

What's new?

An overview of changes to unfair contract terms law in the Consumer Rights Bill

Draft for consultation

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Quick reference list of abbreviations used in this document

BIS	The Department for Business, Innovation and Skills
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
OFT	Office of Fair Trading
UCTA	Unfair Contract Terms Act 1977
UTCCRs	Unfair Terms in Consumer Contracts Regulations 1999

1. Introduction

- 1.1 'What's new?' covers key changes to the law on unfair terms to be introduced by **the Consumer Rights Bill**.¹ It is expected that Bill will receive Royal Assent in the spring and the Act will come into force in October 2015. Our aim is to provide readers with a factual introduction to the unfair terms part of the Bill in the context of the existing law on unfair terms – the [Unfair Terms in Consumer Contracts Regulations 1999 \(UTCCRs\)](#) and [Unfair Contract Terms Act 1977 \(UCTA\)](#). [Guidance covering other aspects of the Act](#) is available (see the further information section).
- 1.2 *What's new?* is not a comprehensive guide to unfair terms, for instance, it does not set out the Competition and Markets Authority's (CMA's) views on terms which are covered by the Bill nor the forms that unfairness can take. More detail will be provided in the CMA's reissue of its main guidance on unfair terms in advance of the Bill coming into force. Please see the further information section of this guide which includes links to the [draft of the more detailed CMA guidance](#) which was published for consultation on 26 January 2014. If you need guidance on the current law on unfair contract terms please see the further information section which includes links to the [Office of Fair Trading's \(OFT's\) main guidance on unfair terms](#) which the CMA has adopted.

2. Summary of the unfair term provisions in Part 2 of the Bill and key words

- 2.1 Part 2 of the Bill consolidates the existing unfair terms legislation which applies to consumers when dealing with traders. The current law is found in the [UCTA](#) and the [UTCCRs](#). The UTCCRs give effect to a European [Directive on Unfair Terms](#) (Council Directive 93/13/EEC on unfair terms in consumer contracts – 'the Directive') in UK law.
- 2.2 The Bill 'blacklists' some terms or notices so that they are never binding on the consumer (see paragraph 6.1).² The Bill also provides that **a consumer** is not bound by a term in a contract with a trader **or a notice** issued by a trader if that term or notice is **unfair**. The fairness test in the Act reflects that in the

¹ In order to provide timely guidance, this document is published before finalisation of the legislation to which it refers. References are to the Bill as amended at Lords Report – that is, in the light of the Report made to the House of Lords following detailed discussion at the Committee stage of its proceedings. This is almost the last stage at which there can be any amendment of a Bill which the House of Commons has already considered, but it cannot be guaranteed that the Bill matches the final Act of Parliament in every detail, in particular as regards clause numbers.

² Most of the 'blacklisted' terms are not included in Part 2 of the Bill but in Part 1 of the Bill.

UTCCRs and the Directive (see paragraph 4.1). As such, the application of the fairness test is subject to some exceptions.

- 2.3 The main exception for terms **relates to** those that specify the main subject matter of the contract or set the price payable under the contract ('the main exemption', see paragraph 5.1). Such terms will only benefit from the exemption if they meet two requirements. First, they must be in plain and intelligible language. This is referred to in the Bill as a term being **transparent** (see paragraph 4.5). **Second**, main subject matter terms or those that set the price must be **prominent** in order to fall within the exemption (see paragraph 5.5).

The Bill's changes to the current law

- 2.4 Essentially, in relation to the existing unfair terms legislation the Bill makes the following broad changes:
- It brings together into one piece of legislation, the unfair terms legislation provisions found in UCTA and the UTCCRs. Unlike the UTCCRs but broadly in line with provisions in UCTA, the Bill covers notices as well as terms, blacklists certain terms and notices and applies to negotiated as well as non-negotiated terms.
 - It adds the requirement of prominence to the UTCCRs' main exemption relating to price setting and main subject matter terms. The Bill also specifies that this exemption does not apply to a Grey List term.
 - It adds three new terms to the Grey List (which in all other respects is largely unchanged from the Grey List in the UTCCRs) and gives the Secretary of State power to amend the Grey List by statutory instrument (clause 64(3)).
 - Part 2 of the Act implements the Directive. There are several aspects of the Directive or European case law, which interprets the Directive, which are now made more explicit on the face of the Bill. For instance, clause 72 provides a court must consider the fairness of terms in a consumer contract even if the parties to the case do not raise it as an issue, provided that the court has sufficient legal and factual information to allow it to do so. Also wording from the Directive's Recitals is added to 'the mandatory statutory or regulatory' exemption at clause 74.

Key words

A **Consumer** is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession (clause 2(3)).

A **Trader** is a person acting for purposes relating to their business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf (clause 2(2)). This includes the activities of any government department or local or public authority.

Consumer notice – see paragraph 3.4 below.

The mandatory statutory or regulatory exemption – see paragraph 3.5 below.

Transparent – see paragraph 4.5 below.

The main exemption – see paragraph 5.1 below.

Prominent – see paragraph 5.5 below.

Blacklisted terms – see paragraph 6.1 below.

3. Scope of the Consumer Rights Bill

- 3.1 The Bill covers contracts and notices between **traders** and **consumers** (a ‘consumer contract’ and a ‘**consumer notice**’). It replaces the provisions between traders and consumers previously found in the [UCTA](#) and the [UTCCRs](#). One of the aims of the Bill was to consolidate and simplify the UK law of business to consumer unfair terms issues by replacing two pieces of legislation with one.
- 3.2 An objective was to ensure that in combining these laws, consumer protection was not reduced. This broadly means that, for example, where the [UCTA](#) covers circumstances which the [UTCCRs](#) do not, the Bill has the wider scope and vice versa. For example, negotiated terms are covered and so too are notices.³

Negotiated terms

- 3.3 The Bill applies to all business to consumer contract terms, whether or not they are negotiated with the consumer, subject to certain exemptions (see paragraphs 3.5 and 5.1 below for more information on these exemptions).

Consumer notices

- 3.4 As indicated, the Bill also covers **consumer notices** issued by a trader. A consumer notice is defined broadly as a notice that relates to rights or obligations between a **trader** and a **consumer**, or a notice which appears to exclude or restrict a trader’s liability to a consumer (clause 62(7) and 62(4)). A notice includes an announcement or other communication, whether or not in writing (clause 62(8)). The Bill makes clear that it does not matter whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume that it is intended to be seen or heard by one (clause 62(6)). This may be taken to reflect the policy that these provisions would include, for instance, notices found in car parks as well as online.⁴

³ See for instance the Department for Business Innovation and Skills (BIS), Consumer Rights Bill, [Table of responses to consultation, June 2013](#) at p64, which states, ‘We agree that the current level of protection under the Unfair Contract Terms Act 1977 should not be reduced’.

⁴ See the [Law Commissions’ Unfair Terms in Consumer Contracts: Advice](#) to BIS at paragraphs 7.26 to 7.32 in particular. The Advice, following a process of consultation, made recommendations to BIS on reforms to the unfair terms legislation.

The mandatory statutory or regulatory exemption

- 3.5 The Bill makes clear that a **consumer notice** has to meet a test of fairness (see paragraph 4.1), subject to an exemption for notices (and terms) that reflect legal provisions (clause 74). This exemption is referred to below as ‘the mandatory statutory or regulatory exemption’. It derives from the [Directive](#) and is included in the [UTCCRs](#), Regulation 4(2) (for more detail see the links to [the current CMA guidance](#) and [draft revised guidance](#) in the further information section).

4. Fairness

- 4.1 The test of fairness reflects that in the [Directive](#) and [UTCCRs](#), Regulation 5. A term is unfair ‘if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’ (clause 63(4)).⁵ The fairness test for notices mirrors this test, except that it does not use the words ‘under the contract’ (clause 63(6)).
- 4.2 Consistently with the [UTCCRs](#), the Bill illustrates the meaning of ‘unfairness’ by listing some types of terms that ‘may be regarded as unfair’ in Part 1 of Schedule 2 to the Bill. By way of shorthand the list is referred to as the Grey List because the terms listed are not necessarily unfair – it is a ‘grey’ not a ‘black’ list. The list is still described as ‘an indicative and non-exhaustive list of terms’ (clause 64(1)). A term may bear no resemblance to any of the terms listed but yet may be regarded as unfair under the test in clause 63. Although the content of the Grey List in the Bill is largely unchanged from the [UTCCRs](#), three new terms are added.
- 4.3 By way of a summary, these are terms which have **the object or effect**⁶ of:
- (a) allowing disproportionate charges or requiring the consumer to pay for services which have not been supplied, if the consumer ends the contract (see Schedule 2, Part 1, paragraph 5);

⁵ An introduction to the test of fairness is currently [available in the short guide on unfair standard terms \(OFT 143\)](#) available from the CMA’s webpages – see the further information section at the back of this note for more details. This document will be superseded by the CMA’s forthcoming guidance on the Act.

⁶ The CMA in its [current main unfair terms guidance](#) (OFT 311) provides, ‘terms are under suspicion of unfairness if they either have the same purpose or can produce the same result as terms in the grey list. They do not have to have the same form or mechanism.’ (p10). The ‘object and effect’ provisions are emphasised in the Bill for each term on the Grey List.

- (b) allowing the trader to decide the characteristics of the subject matter of the contract after the consumer is bound by the contract (see Schedule 2, Part 1, paragraph 12); and/or
- (c) allowing the trader discretion to set the price after the consumer is bound by the contract, where no price or method of determining the price is agreed when the consumer is bound (see Schedule 2, Part 1, paragraph 14).

4.4 Examples of the new Grey List terms include:⁷

- A term which imposes a disproportionate cancellation charge on the consumer when s/he decides to pull out of the contract early is likely to be covered by the first new Grey List term above.
- In relation to (b) and (c), example terms are likely to include (as applicable) those which allow the trader to decide at his discretion the price or characteristics of the subject matter of the contract after the consumer is bound by the contract, when no other provision for either of these important aspects of the contract have been made between the parties.

Plain and intelligible language (transparent)

- 4.5 A trader must ensure that a written term of a consumer contract or a **consumer notice** in writing is expressed in plain and intelligible language and it is legible (clauses 69(1) and (2)). The reference to 'plain and intelligible language' comes from the [Directive](#) and reflects Regulation 7 of the [UTCCRs](#). 'Legible' was added to the test on the recommendation of the Law Commissions.⁸ Schedule 3, paragraph 3(5) of the Bill makes clear that enforcement action can be taken by a 'regulator' (which includes the CMA and local Trading Standards services) if it thinks that a term or notice breaches the requirement of transparency set out in clause 69 of the Bill.

5. The main exemption

- 5.1 As indicated above the Bill includes an exemption relating to terms that specify the main subject matter of the contract or terms which set the price.

⁷ Note that these examples are not intended to be exhaustive and are based on the Law Commissions' policy for recommending the inclusion of these terms in their [Advice](#) to BIS – see paragraphs 5.81, 5.97 and 5.113 in particular. For information on the CMA's initial views on the types of terms covered by the new Grey List terms we refer you to our [draft unfair terms guidance](#), which is subject to consultation and therefore change – see the further information section at the back of this note.

⁸ See the [Law Commissions' Unfair Terms in Consumer Contracts: Advice](#) to BIS at paragraph 4.26.

- 5.2 A term of a consumer contract may not be assessed for fairness (that is under clause 63) **to the extent that** it specifies the main subject matter of the contract or the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it (clause 65(1)). For example, in relation to terms that set the price, other aspects of the term are assessable for fairness such as the timing and method of payment (See, for example, the [Law Commissions' Advice](#) to BIS, paragraphs 3.80 to 3.103).
- 5.3 **Relevant terms** (that is, those capable of benefiting from the exemption) can only fall within it if they are both **transparent** and **prominent**.

Transparent

- 5.4 For the purpose of the exemption this has the same meaning for written terms as explained in paragraph 4.5 above. In relation to terms communicated orally, they must be in plain and intelligible language – there is no requirement for oral terms to be ‘legible’ (clause 65(3)). The requirement that terms must be in plain and intelligible language to benefit from the exemption reflects the [Directive](#) and the [UTCCRs](#), Regulation 6(2).

Prominent

- 5.5 However, if they are to fall within the scope of the exemption, the Act provides that in addition relevant terms must also be ‘prominent’.
- 5.6 The Bill says that a relevant term is prominent for these purposes if it is brought to the consumer’s attention in such a way that an average consumer would be **aware** of the term (clause 65 (4)). In this context, an average consumer is defined as a ‘reasonably well-informed, observant and circumspect’ consumer (clause 65(5)). This is an objective standard which is well established in European Law.
- 5.7 The Law Commissions, which suggested the introduction of prominence into the wording of the exemption, indicated that one of the problems which ‘prominence’ should be intended to address is where traders offer low headline prices and then add hidden extras in the terms, which undermine the competitiveness of the market (see for instance [Law Commissions' Advice](#) to BIS at paragraph 2.39).
- 5.8 It is important to remember that if a **relevant** term is not prominent, that does not make it automatically unfair but it does mean that it is fully assessable for fairness. As the Law Commissions explained, businesses may well include in

their contracts charges which are not prominent and which are therefore assessable for fairness ([Law Commissions' Advice](#) to BIS at paragraph 3.48).

- 5.9 A provision is included in the Bill which provides that the exemption does not apply to a term of a contract listed in the Grey List (clause 65(6)). Thus, the legislation makes clear that terms of the type on the Grey List cannot fall within the exemption even where such terms are transparent and prominent.

6. Blacklisted terms

- 6.1 The Bill provides that some terms in consumer contracts and consumer notices are automatically unenforceable. For the purpose of this briefing, we refer to these terms or notices as 'blacklisted'.⁹ Some of these provisions are a consolidation of those found in the [UCTA](#).
- 6.2 An example of such a 'blacklisted' term or notice is found in Part 2 of the Bill. Clause 66(1) of the Bill provides that a trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. This 'blacklisted' provision does not apply to certain contracts referred to in clause 67, including, for instance, contracts so far as they relate to the creation or transfer of interests in land or insurance contracts.
- 6.3 However, it should be noted that there is no exception for these types of contracts from the [fairness test](#) found in clause 63.
- 6.4 Parts of the Bill covering goods, digital content and services also 'blacklist' various terms in consumer contracts which have the effect of excluding or restricting the trader's liability.¹⁰ Broadly speaking, the 'blacklisted' terms covered outside of Part 2 of the Bill are those which would exclude or restrict the trader's liability arising from breach of certain consumer rights provided by the Bill.
- 6.5 For instance, a term in a contract to supply paid-for¹¹ digital content or in a contract to supply goods which excludes or restricts the trader's liability for

⁹ Note that other legislation includes provisions which effectively blacklist terms, for example, notably under section 91 of the Arbitration Act 1996, a compulsory arbitration clause is automatically unfair if it relates to claims of £5,000 or less.

¹⁰ For a list of all blacklisted terms excluding or restricting the trader's liability in a contract for the supply of goods see clause 31 of the Bill. For blacklisted terms excluding or restricting the trader's liability in a contract to supply digital content contracts see clause 48 of the Bill and for blacklisted terms excluding or restricting the trader's liability in a contract to supply a service see clause 58 of the Bill.

¹¹ See clauses 34(1) and (2) of the Bill for what digital content contracts are covered under the Bill.

failing to supply digital content or goods of satisfactory quality would not be binding on consumers.

- 6.6 Similarly, in a contract to supply a service, a term is not binding on the consumer to the extent that it would restrict the trader's liability for failure to carry out the services with reasonable care and skill if, in an appropriate case, it would not allow the consumer to recover the price paid under the contract.¹² (See also paragraph 7.5 regarding the relationship between the blacklisted provisions and the fairness test in clause 63).

7. Other provisions

- 7.1 The Bill includes provisions which are intended to simplify and clarify the law, for example by reflecting European case law or setting out how the law is already applied in practice. These provisions include the following.

Duty of a court to consider the fairness of terms

- 7.2 Clause 72 of the Bill says that a court must consider the fairness of terms in a consumer contract even if the parties to the case do not raise it as an issue, provided that the court has sufficient legal and factual information to allow it to do so. This reflects decisions of the Court of Justice of the European Union (CJEU) about the duties of national courts (see the further information section for examples of recent cases on this point).

Consumers can choose to rely on unfair terms or notices

- 7.3 Consistently with the [Directive](#) and [UTCCRs](#), the Bill provides that an unfair term is not binding on a consumer. Similar provisions are made for notices. Clause 63(3) of the Bill provides that this does not prevent the consumer from relying on a term or notice which is unfair, if they choose to do so.

Application to secondary contracts

- 7.4 Clause 73 allows for the unfair terms provisions in Part 2 of the Bill to apply to secondary contracts even if the secondary contracts are not consumer contracts. Secondary contracts are ones which affect the rights and obligations of the consumer and trader under the main contract. This provision

¹² Note that clause 58(3) makes clear that a term limiting liability to the contract price would still be subject to the [fairness test](#) in clause 63.

does not apply if the secondary contract is a settlement of a claim arising under the main contract.

Relationship of blacklisted terms and the fairness test

- 7.5 The Bill allows that terms or notices which are blacklisted (see paragraph 6.1 above) are assessable for fairness under the fairness test in clause 63. This is underlined by the fact that Schedule 3, paragraph 3 provides that a ‘regulator’ may apply for an injunction or an interdict if it thinks that the term or notice ‘falls within **any one or more**’ of the following provisions – the blacklisted provisions as discussed above (clauses 31, 48, 58 and 66(1) of the Bill), it is unfair or it breaches the requirement of transparency (clause 69). A consequence of this is, for example, that a court can prohibit the use of a term which is blacklisted on the basis that it is blacklisted under the Bill or on the basis that it is unfair under clause 63 of the Bill. More information will be provided in the [CMA’s main guidance, currently available in draft](#) for consultation.

Sources of further information

1. Guidance

- A range of guidance on the [current law](#) on unfair contract terms is available on the CMA's webpages at:¹³
www.gov.uk/government/collections/cma-consumer-enforcement-guidance
- A re-issue of the CMA's main guidance on unfair contract terms, updated to reflect the changes that will be introduced by the Consumer Rights Act, is available in draft, for consultation, at:
ADD link when available
- Guidance on other aspects of the Consumer Rights Act, including goods and services and digital content, will be available at:
ADD links when available

2. Information about the Consumer Rights Bill

ADD link to the text of the Act once available.

- Information about the BIS policy for providing better information and protection for consumers and documents relating to the development of the Consumer Rights Bill are available at:
www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-bill-of-rights
- The proposals and recommendations from the Law Commissions on unfair contract terms law, which the Government adopted to a large extent in the Consumer Rights Bill, are available at:
<http://lawcommission.justice.gov.uk/areas/unfair-terms-in-contracts.htm>
- BIS: Consumer Rights Bill, Table of responses to consultations, June 2013:
www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf

¹³ The majority of the guidance was issued by the OFT and adopted by the CMA when it gained powers to enforce unfair contract terms legislation. The CMA is the lead enforcer of unfair terms.

3. Legislation

- The Unfair Terms in Consumer Contracts Regulations 1999:
www.legislation.gov.uk/uksi/1999/2083/contents/made
- The Unfair Terms Directive (Council Directive 93/13/ EEC on unfair terms in consumer contracts). It is a European law requirement that the minimum levels of protection provided by the Directive are given effect in UK law. The UTCCRs currently do this by mirroring very closely the provisions in the Directive. When the Bill becomes an Act and comes into force, it will give effect to the Directive in UK law in place of the UTCCRs. The full text of the Directive is available at: <http://eur-lex.europa.eu/eli/dir/1993/013>*
- The Unfair Contract Terms Act 1977 is available at:
www.legislation.gov.uk/ukpga/1977/50/contents

4. Some recent CJEU cases of relevance

The cases listed below set out the CJEU's approach to particular aspects of the Directive. The cases chosen are relevant to understanding some of the Bill's provisions referred to in this briefing note. They are included here to highlight the fact that since the last issue of the OFT's main guidance on unfair terms (adopted by the CMA) there have been a number of decisions from the CJEU on the Directive. This is not a comprehensive list of relevant cases and, similarly, the summaries of the cases do not attempt to summarise all issues discussed in them. Nevertheless, it is hoped that the list will provide a useful starting point, on some issues, for those considering recent CJEU case law.

- The CJEU's considerations include factors that the national courts should take into account when assessing the fairness of contract terms – looking particularly at 'significant imbalance' and 'contrary to the requirement of good faith':

Aziz v. Caixa D'Estalvis de Catalunya, Tarragona i Manresa Case C-415/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0415>*

- Further criteria given to national courts, when considering 'significant imbalance':

Constructora Principado SA v José Ignacio Menéndez Álvarez, Case C-226/12

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0226>*

- In both cases, the CJEU's considerations include the correct approach when assessing the fairness of price variation terms:

RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V., Case C-92/11¹⁴

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0092>*

Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, Case C-472/10

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0472>*

- The CJEU considerations include the scope of the exemption (ie for the main subject matter and the adequacy of the price) as well as considering the meaning of plain and intelligible language:

Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, Case C-26/13

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0026>*

- Some recent cases, where the CJEU's considerations include the duty of national courts to assess terms, whether or not the parties raise the issue:

Banco Espanol de Credito SA v Joaquin Calderon Camino, Case 618/10

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0618>*

Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai, Case C-472/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0472>*

Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV, Case C-488/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0488>*

Erika Jorös v Aegon Magyarország Hitel Zrt, Case C-397/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0397>*

*Links to European cases and law are to documents on the EUR-Lex website,
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¹⁴ In the *RWE Vertrieb* case, the court also illuminates the scope of 'the mandatory statutory or regulatory' exemption, see in particular, paragraphs 24 to 39 of the judgment.