

# Unfair contract terms guidance

Guidance on the unfair terms provisions  
in the Consumer Rights Act 2015

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Annex A: Historic Annex A to unfair contract terms guidance

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## Advice and complaints about unfair terms

Advice about unfair terms and other consumer issues can be sought from the Citizens Advice consumer service (see [www.adviceguide.org.uk](http://www.adviceguide.org.uk) or call 03454 04 05 06), or privately, for instance from a solicitor. If you wish to complain about a consumer contract term or notice, please contact Citizens Advice in the first instance. The Competition and Markets Authority (CMA) welcomes information but does not provide individual advice or respond in detail to complaints.

## The Consumer Rights Act 2015

A copy of the Act is available from the Office of Public Sector Information at [www.legislation.gov.uk](http://www.legislation.gov.uk).

## Helpful links

Consumer Rights Act:

[www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga\\_20150015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf)

CMA guidance page

[www.gov.uk/government/publications/unfair-contract-terms-cma37](http://www.gov.uk/government/publications/unfair-contract-terms-cma37)

CMA website: [www.gov.uk/government/organisations/competition-and-markets-authority](http://www.gov.uk/government/organisations/competition-and-markets-authority)

Financial Conduct Authority website: [www.fca.org.uk/](http://www.fca.org.uk/)

Ofcom website: [www.ofcom.org.uk/](http://www.ofcom.org.uk/)

Department for Business, Innovation and Skills website:

[www.gov.uk/government/organisations/department-for-business-innovation-skills](http://www.gov.uk/government/organisations/department-for-business-innovation-skills)

## Abbreviations and technical terms used in this guidance

A list of the main abbreviations used in this guidance is given below, with explanations for reference. The abbreviations are also defined when first used.

See paragraph 1.10 below for definitions of certain legal terms used in the guidance, and paragraphs 1.29 and 1.34 for the meaning of ‘the Grey List’ and ‘blacklisted terms’. A ‘regulator’ is defined in part 6 below.

<b>The Act</b>	The Consumer Rights Act 2015
<b>The Directive</b>	Council Directive 93/13/ECC on unfair terms in consumer contracts
<b>UTCCRs</b>	Unfair Terms in Consumer Contracts Regulations 1999
<b>UCTA</b>	Unfair Contract Terms Act 1977
<b>CCA</b>	Consumer Credit Act 1974, as amended
<b>CCRs</b>	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
<b>CJEU</b>	Court of Justice of the European Union
<b>CMA</b>	Competition and Markets Authority
<b>CPRs</b>	Consumer Protection from Unfair Trading Regulations 2008
<b>ECRs</b>	Electronic Commerce (EC Directive) Regulations 2002
<b>FCA</b>	Financial Conduct Authority
<b>Ofcom</b>	Office of Communications
<b>OFT</b>	Office of Fair Trading
<b>PSRs</b>	Provision of Services Regulations 2009
<b>TSS</b>	Local weights and measures authorities in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland – commonly known as Trading Standards Services

# 1. The guidance: an overview

## Introduction

- 1.1 This guidance sets out the CMA's understanding of the provisions in the Consumer Rights Act 2015 (the Act) which deal with unfair contract terms and notices. Parts 1 and 2 of the Act consolidate and replace the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) and relevant provisions of the Unfair Contract Terms Act 1977 (UCTA). The guidance supersedes the general unfair contract terms guidance originally issued by the Office of Fair Trading (OFT).<sup>1</sup>
- 1.2 The Act deals with a range of matters not all directly relevant to contract terms. However, one of its principal purposes is to give effect in the UK to the Unfair Contract Terms Directive (the Directive).<sup>2</sup> This is achieved particularly in Part 2 of the Act, which replaces the UTCCRs and is the main subject of this guidance. It applies to contracts entered into, and relevant notices issued, on or after 1 October 2015.
- 1.3 The Directive is a 'minimum harmonisation' measure, allowing EU member states to adopt or maintain more stringent provisions if they choose. The Act confers additional protections mainly in Part 1, where it gives consumers rights against traders where they enter a range of types of contract, and, similar to the relevant UCTA provisions, makes particular terms always unenforceable, without the need to subject them to the fairness test.
- 1.4 This guidance is issued by the CMA as the UK's national competition and consumer authority. The CMA replaced the OFT and the Competition Commission under a legislative programme which implemented a number of major changes to the UK's statutory consumer and competition landscape, transferring certain consumer functions of the OFT to other authorities<sup>3</sup> but giving the CMA a statutory role comparable to that of the OFT in relation to unfair contract terms.
- 1.5 This guidance sits alongside two complementary CMA publications aimed particularly at smaller businesses and others who want a short introduction to unfair terms law and to the CMA's approach to unfair terms enforcement.<sup>4</sup> It is designed for those who need more detailed information about the unfair terms

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<sup>1</sup> OFT (September 2008), *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999*, OFT311, adopted without amendment by the CMA without amendment in 2014.

<sup>2</sup> Council Directive 93/13/ECC on unfair terms in consumer contracts.

<sup>3</sup> [www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers](http://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers).

<sup>4</sup> [www.gov.uk/government/publications/unfair-contract-terms-cma37](http://www.gov.uk/government/publications/unfair-contract-terms-cma37).

provisions in the Act. It aims to give a comprehensive account of the CMA's understanding of Part 2 of the Act, and offers detailed suggestions as to how businesses using contract terms and notices with consumers can seek to achieve compliance with unfair terms law. It is general in character and not intended to replace CMA guidance dealing with particular market sectors.<sup>5</sup>

- 1.6 The guidance is meant not primarily for lawyers but particularly, for instance, for in-house and trade association advisers working on compliance issues for businesses dealing with consumers. It has to engage with detailed legal issues, but purely legal points are confined, so far as possible, to footnotes. It is also intended to be of use to public authorities who are 'regulators' for the purposes of the Act, with powers to act as enforcers alongside the CMA – in particular Trading Standards Services (TSS) and regulators with responsibility for particular economic sectors.
- 1.7 It is hoped that this guidance may also assist consumers considering whether terms in contracts they have entered, or may enter, are fair. However, it is not primarily intended as a guide to the rights of private individuals under the Act. It does not provide information about either consumer rights generally or contract law as a whole. Those involved in contractual disputes with businesses are likely to need advice on a broader range of issues than are covered in this guidance. Such advice can be sought from the Citizens Advice consumer service (see [www.adviceguide.org.uk/](http://www.adviceguide.org.uk/) or call 03454 04 05 06).

This guidance sets out the CMA's understanding of the provisions in the Act which are concerned with the fairness of contract terms or notices used by traders in their dealing with consumers. Part 2 of the Act requires that contract terms used by traders in transactions with consumers are fair. Similarly notices issued by a trader, which can reasonably be assumed to be intended to be seen or heard by consumers, must be fair.

The guidance:

- explains the fairness and transparency tests in Part 2 of the Act;
- considers the exemptions from the assessment of fairness;

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<sup>5</sup> The OFT previously published guidance that covered the application of the UTCCRs to particular areas of economic activity: OFT 635, OFT 356, OFT 737, OFT 373, OFT 734, OFT, 667, OFT 668. That guidance is to be treated as no longer adopted by the CMA from 1 October 2015. The CMA will consider from time to time, whether to produce guidance relevant to particular areas of economic activity, having regard to its published prioritisation policy.

- considers contract terms and notices which are always unenforceable under the Act independently of the fairness test (some of these provisions are found in Part 2 of the Act but most are in Part 1);
- explains why the CMA considers that certain kinds of terms or notices may be regarded as unfair; and
- considers the consequences that are liable to arise for businesses that use unfair terms or notices.

1.8 The guidance does not state the law, only the CMA's views as to how the law is intended to operate. In specific sectors with their own regulatory authorities, the views of those authorities as to how unfair terms law applies to issues within their remit also deserve full consideration. In any event, it is ultimately for the courts to interpret and apply the provisions in the Act. The final decision on whether a term or notice is unfair rests with the courts. The guidance cannot, therefore, be a substitute for independent legal advice as to the view that a court would take under the Act.

1.9 This guidance applies to terms and notices used in dealings between businesses and consumers in England, Wales, Scotland and Northern Ireland. It should be read as being relevant in all of these nations, except where specific differences (such as differences in contract law) are flagged.

## **Key concepts in the Act, referred to in this guidance**

1.10 Part 2 of the Act applies to **terms** in **consumer contracts** between **traders** and **consumers**. Its requirements also apply to certain **consumer notices** which can be used in connection with consumer transactions. It applies in the context of nearly all kinds of sales involving consumers, including sales of goods, services and **digital content**. The words used selectively in bold print here and in following paragraphs are technical terms explained below.

### ***Consumer***

1.11 A **consumer** is an individual (a natural person rather than a legally incorporated organisation such as a company) who is acting for purposes wholly or mainly outside his or her trade, business, craft or profession. The CMA considers that the words 'wholly or mainly' clearly invite consideration of transactions that are entered into for a mixture of personal and business

reasons.<sup>6</sup> In any event, in cases of doubt, an individual is presumed to be a consumer until shown not to be. If a trader claims in court proceedings that an individual was not acting as a consumer, he or she has to prove this.

### **Trader**

- 1.12 For the purposes of the Act, **trader** is broadly defined as a legal person (which includes both natural and legal persons such as companies) acting for purposes relating to that person's trade, business, craft or profession. 'Business' is broadly defined to include the activities of any government department or local or public authority. The definition of 'trader' also includes those acting in a trader's name or on a trader's behalf, such as a trader's employees or agents.
- 1.13 In this guidance, the words 'business' and 'supplier' are from time to time used instead of the word **trader**, but with the same meaning. These alternatives are mainly used to avoid undue repetition, or where what is said is particularly applicable to businesses which would not normally be described as 'traders' in ordinary speech.

### **Consumer contract**

- 1.14 The Act defines a **consumer contract** as one between a **trader** and a **consumer**. Part 2 of the Act applies to all consumer contracts whether written or not. Part 1 of the Act applies to most, but not all, kinds of consumer contracts.
- 1.15 The Act includes a provision which, in certain circumstances, applies Part 2 of the Act to terms in a 'secondary' contract – a separate contract which has an effect on the rights and obligations of the consumer and trader under the main contract – even if it does not in itself meet the criteria of a **consumer contract**.<sup>7</sup> This is for anti-evasion purposes.

### **Term**

- 1.16 A contractual **term** is not defined in the Act or in the Directive. Generally it will be clear as a matter of common sense what constitutes a term. In any case, wording that may not be a term for legal purposes is likely to be treated as a

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<sup>6</sup> The words 'wholly or mainly' are not found in the UTCCRs, which followed the Directive. The UTCCRs provided that a consumer is 'any natural person who [...] is acting for purposes *which are outside* his trade, business or profession'.

<sup>7</sup> Section 72 of the Act. This provision does not apply if the secondary contract is a settlement of a claim arising under the main contract.

**consumer notice**, and as such subject to similar requirements in relation to fairness.

- 1.17 Where there is any doubt as to what constitutes a term, it should be resolved having regard to matters of substance rather than form. It has been judicially recognised<sup>8</sup> that a **term** is not limited to what is said in a particular numbered clause or paragraph in the contract. Rather, a term constitutes all the provisions in the contractual documentation which give rise to a particular obligation or right. It does not matter whether the obligation or right is found in a single clause, various paragraphs of the contract documents or in part of a clause.
- 1.18 Unlike the Directive, Part 2 of the Act applies to all consumer contract terms, including those that have been individually negotiated by the **consumer** and **trader**, not just to those contained in standard form contracts.

### **Consumer notice**

- 1.19 A **consumer notice** is defined broadly in the Act as a notice that relates to rights or obligations between a **trader** and a **consumer**, or a notice which appears to exclude or restrict a trader's liability to a consumer. It includes an announcement or other communication, whether or not in writing, as long as it is reasonable to assume that it is intended to be seen or heard by a consumer. Consumer notices are often used, for instance, in public places such as shops or car parks as well as online and in documentation that is otherwise contractual in nature.
- 1.20 **Consumer notices** are, therefore, subject to control for fairness under the Act even where it could be argued that they do not form part of the contract as a matter of law. Part 2 of the Act<sup>9</sup> covers consumer notices as well as **terms**, ensuring that, in a broad sense any wording directed by **traders** to **consumers** which has an effect comparable to that of a potentially unfair contract term is open to challenge in the same way as such a term. There is no need for technical legal arguments about whether a contract exists and whether, if it does, the wording under consideration forms part of it.
- 1.21 The CMA does not consider that this represents a major change in the law. The OFT previously took the view that notices could be argued to fall within

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<sup>8</sup> See *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), paragraphs 67–69. This does not represent a change from the view previously expressed in the OFT's unfair contract terms guidance.

<sup>9</sup> Part 1 does not make provision for notices, see below part 4, particularly paragraph 4.4 and note.

the scope of the UTCCRs.<sup>10</sup> The use of certain kinds of unfair notices with consumers was previously prohibited by earlier legislation, and wording used in dealings with customers, whether written or oral, could in particular circumstances then (as now) be legally ineffective as against them under general contract law – for example, onerous provisions in unsigned documents which were not sufficiently brought to their attention. Non-contractual notices have nonetheless continued to be used extensively – by businesses and other organisations – as if they were legally binding. The fairness concerns to which this practice can give rise to are now clearly addressed.

- 1.22 Among the kinds of transaction to which the **consumer notice** provisions of the Act may be of particular significance are those involving **digital content**. Software and other digital products are sold to consumers subject to End User Licence Agreements (EULAs). For legal purposes, the terms of EULAs may not in all cases be clearly part of the contract with the consumer. The effect of the Act is to establish that, even if they are not, they are still assessable for fairness and transparency, as consumer notices.
- 1.23 In order to avoid undue repetition, this guidance does not explicitly refer at every point to both contract **terms** and **consumer notices**, in making points that cover both. Generally, explicit reference to consumer notices is made only where it is particularly desirable to clarify the position applicable to wording which falls within the wide definition of **consumer notices** but for legal reasons does not have the status of a contract **term**. Explicit additional reference to notices is particularly selective in part 2 of the guidance, which sets out the CMA's understanding of the requirements of fairness and transparency, and in part 5, which explains why the CMA considers that a range of particular kinds of terms and notices have the potential for unfairness under the Act. In these two parts of the guidance, it may be generally assumed that what is said about terms covers notices unless otherwise indicated.
- 1.24 This approach reflects the CMA's view that the Act's intended effect is to apply in substance the same fairness and transparency tests to contract **terms** and **consumer notices**. The fairness provisions in section 62 of the Act for both written or oral terms and notices, while separate, mirror one

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<sup>10</sup> The OFT considered (and acted on its view) that wording having the practical effect of a contract term was properly treated, for the purpose of giving effect to the Directive, as if it was in law a contract term. The CMA considers that unfair consumers notices which predate the coming into force of the Act are liable to potential challenge, on this basis, in the same way as unfair contract terms of the same date.

another as far as possible (see part 2 below for details). They apply in largely the same circumstances.<sup>11</sup>

- 1.25 Since the fairness and transparency tests under the Act apply to **terms** and **consumer notices** in largely the same way, the CMA considers that the indicative list of the types of terms that may be regarded as unfair (known as the ‘Grey List’ – considered in part 5 of this guidance) also serves to illustrate the forms that unfairness can take in non-contractual notices – see introduction to part 5 under ‘Consumer notices’ below for further details.

### **Digital content**

- 1.26 **Digital content** means data that is produced and supplied in digital form. The digital content may be contained within a physical product, as is the case with, for example, music, films, games or software contained in CD, DVD or computer disc. Alternatively it may be supplied in a non-tangible form, such as a music download on to a computer, apps on a mobile phone/tablet and a film that is streamed.
- 1.27 The statutory rights and remedies under Part 1 of the Act for the most part do not apply to contracts for a trader to supply digital content to a consumer unless it has been paid for either directly or indirectly.<sup>12</sup> The requirements of fairness and transparency under Part 2 of the Act, however, apply to contracts and notices for digital content whether it is ‘paid for’ or supplied free.

### **How the Act works**

- 1.28 The main way in which the Act deals with the issues covered in this guidance is by applying a test of fairness to contract **terms** used by **traders** in transactions with **consumers**. The fairness test takes account of the subject matter of the contract, all the circumstances existing when the **term** was agreed, and all the other terms of the contract or any other relevant contract. The Act also applies substantially the same test of fairness to **consumer notices**. The overall requirement of these provisions is that such terms and notices should be fair.
- 1.29 The Act illustrates the meaning of unfairness by listing types of **terms** which may be regarded as unfair. This indicative list is in Schedule 2 to the Act and

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<sup>11</sup> The same exemption applies to ‘mandatory statutory or regulatory’ wording (see below paragraphs 3.34 onwards). A second exemption, for terms dealing with the ‘core’ contractual issues such as the price, is not expressed to apply to notices, but would not normally be likely to be relevant in any case, see below paragraphs 3.1 onwards.

<sup>12</sup> See below, paragraphs 4.22 and 4.23, for what precisely is meant in this context by ‘paid for either directly or indirectly’.

is substantially the same, but for the addition of three terms, as the indicative list in the Annex to the Directive formerly reproduced without any additions in Schedule 2 to the UTCCRs. The list is referred to below as the Grey List, because what is listed is under suspicion of unfairness, but not necessarily unfair.

- 1.30 It is also a separate and distinct requirement that a written **term** of a **consumer contract** or a **consumer notice** is transparent. The primary requirement of transparency is that a term should be intelligible to consumers.
- 1.31 A term or notice that is unfair<sup>13</sup> is not legally binding on **consumers**. This does not prevent consumers from relying on it if they wish. The Act enables consumers to challenge wording if they consider it unfair and do not wish it to be relied upon as against them. If they make such a challenge, and the **trader** refuses to accept that the wording is unfair, they may wish to consider whether they have a legal case for taking matters further, with a view to seeking, for instance, to resist an apparently unfair demand, or to insist that the trader acts in a particular way. Before taking any steps that will, or may, involve resisting or taking legal proceedings, consumers should always seek legal advice.
- 1.32 There are certain exemptions from the fairness test. The main exemption is commonly called ‘the core exemption’ and relates to terms that specify the main subject matter of the contract or set the price – provided they are transparent and prominent.
- 1.33 Both terms and notices may also benefit from another exemption in the Act which is relevant where wording is covered by legal provision for instance, where its use is required by legislation. This exemption is referred to in this guidance as the ‘mandatory statutory or regulatory’ exemption.
- 1.34 The Act also includes provisions under which certain **terms** (in Part 1 of the Act) and one kind of **consumer notice** (in Part 2) are automatically unenforceable – they are treated as inherently objectionable independently of the fairness assessment. In general these provisions reflect and continue the approach of the UCTA. For the purpose of this guidance, wording subject to this effect is referred to as having been ‘blacklisted’.
- 1.35 The CMA and other bodies can take enforcement action to stop the use of either **terms** or **consumer notices** which they consider are unfair for the purposes of the Act, or which breach its requirements of transparency, or

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<sup>13</sup> Note that what is said in this paragraph does not apply to a term which only fails the Act’s transparency requirement, without being unfair, though such a term is still open to enforcement action – see below paragraph 2.6.

which are blacklisted under it. This type of action seeks to protect consumers in general rather than taking up particular consumers' individual cases.

## Using the guidance

- 1.36 The guidance is divided into six parts. In this first part of the guidance, the CMA's aim is to provide an introduction and a very broad overview of the provisions of the Act.
- 1.37 Part 2 of the guidance sets out the CMA's understanding of the requirements of fairness and transparency. It explains:
- the CMA's approach to interpreting the three elements that make up the fairness test – 'significant imbalance', 'consumer detriment' and 'good faith';
  - the factors which the Act requires to be taken into account when assessing fairness, and the nature of the Grey List of terms that may be regarded as unfair; and
  - the meaning of the requirement of transparency and the ways in which the CMA considers that compliance with it is likely to be achieved.
- 1.38 Part 3 sets out the CMA's views as to the scope of the exemptions from the fairness assessment of certain types of **consumer contract terms** and **consumer notices**. This part of the guidance therefore covers both:
- the exemption for main subject matter terms and price-setting terms – the 'core exemption'; and
  - the exemption for terms and notices which are covered by legal provision – the 'mandatory statutory or regulatory' exemption.
- 1.39 As regards the core exemption, guidance is provided on:
- the purpose and objectives of the exemption;
  - what terms can and cannot fall into it;
  - the type of fairness assessment that it excludes for terms which fall into it; and
  - the conditions that specific types of terms need to meet in order to benefit from exemption, including the CMA's interpretation of the 'prominence' condition.

- 1.40 As regards the ‘mandatory statutory or regulatory’ exemption, guidance is provided on the purpose of the exemption and the type of terms and notices that the CMA considers it covers.
- 1.41 Part 4 of the guidance provides detail on the **terms** (and the one case of a **consumer notice**) which that are treated as inherently objectionable and are therefore ‘blacklisted’ making them automatically ineffective without the need to consider the fairness test.
- 1.42 The majority of the blacklisted terms are those which would exclude or restrict the trader’s liability and remedies arising from breach of certain consumer rights provided by the Act. Part 4 of the guidance therefore explains the rights and, where applicable, the remedies, which **consumers** have under the Act relating to contracts for the supply of goods, digital content and services.
- 1.43 Part 5 of the guidance explains why the CMA considers that certain kinds of terms and notices have the potential for unfairness under the Act. It is arranged according to the categories of unfair terms listed in the Grey List with an additional category covering other types of unfairness (part 5A of the guidance).
- 1.44 In part 5 of the guidance reference is made to Annex A, examples of terms which the OFT challenged as unfair under the UTCCRs. The OFT’s initial approach to enforcement of the UTCCRs involved extensive collation and publication of examples, such as those included in the Annex, as a means of illustrating the requirements of the Regulations and helping business and consumers to understand the law. As understanding of the UTCCRs became better established, the OFT moved to using the UTCCRs more selectively, together with its other tools, so as to ensure maximum impact in tackling harm to consumers across markets. The CMA has continued this selective approach, but considers that the Annex continues to provide numerous practical illustrations of how the principles of contractual fairness have been applied in particular cases.
- 1.45 Part 6 of the guidance deals with the powers of the CMA and other bodies to enforce the unfair terms provisions of the Act. It also considers in more detail the rights for consumers to seek the assistance of the courts to stop a trader with whom they have entered into a contract from using unfair terms in it.

## **The relevance of earlier unfair terms law**

- 1.46 As from 1 October 2015, the Act supersedes the UTCCRs, and the UCTA so far as applicable to **consumer contracts**. Generally, however, it carries forward rather than changing the protections provided to consumers under

earlier legislation. Changes are mainly in the scope rather than substance. The fairness and transparency provisions of Part 2 are effectively the same as those of the UTCCRs – save in applying to consumer notices and negotiated terms – as is to be expected, since it mainly serves to give effect to the Directive which remains unchanged. Similarly, Part 1 largely continues the effect of the UCTA, save that the scope of its protection is selectively extended to services and digital content.

1.47 UK law relating to unfair terms has, however, been developed and changed not only by Parliament, but through decisions of the courts. One of the principal aims in revising this guidance is to reflect the impact of certain judicial decisions taken both in the UK and at European level. Decisions of the CJEU must be taken into account by UK courts when interpreting the provisions in the Act which give effect to the Directive. The extent of continuity in unfair terms legislation means that existing case-law generally, and that of the CJEU particularly, is for the most part as relevant to the Act as it was the UTCCRs.

1.48 1 October 2015 is nonetheless a significant date for legal purposes. **Consumers** entering contracts with **traders** on or after 1 October 2015 are protected by the Act. Those who did so before that date remain protected by the UCTA and the UTCCRs in relation to those contracts. The interpretation of this earlier legislation is and will continue to be subject to development in the light of the same case law as the Act, but it will remain a separate legal regime with its own distinctive characteristics. This guidance endeavours to make clear where the coming into force of the Act changes the law (see Annex B), but is not intended to be treated as a source of information about the earlier legislation.

## **Other legislation particularly relevant to unfair terms**

1.49 In cases involving contract terms and notices, both the general law of contract and other legislation are applicable alongside the Act. Below we briefly consider the relationship between the unfair terms provisions in the Act and two particularly relevant sets of Regulations which are referred to extensively in the guidance. More detailed information on other relevant legislation is given in part 6 of the guidance.

### ***The Consumer Protection from Unfair Trading Regulations 2008***

1.50 The Consumer Protection from Unfair Trading Regulations 2008 (the **CPRs**) transpose into UK law the requirements of the Unfair Commercial Practices Directive 2005. They provide consumers with a range of protections from

unfair commercial practices which distort their decision-making. They introduce a general duty not to trade unfairly, and ban certain specified practices. For more details, see the guidance<sup>14</sup> issued by the OFT and the Department for Business Innovation and Skills in 2008 (BIS) which has been adopted by the CMA.

- 1.51 The CPRs and the Act between them provide protection to consumers at all stages of their dealings with traders. The CPRs cover marketing and other trader activity that has an impact on consumers both before and at the time of their agreement to any contract terms, and with their treatment following any purchases they agree to make. The unfair term provisions of the Act deal with the fairness of the contracts they enter, and therefore need to be seen alongside relevant provisions in the CPRs.
- 1.52 Certain kinds of unfair wording can distort consumers' purchasing decisions, for instance through misleading them about their rights or the risks they may face, omitting key information or providing unclear information.
- 1.53 The CPRs' provisions are thus particularly relevant to the requirement that written terms or notices are transparent. For instance, a term which is potentially onerous but is hidden away or buried in the small print may in some instances be open to challenge by an enforcer as an unfair term, or as a breach of the transparency provision in the Act as well as, or alternatively, a breach of the CPRs.
- 1.54 See below part 6, 'Other relevant law', for more information.

### ***The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013***

- 1.55 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the **CCRs**)<sup>15</sup> implement the Consumer Rights Directive of 2011. Among other things, the CCRs require traders, in contracts covered by the regulations,<sup>16</sup> to provide certain **pre-contract information** to consumers, and to do so 'in a clear and comprehensible manner'. This statutory **pre-contract information** is to be treated as legally binding on the business in the same way as what is said in the contract itself. The goods services or digital content must be provided as stated in the **pre-contract information**, and any

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<sup>14</sup> [Consumer Protection from Unfair Trading Regulations – traders \(OFT1008\)](#).

<sup>15</sup> The CCRs apply to contracts concluded on or after 13 June 2014. For further information, see [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).

<sup>16</sup> A number of contracts are excluded from the Regulations including financial services (albeit in certain circumstances they will be affected by other parts of the Regulations) and rental accommodation for residential purposes.

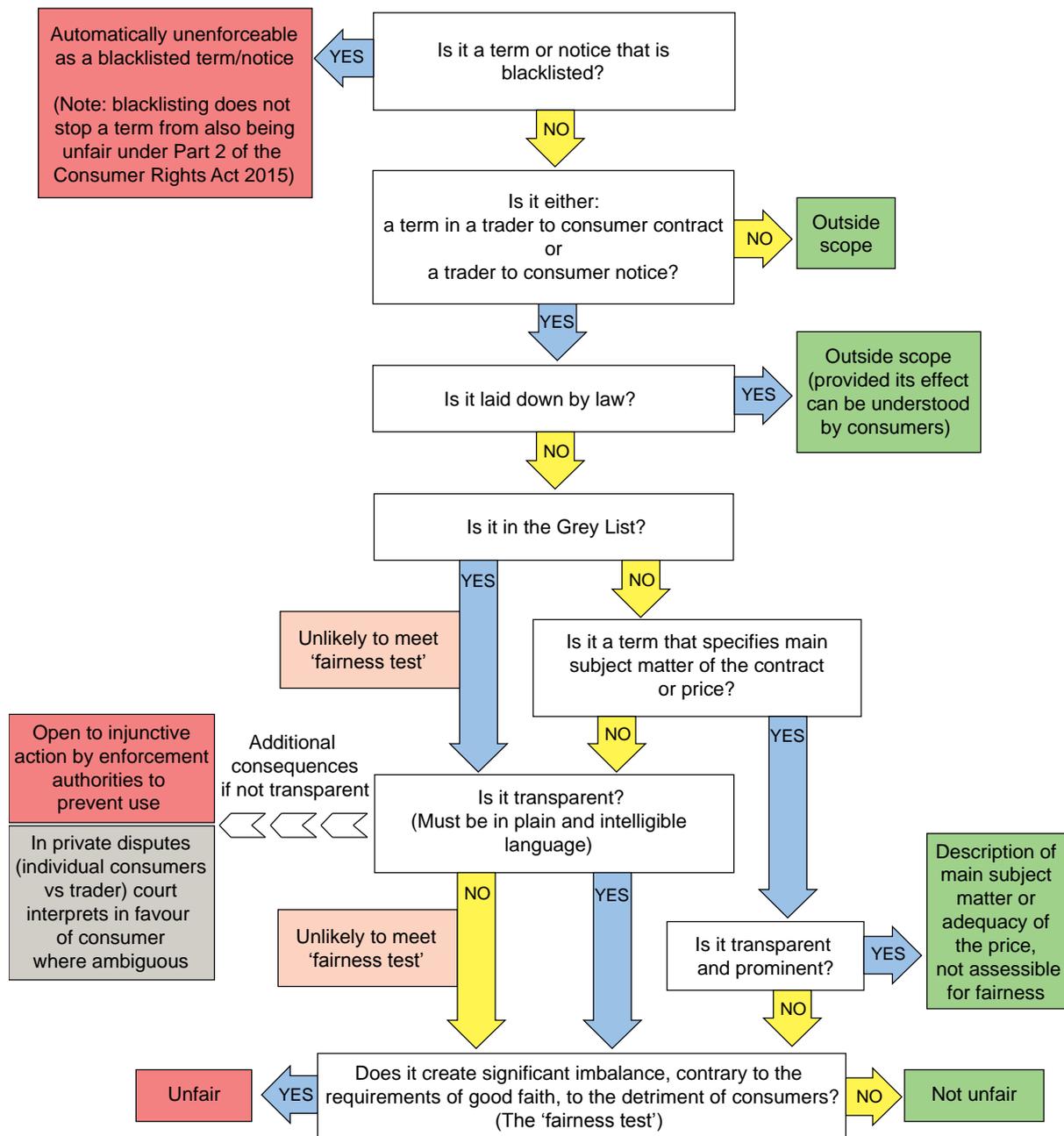
change will not be effective unless expressly agreed between the consumer and the trader.

- 1.56 The provisions of the CCRs should particularly be borne in mind in connection with the use of what are commonly called variation clauses – that is, wording that could be used to allow changes to be made to any aspect of the contract. Where a variation clause allows changes to be made to any details as to (for instance) the product or its price as set out in the **pre-contract information**, businesses need carefully to consider whether their use of such clauses with consumers will meet the requirements of the CCRs and the Act. See below part 6, ‘Other relevant law’, for more information.

### **Unfair terms flowchart**

- 1.57 The final element of this part of the guidance is a diagram, intended to provide an illustrative indication in diagrammatic form of the operation of the Act’s requirements of fairness and transparency.
- 1.58 The flowchart aims to provide an ‘at a glance’ **simplified** overview of the unfair terms provisions in Part 2 of the Act. It should not be used, in isolation, to determine the fairness or otherwise of a particular term, and should be read in light of the guidance documents as a whole. It is not a substitute for legal advice.

**Figure 1: Unfair terms flowchart**



## 2. Part 2 of the Guidance: Fairness and transparency

- 2.1 Part 2 of the Act works alongside the CPRs and other consumer legislation to ensure fairness, in a general sense, in consumer transactions. It does this by applying specific tests of fairness and transparency to all **terms in consumer contracts** used by **traders** in transactions with **consumers**, whether individually negotiated or in standard form. It also applies these tests to **consumer notices**. (The words in bold print are explained above in the ‘key concepts’ section of part 1). The application of these tests is subject to the ‘core’ and ‘mandatory statutory or regulatory’ exemptions (see part 3 of the guidance) which serve to minimise unnecessary impacts and duplication.
- 2.2 Section 62 of the Act provides that a term 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’. The test for notices mirrors the test for terms, except that (in line with the intention to cover non-contractual notices) it does not make reference to ‘the contract’.
- 2.3 Unfair terms and notices are liable to potential enforcement action by a ‘regulator’ such as the CMA or a TSS, and are not enforceable against the consumer. See part 6 of this guidance for more information on public enforcement. If consumers consider that wording on which a trader seeks to rely is unfair, they are entitled to challenge the trader and, if any dispute arises, to invoke the provisions of the Act more formally – taking legal advice as appropriate – for instance by bringing their own proceedings.
- 2.4 Transparency is fundamental to fairness and is also a requirement in its own right, breach of which can lead to enforcement action. The Act at section 68 requires that a written term of a consumer contract, or a consumer notice in writing, is transparent. This means that written terms and notices need to be expressed in plain and intelligible language and be legible. This specific transparency requirement sits alongside and reinforces, the more general obligation, embodied in the requirement of good faith, of fair and open dealing in the use of contract terms which is considered in detail below. To meet the section 68 requirement of transparency, also considered further below, obligations and rights should be set out fully, and in a way that is not only comprehensible but puts the consumer into a position where he or she can understand their practical significance.
- 2.5 This guidance refers at various points to the section 68 transparency requirement as a transparency test, when the context makes this appropriate, in the same way that it refers to the fairness test, and it treats the two tests as operating separately alongside one another. But the purpose of both is to

achieve fairness, and (as underlined by the requirement of good faith) the fairness test is more likely to be met where there is transparency.

- 2.6 Failing this specific transparency test alone, independently of the fairness test, does not make a term unenforceable against an individual consumer in the same way as a finding of unfairness. But there is a requirement that, if a term or notice has more than one possible meaning, and so is ambiguous, it should be given the meaning that is most favourable to the consumer. This is designed particularly to assist consumers in their own disputes with traders. Further, if a regulator considers that a term or notice breaches the section 68 transparency requirement, it can take enforcement action in the same way as when the requirement of fairness is considered to have been breached. Such action may be taken where a term or notice is ambiguous even if one of its potential meanings is not unfair.

## **Consumer notices**

- 2.7 This guidance covers both consumer notices and contract terms. It does not make explicit, in relation to every point applicable to both, that both are covered (see above part 1, 'Consumer notices'). In part 2 of the guidance, references to terms may be generally understood to include consumer notices. This reflects the CMA's view (explained above) that the Act's intended effect is to apply in substance the same test of fairness to both terms and notices, and the transparency test is the same for terms and notices. This approach of the Act has the advantage of ensuring consistency in the application of the law to circumstances involving very closely connected sets of facts and legal issues.

## **Relevance of earlier case law**

- 2.8 This guidance treats UK case law under the UTCCRs relating to the requirements of fairness and transparency as relevant to understanding the corresponding requirements in the Act. As explained above (part 1, 'the relevance of earlier unfair terms law'), the law on these issues has not substantially changed, but it is one of the purposes of reissuing this guidance, to draw attention to ways in which the law has been clarified in recent cases, particularly at European level.
- 2.9 It is the CMA's view that the requirements of fairness as interpreted by the courts should be understood to apply in the same way, and to the same extent, to all terms and notices, irrespective of technical legal issues as to whether they fall within the scope of the minimum protection required by the Directive. Part 2 as a whole obviously needs to be given a consistent

interpretation so far as possible. Such an interpretation is, in any case, required to the extent that the purpose underlying Part 2 of the Act as a whole remains the same as that of the Directive – to protect consumers who contract with a trader, so far as they are in a weaker position than the trader regarding their bargaining power and level of knowledge.

## The fairness test – section 62

- 2.10 A term 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'. The fairness test thus includes the following main elements: **significant imbalance** to the **detriment of the consumer** and **good faith**. It must, however, be emphasised that the overall requirement is a unitary one – the question is whether a term is unfair. The elements of the test are recognised as being capable of overlapping with each other in their application to any particular set of relevant facts. A rigid approach to assessing fairness, involving an artificial exercise broken into separate parts, is not appropriate.
- 2.11 The Act illustrates what is meant by 'fairness' by means of an indicative and non-exhaustive list of types of terms that may be regarded as unfair. This is included in Part 1 of Schedule 2 of the Act. It is referred to below as the Grey List. The Grey List is considered in more detail below and in part 5.
- 2.12 **Significant imbalance** is concerned with the parties' rights and obligations under the contract. The requirement is met if a term is so weighted in favour of a business that it tilts the rights and obligations under the contract significantly in its favour, for instance by granting the trader undue discretion or imposing a disadvantageous burden on the consumer.<sup>17</sup>
- 2.13 A consumer contract may be considered balanced if both parties enjoy rights of equal extent and value in reality, particularly taking into account the nature of the goods, services or digital content provided under the contract. The CMA considers that significant imbalance cannot be avoided just by ensuring a merely mechanical or formal equivalence in rights and obligations. For instance, the fact that the same financial sanction is imposed on both the consumer and the trader for cancelling the contract is unlikely to be acceptable, where (as is often the case) the trader has no interest in cancelling. In these circumstances, the sanction on the trader does not

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<sup>17</sup> Per Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 17.

'balance' fairly the imposition of the same sanction on the consumer for cancelling.<sup>18</sup>

- 2.14 **Significant imbalance** also should not be understood as being restricted to cases in which a purely financial burden or cost is imposed on the consumer. The focus of the fairness test, particularly as regards imbalance, is upon the consumer's legal rights and obligations generally. An example of a term which could impose non-financial disadvantage is one which purports to allow the trader to pass on information it holds on the consumer more widely than is permitted under the Data Protection Act 1998.<sup>19</sup> There may be no financial cost, but the intention is to take away the consumer's legal rights.
- 2.15 Linked to this, it should not be assumed that a reduction in the price will necessarily remove or reduce the effect of a detrimental imbalance in the contract. Unfair terms do not become fair just because a service is categorised by the business as being offered at low cost. The CMA considers that (for example) a term allowing the trader to keep all prepayments where the consumer terminates, regardless of the circumstances, is highly unlikely to be defensible solely on the basis that the overall service provided is good value for money (see paragraph 6 of the Grey List, considered in detail in part 5 of the guidance).
- 2.16 A term is considered most likely to cause an unfair imbalance if it alters the balance in rights and obligations that the law would have struck if left to itself. The CJEU has indicated that an important part of the assessment of fairness of any term is to consider the extent to which it places the consumer in a legal position less favourable than that ordinarily provided for by the law.<sup>20</sup>
- 2.17 A summary of the types of common problems tackled by terms on the Grey List is provided below under the heading 'The Grey List'. Examples of the types of terms where an unfair imbalance is likely to arise include those that have the effect of:
- restricting or excluding the consumer's normal legal rights (for instance, saying the consumer has no right to seek damages where the trader is at fault);

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<sup>18</sup> See paragraph 4 of the Grey List in part 5 of the guidance – paragraph 5.13.4 in particular.

<sup>19</sup> See under 'Exclusions and reservations of special rights' in part 5A of the Guidance.

<sup>20</sup> See Case C-415/11 *Aziz v Caixa D'Estalvis de Catalunya, Tarragona i Manresa*, referred to below as *Aziz*, at paragraph 68.

- constraining the consumer from seeking the legal remedies to which their rights give rise (for instance, compelling the consumer to take a dispute to arbitration); and
- imposing on the consumer additional obligations or risks which are not envisaged by law or unreasonably go beyond anything needed to protect the legitimate interests of the trader (for instance, imposing excessive financial sanctions on the consumer for breaching the contract).

2.18 Fairness has to be considered in the context of the contract as a whole and all the circumstances in which the contract is entered into. Where there is an additional legal safeguard against the detriment that a term might otherwise cause, and this is genuinely available to the consumer, it may be relevant to the overall assessment of fairness. The CMA considers that such legal safeguards are unlikely to be relevant unless they are known and understood by consumers. Consumers may be unaware of, or unable in practice to rely on, protections that are found elsewhere in contractual small print or in the general law.

2.19 To be unfair an imbalance must be practically significant, but a finding of unfairness does not require proof that a term has already caused actual harm. The fairness assessment is concerned with rights and duties, and therefore its focus is on potential not actual outcomes. A term may be open to challenge if it *could* be used to cause consumer detriment even if it is not at present being used so as to produce that outcome in practice. Where it appears that a potentially unfair term is not currently being relied on in such a way as to cause any harm, this may point towards there being scope to improve its chances of being considered fair by redrafting it, for instance by narrowing its effect so that it more precisely reflects the actual practice of the business.

### **‘Good faith’**

2.20 A term is unfair if it causes an imbalance as described ‘contrary to the requirement of good faith’. The preamble to the Directive at recital 16 explains that the purpose of the requirement is to ensure that the fairness assessment includes ‘an overall evaluation of the different interests involved’. As this implies, the concept of ‘good faith’ for the purposes of the legislation is intended to have a broad application.

## ***Fair and open dealing***

2.21 The requirement of good faith embodies a general principle of ‘fair and open dealing’.<sup>21</sup> ‘Good faith’ relates to how contracts are drafted and presented, as well as the way in which they are negotiated and carried out. It is not a technical concept but one that looks to good standards of commercial morality and practice. It requires, in particular, that contracts should be drawn up in a way that respects consumers’ legitimate interests.

## ***Openness***

2.22 In order to achieve the openness required by good faith, 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 consumer.<sup>22</sup> Consumers should not be assumed necessarily to be able themselves to identify (particularly in longer contracts) terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention.<sup>23</sup>

## ***Fair dealing***

2.23 As indicated, openness is not enough on its own, since good faith relates to the content of terms as well as the way they are expressed. Fair dealing has been authoritatively said to require that, in drafting and using contract terms, a trader ‘should not, whether deliberately or unconsciously, take advantage’ of the consumers’ circumstances to their detriment.<sup>24</sup> Relevant circumstances may – depending on the facts of each case – include consumers’ lack of financial resources, their need for the service or product they are buying, their lack of experience of negotiation, and their relative unfamiliarity with the subject matter of the contract.

2.24 The requirement not to take advantage of the consumer may be regarded as a minimum rather than a full statement of the significance of good faith. The CJEU has more recently provided guidance on the meaning of ‘good faith’ that takes a broader approach. It directed the national court to consider whether the business ‘dealing fairly and equitably with the consumer’ could reasonably assume that the consumer would have agreed to the term had the contract been negotiated on equal terms.<sup>25</sup> The CMA considers the CJEU’s

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<sup>21</sup> Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* 2001, as above.

<sup>22</sup> *Ibid.*

<sup>23</sup> See for example, *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), and *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm), at paragraph 21.

<sup>24</sup> Lord Bingham, as above.

<sup>25</sup> See CJEU case C-415/11 *Aziz*, as above, at paragraphs 44, 45 and 69.

approach demonstrates that businesses need, in formulating their contract terms, not just to resist the temptation to take advantage, but actively to take the legitimate interests of the consumer into account.

### ***Consumers' circumstances – how they behave in practice***

- 2.25 Economic research has drawn attention to a number of factors that the CMA considers are potentially relevant to the assessment of fairness. One of these is that most consumers do not read standard written contracts thoroughly before making a purchase.<sup>26</sup> This finding cannot be considered surprising, and it is not clear how it would be practical or economically efficient for consumers generally always to read all the terms of all contracts into which they enter, given the number of transactions in which they are involved and other claims on their time. It remains important that terms should be transparent, since those who do read them should be properly informed. But lack of time and ability to do so is an important source of consumer vulnerability that unfair terms legislation seeks to address.
- 2.26 Such findings, supported by case law,<sup>27</sup> highlight the need for traders to think carefully about how to communicate the substance of rights and obligations to the consumer. In particular, where they consider that their legitimate interests require use of terms that are likely to have a significant impact on the consumer, they cannot rely on doing nothing more than including such terms somewhere in their contractual documents – especially in lengthy contracts that include many less practically important terms.
- 2.27 Economic research has also identified other factors that are potentially relevant to the assessment of fairness, in particular, inherent biases affecting consumers' behaviour generally. Businesses are not ignorant of how consumers are likely to behave and can be expected to rely on their knowledge. Concerns as to fairness are likely to arise where businesses sets the parties' rights and obligations in a consumer contract so as to exploit such biases to their advantage.<sup>28</sup>
- 2.28 Such biases have been identified particularly by practitioners of behavioural economics, a branch of the discipline which acknowledges that people are not always fully rational and can be subject to various limitations on their ability to make assessments or choices. For example, consumers tend to be strongly influenced by how things are presented. They also tend to be poor in

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<sup>26</sup> See the OFT's [Consumer Contracts, OFT1312](#), February 2011, at paragraph 2.23.

<sup>27</sup> See, for instance, *The Office of Fair Trading v Foxtons Ltd*, as above, at paragraph 92.

<sup>28</sup> See *The Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch), at paragraphs 162–173. The facts are described below at 5.15.7.

predicting the future, and to overvalue immediate impacts and undervalue future ones (for example, preferring to receive £5 today than £25 next week). The tendency to attach less weight to effects that are further off is sometimes known as 'hyperbolic discounting'. It may lead consumers not to pay close attention to terms dealing with issues that at the time of contracting may seem to them to be remote or unlikely to arise – for example, termination or renewal fees – even when they are not in any obvious sense hidden from view.

- 2.29 Businesses need to take particular care in communicating key terms to consumers who may have greater difficulty than others in collecting, processing and acting upon information and thus in exercising choice effectively. These consumers may include, for example, young consumers (who lack the benefit of experience), some older consumers (studies show that some mental capacities decline with age) and consumers who in circumstances that leave them short of time or inclined to be distracted (for example, new parents or the recently bereaved). Some consumers in categories such as these may especially favour immediacy rather than reflecting on all aspects of their purchasing decisions. Consumers may also be vulnerable in the context of specific transactions, for example when they make infrequent or expensive purchases.

### ***Good faith, negotiated terms and legal advice***

- 2.30 The fairness test under the Act applies to all consumer contract terms, including those that have been individually negotiated. It is sufficiently flexible to recognise the special character of negotiated as opposed to standard written terms. The requirement of good faith, particularly, allows for proper account to be taken of the significance of any real negotiation that has actually taken place. However, the CMA considers that any contention that a particular consumer has actually influenced the substance of a term has to be tested against a detailed consideration of the circumstances existing at the time the contract was concluded. In our view, individual consumers rarely in practice have the required knowledge and bargaining power to ensure that contractual negotiations involving them are effectively conducted on equal terms.
- 2.31 The CMA considers that, in any case, this issue will not commonly arise in the context of the activity of public enforcement authorities such as the CMA. Their action is taken to restrain the future use of terms with consumers generally, and so is inherently likely to focus on standard terms designed to be used with numerous consumers. It is more likely to be significant in a case brought by an individual consumer who is arguing that a term is unfair in a particular transaction and so should not be binding on him or her. Such an

individual case focuses on a specific set of facts in the past, which may in principle involve negotiation.

- 2.32 A related issue, and one more likely to arise in the context of public enforcement action, is whether a different standard of fairness applies where the consumer is legally advised. Consumers routinely enjoy legal advice prior to entering some kinds of contracts. In the CMA's view, consumers having access to legal advice in relation to a contract does not of itself necessarily close down the issue of whether a particular term unfairly weights it to their disadvantage – especially where the end result is that the parties contract on the trader's standard terms. As indicated above, the CMA acknowledges the need to take account of factors such as negotiation and the availability of legal advice to the consumer in the overall assessment of good faith<sup>29</sup> but considers that receipt of legal advice by consumers does not necessarily put them on an equal footing in terms of bargaining power or level of knowledge as against a business.

### ***Factors in assessing fairness***

2.33 The Act requires the fairness of a term to be assessed taking into account:

- the nature of the subject matter of the contract;
- all the circumstances existing when the term was agreed;
- all the other terms of the contract; and
- all the terms of another contract on which it depends.

Very similar provision is made for notices.

### ***'All the circumstances existing when the term was agreed'***

- 2.34 A term must be assessed taking account of all the circumstances existing when it was agreed. This is not inherently difficult in a case involving a single transaction. An example of a relevant circumstance would be whether the consumer was given a genuine opportunity to understand and consider the term. For the purpose of an enforcement case, however, the position is less straightforward, because enforcement action focuses on consumer transactions generally. The CMA considers that the assessment of fairness in

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<sup>29</sup> This is in line, for instance, with the approach taken in *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm), see in particular paragraphs 372–381 and also see *Harrison and others v Shepherd Homes Ltd and others* [2011] EWHC 1811 (TCC), in particular paragraphs 103–123.

such a cases cannot appropriately be based on all the circumstances existing at the time any particular term was agreed. Rather the enforcer should apply the above requirement as best it can, by reference to a correctly defined hypothetical consumer for that case.<sup>30</sup> In order for the provision to work effectively in such cases, account needs to be taken of ‘the effects of contemplated or typical relationships between the contracting parties’.<sup>31</sup>

- 2.35 The CMA considers that the requirement to take into account ‘all the circumstances existing when the term was agreed’ is consistent with an interpretation of the legislation as being intended to offer special protection to vulnerable consumers. It allows the Act to operate so as particularly to protect those whose circumstances make them vulnerable to exploitation or pressure at the time they actually sign or otherwise agree to a contract. This may include, for example, cases where a contract is signed in the presence of a representative of the trader in the consumer’s home.
- 2.36 The assessment of fairness takes into account circumstances that existed when the term was agreed, not those arising later. This allows for account to be taken of what was contemplated by the parties at the time of agreeing to a term as regards its likely effect as drafted.<sup>32</sup> It does not, however, allow for a term to be treated as unfair because of the trader’s subsequent approach to applying it, where that approach was not foreseen as part of the contractual agreement. For instance, where a trader’s enforcement of a term turns out to involve some form of harassment, the term is not unfair because it fails to forbid such conduct, as opposed to positively permitting it. The way in which contracts are enforced is covered by other legal requirements, such as those in the CPRs on aggressive commercial practices. The general law of contract can also provide remedies for failure to comply with ordinary and reasonable expectations in the way contracts are carried out.
- 2.37 What consumers were told, before concluding a contract, as to its likely effects would in principle form one element of the circumstances taken into account in assessing its fairness. But whether they were actually misled is, again, an issue separate from that of contractual fairness. For the purposes of unfair contract terms legislation, the essential question is whether an unfair imbalance exists in rights and obligations under the contract – for example whether the term has the potential to exclude liability for statements made by the business. Where consumers have been the victim of misrepresentation, or

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<sup>30</sup> *The Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288 at paragraph 47, where the Court of Appeal commented on the meaning of the equivalent provision in the UTCCRs.

<sup>31</sup> As per Lord Steyn in *The Director General of Fair Trading v First National Bank plc*, as above, at paragraph 33.

<sup>32</sup> Lord Bingham in *The Director General of Fair Trading v First National Bank plc*, as above, at paragraph 13.

of other unfair, misleading or aggressive practices, remedies may be more directly available under the law of misrepresentation or under the CPRs.

### ***The Grey List***

- 2.38 Schedule 2 of the Act illustrates the meaning of fairness by including a non-exhaustive and illustrative list of terms that may be unfair. It is a 'grey' list because it does not blacklist terms (see part 4 of the guidance for terms that are blacklisted by the legislation). A term corresponding to one of the types of terms in the Grey List is not necessarily unfair. It may be unfair in some circumstances but not others. Similarly a term may bear no resemblance to any of the terms listed and yet be unfair if it fails the fairness test described above. However, a suspicion of unfairness arises if a term has the object or effect of one of the types of terms listed.<sup>33</sup>
- 2.39 The types of terms in the Schedule overlap with each other, but may cause or allow one or more of the following common problems:
- Consumers being denied full redress if things go wrong.
  - Consumers being tied into the contract beyond what they would normally expect.
  - The trader not having to perform their obligations.
  - Consumers unfairly losing prepayments, if the contract is ended.
  - The trader arbitrarily varying the terms after they have been agreed, for instance, so as to supply a different product, raise the price or reduce consumer rights.
  - The trader determining the price or subject matter of the contract after the consumer is bound by it.
  - Consumers being subject to disproportionate financial sanctions.
- 2.40 Terms are under suspicion of unfairness if they have the same purpose as terms in the Schedule or if they can, by whatever means (whether an imbalance or a lack of transparency) produce the same result. They do not have to have the same form or mechanism. This is now emphasised in the legislation: each type of term on the list begins with the phrase, 'A term which has the object or effect ...'. The wording is taken from the Directive and

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<sup>33</sup> Part 5A of the guidance provides examples of commonly encountered terms considered to be potentially unfair despite not corresponding directly to any term in the Grey List.

reflects its underlying purpose of providing effective rather than narrowly circumscribed protection to consumers.

- 2.41 A consistent approach needs to be taken to the interpretation of both of the two parts into which the Schedule is divided. The purpose of Part 2 is to deal with the scope of the Grey List contained in Part 1 in certain specific contexts, particularly financial service contracts, ongoing contracts, sales of securities and foreign exchange, and other transactions where recognised price indexes are available. A formalistic approach to the interpretation of both parts should be avoided. The Grey List is not intended to apply narrowly, and Part 2 is not to be understood as providing exemptions from the requirement of fairness. The Act specifically states at section 63(2) that a term listed in Part 2 of the Schedule ‘may nevertheless be assessed for fairness’. Any other approach would have the potential to undermine the main purpose behind the list, of illustrating the meaning of ‘unfairness’ in section 62. For more detailed information about terms that appear in the Grey List and other terms that are considered unfair, see part 5 of the guidance.

## **The Transparency test – section 68**

- 2.42 The Act requires at section 68 that a written consumer contract term or consumer notice<sup>34</sup> is transparent. Transparency is also fundamental to fairness in a general sense, but where this guidance refers to ‘the transparency test’ or ‘the transparency requirement’ it is referring to the Act’s specific requirement. This provision is based on the requirement in the Directive that terms are written in plain and intelligible language – the Act adds a requirement of legibility.<sup>35</sup> However, legibility and clarity of language are not enough to ensure compliance – as explained below, terms should be drafted to ensure that consumers can make informed choices.<sup>36</sup>
- 2.43 Although our focus below is on standard terms, the Act’s transparency test, like its fairness test, applies to all written consumer contract terms, including those that are individually negotiated. In addition, terms defining the main subject matter and setting the price can only benefit from the main exemption from the fairness test (‘the core exemption’) if they are transparent (and prominent) – see part 3 of the guidance.

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<sup>34</sup> As explained above, references to terms should generally be taken to include notices in this part of the guidance.

<sup>35</sup> The key role of transparency in assessing fairness itself was underlined in the CJEU case of C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* (referred to below as *RWE*).

<sup>36</sup> See part 3 of the guidance for the role that transparency has in limiting the application of ‘the core exemption’.

- 2.44 Clarity and legibility in contractual language is widely recognised as desirable in its own right but the Act goes beyond promoting that objective as an end in itself, or as a means to ensure legal certainty. Consistently with the Act's (and Directive's) purpose of protecting consumers from one-sided agreements, and the requirement of the Directive that 'the consumer should actually be given an opportunity to examine all the terms' (Recital 20), the transparency provisions in the Act have to be understood as demanding 'transparency' in the full sense.
- 2.45 The CJEU has explained that the requirement of plainness and intelligibility means that the term should not only make grammatical sense to the average consumer but must put the consumer into the position of being able 'to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [the term]'. The reason for the term and its relationship with other terms should be transparently set out.<sup>37</sup> This is consistent with the court's stated view that 'it is of fundamental importance for a consumer' to have 'information, before concluding a contract, on the terms of the contract and the consequences of concluding it ... It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms'.<sup>38</sup>
- 2.46 Terms should therefore be drafted to ensure that consumers are put into a position where they can make an informed choice whether or not to enter into the contract. The consumer needs to have a proper understanding of the contract for sensible and practical purposes. It should set out all obligations and rights in a clear and comprehensible way, so that the consumer is able to see how they relate to each other, and can foresee and evaluate, at the time of conclusion of the contract, the consequences they may have in the future.
- 2.47 Where complex and technical issues have to be covered, particular care should be taken. It should not be assumed, for instance, that the consumer understands the detail of how a particular transaction or market operates. Sufficient information should be given (for example, in accompanying literature) to ensure that the consumer understands both the words used and the practical implications of any unavoidably difficult terms and their relationship with his or her other rights and obligations.
- 2.48 The transparency requirement in the Act needs to be seen alongside other legal requirements whose effect is to oblige businesses as far as possible to

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<sup>37</sup> Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraph 75 (referred to below as *Kásler*). See also Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* (referred to below as *Matei*, at paragraphs 73–77 and Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, at paragraphs 40–49.

<sup>38</sup> Per the CJEU case of C-92/11 *RWE*, as above, at paragraph 44.

put consumers into a position where they can make an informed choice. For instance, the CPRs prohibit business practices that mislead consumers and which are likely to cause the average consumer to take a different decision, which could include buying a product they would not otherwise have bought or not exercising a legal or contractual right which they otherwise may have exercised (see part 1 above on 'other legislation').

- 2.49 A term that fails to meet the transparency test alone is not, like a term that creates an unfair imbalance, unenforceable against the consumer. However, where lack of transparency results in ambiguity, so that there is more than one possible meaning and potentially confusion, the court is required to apply the interpretation most favourable to the consumer. This provides a degree of consumer protection while allowing the court to enforce the contract in such a way as to interfere as little as possible with the transaction as agreed between the parties.
- 2.50 The Act (in line with the Directive) makes clear that the purpose of the 'most favourable interpretation' rule is to protect individual consumers in private disputes.<sup>39</sup> It does not give traders a defence against regulatory action. If a term's ambiguity could cause detriment to consumers it may be challenged by a 'regulator' as unfair even if one of its possible meanings is fair. In addition, a 'regulator' can take enforcement action if a term is considered to breach the requirement of transparency in the same way as if it is considered unfair.

### ***What is required to comply?***

- 2.51 The starting point is that consumers need to be able to understand their rights and obligations. Terms must be intelligible to the average consumer, taking into account for instance the nature of the goods, services or digital content provided. Ordinary words should be used as far as possible and in their normal sense. In the CMA's view, words that are not literally unintelligible are likely to fail the transparency test where, for instance, as a result of vagueness of language, their effect is likely to be unclear or misleading to the average consumer.
- 2.52 To ensure that terms are fully intelligible, there is a need for clarity in the way terms are organised. Transparency is more likely to be achieved where sentences are short, and the text of the contract is broken up with easily understood subheadings covering recognisably similar issues. Statutory

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<sup>39</sup> See section 69 of the Act, which applies to notices as well as terms.

references, elaborate definitions, and extensive cross-referencing should be avoided.

- 2.53 Section 68 refers specifically to legibility. In written contracts, the print must be clear. This depends not only on the size of font used but also its colour, the background and, where paper is used, its quality.
- 2.54 While it is desirable that terms are clear and precise for legal purposes, legal precision alone will not suffice to meet the transparency test. This is because the purpose of transparency is to ensure that the average consumer is properly informed. Consumers do not normally act on legal advice, so precise legal terminology does not generally assist them in their decision-making. An example of unhelpful legal drafting is the inclusion of references to statute in exclusion clauses. This may be intended to ensure that the law treats such clauses as fair, but the CMA considers that where a wide exclusion clause is qualified merely by a statement that the trader's liability is excluded only to the extent permitted by statute, it is highly likely not only to cause an unfair imbalance but also to be in breach of the transparency provisions in the Act (see paragraphs 5.2.8 to 5.2.10).
- 2.55 Mere inclusion of references to a legislative or regulatory provision is generally unlikely to contribute usefully achieving either fairness or transparency. Wherever the protection of consumers requires that they be made aware of relevant legal provisions, the CJEU has stated that 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned'.<sup>40</sup> It is not sufficient, therefore, just to name or allude to the relevant legal provisions – consumers must be put in a position of being able to understand their effects.
- 2.56 The points made above do not apply only to cases where obviously obscure legal jargon is used. What may appear to be relatively straightforward technicalities can have onerous implications of which consumers are likely to be unaware. Some examples appear in part 5 of the guidance, such as references to 'indemnity' (see paragraph 5.31.7) and 'statutory rights' (see paragraphs 5.11.4 and 5.11.5).
- 2.57 As the 20<sup>th</sup> recital of the Directive expressly acknowledges, plain language is of little value unless consumers are actually given an opportunity to examine all the terms. For example, where a contract is long or detailed, or covers technical or complex issues that need to be explained elsewhere (for example, in accompanying literature), consideration of the documentation

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<sup>40</sup> See the CJEU case of C-92/11 *RWE*, as above, at paragraph 50.

may in practice require more time than is practically available to the consumer. One way of ensuring a fuller opportunity to examine is if a 'cooling-off period' (including a cancellation right) is provided, but it should not be assumed that a cooling-off period can cure a lack of transparency, whether it arises from gratuitous lack of clarity of language or more fundamental problems inherent in the nature of the contract provisions.

- 2.58 Transparency, like fairness, is not a matter of rigid requirements. Transparency and fairness require that consumers have a real chance to learn and understand, by the time the contract becomes binding, the nature and consequences of their obligations including those whose effect might otherwise come as an unpleasant surprise. Terms that could have a disadvantageous impact on the consumer should be given appropriate prominence, as well as setting out clearly the obligations and the circumstances in which they arise (see above on 'good faith').
- 2.59 If potentially disadvantageous terms are in any way concealed, they may become a trap for the consumer. No such term is likely to meet the transparency test if it requires 'some legal mining to bring it to the surface ... the typical consumer is not a miner for these purposes'.<sup>41</sup> This is particularly true for complex pricing terms or those which involve potentially surprising, significant or onerous obligations being imposed on the consumer in the future (for instance, on the occurrence of a future event where there is some element of uncertainty as to whether the event will happen). This may cover, for example, terms that impose administration charges, or termination and renewal fees, in the event of the consumer making decisions that, at the time of contracting, he or she is unlikely to anticipate having to make.
- 2.60 There are various ways in which a significant term may be made more likely to be transparent. For instance, in addition to setting out the obligations it involves fully and clearly, it may assist if such a term is highlighted to the consumer by comparison with the majority of terms. However, merely highlighting a term in the contract itself may achieve little, for example, if its meaning and significance are obscure. As indicated, this risk may in some cases be addressed, by providing explanatory material – for example, a summary – alongside the contract. And transparency is more likely to be achieved if information is conveyed earlier on, in brochures and even advertisements. Providing information early on will incidentally tend to help compliance with the other legislation referred to in part 1 above.

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<sup>41</sup> See *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 74.

- 2.61 Where transparency is achieved, all kinds of terms are more likely to be fair. The ‘requirement of good faith’ mentioned above cannot be met by transparency alone. However, when consumers are in a position to understand fully what they are agreeing to, there is less scope for doubting that this part of the test of fairness, has been met. There is also less likelihood of disputes arising between trader and consumer. Many companies and trade associations have seen potential commercial advantages in having clear and well-presented contract terms.
- 2.62 Annex A contains examples of terms under the heading ‘Group 19 – Plain and intelligible language’ which were considered by the OFT not to meet the transparency requirement.<sup>42</sup>

### ***The ‘average consumer’***

- 2.63 The ‘average consumer’ is an objective standard which has been developed for certain purposes in European case law. These purposes do not include the assessment of contractual fairness. The CJEU has, however, held that the average consumer is the appropriate standard by which to determine whether terms meet the Directive’s specific requirement of transparency.<sup>43</sup> The average consumer is also expressly referred to in the Act, though only as a standard by which to judge whether a term is ‘prominent’ for the purposes of ‘the core exemption’ (see below, part 3 of the guidance, under ‘Transparency and prominence’).
- 2.64 The average consumer is a ‘consumer who is reasonably well informed, observant and circumspect’.<sup>44</sup> Though this is clearly intended to be an objective standard, it is capable of recognising that the average consumer’s ‘level of attention is likely to vary according to the category of goods or services in question’.<sup>45</sup> The significance of the context can be illustrated by reference to a case which came before the CJEU, involving the sale of loans with a linked insurance contract as part of a single transaction. The court found that the average consumer ‘cannot be required ... to have the same vigilance’ as regards the insurance element of the transaction as he would if he had entered into it separately.<sup>46</sup>

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<sup>42</sup> Before referring to Annex A see part 5 of the guidance, paragraphs 5.1.5–5.1.9.

<sup>43</sup> C-26/13 *Kasler*, paragraph 75.

<sup>44</sup> This is the definition in the Act at section 64(5) for the purposes of assessing whether a term is prominent, but it is the same definition as used by the CJEU in the case law referred to.

<sup>45</sup> See Joined Cases T-183/02 and T-184/02 *El Corte Inglés v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2004] ECR II-965, at paragraph 68.

<sup>46</sup> See C-96/14 *Jean-Claude Van Hove*, as above, at paragraph 48. See below, paragraph 3.21 for an example drawn from UK jurisprudence.

2.65 The CMA does not consider that the concept of the average consumer is directly relevant to the assessment of fairness for the purposes of enforcement action. In the CMA's view, it is appropriate in assessing whether a term is fair to examine the circumstances existing when the term was agreed, taking into account 'the effects of the contemplated or typical relationships between the contracting parties' (as mentioned above in line with the approach taken by the House of Lords in the leading UK UTCCRs case).<sup>47</sup> Such an approach accommodates the fact that the focus of an enforcement case is not on the circumstances of one individual but on the interests of consumers generally, including those with whom the trader (and other traders) may contract in the future. It allows the enforcer to take into account circumstances which may make consumers vulnerable at the time of entering the contract, including for example, where contracts are signed in the presence of a representative of the trader in the consumer's home or where terms and conditions are targeted at those in financial difficulties.

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<sup>47</sup> See section 62(5)(b) of the Act and above under the heading 'All the circumstances existing when the term was agreed'. The words quoted are those of Lord Steyn in *The Director General of Fair Trading v First National Bank plc* as above, paragraph 33. This formulation is considered to be of particular importance in explaining why public authorities when enforcing the Act, though clearly taking action on behalf of consumers generally, do not necessarily have any reason to focus on the hypothetical average consumer who is reasonably well informed, observant and circumspect.

## 3. Part 3 of the Guidance: the exemptions

### Introduction

3.1 This part of the guidance sets down the CMA's views as to the scope of the exemptions from the fairness assessment in Part 2 of the Act. The partial exemption for main subject matter and price-setting terms – the 'core' exemption – is dealt with first, covering the purpose and objectives of this exemption and then the detail of the legislation. The second section deals with the exemption for terms and notices which are covered by legal provision – the 'mandatory statutory or regulatory' exemption.

### 'The core exemption'

#### *Purpose of 'the core exemption'*

3.2 The Act includes an exemption from the fairness test in Part 2 for **terms** that deal with the main subject matter of the contract or the adequacy of the price, provided they are transparent and prominent. (This exemption does not extend to **consumer notices** but businesses are unlikely to wish to use wording that has no legal force to determine 'core' contractual issues). This exemption is referred to in this guidance as 'the core exemption' because it can be said to relate to the core of the contract – what the CJEU has called the 'essence of the contractual relationship'. In the guidance we use the phrase 'core exemption' by way of shorthand. It is not an absolute exemption – its application is subject to terms being transparent and prominent.

3.3 The primary purpose of the Directive is to protect **consumers**, from one-sided contracts and from distortions in competition that are detrimental to them. It is settled law that the legislation giving effect to the Directive has to be interpreted and applied so as to operate consistently with its purpose. Exemptions from the fairness test, in particular, must be 'strictly interpreted'.<sup>48</sup> The CMA considers that the exemptions are not intended to mean that, where they apply, the Directive's purpose of protecting consumers can be ignored. Rather they recognise that, in the areas they cover, the Directive's purposes may be as well or better served by other means.

3.4 It follows that no interpretation of 'the core exemption' provision is likely to be correct that would allow it to serve as a means of escaping the requirements

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<sup>48</sup> CJEU case C-26/13 *Kasler*, as above, at paragraph 42, and see *The Director General of Fair Trading v First National Bank plc*, as above, at paragraphs 12 and 34, and *The Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6, at paragraph 43.

of fairness through the use of mere drafting techniques. It cannot be used to remove from an assessment of fairness terms which have as their object or effect the creation of an unfair imbalance – such as, for example, exclusion clauses, cancellation provisions, disproportionate financial sanctions or other terms included in the Grey List. This would allow ‘the main purpose of the scheme to be frustrated’.<sup>49</sup>

- 3.5 ‘The core exemption’ serves to remove any risk of unnecessary regulation of the principal obligations or price in the contract. Its inclusion in the Directive represents a recognition that, ‘in a free market economy parties to a contract are free to shape the principal obligations as they see fit. The relationship between the price and the goods or services provided is determined not according to some legal formula but by the mechanism of the market’.<sup>50</sup> In line with this analysis, the CMA takes the view that only terms that are subject to and constrained by competition have any realistic chance of being seen to fall within ‘the core exemption’.<sup>51</sup>
- 3.6 Under the Directive, if terms that determine the ‘principal obligations’ or the quality/price ratio are not in plain and intelligible language ‘the core exemption’ does not apply – they are fully assessable for fairness. This is consistent with what is said above. It is only if such terms are transparent that consumers are able to compare what is on offer across the market and make the best choices available to them in deciding which contracts to enter.
- 3.7 A condition of prominence has been added to the provisions implementing the Directive’s ‘core exemption’ in UK legislation. The CMA considers this to be fully consistent with an interpretation of ‘the core exemption’ as intended to ensure that only those ‘principal obligations’ or price terms which are subject to the correcting forces of competition and genuine decision-making are fully assessable for fairness.<sup>52</sup>

### **‘The core exemption’ in the Act**

- 3.8 The exemption in the legislation provides that a term may not be assessed for fairness to the extent that:
- it specifies the main subject matter of the contract; or

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<sup>49</sup> *The Director General of Fair Trading v First National Bank*, as above, paragraph 34.

<sup>50</sup> Brandner, HE and Ulmer, P (1991), ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’, 28 *Common Market Law Review* 647, p656.

<sup>51</sup> This is not to say or imply that the CMA considers evidence as to whether a term is subject to competition is needed, as a matter of law, to establish whether it is subject to the exemption.

<sup>52</sup> See also Law Commission (25 July 2012), ‘Unfair Terms in Consumer Contracts: a new approach? Issues Paper, paragraph 8.3.

- the fairness assessment would be of the appropriateness of the price payable under the contract, by comparison with the goods, digital content or services supplied.

These two limbs are not to be understood simplistically as applying to two separate and mutually exclusive categories of term – those dealing with what is bought, and those with what is paid. The first limb is broader than that – it can, for instance, in principle cover terms relating to payment.<sup>53</sup> The second limb, by contrast, is narrower – in the CMA's view, it does not operate to exempt payment terms as such – and particularly not indiscriminately. Rather, it covers terms that go directly to the question of whether the contract price can be considered to be 'adequate' or 'appropriate' as compared with what is supplied in return, to the extent that they do that. Price-setting terms are those most likely to fall within it, and this guidance for brevity refers to it as an exemption for such terms, but not all such terms do so. This reflects the fact that its focus is not on price alone but on 'the quality/price ratio of the goods or services supplied'.<sup>54</sup>

- 3.9 A term which specifies the main subject matter of the contract or sets the quality/price can benefit from the exemption only if it is both transparent and prominent. If such terms are not prominent and transparent, the exemption does not apply and they are fully assessable for fairness.
- 3.10 The Act also makes clear that 'the core exemption' does not apply to a term that corresponds, as regards either its object or its effect, to a term set out in the Grey List. Such terms are always fully assessable for fairness even when they are transparent and prominent. This confirms rather than changes the position as it was previously understood by the OFT and the CMA.<sup>55</sup>

### **'Main subject matter'**

- 3.11 Only terms which specify what the CJEU has called the 'very essence of the contractual relationship' fall within the first part of 'the core exemption', which refers to the 'the main subject matter of the contract'. Such terms 'must be understood as being those that lay down the essential obligations of the contract' as against terms which are 'ancillary to those that define the very essence of the contractual relationship'.<sup>56</sup> The CMA considers that in a

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<sup>53</sup> See the CJEU case of C-26/13 *Kasler*, as above, for example, at paragraph 59 and also C-143/13 *Matei*, as above, for instance, at paragraphs 64–72, where the CJEU directs the national court to consider whether the 'risk charge' falls within the first and second limb of the exemption.

<sup>54</sup> See the 19<sup>th</sup> recital of the Directive.

<sup>55</sup> This position was also recognised by the courts, see *The Office of Fair Trading v Abbey National plc*, as above, at paragraph 101.

<sup>56</sup> C-26/13 *Kasler*, as above, at paragraphs 49 and 50.

contract for the sale of goods, for instance, terms which describe the nature of the goods to be sold are likely to be seen as setting out ‘essential obligations’. Such terms are able, provided they are transparent and prominent, to benefit from ‘the core exemption’. By contrast, a term describing the arrangements for delivery of the same goods would (depending on the circumstances) be likely to be considered to be ancillary and not be able to benefit from the exemption (see also below on the ‘exchange approach’).

### ***Price/quality assessment***

- 3.12 A price-setting term which falls within the second limb of the exemption can be assessed for fairness except to the extent that the assessment relates to the appropriateness of the price as against the services, goods or digital content supplied in exchange. This means that the level of the price cannot be assessed against the value of the product. Such a term may still be assessed, however, on grounds other than the appropriateness/adequacy of the price. This could include, for instance, the timing, method or variation of the payment.

### ***The exchange approach***

- 3.13 Where a term makes a charge payable, but not in return for any separately identifiable goods, services or digital content, there is a risk that it may not benefit from the second limb of ‘the core exemption’, even if it is transparent and prominent. A price-setting term is capable of falling clearly within the exemption where a service, goods or digital content is provided to the consumer in exchange for that charge.<sup>57</sup>
- 3.14 For example, even in a complex service contract, with multiple charges payable both immediately and in the future, a term setting a charge is likely to benefit from the exemption if a particular service is provided to the consumer in exchange for the particular charge, provided it is transparent and prominent. If, for instance, a consumer is charged an administration fee during the performance of the contract but no service is provided specifically to the consumer in exchange for that fee, then in our view such an ancillary term is unlikely to benefit from the exemption. A case in which the exemption was found not to apply involved a clause in a letting agreement entered by a consumer landlord which required payment of sales commission to the letting

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<sup>57</sup> See *Kasler*, as above, at paragraph 58 and *C-143/13 Matei*, as above, at paragraphs 70 and 71.

agent if the landlord sold the property to the tenant, but where no selling service was offered or provided.<sup>58</sup>

### ***Grey List terms and ‘the core exemption’***

3.15 The Act makes clear that terms with the object or effect of those on the Grey List cannot fall within the exemption. Regardless of its form or mechanism, any term which has the object or effect of a term on the Grey List will be fully assessable for fairness. This exclusion underlines the fact that a term may not benefit from ‘the core exemption’ merely on the basis that it can be said to have an impact on the main subject matter of the contract or the price. Terms granting the trader unilateral discretion to vary the price or the definition of the main subject matter provide obvious examples of terms included in the Grey List that are open to, and indeed particularly liable to, come under scrutiny as regards compliance with the requirements of fairness.

### ***An overview of ‘the core exemption’***

3.16 The chart below provides a simplified guide as to assessing whether terms are subject to the core exemption.

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<sup>58</sup> See *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 103.

**Figure 2: Chart for core exemption**

Start with Question 1 (Q1) and work through the chart to see whether a term falls within the core exemption.<sup>59</sup>

<b>Q1</b>	Does the term have the object or effect of a term on the Grey list?	Yes	The term is fully assessable for fairness	No	Go to Q2
<b>Q2</b>	Is the fairness assessment of the main subject matter of the contract?	Yes	<b>Go to Q4</b>	No	Go to Q3
<b>Q3</b>	Is the fairness assessment going to be of the appropriateness of the price in comparison with the services, goods or digital content supplied in exchange?	Yes	<b>Go to Q4</b>	No (ie answers to Q2, and Q3 are no)	'The core exemption' does not apply.
<b>Q4</b> (ie answer to Q2 or Q3 is yes)	Is the term both transparent and prominent?	Yes	The term benefits from 'the core exemption'	No	The term is fully assessable for fairness

### ***Transparency and prominence***

3.17 To benefit from 'the core exemption' terms must be **transparent** and **prominent**. Particular attention is given below to prominence, since it is a condition created by new domestic legislation and not yet the subject of any judicial consideration. For the same reason, it should particularly be appreciated that what is said below is the CMA's view, and that the meaning of 'prominence' is ultimately a matter for the courts.

#### *Transparent*

3.18 **Transparent** for the purpose of 'the core exemption' has the same meaning as explained in part 2 of the guidance in relation to the Act's specific requirement of transparency for written terms. It should, however, be noted that for the purposes of 'the core exemption' the transparency requirement applies to both written and oral terms, save that relevant oral terms do not (for obvious reasons) have to be legible.

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<sup>59</sup> Note that there will be no need go through these steps if the 'mandatory statutory or regulatory' exemption (on which see below) applies.

3.19 As explained above in part 2, in line with the Directive, the requirement of transparency has to be understood as demanding transparency in a full sense. Terms should not only be comprehensible but drafted to ensure that consumers are put in a position where they can make an informed choice about whether or not to enter the contract, on the basis of a proper understanding of the terms for sensible and practical purposes. Contracts should be structured clearly, and explained in accompanying literature as necessary. Consumers need to be able to see and understand terms that could disadvantage them. However, in relation to ‘the core exemption’, the requirement of transparency is supplemented by an additional condition of prominence.

### *Prominent*

3.20 The legislation says that a relevant term is prominent for these purposes if it is brought to the consumer’s attention in such a way that an **average consumer** would be **aware** of it. In this context, an average consumer is defined in section 64(5) as a ‘reasonably well-informed, observant and circumspect’ consumer.

3.21 The meaning of **average consumer** has already been discussed in connection with the Act’s transparency test. The standard it denotes is well established in European law. It is objective in character, but variable to the extent that the average consumer’s level of attention is likely to vary according to the nature and context of the transaction involved. A relevant example of the application of the average consumer standard in a UK court case involved terms in certain gym contracts. The average consumer was taken to mean ‘a member of the public interested in using a gym which is not a high end facility and who may be attracted by the relatively low monthly subscriptions’.<sup>60</sup> The CMA considers that consumers, whether or not they can be considered to meet the average consumer criteria, cannot generally be expected to read thoroughly terms in the small print of standard contracts (see above paragraph 2.25).

3.22 The legislation requires that a relevant term must separately meet the requirements of both transparency and prominence to benefit from the core exemption. The requirements of transparency and prominence are both set by reference to the average consumer, and are obviously not unrelated in other respects too – for example, a term that is concealed or hidden away is unlikely to be either transparent (see above paragraph 2.59) or prominent. But

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<sup>60</sup> *The Office of Fair Trading v Ashbourne Management Services Ltd and others*, as above, at paragraph 155. See also above, paragraph 2.64 for a further example).

this potential for overlap in practice should not distract from the fact that for a relevant term cannot escape a full assessment for fairness if it is only transparent or only prominent.

### *Awareness*

- 3.23 In the CMA's view, the Act's reference to the average consumer being **aware** of a term should – as with transparency – be taken to denote awareness of it for practical purposes, so that he or she can make an informed purchasing decision. In order to benefit from the exemption, terms need to be brought to the consumer's attention prior to the conclusion of the contract in a way that is likely to enable the average consumer to understand and appreciate the essential features of the bargain when making purchasing decisions, particularly so that he or she can compare and decide between different products on offer (see above paragraph 3.5).
- 3.24 The CMA considers that when formulating their terms and their sales processes, businesses need to focus on ensuring that ordinary consumer are in a position to make informed purchasing decisions. This should help to achieve compliance with the Act generally, and particularly with its prominence provision since it recognises that:
- the UK courts are bound to interpret the scope of the core exemption consistently with the Directive, which intended that terms must be subject to effective competitive pressures to fall within 'the core exemption' (see paragraphs 3.5 and 3.6 above); and
  - the approach to interpreting prominence needs to be consistent with that required for the closely related and, in some circumstances, overlapping provision regarding transparency in the core exemption and with the requirement of good faith.
- 3.25 In line with this approach, the CMA considers that different levels of prominence are likely to be needed for terms which entail different levels of risk of detriment to the consumer. If traders have regard to this, there should be less risk of the practical benefits of prominence being lost through adoption of crude or simplistic methods of attempting to achieve prominence – for instance, making numerous terms in the same document equally 'prominent', regardless of their nature and type, via use of (for instance) large or bold print.
- 3.26 A term that is potentially surprising, or particularly onerous, or inherently difficult to understand, is likely to require greater prominence than terms which are none of those things. Terms of this kind may include price-setting terms that are tied into complex pricing structures, and terms that require the

consumer to pay charges on the occurrence of a future event that the consumer may, at the date of the contract, not be expecting to occur. When considering the level of prominence needed for such a term, account needs to be taken of the likely reasonable expectations of the average consumer when entering the contract, and whether the charge is, by reference to those expectations, disproportionately high compared to the charges imposed by other terms of a similar type in the contract.

3.27 The question to be determined in deciding whether a term falls within or outside ‘the core exemption’ on the basis of prominence is, therefore, not whether it is made prominent in a merely formalistic way, for instance by textual highlighting, but:

- whether any such formal prominence is likely to be practically effective in the transaction; and, if it is,
- whether the degree of prominence achieved is, in all the circumstances, sufficient to meet the requirements of the legislation. As noted above, these embody a recognition that terms need to be subject to the correcting forces of competition if they are to be appropriately treated as not assessable for fairness (see paragraphs 3.5 and 3.6).

3.28 The CMA considers that whether a term achieves practical and effective, not merely formal, prominence, will depend on consideration of all the circumstances at the conclusion of the contract, the nature of the term and its relationship to other terms. Regard will need to be had particularly to:

- all the information given to the consumer prior to the conclusion of the contract as well as relevant aspects of the sales process;
- the nature of the relevant term and its relationship to the other terms of the contract (and of other contracts, if there is more than one) – for instance, any complexity in charging structures generally; and
- what will have been the consumer’s reasonable expectations when deciding whether to enter the contract.<sup>61</sup>

3.29 For the purposes of action taken by a public authority, judging whether a term meets the condition of prominence may include considering one or more of the following:

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<sup>61</sup> As to the importance of reasonable expectations, see the Law Commission’s Issues paper, ‘Unfair Terms in Consumer Contracts: a new approach?’, paragraph 8.72.

- the content of terms and conditions and the way they are communicated to the consumer at the pre-contract stage, taking into account, for instance, how they are made available, their structure and length;
- what the trader says, and what their sales representatives say or are instructed to say to consumers, during the sales process leading up to the conclusion of the contract;
- the content and nature of the trader's advertising material;
- any information provided to consumers before entering the contract, including the terms and conditions themselves, and any material that explains the parties' rights and obligations under the contract, for example leaflets, summaries of key information documents or upfront information provided on the website; and
- the amount of time generally given to consumers to consider such material before agreeing to the contract.

3.30 For certain terms to which 'the core exemption' might otherwise seem relevant, it may in some circumstances be practically difficult to achieve prominence.<sup>62</sup> Such a position might arise, for example, where there are numerous charges for various services under the contract, which will or might arise depending on the choices of the consumer or external contingencies.

3.31 The CMA does not consider that prominence can be achieved in such cases simply by bringing all the terms in question to the consumer's attention equally through the same mechanism. Any single approach to highlighting is liable to lose its effectiveness when applied to more than isolated individual terms. Just because there are, in a particular contract, too many terms that a trader wishes to be exempt to allow for them all to be meaningfully singled out does not mean that the condition of prominence is disapplied, or that the standard of prominence required is relaxed. The need to achieve prominence is similarly to be understood as holding good in other cases where it may not be obvious how prominence might be achieved in practical terms – for instance, where the medium of communication used is a very small electronic screen.

3.32 This may mean, in some cases, that traders are unable to achieve prominence for terms that they wish to benefit from the core exemption. The CMA does not consider this to be the result of any error or problem in the drafting of the Act. On the contrary, it is consistent with the purposes of the

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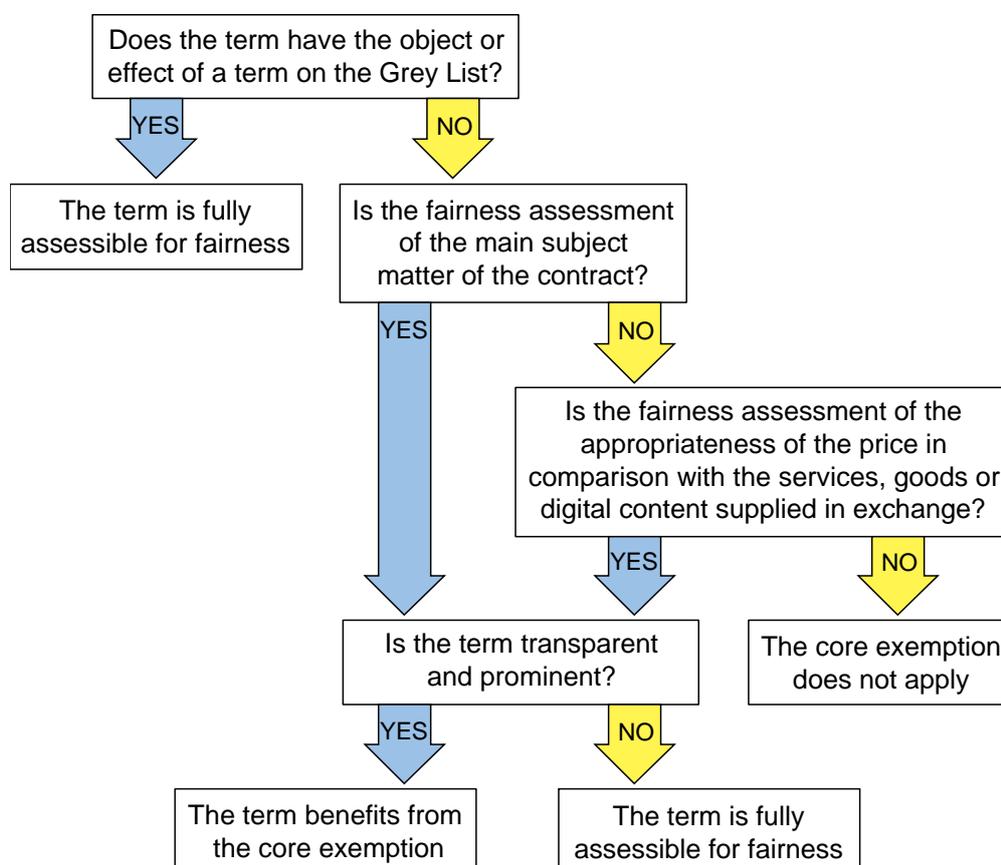
<sup>62</sup> This was recognised by the Law Commission – see 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills,' March 2015, at paragraph 3.48.

legislation that terms which cannot be made meaningfully and effectively prominent should be subject to assessment for fairness. It should be remembered that terms falling outside of the exemption, even because of their lack of necessary prominence, are not necessarily likely to be found unfair and deprived of legal effect. Where there is little risk of consumers finding themselves worse off than they reasonably expected, there is also likely to be little risk of a successful challenge under the Act.

### **Chart for the Act's 'core exemption'**

3.33 The flowchart below aims to provide an 'at a glance' **simplified** overview of the core exemption provisions in Part 2 of the Act. It should not be used, in isolation, to determine the fairness or otherwise of a particular term, and should be read in the light of guidance documents as a whole. It is not a substitute for legal advice.

**Figure 3: Chart for the Act's core exemption**



## Mandatory terms and notices – the ‘mandatory statutory or regulatory’ exemption

3.34 Section 73 of the Act provides for an exemption, from both the fairness and the transparency tests in Part 2, for contract terms and notice provisions that reflect:

- mandatory statutory or regulatory provisions, for instance in legislation; and
- the provisions or principles of international conventions.

3.35 This exemption is referred to in this guidance as the ‘mandatory statutory or regulatory’ exemption. It covers wording that is included in contracts and notices in line with the requirements of Parliament, or of those authorities which regulate them under powers granted by Parliament, or under international obligations.<sup>63</sup>

3.36 In line with its approach to exemptions from the assessment of fairness generally (see paragraph 3.3 above), the CMA considers that this exemption needs to be interpreted restrictively, taking account of the purpose of the Directive, which is to protect consumers as the weaker party from one-sided contracts. This particularly applies to the interpretation of the word ‘reflects’. The Directive’s 13<sup>th</sup> recital indicates that terms must be ‘directly or indirectly’ determined by ‘statutory or regulatory provisions’ to benefit from the exemption. It is not enough, for instance, for a term or notice merely to resemble what is provided for by law in a different context, or for wording merely to include some elements that reflect legal requirements. The CJEU has emphasised that the exemption applies where and to the extent that ‘it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts’.<sup>64</sup>

3.37 It is clearly not the intention of this exemption to permit unfairness, even within a limited context. The Directive states that ‘it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions’ to a test of fairness, on the basis that these provisions are ‘presumed not to contain unfair terms’.<sup>65</sup> It follows that the CMA would expect an attempt to claim benefit of the exemption for a term or notice to be open to particular

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<sup>63</sup> In C-92/11 *RWE*, as above, at paragraph 26, the CJEU has held that ‘the exclusions in Article 1(2) of that directive extends to terms which reflect provisions of national law that apply between the parties to the contract independently of their choice or provisions that apply by default in the absence of other arrangements established by the parties’.

<sup>64</sup> C-92/11 *RWE*, as above, at paragraph 28.

<sup>65</sup> See the 13<sup>th</sup> recital of the Directive. The 14<sup>th</sup> recital adds that ‘Member States must however ensure that unfair terms are not included’.

scrutiny if its effect would be to cause a significant imbalance to the detriment of the consumer.

- 3.38 It is similarly not the intention of this exemption to permit lack of transparency in even a limited category of contract terms. Consistently with the purposes of the legislation, mere inclusion in contracts or notices of a reference to a legislative or regulatory provision is unlikely to ensure that they benefit from this exemption. The CJEU has stated that, where consumers will otherwise not receive appropriate protection, 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned'.<sup>66</sup> It follows necessarily that the provisions' effects must be set out in a way that consumers can understand.

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<sup>66</sup> See C-92/11 *RWE*, as above, at paragraph 50.

## 4. Blacklisted terms and notices

### Introduction

- 4.1 The Act makes certain contract **terms** and one kind of **consumer notice** legally ineffective – not binding on or enforceable by the **trader** against the **consumer** – in a number of specific situations. For the purposes of this guidance, the CMA refers to these terms or notices as ‘blacklisted’. Terms and notices can also be ineffective and unenforceable if they are found to be unfair by reference to the general fairness test in Part 2 of the Act. However if they are blacklisted, they are automatically unenforceable and so there is no need to apply the fairness test.
- 4.2 Although the practical effects of a term or notice being blacklisted and being found unfair may be similar for businesses and consumers, these effects are produced independently and via different legal mechanisms. The same wording can be separately both blacklisted and unfair (see below). However, while any blacklisted term or notice is highly likely to be unfair, it is not true that any potentially unfair wording is also likely to be blacklisted. Whereas the fairness requirements in Part 2 of the Act apply to most consumer contract terms and consumer notices, blacklisting under Part 1 is applicable to only a very limited number of terms and not to all kind of contracts.
- 4.3 An example of blacklisted wording is provided by section 65(1), in Part 2 of the Act. This provides that a trader cannot use a consumer contract term or notice to exclude or restrict liability for death or personal injury resulting from negligence. This does not apply in all cases – the exceptions include contracts for insurance. Similar provision was formerly found in the UCTA.
- 4.4 Part 1 of the Act also blacklists various terms<sup>67</sup> in contracts for a trader to supply goods, **digital content** and services to consumers. The kind of terms covered include those which aim to relieve traders from their ordinary obligations under the Act to ensure their products are of satisfactory quality and that their services are provided with reasonable care. See below, part 5 of the guidance, paragraphs 1 and 2 of the Grey List, for examples of the different forms that such disclaimers can take.

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<sup>67</sup> The guidance refers here only to terms, not notices, because this is the approach of Part 1 of the Act, which, however, is not to be understood as leaving a gap in its coverage. Strictly, there is no legal reason for notices to be covered because the obligations in Part 1 have the same status as contract terms, and the contractual rights of one party cannot normally be overridden unilaterally by the other, using just a notice, as opposed to a term. However, this does not mean it would necessarily (or even probably) be fair to use a notice whose effect was purportedly to override one of the rights created by Part 1 – see below.

4.5 Terms in such contracts are also blacklisted where they are inconsistent with other rights which consumers have under the Act.<sup>68</sup> An example is a term which does not ensure the consumer gets full legal rights to own goods being supplied. Where the contract is a licence agreement covering digital content, a term is blacklisted if it is inconsistent with the full legal right to use the digital content.

4.6 Below is an overview of the blacklisting provisions in the Act.

Description of blacklisting provisions in the Act	Where blacklisting provisions are found in the Act
Terms or notices cannot exclude or restrict liability for death or personal injury resulting from negligence	Part 2 of the Act – sections 65 and 66
Terms must be regarded as unfair if they have the effect that the consumer bears the burden of proof regarding compliance by a distance supplier, or an intermediary, with an obligation under law implementing the Distance Marketing of Financial Services Directive 2002. <sup>69</sup>	Part 2 of the Act – sections 63(6) and (7)
Contract terms seeking to exclude or restrict statutory rights and any remedies are not binding on the consumer. <sup>70</sup>	Part 1 of the Act – section 31 (covering goods contracts) – section 47 (covering digital content contracts) – section 57 (covering services contracts)

<sup>68</sup> This part of the guidance focuses on terms that are blacklisted under the Act itself. However other consumer protection legislation also in effect 'blacklists' terms in a similar way, by giving consumers rights, or imposing duties on businesses, which the business cannot exclude or restrict through contract terms. The legislation involved may state expressly that such terms are legally ineffective, or this may be inferred. Examples of such legislation are the CCRs (see above, part 1, 'Other legislation'), Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, Package Travel, Package Holidays and Package Tours Regulations 1992 and Consumer Rights (Payment Surcharges) Regulations 2012.

<sup>69</sup> This provision reflects Regulations 5(6) and (7) of the UTCCRs as inserted by the Financial Services (Distance Marketing) Regulations 2004. Further the Act retains the provision in the Arbitration Act 1996 which provides that a term in a contract which constitutes an arbitration agreement is deemed unfair if it relates to a sum not exceeding £5,000 (see paragraph 5.29.2 of the guidance).

<sup>70</sup> These are explained in more detail in paragraphs 4.10–4.28 and in the table of statutory rights below.

## **Blacklisted terms and notices subject to fairness test**

- 4.7 As already noted, terms or notices that are blacklisted by the Act are nonetheless also subject to Part 2.<sup>71</sup> This is not because a term that is legally ineffective by reason of blacklisting is subject to any additional sanctions if (as is very likely) it also separately fails to meet the fairness requirements in Part 2. However, it does mean that where a regulator considers that wording is unfair and also that all or part of it may fall within the blacklisting provisions, action can be taken on either or both of these legal grounds, enabling the court to grant an enforcement order against its continued use on the most appropriate grounds.
- 4.8 It is particularly important to note that wording which would be covered by blacklisting provisions but for being specifically ‘carved out’ of those provisions, for example terms in insurance contracts, may be unfair under the fairness test in Part 2. This is also true of notices intended to have the same effect as blacklisted terms, but which in the majority of cases have not been blacklisted in their own right. The non-application of blacklisting to these sub-groups of terms and notices is for specific reasons, and is not to be understood as a form of ‘whitelisting’ – that is indicating that their use is necessarily (or even likely) to be fair.
- 4.9 If wording is blacklisted under the Act, or has the same intended effect as wording that is blacklisted, the CMA considers it highly likely that it will be regarded as unfair. If it comes before the court, it may not be given the harmful effect that it is probably intended to have, but that does not mean it is fair.<sup>72</sup> Rather it makes it misleading, with the potential to result in consumers not being aware that they can rely on rights that the law intends to protect them. If it is misleading, it is liable to be at risk of challenge not only under the Act, but also under legislation directed against unfair commercial practices.

## **Consumer rights and blacklisted terms in contracts for goods, digital content and services**

- 4.10 The Act makes certain changes to the rights and remedies that apply in consumer contracts for the supply of goods, digital content and services.

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<sup>71</sup> Schedule 3, paragraph 3 provides that a regulator may apply for an injunction or an interdict if it thinks that the term or notice ‘falls within any one or more’ of the following provisions – the blacklisted provisions as discussed above (sections 31, 47, 57 and 65(1) of the Act), it is unfair or it breaches the requirement of transparency (section 68).

<sup>72</sup> See Schedule 3, paragraph 5(4).

However, it largely preserves existing statutory and general law remedies and it operates in a similar way to the legislation it replaces by:

- giving certain statutory rights to consumers and treating them as having been included as terms of the contract;
- giving statutory remedies to consumers while preserving most remedies under the general law; and
- making any terms that have been explicitly put into the contract, in general, not binding on consumers – blacklisting them, as mentioned above – to the extent they are inconsistent with any of these rights and remedies.

4.11 Note that, as under previous legislation, blacklisting is not confined to terms that would remove or cut back on the trader’s liability for breaching the consumer’s rights. It also applies to terms which would produce the same effect by (for instance) preventing an obligation arising for the trader in the first place, or putting procedural obstacles in the way of consumers enforcing their rights and remedies (see for instance paragraph 5.4.4 of the guidance).

4.12 The following paragraphs set out the key rights the Act gives to consumers entering into contracts for goods, digital content and services. Where what is supplied under the contract falls within more than one category (a ‘mixed contract’), the rights for each of those categories will apply so far as relevant.<sup>73</sup>

## Goods

4.13 The Act gives consumers a number of important rights under contracts for the supply of goods. The main ones are:

- Goods must be of satisfactory quality.
- Goods must be fit for their purpose, including any particular purpose the consumer made known to the seller before the contract.
- Goods must match the description given to them by the trader particularly (for instance) in marketing them.<sup>74</sup>

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<sup>73</sup> Business Companion, [Consumer Rights Act 2015 / ADR: guidance for businesses](#).

<sup>74</sup> Ibid.

These rights apply to all consumer contracts for goods, whether the goods are supplied by sale, hire, hire-purchase or in any other way, provided the consumer pays for them, or gives something else in exchange.

- 4.14 Most of these rights reflect those given to consumers, when buying goods, by previous legislation. The table of statutory rights below gives a detailed picture covering all the rights and remedies in Part 1 of the Act (both old and new). It lists all the statutory rights in relation to purchases of goods together with the remedies that are available to the consumer if any of the rights are not met.
- 4.15 As indicated above, any term of the contract which is calculated to have the effect of excluding or restricting the trader's liability in respect of any of these rights, or the available remedies, is blacklisted. So too is any term making the remedy more difficult for the consumer to enforce. The table of statutory rights below also specifies, in relation to each right listed, the extent to which blacklisting applies to contract terms which purport to exclude or limit the trader's liability for breach of it or the consumer's access to available remedies in the event of breach of it.

## Digital content

- 4.16 The Act introduces a new category of product, distinct from goods and services, known as **digital content**, defined in the 'key concepts' section of part 1 above. Consumers are given certain statutory rights and remedies in relation to it. These rights are mainly similar to, and conferred in the same way as, those enjoyed by consumers buying goods, but there are some differences reflecting the special nature of digital content, in particular there is no right to reject substandard digital content (see the table of statutory rights below).
- 4.17 Under the Act, digital content that has been paid for (directly or indirectly) must be of satisfactory quality, fit for purpose and as described. A term calculated to exclude or restrict liability for breach of these rights or hinder access to any available remedy associated with them is blacklisted – see the table of statutory rights below. This mirrors the position in relation to goods as just described.
- 4.18 It is also a statutory requirement that the business must have the right to supply such digital content – that is, to enable the consumer to use it (or own it, if ownership is being transferred – see below). A contract term seeking to exclude or restrict liability for breach of this requirement, or hindering access to any available remedy, is also blacklisted and unenforceable. This too mirrors a provision in the Act regarding the sale of goods.

### ***When consumers have rights in relation to digital content***

- 4.19 Digital content may be supplied to consumers in a number of different ways. Often the consumer is purchasing only the right to use digital content under the terms of a standard form licence, commonly called an end-user licence agreement or EULA.
- 4.20 The terms of a consumer's licence to use digital content may be a normal part of the contract. This will typically be the case in an online transaction where the consumer is instructed to read the terms and has to click a box designed to indicate acceptance of them before going on to agree the contract.<sup>75</sup> (Such a licence may be described as a 'click-wrap' licence). Where that is the position and the digital content has been 'paid for either directly or indirectly' (see below), the consumer enjoys the statutory rights and remedies in the usual way (and such terms are, additionally assessable for fairness).
- 4.21 In some cases, however, licence terms may not, for legal purposes, form part of the supplier's contract with the consumer. An example, would be where the consumer, though able to see the licence terms, is not asked to indicate acceptance of them (as may be the case with online 'browse wrap' licences). In such cases, the rights and remedies under Part 1 of the Act may not apply for legal reasons.<sup>76</sup> However, in such cases, the licence terms are still assessable for fairness, since the requirements of Part 2 of the Act covers provisions within a 'consumer notice' as well as consumer contracts.
- 4.22 As indicated above, the full statutory rights and remedies under Part 1 of the Act generally only apply where digital content has been paid for either directly or indirectly. This means that it:
- (a) has been paid for either with money or with something else (for instance a virtual currency) that has itself been paid for with money; or
  - (b) has been supplied 'free', but only together with something else that has been paid for – for instance when it has been 'bundled' with a magazine.
- 4.23 In some cases, digital content may have been supplied in return for something other than money – for instance where a consumer gives the trader access to their personal data. This is not the same as a situation in which digital content has been 'paid for either directly or indirectly' as those words are used in this guidance, and in such cases, the consumer does not enjoy the rights and

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<sup>75</sup> Note that the CMA does not consider that such acceptance necessarily will result in the terms being binding on the consumer – see paragraph 5.20.2 below.

<sup>76</sup>The question of whether licence terms (which the consumer does not formally accept) form part of a contract would be a matter for specialist advice taking account of the particular circumstances of the case.

remedies set out in Part 1 of the Act, except where damage has been caused by the digital content supplied – see the table of statutory rights below.

- 4.24 Any consumer contract or notice used in connection with digital content, whether it is paid for or supplied free, must still meet the requirements of fairness and transparency under Part 2 of the Act. This may be of particular relevance to, for instance, 'free' software that can only be used subject to the terms of a licence.

## Services

- 4.25 As with goods and digital content contracts, the Act gives consumers certain basic rights when they enter contracts to supply a service. Also as with goods, most of these rights reflect those that consumers had, when buying services, under the previous legislation and the general law. But as described below, some changes to the law relating to services involve providing certain new rights and remedies. Full details of the relevant rights and remedies are available in the table of statutory rights below. The consumer's rights in summary are as follows.

- The service must be performed with reasonable care and skill.
- If no price for the service has been agreed, a reasonable price only is payable.
- If no time for performance has been agreed, the service must be performed within a reasonable time.

- 4.26 Consumers enjoy additional protection where they are given information about the trader and/or the service. If it is taken into account by the consumer, it is likely to be treated as a term of the contract. This goes further than rights under previous legislation. It means that if a business makes statements about itself and its services, which the consumer is likely to see, it is likely to find itself legally bound actually to supply, for instance, something that meets any description applied to it in those statements. In these circumstances, the service provider's liability is similar to that of a supplier of goods or digital content – it is not accountable, for example, only for statements that could be considered misleading.

- 4.27 As indicated above, in general blacklisting prevents terms being used to take away the protection that the Act gives. A term of the contract is blacklisted to the extent that it would:

- exclude the trader's liability for failing to carry out the service with reasonable care and skill, or for failing to act in compliance with information about the trader or service which is binding on the trader under the Act;
- exclude or restrict any available remedy for breach of any of the rights set out in the table below, or make a remedy more difficult for the consumer to enforce; and/or
- restrict the amount of compensation a trader can be required to pay for breach of any of the statutory rights to less than the price the consumer is required to pay under the contract.

The Act also makes clear that a term limiting liability to the contract price (in any way or amount) is, in any case, also subject to the general fairness test in Part 2.

4.28 Below is a summary in tabular form of:

- all the consumer rights the Act applies to contracts for the supply of goods, digital content and services;
- all the available remedies for breach of these rights; and
- the extent to which terms seeking to limit the trader's liability, or the consumer's rights and remedies, are blacklisted.

**Figure 4: Table of statutory rights, remedies and blacklisted wording**

Note that references to digital content are to content that has been paid for, either directly or indirectly, in the sense explained in paragraph 4.22, except where otherwise indicated

<b>Statutory right</b>	<b>Remedies for breach</b>	<b>What is blacklisted?</b>
<b>Section 9 (Goods)</b> – Goods to be of satisfactory quality.	<b>Section 19(3)</b> – <ul style="list-style-type: none"> <li>• short-term right to reject;</li> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul> <p>Other remedies under general law<sup>77</sup> (but note that there is no right to treat the contract as at an end except as indicated above).</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 10 (Goods)</b> – Goods to be fit for particular purpose.	<b>Section 19(3)</b> – <ul style="list-style-type: none"> <li>• short-term right to reject;</li> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul> <p>Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 11 (Goods)</b> – <ul style="list-style-type: none"> <li>• goods to match description;</li> <li>• CCRs pre-contract information<sup>78</sup> on main characteristics of goods to be treated as a term of the contract.</li> </ul>	<b>Section 19(3)</b> – <ul style="list-style-type: none"> <li>• short-term right to reject;</li> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul> <p>Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 12 (Goods)</b> – other CCRs pre-contract information (not about the goods) to be treated as a term of the contract.	<b>Section 19(5)</b> – right to recover costs incurred as a result of the breach up to the price of the goods. <p>Other remedies under general law, except that there is no right to treat the contract as at an end.</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 13 (Goods)</b> – Goods to match a sample.	<b>Section 19(3)</b> – <ul style="list-style-type: none"> <li>• short-term right to reject;</li> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul>	Exclusion or restriction of rights or remedies – <b>section 31</b>

<sup>77</sup> Section 19(11) makes clear that these could include (where appropriate): damages (monetary compensation), specific performance/specific implement (a court order requiring the business to fulfil its contractual obligations), and relying on the breach against a claim by the trader for the price.

<sup>78</sup> References in this table to ‘CCRs pre-contract information’ refer to information provided pursuant to the requirements of Regulations 9, 10 and 13 of the CCRs (see ‘other legislation’ section in part 1 above).

<b>Statutory right</b>	<b>Remedies for breach</b>	<b>What is blacklisted?</b>
	Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).	
<b>Section 14 (Goods)</b> – Goods to match a model.	<p><b>Section 19(3)</b> –</p> <ul style="list-style-type: none"> <li>• short-term right to reject;</li> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul> <p>Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 15 (Goods)</b> – Goods must be installed correctly (where goods are installed by the supplier or under his responsibility).	<p><b>Section 19(4)</b> –</p> <ul style="list-style-type: none"> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul> <p>Other remedies under general law, except that there is no right to treat the contract as at an end except as indicated above.</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 16 (Goods)</b> – Digital content (whether paid for or not) must conform to the contract to supply that content (where goods are an item including digital content).	<p><b>Section 19(3)</b> –</p> <ul style="list-style-type: none"> <li>• short-term right to reject;</li> <li>• right to repair or replacement;</li> <li>• right to a price reduction or final right to reject.</li> </ul> <p>Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<b>Section 17 (Goods)</b> – Trader must have the right to supply the goods.	<p><b>Section 19(6)</b> – right to reject.</p> <p>Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>
<p><b>Section 28 (Goods)</b> –</p> <ul style="list-style-type: none"> <li>• trader to deliver goods to consumer unless otherwise agreed;</li> <li>• goods to be delivered without undue delay and in any case within 30 days of contract if no time for delivery agreed.</li> </ul>	<p><b>Section 28(6) to (8)</b> – (time for delivery)</p> <ul style="list-style-type: none"> <li>• right to treat contract as at an end in some cases or to specify a further period for delivery;</li> <li>• If further delivery period missed, right to treat contract as at an end.</li> </ul> <p>Other remedies under general law.</p>	Exclusion or restriction of rights or remedies – <b>section 31</b>

<b>Statutory right</b>	<b>Remedies for breach</b>	<b>What is blacklisted?</b>
<p><b>Section 29 (Goods)</b> – goods remain at trader’s risk until delivered to:</p> <ul style="list-style-type: none"> <li>• the consumer;</li> <li>• someone nominated by the consumer; or</li> <li>• a carrier arranged by the consumer.</li> </ul>	N/A	Exclusion or restriction of rights – <b>section 31</b>
<p><b>Section 34 (Digital content)</b> – ‘digital content to be of satisfactory quality.</p>	<p><b>Section 42 (2)</b> –</p> <ul style="list-style-type: none"> <li>• right to repair or replacement;</li> <li>• right to a price reduction.</li> </ul> <p>Other remedies under general law except that there is no right to treat the contract as at an end.</p>	Exclusion or restriction of rights or remedies – <b>section 47</b>
<p><b>Section 35 (Digital content)</b> – digital content to be fit for a particular purpose.</p>	<p><b>Section 42 (2)</b> –</p> <ul style="list-style-type: none"> <li>• right to repair or replacement;</li> <li>• right to a price reduction.</li> </ul> <p>Other remedies under general law<sup>79</sup> except that there is no right to treat the contract as at an end.</p>	Exclusion or restriction of rights or remedies – <b>section 47</b>
<p><b>Section 36 (Digital content)</b> – digital content:</p> <ul style="list-style-type: none"> <li>• to match description;</li> <li>• CCRs pre-contract information on main characteristics, functionality and compatibility to be treated as term of contract.</li> </ul>	<p><b>Section 42(2)</b> –</p> <ul style="list-style-type: none"> <li>• right to repair or replacement;</li> <li>• right to a price reduction.</li> </ul> <p>Other remedies under general law except that there is no right to treat the contract as at an end.</p>	Exclusion or restriction of rights or remedies – <b>section 47</b>
<p><b>Section 37 (Digital content)</b> – digital content:</p> <ul style="list-style-type: none"> <li>• other CCRs pre-contract information (not about the digital content) to be treated as a term of the contract.</li> </ul>	<p><b>Section 42 (4)</b> – right to recover costs incurred as a result of the breach up to a maximum of the contract price for the digital content or facility.</p> <p>Other remedies under general law except that there is no right to treat the contract as at an end.</p>	Exclusion or restriction of rights or remedies – <b>section 47</b>
<p><b>Section 40 (Digital content)</b> – digital content:</p> <ul style="list-style-type: none"> <li>• Statutory rights of satisfactory quality, fitness for a particular purpose and description apply to modified digital content as they do to original digital content.</li> </ul>	<p><b>Section 42 (2)</b> –</p> <ul style="list-style-type: none"> <li>• right to repair or replacement;</li> <li>• right to a price reduction.</li> </ul> <p>Other remedies under general law except that there is no right to treat the contract as at an end.</p>	Exclusion or restriction of rights or remedies – <b>section 47</b>

<sup>79</sup> Section 42(7) makes clear that these could include (where appropriate): damages (monetary compensation), specific performance/specific implement (a court order requiring the business to fulfil its contractual obligations), seeking to recover money paid where the consideration for payment of the money has failed, and relying on the breach against a claim by the trader for the price.

<b>Statutory right</b>	<b>Remedies for breach</b>	<b>What is blacklisted?</b>
<p><b>Section 41 (Digital content)</b> – digital content:</p> <ul style="list-style-type: none"> <li>• Trader must have the right to supply the digital content.</li> </ul>	<p><b>Section 45</b> – right to a refund. Other remedies under general law (but note that there is no right to treat the contract as at an end except as indicated above).</p>	<p>Exclusion or restriction of rights or remedies – <b>section 47</b></p>
<p><b>Section 46 (Digital content)</b> – Right to a remedy for damage to the consumer’s device or other digital content caused by digital content (whether paid for or not) supplied under a contract.</p>	<p><b>Section 46</b> – right to repair or compensation.  Other remedies under general law.<sup>80</sup></p>	<p>Exclusion or restriction of rights and remedies is not blacklisted (but is assessable for fairness – <b>section 47(6)</b>).</p>
<p><b>Section 49 (Services)</b> – Service must be performed with reasonable care and skill.</p>	<p><b>Section 54(3)</b> –</p> <ul style="list-style-type: none"> <li>• right to require repeat performance;</li> <li>• right to a price reduction.</li> </ul> <p>Other remedies under general law<sup>81</sup> including the right to treat the contract as at an end.</p>	<p>Exclusion or restriction of rights or remedies – <b>section 57</b></p>
<p><b>Section 50 (Services)</b> –</p> <ul style="list-style-type: none"> <li>• anything said or written about the trader or service to be treated as term of contract (subject to conditions);</li> <li>• CCRs pre-contract information to be treated as term of contract.</li> </ul>	<p><b>Section 54(3)</b> – for breach of information about performance of the service:</p> <ul style="list-style-type: none"> <li>• right to repeat performance;</li> <li>• right to a price reduction.</li> </ul> <p><b>Section 54(4)</b> – for breach of information not about the service:</p> <ul style="list-style-type: none"> <li>• right to a price reduction.</li> </ul> <p>Other remedies under general law including the right to treat the contract as at an end.</p>	<p>Exclusion of liability – <b>section 57(2)</b>.</p> <p>Restriction of liability where that prevents the consumer recovering the price paid – <b>section 57(3)</b>.</p>
<p><b>Section 51 (Services)</b> – If no price for the service has been agreed, a reasonable price only is payable.</p>	<p><b>N/A</b></p>	<p>Exclusion of liability is not blacklisted (but would be assessable for fairness).</p> <p>Restriction of liability where that prevents the consumer recovering the price paid – <b>section 57(3)</b>.</p>

<sup>80</sup> Note that section 42(7) does not apply in the case of the consumer’s right to a remedy under section 46.

<sup>81</sup> Section 54(7) makes clear that these could include (where appropriate): damages (monetary compensation), specific performance / specific implement (a court order requiring the business to fulfil its contractual obligations), relying on the breach against a claim by the trader under the contract, and exercising a right to treat the contract as at an end.

<b>Statutory right</b>	<b>Remedies for breach</b>	<b>What is blacklisted?</b>
<b>Section 52 (Services)</b> – If no time for performance has been agreed, the service must be performed within a reasonable time.	<b>Section 54(5)</b> – right to a price reduction.  Other remedies under general law including the right to treat the contract as at an end.	Exclusion of liability is <i>not</i> blacklisted.  Restriction of liability where that prevents the consumer recovering the price paid – <b>section 57(3)</b> .

## 5. The Grey List and other potentially unfair terms and notices

### Introduction

- 5.1.1 Unfairness for the purposes of the Act can take many different forms. This part of the guidance sets out the various ways in which the CMA considers that **terms** used in **consumer contracts** by **traders**, and their **consumer notices**, can be potentially unfair under the Act, together with the reasons for considering them potentially unfair. This part of the guidance is divided into two sections.
- 5.1.2 The first section deals with terms according to the listing of unfair terms, known as the Grey List, in Part 1 of Schedule 2 of the Act. This is a non-exhaustive indicative and illustrative list of terms that may be unfair, included in the legislation to provide guidance as to how the test of fairness is intended to be applied. The second section (part 5A of the guidance below), deals with other terms considered potentially unfair. The seven additional types of potential unfairness identified follow the categorisation of additional types of term previously included in guidance issued by the OFT.
- 5.1.3 The Grey List as referred to in this guidance is not exactly the same as that referred to in earlier publications dealing with the UTCCRs. It includes three new items added by the Act. These appear at paragraphs 5, 12 and 14 of Schedule 2 and their significance is considered below in paragraphs 5.15.1, 5.22.11 and 5.23.1 respectively. Immediately below is a chart that details first the Grey List terms described in the guidance, and second the selected examples of other terms considered potentially unfair. Also, at the back of part 5A is an index of common types of terms, with reference to where they are considered in part 5 (and part 5A) of this guidance.

**Figure 5: Index of Grey List terms**

<b>Grey List terms</b>	<b>Guidance paragraphs</b>
Exclusion and limitation clauses	5.2.1
Exclusion of liability for death and personal injury	5.3.1
Exclusion of liability for faulty and misdescribed goods or digital content	5.4.1
Exclusion of liability for poor service	5.5.1
Limitations of liability	5.6.1
Time limits on claims	5.7.1
Terms excluding the right of set-off	5.8.1
Exclusions of liability for delay	5.9.1
Exclusion of liability for failure to perform contractual obligations	5.10.1
Guarantees and warranties operating as exclusion clauses	5.11.1
Binding consumers while allowing the trader to provide no service	5.12.1
Retention of prepayments on consumer cancellation	5.13.1
Disproportionate financial sanctions	5.14.1
Disproportionate termination fees and requiring consumers to pay for services not supplied	5.15.1
Unequal cancellation rights	5.16.1
Trader's right to cancel without refund	5.17.1
Trader's right to cancel without notice	5.18.1
Excessive notice periods for consumer cancellation	5.19.1
Binding consumers to hidden terms	5.20.1
Trader's right to vary terms generally	5.21.1
Right to determine or change what is supplied	5.22.1
Price variation clauses	5.23.1
Trader's right of final decision	5.24.1
Entire agreement clauses	5.25.1
Formality requirements	5.26.1
Binding consumers where the trader defaults	5.27.1
Trader's right to assign without consent	5.28.1
Restricting the consumer's remedies	5.29.1
<b>Other terms considered potentially unfair</b>	
Allowing the trader to impose unfair financial burdens	5.30.1
Transferring inappropriate risks to consumers	5.31.1
Unfair enforcement powers	5.32.1
Excluding the consumer's right to assign	5.33.1
Consumer declarations	5.34.1
Exclusion and reservations of special rights	5.35.1
Trader's discretion in relation to obligations	5.36.1

5.1.4 We also refer in this part of the guidance to Annex A, which contains examples of actual wording regarded as unfair by the OFT, and which traders have either removed from their contracts or amended in response to enforcement action taken by the OFT.

## **Examples of unfair terms – Annex A**

5.1.5 Annex A provides examples of two kinds of terms – 'original terms', which are terms drawn from standard contracts referred to OFT by complainants and considered unfair, and 'new terms' which are revisions of the originals referred to the OFT which it considered either fair, or sufficiently improved

to require no further action on the evidence available to it at the time. The document was last revised by the OFT in September 2008 and, for the purposes of republishing, has been only minimally edited by the CMA.<sup>82</sup> It is not possible to compile an equivalent new listing, for practical reasons, including the non-availability of material to illustrate the application of the three new items in the Grey List mentioned above.

- 5.1.6 Those making reference to Annex A should bear in mind that the terms it contains were considered by the OFT under the UTCCRs applying the 'old' Grey List. Their fairness was assessed taking into account the applicable general law at the time. The Act supersedes the UTCCRs and, as referred to in this guidance, has in general extensively consolidated and updated the law relating to consumers to business contracts for the supply of goods, services and digital content.
- 5.1.7 There is, however, substantial continuity in UK unfair terms legislation since 1995, because the Directive to which it gives effect has remained unchanged, and the UK's transposition of the Directive has throughout sought to avoid unnecessary 'gold plating' (exceeding the requirements of the Directive). Continuity is particularly marked in relation to the Grey List. The three additions made by the Act to the List as it appeared in the UTCCRs clarify it rather than changing it. Annex A was always structured by reference to the Grey List and primarily designed to shed light on its applicability to UK contract terms commonly encountered in regulatory practice.
- 5.1.8 It is therefore considered that, although the listing is incomplete as an illustration of the Grey List in its new form, it is still of substantial illustrative value. It provides 'real' examples of terms which were considered to be unfair by the UK's lead regulator, and of ways in which they were revised to meet its concerns. As such, it is believed to be still capable of usefully illustrating how the Directive-based fairness requirements tend to operate in practice.
- 5.1.9 The way the terms were selected and edited for use in Annex A and their significance is considered in more detail in the introductory text which appears in Annex A itself, but two points need to be particularly stressed:
- The revised terms should not be seen in any way as having been 'cleared' for general use, particularly by the CMA. They reflect the OFT's assessment of what a court would have been likely to have

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<sup>82</sup> Although the Annex has not been updated, rewritten or restructured, even in part, some material has been removed on the basis that it would have been clearly misleading to leave it in. For instance some revised terms reflected the statutory cooling-off period which applied to the contract but have been changed by the CCRs.

considered fair in the particular contract under consideration, and at that time (prior to September 2008).

- The case law taken into account by the OFT necessarily did not include significant recent judgments to which reference is made at various points in this guidance. There have also been legislative changes, not only those introduced by the Act itself but also for instance the CCRs – see below, part 6, on ‘other relevant law’.
- The OFT’s view does not fetter the freedom of the CMA to take future enforcement action in the interests of consumers nor is it binding on the court or other enforcers.

## Consumer notices in part 5 of the guidance

- 5.1.10 References to **terms** in this part of the guidance should generally be taken to include consumer **notices**. The main exceptions to this are when reference is made to terms which are implied into contract by law and to the ‘blacklisted’ terms in Part 1 of the Act.<sup>83</sup>
- 5.1.11 Although ‘the Grey List’ in Schedule 2 refers to terms, the CMA considers, as already explained (part 1 above, ‘Consumer notices’) that the list also illustrates the meaning of unfairness for notices. Notices issued by a trader that meet the definition of a ‘consumer notice’ can have an effect similar to a contract term, for instance, if they exclude liability, without in some cases being strictly part of a contract. The CMA considers that the Act’s effect is to apply in substance the same test of fairness to notices and terms.

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<sup>83</sup> As explained elsewhere in the guidance (see in particular part 4) – the blacklisting provisions in Part 1 of the Act relate only to specific terms. Only one notice is blacklisted, and that is in Part 2.

## Analysis of unfair terms in Schedule 2: The Grey List

### *Exclusion and limitation clauses – Schedule 2, Part 1, paragraphs 1 and 2*

Part 1 of Schedule 2 states that the following may be unfair:

- (1) A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader, and
- (2) A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

### *Exclusion and limitation clauses in general*

- 5.2.1 Terms which serve to remove or cut back on a trader's liability to consumers (also known as disclaimers, or exemption clauses) take many different forms. Detailed comments on particular types of disclaimer which may be unfair can be found below. But some comments can be made which apply to all of them.
- 5.2.2 Rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their obligations under the contract and the general law. Any term that undermines the value of such obligations by preventing or hindering the consumer from seeking redress from a trader who has not complied with them is open to challenge as unfair under Part 2 of the Act.
- 5.2.3 A disclaimer may seek to exclude or limit liability for breach of the 'implied' terms that the law presumes are included in a contract when nothing is expressly agreed on the issues involved. Implied terms are intended, for instance, to ensure that agreements are workable and meet the expectations of reasonable persons. Excluding or limiting their effect necessarily tends to have the effect of allowing one party to act unreasonably towards the other without consequences, and terms having such an effect to the detriment of consumers are liable to be considered unfair.

- 5.2.4 Part 1 of the Act provides for a number of statutory terms to be treated as included in certain kinds of consumer contracts (see part 4 of the guidance). They reflect the key obligations imposed on the trader and rights conferred on the consumer by Part 1 of the Act. Excluding or limiting liability for breach of these standards would deny consumers the benefit of their ‘statutory rights’ and Part 1 of the Act therefore makes most terms that exclude or limit such liability legally ineffective for that purpose, without any need to prove that they are unfair. Terms of this kind are referred to in this guidance as **blacklisted** (see part 4 of the guidance). Any term which can have such an effect in a consumer contract is, in any case, very likely to be considered unfair under Part 2 of the Act.
- 5.2.5 Further, exclusions or restrictions of liability for death or injury caused by negligence are always legally ineffective – see paragraphs 5.3.1 to 5.3.4. But the fact that a term is unenforceable – and thus, if it comes before a court, cannot have the harmful effect intended – is not something that the consumer may be aware of and so not only is such a term pointless, it is also potentially misleading. This makes it, in our view, unfair and using it in consumer contracts may amount to an unfair commercial practice – see part 1 ‘other legislation’ on the CPRs.
- 5.2.6 Among the arguments that cannot be used to justify use of an over-extensive disclaimer in a consumer contract are the following.
- That it is intended only to deal with unjustified demands. If a disclaimer could be used to defeat legitimate claims it is likely to be unfair. The fairness test, in Part 2 of the Act, is concerned with the effect terms can have, not just with the intentions behind them. If the potential effect of a term goes further than is intended, it may be possible to make it fair by cutting back its scope (see Annex A for examples showing how this can be done).
  - That it does not actually operate by excluding liability. If a term achieves the same effect as an unfair or blacklisted exemption or limitation clause, it will likely be unfair whatever its form or mechanism, particularly if it makes it more difficult for consumers to enforce their rights against the trader. This could apply, for example, to terms which ‘deem’ things to be the case, or get consumers to declare that they are satisfied with what they have received – whether they really are or not – with the aim of ensuring that no liability arises in the first place.
  - That there is a statement which says ‘the customer’s statutory rights are not affected’. An unfair disclaimer is not made acceptable by being

partially contradicted by an unexplained legal technicality whose effect only a lawyer is likely to understand.<sup>84</sup>

- 5.2.7 The fact that certain customers – even a majority – are not consumers does not justify exclusion of liability that could affect consumers. However, there is no objection under the Act to terms which cannot affect consumers.
- 5.2.8 **Exclusions ‘so far as the law permits’.** The purpose of the fairness provisions, in Part 2 of the Act, is to give consumers additional protection against terms which may be unfair even if they are not blacklisted under Part 1 of the Act or the law more generally. So terms which exclude liability ‘as far as the law permits’ are still potentially unfair. They are also objectionable as being unclear as to their practical effect to those without legal knowledge.
- 5.2.9 Disclaimers might say that liability is excluded to the extent permitted by unfair contract terms law. That would be open to objection, because it would be unclear and uncertain in effect. Deciding whether a term is legally fair or unfair requires consideration of a number of factors, including the circumstances in which it is used. This means it is impossible – at any rate, without expert legal advice – to know what liability could or could not be excluded in any particular situation, and thus what liability is meant to be excluded.
- 5.2.10 A disclaimer covering problems caused by a trader’s suppliers or subcontractors is regarded in the same way as one covering loss or damage caused directly by its own fault. The consumer has no choice as to whom they are, and has no contractual rights against them. The business has chosen to enter agreements with them, and therefore should not seek to disclaim responsibility for their defaults.

### ***1. Exclusion of liability for death or personal injury***

- 5.3.1 No contract term, or notice, can legally have the effect of excluding or restricting liability for death or injury caused by negligence in the course of business, and such terms should not be used in consumer contracts (see above paragraph 4.3). As well as being unfair, their use is liable to be misleading, and therefore may give rise to action as an unfair commercial practice, which can in certain circumstances involve prosecution (see part 1 ‘other legislation’ on the CPRs).

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<sup>84</sup> See part 2 of the guidance under the heading ‘The transparency test’ and in particular on the undesirability of legal jargon.

- 5.3.2 General disclaimers, for example saying that customers use equipment or premises ‘at their own risk’, cover liability for death or personal injury even though the main concern of the supplier may be something else. It might, for example, be intended to stop consumers trying to sue for loss of or damage to their clothes or other property which is really the result of their own carelessness. But the fact that the intention behind a term is more limited than its potential effects does not make it fair.
- 5.3.3 Disclaimers of this kind, like other exemption clauses, are more likely to be acceptable if they are qualified so that liability for loss or harm is excluded or restricted only where the trader is not at fault. Another possible route to fairness where a contract involves an inherently risky activity, is that of using prominent warnings against hazards which provide information, and make clear the consumer needs to take sensible precautions, but do not have the effect of excluding or restricting liability. The OFT’s list of specimen terms (see Annex A, Group 1) provides examples of terms of this kind and of ways in which they have been revised to meet the OFT’s concerns.
- 5.3.4 Note however that, as the legislation makes clear,<sup>85</sup> amending such terms so that liability is accepted only for negligence does not necessarily achieve fairness. Negligence is not the only kind of misconduct involving breach of duty that can cause death or injury. The CMA does not consider it fair to seek to deprive consumers of compensation in any circumstances in which they would normally be entitled to it by law.

## ***2(a) Exclusion of liability for faulty or misdescribed goods or digital content***

- 5.4.1 Any business selling goods or digital content to consumers is legally bound to accept certain obligations. These are the consumer’s ‘statutory rights’. Key statutory rights are that goods and digital content (which is ‘paid for either directly or indirectly’)<sup>86</sup> must match the description given to them, and be of satisfactory quality and fit for their purposes. Contract terms which deny consumers the right to their full legal remedies where goods or digital content are misdescribed or defective are blacklisted for that purpose in all cases under Part 1 of the Act, as well as liable to be considered unfair under Part 2 of the Act.<sup>87</sup>

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<sup>85</sup> See the wording of paragraph 1 of the Grey List which refers to excluding or limiting the trader’s liability resulting from ‘an act or omission of the trader’.

<sup>86</sup> See part 4 of the guidance, paragraph 4.22.

<sup>87</sup> See part 4 of the guidance, ‘Blacklisted terms and notices subject to fairness test’.

- 5.4.2 As well as being doubly open to challenge under the Act, the use of such disclaimers is liable to mislead consumers about their statutory rights. As such, it can potentially give rise to enforcement action as an unfair commercial practice (see part 1 ‘other legislation’ on the CPRs). Disclaimers used in sales of digital content give rise to similar concerns to those used in sales of goods.
- 5.4.3 See paragraphs 5.2.1 to 5.2.10 for the objections under the fairness provisions in Part 2 of the Act to disclaimers generally. Note that these apply to any wording, whatever the form of words used, or the legal mechanism involved, which has the object or effect of protecting the trader from claims for redress for defective or misdescribed goods or digital content. It is also important to note that a statement that statutory rights are not affected, without explanation, cannot make such a term acceptable in the view of the CMA.
- 5.4.4 A variety of different types of wording can have the effect of excluding liability for unsatisfactory goods or digital content. For example:
- Terms saying that the goods must be (or that they have been) examined by the consumer, or by someone on his or her behalf.  
  
Consumers cannot be legally deprived of redress for faults in goods, unless they were genuinely able to examine them before purchase and the faults were obvious or specifically drawn to their attention.
  - Terms saying that goods or digital content only have the description and/or purpose stated on the invoice.  
  
Consumers cannot legally be deprived of redress where goods or digital content, which is ‘paid for either directly or indirectly’, do not meet the description under which they were actually sold, nor if they are not reasonably fit for all the purposes for which goods or digital content of the kind are commonly supplied.
  - Terms which seek to pass on the risk of damage or loss before the goods are actually delivered – for example, from when the trader notifies their availability.  
  
Part 1 of the Act blacklists any term which deprives the consumer of recourse where goods are destroyed, stolen or damaged while in the care of the trader (that is before delivery to the consumer – see section 29). The fact that a term may be meant to apply only when the consumer fails to collect or take delivery as agreed does not make it either lawful or fair. The intention behind using such a term may be to encourage

consumers to be punctual, but depriving them of redress for negligence by the trader or his or her employees is not an appropriate way to do this – as opposed to, for instance, requiring payment of reasonable storage and insurance charges.

- Terms requiring that the goods are accepted as satisfactory on delivery, or imposing unreasonable conditions on the consumer's right to return them if faulty.

Consumers normally have a short-term right to examine goods and reject them if faulty (see the table of statutory rights above, part 4). This right normally lasts for 30 days. Consumers cannot legally be deprived of this right by being required to sign 'satisfaction notes' on delivery, or by being required to return goods in a way that may not be possible – for example, in disposable packaging that they are likely to discard after opening.

- Terms disclaiming liability for 'sale' goods or saying that sale goods cannot be returned.

Consumers have the same rights whether they buy goods at a reduced price or not.

- Terms which end rights to redress 30 days after delivery of the goods.

Even where the consumer has lost the short-term right to reject defective goods, the trader remains legally obliged to provide other redress if the goods subsequently prove to have been defective when sold.

5.4.5 **Second-hand goods.** Disclaimers are just as likely to be unfair where their use is restricted to second-quality or damaged goods, for example using the phrase 'sold as seen'. It is appropriate to warn the consumer when the standard of quality that can reasonably be expected is lower, but the law forbids the use of terms which disclaim responsibility for failure to meet any reasonable standard.

5.4.6 For illustrated examples of this kind of term see Group 2(a) of the specimen terms listing in Annex A.

## **2(b) Exclusion of liability for poor service**

5.5.1. A business that supplies services to consumers accepts certain contractual obligations as a matter of law. In particular, consumers can normally expect services to be carried out to a reasonable standard, that is, with

- ‘reasonable care and skill’. This applies not just to the main tasks the trader agrees to perform, but to everything that is done, or should be done, as part of the transaction.
- 5.5.2 See paragraphs 5.2.1 to 5.2.10 for an explanation of concerns that arise in relation to disclaimers generally. A term which could – whether or not that is the intention – serve to relieve a trader of the obligation to take reasonable care in carrying out services under consumer contracts is blacklisted under Part 1 of the Act and, also separately liable to be considered unfair under Part 2.
- 5.5.3 Where goods or materials, or digital content<sup>88</sup> are supplied under the same contract as a service, the consumer has the same rights as regards their description, quality and fitness for purpose as are described above in paragraph 5.4.1. A disclaimer that is intended to relieve the trader of liability for breach of these rights is open to the same objections as are set out there.
- 5.5.4 As already explained, mere addition of a statement that statutory rights are unaffected, without explanation, cannot make such a term acceptable – see paragraph 5.2.6. An approach which may assist in achieving fairness is to narrow the scope of the disclaimer, so that its effect does not go beyond excluding liability for clearly defined losses for which the trader is not legally responsible, or which were not foreseeable by both the parties when the contract was entered into.
- 5.5.5 Two kinds of disclaimer deserve more specific comment.
- 5.5.6 **Disclaiming liability where the consumer is at fault.** Terms which disclaim liability for loss or damage (for example, to the consumer’s property) which is caused by the consumer’s own fault may be acceptable. But this does not mean that a disclaimer which operates only where the consumer is in breach of contract is necessarily fair.
- 5.5.7 Such a term is unlikely to be acceptable if it could deprive the consumer of all redress in the event of a trivial or technical breach, or where the trader may be partly responsible for loss or harm suffered by the consumer. For example, failure to take specified precautions against the risk of damage or theft by third parties should not be a basis on which the business can escape all liability where it, or any of its employees is negligent or dishonest. That is especially so if the precautions consumers are required

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<sup>88</sup> What is said assumes the digital content is paid for either directly or indirectly – see part 4 of the guidance, particularly paragraph 4.22.

- to take are unusual or unreasonable in character, or not stated with sufficient clarity.
- 5.5.8 **Gratuitous services.** Sometimes services are provided to consumers without charge alongside products or services being sold, even where these are not covered by the contract – for example, advice as to how to use a product, or help with installation. The statutory obligation of reasonable care and skill may not apply to such ‘free’ services. However, the business and its employees may still owe a duty to take reasonable care under the general law and a disclaimer covering negligence is still liable to be considered unfair.
- 5.5.9 This is not to say that ordinary employees, trying to be helpful when asked to do things they are not trained to do, have to be infallible. There is no objection to wording which spells out that consumers need to employ appropriate specialists if they want an expert or professional standard of service. However, no term should shield a business from liability where its employees fail to provide as good a standard of service as they are reasonably able.
- 5.5.10 There may be no objection to the contract stating that such services are not provided, as long as that this is really the case. To ensure that it is, steps may need to be taken to ensure that employees know that they are not authorised to, and should not, provide additional services.

### ***2(c) Limitations of liability***

- 5.6.1 If a contract is to be fully and equally binding on both trader and consumer, each party should be entitled to full compensation where the other fails to honour its obligations. Clauses which limit the trader’s liability are open to the same objections as those which exclude it altogether. See paragraphs 5.2.1 to 5.2.10 regarding disclaimers generally.
- 5.6.2 Use of a term restricting liability for breach of consumers’ rights under Part 1 of the Act is very likely<sup>89</sup> to be blacklisted as well as unfair (see above, paragraph 5.2.4), and as such its use may give rise to enforcement action as a misleading commercial practice (see part 1 ‘other legislation’ on the CPRs) in the same way as terms that exclude liability in full.

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<sup>89</sup> This is subject to the exception that a term restricting the trader’s liability for sub-standard performance of the service to a sum which is no less than the contract price is not automatically blacklisted by the Act. However, in the CMA’s view, any term limiting the amount of compensation the consumer would be entitled to claim would be under strong suspicion of unfairness.

- 5.6.3 Many types of clauses – not just terms which simply place an overall cap on available compensation – can have the effect of limiting a trader’s liability. They include, for example, terms which:
- (a) require consumers to meet costs that in law might be for the trader to pay where what is supplied breaches the statutory standards – for example, by making call-out charges non-refundable, obliging the consumer to meet the costs of returning faulty goods to the trader or remedying defects in digital content;
  - (b) say the business is liable only to the extent that it can claim against someone else, such as the manufacturer or a subcontractor;
  - (c) limit redress for problems to what is available under the terms of a guarantee or warranty so that consumers may not have (or may mistakenly believe they do not have) full access to all the remedies that the law intends them to have;
  - (d) limit the types of redress that are available below what the law provides for – for example, allowing only credit notes, not cash refunds – or which give the trader the choice as to what type of redress to give when the law would otherwise let the consumer choose; and
  - (e) inappropriately limit the kinds of loss for which redress is given, for example by excluding ‘consequential’ loss (see paragraph 5.6.6 below).
- 5.6.4 The CMA has no objection to terms which, for example, allow the trader to charge reasonably for dealing with problems which arise owing to the consumer’s fault (but see paragraph 6 of the Grey List at paragraphs 5.14.1 to 5.14.10 on the need to avoid imposing any unfair financial sanction).
- 5.6.5 As already explained (paragraph 5.2.6), the mere addition of wording saying that the consumer’s statutory rights are not affected, without explanation, cannot on its own make a limitation clause acceptable.
- 5.6.6 **Consequential loss exclusions.** Businesses often wish to protect themselves from liability to pay damages for remote ‘knock-on’ consequences of breaches of contract on their part. To achieve this they commonly use terms that exclude liability for ‘consequential’ losses. The CMA considers that the use of this technical term (or the similar term ‘indirect losses’ where the same effect is produced) is potentially unfair in two separate ways.
- 5.6.7 First, the special legal meaning of ‘consequential loss’ is unknown to most people and very different from its ordinary meaning. Its use in standard

- contracts can lead to consumers thinking – and being told – that they have no claim for any loss which is a consequence of a trader’s breach of contract. In the absence of legal advice, this misunderstanding may effectively deprive them of the chance to claim any compensation at all.
- 5.6.8 Secondly, an exclusion of consequential loss, even if given its proper legal meaning, has the potential to stop the consumer from seeking redress in certain circumstances when it ought to be available. That is because it is liable to be understood, as a matter of law, as involving a disclaimer of liability for all losses except those which anyone could see would flow directly and naturally from the trader’s breach. It can be argued that it therefore excludes liability for less obvious risks, even if the consumer actually told the trader about them and asked him or her to take care to avoid them.
- 5.6.9 An example of a case in which a consequential loss exclusion could cause unfair detriment would be where the supplier of a service has been told that if it is not performed on time, the consumer will incur a financial penalty or lose an advantage such as a discount under another contract. If the trader then negligently fails to provide the service on time, he or she should not be able to escape liability for that loss, just because the risk of its happening would not have been obvious to the world at large.
- 5.6.10 Fairness is more likely to be achieved, for example, by excluding liability for:
- (a) losses that were not foreseeable to both parties when the contract was formed;
  - (b) losses that were not caused by any breach on the part of the trader; and
  - (c) business losses, and/or losses to non-consumers.<sup>90</sup>
- 5.6.11 See examples of terms considered by the OFT at Annex A under the Group 2(c) ‘consequential loss’ subheading.

**2(d): Time limits on claims**

- 5.7.1. If a contract is to be considered balanced, each party’s rights must remain enforceable against the other for as long as is reasonably necessary, as

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<sup>90</sup> Note, however, that unreasonable exclusions in standard terms can be void and unenforceable even as between businesses under the UCTA, which remains in force in relation to contracts not involving consumers.

well as being adequate in other respects. The general law allows a period of six years (five years in Scotland) for making claims for breach of contract<sup>91</sup> where the parties have not agreed a definite period between themselves, and this may be regarded as the benchmark of fairness.

5.7.2 A term that frees the business from its responsibilities towards the consumer where the consumer does not make a complaint immediately or within an unduly short period of time is likely to be considered unfair. This applies particularly where:

(a) a time limit is so short that ordinary persons could easily miss it, or overlook it because of circumstances outside their control; and

(b) faults for which the trader is responsible could only become apparent after a time limit has expired.

A term which sets a lesser time limit on a consumer's right to enforce the rights set out in Part 1 of the Act is, in any case, blacklisted for that purpose and cannot bind the consumer – see paragraph 5.4.1.

5.7.3 Prompt notification of complaints is desirable because it encourages successful resolution and is therefore to be encouraged. But taking away all rights to redress is liable to be considered an over-severe sanction for this purpose.

5.7.4 Where the consumer's statutory rights are at issue,<sup>92</sup> any fault found in goods or digital content (which is paid for either directly or indirectly) within six months of the date of sale is generally assumed to be the business's responsibility unless it can prove otherwise. It is therefore particularly unfair and misleading for terms to seek to exclude or limit the consumer's right to redress for faulty goods or digital content during the first six months after purchase. As noted above (in part 1 'other legislation' on the CPRs) the use of misleading terms may give rise to enforcement action as an unfair commercial practice.

5.7.5 Merely adding to such a term a statement that statutory rights are unaffected, without explanation, will not make it acceptable in the CMA's view – see paragraph 5.2.6. A better approach is to deal with the issue of prompt notification so as not to restrict consumers' legal rights. One way to

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<sup>91</sup> Note that the law relating to limitation periods is complex, and limitation periods can in particular cases be longer or shorter. The limitation period for personal injury claims is three years.

<sup>92</sup> This refers to the consumer's right to a remedy under Part 1 of the Act for breach of rights where goods or digital content that has been 'paid for either directly or indirectly' are faulty, or otherwise do not conform to the contract, *other than* the short-term right to reject goods – see part 4 of the guidance. On the meaning of 'paid for either directly or indirectly', see part 4 of the guidance at paragraph 4.22.

- do this is to require notification of a complaint within a 'reasonable' time after discovery of a problem.
- 5.7.6 There is similarly likely to be no objection to wording that encourages consumers to check to the best of their ability for any defects or discrepancies at the earliest opportunity, and take prompt action as soon as they become aware of any problem. Concerns do not arise so long as there is no suggestion that the trader disclaims liability for problems which consumers fail to notice.
- 5.7.7 Any kind of wording which is designed to encourage consumers to act promptly is more likely to be fair, and to be effective, if clear language is used, and it is given appropriate prominence.
- 5.7.8 The OFT's view of such terms is illustrated by examples of terms published at Annex A under Group 2(d).

### **2(e) Terms excluding the right of set-off**

Schedule 2, Part 1, paragraph 1, states that the following may be unfair:

- (2) A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader ... including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

- 5.8.1 Terms which deprive the consumer of a route to redress, as well as those which actually disclaim liability, may be both legally ineffective for that purpose ('blacklisted') and unfair (see paragraph 5.2.4 above). One legitimate way for the consumer to obtain compensation from a trader is by exercising the right of set-off. Where a consumer has an arguable claim under the contract against a trader, the law generally allows the consumer to deduct the amount of that claim from anything he or she has to pay. This helps prevent unnecessary legal proceedings.
- 5.8.2 If the right of set-off is excluded, consumers may have (or believe they have) no choice but to pay in full, even when there is something wrong with what they are buying. To obtain redress, they then have to go to court. The costs, delays, and uncertainties involved may in practice force them to give up their claim, and therefore deprive them of their rights.
- 5.8.3 There is unlikely to be an objection to terms which fairly reflect the consumer's normal legal obligation to pay promptly and in full what is properly

- owing – that is, the full price, on satisfactory completion of the contract. But terms may be unfair if they say, or clearly imply, that the consumer must in all cases complete his or her payment of the whole contract price, without any deduction, as soon as the business chooses to regard its side of the bargain as finished. They are likely to be seen as excluding the right of set-off even if they do not actually mention that right.
- 5.8.4 Exclusion of the right of set-off is particularly likely to be seen as harmful where the consumer is not fully protected by the short-term right to ‘reject’ – that is to return goods for a full refund if they are unsatisfactory. The short-term right to reject can be exercised only in relation to goods but it is available for the goods element of a purchase where the consumer has bought the goods along with services or digital content.
- 5.8.5 Even where the consumer can reject goods, a term excluding the right of set-off will still likely be blacklisted and unfair. It restricts the consumer’s freedom to use other legitimate methods to exercise their statutory rights to redress, contrary to Part 1 of the Act (see paragraph 5.4.1). Rejection is usually the preferred recourse for consumers who receive unsatisfactory goods, but not always. The consumer may have no time to start looking again for a new car, or wait for delivery of a replacement computer. Where departures from the promised specification are minor, accepting the product but paying a reduced price for it may be a better option, and consumers should not have their right to exercise that option removed or reduced.
- 5.8.6 **Clauses subjecting set-off to sanction.** Concerns are particularly likely, whatever the subject matter of the contract, where the trader can impose a sanction on the consumer (without first going to court) if they do not pay the whole contract price when demanded – for example, where there is a loss of guarantee rights, or of a right to a discount of the price.
- 5.8.7 The above objections do not apply where the wording used makes clear that it is designed only to deter consumers from withholding disproportionate sums – for instance, the whole contract price where any faults in the goods or services are merely minor – so that it does not stop consumers from withholding reasonable amounts. Other relevant examples of revised terms may be found at Annex A under Group 2(e).
- 5.8.8 **Full payment in advance.** Terms can be open to objection on the basis that they have the indirect effect of removing the consumer’s right to set-off, and therefore also of excluding liability unfairly. For example, that right is effectively removed where consumers are required to pay in full (or nearly in full) before the business has finished carrying out its side of the contract.

Such terms also leave consumers at risk of loss if the trader becomes insolvent (see also below paragraph 5.31.6).

- 5.8.9 These objections apply particularly in connection with contracts under which a substantial amount of work is carried out individually for the consumer after full, or nearly full, payment has been made. Terms which cause that position to arise tend to remove or weaken the trader's proper incentive to perform work with reasonable care and skill. The same objections apply to 'accelerated payment' clauses, which demand all or most of the full contract price if the consumer breaks a contractual obligation – for example, to allow work to start on or by a certain date.
- 5.8.10 There is unlikely to be an objection to 'stage payment' arrangements which fairly reflect the trader's expenditure in carrying out the contract, and which leave consumers holding until completion a 'retention' of an amount reasonably sufficient to enable them to exercise an effective right of set-off. Fairness may also be achieved, even if full payment is required in advance, if such an amount is held under secure arrangements which guarantee that it will not be released until any dispute is resolved by independent adjudication.
- 5.8.11 See Annex A under Group 2(e) for examples of terms considered by the OFT.

## ***2(f) Exclusion of liability for delay***

- 5.9.1 The law requires that goods should be delivered, and services carried out on time. Where the business has set a time in stating its terms to the consumer, it is bound to meet that deadline – where no date was set, any goods ordered generally have to be delivered within the standard 30-day period generally applicable for delivery of goods (see the table of statutory rights in part 4 above), and services must be performed within a reasonable time. A term which allows the trader to fail to meet this fundamental requirement of timeliness is liable to be considered unfair. Because of its likely impact on the consumer's ability to rely on statutory rights and remedies – see part 4 of the guidance – it may well be blacklisted in any event.
- 5.9.2 This applies not just to terms which simply exclude all liability for delay, but also to standard terms allowing unduly long periods for delivery or completion of work, or excessive margins of delay after an agreed date. The effect is the same – to allow the business to ignore the convenience of customers, and even its own oral promises as to deadlines.

- 5.9.3 The fact that delays can be caused by circumstances genuinely beyond the trader's control does not make it fair to exclude liability for all delays however caused. Such terms protect the business indiscriminately, whether or not it is at fault.
- 5.9.4 Contracts sometimes say that 'every effort' will be made to honour agreed deadlines, yet still exclude all liability for any delay. This leaves the consumer with no right to redress if no effort is actually made. Guarantees of this kind are largely valueless.
- 5.9.5 Clauses excluding liability for delay are more likely to be regarded as fair and thus to be enforceable (though this will also depend on compliance with the CCRs)<sup>93</sup> where they are restricted in scope to delays unavoidably caused by factors beyond the trader's control – see examples in Annex A, Group 2(f). But such terms should not enable the business to refuse redress where it is at fault, for example in not taking reasonable steps to prevent or minimise delay. Where examples of such factors are stated, then, in order to be clearly fair, they should only be matters which are genuinely outside the trader's control, not situations such as shortage of stock, labour problems, etc, which can be the fault of the trader.
- 5.9.6 Where there is a risk of substantial delay, a right for the consumer to cancel without penalty may additionally help achieve fairness in relation to an exclusion of liability for delay caused by circumstances beyond the trader's control. It will not make acceptable a term which allows the trader to delay at will.
- 5.9.7 The term 'force majeure' to describe events which are completely outside the trader's control is sometimes used in clauses of this kind. It is legal jargon and best avoided, and should never be used without clear explanation. Plain language is required for terms in consumer contracts under the Act – section 68. See Annex A, subgroup 19(b), for possible alternatives.

## **2(g) Exclusion of liability for failure to perform contractual obligations**

- 5.10.1 A term which could allow the business to fail to meet any of its obligations under the contract, at its discretion and without liability, clearly gives rise to the same concerns already outlined at paragraphs 5.2.1 to 5.2.10 regarding disclaimers generally, but in particularly acute form.

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<sup>93</sup> See part 1 'other legislation' and following, and in part 6 below as indicated there.

- 5.10.2 Similar concerns apply to terms which are intended to allow the trader merely to suspend provision of any significant benefit under the contract – see paragraphs 5.27.1 below, and following, on paragraph 18 of the Grey List. Such terms may be intended to enable the business to deal with technical problems or other circumstances outside its control, protect the interests of other innocent third parties, or to provide an enhanced service to the customer, but the potential effect, as well as the intention behind, contract terms has to be considered in assessing fairness. If an exclusion clause goes further than is strictly necessary to achieve a legitimate purpose it could be open to abuse, and is liable to be seen as unbalancing the contract.
- 5.10.3 Such a term is more likely to be considered fair if:
- (a) it is narrowed in effect, so that it cannot be used to distort the balance of the contract to the disadvantage of the consumer;
  - (b) it is qualified in such a way – for example, by specifying exactly the circumstances in which it can be used – that consumers will know when and how they are likely to be affected; and/or
  - (c) there is a duty on the trader to give notice of any proposal to rely on the term, and a right for the consumer to cancel before being affected by it, without the imposition of a financial sanction or otherwise being worse off for having entered the contract.
- 5.10.4 Sometimes terms of this kind are intended to allow the traders to suspend or modify performance of their contractual obligations in the event of what is considered to be a breach of contract on the part of the consumer. However, there is no need for provision of this kind to deal with serious breaches, since the general law covers the point, and where there is no serious breach, it is unlikely to be appropriate for the business to opt out of carrying out its side of the bargain. Any term allowing the trader to withhold a significant benefit under the contract where that would not be allowed by the general law is liable to meet the same objection as other terms that permit imposition of disproportionate sanctions – see paragraphs 5.32.1 onwards below – or which reserve to the trader the right to decide whether the consumer is in breach – see paragraphs 5.36.1 onwards below.
- 5.10.5 See examples of terms considered by the OFT at Annex A under Group 2(g).

## **2(h) Guarantees and warranties operating as exclusion clauses**

- 5.11.1 A guarantee or warranty might be worded in such a way that, if successfully relied on, it would leave consumers less well able to seek redress, in the event of default by the trader, than they would be under Part 1 of the Act or the general law. Using of wording of this kind will raise the same concerns as exclusion or limitation clauses can do (see paragraphs 5.2.1 to 5.2.10).
- 5.11.2 There is no objection to guarantees or warranties that simply enlarge the scope of the consumer's ordinary legal rights – for example, by offering refunds or exchanges on a no-fault basis, or offering repairs regardless of the cause of the problem. But sometimes guarantees or warranties offer more limited rights than are available under the law, either because the benefits are less, or because their availability is made subject to special conditions or restrictions. These are highly likely to be unfair and blacklisted if they could have the effect of reducing the benefit provided to consumers by their legal protections.
- 5.11.3 Certain fundamental legal rights are treated as included in all consumer contracts by Part 1 of the Act. In general, these statutory rights cannot be excluded by any form of contractual wording or notice – see above, in part 4 of the guidance on blacklisted terms. But inappropriately restrictive guarantees may still be challenged as unfair, particularly if they could deprive consumers of other legal protections. Such wording is also likely to mislead consumers into assuming that it represents the full extent of their rights, and cause them to refrain from exercising their statutory rights, which may be actionable as a breach of the CPRs.<sup>94</sup>
- 5.11.4 Consumer contracts often include statements that statutory rights are unaffected. The aim is to achieve minimum compliance with legislation<sup>95</sup> designed to protect consumers by ensuring they are not misled into thinking these rights have been removed. But simply including those words cannot be relied upon to achieve fairness under Part 2 of the Act. The CMA considers that adding an unexplained piece of legal jargon to contradict the effect of an unfair term does not result in fairness, and indeed is likely to involve a breach of the requirement to use plain and intelligible language – see part 2 of the guidance under the heading 'The Transparency test'.

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<sup>94</sup> See above part 1 'other legislation'. Note that, in addition, even in the absence of any attempt to reduce the rights conferred on consumers, it is illegal under the CPRs to present rights given to consumers in law as a distinctive feature of the trader's offer.

<sup>95</sup> Under section 30 of the Act, consumer guarantees in contracts to supply goods have to contain a statement that the consumer has statutory rights which are not affected by the guarantee. See paragraph 5.35.11 below on rights that consumers have in relation to guarantees.

- 5.11.5 Where a business has not reduced consumers' rights, and merely wishes to put beyond doubt that its guarantee is not intended to have any such effect, any kind of wording that is used for that purpose about the consumer's legal rights needs to have some practical meaning for the ordinary consumer. This may be achieved by, for example, giving an indication as to what sort of protection is involved and/or indicating where advice on it can be obtained. See examples given at Annex A under Group 2(h) (guarantees) and under Group 19(b) ('statutory references').
- 5.11.6 Any guarantee or warranty which gives consumers less protection than their ordinary rights is unlikely to be made fair merely by addition of a qualifying statement of any kind. In the CMA's view, such a guarantee should be discontinued altogether, or its terms should be brought into line with the consumer's legal rights. See OFT examples given at Annex A under Group 2(h) (guarantees) and under Group 19(b) ('statutory references').

***Binding consumers while allowing the trader to provide no service –  
Schedule 2, Part 1, paragraph 3***

Part 1 of Schedule 2 states that the following may be unfair:

- (3) A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.

- 5.12.1 Terms which give the trader the choice whether or not to do anything under a contract that involves provision of a service or services in any form, whilst the consumer continues to be bound by the contract, are clearly open to objection as potentially unfair.
- 5.12.2 A term which, for example, requires customers to go on paying when services are not provided as agreed is clearly open to even stronger objection than the exemption clauses considered under the heading 2(g) above. That kind of term excludes the trader's liability to provide compensation for breach of contract but does not prevent the consumer from ending the contract.
- 5.12.3 In general, clauses allowing a business some flexibility in the performance of its duties under the contract are more likely to be fair where they specify the circumstances in which any contractual obligations may not be observed and these are reasonable in nature – see, for example,

paragraphs 5.10.2 and 5.10.3. But fairness is unlikely to be achieved where the circumstances in question are effectively under the control of the trader.

***Retention of prepayments on consumer cancellation – Schedule 2, Part 1, paragraph 4***

Part 1 of Schedule 2 states that the following may be unfair:

- (4) A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.

- 5.13.1 Terms are always likely to be considered unfair if they seek to exclude the consumer's rights under contract law to the advantage of the trader. A basic right of this kind is to receive, in many cases, a refund of prepayments made under a contract which does not go ahead, or which ends before any significant benefit is enjoyed by the consumer. A term which makes any substantial prepayment entirely non-refundable, whatever the circumstances, potentially allows the trader to make an unjustified windfall gain.
- 5.13.2 In certain circumstances consumers are entitled to a refund even where they themselves bring the contract to an end. Generally, where the trader breaks a contract for goods or services in such a way as to threaten its whole value to the consumer, the consumer is likely to have the right to end the contract (see part 4 of the guidance). In this case, the consumer would normally be entitled to a full refund of any prepayments (and possibly compensation as well). If the contract is for digital content which is 'paid for either directly or indirectly', the consumer's ability to terminate the contract is more restricted but there is still scope for the consumer to recover payments in full in certain cases, particularly when the trader has completely failed to supply the digital content under the contract (see part 4 consumer rights and remedies and paragraph 4.22 for the definition of 'paid for' digital content).
- 5.13.3 Where customers bring the contract to an end without any justification, and the trader suffers loss as a result, they cannot expect a full refund of all

prepayments.<sup>96</sup> But a term under which they always lose everything they have paid in advance, regardless of the amount of any costs and losses caused by the termination, is at risk of being considered an unfair financial sanction – see paragraph 6 of the Grey List, discussed in paragraphs 5.14.1 of the guidance onwards.

- 5.13.4 The Grey List term quoted above may be read as indicating there is no objection to a substantial financial sanction for pulling out of the contract that applies equally to both parties. However, in practice such an ostensibly ‘balanced solution’ is unlikely to achieve fairness. Whether or not such a provision is fair depends on a number of factors, and in particular on whether it confers any real benefit on the consumer, comparable to that enjoyed by the trader. A ‘balanced’ solution is likely to be acceptable only where there is a roughly equal risk to each party of losing out as a result of the other’s cancelling. In many forms of contract, the business has no particular interest in being able to end the contract, and therefore its agreeing to accept a severe financial sanction for doing so does not ‘balance’ fairly a term imposing a heavy sanction on the consumer for cancelling.
- 5.13.5 Fairness is more likely to be achieved for such a term by ensuring that it does not go beyond the ordinary legal position. Generally, where the contract comes to an end because of the fault of the consumer, the business is entitled to hold back from any refund of prepayments what is likely to be reasonably needed to cover either its net costs or the net loss of profit resulting directly from the default (see paragraph 5.14.3 below on the need to avoid double counting). There is no entitlement to any sum that could reasonably be saved by, for example, finding another customer.<sup>97</sup>
- 5.13.6 Alternatively, there may be no objection to a prepayment which is set low enough that it merely reflects the ordinary expenses necessarily entailed for the trader. A genuine ‘deposit’– which is a reservation fee not an advance payment – may legitimately be kept in full, as payment for the reservation. But such a deposit will not normally be more than a small percentage of the price. A larger prepayment is necessarily more likely to give rise to fairness issues, for instance being seen as a disguised penalty

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<sup>96</sup> What is said in these paragraphs assumes that there are no special statutory provisions governing cancellation rights, such as apply under legislation relating to distance or off premises contracts (see paragraphs 5.35.6–5.35.8 below), consumer credit and other particular areas. Such provision might allow for no-fault cancellation and recovery of prepayments even where the trader is not at fault.

<sup>97</sup> Paragraph 5 of the Grey List covers the related issue of requiring consumers to pay for services which are not supplied. The CMA considers that there is a potential for unfairness where terms can have the effect of committing consumers to pay for services for an unduly lengthy tie-in period following the consumer’s cancellation (see paragraphs 5.15.4–5.15.7 below).

(see paragraph 5.14.9) or even as undermining the consumer's right of set-off (see paragraph 5.8.8).

- 5.13.7 Terms of this kind are illustrated by examples of terms published in Annex A under Group 4.

***Disproportionate financial sanctions, Schedule 2, Part 1, paragraph 6<sup>98</sup>***

Part 1 of Schedule 2 states that the following may be unfair:

- (6) A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.

- 5.14.1 It is unfair to impose disproportionate sanctions for breach of contract. A requirement to pay more in compensation for a breach than a reasonable pre-estimate of the loss caused to the trader is one kind of sanction that is liable to be considered disproportionate. Such a requirement may be void to the extent that it amounts to a penalty under English common law. However, (as the courts have recognised)<sup>99</sup> a term may still be considered unfair independently of the common law, if it has a penal purpose or effect. Other types of disproportionate sanction are considered in paragraphs 5.15.1 to 5.15.7 below.
- 5.14.2 A requirement to pay unreasonable interest on outstanding payments, for example at a rate excessively above the clearing banks' base rates, is likely to be regarded as unfair. It makes the consumer pay more than the cost of making up the deficit caused by the consumer's default. The same applies to a requirement to pay excessive storage or similar charges where the consumer fails to take delivery as agreed.
- 5.14.3 Other kinds of penal provisions which may be unfair are clauses saying that the business can:
- claim all its costs and expenses, not just its net costs resulting directly from the breach;

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<sup>98</sup> Paragraph 6 of the Grey List is considered in this guidance before paragraph 5 of that list. Both cover the imposition of disproportionate financial sanctions onto the consumer but paragraph 5 is more narrowly focused on sanctions arising upon early termination. The discussion of paragraph 5, therefore, logically follows on from the discussion of paragraph 6.

<sup>99</sup> See *Munkenbeck and another v Harold* [2005] EWHC 356 (TCC) in which a clause requiring a consumer to pay interest at 8% above the Bank of England base rate on sums due to a trader was found to be unfair, even though it constituted a genuine pre-estimate of damage and was not a penalty at common law.

- claim both its costs and its loss of profit where this would lead to being compensated twice over for the same loss; and
- claim its legal costs on an ‘indemnity’ basis, that is all costs, not just costs reasonably incurred. The words ‘indemnity’ and ‘indemnify’ are also objectionable as legal jargon – see the section on transparency in part 2 of the guidance.

The fairness of any term is assessed having regard to the other terms of the contract, and even if not excessive when considered separately, may be unfair if it could operate together with another term or terms so as to lead to the trader being compensated twice for the same loss.

- 5.14.4 **Potentially penal terms.** A disproportionate financial sanction involving requirement to pay a fixed or minimum sum, in all circumstances, will be open to challenge if the sum could be too high in some cases.
- 5.14.5 Assessment of unfairness focuses on the effect terms could have, not just the purposes they are intended to serve. Thus a clause may be unfair if it allows the trader excessive discretion to decide the level of a financial sanction, or if it could have that effect through being vague, or unclear, or misleading about what consumers will be required to pay in the event of default. Consumers rarely know about technical issues such as ‘mitigation’ of loss (see below), and so can easily be misled into thinking that the trader can claim more than is really the case.
- 5.14.6 **Termination charges.** A term which says, or is calculated to suggest, that inflated sums could be claimed (or retained from prepayments) if the consumer ends the contract is likely to be challenged as unfair. For example, a charge for wrongful termination that requires payment of the whole contract price, or a large part of it, is likely to be unfair if in some cases the business could reasonably reduce (‘mitigate’) its loss. If, for example, it could find another customer, generally, the law would allow it to claim no more than the likely costs of doing so, together with any difference between the original price and the resale price.<sup>100</sup>
- 5.14.7 There is unlikely, for example, to be any objection to terms which, in plain language:

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<sup>100</sup> This is not to say that a term allowing the business in effect to claim the whole contract price will necessarily be fair in every situation in which the business might claim that it is unable to mitigate its loss – see paragraphs 5.15.4–5.15.7 below.

- require the consumer to pay a stated sum which represents a genuine pre-estimate of loss the supplier is likely to suffer (subject to what is said below in paragraph 5.15.6 about unduly long tie-in periods); or
- states simply that the consumer can be expected to pay reasonable compensation, or compensation according to law.

Note, however, that if a term purports to reflect the law on damages in a way that is potentially misleading, its use may be open to challenge, both as involving contractual unfairness under the Act and as an unfair commercial practice under the CPRs (see part 1 'other legislation').

5.14.8 It may be acceptable for a contract to contain a sliding scale of cancellation charges as long as there are no circumstances in which these are likely to be disproportionate. This is less likely where they are not punitive in intention and represent a genuine pre-estimate of loss. Such a scale, if given appropriate prominence, can provide consumers with certainty and clarity as to their position if they need to cancel.

5.14.9 **Disguised penalties.** The Act is concerned with the intention and effects of terms, not just their mechanism. If a term has the effect of a penalty or sanction, it will be regarded as such, and not as term which can benefit from 'the core exemption'. For instance, a disproportionate sanction cannot be made fair by transforming it into a provision requiring payment of a fee for exercising a contractual option (see the discussion of paragraph 5 of the Grey List, at paragraph 5.15.1 and following below).

5.14.10 See examples of terms considered by the OFT at Annex A under Group 6.

***Disproportionate termination fees and requiring consumers to pay for services not supplied – Schedule 2, Part 1, paragraph 5***

Part 1 of Schedule 2 states that the following may be unfair:

- (5) A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.

5.15.1 Terms are always at risk of being considered unfair if they have the effect of imposing disproportionate sanctions on the consumer who decides to end the contract early. Paragraph 5 illustrates two different kinds of terms which are calculated to have this effect – disproportionate termination fees,

and requirements which can operate so as to force consumers to pay for services they have not received.

5.15.2 **Disproportionate termination fees.** A term which imposes disproportionate sanctions on consumers who end their contracts early will fall under suspicion of unfairness. It is important to note that this is not limited to cases in which the termination involves a breach of contract on the part of the consumer. It is also to be noted that, like all wording having the object or effect of terms listed in Schedule 2, it cannot benefit from 'the core exemption' (see part 3 above).

5.15.3 The CMA considers that any termination charge which allows a business to recover more from the consumer than the losses it is likely reasonably to incur as a result of the consumer's early termination will be open to scrutiny for fairness as being potentially disproportionate.<sup>101</sup> A term requiring a payment for exercising a contractual right to cancel the contract early is likely to be open to challenge as excessive, in the CMA's view, if it does not appropriately reflect:

- any savings for the business associated with no longer having to provide the goods, service or digital content;
- any ability of the business to mitigate (reduce) its loss, for instance by finding another customer; and
- any benefit to the business of receiving a payment earlier than it would otherwise have done.

As mentioned above, in paragraph 5.14.3, a term that is not unfair on its own may be unfair if it operates with another term or terms to allow excessive recovery of loss.

5.15.4 **Requiring consumers to pay for services not supplied.** The CMA considers that the final words of paragraph 5 are relevant to terms that effectively lock consumers into paying for services. Terms can operate to create a fixed or 'tie-in' minimum contract period if they:

- do not allow for cancellation within the 'tie-in' period, and thus bind the consumer who terminates to make all, or substantially all, the payments that would have been made had the contract remained in place; or
- allow for cancellation, but only on payment of a charge or fee equivalent to all, or substantially all, of the payments.

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<sup>101</sup> See paragraph 6 of the Grey List above and in particular paragraphs 5.14.6–5.14.8.

- 5.15.5 A service contract does not necessarily have to provide a formal right of cancellation without liability to be fair. In the CMA's view, however, it will be under suspicion of unfairness if the consumer who chooses to stop receiving the service is always required to pay in full or nearly in full, regardless of whether allowance could be made for savings or gains available as a result of the contracts' early termination (see above paragraph 5.15.3). A saving may be available, for instance where there is scope to find other customers to take their place.
- 5.15.6 In some situations there may be less scope for the business to reduce its loss. In such cases, the focus of the fairness assessment will necessarily be on the length the period for which the consumer is tied in. In such cases, a minimum period for a service contract is, in the CMA's view, open to scrutiny, particularly if its effect is to give the trader an advantage arising from practical limitations to the consumer's ability to assess what their circumstances are likely to be in the longer term. In considering fairness, regard needs to be had to factors described above in part 2 of the guidance, under the 'Fairness test' heading.
- 5.15.7. The High Court recognised the potential for unfairness of unduly long minimum tie-in clauses in a case brought by the OFT concerning gym contracts. The court held that tie-ins of over 12 months were unfair, on the basis of findings as to, in particular:
- the vulnerability of consumers, arising from their limited ability to plan ahead and assess what their circumstances would be in more than a year's time; and
  - the level of advantage conferred on the gym operators, taking into account, in particular, that they were rarely in practice unable to take on new members.<sup>102</sup>

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<sup>102</sup> *The Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch), at paragraph 169 (see paragraphs 162–174). The gym operators were in a position to argue that they were never in practice so oversubscribed that they could not take on new members. Thus it could not be said that any individual member's early termination created a vacancy which they could then fill. Note also, minimum tie-in periods of 12 months were held to be unfair where the consumer could not end the agreement in certain circumstances including medical reasons which stopped the consumer using the gym, or loss of livelihood.

## **Cancellation clauses – Schedule 2 (first half), Part 1, paragraph 7**

### *Unequal cancellation rights*

Part 1 of Schedule 2 states that the following may be unfair:

- (7) A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer ...

- 5.16.1 Fairness and balance require that consumers and traders enjoy rights of equal extent and value in relation to ending or withdrawing from the contract.<sup>103</sup> The trader's rights should not be excessive, nor should the consumer's be unduly restricted, and the balance between their rights should be real, not a matter of mere formal equivalence.
- 5.16.2 **Excessive rights for the trader.** Cancellation of a contract by the trader can leave the consumer facing inconvenience at least, if not costs or other problems. Where that is so, a unilateral right for the trader to cancel without any liability to do more than return prepayments is likely to be considered unfair (see the discussion of the second half of paragraph 7 of the Grey List at paragraphs 5.17.1 below and following, on terms which exclude even that liability).
- 5.16.3 This applies particularly to terms which explicitly say that the trader can cancel at will, without having any valid reason. But it also applies to terms which permit cancellation for vaguely defined reasons, or in response to any breach of contract (however trivial) by the consumer. Such terms may be intended to allow the business to do no more than protect itself legitimately from problems beyond its control, or from serious misconduct by the consumer. But the potential effect as well as the purpose of terms is relevant to fairness, and if wording is loosely drafted and open to abuse it is liable to be seen as unbalancing the contract.
- 5.16.4 Fairness is more likely to be achieved where terms reflect fairly the ordinary law, by allowing the trader to end the contract if the consumer is in serious breach (see paragraph 6 of the Grey List above at paragraph 5.14.1 of the guidance and the discussion following on the potential for unfairness for terms dealing with claims in damages in such circumstances).

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<sup>103</sup> What is said in this paragraph assumes that there are no special statutory provisions governing cancellation rights, such as apply under legislation to 'distance' or 'off premises' contracts, consumer credit and other particular areas (see, for instance, paragraphs 5.35.6–5.35.8 below).

5.16.5 A right to cancel where the consumer is not at fault, with liability only to return prepayments, is more likely to meet the requirements of fairness if it is non-discretionary – that is, can operate exclusively where circumstances make it impossible or impractical to complete the contract. But for fairness to be achieved other conditions may also need to be met. In the CMA’s view:

- Attention needs to be drawn to the risk of cancellation if it is a real possibility.
- The circumstances should be clearly and specifically described. There should be no listing of matters that could be within the trader’s control – for example, industrial disputes with the trader’s own employees, equipment breakdown, or transportation difficulties.
- Where the trader has a responsibility to carry out a survey or otherwise consider whether it is practicable to undertake work this should be done and the consumer should be informed of the outcome as soon as possible with an explanation of the reasons for the proposed cancellation if they are not obvious.

5.16.6 **Inadequate rights for the consumer.** A term can also be unfair if it undermines the consumer’s legitimate rights to end the contract. Clauses frequently state or imply that the consumer cannot cancel the contract in any circumstances, or only with the trader’s agreement. In law, where the trader breaks a contract for goods, services or digital content (which is paid for either directly or indirectly), the consumer has remedies which may include a right to end it (see the table of statutory rights in part 4 of the guidance). A term that purports to deny the consumer those remedies, and in particular to rule out all possibility of the consumer bringing the contract to an end is potentially misleading and unfair.

5.16.7 Again, fairness is more likely to be achieved if cancellation terms merely reflect the way in which the ordinary law would apply in any event. A cancellation clause is, for instance, unlikely to raise concerns if it *fairly* alerts the consumer to his or her liability in damages for wrongful cancellation (see paragraphs 4, 5 and 6 of the Grey List on what is unlikely to be unfair).

5.16.8 See examples of terms considered by the OFT at Annex A under Group 6.

***Trader's right to cancel without refund – Schedule 2 (second half), Part 1, paragraph 7***

Part 1 of Schedule 2 states that the following may be unfair:

- (7) A term which has the object or effect of ... permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.

- 5.17.1 Cancellation clauses which allow the trader to cancel without acknowledging any right on the part of consumers to a refund of prepayments can be particularly open to abuse. This applies equally to deposits and sums paid when (or after) the contract is entered into.
- 5.17.2 As with cancellation rights generally, concern arises particularly where such a term could be used at the discretion of the trader. But even a more restricted right to cancel, for example, along lines indicated in paragraph 5.16.5, is likely to be unfair if it could allow retention of prepayments for which the consumer has received no benefit.
- 5.17.3 Where a business terminates in response to a serious breach of the contract (see paragraph 5.16.4) by the consumer, it may be entitled to retain all or some monies prepaid by the consumer, particularly by way of compensation for any loss directly caused by the breach (see the guidance on paragraphs 4 and 6 of the Grey List in paragraphs 5.13.1 and 5.14.1 respectively, on what is unlikely to be unfair). However, a term is likely to be subject to scrutiny if it makes a substantial prepayment non-refundable in all cases of termination on consumer default, regardless of whether any such loss has occurred.

***Trader's right to cancel without notice – Schedule 2, Part 1, paragraph 8***

Part 1 of Schedule 2 states that the following may be unfair:

- (8) A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

- 5.18.1 In most kinds of contract, a sudden and unexpected termination of the contract by the trader may cause inconvenience, and sometimes expense, for the consumer. Even in a 'continuing' contract, which by definition continues until one or other party cancels – for example a contract for cloud

- services – the trader should (with any other appropriate safeguards) normally give reasonable notice of termination.
- 5.18.2 A right for the trader to cancel a contract without notice is less likely to raise concerns if its use is effectively restricted to situations in which there are ‘serious grounds’ for immediate termination. These might be circumstances in which there is a real risk of loss or harm to the trader or others if the contract continues for even a short period – for example, where there is a reasonable suspicion of fraud or other abuse.
- 5.18.3 However, fairness is likely to require that clear indication is given of the nature of any ‘serious grounds’ for cancellation without notice. If the consumer will be unaware whether an immediate cancellation is or is not contractually justified, he or she is in no position to seek redress if it is not, and the term will in practice be open to abuse.
- 5.18.4 In contracts for financial services – for example, banking and credit contracts – the Act, Schedule 2, Part 2 indicates that there may be a need only for the trader to have a ‘valid reason’ for cancellation without notice, and to inform the consumer of the decision to immediately.<sup>104</sup> Such a term should, however, not be drafted in such a way that it could in practice be used arbitrarily to suit the interests of the trader – see paragraphs 5.22.6 and 5.22.7 on what may be considered to constitute ‘valid reasons’.

***Excessive notice periods for consumer cancellation – Schedule 2, Part 1, paragraph 9***

Part 1 of Schedule 2 states that the following may be unfair:

- (9) A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.

- 5.19.1 A clause which states how long a contract has to run is likely to be among its most important provisions for consumers. If a term can be used – relying on a consumer’s inertia or insufficient information – to extend the contract

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<sup>104</sup> Schedule 2, Part 2, paragraph 21. In a few stated specialised areas, there may be no need for notice at all. These are not exemptions from the control of the unfair terms provisions of the Act, see above paragraph 2.41. Any ‘cancellation without notice’ term may still be unfair if it satisfies the test of unfairness set out in section 62 of the Act.

- period beyond what the consumer would normally expect, it is liable to be considered unfair.
- 5.19.2 Particular suspicion attaches to a term in a contract for a fixed period which, if early notice to cancel is not given, automatically commits the consumer to a renewed fixed term.
- 5.19.3 A term which could have the effect of automatically renewing a contract is more likely to be fair if the renewal term is properly brought to the consumer's attention before entering the contract (see part 2 of the guidance under the heading 'the Transparency test') and the contract requires that the consumer is sent a reminder a reasonable time before the renewal takes effect, provided it is accompanied by appropriate information covering, in particular:
- the terms of the proposed renewal of the contract; and
  - any steps consumers are reasonably required to take to notify the trader of their intention that the contract should not be renewed.
- 5.19.4 Such a term may also be more likely to be fair if there are reasonable procedures which allow for cancellation of the contract during the renewed period provided that
- the consumer is not subject to any financial sanction for cancellation; and
  - any requirement to give notice of cancellation is reasonable and in particular does not have the effect of itself tying the consumer unfairly into the contract.
- 5.19.5 An over-long cancellation notice term may also be unfair in a contract which continues indefinitely rather than for a fixed term. Consumers entering such contracts normally expect to be able to end it a reasonable time after they decide they no longer want or can no longer afford what is provided under it. If they are required to make a cancellation decision too far ahead of time, they are liable either to forget to do so when they need to, or wrongly to anticipate their future needs. In either case, the effect of the term is the same as that of an 'automatic renewal' clause – consumers experience an unintended extension of their payment obligations.
- 5.19.6 Terms of this kind are illustrated at Annex A under Group 8.

## ***Binding consumers to hidden terms – Schedule 2, Part 1, paragraph 10***

Part 1 of Schedule 2 states that the following may be unfair:

- (10) A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

- 5.20.1 It is a fundamental requirement of contractual fairness that consumers should always have a real opportunity to read and understand contracts before becoming bound by them (see part 2 of the guidance under the heading 'The transparency test'). Terms whose purpose is to subject consumers to obligations of which they can have no knowledge at the time of contracting are open to serious objection. The underlying principle that consumers need full information about the agreements they are entering is mentioned frequently in this guidance and also reflected in, for instance, the CCRs (see part 1 'other legislation' above).
- 5.20.2 Any provision or notice which seeks to bind the consumer to accept or comply with terms which are 'hidden' – or, in legal jargon, 'incorporated' solely 'by reference' – is liable to challenge. This issue commonly arises in the context of online transactions – for example, where a condition of receiving digital content is the acceptance of terms and conditions through a tick box against a provision which has the purported effect of binding the consumer to 'terms' of the agreement in circumstances where the consumer has no reasonable prospect of reading and understanding them. The general 'contract terms' may, in any case, not be binding under the general law especially if they are onerous in character. Their use may also involve breach of the CPRs (see above part 1 'other legislation' on the CPRs).
- 5.20.3 The same objections apply to terms which require consumers to accept that they are bound by the terms of other linked contracts (for example, insurance contracts) or rules or regulations or agree to the terms of first or third party privacy policies unless they are given an appropriate chance to become acquainted with them.
- 5.20.4 This is not to say that every detail of information about an agreement must always be included in a single contract document. Indeed, relying solely on lengthy terms and conditions to communicate with consumers may be positively unhelpful. Face-to-face explanation serves a valuable purpose, as do brochures, executive summaries, and other forms of written guidance

- particularly as a means of drawing attention to the more important terms. The overriding requirement is that consumers are effectively alerted – before committing themselves – to all contractual provisions that could significantly affect their legitimate interests.
- 5.20.5 **Cooling-off periods.** Where contract documentation is lengthy and unavoidably complex, or there are other reasons why consumers are likely to be unable to understand and consider all relevant information provided in order to inform their decision-taking, a contractual right to cancel may be one way to help achieve fairness. This would allow for a specified reasonable period of time in which consumers can read the terms, consider their position, and pull out without financial sanction or loss of prepayments if they find that the agreement is not what they expected. The law requires provision of a cooling-off period in some situations, particularly where a contract is entered away from the trader’s place of business or at a distance, for example by post, telephone, text messaging or internet.
- 5.20.6 A contractual ‘cooling off’ period as described can assist in a limited range of case, where the problem for the consumers is essentially just lack of time to read all the information provided. It is not a universal remedy, and in particular, it cannot ‘cure’ a lack of transparency in the material itself such that the consumer would be likely to be confused or misled by it, even if given an extended opportunity to consider it.
- 5.20.7 Terms of this kind are illustrated in Annex A under Group 9.

***Trader’s right to vary terms generally – Schedule 2, Part 1, paragraph 11***

Part 1 of Schedule 2 states that the following may be unfair:

- (11) A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

- 5.21.1 A right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party, is under strong suspicion of unfairness and may well, in any case, be blacklisted for the purposes of Part 1 of the Act. A contract can be considered balanced only if both parties are bound by their obligations as agreed.
- 5.21.2 A right of variation is likely to be at risk of being considered unfair depending on:

- (a) its breadth – the extent of the changes that it allows, and particularly changes that are exclusively in the interest of the trader;
- (b) its transparency – how far it can result in changes that are unexpected to and unforeseeable by the consumer; and
- (c) the vulnerability of the consumer – in particular, whether consumers can realistically escape the impact of the changes by cancelling the contract.

5.21.3 If a term could be used to force the consumer to accept unanticipated costs or penalties, new requirements, or reduced benefits, it is likely to be considered unfair whether or not it is meant to be used in that way. A variation clause can upset the legal balance of the contract, even though it was intended solely to facilitate minor adjustments or corrections, if its wording means it could be used to impose more substantial changes.

5.21.4 The CMA's concerns apply particularly to variation clauses in contracts for a fixed or minimum contractual period. Where a consumer enters a contract for a defined period (especially if it is short) the natural expectation will be that the terms of the contract are fixed for that period. A term which, contrary to such an expectation, allows the business to provide something that is not in all significant respects what the consumer agreed to buy, or to charge a higher price than was agreed, is clearly under particular suspicion of unfairness and may well be blacklisted for the purposes of Part 1 of the Act.

5.21.5 A variation clause is more likely to be found fair if it is narrow in effect, so that it cannot be used at the discretion of the trader to change the balance of advantage under the contract to the consumer's detriment. An example would be a term allowing variations to reflect changes in the law, or to meet regulatory requirements (e.g. new health and safety requirements). But allowing variation by reference to technical legislative or regulatory provisions, without any information to enable consumers to understand what this is likely to mean for consumers in practical terms, is unlikely to suffice.<sup>105</sup>

5.21.6 Where a term leaves some discretion in the hands of the business, the chances of it being considered fair can still be increased provided it cannot be used unexpectedly and to the detriment of consumers. This may be achieved through transparency – that is where the contract sets out the

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<sup>105</sup> See the CJEU case of C-92/11 *RWE* (as referred to above in part 2, under the heading 'transparency'): 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned', at paragraph 50.

circumstances, method and reasons for use of the right of variation in an appropriately clear and specific way. Whilst recognising that the level of information required may vary depending for instance on the nature of the goods or services, the CJEU has strongly emphasised the need for this kind of full transparency in the use of variation clauses, so that consumers entering contracts are able to foresee the changes that can be made and understand the implications for them (see paragraph 5.22.6).<sup>106</sup>

5.21.7 However, transparency – even in the fullest sense – is not the sole criterion of fairness. If it remains the case that a term permitting unilateral contractual variation could operate to the detriment of the consumer, fairness can only be achieved via other elements of the term or the contract. Regard will be had to these other elements in making an assessment of fairness, most notably the consumer’s right to cancel, which is discussed below.

5.21.8 A variation clause may also be more likely to be found fair if it includes a duty on the trader to give notice of any variation in good time prior to it taking effect and a right for the consumer to cancel without being adversely affected. However, in the same way that steps to achieve transparency as set out in paragraph 5.21.6 will not necessarily suffice to achieve fairness, so also the provision of notice and cancellation rights cannot be relied upon in itself, independently of other factors, to make a widely drafted variation clause fair. The CMA considers that fairness is particularly unlikely to be achieved via inclusion of cancellation rights in the following two kinds of case:

- (a) Where there is (formally or in effect) a financial sanction for exercising the right to cancel, or the consumer will otherwise be worse off as a result of doing so. The right to cancel must be genuine, and not merely a formal right: it must be capable of being exercised in practice without loss or serious inconvenience (see paragraph 5.23.6).
- (b) Where the circumstances in which a variation could occur have not been made sufficiently clear as mentioned in paragraph 5.21.6 above. Fairness requires that the consumer should be able to foresee and evaluate the implications of the fact that he or she may at some point

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<sup>106</sup> See for instance *RWE*, as above, at paragraphs 43 and 44, and 55 in particular, where the CJEU followed its earlier approach to price variation terms in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Tavkozlesi Zrt.* (referred to below as *Invitel*, see paragraphs 21–31 of the latter case and paragraphs 27 and 28 in particular). Variation terms, like all written terms, must in any case, meet the requirements of transparency set down in the legislation (see part 2 of the guidance), see C-26/13 *Kasler* at paragraph 73 and C-143/13 *Matei*, as above, at paragraph 74, which build upon the earlier cases cited of *Invitel* and *RWE*.

have to choose between accepting a variation and abandoning the bargain altogether (see paragraph 5.22.6).<sup>107</sup>

- 5.21.9 **Reasonableness requirements.** A term which merely says that variations will only be ‘reasonable’, or will only be made ‘reasonably’, is unlikely to be any fairer than one which contains no such qualification, unless there can be little doubt, before the conclusion of the contract, as to what sort of variation such wording allows, and in what circumstances. Where the criteria of reasonableness are vague, or clearly meant to include the best commercial interests of the business, there will be scope for the business to change the bargain unexpectedly and potentially to the detriment of consumers to protect its profit margins.
- 5.21.10 A reasonableness requirement is more likely to be acceptable where those in the position of the consumer and trader would be likely to share a common view as to what would be ‘reasonable’ – for example, where a ‘reasonable charge’ clearly means a charge sufficient to meet specific and verifiable open-market costs.
- 5.21.11 **Scope of paragraph 11.** This paragraph of the Grey List is said to be subject to certain paragraphs in Part 2 of Schedule 2 including paragraph 22 (covering certain types of terms in financial services contracts) and paragraph 23 (covering certain types of terms in contracts which last indefinitely). As explained in paragraph 2.41, these paragraphs in Part 2 of the Schedule are not exemptions from the fairness test. When assessment is made of the fairness of any variation clause regard needs to be had to all the relevant fairness provisions in the Act including those in Schedule 2 (as a whole) and the Act’s transparency requirements – given the importance that the CJEU has indicated transparency plays in assessing the fairness of these types of clauses.
- 5.21.12 Examples of general variation clauses which have been considered unfair by the OFT are illustrated in Annex A under Group 10.
- 5.21.13 When considering the paragraphs 12 to 15 of the Grey List terms, we set out our objections to other particular kinds of variation clause, and suggest ways in which they can be modified to achieve fairness.

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<sup>107</sup> See C-472/10 *Invitel*, as above, particularly at paragraph 24, and C-92/11 *RWE*, as above, particularly at paragraphs 51 and 52.

**Right to determine or change what is supplied – Schedule 2, Part 1, paragraphs 12 and 13**

Part 1 of Schedule 2 states that the following may be unfair:

- (12) A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
- (13) A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

- 5.22.1 Concerns regarding terms that allow the trader to substitute something different for what the consumer actually agreed to, or reasonably understood as having been agreed, are set out on a general basis in paragraphs 5.21.1 to 5.21.11. This section considers two particular kinds of term that give rise to these concerns.
- 5.22.2 Variation clauses, illustrated in paragraph 13 of the Grey List, are more commonly encountered than determination clauses as illustrated in paragraph 12 of the Grey List, and are therefore dealt with first, but in any event both kinds of term have the same potential effects, and what is said applies to both of them equally.
- 5.22.3 The use of terms that allow the trader to change what is supplied conflicts with the consumer's legal right to receive something that is in all significant respects what the trader stated<sup>108</sup> would be supplied, not merely something similar or equivalent. Consumers are legally entitled to expect satisfactory quality in goods and digital content which they have paid for, and that services will be provided with reasonable skill and care, but this does not mean it is fair to reserve a right to supply something that is merely of equivalent standard or value. Terms should respect both the right to receive products that are as described and the right to satisfactory quality, not one or the other.
- 5.22.4 A clause which allows the trader to vary what is supplied is more likely to be considered fair if it is clear and restricted to allowing either minor

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<sup>108</sup> What is said here reflects the provisions of the CCRs under which, for many types of contract, certain pre-contract information must be provided by the trader, and is to be treated as constituting a term of the contract, irrespective of whether it appears in a contract document as such. It is the CMA's view that any provision made for variation of the contract needs to be reflected in the pre-contract information itself (see above, part 1 'other legislation' on the CCRs and see also the table of statutory rights at paragraph 4.28 of the guidance).

- technical adjustments which can be of no real significance to the consumer, or changes required by law or necessity. In the case of digital content, an acceptable term might be designed, for example, to address a security threat to a consumer's digital content or device. Conversely, more open-ended terms which permit wide-ranging variations for unspecified reasons are more likely to be considered unfair.
- 5.22.5 If the intention is to permit changes that are more significant, but still only limited in scope, another approach is possible. This is to ensure that, as far as possible, the consumer fully understands and agrees to the change in advance. The contract will need, as a minimum, to set out clearly what variation might be made, and in what circumstances, and define how far it can go, for example if the consumer orders goods of a certain colour but agrees to accept one of a range of others if that is not available. However, even in these circumstances, a genuine right to cancel the contract as described above (paragraph 5.21.8) and below (paragraph 5.23.6) may be needed to achieve fairness, for example, where there is a risk that consumers will not be fully aware of and may not have accepted the clearly defined variation.
- 5.22.6 **Valid reasons.** Stating a valid reason in the contract as to why a particular change may be made can also help if it serves to ensure that customers can, when deciding whether to enter the contract, foresee the circumstances in which the changes to it may occur and understand how these changes may affect their rights and obligations under the contract.
- 5.22.7 A reason can be considered 'valid' only if its inclusion in the contract offers real protection to the consumer against encountering unexpected and unacceptable changes in his or her position. Vague or unclear reasons are most unlikely to be considered valid. In any case, no statement of reasons can justify making consumers pay for a product that is substantially different from the one they agreed to buy.
- 5.22.8 **Rights to cancel.** Where circumstances could prevent the supply of the goods, digital content or services agreed (or a version of them that the consumer has indicated is acceptable) then fairness is likely to require that the consumer should have a genuine right to cancel the contract,<sup>109</sup> and receive a refund of any prepayments. Fairness requires that the consumer should be given appropriate information, before the contract is concluded, as to what these circumstances are. Where it is known that, for example, a

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<sup>109</sup> On what can be expected to make a cancellation right 'genuine', see paragraph 5.23.6. Note that cancellation rights that exist independently of a variation clause may not suffice to make the variation clause fair if that clause could itself be used to remove or change them.

- chosen item could be unavailable from the manufacturer, that risk should be drawn to the consumer's attention.
- 5.22.9 A term which has the effect of allowing the trader to vary what is supplied at will – rather than in circumstances described in the contract – is unlikely to be fair even if customers have a right of cancellation and refund. The consumer should never have to choose between accepting a product that is not what was agreed, or suffering the inconvenience of unexpectedly not getting, for example, a product for which he or she may have an immediate need, or a long-planned holiday, just because it suits the trader not to supply what was promised.
- 5.22.10 **Notice of variation.** If a right to cancel is to be of any value in connection with the use of a variation clause, generally consumers need to be given notice of a proposed variation in good time so that they can consider their position before deciding whether to accept it or to end the contract. However, as explained in paragraph 5.21.8, a requirement to provide notice of the variation and a cancellation right cannot be relied upon in itself to make a variation clause fair, independently of the breadth of the variation right conferred on the trader and the extent to which it can be exercised at discretion rather than in line with information and reasons stated in the contract. Both cancellation rights and rights to receive advance notice must actually enable the consumer to take a decision in his or her best interests if they are to increase the likelihood of a variation clause being considered fair.
- 5.22.11 **Right to determine what is supplied.** Paragraph 12 of the Grey List clarifies the legal position in connection with contracts where the trader and consumer have not agreed, by the time a contract is concluded, on all the details of what is to be supplied. In such cases, a term that gives the trader the sole right to determine the characteristics of the subject matter of the contract will be under strong suspicion of unfairness.
- 5.22.12 The effect of such a term is, for practical purposes, likely to be very similar to that of a variation clause or an exclusion clause (see paragraph 2 of the Grey List). It is liable to be capable, especially if widely drafted, of being used to deny consumers the full enjoyment of benefits they reasonably expected to enjoy under the contract. That being so, fairness is more likely to be achieved if such a term is worded in such a way as to address the detailed points made above, so that any scope for consumers to be taken by surprise as regards what they receive under the contract is removed or at least minimised.

5.22.13 For illustrative examples of terms allowing the trader to change what is supplied, both those considered unfair and amendments considered acceptable by the OFT, see Annex A under Group 11.

**Price variation clauses – Schedule 2, Part 1, paragraphs 14 and 15**

Schedule 2, Part 1, states that the following may be unfair:

- (14) A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.
- (15) A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

5.23.1 Concerns arising in relation to terms that allow the trader to substitute something different for what the consumer actually agreed to, or reasonably understood as having been agreed, are set out on a general basis in paragraphs 5.21.1 to 5.21.11 above. If a contract is to be considered balanced, the consumer should be sure of getting what he or she was promised in exchange for paying an agreed price. Paragraphs 14 and 15 of the Grey List illustrate two kinds of term which give rise to particular concerns in this connection.

5.23.2 Any purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable. Paragraph 14 of the Grey List particularly highlights the potential unfairness of terms which have the effect of leaving the trader free to calculate or determine the price so that the consumer cannot work out in advance of entering the contract how much they will have to pay under it.

5.23.3 Any term which can be relied on as a basis for varying the price should set out clearly the circumstances in which a variation may occur, and the method of calculating the price variation, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made

and evaluate the practical implications for them.<sup>110</sup> Similarly a price determination clause should clearly set out the information to enable the consumer to foresee what price will be payable depending on the circumstances.

5.23.4 A price clause is not necessarily fair just because it is not on its face discretionary. Using a term that, for example, gives a right to increase prices to cover any increased costs experienced by the trader fails to recognise that traders are much better able to anticipate and control changes in their own costs than consumers can possibly be. Such a clause is both unclear as to what the consumer can expect and open to abuse if (as will normally be the case) the consumer can have no reasonable certainty that the increases imposed on them actually match net cost increases.<sup>111</sup>

5.23.5 A degree of flexibility in pricing is more likely to be achieved fairly in the following ways:

- Where the level and timing of any price increases are specified (within narrow limits if not precisely) they may effectively form part of the agreed price. As such they are acceptable, provided the details are clear and adequately drawn to the consumer's attention before entering into the contract in a way which allows the consumer to foresee and evaluate the practical implications on them of the variation.
- Terms which permit increases linked to a relevant published price index such as the Retail Prices Index are likely to be acceptable, as Part 2 of Schedule 2, paragraph 25 of the Act indicates, subject to the same proviso as above.
- Any kind of variation clause may in principle be fair provided that, in line with what is said in paragraph 5.21.8 above, consumers are genuinely free to escape its effects by ending the contract, and that transparency criteria have been met so that they are able to make an informed choice whether to enter the contract in the first place.

5.23.6 To allow genuine freedom to end the contract, a term must not confer just a formal cancellation right, but one that is capable of being exercised freely. The consumer should not be left worse off for having entered the contract,

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<sup>110</sup> Per C-92/11 *RWE*, as above, at paragraph 49.

<sup>111</sup> An example of a change that is outside the trader's control and publicly known and verifiable would be the imposition of a new tax, or a change in the amount of an existing tax. This is not to say that it is necessarily fair for a trader to reserve the right to pass on tax increases, particularly in the absence of provision relating to tax reductions.

whether by experiencing financial loss (for example, forfeiture of a prepayment) or serious inconvenience, or any other adverse consequences. Factors relevant to the genuineness of a right to cancel are likely to include whether the consumer was given sufficient notice of the alteration, any practical difficulties in finding an alternative supplier and whether the market is competitive.<sup>112</sup>

5.23.7 Terms of this kind, and amendments that were acceptable to the OFT, are illustrated at Annex A under Group 12.

### ***Trader's right of final decision – Schedule 2, Part 1, paragraph 16***

Part 1 of Schedule 2 states that the following may be unfair if they have the object or effect of:

- (16) A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.

5.24.1 Terms are always likely to be considered unfair if they allow a business unilaterally to take itself outside the normal rules of law. Disputes over the meaning and application of contract terms can normally be referred to the courts if either party so chooses. Paragraph 16 of the Grey List illustrates two different kinds of term, which purport to take away this right from the consumer.

5.24.2 **Right for traders to determine whether they are themselves in breach.** If traders reserve the right to decide whether they have performed their contractual obligations properly, then they can unfairly refuse to acknowledge that they have broken them, and deny redress to the consumer. Such terms can have an effect comparable to clauses unfairly excluding liability for supplying unsatisfactory goods or digital content or providing services without reasonable skill and care (see paragraphs 1 and 2 of the Grey List).

5.24.3 An example would be a term allowing the business or its agent, if the consumer complains that goods are faulty or work has not been properly carried out, to undertake their own test or inspection to determine whether the complaint is well-founded. Such a term is more likely to be fair if it

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<sup>112</sup>As per C-92/11 *RWE*, as above, at paragraph 54, where the CJEU indicated the type of factors which are relevant when considering if the right to cancel can be exercised following a price rise for the supply of gas.

- provides for independent inspection or testing – provided that consumers are not required to meet the costs of this where it turns out that their complaint is well-founded.
- 5.24.4 Terms allowing the trader to decide when the consumer is in breach of his or her obligations are open to comparable objection.
- 5.24.5 **Right to decide the meaning of terms.** Similarly, if traders reserve the right to decide what a term in a contract means, then they are effectively in a position to alter the way it works so as to suit themselves. It is not necessarily sufficient to say that the trader will act ‘reasonably’. Such a term potentially gives rise to the same objections as a right to vary terms generally, dealt with under paragraph 11 of the Grey List.
- 5.24.6 This second kind of ‘final decision’ term, too, is more likely to be considered fair if an element of independent adjudication is introduced into it – if, that is, a consumer who is unhappy with the trader’s interpretation of the contract can decide to refer the matter to an independent expert or arbitrator. However, such terms should not compel the consumer to resolve the issues in this way as compulsory arbitration clauses involving sums of £5,000 or less are always unfair and those involving sums of more than £5,000 may also be unfair – see paragraphs 5.29.2 and 5.29.3.
- 5.24.7 Relevant examples of terms, and amendments that were acceptable to the OFT, are listed in Annex A under Group 13.

### ***Entire agreement and formality clauses – Schedule 2, Part 1, paragraph 17***

#### *Entire agreement clauses*

Part 1 of Schedule 2 states that the following may be unfair:

- (17) A term which has the object or effect of limiting the trader’s obligation to respect commitments undertaken by the trader’s agents ...

- 5.25.1 Good faith demands that each party to a contract is bound by his or her promises and by any other statements which help secure the other party’s

- agreement. If a contract excludes liability for words that do not appear in it, there is scope for consumers to be misled with impunity.<sup>113</sup>
- 5.25.2 These objections apply equally to other types of wording which have the same effect. Examples are clauses saying that employees or agents have no authority to make binding statements or amendments to the contract, or that contract changes may only be made in writing, or that they must be signed by a Director. Such terms enable the trader to disclaim liability for oral promises even when they have been relied on by the consumer reasonably and in good faith.
- 5.25.3 Consumers commonly and naturally rely on what is said to them when they are entering a contract. If they can be induced to part with money by claims and promises, and the trader can then simply disclaim responsibility by using an entire agreement clause, the scope for unfair detriment is clear. False or misleading statements that affect their decisions are liable to involve breach of the CPRs and to give rise to remedies accordingly (see above part 1 'other legislation'). But even if such a term is not deliberately abused, its use weakens the traders' incentive to take care (and to ensure that employees and agents take care) in what they say to consumers before contracts are concluded, and thus tends to impair the quality of pre-contract information for consumers.
- 5.25.4 Such terms are often defended on the grounds that they achieve 'certainty' as to what statements bind the parties. But they are liable to do so at the unacceptable price of excluding the consumer's right to redress for misrepresentation or breach of an obligation, which the consumer relied upon when entering the contract (see above on unfair exclusion of liability clauses as illustrated by paragraphs 1 and 2 of the Grey List).
- 5.25.5 The ordinary law of contract strikes a fairer balance. Although it respects the need for certainty, in that there is a presumption that a contractual document is intended to contain all the terms of the agreement,<sup>114</sup> nevertheless it still remains open to a party to produce evidence to prove that the document is not a complete record of the contract. If the party is successful, the court will also take the other statements into account.<sup>115</sup>

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<sup>113</sup> For an example of such a term which was held to be unfair see *The Financial Services Authority v Asset LI Inc (trading as Asset Land Investment Inc) and Others* [2013] EWHC 178 (Ch). Note that a term of this type is automatically unenforceable in a service contract – see paragraph 5.25.6

<sup>114</sup> This is known to lawyers as the 'parol evidence' rule.

<sup>115</sup> For Scotland see the Contract (Scotland) Act 1997 section 1.

- 5.25.6 In addition, separate provision is made in Part 1 of the Act that blacklists the use of terms of this kind in contracts for the supply of services, rather than just indicating that they *may* be unfair. It says that:
- any statement (oral or written) made by the business or someone on its behalf about the business or the service is to be treated as a term of the contract if it is taken into account by consumer when deciding to enter the contract or, later, when making any decision about the service; and
  - any term that purports to exclude liability for such statements is black-listed and automatically unenforceable under Part 1 of the Act (see part 4 of the guidance).
- 5.25.7 The OFT's specimen terms provide examples of other ways in which terms of this kind have been revised to meet the OFT's objections under the UTCCRs – see Annex A, under Group 14(a).

### ***Formality requirements***

Part 1 of Schedule 2 states that the following may be unfair:

- (17) A term which has the object of effect of ... making the trader's commitments subject to compliance with a particular formality.

- 5.26.1 If a contract is to be considered balanced, the rights it confers must be secure and enforceable, not vulnerable to being lost without good reason. Under the general law, contracts normally remain binding on both parties unless a breach by one of them threatens the whole value of it for the other. The loss of contract rights is a severe sanction which should not be imposed on consumers for merely technical breaches.
- 5.26.2 There may be administrative advantages in requiring consumers to comply with certain formalities – for example, procedures involving paperwork. But these do not justify a business opting out of important obligations where the consumer fails to comply with a minor or procedural requirement and commits a trivial breach.
- 5.26.3 A term that imposes severe sanctions for trivial breaches is open to particularly strong objection where these may be committed inadvertently. Unless the need to observe a formality is obvious and important, or is prominently drawn to the attention of consumers, they may overlook or forget it. That risk is particularly significant if it has to be complied with sometime in the future without any reminder.

- 5.26.4 Obviously where compliance with a formality involves disproportionate costs or inconvenience, the potential for unfairness is also increased. An example would be a requirement to use registered post for written notification when notification by ordinary post would be perfectly adequate.
- 5.26.5 A formality requirement has a better chance of being considered fair if the following three conditions are all met:
- (a) it requires a consumer to do no more than is reasonably necessary;
  - (b) non-compliance does not involve loss of important rights for the consumer; and
  - (c) the need to comply with the formality is adequately drawn to the consumer's attention as close as possible to the time when it has to be complied with.
- 5.26.6 Terms of this kind, and amendments that were acceptable to the OFT, are illustrated in Group 14(b) of Annex A.

***Binding consumers where the trader defaults – Schedule 2, Part 1, paragraph 18***

Part 1 of Schedule 2, states that the following may be unfair:

- (18) A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

- 5.27.1 A term binding customers to go on paying when goods, digital content or services are not provided as agreed is clearly open to even stronger objection than the exemption clauses which exclude the business's liability when it fails to perform its obligations (under the heading 2(g) at paragraph 5.10.1), or terms allowing the trader to cancel at will – see the discussion of paragraph 7 of the Grey List above. Those terms exclude the trader's liability to provide a remedy for breach of contract, but do not require the consumer to continue to perform his or her side of the bargain.
- 5.27.2 An example of this type of provision is a clause in a contract for the supply of goods by instalments, which does not allow the consumer the right to cancel if the trader fails to make delivery of an instalment.
- 5.27.3 Similar objections are likely if consumers are tied in to a continuing contract for services despite the trader exercising a power to suspend provision of

some benefits under the contract, unless the circumstances in which suspension can take place are strictly limited and certain other conditions are met (the same as those set out in paragraphs 5.10.2 and 5.10.3).

5.27.4 The fairness of rights to suspend services may be improved where the consumer does not have to continue to pay during periods of suspension. Another possible way to help achieve fairness may be for the contract period to be extended without additional cost to ensure that the consumer receives all the services and benefits contracted for.

5.27.5 Terms of this kind, and amendments that were acceptable to the OFT, are illustrated in Group 15 of Annex A.

### ***Trader's right to assign without consent – Schedule 2, paragraph 19***

Part 1 of Schedule 2, states that the following may be unfair:

- (19) A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.

5.28.1 When rights under a contract are transferred to a new owner, this is known as an 'assignment' (or in Scotland an 'assignation'). If a business changes hands, then rights and obligations<sup>116</sup> under any contracts with consumers are likely to transfer with it. As a result the consumers affected may find themselves dealing with someone else if their contract was a continuing one (like an insurance contract) or, if it was for a single transaction, where any problem arises with the goods, services or digital content that were supplied to them under that transaction. A term is unlikely to be fair if it allows for the 'transfer' of rights and obligations that could result in:

- the consumer having to deal with someone who, for instance, offers a poorer service; or

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<sup>116</sup> In law, strictly speaking, only the rights under the contract can be 'assigned' and not the obligations/burdens under the contract, for instance the provisions of goods or services by the trader to the consumer. In practice, parties often behave as though the burden of the contract can also be assigned. It is the CMA's view that such a course of dealing may be classified in legal terms as a novation (that is the old contract is replaced with a new contract between the consumer and the new trader) or as an assignment of the benefit of the contract coupled with the subcontracting of the obligations to the new business. What is said above is considered to apply whether assignment or novation is involved.

- legal complications, such as a need for the consumer to deal with two traders.

5.28.2 The last three words of the Grey List paragraph quoted above point to one way which may help to achieve fairness – for consumers to be consulted and the ‘transfer’ of rights and obligations affecting them to be permitted only if they consent before it proceeds. Where services, goods or digital content are being provided, and payment is being made, on a continuing basis (as, for example, with membership of a club) a more practicable approach which may assist in achieving fairness is for consumers to have a penalty-free right of exit if they object to the new trader. Alternatively, an ‘assignment clause’ (or ‘assignment’) is less likely to be considered unfair if it operates only in circumstances which ensure that the consumer’s rights under the contract will not be prejudiced in any way.

5.28.3 Note that Schedule 2 mentions only traders’ rights to assign. Consumers also have the right to transfer their rights under contracts, and sometimes will reasonably expect that they can. Terms which might unfairly affect the consumer’s ability to assign are therefore dealt with separately in paragraphs 5.33.1 to 5.33.4.

5.28.4 Group 16 of Annex A illustrates one relevant term.

### ***Restricting the consumer’s remedies – Schedule 2, Part 1, paragraph 20***

Part 1 of Schedule 2, states that following may be unfair:

- (20) A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by –
  - (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
  - (b) unduly restricting the evidence available to the consumer, or
  - (c) imposing on the consumer a burden of proof which, according to applicable law, should lie with another party to the contract.

5.29.1 Terms covered by paragraph 20 of the Grey List have an effect similar to that of exclusion and limitation clauses – see under paragraphs 1 and 2 of the Grey List above. As noted there, any term which could be used – even if that is not the intention – to prevent or hinder customers from seeking

redress when the trader is in default is likely to upset the balance of the contract to the consumer's disadvantage. Such terms may well be blacklisted if they interfere with certain rights.

### *Compulsory arbitration and alternative dispute resolution clauses*

- 5.29.2 The law allows contractual disputes to be resolved through arbitration, rather than going to court, where the parties agree. Fairness requires that agreement to go to arbitration should be genuine, not forced. Under section 91 of the Arbitration Act 1996, a compulsory arbitration clause as defined<sup>117</sup> is automatically unfair if it relates to claims of £5,000 or less. This is an example of a term, like those mentioned above that are blacklisted by the Act itself, that is always unfair under the Act regardless of circumstances. A compulsory arbitration clause forbidden by the 1996 Act is therefore both legally ineffective and open to regulatory action in all cases.
- 5.29.3 If an arbitration clause is to be used with consumers, it must be free from the element of compulsion, and in the view of the CMA this is necessary to meet the requirement of fairness even if it relates to claims higher than the £5,000 threshold sum in the 1996 Act. When entering contracts, ordinary consumers are most unlikely to consider detailed legal issues connected with the possibility of a dispute arising unless they have the benefit of legal advice on this issue. The consequences of the inclusion of such a clause are thus liable to surprise them unfairly if such a dispute does arise.
- 5.29.4 Arbitration is not the only form of alternative dispute resolution (ADR) for which consumer contracts can provide. For instance, a comparable process known as adjudication is also used particularly in the building industry.<sup>118</sup> The CMA considers that a requirement to refer disputes to an ADR process of any kind will be under suspicion of unfairness if its effect is to remove or limit the consumer's right to take legal action before the courts. With a view to ensuring that it complies with the requirements of fairness, an arbitration or other ADR clause can, for example, make clear that consumers have a free choice, when the dispute arises, as to whether to go to ADR or not.

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<sup>117</sup> A compulsory arbitration clause is defined as 'an agreement to submit to arbitration present or future disputes or differences (whether or not contractual)' (section 89(1)).

<sup>118</sup> The Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) gives parties to a construction contract the statutory right to refer a dispute to adjudication. However section 106 excludes a construction contract with a residential occupier, meaning 'a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence' (section 106(2)). When a contract does not fall within the Construction Act 1996, the parties may nevertheless agree to refer disputes under the contract to adjudication.

- 5.29.5 ADR clauses of this kind need to use clear language and in the view of the CMA are more likely to be fair if they set out as fully as reasonably possible the practical implications for the consumer of using ADR. Compliance with the law is also more likely if they offer a consumer an affordable, fair and impartial dispute resolution.
- 5.29.6 The law now requires that ADR provided by a certified ADR body is available for most disputes concerning contractual obligations between a consumer and a business.<sup>119</sup> In order to become certified, the ADR provider must meet certain requirements regarding, for example, impartiality and fairness. But note that this does not alter the position as set out above, a term which purports to require consumers to submit disputes to a certified 'ADR entity' is not binding on the consumer if the agreement was concluded before the dispute arose, and has the effect of depriving the consumer of the right to bring proceedings before the courts.<sup>120</sup>

#### *Exclusive jurisdiction and 'choice of law' clauses*

- 5.29.7 **Exclusive jurisdiction:** Consumers should not normally be prevented from starting legal proceedings in their local courts – for example, by a term requiring resort to the courts of England and Wales despite the fact that the contract is being used in another part of the UK having its own laws and courts. It is not fair for the consumer to be forced to travel long distances and use unfamiliar procedures to defend or bring proceedings.
- 5.29.8 **Choice of Law:** A contract may specify the applicable law that purports to govern the contractual relationships between the trader and the consumer. The Act makes provision to ensure that the consumer may not be deprived of the protection of the unfair terms provisions of Part 2 of the Act, where the 'consumer contract has a close connection with the United Kingdom' but the contract states that the law of a non-EAA state applies. In these circumstances, the unfair provisions of the Act will apply. Further, international conventions lay down rules on this issue, which are part of UK law.<sup>121</sup> Terms which conflict with them are also likely to be unenforceable.

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<sup>119</sup> This is the effect of the Regulations implementing the Alternative Dispute Resolution Directive 2013/11/EU which is implemented within the UK by The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (ADRRs) and The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (ADRARs).

<sup>120</sup> See Regulation 14B of the ADRRs as amended by the ADRARs.

<sup>121</sup> In relation to jurisdiction of the courts, rules such as those in the recast Brussels Regulation, the Brussels I Regulation and the Lugano Conventions make provision as to where proceedings may be brought, and include provisions specifically relating to consumer contracts. In relation to the law governing a contract, rules such as those in the Rome I Regulation set out the appropriate governing law for certain disputes, and include provisions relating to disputes involving consumers.

- 5.29.9 The OFT's specimen terms indicates examples of terms dealing with arbitration and choice of law which the OFT has not considered to be unfair – see Annex A, under Group 17.

## **Part 5A – Other terms considered potentially unfair**

### ***Introduction***

- 5A.1 Some **consumer contract terms** or **consumer notices** fail the test of fairness set out in section 62 without obviously corresponding to any of the types of potential unfairness set out in the Grey List (the Act, Schedule 2, Part 1). The Grey List predominantly reflects the Annex to the Directive. As this implies, the types of term featured are those commonly used over the EU as a whole, not in any one member state. The list is expressly said to be non-exhaustive. The OFT found a range of different types of term being used in the UK which it considered to have a potential for unfairness comparable to that illustrated by items in Schedule 2, but which operated in different ways. The CMA considers that the OFT's categorisation of these terms for the most part remains useful.
- 5A.2 Some of the more commonly occurring kinds of term not obviously illustrated by examples in the Grey List are commented upon below. We continue below to refer to Annex A to the guidance, which includes examples of these kinds of terms encountered by the OFT and of amendments to them which the OFT considered acceptable. In addition, the Annex provides examples of terms which were considered to be in breach of the transparency requirements in the Act, and revisions to them. These too are referenced below. These two groups of example terms are numbered 18 and 19 in the Annex in line with the OFT's mode of categorising potentially unfair terms in its guidance, which arose from the fact that the Grey List under the UTCCRs, unlike the Act, contained 17 terms.
- 5A.3 As explained above (paragraph 5.1.11) what is said in this part of the guidance generally applies to consumer notices as well as terms, and references to terms should generally be taken to include consumer notices.

### ***Allowing the trader to impose unfair financial burdens***

- 5.30.1 If a contract is to be considered balanced, each party must be subject only to obligations which he or she has agreed to accept. Any kind of term which has the object or effect of allowing the trader to impose an unexpected financial burden on the consumer gives rise to concern. Such a term

- operates in a way similar to a price variation clause (see paragraphs 14 and 15 of the Grey List considered above) and, like such a clause, cannot be considered to fall within 'the core exemption' because it does not clearly set an agreed price (see part 3 of the guidance).
- 5.30.2 An explicit right to demand payment of unspecified amounts at the trader's discretion – for example, by way of advance payment or security deposit – is particularly open to challenge. But the same objections may apply if terms are merely unclear about what will be payable and when, if the effect could be to allow the business to make unexpected demands for money at its discretion.
- 5.30.3 These objections are less likely to arise if for instance – as with a price variation clause – such a term is narrowed in effect so that it is specific as to what must be paid and in what circumstances (see paragraph 5.21.5). In that case, it may be sufficiently transparent that it can be said to put consumers into a position where they can make an informed choice whether or not to enter the contract (see part 2 of the guidance). Note, however, that greater precision and clarity in such a term may not suffice to make it fair if, for instance, its real purpose is penal in nature and the charge imposed is disproportionately high (see paragraph 5.14.9).
- 5.30.4 Where a business has to meet specific costs in performing the contract, but it is not certain that these will necessarily arise, fairness is more likely to be achieved where the contract makes clear the circumstances in which they may be passed on. This is likely to be an option where the incidence and level of such costs is likely to be within the knowledge of the consumer, or is verifiable in cases of doubt. The term should not allow for such costs to be invented or inflated. It is neither fair nor economically efficient for traders to offer products and services at unrealistically low headline prices and then seek to compensate themselves by making charges that consumers have no reason to expect to pay or at levels beyond their reasonable expectations.
- 5.30.5 Where it is not possible to state a precise amount for such costs, compliance is more likely to be achieved if it is clear how the charge to be imposed will be set. It may in some circumstances be enough merely to say that it will be reasonable, but only where fair-minded persons would have little doubt as to what would be a reasonable sum. This is likely to be the case where the costs involved are identifiable and verifiable.
- 5.30.6 These types of clauses are also more likely to be regarded as fair if consumers are genuinely free, for instance under a cancellation clause, to escape its effects by ending the contract before it is applied to them without

suffering any financial sanction (such as loss of prepayments) or otherwise being left worse off (see paragraph 5.23.6). However, this will not be the case where it is impracticable or would be disadvantageous for the consumer to bring an end to the contract. Annex A illustrates relevant terms under heading Group 18(a).

### ***Transferring inappropriate risks to consumers***

5.31.1 A contract may be considered unbalanced if it contains a term imposing on the consumer a risk that the trader is better able to bear. A risk lies more appropriately with the trader if, for instance:

- it is within their control;
- it is a risk the consumer cannot be expected to know about; or
- the trader can insure against it more cheaply than the consumer.

5.31.2 Particular suspicion falls on any term which makes the consumer bear a risk that the trader could remove or at least reduce by taking reasonable care, for example, where:

- the contract is for services and involves use of equipment by the business itself, the risk of damage to that equipment;
- the contract is for home improvement work, the risk of encountering structural problems that the trader could have identified in advance of undertaking the work; or
- the contract is for a trader to provide online gaming over the internet, the risk of downtime caused by a server under the control of the trader.

Such terms effectively allow the business to be negligent with impunity. As such, they are open to the objections to exclusion clauses which are set out by reference to paragraphs 1 and 2 of the Grey List.

5.31.3 Objections are likely even where a risk is outside the trader's control (for example, weather damage) if the consumer cannot reasonably be expected to know about and deal with it. The business should not make the consumer its insurer. The use of such terms is sometimes defended on the basis that they enable prices to be kept down. But unless suitable insurance is easily available to consumers at reasonable cost, they are still liable to be worse off for the use of such a term.

- 5.31.4 Generally such clauses are more likely to be fair where consumers are merely made responsible for losses caused by their own fault (provided they are not subjected to excessive sanctions). Alternatively, fairness is more likely to be achieved if the term is narrowed in scope, so as to relate only to risks against which consumers are likely to be already insured – for example, the risk of loss or damage to goods while they are in the consumer’s home – or can easily insure, such as the risk of illness while abroad.
- 5.31.5 If a risk is transferred to consumers on the basis that they can themselves reasonably control it or that insurance is available at reasonable cost, they need to be aware of what steps they are supposed to take. To be useful, provision along such lines must be adequately drawn to their attention. Warnings separate from the main body of the contract may be needed. Effective highlighting of such clauses is essential if they require – rather than merely advise – the consumer to do anything.
- 5.31.6 **Advance payments.** One kind of risk that should not be unfairly imposed on the consumer is that of the trader’s own insolvency. This may occur where the purchase price of goods, services or digital content, or a large part of it, is demanded substantially earlier than is needed to cover the trader’s costs. Such a prepayment assists the cash flow of the business, but is liable to be lost to the consumer if the business becomes insolvent before completion of the contract (see paragraphs 5.8.8 to 5.8.9).
- 5.31.7 **Indemnities against risk.** Terms under which the trader must be ‘indemnified’ for costs which could arise through no fault of the consumer are open to comparable objections, particularly where the business could itself be at fault. The word ‘indemnify’ itself is legal jargon which, if understood at all by a consumer, is liable to be taken as a threat to pass on legal and other costs incurred without regard to reasonableness. Clearer wording to replace legal jargon of this kind is illustrated in Group 19(b) of Annex A.
- 5.31.8 Annex A illustrates relevant terms under heading Group 18(b).

### ***Unfair enforcement powers***

- 5.32.1 A contract cannot be considered fair and balanced if it gives one party the power to impose disproportionately severe sanctions on the other, or if it misleadingly threatens sanctions over and above those that can really be imposed. The same principles apply as in relation to disproportionate financial sanctions (see paragraph 6 of the Grey List at paragraph 5.14.1).

- 5.32.2 **Rights of entry.** An example is a term which purports to give the right of entry without consent to private property, whether to repossess goods for which consumers have not paid on time, to evict the consumer, or for any other purpose. Such a term seeks to permit direct resort to a sanction that can normally and properly only be authorised by court order.
- 5.32.3 There is even less justification for terms which purport to exclude liability for causing property damage in the course of exercising such rights. Such a term would appear to be designed to permit wilful or even criminal damage and does not, in the CMA's view, have any place in a consumer contract.
- 5.32.4 **Sale of the consumer's goods (as being subject to 'lien').** Similar principles apply in relation to other kinds of term, which purport to allow traders to take direct action to secure redress that the court would not necessarily allow. An example would be a term permitting the sale of goods belonging to the consumer which the business has in its possession.
- 5.32.5 The law<sup>122</sup> makes detailed provision as to how such goods should normally be treated. A contract need not reflect these rules in detail, provided it does not override or contradict them. Terms are unlikely to be considered fair if they indicate that goods may be sold immediately, or without adequate notice of the date and place of the sale, and particularly if they exclude the duties to obtain the best price that can reasonably be got and to refund any surplus obtained.
- 5.32.6 The term 'lien' itself is legal jargon, which should be avoided in consumer contracts. Clearer alternative wording is possible, see the OFT examples at Group 19(b) in Annex A. Terms relevant to enforcement clauses generally may be found in Group 18(c) of Annex A.

### ***Excluding the consumer's right to assign***

- 5.33.1 Contract law ordinarily allows purchasers to transfer (or 'assign') to someone else what they bought. Terms which seek to restrict this right are considered to be open to scrutiny as regards fairness.
- 5.33.2 One form of restriction on the consumer's right to assign is to make guarantees non-transferable. Guarantees, while they remain current, can add substantial value to the main subject matter of the contract. If consumers cannot sell something still under guarantee with the benefit of

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<sup>122</sup> In particular, the Torts (Interference with Goods) Act 1977, sections 12 and 13. The legislation does not apply to Scotland, where the position is governed by the common law.

- that guarantee, they are effectively deprived of part of what they may reasonably feel they have paid for.
- 5.33.3 Traders have a legitimate interest in ensuring that they are not subject to baseless claims under guarantee. There are unlikely to be objections to terms which require the purchaser (or 'assignee') of goods, if he or she wishes to rely on the guarantee, to establish that it was properly assigned, as long as the procedural requirements involved are reasonable.
- 5.33.4 The resale (assignment) of tickets bought online is the subject of separate provisions of the Act. The re-selling of tickets remains permitted, but where it takes place online, certain information must be provided.<sup>123</sup> The Act expressly requires that a term which allows an event organiser, where a ticket is being resold or offered for resale, to cancel it or blacklist the seller must meet the requirements of Part 2 of the Act. In other words, it makes such terms subject to the usual tests of fairness and transparency. As indicated above, it is the CMA's view that a term which undermines a consumer's right to sell what they own is at risk of being regarded as unfair.
- 5.33.5 Illustrative examples of relevant terms may be found in Group 18(d) of Annex A.

### **Consumer declarations<sup>124</sup>**

- 5.34.1 If a declaration is written into a consumer contract, particularly a standard form contract used with all customers, it is liable to be made whether or not consumers fully understand its significance and know the facts stated to be true. They are likely to regard it as a mere formality, which must be completed for the contract to go ahead. Yet it could put them at a disadvantage.
- 5.34.2 For example, consumers are sometimes sold goods on written terms which include a declaration that they have inspected their purchase and found it to be free from faults. If they then subsequently discover defects, they are at risk of being told, or of believing without being told, that they have 'signed away their right' to make any claim. Comparable problems can be

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<sup>123</sup> Chapter 5 of the Act sets out the information which must be provided when re-selling tickets online. The provisions described in this paragraph act as safeguards designed to prevent event organisers from using this information unfairly to cancel tickets or blacklist sellers.

<sup>124</sup> Where declarations are not considered to be incorporated for legal purposes into the contract, they are capable nonetheless of falling within the legislation as 'notices'. In any case, under the general law, declarations of this kind are liable to be treated as having no legal force if the recipient did not believe the statement to be true and did not act upon it (see *Lowe v Lombank* [1960] 1 All ER 611. The misleading use of such wording is also potentially open to challenge as an unfair commercial practice under the CPRs (see above part 1, 'other legislation').

caused by any enforced declaration indicating that the consumer has been dealt with fairly and properly. Declarations as to facts that could be established with certainty only by an expert – such as the condition of a property – are particularly open to objection.

- 5.34.3 Use of such declarations may be intended only to stop consumers making baseless allegations, but it could be used to bar legitimate as well as unfounded claims. As such their use gives rise to broadly the same objections as exclusion clauses, see paragraphs 1 and 2 of the Grey List. Misleading or aggressive reliance on such terms with a view to depriving consumers their legal rights is likely to amount to an unfair commercial practice which could attract enforcement action under the CPRs (see above part 1 ‘other legislation’).
- 5.34.4 Declarations are more likely to be acceptable if they are about matters wholly and necessarily within the consumer’s knowledge (for example, their age), and a free choice is given to the consumer as to what (if anything) to say. But whether any declaration is in fact fair will depend on how it is used. If consumers are routinely told or given to understand that they must say one thing for the contract to go ahead, the declaration is just as likely to be considered unfair and legally ineffective as if the written words gave no apparent choice. The legislation applies to unwritten as much as to written terms.

#### ***‘Have read and understood’ declarations***

- 5.34.5 Declarations that the consumer has read and/or understood the agreement give rise to special concerns. The legislation implements an EU Directive saying that terms must be plain and intelligible and that consumers must have a proper opportunity to read all of them (see part 2 of the guidance under the heading ‘the Transparency test’ at paragraphs 2.42 and following). Including a declaration of this kind in a contract effectively requires consumers to say that these conditions have been met, whether they have or not. This tends to defeat the purpose of the Directive, and as such is open to serious objection.
- 5.34.6 In practice consumers often do not thoroughly read standard written contracts. There is no justification for requiring them to say they have done so whether they have or not. The purpose of ‘a read and understood’ declarations is clearly to bind consumers to wording regardless of whether they have any real awareness of it. Such statements are thus open to the same objections as provisions binding consumers to terms they have not seen at all – see paragraph 10 of the Grey List (see paragraphs 5.20.1 to 5.20.4).

- 5.34.7 What such declarations do not do, which needs to be done, is effectively to draw attention to any important terms that could otherwise come as a surprise to the consumer. Unless such terms are properly flagged up, they are unlikely to be binding on the consumer. An appropriate warning that the consumer should read and understand terms before signing them can contribute to the transparency of the terms in question, in the interests of both parties. This is subject to the proviso that the terms are clear, allowing the consumer to understand the practical significance of what is said in them, and that reading them is likely to be practically feasible for a consumer in the circumstances.
- 5.34.8 See Annex A, Group 18(e), for illustrative examples of wording relevant to declarations in general.

### ***Exclusions and reservations of special rights***

- 5.35.1 Any contract wording which could have the effect of depriving consumers of protection normally afforded to them under the law is liable to be considered unfair as well as being potentially blacklisted under Part 1 of the Act (see part 4 of the guidance) and as such legally ineffective. The Grey List indicates specifically that terms excluding rights to redress for breach of contract may be unfair. But consumers also enjoy protection under legislation that operates separately and independently of contract law.
- 5.35.2 An example is the law relating to data protection. The Data Protection Act 1998 protects individuals from inappropriate use of personal information about them (their personal data) by others. A term or statement which could be understood as permitting a trader to deal more freely with a consumer's personal data (particularly sensitive personal data) than the law allows – for example, to pass it on more widely – is likely to be open to challenge as unfair.
- 5.35.3 Provisions of this kind may be acceptable if they are modified so as not to diminish the protection offered by the law – if, for instance, a genuine choice is allowed as to whether or not to give consent to data being collected. But note that compliance with unfair contract terms law is much less likely where consumers are merely given a purported chance to 'opt out' of giving their consent in small print that may be missed or misunderstood. In any case, the chances of fairness will be increased if the significance of the choice is in some meaningful way drawn to the consumer's attention.
- 5.35.4 In the context of mail-order or online transactions, regard needs to be had to the law relating to 'unsolicited' products and services. Generally

- speaking, consumers have the right to treat what they have not asked to receive as a gift, and cannot be made to pay for it.<sup>125</sup> There is a risk of unfairness if contractual wording about possible future offers that the consumer can expect to receive could operate in such a way as to undermine this right.
- 5.35.5 There is unlikely to be objection to consumers being given a clear option, accompanied by appropriate explanation, to request more items to be sent on approval. But unclear wording might be used which looks to the consumer as if it is merely designed to indicate his or her willingness to consider further purchases, but is capable of being treated by the trader as a definite request for goods. Any term which could result in consumers being sent goods they were not expecting, and paying for them in breach (or in ignorance) of their right not to do so, is likely to be considered unfair.
- 5.35.6 Another example of additional statutory consumer protection is legislation relating to 'off-premises' contracts such as 'doorstep selling'.<sup>126</sup> This legislation gives the consumer a right to cancel a purchase within a 'cooling-off' period (time for reconsideration or for examination of goods supplied) where the sale was made away from the trader's business premises, for example on the consumer's doorstep or in his or her home. The protection given should not be undermined by the use of any form of wording.
- 5.35.7 An example is a statement in contractual documentation to the effect that the contract has been made at the trader's place of business. There is of course no objection to use of such a declaration where it is true, but it needs to be true in all cases if its use as a standard term or notice is to be fair. If it is not necessarily true in every case, it is likely to be unfair, since it may, in practice, have the effect of unjustifiably depriving some consumers of their rights.
- 5.35.8 Another form of wording that can undermine the protection conferred by this legislation is a term which says or seeks to give the impression that the consumer has to do something, for example return a form by post, in order to enjoy the cancellation right. Such wording is also open to objection.
- 5.35.9 **Distance sales.** Consumers entering contracts 'at a distance', for example by post, over the telephone or on the internet, where the trader's distance selling is being operated in an organised way, enjoy legal protection

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<sup>125</sup> Regulation 27M and paragraph 29 of Schedule 1 to the CPRs – see above part 1 'other legislation'.

<sup>126</sup> See the CCRs, see above part 1 'other legislation'.

equivalent to that for 'off-premises' contracts as mentioned above.<sup>127</sup> They have, in particular, a right to receive certain information before the contract is concluded and normally have a right to cancel during a 'cooling-off' period.

- 5.35.10 Terms in distance contracts which seek to exclude or restrict these rights, or which could have the practical effect of depriving consumers of the protection they are intended to confer, are likely to be unfair and mislead consumers about their rights and as such potentially give rise to breaches of the CPRs (see above part 1 'other legislation').
- 5.35.11 **Guarantees.** A trader who provides a consumer guarantee at no extra charge must ensure that it sets out the contents of the guarantee in plain intelligible language and gives certain information that a consumer needs to know before making a claim under it. Under section 30 of the Act, this information must include the duration of the guarantee, and the name and address of the person providing it. Consumer guarantees also have to contain a statement that the consumer has statutory rights in relation to the goods and that those rights are not affected by the guarantee – note, however, that simply including the words 'your statutory rights are unaffected' cannot be relied upon to achieve fairness (see above, paragraphs 5.11.4 to 5.11.5).
- 5.35.12 The rights that consumers enjoy in relation to guarantees are enforceable separately, using powers similar to those which deal with unfair terms. However, in addition, any term which seeks to exclude or restrict these rights, or which could have the practical effect of depriving consumers of the protection they are intended to confer, is likely to be unfair.

### ***Trader's discretion in relation to obligations***

- 5.36.1 This guidance has already dealt (by reference to paragraph 16 of the Grey List) with the potential unfairness of terms which allow the trader too wide a discretion in relation to two aspects of the interpretation and application of the contract. There are similar objections to other kinds of term giving the business the ability to free itself from compliance with what ought to be its obligations, or to penalise consumers for what it considers to be their breaches.

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<sup>127</sup> See the CCRs as above.

*Rights to determine how the trader's own obligations are performed*

- 5.36.2 The ordinary law allows traders a reasonable degree of flexibility as to how and when they carry out obligations, where they have made no specific promises on the subject. A term giving complete freedom to make arrangements, whether for the carrying out of services or delivery of goods, allows the customer's needs to be disregarded, and has practically the same effect as an exclusion of liability for causing loss and inconvenience. Such provision is likely to be fair only if it is drafted so as not to allow the trader to act unreasonably.
- 5.36.3 An example is a term allowing the trader to deliver goods in such consignments as he or she thinks fit. Consumers may need to be able to make arrangements depending on when goods are due to arrive, and to be brought into use, which can be hindered by lack of clarity as to the schedule of delivery, or by changes made without consultation, especially at short notice. This is not to say that delivery terms either can or should reflect only the convenience of the consumer, but rather that they should strike a reasonable balance. Often, such issues as the timing of deliveries are best left to individual agreement rather than being made the subject of any kind of standard contractual provision.

*Rights to determine whether the consumer is in breach*

- 5.36.4 Suspicion of unfairness falls on any term giving to the business, or its agent, excessive power to decide whether the consumer ought to be subject to a financial sanction, obliged to make reparation of any kind, or deprived of any benefits under the contract. An example of this kind of unfairness is a term in a contract with a club giving the management undue freedom to suspend or expel a member for misconduct, especially if the criteria of misconduct are left unstated or are vaguely defined.
- 5.36.5 Terms of this kind in effect allow traders to reserve the right to decide what the term in the contract means, putting them in a position where they can alter the way it works to suit themselves. They therefore strongly resemble 'final decision' terms (see paragraph 16 of the Grey List). As with such terms, fairness is more likely where there is a clear procedure under which the consumer, if unhappy with the decision as to whether he or she is in breach, can refer the matter to an independent expert or arbitrator. Note, however, that compulsory arbitration clauses are unfair – see paragraphs 5.29.2 to 5.29.4.
- 5.36.6 For relevant illustrative examples of terms, see Annex A, Group 18(g).

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## 6. Enforcement

- 6.1 The CMA has a lead role in relation to unfair terms law, comparable to that formerly taken by the OFT. Reforms of the UK consumer landscape in 2013/14 reflected the government's aim of giving TSS a central role in consumer enforcement whilst ensuring that the CMA takes forward its predecessor's unfair terms leadership work, in partnership with TSS, and targets its action where it can secure wide-ranging changes to markets.
- 6.2 The CMA acts in cooperation with UK and international partners, and expects to be selective in taking enforcement cases, focusing particularly on those which have a market-wide impact or precedent-setting value. A number of considerations will be taken into account in deciding whether the CMA or one of its partners is best placed to act. These will include the facts of the case and the characteristics of the market in question, as well as the CMA's policies and commitments – particularly its published prioritisation principles and its Annual Plan. The CMA will then discuss the issue with relevant partners and agree with them who is likely to be best placed to act.
- 6.3 The CMA shares most of its consumer powers not only with TSS but with a number of other agencies, many of which have enforcement responsibilities for particular economic sectors such as Ofcom and the Financial Conduct Authority (FCA, see the list of regulators below). The CMA works closely with such regulators, as it is important to avoid duplication of effort and to maximise the impact of interventions for consumers. To this end, for instance, the CMA has agreed Memoranda of Understanding with a number of sector regulators to ensure a joined-up approach.<sup>128</sup>

### Enforcement powers

- 6.4 As indicated above, the CMA, TSS and sector regulators all have powers to enforce the unfair terms provisions in the Act. The following paragraphs provide an overview of these formal enforcement powers.
- 6.5 It is important to note that these enforcement powers are discretionary and do not mean enforcement action must or can properly be taken against each and every unfair or blacklisted **contract term** or **consumer notice**.<sup>129</sup> Compliance with unfair terms law will be promoted by the most appropriate means, in line with relevant enforcement policies, priorities and available resources. In addition to formal action, there are a number of informal routes which the

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<sup>128</sup> For further information on how the CMA works in partnership with other agencies see the [CMA's webpages](#).

<sup>129</sup> See the 'key concepts' section of part 1 of the guidance for an explanation of the highlighted words.

CMA may use to promote and ensure compliance with the unfair terms provisions of the Act, including, for example, issuing targeted guidance aimed at specific traders or sectors.

- 6.6 In addition to allowing intervention by public enforcers, the Act enables individual consumers to benefit directly from its protections. It provides that they are not bound by unfair terms or notices, and they can rely on this point in any dispute with a business regarding wording that they consider to be unfair (see below on private actions). A consumer should, however, seek legal advice if it becomes clear that such a dispute could lead to court proceedings.

### ***Enforcement powers under the Act***

- 6.7 The CMA and other relevant bodies – referred to as **regulators** in the Act (see below for a list) – may take enforcement action under the Act where a term or notice is considered by the **regulator** to be:

- unfair;
- in breach of the transparency provisions in the Act; and/or
- ‘blacklisted’ by virtue of the provisions in the Act.<sup>130</sup>

A term may be challenged if it appears in a consumer contract, is proposed for use in such a contract or is recommended by a third party for use in a consumer contract.

- 6.8 **Regulators** are not restricted to taking action in cases in which they have received complaints. However, under Schedule 3 to the Act, the CMA and other regulators have a discretion to give detailed consideration to any complaint received about terms and consumer notices used by traders in their dealings with consumers.<sup>131</sup>
- 6.9 Under Schedule 3 to the Act, enforcement action may be taken to stop the use of such terms or notices, if necessary by seeking a court order – an injunction or, in Scotland, an interdict. An order can apply to the use of terms in existing as well as future agreements, and may include provision about any term or notice of a similar kind or with a similar effect. It is not a defence to show that because of a rule of law that the term could not be enforced. A **regulator** can also seek a temporary order to prevent further use of the term or notice until the case can be fully argued in court. Action can be taken in any

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<sup>130</sup> See part 4 of the guidance on blacklisting, and part 2 on fairness and transparency.

<sup>131</sup> Note that Schedule 3 covers consumer notices, terms in consumer contracts, terms proposed for use in consumer contracts as well as terms which a third party recommends for use in consumer contracts.

county court or the High Court or, in Scotland, in any sheriff court or the Court of Session.

### ***Part 8 of the Enterprise Act 2002***

- 6.10 In addition, Part 8 of the Enterprise Act 2002 (the Enterprise Act) gives the CMA and certain other bodies separate powers against traders who breach consumer legislation generally including the Act (see the list below). It enables them to seek enforcement orders against traders who breach UK laws that protect consumers, and particularly those giving effect to specific European Directives, where there is a threat of harm to the collective interests of consumers. The Directive is a specified Directive for these purposes.
- 6.11 The CMA and all other **regulators** under the Act are able to take enforcement action under Part 8 of the Enterprise Act for all relevant infringements that involve breach of the Act as of other consumer legislation. Therefore, the Enterprise Act provides an alternative or further enforcement mechanism to that provided in Schedule 3 to the Act itself, and one that is of particular value in cases involving issues arising under several different pieces of consumer law.<sup>132</sup>

### ***Undertakings in lieu of court proceedings***

- 6.12 The Act includes express provision recognising that the CMA and other **regulators** can consider appropriate undertakings from businesses<sup>133</sup> about the use of terms or notices with consumers. Similar provisions are found in the Enterprise Act. If a business gives a satisfactory undertaking to stop using a term or notice, or to revise it to meet the concerns raised, court action will be unnecessary provided, of course, that the undertaking is honoured.

### **Investigatory powers**

- 6.13 Under Schedule 5 to the Act the CMA, as well as other **regulators**, can require traders to provide information necessary to identify whether, for instance, unfair terms and notices are in use or whether a person is complying with an undertaking or injunction. Enterprise Act enforcers also have additional investigatory powers.
- 6.14 Although the CMA, and all the other enforcement bodies referred to in the list below, can seek to protect consumers in general (as described above) neither

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<sup>132</sup> See, for example, OFT (1 March 2008), [Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act, OFT512](#).

<sup>133</sup> Paragraph 6 of Schedule 3 to the Act.

the Act nor the Enterprise Act give them a power to take up consumers' individual cases for them or provide advice on private disputes. However, an undertaking or enforcement order under the Enterprise Act may, in certain circumstances, include provisions where consumers who have suffered loss as a result of breaches of consumer law, including the use of unfair terms, could be offered redress. Individual redress (including provision of monetary compensation where appropriate) is one of the 'enhanced consumer measures' provided for under Schedule 7 to the Act which can be added to an enforcement order or undertaking. Other such measures are also available for the purposes of improving consumer choice or business compliance.<sup>134</sup>

## Publications

- 6.15 The CMA has the function of arranging for the publication of details of any undertakings and injunctions that it or another **regulator** has obtained under the Act (including details of any applications made to the court).

## Duty to give reasons

- 6.16 If a **regulator** exercises its power to give full consideration to a relevant complaint about a term or notice (covered by Schedule 3 – see above), those who have made the complaint are entitled to be given reasons by the regulator to which the complaint was made for any decision not to seek an order. When and how the reasons are given will depend on the circumstances of the case.

## Coordination of enforcement action

- 6.17 Other **regulators** or enforcement bodies taking action against blacklisted or unfair terms or notices, under either Schedule 3 to the Act or the Enterprise Act, are required to notify the CMA of their intention to apply for a court order, of the outcome of any court case they bring, and of the details of any undertaking they accept in lieu of court proceedings.

## Private action under the Act

- 6.18 In addition to public enforcement action, as mentioned above, individual consumers have certain legal rights under the Act. They can take action on

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<sup>134</sup> BIS, *Draft guidance for businesses on the Consumer Rights Act [2015]*.

the basis of these rights independently of any action by the CMA or other 'regulators' as defined under the Act.

- 6.19 If a trader refuses to accept that a term or notice is unfair or blacklisted, consumers may therefore choose, on the basis of their rights under the Act, either to resist legal proceedings brought by the trader against them, or to instigate proceedings themselves. Before doing so, however, they should seek legal advice. If the court agrees with the consumer, the trader will not be allowed to rely on that term or notice against the consumer, but if the court agrees with the trader, the consumer may face a liability in costs.
- 6.20 Where any proceedings are brought which relate to a term in a consumer contract, the court is, in any case, under a duty consider whether the term is fair. This duty applies even if none of the parties raises the issue, provided the court has enough information to make an assessment of fairness.<sup>135</sup>

### **Other relevant law**

- 6.21 In some cases, other relevant legislation might be used in conjunction with the Act to protect consumers. The following paragraphs give details of further areas of law that may be relevant to cases involving issues of contractual fairness as well as links to further information.

### ***The Consumer Protection from Unfair Trading Regulations 2008 – CPRs***

- 6.22 As mentioned in part 1 above, the CPRs transpose into UK law the requirements of the Unfair Commercial Practices Directive 2005.<sup>136</sup> They complement the law relating to unfair contract terms as briefly indicated, providing a range of protections for consumers from unfair commercial practices which distort their decision-making.
- 6.23 Unlike Part 2 of the Act, which focuses on the contract, the scope of the CPRs embraces all stages of a typical consumer transaction, but there is nonetheless some overlap between them. Depending on the circumstances, the use of particular types of terms or notices could give rise to enforcement action under either set of provisions. For instance, the CPRs prohibit practices which mislead, either by action or omission, where the consumer's decision as to whether, how and on what terms to purchase a product is likely to be affected.

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<sup>135</sup> See section 71 of the Act, which reflects European case law.

<sup>136</sup> Note that the CPRs were amended by The Consumer Protection (Amendment) Regulations 2014, which give consumers rights to seek redress against traders in the case of misleading actions and aggressive practices.

6.24 The CPRs' misleading practices provisions are particularly relevant to the requirement that written terms or notice are transparent. There may also be overlaps between the use of unfair terms and the other provisions in the CPRs. For instance, the CPRs prohibit commercial practices which fail to meet a standard defined particularly by reference to honest market practice, where there is likely to be an appreciable impact on consumers' ability to make an informed decision. Using, recommending or enforcing a contract term that is unfair under the Act, and therefore unenforceable, is inherently likely to be considered an unfair practice under the CPRs, and subject to enforcement action, having regard to this standard.<sup>137</sup>

### ***The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 – CCRs***

6.25 As mentioned in part 1 above, the CCRs implement the Consumer Rights Directive of 2011 and replace earlier Directive-based legislation on distance and doorstep selling. However, in contrast to that legislation, certain provisions of the CCRs apply to some transactions concluded on business premises.

6.26 Among other things, the CCRs require traders to provide certain Pre-Contract Information to consumers, and to do so 'in a clear and comprehensible manner'. This information includes, in particular, details of:

- the main characteristics of the goods, services or digital content;
- arrangements for carrying out the contract (for example performing the service or delivering the goods);
- the total price; and
- in the case of digital content, its functionality and compatibility.

6.27 This statutory Pre-Contract Information is to be treated as legally binding on the business in the same way as what is said in the contract itself. The goods, services or digital content must be provided as stated in the Pre-Contract Information, and any change will not be effective unless expressly agreed between the consumer and the trader. Businesses cannot contract out of this obligation and any term purporting to do so is blacklisted in the Act (see the table in part 4 of the guidance).

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<sup>137</sup> See, for instance, *The Office of Fair Trading v Ashbourne Management Services Ltd and others*, as above, at paragraph 227.

- 6.28 The provisions of the CCRs should particularly be borne in mind where clauses could be used to allow changes to be made to any details as to (for instance) the product or its price set out in the Pre-Contract Information. The CMA considers that for such clauses to be legally effective when used with consumers, the Pre-Contract Information must itself reflect the fact that the potential changes envisaged may be made. For example, this applies in the case of a contract which runs for a period of time, where the trader wishes to be able to increase the amount payable by the consumer during the period of the contract. Where the trader does not make appropriate provision in the Pre-Contract Information itself for a variation – whether to the price or to any other issue covered in it – that variation is liable to be ineffective unless the consumer expressly agrees to it, independently of any questions of fairness that may arise under the Act.
- 6.29 However, a variation provision in the Pre-Contract Information is to be treated, under the CCRs, as a term of the contract with the consumer in the same way as other component elements of that information. As such it will (in the CMA's view) be subject, along with the contract terms proper, to the requirements of fairness under the Act, including transparency. The CMA considers that meeting these requirements particularly requires enabling the consumer to foresee the incidence, nature and extent of any changes, as explained below (see variation clauses in part 5 of the guidance, paragraphs 5.21.1 onwards).
- 6.30 Both the CCRs and the Act are designed to protect consumers and therefore tend to be similar in their implications for traders. However, it must be emphasised that what is said in this document is designed to assist businesses in achieving fairness in their contract terms rather than in complying with the requirement to provide Pre-Contract Information. Compliance with one set of provisions may well assist with meeting the requirements of the other, but it cannot guarantee doing so.

### ***Consumer Credit Act 1974, as amended***

- 6.31 Generally, the Consumer Credit Act 1974 (CCA) regulates the way in which consumer credit businesses carry on business. For example, there are rules on advertising, pre-contract disclosure, credit agreements and post-contractual information. In addition, the CCA confers certain rights on consumers, including in relation to withdrawal from a credit agreement and early settlement. Under the CCA, the courts have a wide discretion to determine whether the relationship between the borrower and a lender arising out of a credit agreement (or the agreement taken with any related

agreement) is unfair to the borrower because of, among other things, any of the terms of the credit agreement or any related agreement.<sup>138</sup>

- 6.32 The FCA is responsible for regulating all aspects of consumer credit business. It has a wide range of powers to enable it to do so, including functions under the CCA, powers to enforce the unfair contract terms provisions of the Act, and enforcement powers under the Enterprise Act.

### ***The Provision of Services Regulations 2009***

- 6.33 The Provision of Services Regulations 2009 (PSRs) contain provisions relating to the supply of information, which traders need to comply with if they supply services.<sup>139</sup> Under the PSRs, businesses should provide certain information to consumers in a clear and unambiguous way and in good time before the contract is concluded or before the service is provided if there is no written contract. This includes information about the identity of the business, the nature of the service, general terms and conditions and the price. The PSRs also prohibit certain service providers from discriminating against consumers on the basis of their place of residence.
- 6.34 The requirements of the PSRs are enforceable alongside the unfair terms provisions of the Act under the Enterprise Act.

### ***The Electronic Commerce (EC Directive) Regulations 2002***

- 6.35 Nearly all commercial websites will be subject to the Electronic Commerce (EC Directive) Regulations 2002 (ECRs). The requirements of the ECRs apply to all traders who provide online services with an economic value, including services provided free to the consumer at the point of use, such as search engines or online auctions. In particular, businesses which market or sell goods or services or digital content to consumers and businesses via the internet, email, text messaging and interactive television are subject to information requirements under which they must make available, among other things, pre-contract information.<sup>140</sup>
- 6.36 In addition to the above, there are other provisions which may be relevant to cases involving issues of contractual fairness including, for instance, The

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<sup>138</sup> See sections 140A–140C of the Consumer Credit Act 1974. For further information on the CCA 1974 see the [FCA website: Consumer credit](#).

<sup>139</sup> The PSRs apply to all businesses operating in a service sector but there are some important exclusion including financial services. For further information on the PSRs see [The Provision of Services Regulations 2009](#).

<sup>140</sup> For further information on the ECRs see [The Electronic Commerce \(EC Directive\) Regulations 2002](#).

Consumer Rights (Payment Surcharges) Regulations 2012,<sup>141</sup> The Financial Services (Distance Marketing) Regulations 2004,<sup>142</sup> The Package Travel, Package Holidays and Package Tours Regulations 1992<sup>143</sup> and The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.<sup>144</sup>

## List of regulators

6.37 The following bodies are listed in Schedule 3 to the Act as having the power to enforce the law on unfair contract terms and notices alongside the CMA. They also have the power to take action against unfair terms under Part 8 of the Enterprise Act.<sup>145</sup>

- The Department of Enterprise, Trade and Investment in Northern Ireland: [www.detini.gov.uk/](http://www.detini.gov.uk/)
- A local weights and measures authority in Great Britain: [www.gov.uk/find-local-trading-standards-office](http://www.gov.uk/find-local-trading-standards-office)
- The Financial Conduct Authority: [www.fca.org.uk/](http://www.fca.org.uk/)
- The Office of Communications: [www.ofcom.org.uk/](http://www.ofcom.org.uk/)
- The Information Commissioner: <https://ico.org.uk/>
- The Gas and Electricity Markets Authority: [www.ofgem.gov.uk/](http://www.ofgem.gov.uk/)
- The Water Services Regulation Authority: [www.ofwat.gov.uk/](http://www.ofwat.gov.uk/)
- The Office of Rail Regulation (since renamed the Office of Rail and Road): <http://orr.gov.uk/>
- The Northern Ireland Authority for Utility Regulation: [www.uregni.gov.uk/](http://www.uregni.gov.uk/)
- The Consumers' Association (Which?): [www.which.co.uk/](http://www.which.co.uk/)

6.38 The following bodies have the power to enforce the Enterprise Act but are not regulators under the Act (that is, they can only enforce the Act by means of the Enterprise Act).

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<sup>141</sup> For further information see [The Consumer Rights \(Payment Surcharges\) Regulations 2012](#).

<sup>142</sup> For further information see [The Financial Services \(Distance Marketing\) Regulations 2004](#).

<sup>143</sup> For further information see [The Package Travel, Package Holidays and Package Tours Regulations 1992](#).

<sup>144</sup> For further information see [The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010](#).

<sup>145</sup> [The Enterprise Act 2002, Part 8](#).

- The Civil Aviation Authority: [www.caa.co.uk/](http://www.caa.co.uk/)
- PhonepayPlus: [www.phonepayplus.org.uk/](http://www.phonepayplus.org.uk/)
- The Secretary of State for Health:  
[www.gov.uk/government/organisations/department-of-health](http://www.gov.uk/government/organisations/department-of-health)
- Department of Health, Social Services and Public Safety in Northern Ireland