

SMEs & Unfair Contract Terms

Qualitative Research Report

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CMA

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1. Executive summary

Generally speaking, there are two core motivations behind establishing contract terms. Firstly they define the nature of the relationship and set a framework for dispute resolution. Secondly they also serve the purpose of protecting future revenue and act as an ‘insurance policy’ for the business.

Most SMEs are more focussed on revenue generation than revenue protection, and tend not to rely on their contract terms when resolving complaints. There are however exceptions in certain sectors where businesses depend on ‘guaranteed’ income levels, such as subscription businesses. Similarly, for events-based businesses, cancellation is a substantial risk worth protecting against.

Some contract terms simply consist of a couple of sentences on an email. In the case of garages, the contract tends to be purely verbal. In more regulated sectors, contracts are much longer and more formal. Across all sectors, contract terms are rarely, if ever, reviewed or revised.

The principles of the fairness test generally resonate with SMEs. But whilst all feel that they act fairly and reasonably, not all were able to correctly discern unfair terms from the examples shown in the research (see 9.9). A number of myths were identified during the research and these limit an SME’s ability to comply with the new legislation. The most commonly held myth is the perception that if a contract is in ‘black and white’ and signed, then it is fully enforceable. There is also an assumption that deposit and cancellation fees can be set at levels designed to protect revenue and profit rather than just to cover losses incurred. In addition, limitation of liability is a grey area. Few seem clear on what is permissible and what is not.

SMEs do need information, guidance and (ideally) some steer as to what they can legally and fairly include in their contract terms. In this context, communications need to strike a balance between being so ‘obvious’ that they will be ignored and so complex that they will not be read or understood. Example terms or templates would definitely help.

2. Background & Methodology

2.1 Background

The Consumer Rights Act 2015 refreshes a number of aspects of UK consumer law, and the CMA is leading on producing guidance on elements of the act relating to Unfair Contract Terms. The CMA is particularly interested in engaging with SMEs and helping them comply with the new legislative framework. Qualitative research was required in order to ensure effective and relevant engagement.

2.2 Objectives of the research

The overall objective of the research was to support the development of new information materials aimed at SMEs to help them comply with the new legislative framework on Unfair Contract Terms.

More specifically the objectives included:

- Identifying insights into how SMEs in the UK approach updating their contract terms, and what triggers them to do so;
- Defining areas in which SMEs in different sectors need particular guidance, and which the CMA should prioritise;
- Gathering feedback from SMEs on draft compliance materials and concepts;
- Highlighting what compliance information, tools and other content would help SMEs.

2.3 Methodology

The research included two phases. The first phase consisted of 30 depth interviews, which were conducted face-to-face at the respondents' places of work and lasted one hour. Fieldwork was conducted across the country and a number of interviews were completed in London and the South East, Birmingham, Leeds, Scotland, Wales and Northern Ireland. Respondents were selected on the basis of their responsibility for contract terms within their organisations; half worked in small businesses (10-49 employees) and half in medium sized businesses (50-250 employees). The research included a spread of sectors including events, online, property, subscription, garages and short term hire (a full breakdown can be found in the appendix). Simultaneously four interviews were conducted with legal advisers (solicitors) who work with SMEs on drafting and reviewing their contract terms, in England, Scotland and Northern Ireland.

The second phase of the research involved two workshops lasting 2.5 hours each. One took place in Birmingham and the other one in Manchester. The profile of the audiences for the workshops was broadly the same as for the depth interviews.



3. Overall views on Unfair Contract Terms

3.1 Awareness and perceptions of contract terms

3.1.1 For SMEs, contract terms are not top-of-mind

The main focus of the business was on maintaining and building business flows. Word-of-mouth, and increasingly, social media and review websites were mentioned as crucial to revenue generation. Businesses therefore often mentioned going above and beyond what was required to please their customers.

'I only work on word of mouth so it's purely recommendation. I don't advertise anywhere'
(Small events, London)

Revenue protection was a secondary focus. Therefore, contract terms were often not even used or referred to when resolving complaints. Many were able to cite examples where they had waived contract terms in order to maintain relationships, avoid poor reviews or where they felt this was 'doing the right thing'. More generally, contract terms were rarely invoked; they are often seen as 'the last resort'.

'We had one where the husband to be actually passed away. I know that our terms and conditions state that this is non-refundable but there's a bit of personal moral. I'm not going to take your money off you because it's not your fault. I know it's less my fault, but equally I couldn't...I just gave them the deposit back and in saying that actually she gave us a bit back saying sorry. So what is legal and what is moral can sometimes be two separate entities can't they?' (Events, Birmingham)

'If they do cancel it and it's quite close to the event, they literally have to pay what I'm out of pocket but they don't even really lose it (deposit), it just gets moved to another function of their choice....that's why clients ring me back.' (Small events, London)

'When you're talking about the terms and conditions with the public; we'll honour anything we do. It's all warrantied, guaranteed, there's not any problem; the customer in my case is always right even when they're wrong! Your reputation's worth more than anything else so if somebody comes in; 'Oh, my car's broken down and you fixed it a week ago,' we'll fix it again.' (Garage, Glasgow)

There were exceptions to this in sectors where terms were essential in order to guarantee income for the business. For instance, this was the case in property sales or subscription businesses.

3.1.2 Businesses' assessment of their own contract terms

Overall, most SMEs wanted to be fair and balanced and saw their contract terms as an expression of this. The language of the Consumer Rights Act 2015 therefore resonated with them.

'Legal obligations? Integrity. If you do the job right when you do it, with honesty - what we do with every customer, we will never do any work unless the customer okays the work. So I would never do a puncture unless, you know, something as banal as that in our trade, unless the customer okayed it.' (Garage, Belfast)

'I always say, 'Try to treat people the way we would like to be treated.' It's not smoke and mirrors.' (Belfast, Small estate agent)

Most SMEs had a good understanding of what was fair and reasonable. However they were not always able to accurately assess what was fair and what was not. A few participants were more cynical and found it challenging to step into the consumer's shoes.

'Yes, I think that's probably fair. I've asked you for a holding deposit and it may have been discussed that we're going to check references and we're expecting a transaction, so they've paid the second transaction and it's been aborted or you've had an unsatisfactory reference. Well unfortunately we've held that based on an agreement and we're not refunding your deposit because we're working on the assumption that this transaction was going to complete.' (Larger gym, Birmingham)

3.2 Usage of contract terms

3.2.1 There are multiple motivations behind contract terms

SMEs motivations to have contract terms included the following:

- Clearly defining the nature of the relationship and clarifying the value of the exchange that is taking place;
- Avoiding disputes: contract terms can be used to set a framework such that the business can resolve disputes at its own discretion and avoid arguments with difficult customers;

- Protecting future revenue: contract terms acted as an insurance policy. Businesses did not intend to use them but they were conscious that they needed to have them in place ‘just in case something went wrong’. This included payment terms, deposits and cancellation details, which aim to ensure that the business is paid for goods and services supplied and in some cases, compensated for lost business;
- Limiting or defining liability where accidents or theft might occur (for instance in gyms etc.) as a result of inappropriate customer behaviour;
- Box ticking: for some SMEs it was simply about having something in place which legitimises the relationship between the business and the customer.

3.2.2 The nature and structure of SMEs’ contract terms

Most SMEs had a few key terms that defined the nature of the contract. In some cases, this was all there was in place. For instance, an online taxi business included a footer in all booking confirmation emails specifying that rides cancelled within 2 hours would be charged.

In larger and more sophisticated businesses, key terms were separated from a longer list of contract terms and presented with greater clarity (using larger font or in a box). During the sales process, these were often the only terms that were explained to customers. This was often the case for subscription terms in subscription-based businesses, payment schedules and cancellation fees in the events industry and sales and letting fees in property businesses.

Larger businesses and those with a more complex business model (for instance events businesses that relied on a chain of suppliers) often added more detail and further conditions to their contract terms in order to cover a wider range of eventualities. These were the only terms identified in the research which were subject to amendments as and when situations arose which were not covered by the existing terms. Such additional terms were rarely if ever explained to customers.

Terms relating to limitation of liability tended to be in small font and not highlighted clearly. Business owners and managers themselves were rarely aware of the content but considered these more in terms of a safeguard or insurance policy. The authors felt that there was potential risk on both sides; that the business might falsely feel it was covered against a particular eventuality or that the consumer might accept the wording of the contract as legally correct (when it may not be).

Except in businesses in sectors such as events, where clauses were added to contract terms when situations arise, contract terms were very rarely, if ever, reviewed or revised. Many participants reported that theirs had been in place for 10 or 15 years (sometimes longer), without having ever been revised. Indeed some long standing employees could not recall any changes throughout the duration of their employment.

Similarly, the use of solicitors to draw up contracts appeared rare for SMEs, particularly the smaller ones. Many businesses either copied and pasted terms from other businesses, or simply drafted them themselves.

3.2.3 There was a wide spectrum with regards to contract terms usage

Within the category of small and medium businesses, the usage of contract terms differed greatly by sector. In more regulated sectors, businesses tended to have more detailed contract terms; in some cases, specific sector-related provisions were mandated by regulatory bodies. This was in particular mentioned by businesses operating in the property industry as well as care homes and nurseries. Larger businesses also tended to have more formalised contract terms, as they had a greater need to have policies in place for staff to follow. Larger businesses also felt less vulnerable and more willing to have the odd dispute with a customer supported by their contract terms. Subscription-based and events businesses also had quite lengthy and detailed contract terms due to the specific risks associated with cancellations.

Towards the other end of the spectrum the research encountered smaller and less formal businesses, most of which relied on one or two key terms which defined the nature of their agreement with customers, such as deposits and cancellations. Some, such as small home improvement businesses and garages did not even have any formal written contract.

3.3 Common myths and misconceptions

A number of misconceptions and misunderstandings on contract terms were identified during the research. Amongst the most common were the following:

- For most, if something was written in black and white on the contract and the customer had signed it, it was perceived to be legally binding. It was felt to be the consumer's responsibility to read the contract.

'I generally think it's tough you signed it...(but) as you say, who does (read the terms and conditions)? But even if there's no ambiguity, even if it's completely black and white but it's three pages long, no one's going to read it.' (Online taxi, London)

- The use of legal jargon in contract terms was felt to make them 'official' (and therefore legally binding)

'I struggle with the jargon sometimes and I know the families do too. They come in and they say, 'Can you please explain what this actually means?' The finance team are quite good at going through the contracts with them' (Larger care home, Leeds)

- In larger businesses, when contract terms had been in place for a very long time, or when they had been copied from a larger business, managers assumed that these must be fair.

'I know it's been in place since I've been there and I've worked there for well over ten years' (Hotel, Birmingham)

- There was no perceived need for a relationship between the loss incurred by the business and the loss incurred by the consumer, and deposits were often kept and considered as penalties for breaking the terms of the contract.

'There can be (situations) when they go, 'Oh, he's left me and he's not going to marry me and I'm cancelling the wedding, I want my money back'. (We've said) 'No, you can't', and that has happened. That has happened a few times. We've said it's a non-refundable deposit.' (Events, Birmingham)

- In the events industry, keeping the full deposit to make up for lost revenue in addition to covering expenses incurred was considered standard practice. Although a few were aware this was not the case:

'That was something that I learnt that you can't claim for your future loss of profit. You can only claim for your future costs.' (Events, Birmingham)

- For online businesses, it was considered acceptable to have a default set of contract terms which consumers agreed to when they clicked on the 'proceed with payment' button.

'To process this order you are agreeing to the terms and conditions', and then there'd be, 'Please click here if you'd like to see the terms and conditions' type of thing. So in essence, the minute they click, 'Proceed with payment', there is your legally, contractually binding.....' (Online events, Leeds)



4. Looking at contract terms by sector

4.1 Events-based businesses

The research included three types of events-based businesses:

- Hotel-based venues, for which having a physical property increased the pressure to try and ensure occupancy and protect future revenue. These SMEs highlighted their view that a wedding booking typically generated additional revenue in room occupancy, bar consumption etc. (and was therefore a driver of revenue and profit).
- Party and event planners: as the venue was typically the item booked, their contracts with consumers were often subject to the contract terms of the venues themselves.
- Tour guides: the main imperative was to ensure that the guides were paid and not cancelled at short notice, but there were fewer additional dependencies.

The specificity of the first two categories of events-based businesses described above was that they were involved in a chain of dependencies. Planning events often involved a whole series of arrangements and contracts between businesses (including the venue, decoration and furniture hire, event staff, music and entertainment staff and equipment, catering suppliers and waitresses etc.), and the consumer represented the final link in each of these chains. If the consumer were to cancel, the whole chain would collapse and the party planner would have to cancel all the businesses-to-business contracts that were in place. This situation led events-based SMEs to establish as 'standard practices' non-refundable deposits (which often covered at a minimum the venue hire cost), a schedule of advance payments and cancellation charges. However, the degree to which some businesses were prepared to waive cancellation fees and return deposits given a moral imperative (for instance the death of a customer) suggested that some of this behaviour was overly conservative and that the practice of cancellation fees was used not only to protect the business from loss, but in order to guarantee revenue streams.

In the sales process, discussing contract terms with consumers was found to be particularly challenging. As consumers planned an event (weddings in particular), they were so focused on the event itself, that the possibility of ever having to cancel was all but absent from their minds. Event planners therefore sometimes struggled to make them aware of the consequences of cancellations.

In the events industry, the most common contract terms involved non-refundable deposits and cancellation charges which increased over time. Venues tended to consider the room as 'sold' at the point of booking and took a minimum deposit that covered this cost and considered this

non-refundable. It was thought logical that the customer was paying the deposit in order to reserve the location and for it to be removed from sale.

'Obviously the deposit is not refundable at the time of booking. For public events that's usually their room hire charge so it depends on how much the room hire is. You're probably looking at about £250. It's 100 per cent non-refundable. Depending on the circumstances we could move the booking within a six month period, but they would have to give us a date that we could move it to.' (Hotel, Birmingham)

Similarly, a schedule of payments was put in place in such a manner that the proportion paid and the cost of cancellation increased as the event neared. The research highlighted some degree of 'herd behaviour' as SMEs in the events industry copied contract terms from each other.

'Nine months before the wedding you're into about 50 per cent of the minimum bill but years ago we would have only had £500 of your money at that stage. So we've since changed it to a slightly higher first deposit and then a higher set deposit nine months before, so then if you cancel your wedding nine months before we've already got what would be due at that stage. We consulted competitors on that.' (Events, Belfast)

4.2 Subscription-based businesses

The research included three different types of subscription-based businesses: gyms, nurseries and care homes. For all of these types of subscription-based businesses, contract terms tended to be detailed and complex. They often included health and safety or welfare related terms, mentions of specific rules and regulations (for members and subscribers), details of what was supplied for the specified fees and specific additional provisions (for instance late pick up fees for nursery). Financial terms corresponded with the nature of the subscription and invariably involved a notice period, the contract length (for gyms), and arrangements related to the end of the contract.

Nurseries and care homes were subject to regular vetting and inspection from regulators. It was not clear whether contract terms were amongst those factors evaluated, but this channel might present the CMA with an opportunity for effective communication.

All subscription businesses sought to limit their liability should an accident or incident occur. However, rather than doing this solely via their contract terms, the businesses included in the research ensured that they were adhering to regulations and provided additional rules and

warnings to subscribers. All seemed aware not to limit their liability by including contract terms which absolved them of responsibility for health and safety failures and that it was illegal to do so.

The maintenance of cash flow was highlighted as both essential and challenging for some of these kinds of businesses; for instance one gym operator reported a 20% monthly default rate before starting the process of routinely chasing errant subscribers. Gyms reported different strategies and approaches when dealing with late payers; whilst one gym did not hesitate to refer cases to the small claims court, another used a debt collection agency to send threatening letters, but with no intention of taking action if this did not achieve the desired result.

The authors felt that in the subscription industry, unilateral variations, in the form of price increases within fixed contract periods, might be an issue but it seemed that the competitive market for gyms and nurseries mitigated against this risk. Similarly, unfair cancellation terms seemed to have been largely driven out of the gym sector by market forces. One gym operator reported that contracts with no minimum term (monthly rolling) were becoming the new norm, whereas a few years back joining fees and 2 years commitment had been commonplace. With so much detail included in contract terms, the main danger for consumers seemed to be lack of transparency, i.e. that the most salient contract terms would not be appropriately signposted.

4.3 Online businesses

The businesses included in the research included online minicab companies and online retailers (including a model railway supplier, company selling vehicle tracking devices and an online electronics store). Within this sector, contract terms varied considerably in length and detail. As in the other sectors included in the research, medium sized businesses were more likely to be clued up and to have their contract terms drafted or reviewed by a lawyer. Smaller online businesses on the other hand were likely to have copied their contract terms from elsewhere (often a larger competitor). Online taxis were heavily regulated by the Public Carriage Office, which provided some help with regards to contract terms, and required them, amongst other regulations, to keep a complaint book.

Amongst businesses operating in this sector, there was a belief that online customers were actually better protected than offline, in order to make up for the fact that trust plays a greater role online. Compared to offline businesses, online customers were more likely to at least *be aware of* contract terms as they had to tick a box to say they agreed to them. However, businesses acknowledged that customers tended not read through contract terms unless there

was an issue (inevitably subsequent to purchase). Typically, customers only had to tick the box agreeing to the contract terms of the site once, on the occasion of the first transaction.

'Our terms are very standard and nobody's ever said that's unfair. I think they're really, really customer biased and that's what we would want them to be. We want the customer to feel that it's easy to shop. Shopping online with anybody is all about a level of trust... I think the online customer is better protected than the store customer and they generally know their T&Cs' (Online, Leeds)

'We have a very reasonable cancellation policy which is we'll cancel a job free of charge within two hours. I think that's extremely reasonable. It's written - we send each booking an email confirmation which I can show you. It's one of those, every booking will get emailed to the person that's booked it, with the details of the job and then it's pretty bold in red there.' (Online taxi, London)

The most important terms for online businesses were policies on returns and refunds, and cancellation clauses. Smaller online retail businesses claimed to be flexible regarding return of items and said that they would be likely to allow a damaged item to be returned. In this sense they might be considered to be interpreting their own contract terms, whether in favour of the customer or the business. Right of final decision could therefore be a factor in this sector, with in some instances long and complex contract terms, which have perhaps been copied and pasted and likely unread by the consumer, being interpreted freely if and when issues occurred. Unfair cancellation terms might also feature for online services, although no examples of this were found in the research.

4.4 Short term hire businesses

Three different types of businesses were included in the research:

- Hotels, with typically very limited contract terms. At the time of check-in the registration papers might include some very basic T&Cs, or these might be given verbally. For hotels, the main objective of such terms was to protect themselves against damages to the hotel room. Terms tended to have been drafted by the owners or inspired by what competitors are doing.
- Marquee and suit hire businesses, who tended to have slightly more detailed terms. A deposit was required to guarantee reservation and return. In the case of marquee hire, contract terms also included health and safety provisions.

- Skip hire: in this heavily regulated industry, businesses received regular visits from the Environment Agency, which reviewed their contract terms every three years. Failure of return of the skip was rarely an issue. Instead, contract terms revolved around limiting customer exposure (and business liability) to health & safety hazards. For instance a skip hire company stated that it did not accept liability if customers moved a skip on their own or placed hazardous materials such as asbestos into a skip.

NB: A business owner offering vehicle hire attended one of the workshops. Whilst it was not possible to talk to him in detail about this, it was clear that this was another sector where terms and conditions were highly salient. The business owner mentioned that he routinely charged customers for dents on vehicles and that this was often the cause of complaints.

Generally speaking, for short-term hire businesses, the purpose of the deposit was to ensure the product would be returned undamaged. Suit hire businesses took a deposit which was refunded upon return of the clothes. For one business it was considered simpler for damages to be covered via separate insurance and therefore not charged to an individual customer.

'We take a deposit and you've got a legality if they don't bring it back, they lose their deposit so there's that legal aspect. We build in an insurance thing that if it gets damaged, whatever, it's built in so there's that legal aspect, if that's what you mean.' (Leeds, clothes hire)

Deposits were also required to guarantee a booking and sometimes these were non-refundable in case of cancellation. This provision was claimed not always to be enforced by SMEs, depending on the circumstances.

'In our terms and conditions it says that you paid us a non-refundable deposit. Yes, if you decide that you want to shop around and you find someone that is cheaper but you've already paid us, we offered to provide the service - if you decide that you don't want to use us that's your prerogative.' (Birmingham, Marquee hire)

Unlike other short-term hire businesses, hotels tended to think that contract terms were not very relevant to their business, unless they hosted weddings and events. In one case there were basic terms at the bottom of the registration documents, along with health & safety / fire information. These included a £100 penalty for smoking, a penalty for any damage to the room, a penalty for last minute cancellation after check-in (contract terms for cancellation before check-in depended on the website on which customers had booked) and a £25 penalty for missing keys. Penalty amounts were roughly calculated based on the costs incurred, such as dry cleaning

fee and impossibility to use the room until the damage was fixed. These contract terms had never been challenged on the rare events they had been applied.

'That's why you have to make sure everybody signs their registration form because it's actually their signature and then this part is at the bottom. So they then can't say, 'I didn't know that,' because they've signed it but I don't believe a lot of people read it.' (Glasgow, Hotel)

By contrast, another hotel did not have anything in writing and only gave verbal warning to certain customers.

'Well they might be a hen party or stag party with smaller groups, we allow up to five at the moment. The receptionists do tend to – if they can see they're a little bit loud, just say you know, 'When you're coming back late at night, keep the noise down. If there's any complaint of real noise, we'll be charging you for any customers' refunds we need to give. If there's any sickness you'll be charged'. You know if we have to throw the duvets away. All verbal I suppose and nothing they sign to. But on the same token we don't want to treat them like kids.' (Cardiff, Hotel)

4.5 Property businesses

In the property industry, the research included real estate and letting agencies as well as home improvement businesses. As these are very different, both in business model and attitude towards contract terms, these two types of businesses should be considered quite separately.

The sale and letting market was heavily regulated and contract terms tended to be very detailed and complex. For sales agents, contracts were about two pages long, but quite detailed and including standard terms which businesses considered to be imposed 'by law'. Terms had often been copied from larger businesses where an individual previously worked or perhaps bought the business from. It was claimed by some that key terms were explained to customers during the sales process, although others in the sector felt that customers (including landlords) were so focussed on getting the deal agreed that they did not listen to or read the terms. It was reported that the vast majority of queries or complaints related to commissions, deposits and exclusivity.

For real estate businesses, the fee paid upfront by consumers was described as covering out-of-pocket marketing costs and was therefore not considered as a deposit as such; this fee was invariably non-refundable. Withdrawal clauses appeared to be the most contentious for customers: whilst some agencies required two weeks or a month's notice for consumers to

withdraw a property from their portfolio, others were reported as charging a penalty for withdrawal.

You have a copy; I have a copy; everybody knows. Now, there are things within that that we don't impose. For example it says that, 'You must give 14 days' written notice if you want to withdraw.' I've never imposed that. If somebody's circumstances change and they want to withdraw, that's fine, they withdraw.' (Medium Real Estate, Belfast)

'A client that we sold for less than a year ago, he was on with another agent before he came to us and he brought in his terms of business. Essentially the agent wanted to charge him, I think it was something like £600 if he took the property off of the market.... It was almost a case of the amount would increase after a certain period of time. It was very odd and I thought it was so unfair that you would actually charge someone to take their house off when in most occasions it's because the agent has failed to successfully sell it. I don't think that's ethically right that you're penalising someone because of a job that you've failed to do. We simply ask for 28 days written notice. I think there are other agents out there who do charge and we certainly wouldn't go down that route.' (Small Real Estate, Glasgow)

Other important terms for real estate agencies related to the exclusivity of the contract and agents mentioned that this provision was the cause of most disputes, with customers tempted to approach buyers directly to avoid paying commission. Late payment penalties were also mentioned but these rarely caused an issue as the agency was often paid by the solicitor from the proceeds of the sale.

Letting agents were likely to charge a non-refundable deposit to confirm interest in the property. This was viewed as a necessity to take the property off the market, but was not always directly linked to costs incurred by the agent and might be considered as going beyond reasonable administration charges.

'I think generally we take £100 deposit. It might be a property that costs say £700 per month so I think in the overall scheme of things it's not a huge amount of money. I think if you gave deposits back, what would stop people almost putting deposits down and then choosing which one they wanted? The lettings market is so different; it's very fast where ten people could be out at a property and it's literally the first one that pays their deposit. So I think it would be unfair if someone took advantage of that and got their deposit back.' (Small Letting agent, Glasgow)

The home improvement sector appeared to be much less regulated and contract terms varied greatly depending on the business. Smaller businesses simply provided an invoice upon commission of the work, with at best a couple of key terms. At the smaller end of the scale, one-man bands such as individual plumbers might not even include any contract terms. On the other hand, one larger business had its own lawyer, brought in mainly for commercial contracts but also involved in drafting each and every consumer contract and meeting with customers to fully explain the terms. These terms included provisions on health & safety, materials to be used, timeframe and risks of delays as well as specific terms for some materials, depending on the third party supplier's terms.

'I think because a lot of the traditional builds, for example, if you were saying you had an extension on a house – you'd probably get a couple of guys come round; they'll give you a written quote and it will be quite vague – clear site of all waste materials, that sort of thing. Price includes material and labour. That's really the biggest description I've seen on somebody else's. I've seen other people's quotes and it's very basic – there's a date, the site address is standard and there's a figure at the bottom. Mine's a bit more detailed than that. I will give them a proper full schedule of works. So, I think they're probably a bit shocked at how much paperwork; they're probably daunted, as well, sometimes.'
(Large Home improvement, Birmingham)

For large home improvement SMEs, limitation of liability for delays was important. A deposit was also taken upfront to cover the cost of materials; this was likely to be non-refundable. Penalties for late payment were also common for the most sophisticated, although they were not always enforced in practice. One of companies guaranteed the work and asked customers to sign and confirm that they were happy at the end of the work.

4.6 Garages

Garages appeared to be a largely unregulated trade. None of the garages included in the research provided a written contract; the scope and price of the work was agreed verbally when the customer brought the vehicle in for repair. There were therefore no written contract terms.

The topic of the interview caused some confusion amongst garage owners: they typically reacted by talking about business registration documents or contracts they had to sign with commercial clients when asked about their own contract terms.

'I've had the terms and conditions a long time. I'm just thinking. I can't actually - the lawyer who was dealing with us actually did them. ... I can't even remember most of it. I haven't read them, you're kidding me, in about 20 years. Well, the first thing you do is go through the health and safety of the building, fire exits, etcetera, etcetera; terms and conditions of the usual working hours, etcetera, etcetera; just basic.' (Garage, Belfast)

All garages insisted that they always checked with customers and made them aware of the costs before working on the vehicle but that this was always a verbal agreement. In case of disputes, they would look to seek agreement and (said that they) would do additional repairs if in order to keep the customer happy. However, a couple of respondents mentioned that their ultimate sanction involved refusal to return the vehicle (clearly not legal). For MOT and specific areas of work (for example, changing brake discs), a certificate or guarantee was provided afterwards.

'We agree a figure with them. That's where the contract is with the customer at that stage. If there's additional work, we phone up and we get authority before anything's carried out. ... No. I've never been asked for my terms and conditions by any customers since I've been here.' (Garage, Cardiff)

5. SMEs' assessment of fairness and unfairness

Non-returnable consumer pre-payments and unfair cancellation clauses (consumer) appeared to be the main areas of risk for the small businesses included in the research. Right of final decision and limitation of liability were considered lower grade risks in the sectors of focus.

Limitation of Liability	Non-returnable consumer prepayments	Unilateral Variation	Unfair Cancellation Clauses (Trader)
Terms that waive responsibility for any damages that are the trader's fault	Terms that make a pre-payment absolutely non-refundable, whatever the circumstance	Terms that give the trader, but not the consumer, the right to change the contract after it has been agreed	Terms that allow the trader to cancel at will – for example without notice, or without the consumer being at fault
Unfair Cancellation Clauses (Consumer)	Lack of Prominence	Right of Final Decision	Lack of Transparency
Terms that restrict the consumer's right to cancel – for example, through excessive exit charges or lengthy notice periods	Terms a consumer should know about – for example, because they are unexpected – but are hidden away in the small print	Terms that allow the trader to decide how to interpret the contract	Terms that are not set out in a way that is clear and comprehensible to consumers

5.1 Non-returnable consumer prepayments

Definition: terms that make a pre-payment absolutely non-refundable, whatever the circumstance.

Example from the terms tested (full list available in the appendix): 'Please note that in the event of an unsatisfactory references or aborted transactions, there is no refund of the holding deposit.'

There were fairly mixed feelings on this type of contract term. Some thought that it was definitely unfair or illegal to keep a deposit, especially when the consumer was not at fault. However others, particularly in the property sales and lettings sectors, considered that this would be legal as a lot of work might have been done already. It was also felt that in a fast moving and competitive market consumers could take advantage and put multiple deposits down if they knew they would be able to get these returned. Some events companies also thought that it was acceptable to have non-returnable prepayments if the consumer cancelled – especially if planning had been done in advance or to cover for loss of revenue (and profit).

'It's not unreasonable, because you could have done a lot of work for a customer; you could have had some drawings done, fuel costs, site visits.' (Home improvement, Birmingham)

5.2 Unfair cancellation clauses (consumer)

Definition: terms that restrict the consumer's right to cancel – for example, through excessive exit charges or lengthy notice periods.

Example from the terms tested (full list available in the appendix): 'You may terminate this contract ... if you give us one month's written notice. We can terminate this contract at any time by giving you a minimum 7 days' written notice.'

All participants agreed that these terms were unfair and gave the trader the upper hand. Care homes and nurseries in particular were aware that they could not tie customers to a lengthy contract or require an excessive notice period.

These terms were also considered as unfair when a 12 months contract was associated with a notice period in excess of one month. Finally, businesses agreed that a contract would be unbalanced if the notice period was not the same for the company and the consumer.

'That's diabolical...It's not two-way, is it? You've got to give them one month but they can give you seven days. It's not balanced, is it?' (Short term hire, Leeds)

5.3 Limitation of liability

Definition: terms that waive responsibility for any damages that are the trader's fault.

Example from the terms tested (full list available in the appendix): 'The company ... will not accept liability for any of the following: a) pebble dashing, special rendering, or any decorative finishes or similar material, painting, decoration, woodwork or furniture, however caused, b) For any consequential loss or damage however caused'.

Overall most businesses thought that these terms were fair and likely legal. This might be explained by the fact that they examined these terms from the business point of view rather than from the perspective of a consumer, and therefore favoured terms that protected the business. As previously established, there is also a widely shared misconception that where consumer had signed a contract, this was legally binding, almost irrespective of its content. This myth asserts a strong hold when assessing contract terms on limitation of liability.

A minority of participants did not think that the examples shown were fair and were aware that they could not absolve themselves of responsibility via their contract terms.

'I don't agree with that. That, to me, is just basically saying, 'I've messed up, good luck to you', and I don't agree with that in principle.' (Garage, Belfast)

'These sorts of things are highly unlikely to happen but I get it. I don't have a problem with that.' (Property, London)

5.4 Unilateral variation

Definition: terms that give the trader, but not the consumer, the right to change the contract after it has been agreed.

Example from the terms tested (full list available in the appendix): 'We may at any time vary or add to these Conditions as it deems necessary'.

There was a strong level of agreement that these examples were unfair as they appeared highly unbalanced in favour of the business. The sentiment was that businesses could not change what had been agreed without informing the customer, and any changes should be confirmed with the customer in writing first. However, terms that allowed a business to vary a price were generally thought to be fair as long as sufficient notice was provided. A reasonable duration of a notice period was deemed to be about a month, and respondents felt that the amount of the increase needed to be clearly specified. There was little or no awareness that a change in price might involve releasing a customer from a contract.

'Yes (it's fair)...obviously you'd have to clarify what the current rate is. So actually if that was in a contract the current rate would have to be X amount per hour or per steward per day, whatever it may be.' (Events, Leeds)

5.5 Unfair cancellation clauses (trader)

Definition: terms that allow the trader to cancel at will - for example without notice, or without the consumer being at fault.

Example from the terms tested (full list available in the appendix): 'This Contract is not subject to cancellation by The Customer ... the Company reserves the right to cancel or refuse acceptance of any order at any time by refunding all monies paid less an administrative charge.'

On the whole these terms were thought to be unfair as they significantly favoured the business over the consumer. The majority of participants considered that if a business was able to cancel then the consumer should be able to do so as well, and that if a consumer had entered into an agreement, then the trader should not be able to cancel at will for no apparent reason.

The manager at one events company, however, thought that his business should retain the right to cancel in case of incidents such as storms, which mean that the event could not go ahead.

'Well, I think if the company has the right to cancel, then surely the customer can cancel as well.' (Online, Cardiff)

5.6 Lack of transparency / prominence

Definition: terms that are not set out in a way that is clear and comprehensible to consumers, or terms that consumers should know about but are hidden away in the small print.

Example from the terms tested (full list available in the appendix): 'The masculine includes the feminine gender and the singular shall include the plural and vice versa and a reference to a statutory provision will be interpreted as a reference to the provision as amended or re-enacted from time to time including any regulation or statutory instrument issued pursuant to such provision at any time.'

All the businesses included in the research considered these terms as unfair and would not agree to them or put them in their contracts. The acid test was felt to be whether they could understand what it meant themselves. Extremely wordy examples were seen as deliberately intended to confuse. Most participants claimed that their terms were very simple and easy to understand and that they had no provision similar to these in their contracts. Additional fees hidden in the contract terms were also considered as unfair.

'No (don't think it's allowed)... when you read through mine, mine's very simple because I don't know who I'm dealing with really ...So, no, I think it should be simple and straight to the point really.' (Events, London)

5.7 Right of final decision

Definition: terms that allow the trader to decide how to interpret the contract.

Example from the terms tested (full list available in the appendix): ‘Any dispute or difference which may arise in regard to the interpretation of the Rules shall be determined by the Management, whose decision shall be final.’

These examples were definitely understood to be unfair by all participants. In the event that a consumer was involved in a dispute, the trader should not be able to consider his interpretation or decision as the final one.

‘It’s judge, jury and executioner. No proper arbitration, is there?’ (Short term hire, Leeds)

5.8 Late payment penalties

Definition: terms that charge the consumer penalties/interest for late payments.

Example from the terms tested (full list available in the appendix): ‘[The tenant] ... will pay the rent to the landlord at the times and in the manner specified and will pay interest at the rate of £5 per day if the rent is in arrears for more than 14 days.’

Overall, most participants found these examples unfair. In some cases, businesses either had late payment penalties in their contract terms or thought that it would be legal for them to add such provision, but considered that the particular example tested (£5 per day) was excessive and likely had no relationship with any actual cost to the business.

Property sales and lettings agents appeared more likely to justify late payment penalties, provided that these were clear and the consumer was informed. Letting agents for instance often had similar provisions in their contract terms, although with lower penalties, in order to encourage tenants to make their payments on time.

‘I think that whilst we will have a provision in ours it won’t be something as harsh, it will be something that will get the message across that we don’t want them to be late but I think that’s probably quite penal to be honest with you.’ (Estate agents, Glasgow)

6. Legal Advisers' views on SMEs' contract terms

6.1 The decision to get legal advice is most often reactive rather than proactive

Legal advisers reported occasionally drafting contract terms for SMEs on start-up. Most often, this happened when they were in the process of advising the business during the start-up process. However solicitors claimed that interest in these services was rarely high: start-ups had to cover a lot of costs and contract terms were not high on their list of priorities; some did not even think that contract terms were needed.

Most often legal advisers became involved when there was a dispute or when something prompted the revision of existing contract terms. They reported that often the existing contract terms had been drafted by the business owners or copied from another business, perhaps one with a fairly high profile or established business model. They also mentioned that SMEs sometimes used contract term templates provided by some trade associations and the Federation of Small Businesses.

'The other thing is that we sometimes do presentations for clients and we'll say we will give you like a legal health check, look at your contracts and your terms, and then if we think anything needs updating or changing we'll advise you and agree a fee for doing that. I wish there was a bigger uptake. Usually people can't be bothered until it all goes wrong, and then you'll say, 'Well actually, these are awful terms.' 'Oh, we just took it off the internet' or, 'We took it from someone else.' 'But this is a totally different business, what are you doing?' Because people cut corners, they want to do it themselves.' (Legal Adviser, London)

In the event of dispute with a customer, legal advisers had in almost all cases advised their clients to settle rather than going to court. They considered that the court would invariably side with the consumer and mentioned the fact that small claims courts did not award costs for legal fees as a deterrent.

6.2 Legal Advisers' approach to reviewing / drafting SME's contract terms

Legal advisers considered that SMEs did not protect themselves enough and when they intervened, they often had to strengthen and add more details to contract terms. Sometimes businesses resisted these changes as they claimed that they would never enforce some of the

additional terms, in particular related to cancellations, and that they preferred building relationships with their customers based on trust.

'Another thing I remember doing in this case is I did suggest to the client that she might want to have a clause in it that allowed her to obtain money upfront if it's a big job but she didn't want to do that. So, the customer won't always go by my advice... I suppose most businesses, quite understandably, want to trust their customers and, unfortunately, when we, as lawyers, take on a case, we have to look at it from the worst case scenario, that it's not always a matter of trust.' (Legal Adviser, London)

Typically, terms added to the contract by legal advisers included:

- Limitation of liability for losses or damages in certain circumstances;
- Deposits;
- Cancellation charges;
- Interests for late payment.

However, on a few occasions, business owners had asked solicitors to add terms that the advisers found unfair, and they had needed to convince their clients that these terms would not be upheld in court. Terms that they resisted adding included:

- Excessive rates of interest for late payment. These were the most common examples of terms that solicitors had advised their clients against including, on the basis that the interest rate was unreasonable. One legal adviser mentioned suggesting offering a discount for early payment instead;
- Excessive limitations of liability;
- Terms that conflict with statutory regulations specific to the industry;
- Terms limiting returns for online businesses.

'I would say it happened very few times but I know one individual who was looking to ensure that every customer paid within a very short period of time. They wanted the option to sue them and add in what was in effect a penalty clause which would be totally illegal, no court would uphold it. So I had to say, 'Look, you have to be reasonable with your terms otherwise it's no point, the court will never enforce what you're looking to put in.' It does come down to the personality of the client sometimes. They can be quite A) ignorant of the law and B) a bit too demanding perhaps in terms of what their expectations are.' (Legal Adviser, Belfast)

Finally, transparency was mentioned as a key issue for legal advisers, who struggled on occasion to limit the legal jargon and to keep the language simple and terms succinct. In Scotland and

Northern Ireland they also had the additional challenge of making the terms more ‘local’ when these had originally been copied from English contracts.

6.3 Awareness and use of materials

Levels of awareness of the Consumer Rights Act amongst the legal advisers who took part in the research were very low, although one was scheduled to receive training on it soon. In Belfast, one solicitor doubted that the Act would apply to Northern Ireland considering the differences in legal framework.

Legal advisers were presented with the Grey List and Annex B and thought that some of the changes could impact on their clients. They anticipated having to review some of the terms they had previously drafted.

They found the 22 page long ‘Unfair contract terms explained’ Guidance useful and claimed to be likely to refer to it. When asked to consider the usefulness of the materials for their clients, they found the Short Guide appropriate but the longer Guidance too comprehensive and the Flowchart too complicated. They felt that the Flowchart would be of more use to an adviser than a small business owner.

The interviews conducted with the legal advisers allowed the authors to confirm that SMEs, in particular at the smaller end of the scale, needed to be educated and encouraged to review their contract terms.

‘We try and encourage people as well, we would have situations where we’re doing seminars or we’re doing email bulletins to people, every now and again one of the articles will say ‘check your terms and conditions of business’. We have articles on our website that would, some of them would touch upon that subject as well. Trying to educate people locally is the challenge because I would say, yes, 30%, 40% of your typical private sector businessmen will know yes, we should have this. But there are a lot of people, especially SMEs, the very, very small SMEs that don’t realise that this is a good idea.’ (Legal Adviser, Belfast)

7. Communications & Materials Test

7.1 How to get SMEs' attention?

The research found that messages that referenced contract terms as an 'insurance' for the business, mentioned the reputation of the business or highlighted changes to the law were most likely to resonate with businesses and make them act.

Example: 'Terms and conditions are your insurance policy...You should revise and change them if a complaint comes up where your current terms don't cover you.'

This particular message was felt likely to make businesses take action. The wording 'insurance policy' reminded businesses that they needed contract terms in the event of something going wrong, and that these needed to be robust and up to date in order to protect them. This message also resonated with the way that SMEs viewed their contract terms and talked about them.

'As soon as you mention insurance, no matter what you say insurance is serious, isn't it? Whether it's your car insurance, your house insurance...For that reason an insurance policy wording makes you realise ah, I'd better have a look at this. It sounds important.'

Example: 'As you may have seen on the news, the Consumer Rights Act came into force this month. This contains new safeguards for consumers which you should know about if you sell goods or services.'

Stating that new legislation had come into place recently alerted businesses to the need to take immediate action, or at least to find out more about the Consumer Rights Act. Equally, mentioning that this had been discussed in the national news media made some think that it was something they should know about.

'I think because it's actually stating The Consumer Rights Act so it makes you think oh, what's that then? Then it says this month, so you think oh, this month I need to actually do something about that now.'

'The law has changed, it's pricked my conscience with regards to what I need to do.'

7.2 Reactions to the fairness test

The language of 'fairness' was one that overall resonated with SMEs. However some small businesses were surprised by the concept of the fairness test and thought that as long as the customer had signed the contract this was legally binding, irrespective of whether it was fair or not.

'They've agreed to it. What more can you do? It's in black and white. I don't understand why fairness comes into it.'

In addition fairness appeared to be a grey area in the sense that its assessment was thought quite subjective. All the participants included in the research considered that they were being fair, even though their responses indicated that not all understood how the concept of fairness applied to contract terms.

'What's fair to one person could be unfair to somebody else... It depends on who the judge is at the time. Does he think it's fair or does he not?'

7.3 Materials test

7.3.1 The Short Guide

The Short Guide was praised by SMEs for its format. It was reckoned to be clear and concise, easy to read and written in plain English. It also covered the key points around fairness. None of the participants disagreed with the content of the document, with the only caveat that the footer indicating that the Guide does not constitute legal advice irritated a number of businesses. However the main danger was that businesses seemed to respond to the Short guide with a degree of complacency; they felt that they were already acting fairly, that their contract terms were fair and that consequently they had nothing to worry about and no action to take. A few participants also found it challenging to put themselves in the consumer's shoes, and tended to think about contract terms from the perspective of a business.

The authors observed a lot of nodding heads during the research but felt that a call to action was missing from the Short Guide.

7.3.2 The Flowchart

The Flowchart was considered to be just too confusing for an SME audience. Businesses found this very complex and were discouraged by the format. It also contained too many references to other documents such as the Grey list and to blacklisted terms. On the other hand, legal advisers found the document useful and would be much more likely to refer to it.

'Just make it clear and easy. Simple English. We're not MENSA here, you know what I mean? (Garage, Belfast)

7.3.3 Documents on advance payments and cancellation

The research confirmed that these two areas were the ones that the CMA should focus on, as they were the ones with the highest risks of unfairness. However feedback from SMEs clearly showed that the documents tested in the research were unsuitable for a non-specialist (legal) audience.

The language of the documents was found to be far too complex and opaque, and businesses criticised the documents for containing too much debate and too many sub clauses. They thought that the documents did not provide clarity over what was acceptable and what was not, and would have preferred examples to bring the subject to life.

'I think it's confusing and difficult to read.'

'It's a bit sort of backwards and forwards to me. It's not clear.'

7.3.4 Examples of videos on competition law

The examples shown of short videos designed to educate SMEs on competition law were very well received and confirmed that this format was highly appropriate for this type of audience, and was likely to capture their attention and interest.

'It makes you want to find out more and click on the links at the end.'

'It's about the right length. It's got me intrigued to look.'

7.3.5 Suggested content for the CMA microsite

During the research, SMEs offered some suggestions for the CMA microsite:

- a. It should follow a clear structure and present simple explanation with no legal jargon;

'Little information bubbles. What does this mean, and it tells you exactly what it is they're looking for or what it is this bit will help you with.'

- b. The information provided should be as sector-specific as possible;
- c. It should include a contract terms template(s) or tools to build their own;

'The key information you need. It gives you preferred wording so you could use that as a base to work with and populate from that.'

- d. Case studies or examples of contract terms that are not allowed should be provided;
- e. It should be interactive;
- f. Ideally, it should contain a chat box or a link to legal advice;
- g. It should aim to convey the impression that it is set up to help businesses, rather than protect consumers (against businesses);

'Make it feel like it's there to help the business rather than police it or be confrontational.'

- h. It should have a strong CMA identity.

8. Conclusions & Recommendations

8.1 Conclusions

Small businesses appeared to be focused on revenue generation and their priority was to keep customers happy rather than to enforce contract terms. For many, contract terms were therefore not top-of-mind. Contract terms often played the role of an insurance policy in case of a dispute with a customer, but were rarely reviewed. However the importance of contract terms varies considerably across sector and also depends on the size of the business. In larger businesses, in heavily regulated sectors such as property care homes or nurseries, or where cancellations have a strong impact on the business, for instance in subscription-based businesses or in the events industry, contract terms tended to be thought through more carefully. At the other end of the scale, written contract terms were found to be non-existent in garages, where everything was agreed orally.

The most risky areas for unfair contract terms appeared to be those related to non-returnable consumer prepayment and unfair cancellation clauses. Limitation of liability was also identified as a grey area which caused some confusion.

The CMA faces some challenges when engaging with SMEs. The authors observed a deeply-rooted belief that once customers have signed written contract terms, these were legally binding and enforceable (irrespective of fairness). Whilst the concept of the Fairness Test resonated, this was criticised for being a highly subjective approach. Although most businesses considered themselves as fair and reasonable, some struggled to put themselves in the consumer's shoes when faced with example unfair terms.

Legal advisers confirmed the importance of the CMA's task to educate SMEs and it became apparent that there was some demand from businesses themselves for some guidance. In this context, the CMA's communication strategy should focus on:

1. Getting SMEs' attention and prompting them to review their contract terms;
2. Providing information on what they can / what they should not include in their contracts.

8.2 Recommendations

As a result of this qualitative research amongst SMEs in 'higher risk' sectors, the authors recommend focussing SMEs' minds on recent changes in the law in order get across the message across that contract terms should be treated like an insurance policy aimed at protecting the business.

All communication materials should either remain simple (or be simplified) and clear, and avoid legal jargon. Examples that are analogous to the business experience were also found to be useful. In terms of format, videos were praised as a way to capture SMEs' attention.

However, it's important to get the balance right. The format and style of the Short Guide was received positively but this document failed to challenge any of the existing assumptions of businesses and lacked a clear call to action.

Whilst there is a strong demand for sector-specific information, in reality what SMEs require is information relevant to their type of business. Therefore rather than providing examples of contract terms for each sector, the CMA should focus on a smaller number of situational factors and perhaps tailor the information provided to the following categories:

- Businesses that receive a deposit from consumers;
- Businesses that involve cancellation charges;
- Businesses that involve a regular subscription for goods or services;
- Businesses that involve any risk to consumers, however small.

9. Appendix

9.1 Full methodological breakdown – depth interviews

		London & South East	Midlands (Birmingham)	North (Leeds)	Wales (Cardiff)	Scotland (Glasgow)	Northern Ireland (Belfast)
Short term hire (hotels, skip hire, marquees, suit hire)	Small				1	1	
	Medium		1	1			1
Subscription (nurseries, care homes, gyms)	Small		1				1
	Medium	2		1	1		
Property (sales & letting agents, home improvement)	Small					1	
	Medium	1	1				1
Events (wedding venues, party planners, tour guides)	Small	1	1	1			
	Medium	1	1				1
Online (online cabs, online retail)	Small	1			1		
	Medium	1		2			
Garages (MOT, service centres)	Small			1	1	1	1
Legal Advisers		2				1	1

9.2 Full methodological breakdown – workshops

		Manchester	Birmingham
Short term hire (car rental, furniture hire, bouncing castles)	Small		1
	Medium	1	1
Subscription (club, nursery, gym)	Small	1	1
	Medium	1	
Property (home improvement, property development, letting agency)	Small	1	2
	Medium	2	1
Events (weddings, venues, events furniture)	Small	2	1
	Medium		1
Online (online retail)	Small		
	Medium	2	

9.3 Recruitment screener for the depth interviews

This questionnaire is confidential and remains property of:



Kingsbourne House, 229 – 231 High Holborn, London WC1V 7DA

J22146 CMA SME FAIR TERMS AND CONDITIONS

Recruitment questionnaire - SMEs

RECRUITMENT QUOTAS

BUSINESS TYPE	Small businesses (10-49 employees) QS2 code 3	Medium businesses (50-249 employees) QS2 code 4
<ul style="list-style-type: none"> • Property: including a mix of businesses offering a one-off service (property developers, home improvements), and on-going contracts (tenancy, letting and estate agency, quick house sale providers, retirement / care homes, storage) - Priorities: home improvement, retirement / care-homes 	2	2
<ul style="list-style-type: none"> • Events: including wedding venues, entertainment, catering, funeral services - Priorities: wedding venues, entertainment (including adventure holidays) 	3	3
<ul style="list-style-type: none"> - Online only: online apps (such as online taxi) 	3	2

booking), online gambling etc. - Priorities: online apps (such as online taxi booking), online platforms for peer-to-peer accommodation sharing (if SME sized)		
- Subscription: businesses offering memberships such as clubs, sports clubs, gyms, courses etc. - Priorities: childcare, gyms	2	3
• Short term hire: including tailoring / suit hire, car hire, caravans / mobile homes etc. - Priorities: hotels & self-catering, caravans and mobile homes	3	3
• Garages: local independent service / MOT centre	2	2
	15	15

THE QUOTAS FOR SIZE OF BUSINESS PER SECTOR CAN BE FLEXIBLE IF A PARTICULAR SECTOR IS MORE SUITED TO SMALL OR MEDIUM BUSINESSES, AS LONG AS WE ACHIEVE 15 INTERVIEWS WITH SMALL BUSINESSES AND 15 WITH MEDIUM BUSINESSES OVERALL

Location	Small businesses (10-49 employees) QS2 code 3	Medium businesses (50-249 employees) QS2 code 4
London and South East	3	2
Midlands	2	3
North of England	3	2
Scotland	2	3
Wales	3	2
Northern Ireland	2	3
Total number of interviews	15	15

ENSURE A MIX OF BUSINESS TYPES ACROSS LOCATION – NO HARD QUOTA

INTRODUCTION

We are conducting a study to better understand small businesses and their customer relationships.

IF RESPONDENT ASKS FOR MORE INFORMATION: The objective of the research is to understand the challenges small businesses face in protecting the interests of the business whilst dealing with customers fairly.

Would you be willing to help us? This would involve a meeting with one of our interviewers lasting 1 hour. As a thank you for your participation, we are offering an incentive of £tbc.

We will be able to tell you who this study is for at the end of the interview. Please be assured that any feedback you give us will be treated as confidential in accordance with the Market Research Society Code of Conduct.

Firstly, we need to ask you a few questions to ensure that we speak to a cross-section of people.

QS1 Have you taken part in any research groups or discussions or any depth interviews for research in the past year? **EXPLAIN WHAT RESEARCH GROUPS OR DEPTH INTERVIEWS ARE IF/AS NECESSARY**

If so, how many? (PLEASE RECORD)

0 1 2 3 4 5 6 7 8 9+

CLOSE IF TWO OR MORE

QS2 How many people does your business employ full time?

Just myself	1	CLOSE
2 to 9	2	CLOSE
10 to 49.....	3	SMALL
50 to 250.....	4	MEDIUM
More than 250	5	CLOSE

CHECK QUOTAS FOR SMALL AND MEDIUM BUSINESSES

QS3 Can I just check, does your business sell mainly to consumers or mainly to businesses

- Mainly to consumers 1 **CONTINUE**
- Mainly to businesses 2 **CLOSE**
- Even mix of both..... 3 **CLOSE**

QS4a Of the following, what best describes what your business does?

- Property (home improvement, retirement / care homes) 1
- Events (wedding venue, entertainment, adventure holidays) 2
- Online apps (taxi booking, gambling, peer to peer accommodation) 3
- Gyms, sports clubs, health clubs 4
- Childcare 5
- Hotels and self-catering, caravans /mobile homes 6
- Garages (independent, MOT centers)..... 7
- Real Estate, Renting and Business Activities 8
- Retail / Wholesale 9 **CLOSE**
- Manufacturing 10 **CLOSE**
- Restaurants..... 11 **CLOSE**
- Agriculture..... 12 **CLOSE**
- Other (WRITE IN) - check with BDRC _____ 13

**CHECK QUOTA GRID ON FRONT OF SCREENER
PRIORITISE CATEGORIES IN RED (FIRST)
IF OTHER: ASK QS4B AND CHECK WITH BDRC**

QS4b Please describe what the business does in more detail

Capture in box below

COLLECT DETAILS ABOUT THE ACTIVITY OF THE BUSINESS FOR THE PROFILE SHEET



QS5 Which of the following describe your role in the business? **CODE ALL APPLICABLE**

1. You have overall responsibility for customer services within the business
2. You have overall responsibility for resolving customer complaints and queries about terms of business.
3. You have overall responsibility for deciding and communicating terms of business
4. All customer services, complaints and terms of business are decided elsewhere or are not your responsibility

IF CODED 4 ONLY – THANK AND CLOSE

MUST CODE 3 AND EITHER 1, 2 OR BOTH TO CONTINUE.

IF NOT CODED 3 AND EITHER 1, 2 OR BOTH: We are looking to talk to people who are responsible for customer services, customer complaints and terms of business. Would it be possible to talk to someone in your company who meets that description?

QS6 What is your job title? **Capture in box below**

IF NOT SENIOR ENOUGH (i.e. junior manager / office manager) ASK TO SPEAK TO THE OPERATIONS MANAGER, CUSTOMER SERVICES MANAGER OR A DIRECTOR/OWNER OF THE BUSINESS (PARTICULARLY FOR SMALL SME'S)

QS7 How much direct contact do you have with customers?

- A lot of contact 1
- A little bit of contact 2
- No contact at all 3



NO HARD QUOTA BUT ENSURE MOST HAVE AT LEAST SOME CONTACT

IF ELIGIBLE:

I'd like to arrange for one of our executives to come out to talk to you face to face about your business and the challenges that you face in complying with rules and regulations. The interview would last about 1 hour and we would pay you **£tbc** for your participation.

WORKSHOPS

I'd like to invite you to take part in a group discussion with other businessmen like yourself. The discussion would last 2.5hrs and we would pay you **£tbc** for your participation.

COMPLETE CONTACT DETAILS BELOW:

**COMPLETE RESPONDENT DETAILS IN CLEAR CAPITALS,
INCLUDING STD TELEPHONE CODE**

NAME: _____

ADDRESS: _____

TEL NO: _____

EMAIL: _____

APPOINTMENT DATE & TIME: _____

NOTES / SPECIFIC TRAVEL INSTRUCTIONS:



IF DEPTH: ENSURE TAKE AND CHECK FULL ADDRESS WITH POSTCODE AND ANY TRAVEL INSTRUCTIONS. PLEASE CONFIRM INTERVIEW IS TO BE CONDUCTED AT ABOVE ADDRESS.

NOW GO BACK AND CHECK THE QUESTIONNAIRE BEFORE SIGNING THE DECLARATION.

RECRUITER'S DECLARATION: I certify that this interview was conducted with a person previously unknown to me, that this interview was conducted according to the provisions of the MARKET RESEARCH SOCIETY'S 'CODE OF CONDUCT' and the briefing instructions from BDRC/PRS, and this has been checked.

RECRUITER'S NAME & SIGNATURE: _____

DATE: _____

9.4 Discussion guide for the depth interviews

22146 CMA SMEs & Unfair Contract Terms 1v1 Depths Discussion Guide

INTRODUCTION (2m)

- Moderator to explain the purpose of interview; the identity of the client will be revealed at the end of the interview.
- There are no right or wrong answers, we are interested in their honest views and experiences, everything will be kept confidential and cannot be used to incriminate them.
- Seek permission to record for an accurate summary of what is discussed.

CONTEXT: THE BUSINESS & ITS CUSTOMERS (10 min)

Capture details of:

- The business – sector, scale, stage of development, geographical focus etc.
- The respondent – experience, role in the business, background etc.
Confirm that the respondent is responsible for customer services, customer complaints and/or terms of business within his business- if not responsible for any of these areas, close and replace the interview.

Customers

- What interaction do they personally have with customers?
- Who are the customers of the business? What is a typical customer like? Are there different typologies / customer segments with different characteristics / needs?
 - Are they sophisticated or not? Demanding?
 - How large is their customer base?
 - Do they have repeat customers? – i.e. do they rely on repeat business and recommendation /or not? If yes, how frequently do they see them?
 - How do they communicate with customers?

AWARENESS OF LEGAL REQUIREMENTS (5 min)

- What are the business' legal obligations with respect to dealing with customers?
 - What requirements are they aware of?

- What are the priority areas? Why?
- How do they ensure they comply with the law?
- Who is involved in ensuring the law is complied with? Which staff?
- Do they get help from any advisers / trade associations etc.? What kind of help?

AWARENESS OF CONTRACT TERMS (10 min)

- Are they aware of any legal requirements related to contract terms? Capture top-of-mind awareness and understanding.
- What do they think is allowed and not allowed in contract terms? Is there anything that is unclear to them?
- What are the terms and conditions that apply to their contracts and transactions with customers?
 - Do they remember them? – are they able to summarise the key points – or not?
 - Do they understand them? Can they explain how they work in practice?
 - How would they deal with any queries about them?
 - When were these drafted?
 - Have they at all been reviewed? If yes, when were they last reviewed?
- In what form do their terms and conditions exist – i.e. online / on paper / on the wall etc.

WHERE POSSIBLE, ASK TO VIEW CONTRACT TERMS

ASK ALL

- Who was involved in drafting these terms? How was it done? What were the principles used?
 - Did they get a solicitor to draw these up – or are they ‘copy and paste’? From whom - a larger supplier / similar business?
 - Was it ‘box ticking’? (*They knew they needed to have something*)
 - Or were there specific aims? If so, what were these?
- Broadly, what do they see as the main purposes of having contract terms?
 - **PROBE ON ANY REFERENCES TO:**
 - Protecting the business from loss / against customer complaints?
 - Having a legally enforceable document in place?
 - Ensuring staff know the rights of the customer?
 - Ensuring customers know their rights?
 - Making it easier to deal with complaints?
 - What is the main / key reason – from their perspective?

- What is the role of contract terms in the sales process?
 - Are they shown to customers / customers asked to sign they've seen and read them?
 - Do they talk customers through them?
 - Are they explained to customers / or key points explained?
 - Do customers need to read them? Why?
 - Is there a 'short' version for customers – what does this look like? Does it summarise key terms?
 - Do customers ever question elements of the contract terms? Which bits? What is their response?
- What, if any, training takes place to ensure that customer facing staff understand the contract terms?
- What happens when / if customers ask questions about contract terms?
 - What are the common questions asked? How are these responded to? *Ask for specific examples*
- How often are contract terms reviewed and / or amended? Who does this?

CUSTOMER COMPLAINTS (10 min)

- What are the main challenges they face in dealing with customers?
 - What, if anything, do customers complain about?
 - How do they deal with these complaints? **PROBE** for specific examples
- What sort of customer complaints do they get?
 - What do they relate to? (i.e. cancellations, changes made to original agreement etc.)
 - How frequently do they receive customer complaints?
 - How serious are they?
- When a customer complains, what is the role of the contract terms?
 - Are they used to resolve complaints / fob customers off? How?
 - Is there a complaints process – if the customer is not happy with the first response? What is this?
 - Do customers ever complain that contract terms are
 - Unfair?
 - Too complicated / they didn't understand them?
 - Have they received complaints about any of the following:
 - Cancellation

- Variation (price or contract)
 - Limiting liability
 - Auto-rollover
- If they have experience of a customer challenging contract terms:
 - When? What happened? *Capture the story in full.*
 - What was their response? - *i.e. is it, 'sorry / tough, but you should have read / understood!'*
 - Who within the business is involved in deciding which action to take
 - If they have not had any complain relating to contract terms: If a customer did challenge their contract terms, perhaps threatening to take legal action or contacting them via a solicitor, what would they do? Who would they go to for advice? Why?

TESTING KNOWLEDGE / UNDERSTANDING OF CONTRACT TERMS REGULATIONS (10 min)

- Why do they think there is a legal requirement to have contract terms in place?
- Are there contract terms that would be illegal under any circumstances? Ask for practical examples, if possible in their sector.
- What do they think would be illegal / unfair for their business to include in terms and conditions? Why?
- Have they seen any contract terms of other businesses in their sector that they would consider illegal / unfair?

SHOW STIMULUS: EXAMPLES OF DIFFERENT CONTRACT TERMS

- Do any of these look similar to terms that they might have in their own contracts? Or that they have seen terms like these in other businesses' contracts in their sector?
- Which ones do they think would protect their business best? *Refer to the reasons for having contract terms mentioned earlier.*
- Capture spontaneous reactions: do they seem right? Or could any of these be considered unfair / illegal? Which ones and why?
- Would they change the wording of any of these?

SHOW THE DEFINITION OF FAIRNESS

To determine whether a contract terms is legal or not, the law establishes a 'fairness test'.

'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.'

- If they apply this test to the contract terms shown, which ones (if any) would pass and which ones (if any) would fail the test? Why?
- Were they aware that:
 - If any aspect of contract terms is deemed to be balanced in favour of the business rather than the customer it would be classed as unfair / invalid?
 - If contract terms are not transparent and unclear – the law sides with the most favourable interpretation for the consumer ?
 - A business cannot rely on contract terms to protect itself against customer complaints / legal action if any terms are adjudged to be unfair? – *Therefore, there is no point in including anything within contract terms that would not be classed as fair in a court of law...*
- What is their reaction to this?
 - Are they surprised at all? By what?
 - Were they aware of any of the limitations of including anything within their contract terms that might be adjudged to be unfair?

MATERIALS TEST (10min)

- What, if anything, do they know about the regulations on contract law and how these are enforced / who enforces them?
- Have they heard of the Consumer Rights Act 2015? If yes, what do they know about it? How does it affect their business?

Reveal that the research is for the CMA.

- Do they know what the CMA is? What is its role?
- Have they ever come across the CMA website or its information and guidance materials before?
 - If yes: what do they remember from it? What did they think about it?

Show the short guide – ‘what do businesses need to know?’

- What is their first impression?
- Does it seem relevant to them?
- What do they think of the format?
- Would they be interested in reading it? Is it too long / too short?
- Would they only use it for their own information or as a training material for other staff members? Who?
- To what extent would it help them to comply with contract law?
- Would reading it prompt them to do anything? *I.e. looking for further information / reviewing their contract terms etc.*

Show the flow chart – ‘what do businesses need to know?’(if time allows)

Explain briefly that the blacklist refers to terms that are prohibited at all times, whereas terms included in the grey list are likely to be considered unfair, but not necessarily.

- What is their first impression?
- What do they think of the format?
- Is this helpful? What could make it more helpful?
- How would they use the flowchart?
- To what extent would it help them to comply with contract law?
- Would reading it prompt them to do anything? *I.e. looking for further information / reviewing their contract terms etc.*

CONCLUSIONS (3min)

Overall what do they think of the CMA materials?

Is anything missing?

Do they get their attention / raise their interest?

Do these information materials help them to better understand the regulations on contract terms?

Did reading all of this change their perception of how compliant their business / other businesses in your industry are?

If there is one piece of advice you could give the people for whom we are doing this research which would help businesses like yours better understand and comply with contract law what would it be?

9.5 Recruitment screener for legal advisers

This questionnaire is confidential and remains property of:



Kingsbourne House, 229 – 231 High Holborn, London WC1V 7DA

J22146 CMA SME FAIR TERMS AND CONDITIONS

Recruitment questionnaire – Legal advisers

RECRUITMENT QUOTAS

- **London: 2 interviews**
- **Scotland: 1 interview**
- **Northern Ireland: 1 interview**

INTRODUCTION

We are conducting a study to better understand how small businesses comply with contract law and would like to speak to a few solicitors who provide legal advice to small and medium businesses.

IF RESPONDENT ASKS FOR MORE INFORMATION: The research is conducted on behalf of the Competition and Markets Authority in view of the entry into force of the Consumer Rights Act 2015.

Would you be willing to help us? This would involve a meeting with one of our interviewers lasting 1 hour. As a thank you for your participation, we are offering an incentive of £100.

We will be able to tell you who this study is for at the end of the interview. Please be assured that any feedback you give us will be treated as confidential in accordance with the Market Research Society Code of Conduct.

Firstly, we need to ask you a few questions to ensure that we speak to a cross-section of people.

QS1 Have you taken part in any research groups or discussions or any depth interviews for research in the past year? **EXPLAIN WHAT RESEARCH GROUPS OR DEPTH INTERVIEWS ARE IF/AS NECESSARY**

If so, how many? (PLEASE RECORD)

0 1 2 3 4 5 6 7 8 9+

CLOSE IF TWO OR MORE

QS2 Can I just check that you are a qualified solicitor?

Yes 1
No 2 **CLOSE**



QS3 Which area(s) of law do you personally practice?

(If the respondent works in a large firm, only capture the areas of law he personally provides legal advice on)

Administrative & public law	1
Crime	2
Employment	3
Family	4
Housing.....	5
Environment.....	6
Immigration	7
Intellectual property	8
Contracts	9
Banking and finance	10
Civil liberties & human rights.....	11
Clinical negligence.....	12
Commercial property / real estate.....	13
Competition & EU law	14
Personal injury	15
Other (WRITE IN).....	16

CONTINUE

ONLY CONTINUE IF CODE 9 – IF FIRM DEALS WITH CONTRACT LAW BUT NOT RESPONDENT, ASK FOR REFERRAL.

QS4 Do you provide any legal advice to businesses on contract terms and conditions?

Yes	1
No	2

ALL TO CODE 1

QS5 Roughly, which type of businesses do you regularly advise?

Small and medium businesses	1
Large businesses	2
Multinational companies	3



ALL TO CODE 1

QS6 In which sectors do the businesses you regularly advise work?

Property (home improvement, retirement / care homes)	1
Events (wedding venue, entertainment, adventure holidays)	2
Online apps (taxi booking, gambling, peer to peer accommodation)	3
Gyms, sports clubs, health clubs	4
Childcare	5
Hotels and self-catering, caravans /mobile homes	6
Garages (independent, MOT centers).....	7
Real Estate, Renting and Business Activities	8
Retail / Wholesale	9
Manufacturing	10
Restaurants.....	11
Agriculture.....	12
Other (WRITE IN) - _____	13

AIM FOR ALL TO CODE ONE OF 1-8

IF ELIGIBLE:

I'd like to arrange for one of our executives to come out to talk to you face to face about your business and the challenges that you face in complying with rules and regulations. The interview would last about 1 hour and we would pay you **£100** for your participation.



COMPLETE CONTACT DETAILS BELOW:

COMPLETE RESPONDENT DETAILS IN CLEAR CAPITALS,
INCLUDING STD TELEPHONE CODE

NAME: _____

ADDRESS: _____

TEL NO: _____

EMAIL: _____

APPOINTMENT DATE & TIME: _____

NOTES / SPECIFIC TRAVEL INSTRUCTIONS:

IF DEPTH: ENSURE TAKE AND CHECK FULL ADDRESS WITH POSTCODE AND ANY TRAVEL INSTRUCTIONS. PLEASE CONFIRM INTERVIEW IS TO BE CONDUCTED AT ABOVE ADDRESS.

NOW GO BACK AND CHECK THE QUESTIONNAIRE BEFORE SIGNING THE
DECLARATION.

RECRUITER'S DECLARATION: I certify that this interview was conducted with a person previously unknown to me, that this interview was conducted according to the provisions of the MARKET RESEARCH SOCIETY'S 'CODE OF CONDUCT' and the briefing instructions from BDRC/PRS, and this has been checked.

RECRUITER'S NAME & SIGNATURE: _____

DATE: _____



9.6 Discussion guide for the legal advisers

22146 CMA SMEs & Unfair Contract Terms

Adviser Discussion Guide

INTRODUCTION (2m)

- Moderator to explain the purpose of interview; understand how advisers interact with small businesses with regard to contract terms
- There are no right or wrong answers, we are interested in their honest views and experiences, everything will be kept confidential and cannot be used to incriminate their clients.
- Seek permission to record for an accurate summary of what is discussed.

CONTEXT: THE FIRM & ITS CUSTOMERS (5 min)

Capture details of:

- The business – size, areas of specialisation, how advising on contract terms fits into the overall business mix
 - E.g. is it a separate service / part of an overall service offering to smaller businesses?
- The respondent – experience, areas of focus
- Do you/ the firm have experience of:
 - Helping smaller businesses to draft contract terms?
 - Helping smaller businesses when their contract terms are challenged by a consumer?
 - Helping consumers where they feel that they have been unfairly treated by a smaller business?

HELPING SMALL BUSINESSES TO DRAFT CONTRACT TERMS (15min)

- What sorts of businesses come to you for advice in regard to their contract terms / terms and conditions?
 - Are there any sectors / types of business that have a particular need for this? Why?
- When do they come to you for advice? What prompts them to seek advice? *I.e. is it because of an issue or complaint they've received? Is it at start-up phase / pre-expansion?*
- To what extent are small businesses aware of their obligations with regard to contract law?
- In particular thinking about smaller businesses that sell to consumers (rather than B2B), at what stage might a business seek advice on their contract terms?
 - Would it be from day one / once they reach a certain size / when they first have an issue or complaint?
- Who, typically, would be the client? The owner / a director / other staff?
- What kind of advice are clients looking for? What are they hoping to achieve?
 - Protecting the business from loss / against customer complaints?
 - Having a legally enforceable document in place?

- Ensuring staff know the rights of the customer?
- Ensuring customers know their rights?
- Making it easier to deal with complaints?
- Being above board / doing the right thing?
- What is the role of the client when putting together contract terms?
 - How are their needs discussed / elicited?
- To what extent do clients ask for something inexpensive / off the shelf / cut and paste? How do they respond to these requests?
- When businesses come to you for advice, do they sometimes already have something in place that they have sourced elsewhere (i.e. copy and paste)?
 - What kind of issues arise from this / copied terms or DIY terms?
 - How do you help them in this regard?
- What, if anything, do clients misunderstand about the role of contract terms? Why? How do you help them?
- After putting together contract terms for smaller businesses do you:
 - Advise them on the meaning / interpretation?
 - Advise them on how to train staff / deal with complaints?
 - *i.e. do they offer these services or not? Are clients prepared to pay for this?*
- In what situations do clients ask to include terms that you would advise against on the grounds that they are unfair to consumers? – ask for specific (anonymous) examples
 - Why do they ask for these terms?
- What might be a typical cost to a small business for having contract terms drawn up professionally? Do you get push back on costs / clients preferring to continue to DIY or cut and paste rather than pay this?
- How often are contract terms reviewed for clients? Do they remind clients to review terms? Why? How?

CHANGES TO CONTRACT LAW (10min)

- Where do you, as an adviser/ a firm, get information and advice on whether contract terms might be unfair or not?
 - i.e. Law Society/SRA / CMA / other?
 - How clear do you find the current law / the current guidance? What could be better or clearer?
- How is contract law changing / likely to change in the near future?
 - Probe on awareness of new contract law changes coming into force in October
- What is your understanding of the key changes?
- SHOW GREY LIST AND ANNEX B
 - Have they seen this already?
 - To what extent is the law / guidance becoming clearer or less clear (with the changes coming into force)?
- What, if any, additional challenges do these changes present you/your firm with as an adviser?
- How will this affect your business / the ways in which you advise on contract law?
 - Will you need to review contract terms for existing clients?
 - Do you plan to contact clients to make them aware of the changes in the law / suggest a review of their contract terms? Why? Why not?
- What changes, if any, will need to be made to existing contracts?

HELPING BUSINESSES WHERE CONTRACT TERMS ARE CHALLENGED (10min)

- Do you / the firm have any experience of helping businesses where their contract terms have been challenged legally?
 - Ask for specific examples
- What typically happens?
 - e.g. do businesses receive a solicitor's letter and then get in touch with them for help? What kind of help?
 - i.e. at this point are they simply wanting a solicitor's letter response saying, 'it's in our terms and conditions; tough!'
- To what extent are businesses clear about the role of contract terms and their legality in these circumstances?
 - i.e. do businesses assume that if it's in the contract and the customer has seen it / has a copy, then they can't challenge it?
- Where / what circumstances do you advise businesses to settle (contract terms are unfair / wrong) and when might you advise them to challenge the customer?
 - Do businesses change their contract terms as a result of this kind of thing?
 - To what extent are incidents like this a 'wake-up call' for businesses?

ADVISING CONSUMERS ON UNFAIR CONTRACT TERMS

- Do you/ the firm ever advise consumers wanting to challenge contract terms?
 - Ask for specific examples?
- What action would take place if you decided to challenge contract terms? What would happen next?

MATERIALS TEST (15min)

- What, if any, contact do you have with the CMA or its predecessor the OFT?
- Have you ever looked at the CMA website or its information and guidance materials on contract law before?
 - If yes: what do they remember from it? What did they think about it?

Show the short guide – 'what do businesses need to know?'

- What is their first impression?
- What do they think of the format?
- Would this work for their small business clients? Is it too long / too short?
 - To what extent might it help them to comply with contract law?

Show the flow chart – 'what do businesses need to know?'

- What is their first impression?
- What do they think of the format?
- Is this helpful? What could make it more helpful?
- To what extent would it help them to advise on contract law?

- How would they use the flowchart? Would they use it when advising their clients or would they refer their clients to it?

Show the 'Unfair terms explained' guide

- What are your impressions?
- What do they think of the format?
- Is this helpful? What could make it more helpful?
- Which of these examples seem relevant to them?
- How useful is this:
 - To them / their firm? Why?
 - To their clients?
 - Would they use it to explain to their clients why a particular contract term could be unfair?
- The CMA also published a Guidance on Unfair terms which is about 100 pages long.
 - How likely would they be to read it?
 - When, if at all, would they be likely to refer to it?
- Is there anything else that the CMA could do to help them advise their clients on contract terms?
 - And to explain to their clients why a particular contract term might be unfair?

CONCLUSIONS (3min)

Overall what do they think of the CMA materials?

Is anything missing?

What (else) would help them / their clients to be better aware of unfair contract terms?

9.7 Recruitment screener for the workshops

This questionnaire is confidential and remains property of:



Kingsbourne House, 229 – 231 High Holborn, London WC1V 7DA

J22146 CMA SME FAIR TERMS AND CONDITIONS

Recruitment questionnaire - SMEs

10 RESPONDENTS PER WORKSHOP – OVERCRUIT BY 1

Workshop 1: Manchester – Thursday 8th of October – 6.30pm – 9pm

Workshop 2: Birmingham – Tuesday 13th of October – 6.30pm – 9pm

RECRUITMENT QUOTAS PER WORKSHOP

BUSINESS TYPE	Small businesses (10-49 employees) QS2 code 3	Medium businesses (50-249 employees) QS2 code 4
<ul style="list-style-type: none"> • Property: including a mix of businesses offering a one-off service (property developers, home improvements), and on-going contracts (tenancy, letting and estate agency, quick house sale providers, retirement / care homes, storage) - Priorities: home improvement, retirement / care-homes 	<p>ENSURE:</p> <ul style="list-style-type: none"> - TO REPRESENT EACH SECTOR: AT LEAST ONE RESPONDENT, MAX 3 RESPONDENTS PER SECTOR - PRIORITISE AREAS IN RED - IF MORE THAN ONE BUSINESS PER SECTOR, MAKE SURE THEY ARE DIFFERENT TYPES OF BUSINESSES (I.E. IN DIFFERENT AREAS LISTED) - TRY TO GET A MIX OF SMALL AND MEDIUM BUSINESSES FOR EACH SECTOR (IDEALLY ONE OF EACH) - 5 SMALL AND 5 MEDIUM BUSINESSES OVERALL PER WORKSHOP 	
<ul style="list-style-type: none"> • Events: including wedding venues, entertainment, catering, funeral services - Priorities: wedding venues, entertainment (including adventure holidays) 		
<ul style="list-style-type: none"> - Online only: online apps (such as online taxi booking), online gambling etc. - Priorities: online apps (such as online taxi booking), online platforms for peer-to-peer accommodation sharing (if SME sized) 		
<ul style="list-style-type: none"> - Subscription: businesses offering memberships such as clubs, sports clubs, gyms, courses etc. - Priorities: childcare, gyms 		
<ul style="list-style-type: none"> • Short term hire: including tailoring / suit hire, car hire, caravans / mobile homes etc. - Priorities: hotels & self-catering, caravans and mobile homes 		
<ul style="list-style-type: none"> • Garages: local independent service / MOT centre 		
	5	5

INTRODUCTION

We are conducting a study to better understand small businesses and their customer relationships.

IF RESPONDENT ASKS FOR MORE INFORMATION: The objective of the research is to understand the challenges small businesses face in protecting the interests of the business whilst dealing with customers fairly.

Would you be willing to help us? This would involve a group discussion with other businessmen like yourself, lasting 2.5 hrs. As a thank you for your participation, we are offering an incentive of £125.

We will be able to tell you who this study is for at the end of the interview. Please be assured that any feedback you give us will be treated as confidential in accordance with the Market Research Society Code of Conduct.

Firstly, we need to ask you a few questions to ensure that we speak to a cross-section of people.

QS1 Have you taken part in any research groups or discussions or any depth interviews for research in the past year? **EXPLAIN WHAT RESEARCH GROUPS OR DEPTH INTERVIEWS ARE IF/AS NECESSARY**

If so, how many? (PLEASE RECORD)

0 1 2 3 4 5 6 7 8 9+

CLOSE IF TWO OR MORE

QS2 How many people does your business employ full time?

Just myself	1	CLOSE
2 to 9	2	CLOSE
10 to 49.....	3	SMALL
50 to 250.....	4	MEDIUM
More than 250	5	CLOSE

CHECK QUOTAS FOR SMALL AND MEDIUM BUSINESSES



QS3 Can I just check, does your business sell mainly to consumers or mainly to businesses

- Mainly to consumers 1 **CONTINUE**
- Mainly to businesses 2 **CLOSE**
- Even mix of both..... 3 **CLOSE**

QS4a Of the following, what best describes what your business does?

- Property (home improvement, retirement / care homes) 1
- Events (wedding venue, entertainment, adventure holidays) 2
- Online apps (taxi booking, gambling, peer to peer accommodation) 3
- Gyms, sports clubs, health clubs 4
- Childcare 5
- Hotels and self-catering, caravans /mobile homes 6
- Garages (independent, MOT centers)..... 7
- Real Estate, Renting and Business Activities 8
- Retail / Wholesale 9 **CLOSE**
- Manufacturing 10 **CLOSE**
- Restaurants..... 11 **CLOSE**
- Agriculture..... 12 **CLOSE**
- Other (WRITE IN) - check with BDRC _____ 13

**CHECK QUOTA GRID ON FRONT OF SCREENER
PRIORITISE CATEGORIES IN RED (FIRST)
IF OTHER: ASK QS4B AND CHECK WITH BDRC**

QS4b Please describe what the business does in more detail

Capture in box below

COLLECT DETAILS ABOUT THE ACTIVITY OF THE BUSINESS FOR THE PROFILE SHEET



QS5 Which of the following describe your role in the business? **CODE ALL APPLICABLE**

5. You have overall responsibility for customer services within the business
6. You have overall responsibility for resolving customer complaints and queries about terms of business.
7. You have overall responsibility for deciding and communicating terms of business
8. All customer services, complaints and terms of business are decided elsewhere or are not your responsibility

IF CODED 4 ONLY – THANK AND CLOSE

MUST CODE 3 AND EITHER 1, 2 OR BOTH TO CONTINUE.

IF NOT CODED 3 AND EITHER 1, 2 OR BOTH: We are looking to talk to people who are responsible for customer services, customer complaints and terms of business. Would it be possible to talk to someone in your company who meets that description?

QS6 What is your job title? **Capture in box below**

IF NOT SENIOR ENOUGH (i.e. junior manager / office manager) ASK TO SPEAK TO THE OPERATIONS MANAGER, CUSTOMER SERVICES MANAGER OR A DIRECTOR/OWNER OF THE BUSINESS (PARTICULARLY FOR SMALL SME'S)

QS7 How much direct contact do you have with customers?

- A lot of contact 1
- A little bit of contact 2
- No contact at all 3

NO HARD QUOTA BUT ENSURE MOST HAVE AT LEAST SOME CONTACT

IF ELIGIBLE:

I'd like to invite you to take part in a group discussion with other businessmen like yourself. The discussion would last 2.5hrs and we would pay you **£125** for your participation.



COMPLETE CONTACT DETAILS BELOW:

**COMPLETE RESPONDENT DETAILS IN CLEAR CAPITALS,
INCLUDING STD TELEPHONE CODE**

NAME: _____

ADDRESS: _____

TEL NO: _____

EMAIL: _____

APPOINTMENT DATE & TIME: _____

NOTES / SPECIFIC TRAVEL INSTRUCTIONS:

IF DEPTH: ENSURE TAKE AND CHECK FULL ADDRESS WITH POSTCODE AND ANY TRAVEL INSTRUCTIONS. PLEASE CONFIRM INTERVIEW IS TO BE CONDUCTED AT ABOVE ADDRESS.

**NOW GO BACK AND CHECK THE QUESTIONNAIRE BEFORE SIGNING THE
DECLARATION.**

RECRUITER'S DECLARATION: I certify that this interview was conducted with a person previously unknown to me, that this interview was conducted according to the provisions of the MARKET RESEARCH SOCIETY'S 'CODE OF CONDUCT' and the briefing instructions from BDR/PRS, and this has been checked.

RECRUITER'S NAME & SIGNATURE: _____

DATE: _____



9.8 Discussion guide for the workshops

22146 CMA SMEs & Unfair contract terms Workshops Discussion Guide - Birmingham

As respondents arrive, hand out quiz for them to complete and refer to at end of discussion.

INTRODUCTION (15m)

- Moderators to introduce themselves and the clients and explain the purpose of the group discussion
- Clients to be introduced as from the Competition and Markets Authority - The CMA's role is to ensure that markets work well (and productively) for the good of consumers and businesses, across all types of industry sector.
- There are no right or wrong answers, we are interested in their honest views and experiences, everything will be kept confidential and cannot be used to incriminate them.
- Explain that the discussion will be audio / video recorded.
- Get respondents to introduce themselves: name / job role / brief description of their business and sector in which it operates / what kind of customers they have

WARM-UP (10 min) – *whole group*

Moderator spreads across the table the **Visual Explorer images** and ask each respondent to choose 1-2 images that represent their thoughts on the role of terms and conditions. Explore reasons for choosing this particular image.

CONSUMER VS BUSINESS RE-ENACTMENT (30 min) – *in pairs*

Moderator assigns respondents in pairs, across different sector. One respondent plays a consumer and the other one his business. The consumer is interested in purchasing and the business has to explain to him/her the terms and conditions.

- Would they be happy agreeing to all of the T&Cs?
- Would they disagree to any of the terms?

Swap.

Once finished, discuss as a whole group:

- What if anything would they disagree to? Why?
 - If so, how would they describe these terms?
 - Could they be re-phrased to feel as if they are fairer / more acceptable?
 - Do they think that all of these terms would be legal? Why / why not?

- Have they encountered any other examples of terms that they find unfair / questionable:
 - As businesses (competitors / suppliers etc.)?
 - As a consumer?

BRIEF EXPLANATION OF THE CONSUMER RIGHTS ACT (10min) – *as a whole group*

Someone from the CMA (if possible, or the moderator otherwise) introduces the Consumer Rights Act 2015 and explains that a business cannot rely on contract terms to protect itself against customer complaints / legal action if any terms are adjudged to be unfair – *Therefore, there is no point in including anything within contract terms that would not be classed as fair in a court of law...*

- How do they react to this? Does this come as a surprise?

CMA staff or moderator explains the fairness test:

- Does this make sense?
- If any aspect of contract terms is deemed to be balanced in favour of the business rather than the customer it would be classed as unfair / invalid
 - Is that what they would expect? Or is that a surprise?
- If contract terms are not transparent and unclear – the law sides with the most favourable interpretation for the consumer
 - Is that what they would expect? Or is that a surprise?
- Is the fairness test clear? Or how would they simplify it?

Looking back at your own terms and conditions, is there anything there which you feel would not pass this test? Go through with your partner from the first exercise and mark any which you are still unsure about?

- How could it be improved or amended to pass the test?

Discuss as a whole group:

- Did they encounter any term that would not pass the fairness test? *Without naming and shaming!*
- Look for patterns: cancellations? Exclusion of liability? Etc.

MESSAGING TEST

Before showing materials ask for examples of materials in whatever form that have succeeded in influencing their behaviour / making them think.

Moderator to give example of driving at speed

- What, if anything has succeeded best in capturing their attention?
- Why did it work

- What was the format?
- How could this format be adopted for tonight's topic?

Split into sub-groups and provide sets of messages (**TRIGGERS AND MOTIVATORS**) and task respondents with sorting these into piles:

Which would:

- **Make them take notice / take action**
- **Make them aware there is an issue, but not strongly enough for them to take any action**
- **Probably be ignored / less powerful**
- Why? Discuss
- Which are the most powerful messages overall?

TERMS THAT ARE LIKELY TO BE UNFAIR

Someone from the CMA (if possible, or the moderator otherwise) introduces the terms that are likely to be unfair stimulus, explaining for each:

- What it means
- A typical example

SHOW GRID IN A3

On the 2 x A3 examples shown, respondents asked to place:

- A red dot on the unfair term that is most likely to affect their business / their sector
- An orange dot on another unfair term which might affect their business / their sector
- Discuss where they have placed their dots and why?

We'd like you to show us what these unfair terms mean to you. Working in small groups of three or four we'd like you to design a poster illustrating one of the unfair terms that is relevant to you including:

- A headline
- Some kind of visual – either one of the images provided or a drawing
- A couple of key messages

- Show and discuss
- Which *ideas* (not the execution necessarily) resonate best? Why?

NEW SECTION: ADVANCE PAYMENTS AND CANCELLATION TERMS

The CMA has put together some advice on **advance payments** and **cancellation terms**

HAND OUT STIMULUS – NB: SUGGEST WE GIVE HALF WORKSHOP THE ADVANCE PAYMENTS DETAILS AND THE OTHER HALF THE CANCELLATION TERMS DETAILS

- What are your immediate thoughts / reactions?
- Is there anything surprising here? What? Why?
- Does this affect the way that you would do business / your contract terms? How? Why?
- Is the advice clear? Why /Why not?
- What, if anything is unclear?

GETTING HELP AND INFORMATION ONLINE

- What have been your experiences of using government and other official websites to get information:
 - What are the worst / most difficult to use? Why? What makes them difficult or frustrating?
 - What are the best / easiest ones to use? Why
- Imagine that you have seen one of the more compelling messages we looked at earlier and have decided that you need to check your contract terms. You search for the CMA and unfair contract terms and arrive at a web page:
 - What do you expect / want to see first?
 - What needs to be on that first page?
 - What links need to be there? What would be the best way of organising the material:
- In small groups (3 or 4) we'd like you to design a front page for the CMA micro-site on unfair contract terms (allow 10 mins for this)
- Discuss

SHOW CMA EXAMPLE

- How does this fit with their own models?

SHOW COMPLIANCE VIDEO

<https://vimeo.com/malffilms/cma-preview/video/141180101>

This is an example of a video designed to help businesses comply with competition law. This has been designed based on feedback from similar sessions to the one this evening.

- Immediate impressions
- What do they like / dislike?
- How would this format work with unfair contract terms?

RECAP ON QUIZ

At the beginning, we gave you a short quiz to complete.

- Would anyone now want to change any of your answers? Which? Why?
- What do you think might be the most common misconceptions around contract terms amongst your small business colleagues?

If they were looking for more information on contract terms and were unable to find it online, which of the advisers or associations that they use would they go to first?

- E.g. legal adviser, accountant, bank, small business adviser, trade association etc.

Which of these advisers or associations are best placed to make sure they know about competition law? Why?

CONCLUSIONS (5min) – *as a whole group*

Did this discussion change their perception of how compliant their business / other businesses in your industry are?

The CMA is there to stop unfair behaviours and to take action where necessary. But part of their role is to make sure that businesses understand their obligations under the new Consumer Rights Act so that they avoid breaking it through ignorance.

If there is one piece of advice you could give the CMA which would help businesses like yours understand more about contract terms regulations, what would it be?

9.9 Stimulus for the depths interviews – examples of unfair contract terms

Example terms for BDRC Research on SME Unfair Contract Terms Compliance

Unfair Terms (from Annex A to the CMA's revised Guidance)

1. *Broad exclusion of liability (general, garages)*

Neither we nor our servants or agents will be under any liability in respect of defects in goods delivered or for any injury, damage or loss resulting from such defects, whatsoever and however caused and whether such injury, loss or damage be by direct or consequential means and notwithstanding that the same may be due to the negligence act or omission of ourselves, our servants or agents, and our liability under this clause shall be in lieu of any warranty or conditions implied by law as to the quality or fitness for any particular purpose of such goods.

[term deleted]

2. *Exclusion of liability for poor service (home improvements, services in general, garages)*

The company ... will not accept liability for any of the following: a) pebble dashing, special rendering, or any decorative finishes or similar material, painting, decoration, woodwork or furniture, however caused, b) For any consequential loss or damage however caused.

[New term: The Customer ... accepts that the installation may cause damage to decorations ... this provision does not exclude the Company's responsibility for damage which is beyond what is reasonably commensurate with the fitting of the window or windows in the usual way (for example damage to other areas of the premises where the window or windows are not being fitted).]

3. *Exclusion of liability for poor service (general, entertainment, gyms)*

We will not be liable for any monetary loss. This includes currency notes, coins, traveller's cheques, money orders, premium bonds and securities of any kind.

[New term: Medication, money and valuable items should not be stowed in the luggage hold under any circumstances but should be taken on board. Such items may be placed in the overhead lockers or under the seat, but should not be left unattended by the passenger. Money and small valuables (such as jewellery) should be retained on the person at all times.]

4. *Exclusion of liability for delay (services, home improvements)*

Whilst the company may quote a delivery period ... time for delivery shall not be of the essence of this contract and in the event of supplies or labour being adversely affected by strikes, lock outs or any other disruptions or contingencies beyond the company's control, the company shall not be held responsible for ... loss or liability incurred by the customer.

[New term: We will make every effort to complete the work on time (or, if no date has been agreed, within a reasonable time from the date of your order) but we cannot be held responsible for delays due to weather

or other circumstances beyond our control. In this case we will complete the work as soon as reasonably possible.]

5. *Retention of prepayments on consumer cancellation (lettings, entertainment, weddings, short term hire, online apps)*

Please note that in the event of an unsatisfactory references or aborted transactions, there is no refund of the holding deposit.

[New term: If false information or references are submitted the company has the right to withhold reasonable costs incurred. In the event that the landlord withdraws the property from the transaction a full refund is given.]

6. *Financial penalties (general, hotels, wedding venues)*

Without prejudice to its right to claim damages for breach of contract the company may in its sole discretion agree to the cancellation of an order which a purchaser has no right to cancel, upon payment to the company of all expenses incurred.

[New term: If the purchaser cancels this agreement otherwise than in accordance with these provisions, the seller may be entitled to claim damages in accordance with the general rules of English law.]

7. *Late payment penalties (home improvements, delivery, general)*

Interest will be charged at the rate of 10 per cent per month or part thereof on any sum outstanding for more than seven days following the delivery and installation of the goods ...

[Term deleted.]

8. *Late payment penalties (property, lettings, caravans, hotels, childcare)*

[The tenant] ... will pay the rent to the landlord at the times and in the manner specified and will pay interest at the rate of £5 per day if the rent is in arrears for more than 14 days.

[Term deleted.]

9. *Disguised penalties (apps, gyms, service contracts)*

After ... termination of this agreement, the customer should pay on demand all charges outstanding at the time of disconnection, including a £60 plus VAT disconnection fee ...

[Term deleted.]

10. *Unequal cancellation (general, entertainment, weddings, apps)*

This Contract is not subject to cancellation by The Customer ... the Company reserves the right to cancel or refuse acceptance of any order at any time by refunding all monies paid less an administrative charge.

[New term: Either party shall have the right to terminate this Contract without penalty within seven days ... In the event of such termination by either party the Company shall refund to the Customer all sums paid by the Customer.]

11. *Unequal cancellation (general, entertainment, weddings, childcare, apps)*

You may terminate this contract ... if you give us one month's written notice. We can terminate this contract at any time by giving you a minimum 7 days' written notice.

[New term: ... you may terminate this contract by giving us 14 days' written notice ... we can terminate this contract at any time by giving you 14 days' written notice.]

12. *Unequal cancellation (entertainment, weddings)*

The Seller ... [may] cancel or rescind the Contract if the performance of its obligations under the Contract is in any way adversely affected by any cause whatsoever beyond the Seller's control including but not limited to the delays or defaults of the suppliers or the default of any sub-contractor, war, strike, lock-out, trade disputes, flood, accident to plant or machinery, shortage of materials or labour ...

[Term deleted.]

13. *Excessive notice / automatic roll-over (gyms, apps, retirement homes, childcare)*

This agreement shall commence on the connection date and shall continue for the 'minimum period' of 12 months and thereafter until terminated by no less than three months' notice in writing given by either party to the other. Such notice to be given not before the expiry of the minimum period.

[New term: This agreement is for a minimum period of 12 months ... it may be terminated by giving one month's notice, which commences on or after the end of the initial 11 months.]

14. *Supplier's variation of terms (general, apps, platforms)*

We may at any time vary or add to these Conditions as it deems necessary.

[New term: We may change or add to Conditions ... for security, legal or regulatory reasons ... We will give you at least one month's notice of any changes or additions. We will not use this right to vary the terms of any special offer which applies to you ... you may end this contract at any time ... by giving one month's notice, if we tell you ... we are going to change these conditions.]

15. *Right to change what is supplied (home improvements, repairs, garages, general)*

The company reserves the right to vary design and/or specification of any installation and/or product used without prior notice to the customer.

[New term: As it is our policy to continually improve products, methods and materials, we reserve the right to change specifications from time to time, we will not make any significant variations without your agreement.]

16. *Price variation (general)*

Any additional work requested which is not specified in writing within this contract shall be charged at current rate.

[New term: Any additional work requested ... which is not specified in writing within this contract will only be carried out if a new contract is entered into with the company.]

17. *Price variation (general, retirement homes, hotels)*

The company reserves the right to increase the amount of the maintenance charge or any other charge in the case of increased costs, expenses and out-goings by giving the customer one month's notice in writing ...

[New term: We may need to increase our prices. The increases will not be more than the change in the Retail Price Index since the last increase.]

18. *Supplier's right to decide meaning of terms (general, caravans)*

Any dispute or difference which may arise in regard to the interpretation of the Rules shall be determined by the Management, whose decision shall be final.

[Term deleted.]

19. *Entire Agreement / exclusion of verbal/agent statements (general)*

No representations made by the Company, or by its agents, shall be treated as having induced the Customer to enter into the contract unless the same is included in this document.

[Term deleted.]

20. *Restricting the consumer's remedies (property, general, caravans)*

... this Agreement ... shall be governed by the laws of England.

[New term: This contract is governed by the laws of England where the property is located in England or Wales and by Scots law where the property is located in Scotland ...]

21. *Transparency (general)*

Severability – The clauses of these Conditions and each sub-clause thereof are several and if any part of any clause or sub-clause shall be void, invalid or unenforceable then the remainder of such clauses or sub-clauses shall nevertheless be valid and enforceable.

[Term deleted.]

22. *Transparency (general)*

The masculine includes the feminine gender and the singular shall include the plural and vice versa and a reference to a statutory provision will be interpreted as a reference to the provision as amended or re-enacted from time to time including any regulation or statutory instrument issued pursuant to such provision at any time.

[Term deleted.]

Unfair contracts – what do businesses need to know?

If you deal with consumers, then you need to know how consumer law applies to your contract terms and notices.

The Consumer Rights Act 2015, in force from 1 October 2015, aims to protect consumers against unfair contract terms and notices.

It applies to wording that lays down the rights and responsibilities of consumers and businesses when entering into agreements with each other. It also applies to consumer notices (often used, for instance, in shops and car parks as well as online).

Key points that businesses need to know

A term may be in a contract document, or in other materials such as brochures or posters, but does not have to be written down. Terms can be agreed by word of mouth or appear in a recorded message. What notices say about rights and liabilities also needs to be fair.

Wording used must be clear, informative and able to be understood by consumers – and not hidden away. If you spell out your terms clearly, you will save time in answering questions, and disputes are less likely to arise.

Unfair terms and notices are not binding on consumers. If a business uses unfair wording, consumers can challenge it – including in court if necessary. Enforcers (such as the CMA and Trading Standards) can also bring cases to stop its use.

What is unfair?

The law uses a 'fairness test' to stop consumers being put at unfair disadvantage. It says that wording is unfair if it tilts the rights and responsibilities between the consumer and the trader too much in favour of the trader.

The test is applied by looking at the words, and how they could be used. It takes into consideration what is being sold, how a term relates to other terms in the contract, and all the circumstances at the time the term was agreed.

There is an exemption for the essential obligations of contracts – namely terms describing the main subject matter and setting the price, provided that they are clear and prominent. There is also an exemption for wording covered by law or rules, for instance words that legally have to be used.

Certain terms and notices giving rise to particular concerns are 'blacklisted' by legislation as unsuitable for use with consumers in any circumstances. They can be challenged on that basis, without needing to prove that they fail the fairness test.

Top tips for setting out your terms and notices

Here are some of the key things businesses need to consider to ensure that you communicate with consumers clearly to avoid unnecessary disputes:

- Respect consumers' interests when choosing terms and notices. Don't use terms you wouldn't like to sign up to yourself.
- Deal openly and fairly with consumers – don't hide important wording away or use 'small print' that might surprise or mislead them. Wording that has a significant impact for consumers should be particularly drawn to their attention.
- Avoid using legal language or jargon. Use plain language that an ordinary person would understand – put yourself in the shoes of your consumer and make sure the language is at their level.
- Use clearly set out written contracts for complex transactions.
- Allow consumers time to read and understand the terms before the agreement is made, and explain wording that is important and may be difficult to understand.
- Take particular care with wording that, for instance, limits the extent of your liability, transfers risks on to the consumer that they can't control, allows you to make changes to the contract, imposes financial sanctions (for instance by charging cancellation fees) or allows you to keep prepayments or automatically renew the contract.

More information on unfair terms can be found on [the CMA's webpages](#) on GOV.UK.

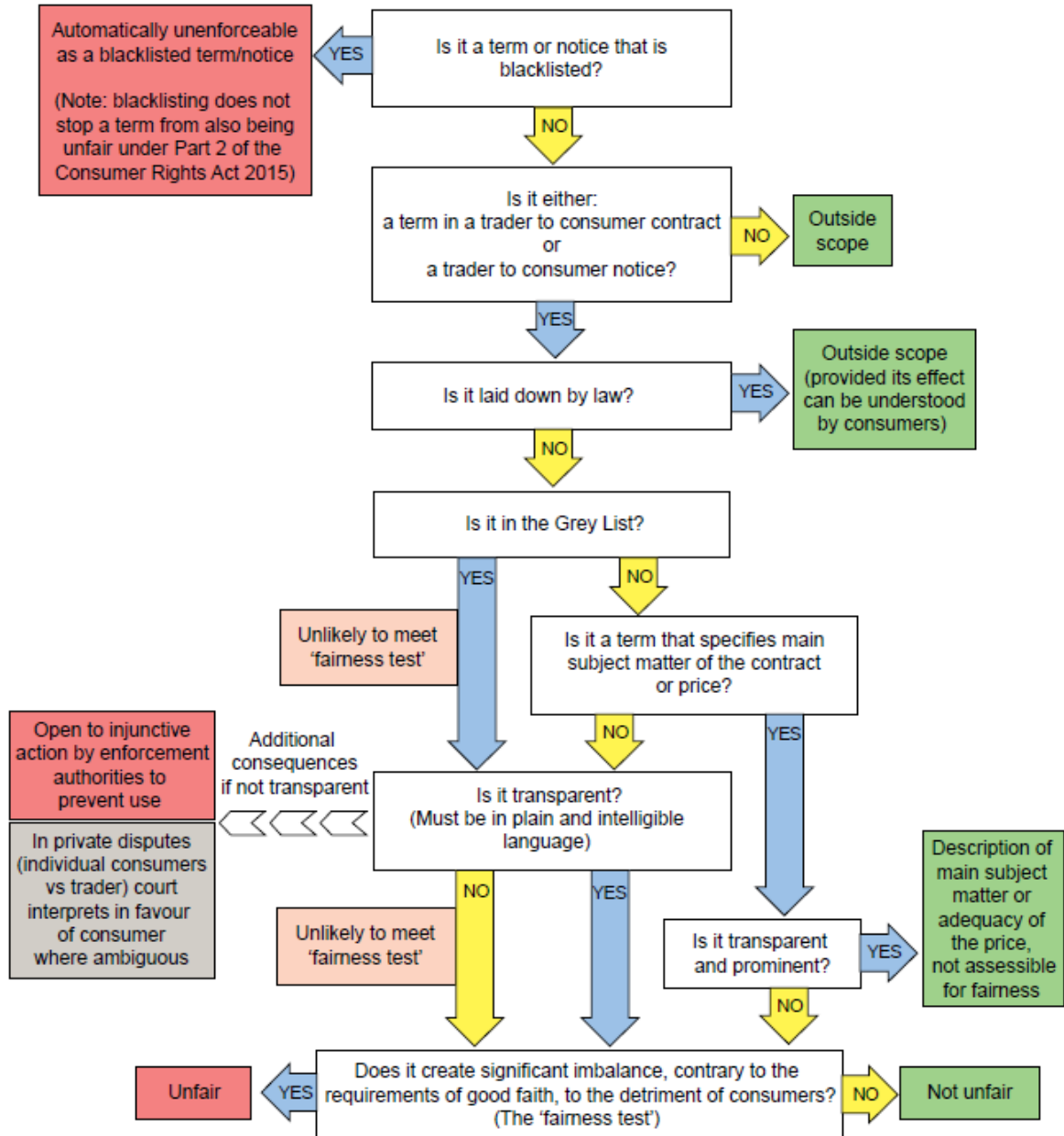
This short guide aims to provide a simplified overview, which may be assisted by the CMA's [flowchart](#). For a full understanding of the law on unfair terms, readers should consult the CMA's [main guidance document](#). Readers may also find the shorter summary document '[Unfair contract terms explained](#)' is useful as an introduction.

These materials are not a substitute for legal advice, and should not be relied upon as such.

9.11 Stimulus for the depths interviews and workshops – Flowchart

Unfair contract terms flowcharts

Unfair terms flowchart



Index to main references in the guidance to new elements of unfair terms law introduced by the Consumer Rights Act as of 1 October 2015

Note that this is a selective, not a complete listing of all changes and clarification provisions in the Act.

1. **Negotiated terms:** extension of fairness and transparency requirements to cover all consumer contract terms, not just standard pro forma terms: paragraph 2.30.
2. **Consumer notices:** confirmation that fairness and transparency requirements cover consumer notices as well as contract terms: paragraphs 1.19 to 1.25.
3. **Enforceability of the transparency requirement:** confirmation that enforcement action can be taken by a 'regulator' in relation to alleged breaches of the Act's transparency requirement: paragraph 2.6.
4. **Definition of 'consumer',** extension of scope: paragraph 1.11.
5. **Prominence:** modification/clarification that contract terms must meet a condition of prominence as well as of transparency in order to fall within 'the core exemption': paragraphs 3.20 to 3.31.
6. **Scope of 'the core terms exemption':** confirmation that terms corresponding to those in the Grey List cannot be considered 'core': paragraph 3.10.
7. **New Grey List terms** added to Schedule 2: paragraphs 5.15 to 5.17.
8. **Secondary contracts:** fairness and transparency requirements apply to terms in 'secondary contracts' which affect the rights and obligations of the consumer and the trader under a main contract to which the Act applies: paragraph 1.15.
9. **Resold tickets:** confirmation that certain terms used in consumer contracts which allow an event organiser to cancel it or blacklist the seller where the ticket is being resold or offered for resale are subject to the fairness and transparency requirements: paragraph 5.33.4.
10. **Goods:** modification of the scope of 'blacklisting' of certain terms in contracts for a trader to supply goods to a consumer, by virtue of which they may be

B1

automatically unenforceable without any need to subject them to an evaluation of fairness: paragraphs 4.13 to 4.15.

11. **Digital content:** new provisions made for certain terms in contracts for a trader to supply of digital content to a consumer, under which such terms may be automatically unenforceable without any need to subject them to an evaluation of fairness: paragraphs 4.16 to 4.24.
12. **Services:** selective extension of the scope of 'blacklisting' of certain terms in contracts for a trader to supply a service contract to a consumer, by virtue of which they may be automatically unenforceable without any need to subject them to an evaluation of fairness: paragraphs 4.25 to 4.28.

Selected additional provision not mentioned in the guidance¹

13. Provision for the Secretary of State to amend the Grey List by statutory instrument (section 63(3)).

Links to legislation

14. [Historic Unfair Terms in Consumer Contracts Regulations 1999 \(UTCCRs\)](#).
15. [Historic Unfair Contract Terms Act 1977 \(UCTA\)](#).
16. [Consumer Rights Bill](#).
17. [Consumer Rights Act 2015](#).

¹ This item is mentioned as having a particular connection to matters covered in the guidance. This is not a list of all the changes made to the law by Parts 1 and 2 of the Act. Standard works of legal reference may be consulted for a more complete consideration of whether and in what way the law has changes by virtue of the coming into force of the Act, but this is ultimately a matter for the courts.

9.13 Stimulus for the depths interviews with legal advisers – Grey List

Consumer Rights Act 2015 (c. 15)

SCHEDULE 2 – Consumer contract terms which may be regarded as unfair

Document Generated: 2015-08-17

1

Status: This is the original version (as it was originally enacted).

SCHEDULES

SCHEDULE 2

Section 63

CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR

PART 1

LIST OF TERMS

- 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.
- 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.
- 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.
- 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 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.
- 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.
- 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, or 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.
- 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.
- 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.

- 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.
- 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.
- 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.
- 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.
- 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.
- 17 A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.
- 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.
- 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.
- 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 the applicable law, should lie with another party to the contract.

PART 2

SCOPE OF PART 1

Financial services

- 21 Paragraph 8 (cancellation without reasonable notice) does not include a term by which a supplier of financial services reserves the right to terminate unilaterally a

contract of indeterminate duration without notice where there is a valid reason, if the supplier is required to inform the consumer of the cancellation immediately.

- 22 Paragraph 11 (variation of contract without valid reason) does not include a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial services without notice where there is a valid reason, if—
- (a) the supplier is required to inform the consumer of the alteration at the earliest opportunity, and
 - (b) the consumer is free to dissolve the contract immediately.

Contracts which last indefinitely

- 23 Paragraphs 11 (variation of contract without valid reason), 12 (determination of characteristics of goods etc after consumer bound) and 14 (determination of price after consumer bound) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration if—
- (a) the trader is required to inform the consumer with reasonable notice, and
 - (b) the consumer is free to dissolve the contract.

Sale of securities, foreign currency etc

- 24 Paragraphs 8 (cancellation without reasonable notice), 11 (variation of contract without valid reason), 14 (determination of price after consumer bound) and 15 (increase in price) do not apply to—
- (a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, and
 - (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

Price index clauses

- 25 Paragraphs 14 (determination of price after consumer bound) and 15 (increase in price) do not include a term which is a price-indexation clause (where otherwise lawful), if the method by which prices vary is explicitly described.

9.14 Stimulus for the depths interviews with legal advisers – Unfair Terms Explained Guidance

Cover page only – full document available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf



Unfair contract terms explained

31 July 2015
CMA37(a)



9.15 Stimulus for the workshops – Examples of videos on competition law

CMA Preview - Intro Text x

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CMA PREVIEW

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What you're about to see are some rough mock-ups of short, animated films.

For now these consist of a few sketches set against a voiceover to give you an idea of what the final films will be like.

The finished versions will be properly animated in a hand-drawn style to link all the scenes together

At the end, we'd like to ask you some very short questions to see what you thought of the films.

We'd be very grateful for your feedback

00:24 HD

INTRO TEXT

2 months ago

9.16 Stimulus for the workshops – CMA document on cancellation charges

What is a cancellation charge?

A monetary amount, either by way of payment or by the non-refunding of advance payments, which a consumer incurs when exercising a contractual right to cancel.

What the CMA has to say about terms imposing a cancellation charge

Where a consumer brings the contract to an end without any justification, and the business suffers loss as a result, the consumer cannot expect to avoid having to pay compensation.

Terms setting out the amount of the compensation, payable either as a cancellation charge or through retention of advance payments, are likely to be considered unfair if the amount of compensation is too much so as to be a disproportionate financial sanction.

A requirement to pay more in compensation than a reasonable pre-estimate of the business' loss is liable to be considered disproportionate. Additionally such a requirement may be void to the extent that it amounts to a penalty under English common law. However, a term may still be considered unfair independently of the common law, if it has a penal purpose or effect.

Terms saying that the business can either claim all its costs and expenses, not just its net costs, or claim both its costs and its loss of profit where this would lead to compensated twice over for the same loss may be unfair.

A term under which the consumer always loses everything they have paid in advance, regardless of the amount of any costs and losses caused by the cancellation, is at risk of being considered unfair.

A requirement to pay a fixed or minimum amount, in all circumstances, will be open to challenge if the amount could be too high in some cases.

A term which says, or is calculated to suggest, that inflated sums could be claimed (or retained from advance payments) if the consumer ends the contract is likely to be challenged as unfair. For example, a charge that requires payment of the whole contract price, or a large part of it, is likely to be unfair.

Fairness is more likely to be achieved by ensuring that the amount of compensation 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 compensation reasonably needed to cover either its net costs **or** the net loss of profit resulting directly from the default. There is no entitlement to any sum that could reasonably be saved by, for example, finding another customer.

This amount could be held back from any refund of advance payments or form a separate cancellation charge payable by the consumer.

Sliding scales of cancellation charges may be acceptable 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.

There is unlikely, for example, to be any objection to terms which, in plain language requires the consumer to pay a stated sum which represents a genuine pre-estimate of loss the business is likely to suffer or states simply that the consumer can be expected to pay reasonable compensation, or compensation according to law (provided the law is not misstated).

A genuine 'deposit' (as discussed above) may legitimately be kept in full, as payment for the reservation, but remembering such a deposit will not normally be more than a small percentage of the price. A larger advance payment is necessarily more likely to give rise to fairness issues, for instance being seen as a disguised penalty.

9.17 Stimulus for the workshops – CMA document on advance payment terms

What is an advance payment term?

A term that requires the consumer to make a payment upfront or in advance of you providing the goods or services. This includes deposits, full, one-off or installment payments.

Key things to consider with advance payments

If you require any type of advance payment then you need to consider whether it is fair to do so. You can't charge what you like. If charges are too high or requested too far in advance, that may be unfair and simply agreeing to return a portion upon cancellation may not be enough to make it fair, so consider:

- How much are you asking for in advance?
- How do you calculate the sums?
- How far in advance of providing the goods or services is the payment required?
- Does this reflect when you need to make payments to provide the goods or service?
- What happens to the payments if the consumer cancels and why?

What the CMA has to say about advance payment terms

Terms which deprive the consumer of a route of redress may be unfair. One legitimate way for the consumer to obtain compensation from a business is by exercising the right of set-off. Where a consumer has an arguable claim under the contract against a business, the law generally allows the consumer to deduct the amount of that claim from anything they have to pay. This helps prevent unnecessary legal proceedings.

Terms can be open to objection on the basis that they have the indirect effect of removing the consumer's right to set-off. 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 business stops trading or goes out of business.

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 business' proper incentive to perform work with reasonable care and skill.

There is unlikely to be an objection to an advance payment which is set low enough that it merely reflects the ordinary expenses necessarily entailed for the business. Likewise, concerns are unlikely to arise with a genuine 'deposit' - which is a reservation fee - though the amount will not normally be more than a small percentage of the price.

There is unlikely to be an objection to installment arrangements which fairly reflect the business' 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.

