions.

B3.3 PRIN 2A (Consumer Duty)

38. PRIN 2A.2 defines firms’ cross-cutting obligations, of which the first two are of particular importance:

- To 'act in good faith towards retail customers' (PRIN 2A.2.1R), being 'a standard of conduct characterised by honesty, fair and open dealing and acting consistently with the reasonable expectations of retail customers' (PRIN 2A.2.2R). Poor presentation of information and/or taking advantage of known vulnerabilities of retail customers in a manner likely to cause detriment are examples of breach of this cross-cutting obligation (PRIN 2A.2.3G(a) & (c)). So far as black-letter documentation is concerned, it covers both matters of form and substance. For example, failing to give adequate prominence to important exclusions and limitations of which consumers would reasonably expect due notice, is likely to be contrary to good faith.

- To 'avoid causing foreseeable harm to retail customers' (PRIN 2A.2.8R) by 'both act and omission' (PRIN 2A.2.9R). That includes 'ensuring all aspects of the… terms… of… its products avoid causing foreseeable harm' (PRIN 2A.2.10G(1)). Thus, for example, a term which potentially falls foul of a provider’s other primary statutory and

regulatory obligations to its customers is also likely to be one which contributes to the product as a whole causing foreseeable harm in breach of this obligation.

39. In addition, the substantive retail customer outcome on consumer understanding at PRIN 2A.5 is relevant. It applies to 'all communications throughout a firm's interactions with retail customers' (PRIN 2A.5.1R(1)(b)) and therefore covers all pre- and post-contractual written materials each provider supplies to their customers. In particular, firms must 'support retail customer understanding' by ensuring communications 'are likely to be understood by retail customers' and 'equip retail customers to make decisions that are effective, timely and properly informed' (PRIN 2A.5.3R(1)(a)-(c)). It also incorporates the broader 'clear, fair and not misleading' obligation considered above (PRIN 2A.5.3R(2)).

B3.4 Section 68 of the Consumer Rights Act 2015

40. The CRA imposes a broader obligation that any consumer term or notice be 'transparent' (s.68(1)), which requires it to be 'expressed in plain and intelligible language and… legible' (s.68(2)). It goes further than merely requiring terms to be 'formally and grammatically intelligible', instead requiring them to put the consumer ' in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from the term in question'.[5]

B3.5 Section 230 of the Digital Markets, Competition and Consumers Act 2024

41. Finally, Part 4 of the DMCCA includes within the concept of a 'commercial practice'[6] the omission of material information from an invitation to purchase unless 'already apparent from the context' (Section 230(1)). The relevant information is as prescribed by subsection (2) and includes 'the main characteristics of the product' (subsection (2)(a)) and 'the existence' of any 'right of withdrawal or cancellation' (subsection (2)(h)). Crucially, information is 'omitted' not only where it is not included at all, but also where it is provided 'in a way that is unclear or untimely' or 'in such a way that the consumer is unlikely to see it' (subsection (9)).

42. An 'invitation to purchase' is any 'commercial practice involving the provision of information to a consumer' which 'indicates the characteristics of a product and its price' and 'enables, or purports to enable, the consumer to decide whether to purchase the product or take another transactional decision in relation to [it]' (subs.(10)). Thus, information given by the providers in compliance with their ICOBS 6 obligations, including the IPID, would fall within the scope of Section 230 DMCCA.

B3.6 Analysis

43. Our review concluded that transparency concerns permeate all of the providers' documentation, both as a matter of substance and presentation.

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[5] *Kásler v OTP Jelzálogbank Zrt* (C-26/13) [2014] Bus LR 664, at [71] & [73].
[6] For example, for the purposes of s.225(1) DMCCA, which prohibits any unfair commercial practice.

B3.6.1 Substance

44. In many policy documents, terms themselves are drafted in unclear or misleading terms. The result is that customers may be unable to understand what the term in question means, how it might apply and the consequences which may flow from its application.

45. In some cases this is because the drafting is such that the meaning of the term cannot be easily understood. For example, one home policy defines 'Accidental damage' by reference to 'visible loss'. However, a loss is, by definition, the absence of something. As such it is conceptually difficult to understand what was intended by the phrase. Likewise, one travel policy includes an exclusion for claims relating to 'an unintentional accident'. Since accidents are necessarily unintentional, it is unclear what this is intended to mean (if anything).

46. In other cases terms are simply misleading. Most notable is a 'Suitability statement' which appears in one travel policy. It suggests that insurance 'suits customers…' but then goes on to say no 'recommendations or advice' have been given 'about whether this product meets your specific needs'. The heading and opening words are therefore apt to mislead consumers into believing that the policy is being offered as specifically suitable for them. At the very least, if read as a whole, it is likely to result in confusion as to the scope of the suitability assessment (if any) undertaken in relation to the policy.

47. Further, some of the documentation contains terms which simply lack key information to enable the customer to consider 'the economic consequences for him which derive from the term in question'. For example, one travel policy includes an exclusion for 'package holidays' if cancelled by the 'travel provider… due to a change in FCDO travel advice'. This may be intended to reflect the fact that consumers may, in those circumstances, obtain a refund of the price directly from the package provider under other legislation. However, that is very unlikely to be evident to a consumer reading the term. In fact, without that knowledge, it appears to conflict with the cover for cancellation of travel in compliance with advice of the '[FCDO] or other regulatory authority in a country which you are travelling to…' .

48. A term which is ambiguous and/or lacks key information required for a consumer to understand its consequences also raises potential Consumer Duty issues. A provider may be able to use such ambiguity to the disadvantage of its customer, thereby breaching the cross-cutting obligation to act in good faith. Likewise, a term which is not transparent because it does not permit the consumer to consider its economic consequences, would breach the retail customer outcome on consumer understanding. Our review concludes that both issues evidence non-compliance with Principle 12.

B3.6.2 Presentation

49. There are also numerous examples of particularly important exclusions or limitations which – although clear on their face – are buried in the small print. In those circumstances, unless the customer’s attention is elsewhere drawn specifically to their importance, it is unlikely that they will be either seen or understood. For example:

- Two home policies in particular confirm Home Emergency Cover as optional cover available only as an extra add-on. However, it is not addressed at all in their IPIDs, both of which omit Home Emergency Cover from the list of 'Optional Cover'. Unless clearly told otherwise, many householders may expect to be able to claim on their home insurance in the event of an emergency such as a burst pipe or broker boiler. Moreover, the nature of emergency cover is such that householders could suffer significant disadvantage in consequence. Thus, in our view a failure to prominently state that it is an optional extra is both a failure to communicate in a way that is clear and fair under ICOBS 2.2.2R and, in light of the IPID, a breach of Section 230 DMCCA.

- One travel policy includes a provision entitling the provider to limit or refuse claims in the event of any failure to declare a pre-existing medical condition 'even if a claim is not related' to such failure. Our review concluded that such exclusion is onerous and surprising. Fair, clear and transparent communication requires it to be explicitly stated in the IPID and/or more prominently set out in the policy itself. However, the IPID merely states: 'If medical conditions are not declared, the claim may be rejected'. In our view, that is unlikely to bring home to a consumer the full effect of the exclusion. The full term then appears only elsewhere in the policy.

- One travel policy includes significant health-related exclusions, which appear only in the middle of the policy documents. Moreover, they are not clearly explained in the IPID which state only in very general terms that 'We are unable to cover claims relating to existing medical conditions'. In our view, however, that statement is likely to be inadequate to communicate the true breadth of the exclusions and is apt to mislead as to material features of the policy.

50. These types of transparency issues arguably cause greater confusion and harm to consumers than the ‘substantial’ issues addressed above since they can mislead as to important features of the product.

B4 Unfair terms

B4.1 The law

51. An unfair contract term is not binding on the consumer (Section 62(1) CRA). Any term in a consumer contract is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer' (Section 62(4)).

52. The assessment is to be made taking account 'the nature of the subject matter of the contract', as well as 'all the circumstances existing when the term was agreed and to all other terms of the contract or of any other contract on which it depends' (Section 62(5)). However, insofar as a term is 'transparent and prominent' it may not be assessed for fairness to the extent that either 'it specifies the main subject matter of contract' or 'the assessment is of the appropriateness of the price payable under the contract by comparison with the… services provided under it' (Section 64(1)-(2)). A term will be 'transparent' if 'expressed in plain and intelligible language and… legible' (s.64(3)). It will be 'prominent' if 'brought to the

consumer's attention in such a way that an average consumer would be aware of [it]' (s.64(4)).

53. The assessment of unfairness is a two-stage process:[7]

- First, whether the term 'causes a significant imbalance' in rights and obligations. In turn, that 'depends mainly on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision…'
- Second, and in any event, whether the imbalance is 'contrary to the requirement of good faith' which depends upon whether the 'seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations…' Questions relevant at this stage may include the term's 'purpose and practical effect' and whether it is appropriate to secure the supplier's objectives but no more.

54. To that extent, the assessment of whether any given term in a provider's policy terms is fair or unfair will considerably overlap with the derogations and transparency issues addressed above. Indeed, insofar as the term derogates from mandatory legislation like CIDRA it will necessarily also be automatically unfair and, on either basis, unenforceable against the consumer.

B4.2 Analysis

55. On the basis of our review, very many of the above points would also justify a finding that the term(s) in question are unfair.

56. In particular, having regard to the indicative list of unfair terms at Schedule 2 to the CRA, those terms which derogate from other mandatory obligations on providers may be said to have the 'effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy' (paragraph 20). For example, cancellation provisions which misapply the 14 day period in ICOBS 7 and thereby entitle the provider to retain premiums paid very clearly create a significant imbalance in the parties' rights and obligations to the detriment of the consumer. On the question of good faith, it is improbable that a consumer would be willing to agree to a term which provides for a lesser cancellation right and a potentially significant financial penalty.

57. Likewise, terms limiting the right to claim on the home policies and specifying evidence needed to claim on travel policies put the consumer at a significant disadvantage. For example:

- In the home policies, the definition of 'storm' used by many providers enables them to refuse many such claims so as to create a significant imbalance between the parties' rights and obligations. Without a corresponding obligation on the provider to apply reasonable margins to (for example) wind speed where other factors justify it (eg the location of the property), it seems unlikely that a consumer would agree to such a specific definition.

[7] *ParkingEye Ltd v Beavis* [2016] AC 1172, at [105].

- The need for original receipts, proof of ownership and proof of usage for items covered on travel insurance imposes a significant burden on consumers and third-parties. By contrast, a lack of appropriate evidence would be an easy discretionary basis for a provider to reject a claim. In our view, there are good arguments that such requirements therefore create a 'significant imbalance… to the detriment of the consumer'. As to good faith, while it is obviously necessary for consumers to prove the legitimacy of any claim, again it would be appropriate for providers to agree to a corresponding commitment to take a reasonable approach to such evidence.

58. In both cases, the effect of terms as presently drafted in several of the policies is to curtail the overall value offered by it. Even if coverage exists in theory, the terms restrict the practical utility of such cover either because exclusions apply or the consumer is unlikely to be able to gather the required evidence to successfully make a claim.