

# CMA response to draft unfair contract terms guidance consultation

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# 1. Introduction

- 1.1 On 26 January 2015, the Competition and Markets Authority (CMA) published a consultation on draft guidance on Unfair Contract Terms. The guidance will replace the unfair contract terms guidance originally issued by the Office of Fair Trading (OFT), [OFT311](#), in 2001 (and reissued in 2008) which was adopted by the CMA in 2014.
- 1.2 The purpose of the guidance is to set out the CMA's understanding of the Consumer Rights Act, (currently the Consumer Rights Bill, subject to Parliamentary debate) so far as it deals with unfair contract terms and notices. The references to the Bill in these documents refers to the House of Lords Bill amended on report, as of 27 November 2014.<sup>1</sup>
- 1.3 The CMA is a non-ministerial department formed on 1 April 2014. It is a unified competition and consumer authority that took over a number of the functions formerly performed by the OFT and the Competition Commission.
- 1.4 The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy. The CMA has powers to enforce consumer protection law.
- 1.5 The CMA has lead responsibility for providing guidance to businesses in relation to unfair contract terms legislation. It also leads on enforcement of this legislation, although it shares the power to enforce this and other consumer protection legislation with Trading Standards services and certain other co-enforcers.
- 1.6 The CMA's consultation covered a suite of draft guidance on unfair contract terms:
  - *Unfair contract terms guidance* – a detailed guidance document which replaces OFT311.
  - *Unfair contract terms explained* – a short guide that gives a brief introduction to the unfair terms provisions, and an overview of their practical effect, aimed at businesses in particular.
  - *Unfair contract terms short guide* – a very short (two-page) document that gives a very brief summary of the key points.

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<sup>1</sup> Available from the [UK Parliament website](#).

This suite of documents is intended to provide differing levels of detail to meet the needs of different audiences.

1.7 The consultation also covered the following:

- *What's new in unfair contract terms?* – an interim detailed guide to the changes in unfair terms law that are expected to be introduced under the Consumer Rights Act.
- *Communication strategy on unfair contract terms* – a short document explaining our intended approach to communicating on this area of the law.

We will not be republishing these documents, though elements of 'What's new?' will be added to the main guidance for ease of reference in the new Annex B.

1.8 For further detail on, and background to, the consultation please see the published [consultation document](#).

## 2. Issues raised in the responses to the consultation

### Approach to questions in the consultation

- 2.1 The CMA's consultation on draft guidance for unfair contract terms invited responses to the questions shown in bold below. However, as most responses did not follow the list of questions, we have not done so in this document. We have instead listed the key specific issues that were raised, and noted the CMA's response to them. We have made various other more general changes and clarifications to the guidance in response to comments from consultees.
- 2.2 For reference, the full list of consultation questions is available in Appendix 1 to this document.
- 2.3 Overall, responses to the consultation were positive. The majority of respondents thought the suite approach was helpful and felt that we had achieved the right balance with length, level of detail, etc.

### Issues raised by the consultation

- 2.4 Under each heading we first outline the issue raised ('Issue'), then explain our response ('Response'), and finally note any major changes made to the text of the guidance ('Outcome'). We have grouped related issues together rather than dealing with every individual point separately.

#### ***Presentational issues***

##### *Flowchart*

- 2.5 **Issue:** A significant number of responses called for a flowchart to be included, both in the main guidance and in the shorter guidance documents.
- 2.6 **Response:** This followed similar comments from attendees at our post-consultation workshop on the guidance. At this workshop we had (with the intention of including a flowchart in the final documents), presented an early draft to gauge reaction and collect feedback. The draft was well-received, and we have refined and developed it in light of the feedback received.
- 2.7 **Outcome:** The flowchart will be included in Explained and the main guidance document.

## General

### *Use of suite of documents (including length, and level of detail of each)*

- 2.8 **Issue:** A small minority of respondents felt that it was not helpful to have several guidance documents pitched at different levels and called for the shorter documents to be incorporated in the main guidance document as an executive summary. However, a large majority of responses considered that the differing levels of detail would be beneficial in ensuring that the guidance is accessible across the whole range of audiences that might have need of it. It was noted that the main guidance is a very substantial document but, the majority view was that we had achieved the right balance between the three guidance documents, with the right length and level of detail in each. There were, however, some calls for inclusion of a small amount of additional text in each of the shorter documents to expand what was there, or include topics which were not covered.
- 2.9 **Response:** We concluded there was no reason to change our overall approach. We judged that inclusion of additional summary material in the main document would have resulted in a significant increase in its length – which, it was clear from the responses, would not have been generally welcomed.
- 2.10 **Outcome:** We have retained the suite of documents without significant amendment to the length and level of detail of each. We have, however, included limited amounts of additional text at particular points to deal with particular issues raised as indicated below.

### *Better links and references between guidance documents*

- 2.11 **Issue:** Some respondents asked for better links between the set of documents and for a clearly stated explanation of the relationship between them.
- 2.12 **Response:** We agreed that better links between the guidance documents, and greater clarity concerning their intended relationships, would be beneficial. While the main guidance is the key document, the shorter summaries are intended to meet the needs of those who wish to gain a quick overview without having to read the whole of the main guidance. It is important, however, that the shorter summaries are not seen as a stand-alone alternative that dispenses with the need to engage with the main guidance in order to obtain a full understanding of the law on unfair terms, and the CMA's position in relation to the law.

- 2.13 **Outcome:** We have added text in the shorter documents signposting readers to the main guidance (and in addition, in the case of the short guide, to UCT Explained), and explaining the relationship between these documents.

*Omissions from guidance*

- 2.14 **Issue:** One respondent suggested that we include text on alternative dispute resolution (including adjudication) and on guarantees that support a contractual obligation. We were also asked for fuller definitions of ‘trader’ and ‘consumer’, for the addition of text on the secondary ticketing provisions in the Consumer Rights Act and for more guidance on ADR. One respondent suggested we might consider the extent to which terms and conditions need to be again communicated to consumers after a move from free to paid-for services.
- 2.15 **Response:** We agreed that more was needed in the guidance to cover the issue of ADR. We already have text covering the definitions and considered them sufficient for the purpose of non-sector specific guidance (see paragraph 2.50 below). We agreed that we should add text covering the secondary ticketing provisions (which were only added to the Act after our draft guidance was published for consultation – see paragraph 2.46 below). After considering some of the potential issues around the move from free to paid for services, we considered that a fuller consideration of such issues would be more appropriate in the context of guidance which covered to an equal extent both the CPRs and unfair terms legislation.
- 2.16 **Outcome:** We have added text on ADR including a reference to adjudication and secondary tickets. We consider that the level of detail in the guidance for both these areas is appropriate for general guidance. However, the guidance does not cover the position where a consumer acts as a guarantee for another, we consider that this is a specialist area more appropriate for guidance covering the sectors in which the issue is likely to arise.

*Structure and general approach*

- 2.17 **Issue:** Respondents raised the following structural issues:
- (a) Some respondents suggested that we should have a separate part for transparency.
  - (b) Some respondents suggested that we should move the exemption part earlier in the document.
  - (c) Some respondents suggested we should have a separate part for notices.

- (d) Some respondents suggested we should add an index to deal with various legal terms such as average consumer, notices and prominence.
- (e) Some respondents suggested the document was too complex and used difficult language.

2.18 **Response:** We found these comments helpful in considering how to set out the document, as follows:

- (a) The requirement of transparency in the Act gives effect in UK law to the corresponding transparency provision in the Directive. The CJEU case-law on the Directive must be taken into account by UK courts when interpreting the provisions in the Act. The CJEU has given clear guidance on the nature of the Directive's transparency requirement and also indicated the important role that transparency plays in assessing fairness. That being so, we consider that it would be unhelpful, and even potentially misleading, to confine our discussion of transparency to a part that is divorced from a discussion on fairness. We have, however, sought to improve this part of the guidance with clearer headings.
- (b) We agree that the exemptions are important, and have moved the part forward. However, we do not believe that it would be helpful for the exemptions to be covered in detail before the fundamental criteria for fairness are explained.
- (c) We considered that a separate section on notices would add unnecessary length and complexity to the guidance given that so much of what is said about terms in the guidance applies equally to notices. We have, however, included more information in the introduction explaining how the Act's provisions apply to notices, with improved signposting to the detailed discussion.
- (d) We considered inclusion of an index of relevant legal terminology. However, we concluded that it would increase the complexity of the document without adding substantial separate value, as compared with other navigation aids in the document (including an index of types of unfair term in part 5). We have instead sought to improve navigation of the document by other means, particularly in relation to key legal issues. The steps taken include the provision of a more detailed initial contents list, an expanded overview summary in part 1 (for instance on notices), new flowcharts, the index to part 5, and revised cross-referencing both in the text and in footnotes.
- (e) We acknowledge that it is difficult for some readers to follow detailed, and sometimes technical, discussion of the law such as is included at certain

points in the main guidance. We have revised parts of the text with a view to simplifying what is said, but the law itself is complex, and there is a significant risk of inaccuracy or confusion if it is over-simplified. We have attempted to ensure that purely legal points are more consistently confined to footnotes. In general, however, we have concluded that the use of shorter documents remains the best way of catering for the needs of those who require a simpler approach.

- 2.19 **Outcome:** We made a number of changes to take these suggestions into account, hopefully making the document more accessible and useful:
- (a) No separate transparency part. Clearer sub-heading for transparency within existing part.
  - (b) Exemption part moved.
  - (c) No separate notices part but text added, and better signposting on notices.
  - (d) A range of steps taken as described above, including addition of an index to part 5.
  - (e) No major changes (but detailed changes made for improved clarity and readability wherever possible).

*Consolidate section on other legislation*

- 2.20 **Issue:** Some respondents suggested that we should put all the discussion about other legislation (eg CPRs and CCRs) in one place for ease of reference.
- 2.21 **Response:** We agreed that this would make the document more user-friendly.
- 2.22 **Outcome:** The detailed text substantively discussing other legislation has been consolidated in one place. The relevant section of part 1 of the guidance now provides only a summary overview, which we considered useful as both the CPRs and/or CCRs are referred to throughout the guidance, especially in part 5.

*Repetition in part 5 dealing with the Grey List*

- 2.23 **Issue:** Some respondents suggested that this part contained too much repetition and should be cut back.

2.24 **Response:** Part 5 of the guidance is deliberately designed, as in the OFT's earlier guidance, to allow readers seeking specific information on particular types of terms (for example on unilateral price variation terms) to identify the information required without having to read the whole part. This approach necessitates a certain amount of duplication. On balance we concluded that the benefits of retaining duplicated material outweighed the advantages of removing it.

2.25 **Outcome:** No change.

#### *Sectoral guidance*

2.26 **Issue:** Nine respondents suggested we should update and revise the set of sector-specific guidance documents on unfair terms previously produced by the OFT and adopted by the CMA. Certain respondents expressed preferences for particular documents in their sectors. Many respondents said they had found the documents extremely useful or made similarly positive comments.

2.27 **Response:** We recognise that these documents have been regarded as helpful, and we agree it is desirable to be as clear as is practically possible about our plans for them. It is therefore necessary to say that there is no commitment on the part of the CMA to making the necessary resource available for updating and reissuing them. The CMA decides how to use its resources on a case by case basis according to its published prioritisation principles, and in the light of consultation responses to its Annual Plan. Properly revising these documents generally, which are all a number of years old, would be a major and long-term project. The CMA may consider revising individual guidance documents, and in deciding whether there is a sufficient case for doing so will take account of the comments of respondents. However, since the introduction of closely-related legislation concerning unfair commercial practices in 2008, sector-specific guidance issued by both the OFT and the CMA has not been confined to dealing with unfair terms alone. It is considered that a cross-legislative approach is generally preferable.

2.28 **Outcome:** We have added a short footnote 5 setting out our current thinking on the historic sectoral documents.

#### *Annex A*

2.29 **Issue:** Some respondents suggested that we include Annex A (the annex to OFT 311 containing examples of terms previously found to be unfair or modified by the OFT), which is referred to in the guidance. They commented

that they found it particularly helpful when thinking about how an unfair term could be improved through changes in drafting.

- 2.30 **Response:** We agree that Annex A should be re-published with the guidance, with minimal editing. For reasons explained in the introduction to part 5 of the Guidance, it has not been possible to update Annex A, and it is published with the caveat that it remains a product of the work of the OFT, not the CMA. Although the Annex necessarily reflects the legal context of its time, it is considered there is sufficient continuity in unfair terms law to make retention of the Annex worthwhile and the views of the lead UK enforcer in relation to unfair terms up to 2014 are considered to be of substantive illustrative value.
- 2.31 **Outcome:** Annex A will be made available as a separate document. A short summary of 'What's new?', presented so as to sit appropriately with the main guidance, will be available as Annex B.

#### *Explained*

- 2.32 **Issue:** There was a range of views about this document. At one end of the spectrum respondents were very positive, commenting that they thought it was pitched at exactly the right level, with an appropriate and helpful amount of detail. At the other end of the spectrum a small number of respondents felt that the document was too detailed and technical, and that it was too long. However, most of the comments were positive, with the majority of respondents having only limited suggestions for improvement. Some detailed drafting suggestions were made, mainly for clarification and in most cases echoing detailed points made on the main guidance. Specific suggestions included:
- (a) improving cross-referencing and links, both to the main guidance and to other useful documents (points made by several respondents);
  - (b) providing more detail on the effect of a term being unfair;
  - (c) avoiding jargon where possible (for example 'repudiate');
  - (d) reducing duplication, especially on key areas such as transparency and the Grey List; and
  - (e) considering merging with the other guidance documents, into a single document.
- 2.33 **Response:** Our response is as follows:

- (a) We have added some cross-references and links, though not all those suggested, so as to maintain the flow of the document.
- (b) We have added wording to clarify.
- (c) We have sought to reduce jargon where possible.
- (d) We have considered where we can reduce duplication, but in some instances it is necessary to ensure the sections make sense.
- (e) We think there is merit in having separate documents for the different needs of our audience/readers.

2.34 **Outcome:** We have added text in the shorter documents signposting readers to the main guidance and explaining the relationship between these documents.

#### *Short guide*

2.35 **Issue:** Generally speaking, comments were very positive. Most respondents thought that this document was clear and helpful. Some respondents suggested that it could be better linked to the main guidance. A small number of detailed drafting points were made, again mostly for improved clarity.

2.36 **Response:** We agreed that it would be useful to link the documents up more effectively. We agreed that the document should be reviewed for clarity.

2.37 **Outcome:** We have added text in the shorter documents signposting readers to the main guidance and to UCT Explained, and explaining the relationship between these documents. We have also revised the document for clarity; for instance, it now accommodates notices more fully.

#### *Others*

- 'What's new?'

2.38 **Issues:** Comments were generally positive. A few specific suggestions were made to improve clarity or simplify the text.

2.39 **Response:** We have considered these suggestions as part of our approach to 'What's new?'

2.40 **Outcome:** We decided to add the key information from 'What's new?' to the guidance, as Annex B, rather than to preserve it as a separate document. The new Annex B is presented in a way that ties in with the rest of the guidance.

As well as ensuring that it is easily accessible, this will also help address any concerns about retrospective application, and about the scope of the guidance document generally (see above).

- Communications strategy

2.41 **Issues:** Comments received on our communications strategy were broadly positive, with the majority of respondents having found it helpful to have been given sight of this document. The following points were made:

- (a) Some respondents wanted greater clarity about whether primarily to consult the CMA or the TSI websites for information concerning the coming into force of the CRA.
- (b) Messaging should include: the status of negotiated terms; unenforceability of blacklisted terms; practical proposals for evaluation; and proposals for working with consumer bodies.
- (c) One respondent thought this was unnecessary as the document duplicates 'What's new?'

2.42 **Response and Outcome:** We will consider these suggestions as we develop our compliance and communications approach and will work with partners and stakeholders to inform businesses and consumers as appropriate.

### ***Detailed issues***

#### *Application/scope of the law*

##### *Retrospective application*

2.43 **Issue:** Some respondents asked that the guidance should include clarification about whether, or to what extent, the guidance (and the law) applies retrospectively.

2.44 **Response:** We agreed that it would be desirable to have greater clarity on this issue.

2.45 **Outcome:** We have added a new paragraph at 1.46 onwards clarifying this issue. We have reproduced the key information in 'What's new?' in a new Annex to the guidance.

*Secondary tickets (See 2.14 above for general statement.)*

- 2.46 **Issue:** We were asked to include guidance on the fairness of various terms relating to the sale of secondary tickets, including cancellation.
- 2.47 **Response:** We agreed that some key issues should be covered, by way of drawing out relevant principles. However, we do not propose to provide detailed sector-specific guidance in this document, the aim of which is to provide general guidance that is relevant across all sectors.
- 2.48 **Outcome:** We have added text to deal with some of these issues at paragraph 5.33.4.

### *Definitions and detail*

#### *Consumer*

- 2.49 **Issue:** One respondent asked for clarification as to who is acting as a trader and who is acting as a consumer in very specific circumstances in relation to the letting of property.
- 2.50 **Response:** It is not the aim of this guidance to provide detailed sector-specific guidance, but rather to set out general guidance that is relevant across all sectors. On this particular issue, readers should refer to the CMA's [sector-specific guidance for letting professionals](#).
- 2.51 **Outcome:** No change.

#### *Average consumer*

- 2.52 **Issue:** One respondent thought that the guidance should define the legal concept of the 'average consumer', and that it should further clarify where, and the extent to which, this concept is relevant. We considered that other responses indicated that there was a need for such an approach.
- 2.53 **Response:** We agreed that it would be helpful for the guidance to contain further clarification in relation to the 'average consumer' concept, as to its meaning and its relevance in the context of the law on unfair terms
- 2.54 **Outcome:** We have added a section to the guidance on the 'average consumer' at paragraphs 2.63 onwards providing such clarification.

### *Whether consumers read standard terms thoroughly*

- 2.55 **Issue:** There was a range of views on our guidance as to what can reasonably be expected of consumers in relation to their reading of standard contract terms. Some respondents believe that it is reasonable to expect more from the average consumer than stated in the guidance, while others take the opposite view.
- 2.56 **Response:** We have considered our position, but have concluded that the view taken in our guidance does not need to be changed. It is in our view supported by the conclusions drawn from the OFT's contracts market study<sup>2</sup> and we consider there is support for this approach in UK case law.
- 2.57 **Outcome:** We have made some detailed changes to improve clarity.

### *Behavioural economics*

- 2.58 **Issue:** A small number of respondents believe that our approach is too pro-consumer in relation to vulnerability and behavioural biases.
- 2.59 **Response:** We have considered our approach but have concluded that it is in line with the legislation, which is intended to protect all consumers allowing account to be taken of their vulnerabilities – particularly those arising by virtue of their circumstances. We consider that our approach is consistent with that taken by the UK courts. It also takes account of current research into consumer behaviour and the exploitation of biases by traders.
- 2.60 **Outcome:** No substantive changes. Some minor changes made for additional clarification.

## *Terms*

### *Unenforceability*

- 2.61 **Issue:** One respondent suggested we should make it clearer that unenforceability relates to the specific term, not the whole contract. It was suggested we should use other language, 'automatically not binding'. We were also asked to consider guidance on section 62(3) of the Act, which states that the provisions making an unfair term or notice not binding on a consumer, do not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

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<sup>2</sup> OFT (2010), [Consumer contracts](#).

2.62 **Response:** After reviewing the guidance in light of comments, we consider that the guidance appropriately focuses on the unenforceability of terms and notices, and uses the right terminology in relation to blacklisting. We agree that section 62(3) should be reflected in the guidance.

2.63 **Outcome:** We have added text to paragraph 1.31 to cover briefly section 62(3).

#### *Implied terms*

2.64 **Issue:** One respondent suggested that we have over-stated the position on some implied terms; in particular it was submitted that excluding them is not necessarily unfair.

2.65 **Response:** We have considered our position but have concluded that it does not need to be changed. We consider that implied terms under the general law are relevant to an assessment of fairness – they indicate the balance in the parties’ rights and obligations that the law would have struck if nothing was said in the contract.

2.66 **Outcome:** No substantive changes.

#### *Notices*

2.67 **Issue:** Some respondents wanted greater clarity on what constitutes a notice, and on their treatment under the law on unfair terms – in particular on the extent to which the grey list and the blacklist provisions apply to notices.

2.68 **Response:** We agreed that it would be helpful to increase the clarity of the guidance in relation to these matters.

2.69 **Outcome:** Most notably, we have expanded the opening section on notices. We have some additions and revisions elsewhere in the text aimed at further clarifying the relationship between notices and other elements of the Act. However, we considered that the most appropriate place to cover how the blacklisting provisions in the Act relate to notices was in part 4 of the guidance, which is entitled ‘Blacklisted terms and notices’.

#### *Fairness – Good faith and negotiated terms*

2.70 **Issue:** One respondent asked that we state explicitly that where a term has been negotiated this would ‘give a little more leeway’ to the trader. Another was concerned that we appeared to suggest that consumers are not capable of negotiating terms that escape suspicion of unfairness even when they are acting with the benefit of legal advice.

2.71 **Response:** We considered that there was scope for improvement in the clarity with which the guidance deals with this issue in order to avoid misinterpretation on the part of the reader.

2.72 **Outcome:** No substantive changes made, but detailed revisions made to improve clarity.

### *Transparency*

2.73 **Issue:** Several respondents questioned our treatment of transparency in the guidance. More specifically, several respondents believed that transparency and fairness are separate tests which should be dealt with separately, and not confused. Some questioned the way in which we had defined transparency in certain paragraphs. Another respondent noted that although transparency will often be a central component of the fairness test, it will lead to enforcement action in its own right, submitting that the latter does not come across as clearly as it should. There were also some responses seeking specific changes to the text, or asking for more information on transparency (See also the related structural issues regarding the treatment of transparency, dealt with at 2.18(a) above).

2.74 **Response:** As stated above at paragraph 2.18 a) we consider that the requirement of transparency in the Act is fundamental to the concept – and assessment – of fairness. We believe that the guidance deals appropriately with the relationship between transparency and fairness, and accurately reflects the law as it currently stands (including developments in case law).

2.75 **Outcome:** We have made some specific changes – see for instance paragraphs 2.4 and 2.6 of the guidance – to assist with clarity. Paragraph 2.42 has been amended for clarity. Paragraph 2.55 of the consultation version has been moved up, for greater clarity, and is now at paragraph 2.47 of the guidance.

### *'Core exemption'*

2.76 **Issue:** Several issues were raised by different respondents in relation to the exemption for main subject matter/price, including the following:

(a) Several respondents asked for more clarity on whether the exemption covers notices.

(b) Several respondents welcomed the analysis, and the chart on the exemption (although some respondents thought that the chart would work better as a flowchart).

- (c) One respondent felt that duration ought to be considered a core term in rental contracts, and asked for more detailed guidance dealing with this point.
- (d) Several respondents suggested we move the part on exemptions forward in the document.
- (e) One respondent challenged our view that terms that are not subject to competition should not benefit from the exemption.
- (f) One respondent asked for greater clarity on the extent to which price can be subject to the fairness test.
- (g) There were also some suggestions about improving the clarity of this part of the text.

2.77 **Response:** Our response is as follows:

- (a) We have added text in footnotes clarifying the position on this (see footnote 11).
- (b) We were pleased to receive this positive feedback. A flowchart has also been added to the guidance which gives a simplified overview of 'the core exemption'.
- (c) We have considered our position as stated in the guidance, but have concluded that it should not be changed. In any event, as previously noted, it is not the aim of this guidance to provide detailed sector-specific guidance, but rather to set out general guidance that is relevant across all sectors.
- (d) We agreed that it would be helpful to bring this part forward.
- (e) We have considered our position as stated in the guidance, but have concluded that it should not be changed. The CMA's view reflects what we understand to be the purpose of the underlying Directive on Unfair Terms, as well as factors widely acknowledged to have influenced the wording of Art 4(2) of the Directive.
- (f) After review, we thought that the text was sufficient for these purposes, but this comment has informed amendments to related paragraphs.
- (g) We found the suggestions as to clarity helpful and they have informed revisions made to the text of the guidance.

2.78 **Outcome:** We have moved the part on the core exemption forward in the guidance. We have also added separate text on notices (in part 1), and made a number of detailed revisions to this part of the guidance, aimed at improving clarity.

*Prominence and transparency in the core exemption*

2.79 **Issue:** Some respondents questioned how we had dealt with the relationship between prominence and transparency in the core exemption. Some respondents felt that the interpretation of ‘prominence’ set out in the guidance was too broad. A number of respondents asked for specific practical guidance to be included on how they could achieve prominence (including the provision of examples illustrating how prominence can be achieved in specific circumstances). Some respondents also pointed out the particular difficulties of achieving prominence in the context of contracts being entered into on mobile devices, or where there was a long list of charges. Issues were also raised around ongoing service contracts where there is, for instance, the ability to make supplementary or optional purchases during the ‘in-contract’ stages. Some respondents also asked for more information to be included on the interaction between the prominence provisions in the law on unfair terms, existing (sectoral) regulatory requirements, and provisions in the CCRs about pre-contractual information.

2.80 **Response:** We have considered the CMA’s position on prominence as stated in the guidance, but have concluded that it should not be changed. Our approach is principle-based, ensuring that it is of general application across sectors and across the varied range of contracts which consumers enter into. We do not consider that this guidance is the appropriate place for sector-specific examples or regulatory issues. The CMA’s interpretation is considered to be consistent with CJEU judgments (on transparency and ‘the core exemption’) as well as the new provisions on prominence contained in the CRA. The reasons for this view are stated in guidance. We accept, however, that the position could, on certain points, have been more clearly and fully expressed.

2.81 **Outcome:** We have added text to provide a more detailed explanation of our interpretation of the law on prominence, including a clear statement that difficulties in complying caused by the limitations of technological devices or the complexity of products do not alter the provisions in the legislation. We have revised the text on the relationship between prominence and transparency. The text has also been reviewed and revised to improve clarity.

### *Mandatory statutory or regulatory exemption*

- 2.82 **Issue:** One respondent wanted more clarity regarding the last sentence of paragraph 5.33 of the consultation version (now paragraph 3.37 of the guidance), which in their view appeared to undermine the exemption provision by suggesting that a term that otherwise qualified for exemption would still be open to scrutiny if it appeared to have an unfair effect on consumers.
- 2.83 **Response:** We have considered our position as stated in the guidance and noted that it could be better expressed.
- 2.84 **Outcome:** Text amended to increase clarity and avoid ambiguity.

### *Blacklisted terms and notices*

- 2.85 **Issue:** One respondent asked that we clarify how the blacklisting provisions apply to notices. Another made detailed suggestions for the expansion of the information in the Guidance in relation to blacklisting. Broadly the requested changes were aimed at listing the statutory remedies available for breach of the statutory rights for services and making clear that the Act blacklists not only contract terms excluding or limiting liability for breach of the statutory rights but also contract terms excluding or limiting the statutory remedies for breach of these rights. It was also suggested that the guidance lists the available common law remedies for services.
- 2.86 **Response:** We agreed that these clarifications and changes would be useful.
- 2.87 **Outcome:** We have made some revisions to part 4 of the guidance in particular (formerly part 3) to clarify the position of blacklisting of notices in the Act (see for instance the opening sentence of part 4). We have also added a new chart at paragraph 4.6 of the guidance to give an overview of the blacklisting provisions in the Act. We have made a number changes, both to the table at paragraph 4.28 and to the text in this part, in response to the suggestion for expansion of the information provided on blacklisting.

### *Other detailed drafting points*

- 2.88 Changes have been made to address a number of drafting points, generally for the sake of clarity. These include, by way of example, the following:
- More information included on Notices (part 1).
  - Amendment made to the definition of digital content (in paragraph 1.26 and 1.27 of the guidance document) to avoid confusion around the Act's treatment of free or otherwise digital content. We have also clarified the

text in part 4 of the guidance to clarify when the full statutory rights and remedies under Part 1 of the Act generally apply to digital content and clarified the text in part 5 of the guidance accordingly.

- Amendments made to remove ambiguity over whether we were providing guidance on burden of proof when a consumer brings a claim (part 1).
- Some text added to clarify the role of the views of sector regulators (part 1) and relevant links have been added to the guidance.
- Changes made to enhance clarity on transparency (part 2 – both in introductory paragraphs and in transparency section).
- Amendment made to text under the heading 'Relevance of earlier case law' to improve clarity (part 2).
- Avoided confusing use of 'unfairly' (part 2).
- Improved numbering, revised key headings and cross-reference of grey listed and other potentially unfair terms, notably by the inclusion of an index (part 5).
- Explained more fully the CMA's approach to Annex A (part 5 and Annex A).
- Reconsideration of the use of the word 'penalty' throughout the guidance.
- Added text to deal with potential double compensation and similar issues.
- Some text added to reflect the increasing online nature of contracts (generally).
- A number of other detailed drafting points were raised but we feel the text is sufficiently clear in relation to these other issues.

## *Grey List*

### *General*

- 2.89 **Issue:** A number of respondents asked us to include specific examples. Some asked for us to be clearer about which parts of the guidance referred to the Grey list.
- 2.90 **Response:** We consider that this general guidance is not the place for detailed examples, especially as it would be impossible to cover the full range of sectors and issues that are subject to the legislation. However, we have reviewed Annex A for publication alongside the guidance. This will give

respondents and stakeholders some examples of real terms, and illustrate the impact of OFT interventions. Most of the terms covered in Annex A are based on the Grey List.

- 2.91 **Outcome:** No substantive changes, other than the inclusion of Annex A. We have added 'Grey List' to the title of the relevant chapter.

*Exclusion and limitation*

- 2.92 **Issue:** Three separate issues were raised here. Firstly in relation to excluding liability for sub-contractors. On this, one respondent suggested that financial services sub-contractors, in particular, are governed by other provisions relating to trust, and therefore such exclusions should not be treated as unfair. Secondly, that it is important that inventory issues in tenancies should be notified within a short period of time, and otherwise can be taken as agreed. Finally, that adjudication ought to be dealt with in the guidance.

- 2.93 **Response:** We have considered these points, but in our view this general guidance is not the place to comment in detail on the highly specific issues raised in the first two points. On the second issue there is already some guidance in the OFT's lettings guidance (at paragraph 7.9), which has been adopted by the CMA. On the third point, see our comments on arbitration/adjudication below.

- 2.94 **Outcome:** Save for revisions made to the guidance to cover adjudication elsewhere, no substantive changes to the guidance.

*Retention of prepayments on cancellation*

- 2.95 **Issue:** Two issues were raised here. One respondent disagreed that retention based on a term providing a financial sanction for cancelling that applies to both parties is unlikely to be fair as it assumes traders will not exit contracts. One respondent considered that net loss of profit for leisure operators not operating at capacity is the lost revenue if a consumer cancels or exits, so that retention of prepayments (and cancellation charges) would be fair in those circumstances. It was argued that this position, albeit supported by some text in the guidance, was then contradicted by later text in the guidance dealing with paragraph 5 of the Grey List (see below).

- 2.96 **Response:** We have considered our position on these issues as stated in the guidance, but having regard to reasoning stated in the text, were not persuaded that it should be changed in substance

2.97 **Outcome:** Some detailed changes made for the sake of clarity and to avoid the perception that the guidance was inconsistent.

*Disproportionate financial sanctions (paragraphs 6 and 5 of the Grey List)*

2.98 **Issue:** Several respondents expressed concern over our views on such sanctions, especially cancellation charges. Some argued that they were already tightly regulated by the relevant sectoral body. Others suggested that the views we stated could allow the consumer to 'get out of jail free' and cancel, even where they have benefited from reduced rates by committing to a fixed period. Some argued that a reasonable pre-estimate of loss may simply be the outstanding balance due on the contract in some circumstances. Particular reference was made to the special position in tenancy contracts. Separately, one respondent suggested that the guidance would benefit from greater clarity in making the point that losses recoverable from consumers on termination should not exceed what would be recoverable in damages under the general law, and in particular should not have the effect of allowing the trader to be compensated twice over.

2.99 **Response:** We have considered our position on these issues as stated in the guidance, but having regard to reasoning stated in the text, are not persuaded that it should be changed in substance.

2.100 **Outcome:** In light of all the comments made, however, some detailed changes have been made for the sake of clarity including, for instance, covering the points on the double recovery point.

*Excessive notice periods*

2.101 **Issue:** One respondent suggested that the duration of tenancy contracts should be regarded as a core term.

2.102 **Response:** We recognise that tenancies are a special case, but do not consider that this general guidance is the right place to deal specifically with them.

2.103 **Outcome:** No change.

*Binding consumers to hidden terms*

2.104 **Issue:** One respondent drew our attention to the limitations of consumers engaging with terms in online transactions, especially on handheld devices. Another drew attention to the limitations of what can be delivered generally through mobile screens. One respondent asked if providing a weblink to

detailed terms and conditions that consumers could read would be sufficient, before ticking a box to confirm their acceptance of those terms

2.105 **Response:** We recognise the significance of the issue raised, but as this is general guidance, have concluded that it should not be expanded to cover these points more fully.

2.106 **Outcome:** We have, however added some text to the guidance providing some clarification in relation to these types of issues.

#### *Variation*

2.107 **Issue:** A large number of respondents expressed views about the Grey List terms, which address variation by the trader. There were different areas of concern covering specific paragraphs in the text as well as general concerns about our approach. The main issues included the following:

- (a) Several respondents challenged our interpretation of the recent new European cases of *C- 92/11 RWE Vertrieb AG v Verbraucherzentrale Nordrhein–Westfalen e.V* and *C-472/10 Nemzeti Fogyasztovedelmi Hatosag v Invitel Tavkozlesi Zrt.*
- (b) Several respondents wanted us to make specific reference to what they referred to as the ‘exemptions’ in Part 2, Schedule 2 (reference was made to paragraphs 22 and 23 in particular). Also, provisions around notice and cancellation were thought to be important and adequate, as were those around ‘valid reasons’.
- (c) Several respondents expressed frustration that we seemed to be asking them to use a ‘crystal ball’ to gaze into the future in order to work out cost increases and other potential problems before they occurred.
- (d) Some respondents thought that consumers were protected adequately by point-of-use competition and the potential to find out costs before using the service.
- (e) Several respondents asked for detailed, practical sector-specific compliance information in relation to variation.
- (f) One respondent asked us to add more detail on the genuine ability of the consumer to cancel and avoid any negative consequences of a term.

2.108 **Response:** We have considered our position on these issues as stated in the guidance, but having regard to reasoning stated in the text, are not persuaded that it should be changed in substance, for the following reasons:

- (a) We have carefully considered our understanding of the law, by means that include discussion with acknowledged external experts, and we are satisfied that it does not require change. We have however revisited the relevant parts of the text of the guidance to ensure that it is not unclear.
- (b) As above.
- (c) We appreciate that it is difficult for firms to predict market forces and other factors in advance. However, we consider that they are better placed to judge such matters than consumers and therefore the onus should be on them to provide information.
- (d) As previously discussed, we think up-front information to facilitate competition is essential, though we can see that providing such information at point-of-use is also potentially helpful.
- (e) We do not think this document is the right place to provide detailed, sector-specific compliance advice. In many cases, there is a relevant sector regulator who may be interested and may already have relevant rules or guidance.
- (f) We agree this is an important point but, but as this is general guidance, have concluded that it should not be expanded to cover it more fully.

2.109 **Outcome:** No significant changes made, though some detailed changes to make our general approach clearer. We have added some text on Part 2 of Schedule 2 to help clarify its effect. Also some changes were made in light of detailed points on specific paragraphs, for instance the addition of examples to explain what is meant by a change to meet regulatory requirements.

*Right to determine or change*

2.110 **Issue:** One respondent challenged our view that consumers should get a right to cancel if there is a variation they have been told about and agreed to upfront. Cancellation was seen as too drastic a step for the consumer to take.

2.111 **Response:** We have considered our position stated in the guidance, but having regard to reasoning stated in the text, are not persuaded that it should be changed in substance.

2.112 **Outcome:** No substantive changes.

### *Consumer declarations*

- 2.113 **Issue:** One respondent expressed concern about tick-box ‘read and understood’ confirmations. They asked for specific views on how to deal with these concerns, given their prevalence, and given that some traders operate in other jurisdictions where these are used.
- 2.114 **Response:** we recognise the significance of the concerns raised in the particular context to which they are relevant, but given the general nature of the guidance are not persuaded that it should be expanded to deal with them more fully.
- 2.115 **Outcome:** No changes made to guidance.

### *Arbitration/adjudication*

- 2.116 **Issue:** One respondent suggested we needed some text to deal with the provisions of the Alternative Dispute Resolution (ADR) Directive as well as online consumer disputes. Another suggested that it ought to cover both adjudication and arbitration.
- 2.117 **Response:** We agree this would be helpful.
- 2.118 **Outcome:** We have now added selective text, in accordance with points that we considered fitted in well with the coverage of the guidance.

### *Enforcement*

#### *General*

- 2.119 **Issue:** One respondent asked us to give more details about interaction with sectoral regulators.
- 2.120 **Response:** We have added some more information about interaction with sectoral regulators generally, but more specific details can be found in our published Memoranda of Understanding.
- 2.121 **Outcome:** Some text added – see below.

#### *Guidance by sectoral regulators*

- 2.122 **Issue:** Some respondents suggested that we should clarify how this guidance document interacts with guidance produced by sectoral regulators.
- 2.123 **Response:** We agree this would be useful to clarify.

2.124 **Outcome:** We have added text to paragraph 1.8 clarifying that the guidance of specific sectoral regulators 'deserves full consideration'.

## 3. Flowchart

### Addition of flowchart

- 3.1 As a result of earlier conversations with stakeholders, it became apparent that there was merit in drafting a flowchart to offer a means of navigating the complex layers of legal tests within the Unfair Terms element of the Consumer Rights Act. We circulated an early version of this flowchart at the CMA-BIS joint event launching the guidance on 5 March 2015, and have since been revising it taking on board feedback from various internal and external stakeholders.
- 3.2 The flowchart will be added to the main guidance and to Explained, but not the short guide. It is not intended to be a prescriptive method of assessing for unfair terms, but rather to give an overview of key sections of the legislation.
- 3.3 It will also be published separately as a [stand-alone document](#).

## 4. Changes made to the main guidance

The following is a list of major changes made to main guidance document. See section 2 for full details of issues raised and corresponding changes to the text:

- Moved exemptions part.
- Added flowcharts.
- Changed text on notices.
- Added text on secondary tickets.
- Added text dealing with transitional issues (see for instance ‘The relevance of earlier unfair terms law’ in part 1).
- Added text on average consumer.
- Made amendments to text on consumer’s circumstances – how they behave in practice (part 2).
- Added text dealing with blacklisting.
- Added text on transparency.
- Added text on prominence.
- Added text on adjudication.
- Changes to part 5 for clarity (for example on paragraph 5 and paragraph 11 of the Grey List).
- Added index to part 5.
- Added Annex A providing historic OFT examples.
- Added Annex B short summary of ‘What’s new?’.
- Changes to text to improve clarity and accessibility generally.

## **5. Changes made to the short guide and explained**

5.1 The following is a list of key changes to the shorter documents. See Section 2 for more information on the issues considered and changes made as a result:

- Added information to help with clarity, for example on notices.
- Added text explaining relationship with the other guidance documents.
- Added flowchart to Explained.
- Changes to improve clarity and ensure consistency with the main guidance.

## **6. Other documents**

- 6.1 'What's new?' reflected the Consumer Rights Bill as of 26 January 2015. Later changes made during the passage of the Consumer Rights Act means that section numbers are generally out by one, and omits the additional provisions on Secondary Ticket Sales. Key provisions of 'What's new?' are now summarised at Annex B of the main guidance.
- 6.2 The Draft Communications Strategy will not be re-published.
- 6.3 The flowchart that has been added to the Short Guide and to Explained is also being published as a separate stand-alone document.

## 7. List of respondents

7.1 The following is a list of those formally responding:

- Association of British Travel Agents.
- Association of Chief Trading Standards Officers/National Trading Standards Board.
- British Banking Association.
- British Retail Consortium.
- Building Societies Association.
- Direct Marketing Association.
- Finance and Leasing Association.
- Law Society of Scotland.
- Live Nation.
- Lloyds Banking Group.
- Online Dating Association.
- Ofcom.
- Residential Landlords Association.
- Three.
- Tower Hamlets Local Authority.
- Trading Standards Institute (now Chartered Trading Standards Institute).
- Trading Standards North West.
- UK Active.
- UK Competitive Telecommunications Association/Mobile Broadband Group/BT joint response.
- Which?

7.2 Informal comments were also received from a number of parties including trade bodies, regulators and academics.

## Appendix 1: List of questions

The following is a list of questions in the original consultation.

### **Unfair contract terms guidance (detailed document to replace OFT311)**

- Q1. Is the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- Q2. Is the format and presentation of the draft guidance helpful? Are there any changes to the format or presentation that you feel would improve it?
- Q3. Are the tables in the guidance helpful? Are there any improvements to them that you can suggest that you feel would increase their clarity and/or usefulness?
- Q4. Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?
- Q5. Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?
- Q6. Are the sections on overlapping legislation helpful? Does their position in the document work well? Do you have any suggestions as to how they might be improved?

### **Unfair contract terms explained (guide aimed at business audiences, in particular)**

- Q7. Is the draft guide sufficiently clear? If there are particular parts of the guide where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- Q8. Is the format and presentation of the draft guide helpful? Are there any changes to the format or presentation that you feel would improve it?
- Q9. Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?
- Q10. Bearing in mind the target audience and the nature of the document, is the draft guide sufficiently comprehensive, and does it have any significant

omissions? Do you have any suggestions for additional content that you would find helpful?

## **Unfair contract terms short guide (two-page guide)**

- Q11. Is this summary document sufficiently clear? If there are particular parts of it where you feel greater clarity, or detail, is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- Q12. Is the format and presentation of the summary helpful? Are there any changes to the format or presentation that you feel would improve it?

## **What's new in unfair contract terms? (a guide to the anticipated changes in unfair terms law)**

Note: As a result of the Consumer Rights Bill not having received Royal Assent as of 26<sup>th</sup> January 2015, we are republishing as an interim document. This document is intended as a factual update on the changes to the law on unfair terms, reflecting the position at publication. Therefore we are not looking for detailed input. However, please let us know:

- Q13. Do you consider that we have made any factual errors or significant omissions?
- Q14. Is the document sufficiently clear?

## **Communication strategy on unfair contract terms**

- Q15. Do you agree with our communications approach? Are there any important elements missing? What else would you find useful?

## **Additional general questions**

- Q16. Do you feel that the first three documents, between them, provide appropriately tailored alternatives to meet the varied demands of different audiences across the spectrum of interest in unfair contract terms issues?
- Q17. The CMA adopted various historical [sector-specific pieces of guidance](#) that can be found on GOV.UK. How often, if at all, have you used these documents? If you have used them, how user friendly do you find them?
- Q18. Do you have any other comments about the suite of guidance documents covered by this consultation?