

Unfair contract terms explained

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Introduction

1. Certain words are selectively presented in **bold**. They are defined in the glossary at the end of this guide.
2. The Consumer Rights Act 2015 (the Act) has important implications for **businesses** entering contracts with **consumers**. It applies to both contract **terms** and consumer **notices** (definitions are provided in the glossary). Broadly, Part 2 of the Act protects the consumer against contractual wording that could be used to give the business an unfair advantage. It requires that such wording should be:
 - fair – not weighting the contract unfairly against the consumer, or hidden away; and
 - transparent (if written) – enabling the consumer to make informed choices, for instance using clear, jargon-free language that consumers can understand.
3. If any of your **terms** or **notices** are unfair under Part 2 of the Act, you could find that they are not legally binding on **consumers**, and you could face enforcement action if they fail either the fairness or transparency tests.
4. The Act also 'blacklists' certain **terms** and **notices**, making them unenforceable in all circumstances – without any need to assess them for fairness.
5. This guide is intended to provide **businesses** with a short overview of the types of **terms** and **notices** that the CMA considers are open to challenge under the Act. It covers:
 - when the fairness provisions will apply;
 - the test of fairness;
 - the test of transparency;
 - 'blacklisted' terms and notices;
 - examples of types of wording that the CMA might consider unfair, which includes consideration of the Act's 'Grey List' of terms that may be potentially unfair;
 - a flowchart providing a simplified approach;

- the possible consequences for a business using unfair terms or notices; and
 - references to some related consumer law.
6. It also includes links to other documents you may find helpful.
 7. This guide provides an introduction to the legislation and the forms that unfairness can take.¹ It is published alongside more detailed guidance that states the CMA's position more fully.

Using this guide

8. In order to avoid undue repetition, this guide does not refer at every point to both **terms** and **notices** when making points that cover both. The Act's requirements for terms and notices are very similar, and it should generally be assumed that what is said about terms also covers notices unless otherwise indicated. 'Wording' refers to both terms and notices. In sections with headings that refer to notices, terms and notices are dealt with separately.
9. More detail can be found in the CMA's [detailed guidance document](#) on the Act's unfair terms provisions and the types of **terms** that the CMA considers are likely to be unfair.
10. Neither this guide, nor the CMA's more detailed guidance, is intended as a full interpretation of the legislation. The CMA's guidance is not a substitute for the Act itself and the underlying European Directive. The final decision on whether a **term** or **notice** is unfair rests with the courts, and reading either this guide or CMA's more detailed guidance cannot be a substitute for taking independent legal advice.

When the fairness provisions of the Act apply and who they apply to

11. Part 2 of the Act applies to all contracts (whether written or not) between a **consumer** and a **trader** (or **business**). Consumer-to-consumer and business-to-business contracts are not covered. The provisions also apply to a **notice** issued by a trader that is intended for consumers, even if it is not part of the contract.

¹ The CMA has also published a shorter summary document: [Unfair terms – what do businesses need to know?](#) which readers may find useful as a reminder of some of the key points which businesses need to consider.

Which terms or notices can be assessed for fairness?

12. Nearly all **business**-to-consumer contract **terms** and **notices** are subject to the Act – whether or not they are in writing, and whether or not there has been any individual negotiation between the **trader** and the **consumer**. However, there are two exemptions:
 - (a) Certain terms and notices covered by legal provisions are exempt. This is sometimes referred to as the ‘mandatory statutory or regulatory exemption’ – see below.
 - (b) There is also a partial exemption for terms that specify the main subject matter of the contract or set the price. This is the main exemption under the Act (referred to in this guidance as ‘the core exemption’), but it applies only if terms are transparent and prominent, and does not apply to notices – see below.

Exemption for terms or notices covered by legal provision

13. This exemption covers wording that is included in contracts and **notices** in line with the requirements of Parliament or authorised regulatory bodies. It can apply, for instance, to wording that is set by law for use in a particular kind of contract: where it does so, it will not protect wording where it is used in a different kind of contract.
14. Where **consumers** need information in order to understand the effects of the legal provisions that cover such wording, this needs to be provided in, or with, the contract. It is not sufficient for the wording used just to mention the relevant legal provisions by name.

Exemption for main subject matter and price

15. A **term** may not be assessed for fairness to the extent that: (a) it specifies the main subject matter of the contract; or (b) the assessment would be of the adequacy of the price as compared to what is supplied.² For the purposes of this guide, this exemption is called ‘the core exemption’ because it covers the essential features of the bargain. It means that a term is not unfair simply because it describes a product that the **consumer** considers represents poor value for money or sets a price that is higher than other **businesses** charge.

² Price-setting terms are those most likely to fall within this part of the exemption, and for brevity this guidance refers to it as exempting such terms. However, not all terms that allow a supplier to levy charges will benefit from it. Its focus is not on one kind of term, but on the question of whether the price can be considered adequate compared with what is supplied in return.

However, terms dealing with these issues may still be assessed on other grounds, for example, the timing of a payment, or whether the main subject matter or price can be varied.

16. Where **terms** of these kinds are not prominent and transparent, 'the core exemption' does not apply and they are subject to a full assessment for fairness (see also the paragraph entitled 'Grey List' below).

Transparency

17. To benefit from 'the core exemption', a 'main subject matter' or price-setting **term** must be transparent – that is, it must be expressed in plain and intelligible language and (if in writing) must be legible. This transparency requirement is explained further below ('Transparency' at page 8). If it is not met, the terms in question will be fully assessable for fairness.

Prominence

18. To benefit from the 'core exemption', 'main subject matter' or price-setting **terms** must be prominent. This means that they must be brought to the **consumer's** attention in such a way that the average consumer (that is, a consumer who is reasonably well-informed, observant and circumspect) would be aware of them. As with transparency, if the terms in question are not prominent, they will be fully assessable for fairness.
19. It is the CMA's view that in order to be prominent in the sense required to benefit from 'the core exemption', **terms** need to be brought to the **consumer's** attention in a way that is practically effective. Steps taken to achieve this should ensure that the average consumer can understand and appreciate all the essential features of the bargain before making a purchase, so as to be able to compare it meaningfully with other available bargains.
20. The CMA considers that prominence is not merely about highlighting **terms** visually in the contract document. In determining whether a term is sufficiently prominent, regard will need to be given to a number of factors – including whether the term itself is onerous, what a reasonable **consumer** would expect, how other contract terms are presented and what information has been given to the consumer before entering the contract. If a term could come as a surprise to the consumer, it will require more effort to ensure its prominence compared to other terms (and this applies not only in the contract but to all pre-contract information, for example brochures or webpages).

What is an unfair term?

21. A **term** in a consumer contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the **consumer**.
22. Transparency is also fundamental to fairness. The Act requires that a written **term** in a consumer contract is expressed in plain and intelligible language and is legible. This sits alongside a more general requirement that **consumers** are given a real chance, before entering a contract, to see and understand all terms that could operate to their disadvantage (see paragraph 28 below).
23. The CMA considers that the Act's effect is to apply in substance the same tests of fairness, and of transparency, to both **terms** and **notices**.

Fairness

24. Broadly, the effects of the fairness test are that wording is more likely to satisfy the law if it is drafted and presented in a way that respects **consumers'** legitimate interests.
25. 'Significant imbalance' is concerned with the parties' rights and obligations under the contract. It arises where a **term** is so weighted in favour of a **trader** that it tilts the balance of the contract significantly in the trader's favour – for instance, by granting the **business** a discretion that could be used unfairly to increase the benefits it enjoys or to impose a disadvantageous burden on the **consumer**.
26. As a starting point, when assessing fairness, it is useful to ask whether the wording places the **consumer** in a legal position less favourable than that which is otherwise provided for by the law.
27. Although the imbalance must be significant, unfairness does not require proof that a **term** has actually caused harm. Wording may be open to challenge if it could be used to cause consumer detriment.
28. 'Good faith' relates to the substance of **terms** as well as the way they are expressed. It is based on the general principle of 'fair and open dealing', where terms are expressed fully, clearly and legibly, and with due respect for the **consumer's** interests. Agreements with consumers should not contain concealed pitfalls or traps, and terms that might disadvantage the consumer should be given appropriate prominence. A **business** should not take advantage of consumers' vulnerability in deciding what their rights and obligations should be and should look like. Businesses need to deal fairly with

consumers, taking into account their legitimate interests. Consumers tend to have weaker bargaining power because of their 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.

29. When drafting contracts, it is important to take into account how **consumers** actually behave in practice, including for instance the fact that most consumers do not read standard written contracts thoroughly before making a purchase.

Factors in assessing fairness

30. The Act requires fairness 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 the contract depends.

The Grey List

31. The Act illustrates what ‘unfairness’ means, by listing some types of **terms**³ that may be unfair in Schedule 2 to the Act (sometimes known as the ‘Grey List’). Wording is under suspicion of unfairness if it has the same purpose, or can produce the same result, as the listed types of terms.
32. The Grey List is so called because it is not a blacklist; **terms** like those included in it are not necessarily unfair. It is also, however, non-exhaustive – which means that terms that do not appear in it may still be unfair.
33. The types of **terms** in the Grey List 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.

³ Although the Grey List in Schedule 2 of the Act refers to terms, the CMA considers that the list also illustrates the meaning of unfairness for notices.

- The **business** not having to perform its obligations.
 - Consumers unreasonably losing prepayments if the contract is ended.
 - The business arbitrarily varying terms after they have been agreed, for instance so as to supply a different product, raise the price or reduce consumer rights.
 - The business determining the price or subject matter of the contract after the consumer has become bound by it.
 - Consumers being subject to disproportionate financial sanctions.
34. It is important to note that **terms** with the object or effect of those on the Grey List cannot benefit from 'the core exemption'.

Transparency

35. As indicated above, Part 2 of the Act includes a specific requirement that all written **terms** have to be transparent – which means that they must be expressed in plain, intelligible language and be legible.
36. Legibility and simple clarity of language are not enough to ensure compliance. Contractual documentation needs to be drafted so as to put **consumers** into a position where they can make an informed choice whether or not to make a contract.
37. The contract should set out all obligations in a clear and comprehensible way, so that the **consumer** can see how they relate to each other, and can foresee and evaluate any future consequences of entering the agreement. Wording that could act disadvantageously for them must not be concealed, but on the contrary should be drawn to their attention.
38. Failing the transparency test does not make a **term** or **notice** unenforceable against the **consumer** independently of the fairness test. However, where the meaning of wording is ambiguous (so there is more than one possible meaning), there is a requirement that it should be given the meaning that is most favourable to the consumer. This rule is intended to benefit consumers in any private disputes they may have with **businesses**. It does not give businesses a defence against regulatory action.
39. Enforcement action may be taken by a **regulator** to prevent the use of a **term** or **notice** that does not meet the requirement of transparency.

40. The following can help you improve the transparency of your **consumer** contracts. They should be:
- jargon free – as far as possible using ordinary words in their normal sense;
 - unambiguous – clear and not open to misinterpretation or differing interpretations;
 - reader-friendly – organised so as to be easily understood (using, for example, short sentences and subheadings);
 - legible – for example in a suitable font size and colour, and of appropriate print quality;
 - comprehensible – for example, the meaning of the words or concepts used, as well as the reasons for them, should be explained if they are not capable of being readily understood by consumers;
 - informative – a consumer should, on the basis of the information provided – if necessary in pre-contractual literature – be able to foresee and evaluate the consequences of all wording used; and
 - accompanied by pre-contractual literature as necessary – if, for instance, the contract is complex or lengthy.

‘Blacklisted’ terms and notices

41. Before moving on to provide, practical examples of **terms** that may be open to challenge as unfair under the Act’s fairness provisions, it is important to note that the Act also ‘blacklists’ certain terms and **notices**, making them automatically unenforceable and open to challenge, without the need to consider the fairness provisions.
42. Part 2 of the Act provides that some **terms** and **notices** are automatically unenforceable against **consumers**. The CMA refers to these as ‘blacklisted’ to distinguish them from terms on the Act’s Grey List (see paragraph 31 above). An example of blacklisting found in Part 2 of the Act is wording that would exclude or restrict liability for death or personal injury resulting from negligence.
43. Part 1 of the Act also ‘blacklists’ various **terms** in a range of types of contracts. The kinds of terms covered include those which aim to relieve **traders** from their ordinary obligations under the Act – for instance, to ensure that their products are of satisfactory quality and that their services are provided with reasonable skill and care.

44. **Terms** and **notices** that are blacklisted are open to challenge either on that basis alone, or on the grounds that they fail to meet the requirements of Part 2. Any wording that is blacklisted is in practice very likely to be unfair.

Terms that may be considered unfair

45. The following examples are intended to provide an insight into the types of wording that could be unfair. They are based on the 'Grey List' **terms** set out in Schedule 2 to the Act, but they include some additional terms that the CMA considers may also be unfair. This is not an exhaustive or definitive list. Terms other than those listed can be unfair if they significantly upset the balance of the contract, contrary to good faith (see the section entitled 'What is an unfair term?'). Wording that has the same object or effect as a listed term may be unfair in some circumstances, but not in others. Whether a term is unfair depends also on how it is presented – any wording is more likely to be unfair if it is unclear or hidden away.

Terms and notices excluding or limiting liability

46. Unfairness is likely to arise when a **business** uses wording that seeks to limit or exclude its liability to the **consumer**. **Terms** of this kind are often called disclaimers or exemption clauses.
47. If wording could be used to reduce or remove **consumers'** ability to seek redress to which they would otherwise be legally entitled, it is likely to be considered unfair, even if that was not the intention. For example, a **term** that states customers use facilities 'at their own risk' covers liability for death or personal injury, even if the main concern of the **business** may be something else.
48. No wording can exclude or restrict liability for death or personal injury resulting from the **trader's** negligence. As well as being unfair, **terms** and **notices** of this kind are blacklisted under Part 2 of the Act. Such wording should not be used in consumer transactions.
49. Any **business** selling goods or **digital content** (whether paid for directly or indirectly)⁴ 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 (if paid for as described) must match the description given to them, and be of satisfactory quality and fit for their purpose. Contract **terms** that deny consumers these rights, or their right to their full available legal

⁴ See the glossary on 'digital content' for the meaning of 'paid for directly or indirectly'.

remedies where goods or digital content (paid for as described) are misdescribed or defective, are blacklisted under Part 1 of the Act.

50. Similarly, 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’. A **term** in a contract which could relieve the **trader** of this obligation, or limit the remedies available to the consumer for failure to meet this standard, is blacklisted and very likely to be considered unfair.
51. There are many other kinds of disclaimers, which may also be considered unfair and may be blacklisted under the Act , including those that may have the effect of:
- excluding the **business**’ liability for its delay;
 - excluding the business’ liability for failing to perform its obligations (for example, ‘management reserves the right to suspend services without liability’);
 - reducing the amount or availability of consumer redress (for example, ‘liability accepted up to the value of the goods only’);
 - placing unreasonable time limitations on consumer claims;
 - excluding the **consumer**’s right of set-off⁵ (for instance, where the consumer is required to pay in full, even if they have a legitimate complaint about the goods, services or **digital content**); and/or
 - excluding liability by giving guarantee rights that are narrower or weaker than the consumer’s statutory rights (for example, ‘we will repair or replace (at our option) any item found faulty within three months’).
52. In all cases the same concerns arise where a **term restricts** liability rather than excluding it altogether, particularly if the **consumer** could be left worse off than the law normally allows.

Non-returnable consumer prepayments

53. **Consumers** sometimes make pre-payments in advance of receiving products or services. A **term** that makes any substantial pre-payment entirely

⁵ The deduction that may be allowable from payments due under a contract, where one party (for example, the consumer) has an arguable claim under the contract against another (for example, the business).

non-refundable, whatever the circumstances, potentially allows the **trader** to make an unjustified windfall gain. This is especially true where there is no fault on the part of the consumer and the contract is ended by the **business**. A term that states no refund is available in this circumstance is likely to be considered unfair (see also unfair cancellation clauses below).

54. Even where the **consumer** brings the contract to an end without any fault on the part of the business, the **business** should not normally keep everything that the consumer has paid in advance, regardless of the amount of any resultant losses.
55. **Terms** should not interfere with other rights that the **consumer** may have regarding cancellation, for example when a contract is entered other than at the **trader's** business premises. See under the heading 'Exclusions and reservations of special rights' below.

Disproportionate sanctions

56. **Terms** that permit the **trader** to impose disproportionately severe sanctions for breach of contract are likely to be unfair. This applies particularly to disproportionate financial sanctions. These may also be unenforceable under the general law. There is unlikely to be any objection to terms, in plain language, which go no further than making **consumers** responsible for financial losses that they have directly caused where they are at fault.
57. A **term** imposing unreasonable interest rates on outstanding payments, for example, at a rate excessively above a bank's base rate, is likely to be regarded as unfair.
58. Other kinds of financial sanctions that could be unfair include those that might:
 - mislead **consumers** into thinking they are required to pay more compensation than is required by law; and/or
 - impose a disproportionate cancellation charge on consumers if they decide to pull out of a contract early.
59. Over-severe sanctions of other kinds are also likely to be considered unfair. An example would be a **term** allowing the **trader** to use enforcement methods that could involve violation of the **consumer's** privacy or property rights.

Unfair cancellation clauses

60. Cancellation of a contract by the **business** can leave the **consumer** seriously inconvenienced, and potentially facing costs. If this is the case, then a **term**

stating that a business can cancel at its option, regardless of whether the consumer is at fault (even if it allows for refund of the consumer's prepayments), is likely to be considered unfair. There is also potential for unfairness if the business can cancel without notice, except on serious grounds.⁶

61. Wording that restricts the **consumer's** ability to cancel might be unfair too – for example, a clause that states or implies that the consumer cannot cancel the contract in any circumstances, or only with the **trader's** agreement. In law, where the trader breaks the contract, the consumer has remedies that may include a right to end the agreement – if, for example, the trader's breach threatens its whole value to the consumer.
62. Disproportionally high termination charges and over-lengthy notice periods can also have similar effects – acting to force **consumers** to continue with contracts, or renew them, when they have no wish to do so. They therefore have the potential to be unfair.

Binding consumers to hidden terms

63. **Consumers** should always have a real opportunity to become acquainted with and understand contract **terms** before they are bound by them. If a term requires consumers to accept wording of which they have no prior knowledge, it could be challenged as unfair.
64. The **consumer's** opportunity to examine **terms** can be extended by provision of a cooling-off period – a specified time after a contract has been entered during which the consumer can cancel without financial sanction. This may be helpful, and in some kinds of contract is required by law, but it is not a substitute for giving consumers full and clear information before entering the contract. It cannot remove unfairness caused by use of obscure or misleading wording.

Variation clauses

65. A **term** that gives a right to change the contract after it has been agreed is known as a variation clause. A term giving the **business** the right to make

⁶ In contracts for financial services – for example banking and credit contracts – the Act indicates that the trader may need only to have a 'valid reason' for cancellation without notice in contracts that last indefinitely, and to inform the consumer immediately. But this does not mean a term meeting these minimum criteria is necessarily fair. Any 'cancellation without notice' term may still be unfair if it satisfies the test of unfairness.

changes regardless of the consent of the other party is under strong suspicion of unfairness and may be blacklisted for the purposes of Part 1 of the Act.⁷

66. Variation clauses are likely to be unfair if they could be used to force the **consumer** to accept increased costs, new requirements or reduced benefits. For example in contracts where important elements of the contract – such as the price – have not been fully agreed at the time the contract is concluded, **terms** that give the **trader** the sole right to determine these matters are likely to be unfair. So too are terms that give the **business** the right to change, at its discretion, elements that have been agreed.
67. **Terms** allowing variation of the price raise obvious concerns, but other variation clauses can also be unfair. For example, a term stating that all materials used may vary in colour and finish is liable to conflict with the customer's legal right to receive something that is (in all significant respects) what the **trader** stated.
68. A variation clause is less likely to be unfair if:
- it is clear and appropriately restricted – for instance allowing for either minor technical adjustments which can have no real significance to the **consumer**, or changes required by law;
 - it permits increases linked to a relevant published price index such as the RPI.⁸ This may be acceptable provided that the details are clear and adequately drawn to the consumer's attention before entering into the contract so that the consumer can understand the practical implications involved.

Any kind of variation clause is more likely to be fair where there is a duty on the **trader** to give notice of the variation (in good time before it takes effect) and the consumer has a genuine right to cancel the contract, which is capable of being exercised without loss or serious inconvenience. But it is still necessary, if wording is to be fair, for consumers to have enough information at the time they enter the contract to be able to foresee how their position is likely to be affected by use of the variation clause, and to understand the implications for them.

⁷ See in particular 'other relevant laws' section below and the reference to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs),

⁸ This applies particularly to terms in a range of specialised financial transactions: terms allowing price variations due to fluctuations in an independent index, or published market rates, or currency values.

Right of final decision

69. The **consumer** could be at a disadvantage when a **term** gives the **business** the right to decide how the contract is interpreted or whether any breach has occurred.
70. If the **business** itself is able to decide whether it has met its own contractual obligations, it can effectively deny **consumers** redress to which they are entitled. Similarly, if a business reserves the right to decide what a **term** of the contract means, then it is effectively in a position to alter the way it works to suit itself.
71. Similar objections arise to **terms** that allow the **business** too much freedom to decide how to perform the contract, if they enable it to ignore the convenience of the **consumer** – for instance when setting the timing of the delivery of instalments. Concerns also arise in relation to terms that could allow the business to impose sanctions on consumers for what it chooses to regard as their breaches, whether the law would regard the consumer as being in breach or not.

Denying liability for statements made by agents or employees

72. It is likely to be unfair to seek to exclude liability for statements that have been made on behalf of the **business** by its employees or sales agents.
73. There is obvious scope for abuse if a business can argue that it is not bound by its oral promises, made to secure a sale, on the basis of written wording that says – literally or in effect – that only written **terms** will be honoured. Wording can have this effect if, for example, it states that ‘employees do not have authority to make statements that are inconsistent with this contract’ or that ‘all terms of the contract are contained in this document’. In some cases, a term to this effect may be blacklisted under Part 1 as well as being unfair under Part 2 of the Act.

Unbalanced assignment clauses

74. It may be unfair for a **business** to reserve the right to transfer the agreement to a third party without the consent of the **consumer** – particularly when the business to which it is assigned could provide a poorer quality of product or service.
75. For example, a **term** stating that a business ‘may at any time assign this agreement to a third party’ may be unfair.

76. **Terms** that unduly restrict the **consumer's** freedom to transfer their rights under the contract to someone else raise comparable concerns. An example of such a right would be a guarantee covering goods or work on the consumer's property. There are usually fairer and less restrictive ways of protecting the **business's** interests than refusing to honour a guarantee if a claim is made by anyone but the consumer.

Hindering or preventing consumers from taking legal action

77. A **term** is likely to be unfair if it seeks to remove the **consumer's** right to seek redress when the **trader** is in default, or could have the effect of hindering legitimate efforts to seek redress. Such a term may be blacklisted under Part 1 of the Act as well as being found to be unfair under Part 2.
78. For instance, a clause stating that disputes must be heard in remote or inappropriate courts could unfairly limit the **consumer's** ability, in practice, to initiate legal proceedings where the **trader** is in breach of contract.
79. Clauses that require (rather than allow) **consumers** to submit to arbitration all disputes for sums of £5,000 or less are always unfair.⁹ The CMA considers that a requirement to refer disputes to an Alternative Dispute Resolution process of any kind will be under strong suspicion of unfairness if its effect is to remove or limit the consumer's right to take legal action before the courts.¹⁰

Allowing excessive burdens or requirements to be imposed on the consumer

80. Wording may be unfair if it could allow excessive and unexpected financial burdens to be imposed on the **consumer**. This has a similar effect to a price variation clause.
81. For example, an explicit right to demand payment of unspecified amounts at the **business's** discretion (such as a security deposit).
82. However, unfairness is much less likely if, for instance:
- the **consumer** has agreed to pay a specific amount, in specified circumstances;¹¹

⁹ Section 91 of the Arbitration Act 1996.

¹⁰ 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. But note that this does not alter the position set out above; a term that 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.

¹¹ Note, however, that a term may meet these requirements but still be unfair if, for instance, its real purpose is to act as a financial sanction and it is disproportionately high.

- the consumer is given a genuine and practical right to cancel the contract (without any sanction or otherwise being left worse off).

Requiring the consumer to bear inappropriate risks

83. It may be unfair for a **business** to use wording that passes risks onto the **consumer** which the business is better able to bear.
84. Indemnity clauses¹² that protect the **business** in this way from its own negligence, or **terms** that transfer a risk to the consumer when the business can insure against it and the consumer cannot (or at least not cheaply and easily), are particularly liable to be considered unfair.

Requiring the consumer to make disadvantageous declarations

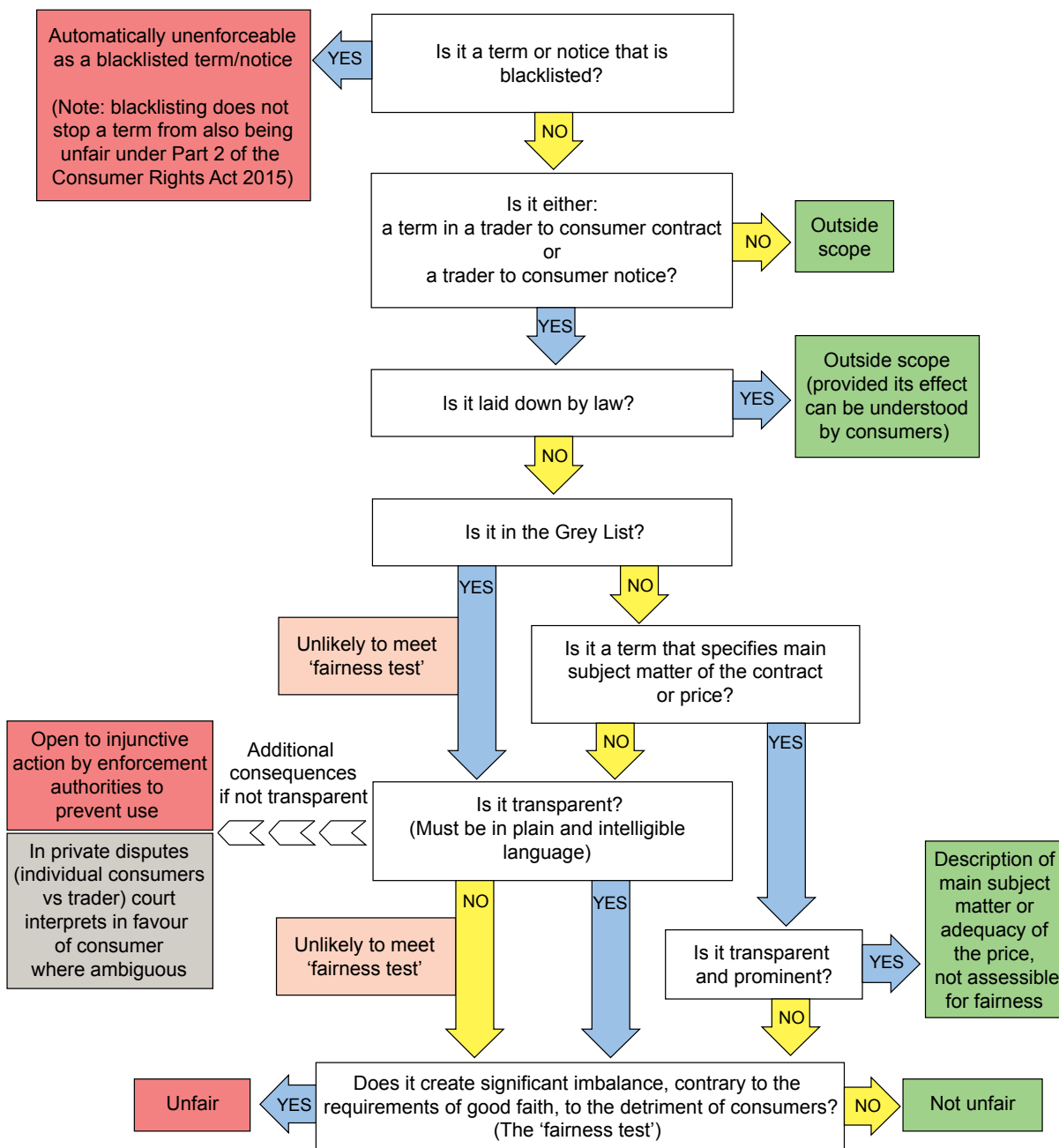
85. If a declaration is written into a contract this may, in practice, force **consumers** to make it even if it is not true. This is potentially unfair. Consumers may think it is just a formality, but could later be told that they have 'signed away their right' to argue that the facts were not as the declaration indicates.
86. For example, it is likely to be unfair for a **consumer** to be required to sign a declaration that states they have 'read and understood the terms and conditions'. The purpose of declarations of this kind is to bind consumers to wording regardless of whether they have any real awareness of it.

Exclusions and reservations of special rights

87. Wording that could override a **consumer's** legal rights, outside of general contract law, may be unfair. Examples of a consumer's legal rights include:
- the confidentiality of personal information; and
 - the rights of **consumers** entering contracts away from the **trader's** business premises (See the 'Other relevant laws' section);
88. A contract term that purports to make the consumer abandon these kinds of rights may be unfair whether or not it is legally effective.

¹² 'Indemnity' clauses generally state or imply, often using legal jargon, that the business can simply pass on to the consumer any costs incurred whether reasonable or not.

Unfair terms flowchart



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.

Helpful links

Consumer Rights Act 2015:

www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf

CMA guidance page:

www.gov.uk/government/publications/unfair-contract-terms-cma37

CMA website: www.gov.uk/government/organisations/competition-and-markets-authority

Financial Conduct Authority website: www.fca.org.uk/

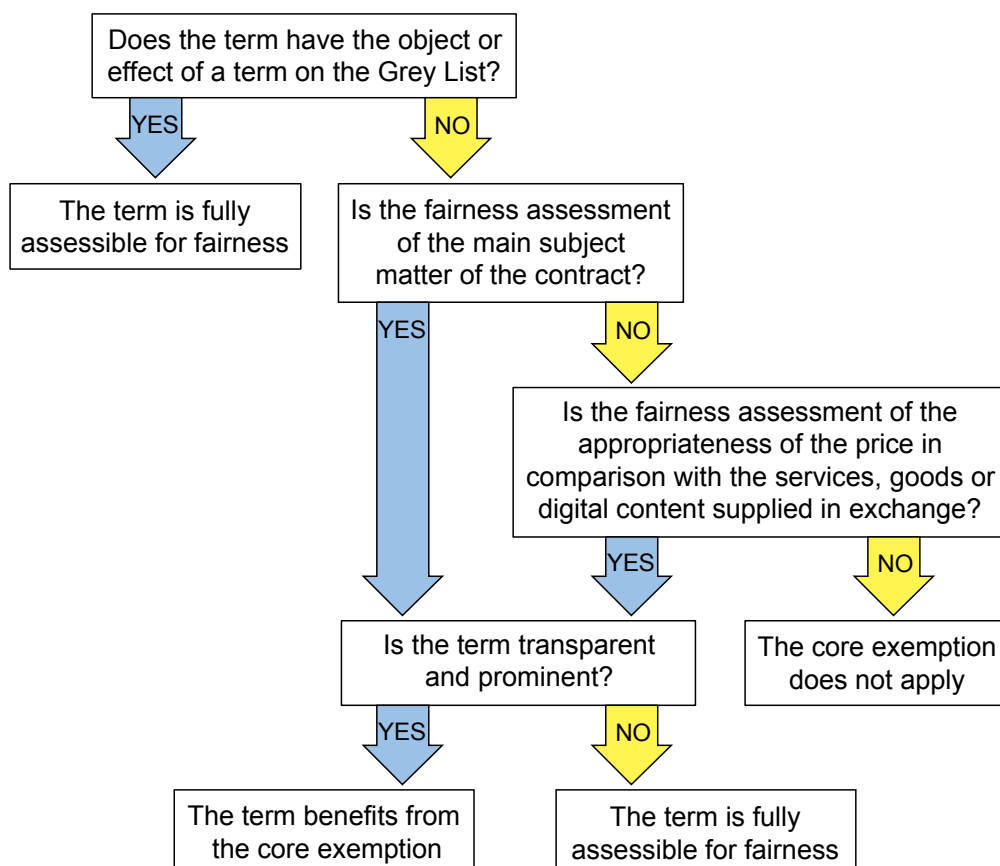
Ofcom website: www.ofcom.org.uk/

Department for Business, Innovation and Skills website:

www.gov.uk/government/organisations/department-for-business-innovation-skills

Chart for the Act's core exemption

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.



What happens when terms or notices are unfair?

89. Using unfair or blacklisted contractual **terms** or **notices** can have a number of consequences. For instance:
- they are not legally binding on the **consumer**;
 - a **business** could be asked to stop using and relying on them;
 - a court **injunction** might be sought.

Enforcement powers

90. The CMA, Trading Standards Services and other relevant bodies have powers to pursue legal action to stop you using **terms** and **notices** that are unfair or a breach of the transparency requirement, as well as those that are blacklisted. If necessary, this will be achieved by seeking a court order.
91. If a **business** is using, proposing to use or recommending wording that appears to be in breach of the transparency requirement, or is unfair or blacklisted under the Act, the CMA or another listed **regulator** can seek an injunction (or interdict in Scotland) from the court against the business under the Act. An order may make provision about wording of a similar kind or with a similar effect.
92. Under the Act, **traders** can be required 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.
93. If a **business** gives a satisfactory undertaking to stop using wording, or to revise it, court proceedings will not be necessary, provided that the agreed course of action is fulfilled.
94. Part 8 of the Enterprise Act 2002 gives the CMA and other enforcers¹³ separate powers to investigate and seek undertakings or enforcement orders in relation to breaches of consumer law generally, including the Act. Use of these powers may be appropriate where, for instance, issues arise under several different pieces of consumer legislation.

¹³ Including all **Regulators** for the purposes of the Act – see the definition of Regulators in the Glossary for details of who can take action under the Enterprise Act 2002 in relation to unfair terms and notices.

95. An undertaking or enforcement order under the Enterprise Act may, in certain circumstances, include provisions offering redress for **consumers** who have suffered loss (which can include monetary compensation).
96. In addition, individual **consumers** have their own legal rights under the Act, independently of the powers of the CMA or other **regulators**. If a **business** seeks to rely on unfair or blacklisted wording, the consumer can refuse to comply with it. If necessary, they can take or defend proceedings in court. However, a consumer should seek legal advice before taking any step that is liable to result in court proceedings.
97. The CMA has no power to take up **consumers'** individual cases for them, or to provide advice on private disputes.

Other relevant laws

98. The Act's provisions are not the only legal provisions that protect **consumers** from unfair wording. In some cases, other relevant legislation may be used to prevent your business from using unfair **terms** or **notices**, see below for some examples.

The Consumer Protection from Unfair Trading Regulations 2008

99. Generally, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) give broad protection for consumers against unfair business practices that distort their decision-taking. Though their focus is different from the Act's they can apply to the use of unfair contract terms or notices. One effect of these Regulations is that the use of certain kinds of wording is prohibited – for example, notices that would be likely to mislead consumers and distort their decisions. In some situations, an unfair term or notice might be subject to enforcement action under the CPRs instead of, or as well as, the provisions of the Act.
100. For more information on the CPRs, see the guidance issued by the OFT and the Department for Business, Innovation and Skills in 2008 which has been adopted by the CMA.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013¹⁴

101. [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (the CCRs) replace earlier legislation on ‘distance’ and ‘doorstep’ sales, providing **consumers** with cancellation and other rights when entering contracts other than on the **trader’s** business premises – for instance, by telephone, or in their own home. However, certain requirements of the CCRs apply also to some transactions concluded on business premises. For instance, in such transactions 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**;
 - the arrangements for carrying out the contract;
 - the total price; and
 - in the case of digital content, its functionality and compatibility.
102. This statutory Pre-Contract Information is legally binding on the **trader** in the same way as what is said in the contract. 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. Traders cannot contract out of this obligation and any **term** that purports to permit contracting out is blacklisted.
103. These provisions of the CCRs should particularly be borne in mind where **terms** such as variation clauses could be understood as allowing changes to be made to any of the details 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 Act and the CCRs. This is a complex area; for more information on this point see [the CMA’s main guidance on unfair terms](#).

¹⁴ A number of contracts are excluded from the Regulations including financial services (albeit in certain circumstances they will be affected by parts of the Regulations) and rental accommodation for residential purposes.

Glossary

104. These explanations are intended to help you understand this guide.

Business

105. We sometimes use the word '**business**' in this guide in place of the technical term 'trader', with the same meaning (see below under **Trader**). This is for stylistic reasons and to avoid giving the impression that the law applies only to individual traders.

Consumer

106. A **consumer** is defined in the Act as an individual (that is a natural person rather than a legal entity such as a company) who is acting for purposes wholly or mainly outside his or her trade, business, craft or profession. 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 is not a consumer, the trader has to prove this.

Digital content

107. The term **digital content** in the Act relates to any data produced and supplied in digital form. It may be contained within a physical product (for example music, films, games or software contained in CD or DVD) or in a non-tangible form (for example, a download onto a computer, apps on a mobile phone/tablet and a streamed film).

108. The statutory rights under Part 1 of the Act for the most part do not apply to **digital content** that has not 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.

109. However, the requirements of fairness and transparency apply to any consumer contract or **notice** used in connection to **digital content** whether it is paid for or supplied free.

Notice

110. A consumer **notice**, for the purposes of Part 2 of the Act, is wording that relates to rights or obligations between a **trader** and a **consumer**, or 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, and whether or not expressed to apply to a consumer, as long as it is reasonable to assume that it is intended to be seen or heard by one. Consumer notices are often used, for instance, in public places such as in shops or car parks, as well as online and in contractual documentation.
111. The inclusion of **notices** in the Act ensures that in a broad sense any wording directed by **traders** to **consumers** that has an effect comparable to a potentially unfair contract **term** is open to challenge. Indeed, there may be a notice but no contract between the parties. The fact that consumer notices are now expressly covered in their own right clarifies that it does not matter whether a contract exists or whether they form part of the contract as a matter of law.
112. All references to **notices** in this guide are to consumer notices. References to 'wording' are meant to cover both **terms** and notices. The only exception to this is when it is used in the explanation for 'terms' in this glossary below.

Regulator

113. Bodies having powers under the Act to enforce its fairness provisions (as well as taking action against blacklisted wording) alongside the CMA are defined as **regulators** and listed in Schedule 3 of the Act. The CMA and regulators also have separate powers to act under Part 8 of the Enterprise Act 2002, as do certain other bodies.
114. The Schedule 3 **regulators** include:
- local weights and measures authorities in Great Britain;
 - the Information Commissioner;
 - the Gas and Electricity Markets Authority (Ofgem and Ofgem Scotland);
 - the Northern Ireland Authority for Utility Regulation;
 - the Office of Communications (Ofcom);
 - the Water Services Regulation Authority (Ofwat);

- the Office of Rail Regulation (since renamed the Office of Rail and Road) (ORR);
 - the Department of Enterprise, Trade and Investment in Northern Ireland (DETI);
 - the Financial Conduct Authority (FCA); and
 - the Consumers' Association (Which?).
115. Some authorities are enforcers under the Enterprise Act 2002, but not **regulators** under Schedule 3. They can still take action against unfair **terms**, but only using Enterprise Act powers. They include:
- the Civil Aviation Authority (CAA);
 - PhonepayPlus;
 - the Secretary of State for Health; and
 - the Department of Health, Social Services and Public Safety in Northern Ireland.

Term

116. There is no definition of '**term**' in the Act. Any wording in a contract that gives rise to a particular obligation or right is liable to be treated as a term, whether or not it appears in written form as a paragraph or clause. Wording that has this legal effect could appear in only one part of a clause, or may be spread over more than one clause.
117. Where there is any doubt as to what constitutes a **term**, it should be resolved having regard to matters of substance rather than form. The fact that a **trader's** contractual wording is described or regarded by the trader as a term does not necessarily make it so.
118. Wording can be used in connection with a consumer contract that is not, for legal purposes, treated as forming part of it. Where such wording is used, it is likely to be regarded as constituting a notice – see above under **Notice**. As such it will be subject to very similar requirements, in relation to fairness and transparency, to a **term**.

Trader

119. For the purposes of the Act, **'trader'** is defined as a legal person (which includes both natural and legal persons such as companies) acting for purposes relating to their trade, business, craft or profession. 'Business' includes 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.
120. In this guide, the word 'business' is used to mean the same as the technical term **'trader'**, as explained above under **Business**.

Sources of information

121. The CMA's more detailed main guidance on Unfair Contracts can be found on [the CMA's webpages on GOV.UK](#). Some examples can be found in Annex A to the main guidance.
122. [The Act can be viewed in full and downloaded at legislation.gov.uk](#).
123. [The EU Directive, which the Regulations implement, can be viewed in full at eur-lex.europa.eu](#).