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*From The Minister of State for
Trade, Investment and Foreign Affairs*

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De Lord Eassie,

I am now able to respond to the Law Commissions' Report on Unfair Terms in Contracts (published 24 February 2005).

This project was undertaken by the Commissions at the request of both the Department of Trade and Industry (DTI) and the (then) Lord Chancellor's Department - now the Department for Constitutional Affairs (DCA). We are grateful for this detailed and thorough report into the feasibility and desirability of unifying the provisions of the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR).

These two pieces of legislation provide important protections, with particular application to consumers, against unfair terms in contracts. But they amount to two distinct legislative regimes. The UCTA deals with exclusion clauses and covers both consumer and business contracts, and the UTCCR deals with all unfair terms but only in relation to consumer contracts. The two regimes contain many overlapping provisions, and use different language and concepts to produce similar although not identical results. This makes for confusion and it seemed desirable therefore to consider the case for unification of these regimes.

Following a commitment in the 1999 Consumer White Paper to look into the possibility of consolidation, we asked the Law Commission and the Scottish Law Commission in January 2001 to consider the desirability and feasibility of:

- (a) replacing UCTA and UTCCR with a single unified regime; and
- (b) presenting the legislation in simpler clearer terms that are more accessible to the reader; and
- (c) extending the scope of the legislation to protect businesses, and in particular, small businesses.

We are grateful for the thoroughness of the Commissions' work and extensive consultations on the issues involved, and for the provision of a draft Bill written in language accessible to non-lawyers.

We accept, in principle, the Commissions' recommendations.

- (a) for unification of the two regimes and for a unified regime for consumer contracts;
- (b) for preservation of the protection afforded by UCTA in business contracts;
- (c) for creation of a new regime extending the protection against unfair contract terms given to consumers by the UTCCR to the smallest businesses (provisionally identified for this purpose as employing nine or fewer employees), with certain exceptions; and
- (d) that new provisions relating to employment contracts are not necessary, but that employment contracts should be treated as a separate category in the new legislation.

This acceptance in principle of the recommendations is, however, subject to evaluation of the potential impact on the costs of the proposed reforms, particularly those recommended for small businesses, on the courts and generally. It is also subject to the evaluation by the Scottish Executive of the effect of the proposals on devolved Scots law.

Moving forward from this acceptance in principle, we, with DCA, will work with the Scottish Executive to develop a regulatory impact assessment and, subject to its outcome, seek an opportunity to introduce appropriate legislation to implement the recommendations as soon as may be practicable. Any proposals for legislation on devolved matters in Scotland would of course be subject to the approval of the Scottish Ministers and the Scottish Parliament.

This work will of course involve more detailed consideration of the recommendations and may require us to raise issues with the Commissions from time to time. I hope that this is acceptable. I am of course mindful that Hugh Beale is due to leave the Law Commission next year. I should note that the Commissions have already provided advice on a number of issues including the treatment of franchise agreements and certain technical drafting points. We are grateful for this further advice, which will be taken into account in carrying forward the recommendations.

In addition, we are giving consideration to certain concerns raised by Fujitsu, of which the Commissions will be aware. Fujitsu considers that it is no longer necessary or appropriate for exclusion and limitation of liability clauses in business-to-business contracts entered into on standard terms of trading to be subject to an overriding test of reasonableness. This is an issue falling outside the terms of reference of the Commissions' report and one which has, therefore, not been considered by the Commissions. Further consideration is being given to this issue and we will, if appropriate, consult the Commissions further.

Finally, I should note that the Report suggests that the UK has not fully implemented the EC Directive on the Sale and Supply of Consumer Goods and Associated Guarantees. The Sale and Supply of Goods to Consumers Regulations 2002 leaves exclusions in the seller's obligations to be regulated by the UCTA. However, provisions made under the UCTA do not apply to international sales contracts. We are grateful to the Law Commissions for bringing this to our attention, and are considering how that lacuna can best be put right.

I am writing in similar terms to the Chairman of the Law Commission, Sir Roger Toulson.



RT. HON. IAN McCARTNEY MP
Minister for Trade, Investment and Foreign Affairs