Unfair contract terms guidance

Guidance on the unfair terms provisions in the Consumer Rights Act

Draft for consultation

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Advice and complaints about unfair terms

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

The Act

A copy of the Consumer Rights Act 2015 is available from the Office of Public Sector Information at www.legislation.gov.uk.

Abbreviations and technical terms used in this guidance

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

Note that the guidance also refers throughout to '**the Act**', meaning the Consumer Rights Act 2015 and '**the Directive**', meaning Council Directive 93/13/ECC on unfair terms in consumer contracts.

See paragraph 1.8 below for definitions of certain legal terms used in the guidance, and paragraphs 1.23 and 1.28 for the meaning of 'the Grey List' and 'blacklisted terms'. A 'regulator' is defined in paragraph 2.3 and Part 6 below.

UTCCRs The Unfair Terms in Consumer Contracts Regulations 1999.

UCTA The Unfair Contract Terms Act 1977.

CCA Consumer Credit Act 1974, as amended.

CCRs The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

CJEU The Court of Justice of the European Union.

CMA The Competition and Markets Authority. **CPRs** The Consumer Protection from Unfair Trading Regulations 2008.

ECRs The Electronic Commerce (EC Directive) Regulations 2002.

FCA The Financial Conduct Authority.

Kasler The CJEU case of C–26/13 *Arpad Kasler, Hajnalka Kaslerne Rabai v OTP Jelzalogbank Zrt.*

Ofcom The Office of Communications.

OFT The Office of Fair Trading.

PSRs The Provision of Services Regulations 2009.

RWE The CJEU case of C–92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein –Westfalen e.V.* **TSS** Trading Standards Services.

1. Introduction

1.1 This guidance supersedes and replaces unfair contract terms guidance originally issued by the Office of Fair Trading (OFT) that was subsequently adopted by the Competition and Markets Authority (CMA).[1] It sets out the CMA's understanding of the Consumer Rights Act 2015 (the Act) so far as it deals with unfair contract terms and notices. The relevant sections of the Act consolidate and replace the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)[2] and a number of provisions of the Unfair Contract Terms Act 1977 (UCTA) to the extent that they apply to terms and notices used in dealings between businesses and consumers.

1.2 The Act comes into force on [XX October 2015] and deals with a range of matters not all directly relevant to contract terms. However, one of its principal purposes is to give effect in the UK to the Unfair Contract Terms Directive[3] (the Directive). This is achieved particularly in Part 2 of the Act. The Directive is a 'minimum harmonisation' measure, allowing EU member states to adopt or maintain more stringent provisions if they choose. The protection from unfair contract terms given to consumers by the Act as a whole (particularly in Part 1) goes in certain respects beyond the minimum required by the Directive, but generally in the same way as provided by the UCTA.

1.3 The guidance is issued by the CMA as the UK's national competition and consumer authority. The CMA replaced the OFT and the Competition Commission under a legislative programme which implemented a number of major changes to the UK's statutory consumer and competition landscape. These changes transferred certain consumer functions of the OFT to other authorities[4] but gave the CMA a leading role comparable to that of the OFT in relation to unfair contract terms, including a function of providing guidance to businesses.

1.4 This guidance sits alongside two existing CMA publications aimed particularly at smaller businesses and others who want a short introduction to unfair terms law and to the CMA's approach to unfair terms enforcement. It is designed for those who need more detailed information about the unfair terms provisions in

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[1] *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, OFT311*, September 2008. The OFT also published other (sectoral) guidance on the UTCCRs. This is no longer to be treated as stating the CMA's views, though it may still be of use as an illustration of the operation of the law so far as it remains unchanged (in particular, to the extent that it continues to implement the requirements of the Unfair Contract Terms Directive without additional protections referred to in this guidance).
[2] Note that these Regulations came into force on 1 July 1995 but were re-enacted on 1 October 1999, mainly in order to enable other authorities than just the OFT to take enforcement action under the Regulations.
[3] Council Directive 93/13/ECC on unfair terms in consumer contracts.
[4] See the Department for Business, Innovation and Skills (BIS), Providing better information and protection for consumers.

the Act. It gives a comprehensive account of the CMA's understanding of the legislation, and offers detailed suggestions as to how businesses using contract terms and notices with consumers can seek to achieve compliance with it.

1.5 It is meant not primarily for lawyers but particularly, for instance, for in-house and trade association advisers working on compliance issues for businesses dealing with consumers. It is also intended to be of use to, for instance, other public authorities who are 'regulators' for the purposes of the Act, with powers to act as enforcers alongside the CMA – in particular Trading Standards Services (TSS) and sector regulators.

1.6 It is hoped that this guidance may also assist consumers considering whether terms in contracts they have entered, or may enter, are fair. However, it is not primarily intended as a guide to the rights of private individuals under the Act, and does not provide information about either consumer rights generally or contract law as a whole. Those involved in contractual disputes with businesses are likely to need advice on a broader range of issues than are covered in this guidance. Such advice can be sought from the Citizens Advice consumer service (see www.adviceguide.org.uk/ or call 03454 04 05 06).

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

The guidance:

- explains the fairness and transparency tests in the Act;
- considers terms and notices which are always unfair under the Act;
- explains why the CMA considers that certain kinds of terms or notices may be regarded as unfair;
- considers the exemptions from the assessment of fairness; and
- considers the consequences that are liable to arise for businesses that use unfair terms or notices.

1.7 The guidance does not state the law, only the CMA's views of how the law is intended to operate. It is ultimately for the courts to interpret and apply the provisions in the Act. The final decision on whether a term or notice is unfair rests with the courts. The guidance cannot, therefore, be a substitute for independent legal advice as to the view that a court would take under the Act.

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

Key concepts in the Act, referred to in this guidance

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

Consumer

1.10 A consumer is an individual (that is a natural person rather than a legally incorporated organisation such as a company) who is acting for purposes wholly or mainly outside his or her trade, business, craft or profession. The CMA considers that the words 'wholly *or mainly*' clearly invite consideration of transactions that are entered for a mixture of personal and business reasons. This is one of the respects in which the Act offers protection beyond that required by the Directive.[5] In any event, in cases of doubt, an individual is presumed to be a consumer until shown not to be. If a trader claims in court proceedings that an individual was not acting as a consumer, he or she has to prove this.

Trader

1.11 For the purposes of the Act, '**trader**' is broadly defined as a legal person (which includes both natural and legal persons such as companies) acting for purposes relating to that person's trade, business, craft or profession. 'Business' includes the activities of any government department or local or

[5] The definition, in section 2(3) of the Act, is wider than that in the Directive, which provides that a consumer is 'any natural person who, in contracts covered by this Directive, is acting for purposes *which are outside* his trade, business or profession'.

public authority. The definition of '**trader**' also includes those acting in a trader's name or on a trader's behalf, such as a trader's employees or agents.

1.12 In this guidance, the words 'business' and 'supplier' are from time to time used instead of the word 'trader', with the same meaning, for instance in order to avoid undue repetition, or where what is said is particularly applicable to businesses which would not normally be described as 'traders' in ordinary speech.

Consumer contract

1.13 The Act defines a **consumer contract** as one between a **trader** and a **consumer**. It applies to all **consumer contracts** whether written or not.

Term

1.14 A contractual '**term**' is not defined in the Act or in the Directive. Generally it will be clear as a matter of common sense what constitutes a term. In any case, wording that may not be a term for legal purposes is likely to be treated as a **consumer notice**, and thus subject to similar requirements in relation to fairness.

1.15 Where there is any doubt as to what constitutes a **term**, it should be resolved having regard to matters of substance rather than form. It has been judicially recognised that a term is not limited to what is said in a particular numbered clause or paragraph in the contract. Rather, a term constitutes all the provisions in the contractual documentation which give rise to a particular obligation or right. It does not matter whether the obligation or right is found in a single clause, various paragraphs of the contract documents or in part of a clause.[6]

1.16 Unlike the Directive, the Act applies to all consumer contract **terms**, including those that have been individually negotiated by the **consumer** and **trader**, not just to those contained in standard form contracts. This reflects the approach taken by UCTA.

Consumer notice

1.17 A **consumer notice** is defined broadly in the Act as a notice that relates to rights or obligations between a **trader** and a **consumer**, or a notice which appears to exclude or restrict a trader's liability to a consumer. It includes an

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

announcement or other communication, whether or not in writing, as long as it is reasonable to assume that it is intended to be seen or heard by a consumer. Consumer notices are often used, for instance, in public places such as shops or car parks as well as online and in contractual documentation.

1.18 **Consumer notices** are, therefore, covered by the unfair terms provisions in Part 2 of the Act whether or not they form part of the contract as a matter of law. It has long been recognised that certain kinds of wording used in dealings with customers may be ineffective for contractual purposes, for instance as regards surprising or onerous provisions which are not sufficiently brought to the consumer's attention in a timely way. Such notices have nonetheless continued to be used extensively by businesses and other organisations as if they were legally binding. The fairness concerns to which this practice potentially gives rise are now more clearly addressed than was the case under previous legislation.[7]

1.19 Note that in order to avoid undue repetition, this guidance does not explicitly refer at every point to both contract terms and consumer notices, in making points that cover both. This is particularly true in Parts 2 and 1 of the guidance where it may be generally assumed that what is said about terms covers notices unless otherwise indicated – see paragraphs 2.9 and 4.1.5 to 4.1.6 (in those respective parts) for further details.

1.20 The CMA considers that the **consumer notice** provisions of the Act are particularly important in the context of transactions involving **digital content**. Software and other digital products are sold to consumers subject to End User Licence Agreements (EULAs). For legal purposes, the terms of EULAs may not in all cases be clearly part of the contract with the consumer, but if they are not, they are very likely to be covered by the unfair terms provisions of the Act, as **consumer notices**.

Digital content

1.21 **Digital content** means data which is produced and supplied in digital form. The digital content may be contained within a physical product, as is the case with, for example, music, films, games or software contained in CD, DVD or computer disc. Alternatively it may be supplied in a non-tangible form, such as

[7] It is not suggested that notices predating the coming into force of the Act have been outside the scope of the UTCCRs – the OFT previously considered and acted on the assumption that wording having the effect of a contract term was properly treated, for the purpose of giving effect to the Directive, as if it was a contract term.

a music download on to a computer, apps on a mobile phone/tablet and streaming a film.

1.22 References to digital content, unless otherwise indicated, are to be taken to be to content that has been paid for. The statutory rights under the Act for the most part do not apply to digital content which has not been paid for (see paragraph 3.22 and 3.23). The requirements of fairness and transparency under Part 2 of the Act, however, apply to contracts and notices for digital content whether monetary payment has been made or not.

A general overview of the provisions covered in this guidance

1.23 The Act applies a test of fairness to contract **terms** used by **traders** in transactions with **consumers**. Assessing whether this test of fairness has been met requires that the subject matter of the contract, all the circumstances existing when the **term** was agreed and all the other terms of the contract or any other relevant contract are taken into account. The Act also applies substantially the same test of fairness to **consumer notices**. The overall requirement of these provisions is that such terms and notices should be fair.

1.24 The Act illustrates the meaning of unfairness by listing types of **terms** which may be regarded as unfair. This indicative list is in Schedule 2 to the Act and is substantially the same, but for the addition of three terms, as the indicative list in the Annex to the Directive formerly reproduced without any additions in Schedule 2 to the UTCCRs. The list is referred to below as the Grey List, because what is listed is under suspicion of unfairness, but not necessarily unfair.

1.25 It is also a requirement that a written **term** of a **consumer contract** or a **consumer notice** is transparent. The primary requirement of transparency is that a term should be intelligible to consumers.

1.26 Unfair terms or notices are not legally binding on **consumers**. If a **trader** seeks to rely on a **term** in a **consumer contract** or on a **consumer notice** that a consumer considers is unfair, he or she is entitled to insist on being satisfied as to whether it has any legal force before complying with it.

1.27 There are some exemptions for certain **terms** in **consumer contracts** or **consumer notices**. The main exemption is commonly called ‘the core exemption’ and relates to terms that set the price or specify the main subject matter of the contract – provided they are transparent and prominent.

1.28 Both terms and notices may also benefit from another exemption in the Act which generally covers wording whose inclusion in the contract is, for instance, required by legislation. This exemption is referred to in this guidance as the 'mandatory statutory or regulatory' exemption.

1.29 The Act also provides that certain terms or notices in particular types of **consumer contracts** are 'automatically' unenforceable – they are treated by the law as being inherently objectionable independently of the fairness assessment. This reflects and continues the approach of the UCTA. For the purpose of this guidance these terms or notices are referred to as having been 'blacklisted' (see paragraphs 1.33 and 1.34 below).

1.30 The CMA and other bodies can take enforcement action to stop the use of unfair terms, unfair notices, terms or notices which they consider breach the requirement of transparency and/or terms or notices which are blacklisted under the Act.

Using the guidance

1.31 The guidance is divided into six parts.

1.32 In this part of the guidance, the CMA's aim is to provide an introduction to the guidance and a very broad overview of the provisions of the Act which it covers.

1.33 Part 2 of the guidance sets out the CMA's understanding of the requirements of fairness and transparency. It explains:

- the CMA's approach to interpreting the three elements that make up the fairness test – 'significant imbalance', 'consumer detriment' and 'good faith';
- the factors which the Act requires to be taken into account when assessing fairness, and the nature of the Grey List of terms that may be regarded as unfair; and
- the meaning of the requirement of transparency and the ways in which the CMA considers that compliance with it is likely to be achieved.

1.34 Part 3 of the guidance provides detail on the terms and notices[8] which are treated as inherently objectionable and are therefore 'blacklisted' making them automatically ineffective without the need to consider the fairness test.

1.35 The majority of the blacklisted terms are those which would exclude or restrict the trader's liability arising from breach of certain consumer rights provided by the Act. Part 3 of the guidance therefore explains the rights and, as appropriate the remedies, which consumers have under the Act relating to contracts for the supply of goods, digital content and services.

1.36 Part 4 of the guidance explains why the CMA considers that certain kinds of terms and notices have the potential for unfairness under the Act. It is arranged according to the categories of unfair terms listed in the Grey List with an additional category covering other types of unfairness (Part 4A of the guidance). The CMA does not currently propose to add to this. The OFT's initial approach to enforcement of the UTCCRs involved dedicating resource to collation and publication of examples such as those included in the Annex, as a means of illustrating the requirements of the Regulations and helping business and consumers to understand the law. The CMA considers that the Annex continues to provide numerous practical illustrations of how the principles of contractual fairness can be applied in particular cases, and retains value as it stands, allowing the CMA to focus on making strategic and flexible use of its powers, in partnership with TSS and other stakeholders, tackling issues causing maximum harm to consumers across markets – see Part 6 of this guidance below.

1.37 Part 5 sets out the CMA's views as to the scope of the exemptions from the fairness assessment of certain types of consumer terms and consumer notices. This part of the guidance therefore covers both:

- the exemption for price setting and main subject matter terms – the '**core exemption**'; and
- the exemption for terms and notices which are covered by legal provision – the '**mandatory statutory or regulatory**' exemption.

1.38 As regards the **core exemption,** guidance is provided on:

- the purpose and objectives of the exemption;
- what terms can and cannot fall into it;

[8] Note that only one 'blacklisting' provision covers both notices and terms: the provision which prevents businesses from excluding liability for death or personal injury resulting from their negligence.

- the type of fairness assessment which it excludes for terms which fall into it; and

- the conditions which specific types of terms need to meet in order to benefit from exemption, including the requirement of prominence.

1.39 As regards the 'mandatory statutory or regulatory' exemption, guidance is provided on the purpose of the exemption and the type of terms and notices that the CMA considers can benefit from it.

1.40 Part 6 of the guidance deals with the powers of the CMA and other bodies to **enforce the unfair terms provisions** of the Act. It also considers in more detail the rights for consumers to seek the assistance of the courts to stop a trader with whom they have entered into a contract from using unfair terms in it.

Other relevant legislation

1.41 In cases involving contract terms and notices, both the general law of contract and other legislation are of course applicable alongside the Act, and certain statutory provisions that protect consumers may be particularly relevant. Below we briefly consider the relationship between the unfair terms provisions in the Act with **The Consumer Protection from Unfair Trading Regulations 2008** and **The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**. Both of these sets of Regulations are referred to in the guidance where appropriate. Other relevant legislation is dealt with separately.

The Consumer Protection from Unfair Trading Regulations 2008

1.42 The Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) transpose into UK law the requirements of the Unfair Commercial Practices Directive 2005. They provide a range of protections for consumers from unfair commercial practices which distort their decision-making. They introduce a general duty not to trade unfairly, and ban certain specified practices. For more details, see the guidance issued by the OFT and BIS[9] which has been adopted by the CMA.

1.43 The CPRs and the Act between them provide protection to consumers at all stages of their dealings with traders. The CPRs cover marketing and other trader activity that has an impact on consumers both before and at the time of

[9] Consumer Protection from Unfair Trading Regulations: Guidance on the Consumer Protection from Unfair Trading Regulations 2008 (OFT1008).

their agreement to any contract terms, and with their treatment following any purchases they agree to make. The unfair term provisions of the Act deal with the fairness of the contracts they enter, and therefore need to be seen alongside relevant provisions in the CPRs.

1.44 There is some overlap between the CPRs and Part 2 of the Act. Depending on the circumstances, the use of particular types of terms or notices could give rise to enforcement action under either set of provisions. For instance, the CPRs prohibit practices which mislead, either by action or omission, where the consumer's decision as to whether, how and on what terms to purchase a product is likely to be affected. Certain kinds of unfair wording can distort consumers' purchasing decisions, for instance through misleading them about their rights or the risks they may face, omitting key information or providing unclear information.

1.45 The CPRs' misleading practices provisions are particularly relevant to the requirement that written terms or notice are transparent. For instance, a term which is potentially onerous but is hidden away or buried in the small print may in some instances be open to challenge by an enforcer as an unfair term, or as a breach of the transparency provision in the Act as well as, or alternatively, a breach of the CPRs.

1.46 There may also be overlaps between the use of unfair terms and the other provisions in the CPRs. For instance, the CPRs prohibit commercial practices which fail to meet a standard defined particularly by reference to honest market practice, where there is likely to be an appreciable impact on consumers' ability to make an informed decision. In many cases, using, recommending or enforcing a contract term that is unfair under the Act, and therefore unenforceable, is inherently likely to be considered an unfair practice under the CPRs, and subject to enforcement action, having regard to this standard.[10]

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

1.47 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the CCRs)[11] implement the Consumer Rights Directive of 2011 and replace earlier Directive-based legislation on distance and doorstep

[10] See, for instance, *Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch) at paragraph 227.
[11] The CCRs apply to contracts concluded on or after 13 June 2014. For further information, see The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

selling. However, in contrast to that legislation, certain provisions of the CCRs apply to some transactions concluded on business premises.

1.48 Among other things, the CCRs require traders to provide certain Pre-Contract Information to consumers, and to do so 'in a clear and comprehensible manner'.[12] This information includes, in particular, details of:

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

This statutory Pre-Contract Information is to be treated as legally binding on the business in the same way as what is said in the contract itself. The goods, services or digital content must be provided as stated in the Pre-Contract Information, and any change will not be effective unless expressly agreed between the consumer and the trader. Businesses cannot contract out of this obligation and any term purporting to do so is blacklisted in the Act (see the table at paragraph 3.27 of Part 3 of the guidance).

1.49 The provisions of the CCRs should particularly be borne in mind where clauses could be used to allow changes to be made to any details as to (for instance) the product or its price set out in the Pre-Contract Information. The CMA considers that for such clauses to be legally effective when used with consumers, the Pre-Contract Information must itself reflect the fact that the potential changes envisaged may be made. For example, this applies in the case of a contract which runs for a period of time, where the trader wishes to be able to increase the amount payable by the consumer during the period of the contract. Where the trader does not make appropriate provision in the Pre-Contract Information itself for a variation – whether to the price or to any other issue covered in it – that variation is liable to be ineffective unless the consumer expressly agrees to it, independently of any questions of fairness that may arise under the Act.

1.50 However, a variation provision in the Pre Contract Information is to be treated, under the CCRs, as a term of the contract with the consumer in the same way as other component elements of that information. As such it will (in the CMA's

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

view) be subject, along with the contract terms proper, to the requirements of fairness under the Act, including transparency. The CMA considers that meeting these requirements particularly requires enabling the consumer to foresee the incidence, nature and extent of any changes, as explained below (see variation clauses in Part 4 of the guidance at paragraphs 4.21.1).

1.51 Both the CCRs and the Act are designed to protect consumers and therefore tend to be similar in their implications for traders. However, it must be emphasised that what is said in this document is designed to assist businesses in achieving fairness in their contract terms rather than in complying with the requirement to provide Pre-Contract Information. Compliance with one set of provisions may well assist with meeting the requirements of the other, but it cannot guarantee doing so.

2. Fairness

2.1 As indicated above, Part 2 of the Act works alongside the CPRs and other consumer legislation to ensure fairness, in a general sense, in consumer transactions. It does this by applying specific tests of fairness and transparency to all **terms** in **consumer contracts** used by **traders** in transactions with **consumers**, whether individually negotiated or in standard form. It also applies these tests to **consumer notices**. (The words in bold print are explained above in paragraphs 1.10 to 1.20). The application of these tests is subject to the 'core' and 'mandatory statutory or regulatory' exemptions which serve to minimise unnecessary impacts and duplication.

2.2 A term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'. The test for notices, which is also in section 63 of the Act, mirrors the test for terms, except that (in line with the intention to cover non-contractual notices) it does not make reference to 'the contract'.

2.3 Unfair terms and notices are liable to potential enforcement action by a 'regulator' such as the CMA or a TSS, and are not enforceable against the consumer. See Part 6 of this guidance for more information on public enforcement. If consumers consider that wording on which a trader seeks to rely is unfair, they are entitled to insist on being satisfied that it has legal force before acquiescing in its further use and, if any dispute arises, to invoke the provisions of the Act more formally – taking legal advice as appropriate – for instance by bringing their own proceedings.

2.4 Transparency is also fundamental to fairness. The Act requires that a written term of a consumer contract, or a consumer notice in writing, is transparent. This means that written terms and notices need to be expressed in plain and intelligible language and be legible. This specific transparency requirement sits alongside and reinforces the more general obligation, embodied in the requirement of good faith, of fair and open dealing in the use of contract terms (see paragraph 2.24). To meet this requirement, written terms and notices should not only set out all obligations and rights in a comprehensible way, and make grammatical sense, but should – if they could in any way disadvantage the consumer – be given appropriate prominence and not be concealed (see paragraph 2.44 onwards).

2.5 This guidance refers at various points to the Act's specific transparency requirement as a transparency test, when the context makes this appropriate, in the same way that it refers to the fairness test, and it treats the two tests as operating separately alongside one another. But of course the purpose of both

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

2.6 Failing the transparency test does not make a term or notice unenforceable against the consumer independently of the fairness test, but there is a requirement that, if a term or notice is ambiguous, it should be given the meaning most favourable to the consumer. Further, enforcement action can be taken by a regulator if it thinks that a term or notice breaches the requirement of transparency in the same way as when the requirement of fairness is considered to have been breached. Such action may be taken where a term or notice is ambiguous even if one of its potential meanings is not unfair.

2.7 As indicated above, the application of the Act's fairness requirements is subject to certain exemptions. The main exemption, referred to in this guidance as the 'core exemption', relates to terms that set the price or specify the main subject of the contract. It applies provided they are transparent and are prominent (see Part 5 of the guidance). The 'core exemption' may be said to acknowledge the role that competition can play in protecting consumers where they are fully able to make choices, and fully informed about those choices. It does not apply to notices.

2.8 Both terms and notices may also benefit from an exemption to the extent that they reflect legal provisions – for instance, if their inclusion in the contract is required by legislation. This serves to avoid duplication of regulatory provision. Guidance is provided on the 'mandatory statutory or regulatory' exemption below, in Part 5 of the guidance.

Consumer notices

2.9 This guidance covers both consumer notices and contract terms. However, as already noted above, it does not make explicit, in relation to every point applicable to both, that both are covered. In Part 2 of the guidance, references to terms may be generally understood to include consumer notices. Bearing in mind that the fairness test provisions in section 63 for terms and notices, while separate, mirror one another as far as possible, it is the CMA's view that the Act's intended effect is to apply in substance the same test. This approach has the advantage of ensuring consistency in the application of the law to circumstances involving very closely connected sets of facts and legal issues. The same is true for the way that the Act deals with transparency in section 69. The test for transparency is the same for terms and notices.

Case law predating the Act

2.10 This guidance is written on the assumption that UK case law existing at the date of the coming into force of the Act is relevant to the understanding of its requirements. The scope of the fairness and transparency tests in the Act is wider than under the UTCCRs in that it clearly covers:

- consumer notices whether or not having contractual force under the law; and
- terms that have been individually negotiated rather than laid down in standard form by the trader.[13]

However, in the view of the CMA, the fundamental nature of the requirements of fairness has not changed. It reflects the underlying requirements of the Directive, and therefore existing case law remains applicable. This is not to say that there has been no subsequent development in the case law – one of the purposes of this guidance is to draw attention to ways in which the law has been clarified in recent cases, particularly at European level.

2.11 This guidance takes account of the case law of the Court of Justice of the European Union (CJEU) because under European law the minimum levels of protection provided by the Directive must be given effect in UK law. As a consequence, CJEU case law which interprets the meaning of specific aspects of the Directive must be taken into account when interpreting the provisions in the Act which give effect to the Directive.

2.12 It is the CMA's view that the requirements of fairness should be understood to apply in the same way, and to the same extent, to all terms and notices, irrespective of technical issues as to whether they fall within the scope of the minimum protection required by the Directive. The Act's requirements, which derive from the Directive, are considered to be sufficiently flexible to allow this. For instance, the fairness test is meaningfully applicable to negotiated terms, notably by reason of the inclusion of 'good faith' in the fairness test (see paragraph 2.24 onwards). The underlying objective of the Directive and the Act is the same – consumers who are in a weaker position than the trader regarding their bargaining power and level of knowledge are in need of protection, and the need for a consistent approach is therefore obvious.

[13] But note, here, that it was previously arguable, in the view of the OFT, that notices were covered, and that negotiated terms (and notices for certain purposes) fell within the scope of the UCTA.

The fairness test – section 63

2.13 The effect of the fairness test can be said to be that, broadly speaking, terms in consumer contracts are more likely to satisfy the requirements of the law if they are drafted and presented in a way that respects consumers' legitimate interests. That is, of course, on the assumption that they do not fall within a relevant exemption.

2.14 A term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'. The fairness test thus includes three main elements: 'significant imbalance', consumer detriment and 'good faith'. It must, however, be emphasised that the overall requirement is a unitary one – the question is whether a term is unfair. The elements of the test are recognised as being capable of overlapping with each other in their application to any particular set of relevant facts. A rigid approach to assessing fairness, involving an artificial exercise broken into separate parts, is not appropriate. This should be borne in mind when considering paragraphs 2.16 to 2.27 below, which for the purpose of closer examination begin by looking at 'significant imbalance' and 'good faith'. The Act also sets down the factors that must be taken into account when assessing fairness, these are considered at paragraphs 2.35 to 2.39.

2.15 The Act illustrates what is meant by 'fairness' by including an indicative and non-exhaustive list of types of terms that may be regarded as unfair in Part 1 of Schedule 2 of the Act. This is referred to below as the Grey List. See below paragraphs 2.40 to 2.43 on the characteristics of this list.

2.16 '**Significant imbalance**' is concerned with the parties' rights and obligations under the contract. The requirement is met if a term is so weighted in favour of a business that it tilts the rights and obligations under the contract significantly in its favour, for instance by granting the trader undue discretion or imposing a disadvantageous burden on the consumer.[14]

2.17 This does not mean that terms which provide for equal rights and obligations for the parties in a mechanical or formal way will necessarily achieve fairness. The CMA considers that the question is, rather, whether both parties enjoy rights of equal extent and value in reality, particularly taking into account the nature of the goods, services or digital content provided under the contract.

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[14] Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52. For the purposes of assessing the fairness of non-contractual notices, this analysis is (it is submitted) applicable by analogy.

For instance, a term which imposes a financial penalty on both the consumer and the trader for cancelling the contract is unlikely to be considered fair where the trader has no interest in cancelling (which is often the case). In these circumstances, the penalty on the trader does not 'balance' fairly the imposition of a penalty on the consumer for cancelling.[15]

2.18 'Significant imbalance' also should not be understood as being restricted to cases in which a purely financial burden or cost is imposed on the consumer. The focus of the fairness test, particularly as regards imbalance, is upon the consumer's legal rights and obligations (see paragraph 2.20 below). An example of a term which could impose non-financial disadvantage is one which purports to allow the trader to pass on information it holds on the consumer more widely than is permitted under the Data Protection Act.[16] There may be no financial cost, but the intention is to take away the consumer's legal rights.

2.19 Linked to this, it should not be assumed that a detrimental imbalance in the contract is necessarily likely to be, or even capable of being, remedied by a reduction in the price. Unfair terms do not become fair just because a service is categorised by the business as being offered at low cost, or a product is part of a 'budget' line. For example, the CMA considers that a term allowing the trader to keep all prepayments where the consumer cancels, regardless of the circumstances, is highly unlikely to be defensible solely on the basis that the overall service provided is good value for money (see paragraph 6 of the Grey List, Part 4 of the guidance).

2.20 As indicated above, a term is most likely to be held to cause an unfair imbalance if it alters the balance in rights and obligations that the law would have struck if left to itself. An important aspect of the assessment of fairness of any term is to consider the extent to which it places the consumer in a legal position less favourable than that ordinarily provided for by the law.[17]

2.21 By way of illustration, examples of the types of terms where an unfair imbalance is likely to arise include those that have the effect of:[18]

(a) restricting or excluding the consumer's normal legal rights (for instance, saying the consumer has no right to seek damages where the trader is at fault);

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[15] See paragraph 4 of the Grey List in Part 4 of the guidance – paragraph 4.13.4 in particular.
[16] See 18(f), part 4A of the guidance.
[17] See C-415/11, *Aziz v Caixa D'Estalvis de Catalunya, Tarragona i Manresa.*
[18] See also paragraph 2.41 below which provides a summary of the types of common problems tackled by terms on the Grey List. The Grey List illustrates the meaning of unfairness by providing a non-exhaustive list of terms that may be unfair.

(b) constraining the consumer from seeking the legal remedies to which their rights give rise (for instance, compelling the consumer to take a dispute to arbitration); and

(c) imposing on the consumer additional obligations or risks which are not envisaged by law or unreasonably go beyond anything needed to protect the legitimate interests of the trader (for instance, imposing excessive penalties on the consumer for breaching the contract).

2.22 The fairness of terms has to be considered in the context of the contract as a whole and all the circumstances in which the contract is entered into. Any additional legal safeguards genuinely available to the consumer that remove the potential for a term to be relied upon to his or her detriment may be relevant to the overall assessment of fairness.[19] The CMA considers that such legal safeguards are unlikely to be relevant unless they are known and understood by the consumer and offer them real protection from what would otherwise be the effects of the term. Consumers may be unaware of, or unable in practice to rely on, protections that are found elsewhere in contractual small print or in the general law.

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

'Good faith'

2.24 A term is unfair if it causes an imbalance as described 'contrary to the requirement of good faith'. The Directive explains that the purpose of the requirement is to ensure that the fairness assessment includes 'an overall evaluation of the different interests involved'.[20] As this implies, the concept of 'good faith' for the purposes of the legislation is intended to have a broad application.

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[19] See, for instance, the CJEU case of *Aziz*, as above, at paragraphs 68 and 73.
[20] See Recital 16 of the preamble of the Directive.

'Fair and open dealing'

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

Openness

2.26 In order to achieve the **openness** required by good faith, terms should be 'expressed fully, clearly and legibly, containing no concealed pitfalls or traps. '**Appropriate prominence should be given to terms which might operate disadvantageously' to the consumer**.[22] Consumers should not be assumed necessarily to be able themselves to identify (particularly in longer contracts) terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention.[23]

Fair dealing

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

Consumer's circumstances – how they behave in practice

2.28 The CMA considers that an important source of the consumer vulnerability that unfair terms legislation seeks to address is that most consumers do not read standard written contracts thoroughly before making a purchase. Indeed it would not be realistic or economically efficient to expect consumers generally to do so, given the number of transactions they engage in and other

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[21] Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc*, as above.
[22] ibid.
[23] See for example *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch) and *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) at paragraph 21.

claims on their time. The view taken by the CMA on these points is consistent not only with common sense but also research findings[24] and case law.

2.29 Economic research has also identified other factors that are potentially relevant to the assessment of fairness, such as biases affecting consumers' behaviour. Businesses generally have an appreciation of how consumers are likely to behave in given circumstances. Concerns may arise where businesses exploit such biases to their advantage when consumers are making purchasing decisions.[25]

2.30 The discipline of behavioural economics acknowledges that people are not always fully rational and can be subject to various limitations on their ability to make assessments or choices. For example, consumers may be influenced by how things are presented and tend to be poor in predicting the future. In relation to the latter, individuals tend to overvalue immediate impacts and undervalue future ones (for example, preferring to receive £5 today than £25 next week) which means that they attach less weight to effects that are further off.[26] In addition, owing to the inherent difficulty of assessing the likelihood of certain events or choices in the future, there is potentially a risk that consumers are unlikely to subject remote or contingent terms to a proper assessment including, for example, terms which impose termination or renewal fees. This may be the case even when the terms involved are sufficiently transparent that they cannot be said to be in any way 'hidden' from the consumer when they enter the contract.

2.31 Some groups of consumers may have greater difficulty collecting, processing and acting upon information than others and therefore may have greater difficulty exercising choice effectively. These consumers may be considered to be particularly vulnerable and may include, for example, young consumers (who lack the benefit of experience), some older consumers (studies show that some mental capacities decline with age) and consumers who are short of time or distracted (for example, new parents or the recently bereaved). Some consumers may favour immediacy rather than reflecting on purchase decisions. Consumers may also be vulnerable in the context of specific transactions, for example when they make infrequent or expensive purchases.

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[24] See the OFT's Consumer Contracts study, February 2011, OFT1312, at paragraph 2.23.
[25] See *Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] EWHC 1237 (Ch), in which the Honourable Mr Justice Kitchin held that certain minimum period provisions in gym contracts were unfair on a basis that involved taking explicit account of how consumers behave in practice – see in particular paragraphs 162–173.
[26] This is sometimes referred to as 'hyperbolic-discounting'.

Good faith, negotiated terms and legal advice

2.32 The fairness test now applies to all consumer contract terms alike, including those that have been individually negotiated, but it is sufficiently flexible (particularly because of the requirement of good faith) to allow for negotiated terms not to be treated in exactly the same way as standard written terms. However, the CMA considers that any contention that a particular consumer has actually influenced the substance of terms has to be grounded in a detailed consideration of the circumstances at the time the contract was concluded. In our view, there are few transactions in which individual consumers generally will tend in practice to have the required knowledge or leverage, in terms of bargaining power, to ensure that contractual negotiations involving them are effectively conducted on equal terms.

2.33 The CMA considers that the issue of whether a term can be said to be subject to meaningful negotiation between particular parties will not commonly arise in the context of a case brought by an enforcement authority to restrain the use of a term. It may be significant in a case brought by an individual consumer who is arguing that a term is unfair and so should not be binding. Such an individual case focuses on a specific set of facts in the past, which can in principle involve negotiation. Public enforcement action is taken to protect the interests of consumers **generally**, and particularly in the future.

2.34 A related issue that is more likely to arise in the context of public enforcement action is whether a different standard of fairness can be said to apply where consumers routinely enjoy access to legal advice prior to entering the contract. In the CMA's view, the fact that consumers benefit from legal advice and are formally given an opportunity to negotiate over the drafting of a term does not of itself mean that it is a fair one regardless of the extent to which it tends to weight the contract to their disadvantage. The CMA acknowledges the need to weigh such factors in the overall assessment of good faith[27] but the fact that the consumer has received legal advice will not necessarily result in the parties being on an equal footing in terms of their bargaining power or level of knowledge.

Factors in assessing fairness

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

[27] This is in line, for instance, with the approach taken in *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) and also see *Harrison and others v Shepherd Homes Ltd and others* [2011] EWHC 1811 (TCC).

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

Similar provisions are made for notices.

'All the circumstances existing when the term was agreed'

2.36 For the purposes of enforcement action, the CMA considers that the assessment of fairness is not based on all the circumstances existing at the time any particular contract was made. Rather the above provision should be applied by the enforcer as best it can be by reference to a correctly defined hypothetical consumer for that case.[28] In order for the provision to work effectively in enforcement action, account needs to be taken of 'the effects of contemplated or typical relationships between the contracting parties'.[29]

2.37 The CMA considers that the need to take into account 'all the circumstances existing when the term was agreed' is consistent with an interpretation of the legislation as being intended to particularly to protect those whose circumstances make them vulnerable to exploitation or pressure at the time they actually sign or otherwise agree to a contract. This may include, for example, cases where a contract is signed in the presence of a representative of the trader in the consumer's home.

2.38 The Act makes clear that the assessment of fairness of a term is to take into account the circumstances which existed when the term was agreed, not those arising later.[30] Thus a term agreed between a trader and a consumer is not unfair for the purposes of the Act because the trader's approach to interpreting or applying it is harmful to the consumer's interests, if that approach is not part of the contractual agreement. For instance, where a trader's enforcement of a term involves some form of harassment, the term is not unfair because it fails to forbid such conduct (as opposed to specifically permitting it). Other legal requirements – such as those in the CPRs on aggressive commercial practices – cover the way in which contracts are enforced, and the general law of contract can provide remedies for failure to

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[28] *Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288, where the Court of Appeal commented on the meaning of the equivalent provision in the UTCCRs.
[29] As per Lord Steyn in *The Director General of Fair Trading v First National Bank plc* as above, at paragraph 33.
[30] Lord Bingham in *The Director General of Fair Trading v First National Bank plc, as above,* at paragraph 13 added that, however, 'account may properly be taken of the likely effect of any term which is then agreed and said to be unfair'.

comply with ordinary and reasonable expectations in the way contracts are carried out.

2.39 What consumers were told, before concluding a contract, as to its likely effects would in principle form one element of the circumstances taken into account in assessing its fairness. But whether they were misled is, again, an issue separate from that of contractual fairness. For the purposes of unfair contract terms legislation, the essential question remains whether there is an unfair imbalance in rights and obligations under the contract. Where consumers have been the victim of misrepresentation, or of other unfair, misleading or aggressive practices, remedies may be more directly available by reference to the law of misrepresentation or the CPRs (see paragraph 1.42 above).

The Grey List – an illustration of the meaning of unfairness

2.40 Schedule 2 of the Act illustrates the meaning of fairness by including a non-exhaustive and illustrative list of terms that may be unfair. It is a 'grey' not a 'black' list. (See Part 3 of the guidance for terms that are blacklisted by the legislation). A term that has the object or effect of one of the types of terms on the list may be unfair in some circumstances but not others. Further a term may bear no resemblance to any of the terms listed and yet may be unfair, if it meets the criteria described above – that is, it creates a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer contrary to the requirement of good faith. (Part 4 of the guidance provides additional examples of terms commonly encountered by the OFT that are considered to be potentially unfair despite not corresponding directly to any term in the Grey List.)

2.41 The types of terms in the Schedule overlap with each other, but may cause or allow one or more of the following common problems:

- Consumers being denied full redress if things go wrong.
- Consumers being tied into the contract unfairly.
- The trader not having to perform their obligations.
- Consumers unfairly losing prepayments if the contract is cancelled.
- The trader unfairly varying the terms after they have been agreed, for instance, so as to supply a different product, raise the price or reduce consumer rights.

- The trader determining the price or subject matter of the contract after the consumer is bound by it.

- Consumers being subject to unfair financial penalties.

2.42 Terms are under suspicion of unfairness if they either have the same purpose or can, by whatever means (whether an imbalance or a lack of transparency) produce the same result as terms in the Grey List. They do not have to have the same form or mechanism. This is now underlined in the legislation by each type of term on the list beginning with the phrase, 'A term which has the object or effect …' The wording is taken from the Directive and reflects its underlying purpose of providing effective rather than narrowly circumscribed protection to consumers.

2.43 A consistent approach needs to be taken to the interpretation of the Schedule as a whole, including Part 2 of the Schedule. The purpose of Part 2 is to deal with the application of the Grey List in certain specific contexts, particularly financial service contracts, ongoing contracts, sales of securities and foreign exchange, and other transactions where recognised price indexes are available. An unduly literal approach to the interpretation of Schedule 2, including Part 2, should be avoided as being likely to result in unduly narrow application of the Grey List terms, and in particular to an erroneous assumption that Part 2 of Schedule 2 provides exemptions from the requirement of fairness. Such an approach has the potential to undermine the main purpose behind the list, of illustrating the meaning of 'unfairness' in section 63. For more information about Schedule 2, Part 1 and other terms that are considered unfair, see Part 4 of the guidance.

Transparency test – section 69

2.44 Transparency is a specific requirement in its own right as well as being fundamental to fairness in a general sense.[31] The Act requires that a written term of a consumer contract, or a consumer notice in writing [32] is transparent. This means that written terms and notices need to be expressed in plain and intelligible language and to be legible. But this does not mean that mere clarity of language will ensure compliance with the law – as explained below, terms should be drafted to ensure that consumers can make informed choices (see paragraph 2.48).

[31] The role of transparency in assessing fairness was underlined in the CJEU case of C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V* (referred to below as RWE).
[32] As explained above, references to terms should generally be taken to include notices in this part of the guidance.

2.45 Although our focus below is on standard terms, the transparency test, like the fairness test, applies to all written consumer contract terms, including those that are individually negotiated as opposed to being pre-formulated by the trader. In addition, terms defining the main subject matter and setting the price can only benefit from the main exemption from the fairness test ('the core exemption') provided they are transparent (and prominent) – see Part 5 of the guidance.

2.46 Clarity and legibility in contractual language is widely recognised as desirable in its own right but the Act goes beyond promoting that objective as an end in itself, or as a means to ensure legal certainty. Consistently with the Act's (and Directive's) purpose of protecting consumers from one-sided agreements, and the requirement of the Directive that 'the consumer should actually be given an opportunity to examine all the terms' (Recital 20), the transparency provisions in the Act have to be understood as demanding 'transparency' in the full sense in which that term is normally used.

2.47 The CJEU has explained that the requirement of plainness and intelligibility means that the term should not only make grammatical sense to the consumer but must put the consumer into the position of being able 'to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [the term]'.[33] This is consistent with the court's stated view that 'it is of fundamental importance for the consumer' to have 'information, before concluding a contract, on the terms of the contract and the consequences of concluding it ... It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms'.[34]

2.48 Terms should therefore be drafted to ensure that consumers are put into a position where they can make an informed choice whether or not to enter into the contract. The consumer needs to have a proper understanding of the contract for sensible and practical purposes. It should set out all obligations and rights in a clear and comprehensible way, so that consumers are able to see how they relate to each other, and can foresee and evaluate, at the time of conclusion of the contract, the consequences they may have in the future.

2.49 The transparency requirement in the Act needs to be seen alongside other legal requirements whose effect is to oblige businesses as far as possible to put consumers into a position where they can make an informed choice. For instance, the CPRs prohibit business practices which mislead consumers and which are likely to cause the average consumer to take a different decision,

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[33] C-26/13 *Arpad Kasler, Hajnalka Kaslerne Rabai v OTP Jelzalogbank Zrt*, at paragraph 75 – referred to below as *Kasler*.
[34] Per *RWE* as above at paragraphs 44.

which could include buying a product they would not otherwise have bought or not exercising a legal or contractual right which they otherwise may have exercised (see paragraph 1.42).

2.50 A term that fails to meet the transparency test is not, like a term that is generally unfair, unenforceable against the consumer as such (that is, if it does not create an unfair imbalance). However, where lack of transparency results in ambiguity, so that there is more than one possible meaning and potentially confusion, the court is required to apply the interpretation most favourable to the consumer. This provides a degree of consumer protection while allowing the court to enforce the contract in such a way as to interfere as little as possible with the transaction as agreed between the parties.

2.51 The Act (in line with the Directive) makes clear that the purpose of the 'most favourable interpretation' rule is to protect individual consumers in private disputes. It does not give traders a defence against regulatory action.[35] If a term's ambiguity could cause detriment to consumers it may be challenged by a 'regulator' as unfair even if one of its possible meanings is fair. In addition, a 'regulator' can take enforcement action if it thinks that a term breaches the requirement of transparency.

What is required to comply?

2.52 The starting point is that the consumer needs to be able to understand their rights and obligations. Terms must be intelligible to the average consumer, taking into account for instance the nature of the goods, services or digital content provided. Ordinary words should be used as far as possible and in their normal sense. In the CMA's view, words that are not literally unintelligible are likely to fail the transparency test where for instance if, as a result of vagueness of language, their effect is likely to be unclear or misleading to the average consumer.

2.53 To ensure that terms are fully intelligible, there is a need for clarity in the way terms are organised. Transparency is more likely to be achieved where sentences are short, and the text of the contract is broken up with easily understood subheadings covering recognisably similar issues. Statutory references, elaborate definitions, and extensive cross-referencing should be avoided.

[35] See section 70 of the Act, which applies to notices as well as terms.

2.54 Section 69 refers specifically to legibility. In written contracts, the print must be clear. This depends not only on the size of font used but also its colour, the background and, where paper is used, its quality.

2.55 Where complex and technical issues have to be covered, particular care should be taken. It should not be assumed, for instance, that a consumer understands the detail of how a particular transaction or market operates. Sufficient information should be given (for example, in accompanying literature) to ensure that the consumer can not only understand the words used but the practical implications of any unavoidably difficult terms and their relationship with his or her other rights and obligations.

2.56 While it is desirable that terms are clear and precise for legal purposes, legal precision alone will not suffice to meet the transparency test. This is because the purpose of transparency is to ensure that consumers are properly informed. Consumers do not normally act on legal advice, so precise legal terminology does not generally assist them in their decision-making. An example of unhelpful legal drafting is the inclusion of references to statute in exclusion clauses. This may be intended to ensure that the law treats such clauses as fair, but the CMA considers that where a wide exclusion clause is qualified merely by a statement that the trader's liability is excluded only to the extent permitted by statute, it is highly likely not only to cause an unfair imbalance but also to be in breach of the transparency provisions in the Act (see paragraphs 4.2.8 to 4.2.10). Such terms may not be unclear or uncertain in law, but their lack of intelligibility may mean consumers are prevented or deterred from pursuing legitimate claims – which is the same outcome as is likely to result from using a clause which is not qualified at all.

2.57 It is not only in connection with exclusion clauses that inclusion of a reference to a legislative or regulatory provision is unlikely to contribute usefully to meeting the requirements of fairness or transparency. Wherever the protection of consumers requires that they be made aware of relevant legal provisions, the CJEU has stated that 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned'.[36] It is not sufficient, therefore, just to name or allude to the relevant legal provisions – consumers must be put in a position of being able to understand their effects.

2.58 The points made above do not apply only to obviously obscure legal jargon. What may appear to be relatively straightforward technicalities, such as references to 'indemnity' (see Part 4 of the guidance, the Grey List section,

[36] See *RWE,* as above, at paragraph 50.

paragraph 4.31.7) and 'statutory rights' (see paragraphs 4.11.4 to 4.11.5), can have onerous implications of which consumers are likely to be unaware.

2.59 As the Directive expressly acknowledges,[37] plain language is of little value unless consumers are actually given an opportunity to examine all the terms. For example, where a contract is long or detailed, or covers technical or complex issues that need to be explained elsewhere (for example, in accompanying literature), consideration of the documentation may in practice require more time than is practically available to the consumer. One way of ensuring a fuller opportunity to examine is if a 'cooling-off period' (including a cancellation right) is provided, but it should not be assumed that a cooling-off period can 'cure' a serious lack of transparency.

2.60 Transparency, like fairness, is not a matter of rigid requirements. Transparency and fairness require that consumers have a real chance to learn and understand, by the time the contract becomes binding, the nature and consequences of their obligations including those whose effect might otherwise come as an unpleasant surprise. Terms that could act disadvantageously to a consumer should be given appropriate prominence, as well as setting out clearly the obligations and the circumstances in which they arise (see paragraph 2.26 above).

2.61 If such terms are in any way concealed, they may become a trap for the consumer. No such term is likely to meet the transparency test if it requires 'some legal mining to bring [it] to the surface… the typical consumer is not a miner for these purposes'.[38] This is particularly true for complex pricing terms or those which involve potentially surprising, significant or onerous obligations being imposed on the consumer in the future (for instance, on the occurrence of a future event where there is some element of uncertainty as to whether the event will happen). This may cover, for example, terms which impose administration charges, or termination and renewal fees, in the event of the consumer making decisions that, at the time of contracting, he or she is unlikely to anticipate having to make.

2.62 There are various ways in which a difficult or significant term may be made more likely to be transparent. For instance, in addition to setting out the obligations it involves fully and clearly (see, for instance, paragraph 2.55 above), it may assist if such a term is highlighted in the contract itself by comparison with the majority of terms. However, highlighting a term may achieve little, for example, if its meaning and significance are obscure. As indicated, this risk may in some cases be addressed, by providing explanatory

[37] See Recital 20 of the Directive.
[38] See *The Office of Fair Trading v Foxtons Limited* [2009] EWHC 1681 (Ch) at paragraph 74.

material – for example, a summary – alongside the contract. And transparency is more likely to be achieved if information is conveyed earlier on, in brochures and even advertisements. Providing information early on will incidentally tend to help compliance with the other legislation referred to above (see paragraph 1.41 above).

2.63 If transparency can be achieved, all kinds of terms are more likely to be fair. The 'requirement of good faith' mentioned above (see paragraph 2.24) cannot be met by transparency alone. However, when consumers are in a position to understand fully what they are agreeing to, there is less scope for doubting that the this part of the test of fairness, has been met. There is also less likelihood of disputes arising between trader and consumer. Many companies and trade associations have seen potential commercial advantages in having clear and well-presented contract terms.

2.64 Annex A contains examples of terms under the heading 'Group 19 – Plain and intelligible language' which were considered by the OFT not to meet the transparency requirement (for more information on Annex A see the introduction to Part 4 of the guidance, paragraphs 4.1.7 to 4.1.11).

3. Blacklisted terms and notices

Introduction

3.1 The Act makes certain contract terms and notices legally ineffective – not binding on or enforceable against consumers – in a number of specific situations. For the purposes of this guidance, the CMA refers to these terms or notices as 'blacklisted'. Terms and notices can also be ineffective and unenforceable if they are found to be unfair by reference to the general fairness test in Part 2 of the Act, but if they are blacklisted, they are automatically unenforceable, without the need to apply this test.

3.2 Although the practical effects of blacklisting and terms being found unfair can be similar for businesses and consumers, these effects are produced independently and via different legal mechanisms. It is quite possible for the same term or notice to be separately ineffective as being blacklisted and unfair (see paragraph 3.7 below). Indeed, any wording that is blacklisted is in practice very likely (if not virtually certain) also to be unfair under Part 2. However, it is not true that all potentially unfair terms are likely to be blacklisted. Whereas the Act's fairness requirements cover all consumer contract terms and consumer notices, with only certain limited exceptions, blacklisting is applicable to only a very limited number of terms and notices.

3.3 An example of blacklisted wording is provided by section 66(1). This provides that a trader cannot, with certain exceptions, use a consumer contract term or notice to exclude or restrict liability for death or personal injury resulting from negligence.[39] Similar provision was formerly found in UCTA.

3.4 Other sections of the Act also 'blacklist' various terms (notices do not need to be covered[40]) in consumer contracts for goods, digital content and services. The kind of terms covered include those which aim to relieve traders from their ordinary obligations under the Act to ensure their products are of satisfactory quality and that their services are provided with reasonable care. See below, Part 4 of the guidance, paragraphs 1 and 2 of the Grey List, for examples of the different forms that such disclaimers can take.

3.5 Terms in consumer contracts are also blacklisted where they are inconsistent with other rights of consumers. An example is a term which does not ensure

[39] Note that this does not apply to certain contracts referred to in section 67, including, for instance, contracts so far as they relate to the creation or transfer of an interest in land or insurance contracts.
[40] The rights referred to are conferred by means of implying terms into contracts, and the contractual rights of one party cannot normally be overridden unilaterally by the other, by means of a notice or in any other way. However, the fact that the use of a notice inconsistent with one of these terms would be ineffective does not mean it would necessarily (or even probably) be fair – see paragraph 3.8 below.

the consumer gets full legal rights to own the goods being supplied. Where the contract is a licence agreement covering digital content, a term is blacklisted if it is inconsistent with the full legal right to use the digital content.

3.6 For a summary of blacklisted terms in consumer contracts, see below from paragraph 3.10.

Blacklisted terms and notices subject to fairness test

3.7 As already noted, terms or notices which are blacklisted by the Act are nonetheless also subject to Part 2.[41] This is not, of course, because a term that is legally ineffective by reason of blacklisting is subject to any additional sanctions if (as is very likely) it also separately fails to meet the fairness requirements in Part 2. However, it does mean that where a regulator considers that wording is unfair and that all or part of it may also meet the requirements of blacklisting, appropriate action can be taken to enable the court to grant an enforcement order against its continued use on either or both of those legal grounds.

3.8 It is particularly important to note that wording which would be covered by blacklisting provisions but for being specifically 'carved out' of those provisions, for example terms in insurance contracts,[42] may be unfair under the fairness test in Part 2. This is also true of notices intended to have the same effect as blacklisted terms, but which have not in the majority of cases been blacklisted in their own right.[43] The non-application of blacklisting to these sub-groups of terms and notices is for specific reasons, and is not to be understood as a form of 'whitelisting' – that is indicating that their use is necessarily (or even likely) to be fair.

3.9 If wording is blacklisted under the Act, or has the same intended effect as wording that is blacklisted, the CMA considers it highly likely that it will be regarded as unfair. Where a term or notice is blacklisted, the fact that, if it comes before the court, it may not be given the harmful effect that it is probably intended to have does not mean it is fair, but rather makes it misleading, with the potential to result in consumers not being aware that they can rely on rights that the law intends to protect them. If it is misleading, it is

[41] Schedule 3, paragraph 3 provides that a regulator may apply for an injunction or an interdict if it thinks that the term or notice '**falls within any one or more**' of the following provisions – the blacklisted provisions as discussed above (sections 31, 48, 58 and 66(1) of the Act), it is unfair or it breaches the requirement of transparency (section 69).
[42] Insurance contracts are one of the exceptions mentioned in footnote 41 above.
[43] See paragraph 3.3 and footnote 41.

liable to be at risk of challenge not only under the Act, but also under legislation directed against unfair commercial practices.

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

3.10 The Act makes certain changes to the rights and remedies which apply in consumer contracts for the supply of goods, digital content and services. However, it preserves existing remedies and it operates in a similar way to existing legislation, in that rights and remedies are conferred on consumers mainly by:

- 'implying' terms into their contracts – that is treating certain terms as having been included in the contract whether they have been explicitly put into it or not, and
- making any terms that have been explicitly put into the contract, in general, not binding on consumers – blacklisting them, as mentioned above – to the extent they are inconsistent with any of these rights and remedies.

3.11 Note that, as under previous legislation, blacklisting applies not only to terms that would remove or cut back on the trader's liability for breaching the consumer's rights, but also to those which would produce the same effect by (for instance) preventing an obligation arising for the trader in the first place, or putting procedural obstacles in the way of consumers enforcing their rights and remedies.

3.12 The following paragraphs set out the key rights that are implied by the Act into consumer contracts for goods, digital content and services. Where what is supplied under the contract falls within more than one category (a 'mixed contract'), the rights for each of those categories will apply so far as relevant.[44]

Goods

3.13 The Act gives consumers a number of fundamental rights under contracts for the supply of goods:

- Goods must be of satisfactory quality.

[44] [*Refer to BIS's four guidances on each of the following: Goods, Digital Content, Services and Mixed Contracts*].

- Goods must be fit for their purpose, including any particular purpose the consumer made known to the seller before the contract.

- Goods must match the description given to them by the trader particularly (for instance) in marketing them.[45]

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

3.14 Most of these rights reflect those that consumers had, when buying goods, under the previous legislation but there are some detailed changes. The table at paragraph 3.27 below lists all the statutory rights together with the remedies that are available to the consumer if any of the rights are not met.

3.15 Any term of the contract which is calculated to have the effect of excluding or restricting the trader's liability in respect of any of these rights, or the available remedies, is blacklisted. The table below also specifies, for each right and remedy, the extent to which contract terms excluding or limiting them are legally ineffective – blacklisted.

Digital content

3.16 The Act introduces a new category of product, distinct from goods and services, known as **digital content**, as defined above (paragraph 1.20). Consumers are given certain statutory rights and remedies in relation to it. These rights are mainly similar to, and conferred in the same way as, those enjoyed by consumers buying goods, but there are some differences reflecting the special nature of digital content, and the ways in which it is supplied.

3.17 Under the Act, digital content supplied must be of satisfactory quality, fit for purpose and as described. A term calculated to exclude or restrict liability for breach of these rights or the remedies associated with them is blacklisted – see the table at paragraph 3.27. This mirrors the position in relation to goods (see paragraph 3.13).

3.18 It is also a statutory requirement that the business must have the right to supply the digital content – that is, to enable the consumer to use it (or own it, if ownership is being transferred – see below). A contract term seeking to exclude or restrict liability for breach of this requirement, or access to the

[45] [*Link to BIS Guidance*.]

remedies associated with them, is also blacklisted and unenforceable. This too mirrors a provision in the Act regarding the sale of goods.

When consumers have rights in relation to digital content

3.19 Digital content may be supplied to consumers in a number of different ways. Often the consumer is purchasing only the right to use digital content under the terms of a standard form licence, commonly called an end-user licence agreement or EULA.

3.20 The terms of a consumer's licence to use digital content may be a normal part of the contract. This will typically be the case in an online transaction where the consumer is instructed to read the terms and has to click a box designed to indicate acceptance of them before going on to agree the contract.[46] Where that is the position, the consumer enjoys the statutory rights and remedies provided for purchasers of digital content in the usual way (and such terms are, additionally assessable for fairness).

3.21 In some cases, however, licence terms may not, for legal purposes, form part of the supplier's contract with the consumer. For example, the consumer will normally be able to see the licence terms, but is not asked to indicate acceptance of them.[47] However, in such cases, they are still liable to be assessable for fairness, as provisions within a 'consumer notice' as opposed to a consumer contract.

3.22 Consumers enjoy statutory rights under the Act mainly where they have paid for digital content with money. Payment does not necessarily have to be made directly. The consumer will be considered to have paid where (for instance) he or she makes payment by means of a virtual currency which has itself been paid for with money. The rights also apply where digital content is 'bundled' with something else that is paid for (when the 'free' digital content is of the kind that is generally paid for), for example commercial software provided with a magazine, which may be described as 'free' but is not in fact available without payment.

3.23 The statutory rights do not apply where the consumer has given nothing in return for digital content. Nor do they apply where the consumer may be said to have given something in return but not money – with one exception where the digital content causes damage (see the table at paragraph 3.27 below). But, again, this does not mean the consumers enjoy no protection against

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[46] Such a licence may be described as a 'click-wrap' licence. Note that the CMA does not consider that such acceptance necessarily will result in the terms being binding on the consumer – see paragraph 4.20.2 below.
[47] As may be the case with online 'browse wrap' licences.

unfair wording since the provisions of Part 2 of the Act apply. Even if no payment is made, terms in a licence may still be assessable under the general fairness tests.

Services

3.24 As with goods and digital content contracts, the Act gives consumers certain basic rights when they enter contracts to supply a service. Also as with goods, most of these rights reflect those that consumers had, when buying services, under the previous legislation. Full details are available in the table at paragraph 3.27. The consumer's rights in summary are as follows:

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

3.25 Under section 51(1) of the Act consumers enjoy additional protection where they are given information about the trader and/or the service. If it is taken to account by the consumer, it is treated as a term of the contract. This goes further than rights under previous legislation. It means that if a business makes statements about itself and its services that the consumer is likely to see, for instance in advertising material, it is likely to find itself, like a supplier of goods or digital content, legally bound to supply something that (for example) meets any description applied to it.

3.26 A term of the contract is blacklisted to the extent that it is inconsistent with the rights described above. The Act also blacklists a term to the extent it would restrict the amount of compensation a trader can be required to pay for breach of any of the statutory rights to less than the price the consumer is required to pay under the contract. The Act also makes clear that a term limiting liability to the contract price (in any way or amount) is, in any case, also subject to the general fairness test in Part 2.

3.27 Below is a summary of blacklisted terms by reference to consumer rights and remedies in the Act.

Table of statutory rights and remedies, and whether contract terms excluding or limiting liability are blacklisted

Statutory right	*Remedies for breach*	*Blacklisted?*
Section 9 (Goods) – Goods to be of satisfactory quality.	**Section 19(3)** – • short-term right to reject; • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law.	**Yes** **Section 31**
Section 10 (Goods) – Goods to be fit for a particular purpose.	**Section 19(3)** – • short-term right to reject; • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law.	**Yes** **Section 31**
Section 11 (Goods) – • goods to match description; • pre-contract information* on main characteristics of goods treated as a binding term of the contract.	**Section 19(3)** – • short-term right to reject; • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law.	**Yes** **Section 31**
Section 12 (Goods) – other pre-contract information (not about the goods) treated as a binding term of the contract.	**Section 19(5)** – right to recover costs incurred as a result of the breach up to a maximum of the contract price for the goods. Other remedies under general law, save that the right to treat the contract as at an end is disapplied.	**Yes** **Section 31**
Section 13 (Goods) – Goods to match a sample.	**Section 19(3)** – • short-term right to reject; • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law.	**Yes** **Section 31**
Section 14 (Goods) – Goods to match a model.	**Section 19(3)** – • short-term right to reject; • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law.	**Yes** **Section 31**

Statutory right	*Remedies for breach*	*Blacklisted?*
Section 15 (Goods) – Goods must be installed correctly (in supply and installation contracts).	**Section 19(4)** – • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law, save that the right to treat the contract as at an end is disapplied.	**Yes** **Section 31**
Section 16 (Goods) – Digital content must conform to the contract to supply digital content (where goods are an item including digital content).	**Section 19(3)** – • short-term right to reject; • right to repair or replacement; • right to a price reduction or final right to reject. Other remedies under general law.	**Yes** **Section 31**
Section 17 (Goods) - Trader must have the right to supply the goods.	**Section 19(3)** – right to reject. Other remedies under general law.	**Yes** **Section 31**
Section 28 (Goods) – • goods to be delivered within 30 days of contract if no time for delivery agreed; • trader to deliver goods to consumer unless otherwise agreed.	**Section 28(6) to (8)** – (time for delivery) • right to treat contract as at an end in some cases or to specify a further period for delivery; • If further delivery period missed, right to treat contract as at an end. Other remedies under general law.	**Yes** **Section 31**
Section 29 (Goods) – goods remain at trader's risk until delivered to any of: • the consumer; • someone nominated by the consumer; • a carrier arranged by the consumer.	**N/A**	**Yes** **Section 31**
Section 35 (Digital content) – Digital content to be of satisfactory quality.	**Section 43(2)** – • right to repair or replacement; • right to a price reduction. Other remedies under general law *except* the right to treat the contract as at an end.	**Yes** **Section 48**
Section 36 (Digital content) – Digital content to be fit for a particular purpose.	**Section 43(2)** – • right to repair or replacement; • right to a price reduction.	**Yes** **Section 48**

Statutory right	*Remedies for breach*	*Blacklisted?*
	Other remedies under general law *except* the right to treat the contract as at an end.	
Section 37 (Digital content) – • digital content to match description; • pre-contract information on main characteristics, functionality & compatibility of digital content treated as term of contract.	**Section 43(2)** – • right to repair or replacement; • right to a price reduction. Other remedies under general law *except* the right to treat the contract as at an end.	**Yes** **Section 48**
Section 38 (Digital content)[48] – other pre-contract information (not about the digital content) treated as a binding term of the contract.	**Section 43(4)** – right to recover costs incurred as a result of the breach up to a maximum of the contract price for the digital content or facility. Other remedies under general law *except* the right to treat the contract as at an end.	**Yes** **Section 48**
Section 41 (Digital content)- Statutory rights of satisfactory quality, fitness for a particular purpose and description apply to modified digital content as they do to original digital content.	**Section 43(2) –** • right to repair or replacement; • right to a price reduction. Other remedies under general law *except* the right to treat the contract as at an end.	**YES** **Section 48**
Section 42 (Digital content) – Trader must have the right to supply the digital content.	**Section 46** – right to a refund. Other remedies under general law *except* the right to treat the contract as at an end.	**Yes** **Section 48**
Section 47(Digital content) –Right to a remedy for damage to the consumer's device or other digital content (whether paid for or not).	**Section 47** – right to repair or compensation. Other remedies under general law.	**No** **Section 48(6)**
Section 50 (Services) – Service must be performed with reasonable care and skill.	**Section 55(3)** – • right to repeat performance; • right to a price reduction.	**Yes** **Section 58**

[48] *[This provision does not appear in the Bill as amended at Lords Report. However, it is included in the guidance for consultation purposes as it has been agreed by the House of Lords.]*

Statutory right	*Remedies for breach*	*Blacklisted?*
	Other remedies under general law *including* the right to treat the contract as at an end.	
Section 51 (Services) – • anything said or written about the trader or service treated as term of contract (subject to conditions); • all pre-contract information treated as term of contract.	**Section 55(3)** – for breach of information about performance of the service: • right to repeat performance; • right to a price reduction. **Section 55(4)** – for breach of information not about the service: • right to a price reduction. Other remedies under general law *including* the right to treat the contract as at an end.	**Terms excluding liability are blacklisted – section 58(2).** **A term restricting liability to less than the contract price is blacklisted – section 58(3).**
Section 52 (Services) – If no price for the service has been agreed, a reasonable price is payable.	**N/A**	**Terms excluding liability are *not* blacklisted.** **A term restricting liability to less than the contract price is blacklisted – section 58(3).**
Section 53 (Services) – If no time for performance has been agreed, the service must be performed within a reasonable time.	**Section 55(5)** – right to a price reduction.	**Terms excluding liability are *not* blacklisted.** **A term restricting liability to less than the contract price is blacklisted – section 58(3).**

*References in this table to 'pre-contract information' refer to Pre-Contract Information provided pursuant to the requirements of Regulations 9, 10 and 13 of the CCRs (see paragraph 1.47).

4. Analysis of unfair terms and notices

4.1.1 In this part of the guidance, the CMA considers certain kinds of terms used in contracts with consumers that have the potential for unfairness under the Act.

4.1.2 In the first section of this part of the guidance, we consider terms according to the categories of unfair terms listed in Part 1 of Schedule 2 of the Act – The Grey List. Schedule 2 illustrates the meaning of fairness (section 63 of the Act) by including a non-exhaustive and illustrative list of terms that may be unfair.

4.1.3 In the second section, we consider additional categories identified by one of our predecessors, the OFT, covering other types of unfairness (paragraph 4.30.1 onwards – part 4A of the guidance).

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

Notices

4.1.5 References to terms in this part of the guidance should generally be taken to include consumer notices.[49] The key exceptions to this is when reference is made to terms which are implied into contract by law including the 'blacklisted' terms in Part 1 of the Act[50] and when reference is made to illustrative examples of terms considered by the OFT, in Annex A.

4.1.6 Although 'the Grey List' in Schedule 2 refers to terms, the CMA considers that the list also illustrates the meaning of unfairness for notices. Notices issued by a trader that meet the definition of a 'consumer notice' can have an effect similar to a contract term, for instance, if they exclude liability, without in some cases being strictly part of a contract. The CMA considers that the Act's effect is to apply in substance the same test of fairness to notices and terms. This approach ensures that the requirement of fairness is applied consistently to similar forms of wording that have similar effects for consumers.

[49] For the definition of terms and notices see paragraph 1.8 onwards of Part 1 of the guidance.
[50] As explained elsewhere in the guidance (see in particular Part 3) – the blacklisting provisions in Part 1 of the Act relate only to specific terms and not notices.

Examples of unfair terms – Annex A

4.1.7 Annex A provides examples of two kinds of terms – 'original terms', which are terms drawn from standard contracts referred to OFT by complainants and considered unfair, and 'new terms' which are revisions of the originals referred to the OFT which it considered either fair, or sufficiently improved to require no further action on the evidence available to it at the time. The document was last revised by the OFT in September 2008. It is not possible to compile an equivalent new listing for practical reasons, including the non-availability of terms to cover certain elements of the Grey List in its new form.

4.1.8 Those making reference to Annex A should bear in mind that the terms it contains were considered by the OFT under the UTCCRs. Their fairness was assessed taking into account the applicable general law at the time. The Act supersedes the UTCCRs and, as referred to in this guidance, has in general extensively consolidated and updated the law relating to consumers to business contracts for the supply of goods, services and digital content, including adding to the Grey List.

4.1.9 However, there is substantial continuity in UK unfair terms legislation since 1995, because the Directive to which it gives effect has remained unchanged, and the UK's transposition of the Directive has throughout sought to avoid unnecessary 'gold plating' (exceeding the requirements of the Directive). Continuity is particularly marked in relation to the Grey List, which has changed only by way of certain relatively minor additions. Annex A was always structured by reference to the Grey List and primarily designed to shed light on its applicability to UK contract terms commonly encountered in regulatory practice.

4.1.10 It is therefore considered that, although the listing is incomplete as an illustration of the Grey List in its new form, it is still of substantial illustrative value. It provides 'real' examples of terms which were considered by the UK's lead regulator to be unfair, and of ways in which they were revised to meet its concerns. As such, it can still usefully illustrate how the Directive-based fairness requirements tend to operate in practice.

4.1.11 The way the terms were selected and edited for use in Annex A and their significance is considered in more detail in the introduction to Annex A, but two points need to be particularly stressed:

- The revised terms should not be seen as having been 'cleared' for general use. They reflect the OFT's assessment of what a court would have been likely to have considered fair in the particular contract under consideration at that time.

- The OFT's view does not fetter the freedom of the CMA to take future enforcement action in the interests of consumers nor is it binding on the court or other enforcers.

4.1.12 Grey List terms described in the guidance and at *(a)* to *(g)* examples of other terms considered potentially unfair.

Note: The remaining text in Part 4 of the guidance follows the numbering used in the table below.

Grey List terms as described in the guidance	*Guidance paragraphs*
Exclusion and limitation clauses – introduction	4.2.1
1. Exclusion of liability for death and personal injury	4.3.1
2(a) Exclusion of liability for faulty and misdescribed goods or digital content	4.4.1
2(b) Exclusion of liability for poor service	4.5.1
2(c) Limitations of liability	4.6.1
2(d) Time limits on claims	4.7.1
2(e) Terms excluding the right of set-off	4.8.1
2(f) Exclusions of liability for delay	4.9.1
2(g) Exclusion of liability for failure to perform contractual obligations	4.10.1
2(h) Guarantees and warranties operating as exclusion clauses	4.11.1
Binding consumers while allowing the trader to provide no service	4.12.1
Retention of prepayments on consumer cancellation	4.13.1
Disproportionate financial sanctions	4.14.1
Disproportionate termination fees and requiring consumers to pay for services not supplied	4.15.1
Unequal cancellation rights	4.16.1
Trader's right to cancel without refund	4.17.1
Trader's right to cancel without notice	4.18.1
Excessive notice periods for consumer cancellation	4.19.1
Binding consumers to hidden terms	4.20.1
Trader's right to vary terms generally	4.21.1
Right to determine or change what is supplied	4.22.1
Price variation clauses	4.23.1
Trader's right of final decision	4.24.1
Entire agreement clauses	4.25.1
Formality requirements	4.26.1
Binding consumers where the trader defaults	4.27.1
Trader's right to assign without consent	4.28.1
Restricting the consumer's remedies	4.29.1
(a) Allowing the trader to impose unfair financial burdens	4.30.1
(b) Transferring inappropriate risks to consumers	4.31.1
(c) Unfair enforcement powers	4.32.1
(d) Excluding the consumer's right to assign	4.33.1
(e) Consumer declarations	4.34.1
(f) Exclusion and reservations of special rights	4.35.1
(g) Trader's discretion in relation to obligations	4.36.1

Analysis of unfair terms in Schedule 2 exclusion and limitation clauses – Schedule 2, Part 1, paragraphs 1 and 2

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

(1) A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader, and

(2) A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

Exclusion and limitation clauses in general

4.2.1 Terms which serve to remove or cut back on a trader's liability to consumers (also known as disclaimers, or exemption clauses) take many different forms. Detailed comments on particular types of disclaimer which may be unfair can be found in subsections 2(a) to 2(h) below (see the table at paragraph 4.1.12). But some comments can be made which apply to all of them.

4.2.2 Rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their obligations under the contract and the general law. Any term that undermines the value of such obligations by preventing or hindering the consumer from seeking redress from a trader who has not complied with them is open to challenge as unfair under Part 2 of the Act.

4.2.3 A disclaimer may seek to exclude or limit liability for breach of the 'implied' terms that the law presumes are included in a contract when nothing is expressly agreed on the issues involved. Implied terms are intended, for instance, to ensure that agreements are workable and meet the expectations of reasonable persons. Excluding or limiting their effect necessarily tends to have the effect of allowing one party to act unreasonably towards the other without consequences, and terms having such an effect to the detriment of consumers are liable to be considered unfair.

4.2.4 These ‘implied’ terms include terms that reflect the trader’s key obligations and the consumer’s fundamental rights under Part 1 of the Act. Excluding or limiting liability for breach of these standards would deny consumers the benefit of their ‘statutory rights’ and Part 1 of the Act therefore makes most terms that exclude or limit such liability legally ineffective for that purpose in any event, without any need to prove that they are unfair. Terms of this kind are referred to in this guidance as ‘blacklisted’ terms (see Part 3 of the guidance). Any term which can have such an effect in a consumer contract is, in any case, also very likely to be considered unfair under Part 2 of the Act.

4.2.5 Further, exclusions or restrictions of liability for death or injury caused by negligence are always legally ineffective – see paragraphs 4.3.1 to 4.3.4. But the fact that a term is unenforceable – and thus, if it comes before a court, cannot have the harmful effect intended – is not something that the consumer may be aware of and so not only is such a term pointless, it is also potentially misleading. This makes it, in our view, unfair and using it in consumer contracts may amount to an unfair commercial practice – see paragraph 1.42.

4.2.6 Among the arguments that cannot be used to justify use of an over-extensive disclaimer in a consumer contract are the following:

- That it is intended only to deal with unjustified demands. If a disclaimer could be used to defeat legitimate claims it is likely to be unfair. The fairness test, in Part 2 of the Act, is concerned with the effect terms can have, not just with the intentions behind them. If the potential effect of a term goes further than is intended, it may be possible to make it fair by cutting back its scope(see Annex A for examples showing how this can be done).

- That it does not actually operate by excluding liability. If a term achieves the same effect as an unfair or blacklisted exemption or limitation clause, it will likely be unfair whatever its form or mechanism, particularly if it makes it more difficult for consumers to enforce their rights against the trader. This could apply, for example, to terms which ‘deem’ things to be the case, or get consumers to declare that they are satisfied with what they have received – whether they really are or not – with the aim of ensuring that no liability arises in the first place.

- That there is a statement which says ‘the customer’s statutory rights are not affected’. An unfair disclaimer is not made acceptable by being

partially contradicted by an unexplained legal technicality whose effect only a lawyer is likely to understand.[51]

4.2.7 The fact that certain customers – even a majority – are not consumers does not justify exclusion of liability that could affect consumers. However, there is no objection under the Act to terms which cannot affect consumers.

4.2.8 **Exclusions 'so far as the law permits'**. The purpose of the fairness provisions, in Part 2 of the Act, are to give consumers additional protection against terms which may be unfair even if they are not blacklisted under Part 1 of the Act or the law more generally. So terms which exclude liability 'as far as the law permits' are still potentially unfair. They are also objectionable as being unclear as to their practical effect to those without legal knowledge.

4.2.9 Disclaimers might say that liability is excluded to the extent permitted by unfair contract terms law. That would be open to objection, because it would be unclear and uncertain in effect. Deciding whether a term is legally fair or unfair requires consideration of a number of factors, including the circumstances in which it is used. This means it is impossible – at any rate, without expert legal advice – to know what liability could or could not be excluded in any particular situation, and thus what liability is meant to be excluded.

4.2.10 Subcontractors. A disclaimer covering problems caused by a business's suppliers or subcontractors is regarded in the same way as one covering loss or damage caused directly by its own fault. The consumer has no choice as to whom they are, and has no contractual rights against them. The business has chosen to enter agreements with them, and therefore should not seek to disclaim responsibility for their defaults.

1. Exclusion of liability for death or personal injury

4.3.1 No contract term, or notice, can legally have the effect of excluding or restricting liability for death or injury caused by negligence in the course of business, and such terms should not be used in consumer contracts (see above paragraphs 3.3). As well as being unfair, their use is liable to be misleading, and therefore may give rise to action as an unfair commercial practice, which can in certain circumstances involve prosecution (see paragraph 1.42).

4.3.2 General disclaimers, for example saying that customers use equipment or premises 'at their own risk', cover liability for death or personal injury even

[51] See Part 2 of the guidance under the heading 'transparency' and in particular paragraphs 2.56 to 2.58.

though the main concern of the supplier may be something else. It might, for example, be intended to stop consumers trying to sue for loss of or damage to their clothes or other property which is really the result of their own carelessness. But the fact that the intention behind a term is more limited than its potential effects does not make it fair.

4.3.3 Disclaimers of this kind, like other exemption clauses, are more likely to be acceptable if they are qualified so that liability for loss or harm is excluded or restricted only where the trader is not at fault. Another possible route to fairness where a contract involves an inherently risky activity, is that of using prominent warnings against hazards which provide information, and make clear the consumer needs to take sensible precautions, but do not have the effect of excluding or restricting liability. The OFT's list of specimen terms (see Annex A, Group 1) provides examples of terms of this kind and of ways in which they have been revised to meet the OFT's concerns.

4.3.4 Note, however, that, as the legislation makes clear,[52] amending such terms so that liability is accepted only for negligence does not necessarily achieve fairness. Negligence is not the only kind of misconduct involving breach of duty that can cause death or injury. The CMA does not consider it fair to seek to deprive consumers of compensation in any circumstances in which they would normally be entitled to it by law.

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

4.4.1 Any business selling goods or digital content to consumers is legally bound to accept certain obligations. These are the consumer's 'statutory rights'. Key statutory rights are that goods and digital content must match the description given to them, and be of satisfactory quality and fit for their purposes. Contract terms which deny consumers the right to their full legal remedies where goods or digital content are misdescribed or defective are blacklisted for that purpose in all cases under Part 1 of the Act, as well as liable to be considered unfair under Part 2 of the Act.[53]

4.4.2 As well as being doubly open to challenge under the Act, the use of such disclaimers is liable to mislead consumers about their statutory rights. As such, it can potentially give rise to enforcement action as an unfair commercial practice (see paragraph 1.42). Disclaimers used in sales of digital content give rise to similar concerns to those used in sales of goods.

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[52] See the wording of paragraph 1 of the Grey List which refers to excluding or limiting the trader's liability resulting from 'an act or omission of the trader'.
[53] See Part 3 of the guidance, particularly, at paragraph 3.2.

4.4.3 See paragraphs 4.2.1 to 4.2.10 for the objections under the fairness provisions in Part 2 of the Act to disclaimers generally. Note that these apply to any wording, whatever the form of words used, or the legal mechanism involved, which has the object or effect of protecting the trader from claims for redress for defective or misdescribed goods or digital content. It is also important to note that a statement that statutory rights are not affected, without explanation, cannot make such a term acceptable in the view of the CMA.

4.4.4 A variety of different types of wording can have the effect of excluding liability for unsatisfactory goods or digital content. For example:

- Terms saying that the goods must be (or that they have been) examined by the consumer, or by someone on his or her behalf.

  Consumers cannot be legally deprived of redress for faults in goods, unless they were genuinely able to examine them before purchase and the faults were obvious or specifically drawn to their attention.

- Terms saying that goods or digital content only have the description and/or purpose stated on the invoice.

  Consumers cannot legally be deprived of redress where goods or digital content do not meet the description under which they were actually sold, nor if they are not reasonably fit for all the purposes for which goods or digital content of the kind are commonly supplied.

- Terms which seek to pass on the risk of damage or loss before the goods are actually delivered – for example, from when the trader notifies their availability.

  Part 1 of the Act blacklists any term which deprives the consumer of recourse where goods are destroyed, stolen or damaged while in the care of the trader (that is before delivery to the consumer).[54] The fact that a term may be meant to apply only when the consumer fails to collect or take delivery as agreed does not make it either lawful or fair. The intention behind using such a term may be to encourage consumers to be punctual, but depriving them of redress for negligence by the trader or his or her employees is not an appropriate way to do this – as opposed to, for instance, requiring payment of reasonable storage and insurance charges.

[54] See section 29.

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

  Consumers normally have a short-term right to examine goods and reject them if faulty.[55] This right normally lasts for 30 days. Consumers cannot legally be deprived of this right by being required to sign 'satisfaction notes on delivery, or by being required to return goods in a way that may not be possible – for example, in disposable packaging that they are likely to discard after opening.

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

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

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

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

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

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

2(b) Exclusion of liability for poor service

4.5.1. A business that supplies services to consumers accepts certain contractual obligations as a matter of law. In particular, consumers can normally expect services to be carried out to a reasonable standard, that is, with 'reasonable care and skill'. This applies not just to the main tasks the trader agrees to perform, but to everything that is done, or should be done, as part of the transaction.

[55] See the table at Part 3, paragraph 3.27 of the guidance covering goods.

4.5.2 See paragraphs 4.2.1 to 4.2.10 for an explanation of concerns that arise in relation to disclaimers generally. A term which could – whether or not that is the intention – serve to relieve a trader of the obligation to take reasonable care in carrying out services under consumer contracts is both blacklisted under Part 1 of the Act and liable to be considered unfair under Part 2.

4.5.3 Where goods or materials, or digital content, are supplied under the same contract as a service, the consumer has the same rights as regards their description, quality and fitness for purpose as are described above in paragraph 4.4.1 A disclaimer that is intended to relieve the trader of liability for breach of these rights is open to the same objections as are set out there.

4.5.4 As already explained, mere addition of a statement that statutory rights are unaffected, without explanation, cannot make such a term acceptable – see paragraph 4.2.6. An approach which may assist in achieving fairness is to narrow the scope of the disclaimer, so that it excludes liability only for losses for which the trader is not legally responsible, or which were not foreseeable by both the parties when the contract was entered into.

4.5.5 Two kinds of disclaimer deserve more specific comment.

4.5.6 **Disclaiming liability where the consumer is at fault**. Terms which disclaim liability for loss or damage (for example, to the consumer's property) which is caused by the consumer’s own fault may be acceptable. But this does not mean that a disclaimer which operates only where the consumer is in breach of contract is necessarily fair.

4.5.7 Such a term is unlikely to be acceptable if it could deprive the consumer of all redress in the event of a trivial or technical breach, or where the trader may be partly responsible for loss or harm suffered by the consumer. For example, failure to take specified precautions against the risk of damage or theft by third parties should not be a basis on which the business can escape all liability where it, or any of its employees is negligent or dishonest. That is especially so if the precautions consumers are required to take are unusual or unreasonable in character, or not stated with sufficient clarity.

4.5.8 **Gratuitous services**. Sometimes services are provided to consumers without charge alongside products or services being sold, even where these are not covered by the contract – for example, advice as to how to use a product, or help with installation. The statutory obligation of reasonable care and skill may not apply to such ‘free’ services. However, the business and its employees may still owe a duty to take reasonable care under the general law and a disclaimer covering negligence is still liable to be considered unfair.

4.5.9 This is not to say that ordinary employees, trying to be helpful when asked to do things they are not trained to do, have to be infallible. There is no objection to wording which spells out that consumers need to employ appropriate specialists if they want an expert or professional standard of service. However, no term should shield a business from liability where its employees fail to provide as good a standard of service as they are reasonably able.

4.5.10 There may be no objection to the contract stating that such services are not provided, as long as that this is really the case. To ensure that it is, steps may need to be taken to ensure that employees know that they are not authorised to, and should not, provide additional services.

2(c) Limitations of liability

4.6.1 If a contract is to be fully and equally binding on both trader and consumer, each party should be entitled to full compensation where the other fails to honour its obligations. Clauses which limit the trader's liability are open to the same objections as those which exclude it altogether. See paragraphs 4.2.1 to 4.2.10 regarding disclaimers generally.

4.6.2 Use of a term restricting liability for breach of consumers' rights under Part 1 of the Act is very likely[56] to be blacklisted as well as unfair (see above, paragraph 4.2.3 to 4.2.4), and as such its use may give rise to enforcement action as a misleading commercial practice (see paragraph 1.42) in the same way as terms that exclude liability in full.

4.6.3 Many types of clauses – not just terms which simply place an overall cap on available compensation – can have the effect of limiting a trader's liability. They include, for example, terms which:

(a) require consumers to meet costs that in law might be for the trader to pay where what is supplied breaches the statutory standards – for example, by making call-out charges non-refundable, obliging the consumer to meet the costs of returning faulty goods to the trader or remedying defects in digital content;

(b) say the business is liable only to the extent that it can claim against someone else, such as the manufacturer or a subcontractor;

[56] In a services contract, this is subject to the exception that a term restricting the trader's liability for sub-standard performance of the service to a sum which is no less than the contract price is not automatically invalidated by the Act. However, in the CMA's view, any term limiting the amount of compensation the consumer would be entitled to claim would be under strong suspicion of unfairness.

(c) limit redress for problems to what is available under the terms of a guarantee or warranty so that consumers may not have (or may mistakenly believe they do not have) full access to all the remedies that the law intends them to have;

(d) limit the types of redress that are available below what the law provides for[57] – for example, allowing only credit notes, not cash refunds – or which give the trader the choice as to what type of redress to give when the law would otherwise let the consumer choose; and

(e) inappropriately limit the kinds of loss for which redress is given, for example by excluding 'consequential' loss (see paragraph 4.6.6 below).

4.6.4 The CMA has no objection to terms which, for example, allow the trader to charge reasonably for dealing with problems which arise owing to the consumer's fault (but see paragraph 6 of the Grey List at paragraphs 4.14.1 to 4.14.10 on the need to avoid imposing any unfair financial sanction).

4.6.5 As already explained (paragraph 4.2.6), the mere addition of wording saying that the consumer's statutory rights are not affected, without explanation, cannot on its own make a limitation clause acceptable.

4.6.6 **Consequential loss exclusions**. Businesses often wish to protect themselves from liability to pay damages for remote 'knock-on' consequences of breaches of contract on their part. To achieve this they commonly use terms that exclude liability for 'consequential' losses.[58] The CMA considers that the use of this technical term is potentially unfair in two separate ways.

4.6.7 First, the special legal meaning of 'consequential loss' is unknown to most people and very different from its ordinary meaning. Its use in standard contracts can lead to consumers thinking – and being told – that they have no claim for any loss which is a consequence of a trader's breach of contract. In the absence of legal advice, this misunderstanding may effectively deprive them of the chance to claim any compensation at all.

4.6.8 Secondly, an exclusion of consequential loss, even if given its proper legal meaning, has the potential to stop the consumer from seeking redress in certain circumstances when it ought to be available. That is because it is liable to be understood, as a matter of law, as involving a disclaimer of liability for all losses except those which anyone could see would flow

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[57] In the case of digital content, the extent of the consumer's statutory rights depends on whether the digital content in question has been paid for with money or not. See Part 3 of the guidance at paragraphs 3.22 and 3.23.
[58] The objections also apply to exclusions of 'indirect' loss to the extent that their meaning is unclear to the consumer and that they are therefore open to being relied on by the trader in the same circumstances as exclusions of consequential loss.

directly and naturally from the trader's breach. It can be argued that it therefore excludes liability for less obvious risks, even if the consumer actually told the trader about them and asked him or her to take care to avoid them.

4.6.9 An example of a case in which a consequential loss exclusion could cause unfair detriment would be where the supplier of a service has been told that if it is not performed on time, the consumer will incur a financial penalty or lose an advantage such as a discount under another contract. If the trader then negligently fails to provide the service on time, he or she should not be able to escape liability for that loss, just because the risk of its happening would not have been obvious to the world at large.

4.6.10 Fairness is more likely to be achieved, for example, by excluding liability for:

(a) losses that were not foreseeable to both parties when the contract was formed;

(b) losses that were not caused by any breach on the part of the trader; and

(c) business losses, and/or losses to non-consumers.[59]

4.6.11 See examples of terms considered by the OFT at Annex A under the Group 2(c) 'consequential loss' subheading.

2(d): Time limits on claims

4.7.1. If a contract is to be considered balanced, each party's rights must remain enforceable against the other for as long as is reasonably necessary, as well as being adequate in other respects. The general law allows a period of six years (five years in Scotland) for making claims for breach of contract[60] where the parties have not agreed a definite period between themselves, and this may be regarded as the benchmark of fairness.

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

[59] Note, however, that unreasonable exclusions in standard terms can be void and unenforceable even as between businesses under UCTA, which remains in force in relation to contracts not involving consumers.
[60] Note that the law relating to limitation periods is complex, and limitation periods can in particular cases be longer or shorter. The limitation period for personal injury claims is three years.

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

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

A term which sets a lesser time limit on a consumer's right to enforce the rights set out in Part 1 of the Act is, in any case, blacklisted for that purpose and cannot bind the consumer – see paragraph 4.4.1.

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

4.7.4 Where the consumer's statutory rights are at issue,[61] any fault found in goods or digital content within six months of the date of sale is generally assumed to be the business's responsibility unless it can prove otherwise. It is therefore particularly unfair and misleading for terms to seek to exclude or limit the consumer's right to redress for faulty goods or digital content during the first six months after purchase. As noted above (at paragraph 1.42), the use of misleading terms may give rise to enforcement action as an unfair commercial practice.

4.7.5 Merely adding to such a term a statement that statutory rights are unaffected, without explanation, will not make it acceptable in the CMA's view – see paragraph 4.2.6. A better approach is to deal with the issue of prompt notification so as not to restrict consumers' legal rights. One way to do this is to require notification of a complaint within a 'reasonable' time after discovery of a problem.

4.7.6 There is similarly likely to be no objection to wording that encourages consumers to check to the best of their ability for any defects or discrepancies at the earliest opportunity, and take prompt action as soon as they become aware of any problem. Concerns do not arise so long as there is no suggestion that the trader disclaims liability for problems which consumers fail to notice.

[61] This refers to the consumer's right to a remedy under Part 1 of the Act for breach of rights where goods or digital content are faulty, or otherwise do not conform to the contract, *other than* the short-term right to reject goods – see Part 3 of the guidance.

4.7.7 Any kind of wording which is designed to encourage consumers to act promptly is more likely to be fair, and to be effective, if clear language is used, and it is given appropriate prominence.

4.7.8 The OFT's view of what terms are fair and unfair is illustrated by examples of terms published at Annex A under Group 2(d).

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

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

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

4.8.1 Terms which deprive the consumer of a route to redress, as well as those which actually disclaim liability, may be both legally ineffective for that purpose ('blacklisted') and unfair (see paragraph 4.2.4 above). One legitimate way for the consumer to obtain compensation from a trader is by exercising the right of set-off. Where a consumer has an arguable claim under the contract against a trader, the law generally allows the consumer to deduct the amount of that claim from anything he or she has to pay. This helps prevent unnecessary legal proceedings.

4.8.2 If the right of set-off is excluded, consumers may have (or believe they have) no choice but to pay in full, even when there is something wrong with what they are buying. To obtain redress, they then have to go to court. The costs, delays, and uncertainties involved may in practice force them to give up their claim, and therefore deprive them of their rights.

4.8.3 There is unlikely to be an objection to terms which fairly reflect the consumer's normal legal obligation to pay promptly and in full what is properly owing – that is, the full price, on satisfactory completion of the contract. But terms may be unfair if they say, or clearly imply, that the consumer must in all cases complete his or her payment of the whole contract price, without any deduction, as soon as the business chooses to regard its side of the bargain as finished. They are likely to be seen as excluding the right of set-off even if they do not actually mention that right.

4.8.4 Exclusion of the right of set-off is particularly likely to be seen as harmful where the consumer is not fully protected by the short-term right to 'reject'–

that is to return goods for a full refund if they are unsatisfactory. The short-term right to reject can be exercised only in relation to goods but it is available for the goods element of a purchase where the consumer has bought the goods along with services or digital content.

4.8.5 Even where the consumer can reject goods, a term excluding the right of set-off will still likely be blacklisted and unfair. It restricts the consumer's freedom to use other legitimate methods to exercise their statutory rights to redress, contrary to Part 1 of the Act (see paragraph 4.4.1). Rejection is usually the preferred recourse for consumers who receive unsatisfactory goods, but not always. The consumer may have no time to start looking again for a new car, or wait for delivery of a replacement computer. Where departures from the promised specification are minor, accepting the product but paying a reduced price for it may be a better option, and consumers should not have their right to exercise that option removed or reduced.

4.8.6 **Clauses subjecting set-off to penalty**. Concerns are particularly likely, whatever the subject matter of the contract, where the trader can impose a sanction on the consumer (without first going to court) if they do not pay the whole contract price when demanded – for example, where there is a loss of guarantee rights, or of a right to a discount of the price.

4.8.7 The above objections do not apply where the wording used makes clear that it is designed only to deter consumers from withholding disproportionate sums – for instance, the whole contract price where any faults in the goods or services are merely minor – so that it does not stop consumers from withholding reasonable amounts. Other relevant examples of terms considered acceptable may be found at Annex A under Group 2(e).

4.8.8 **Full payment in advance**. Terms can be open to objection on the basis that they have the indirect effect of removing the consumer's right to set-off, and therefore also of excluding liability unfairly. For example, that right is effectively removed where consumers are required to pay in full (or nearly in full) before the business has finished carrying out its side of the contract. Such terms also leave consumers at risk of loss if the trader becomes insolvent.

4.8.9 These objections apply particularly in connection with contracts under which a substantial amount of work is carried out individually for the consumer after full, or nearly full, payment has been made. Terms which cause that position to arise tend to remove or weaken the trader's proper incentive to perform work with reasonable care and skill. The same objections apply to 'accelerated payment' clauses, which demand all or most of the full contract

price if the consumer breaks a contractual obligation – for example, to allow work to start on or by a certain date.

4.8.10 There is unlikely to be an objection to 'stage payment' arrangements which fairly reflect the trader's expenditure in carrying out the contract, and which leave consumers holding until completion a 'retention' of an amount reasonably sufficient to enable them to exercise an effective right of set-off. Fairness may also be achieved, even if full payment is required in advance, if such an amount is held under secure arrangements which guarantee that it will not be released until any dispute is resolved by independent adjudication.

4.8.11 See Annex A under Group 2(e) for examples of terms considered by the OFT.

2(f) Exclusion of liability for delay

4.9.1 The law requires that goods should be delivered, and services carried out on time. Where the business has set a time in stating its terms to the consumer, it is bound to meet that deadline – where no date was set, any goods ordered generally have to be delivered within the standard 30-day period generally applicable for delivery of goods (see the table at paragraph 3.27 above), and services must be performed within a reasonable time. A term which allows the trader to fail to meet this fundamental requirement of timeliness is liable to be considered unfair. Because of its likely impact on the consumer's ability to rely on statutory rights and remedies – see Part 3 of the guidance – it may well be blacklisted in any event.

4.9.2 This applies not just to terms which simply exclude all liability for delay, but also to standard terms allowing unduly long periods for delivery or completion of work, or excessive margins of delay after an agreed date. The effect is the same – to allow the business to ignore the convenience of customers, and even its own oral promises as to deadlines.

4.9.3 The fact that delays can be caused by circumstances genuinely beyond the trader's control does not make it fair to exclude liability for all delays however caused. Such terms protect the business indiscriminately, whether or not it is at fault.

4.9.4 Contracts sometimes say that 'every effort' will be made to honour agreed deadlines, yet still exclude all liability for any delay. This leaves the consumer with no right to redress if no effort is actually made. Guarantees of this kind are largely valueless.

4.9.5 Clauses excluding liability for delay are more likely to be regarded as fair and thus to be enforceable (though this will also depend on compliance with the CCRs[62]) where they are restricted in scope to delays unavoidably caused by factors beyond the trader's control – see examples in Annex A, Group 2(f). But such terms should not enable the business to refuse redress where it is at fault, for example in not taking reasonable steps to prevent or minimise delay. Where examples of such factors are stated, then, in order to be clearly fair, they should only be matters which are genuinely outside the trader's control, not situations such as shortage of stock, labour problems, etc, which can be the fault of the trader.

4.9.6 Where there is a risk of substantial delay, a right for the consumer to cancel without penalty may additionally help achieve fairness in relation to an exclusion of liability for delay caused by circumstances beyond the trader's control. It will not make acceptable a term which allows the trader to delay at will.

4.9.7 The term 'force majeure' to describe events which are completely outside the trader's control is sometimes used in clauses of this kind. It is legal jargon and best avoided, and should never be used without clear explanation. Plain language is required for terms in consumer contracts under the Act – section 69. See Annex A, subgroup 19(b), for possible alternatives.

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

4.10.1 A term which could allow the business to fail to meet any of its obligations under the contract, at its discretion and without liability, clearly gives rise to the same concerns already outlined at paragraphs 4.2.1 to 4.2.10 regarding disclaimers generally, but in particularly acute form.

4.10.2 Similar concerns apply to terms which are intended to allow the trader merely to suspend provision of any significant benefit under the contract – see paragraphs 4.27.1 below, and following, on the Grey List, paragraph 18. Such terms may be intended to enable the business to deal with technical problems or other circumstances outside its control, protect the interests of other innocent third parties, or to provide an enhanced service to the customer, but the potential effect, as well as the intention behind, contract terms has to be considered in assessing fairness. If an exclusion clause goes further than is strictly necessary to achieve a legitimate purpose it could be open to abuse, and is liable to be seen as unbalancing the contract.

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[62] See above paragraph 1.47 and following.

4.10.3 Such a term is more likely to be considered fair if:

(a) it is narrowed in effect, so that it cannot be used to distort the balance of the contract to the disadvantage of the consumer;

(b) it is qualified in such a way – for example, by specifying exactly the circumstances in which it can be used – that consumers will know when and how they are likely to be affected;

(c) there is a duty on the trader to give notice of any proposal to rely on the term, and a right for the consumer to cancel before being affected by it, without penalty or otherwise being worse off for having entered the contract.

4.10.4 Sometimes terms of this kind are intended to allow the traders to suspend or modify performance of their contractual obligations in the event of what is considered to be a breach of contract on the part of the consumer. However, there is no need for provision of this kind to deal with serious breaches, since the general law covers the point, and where there is no serious breach, it is unlikely to be appropriate for the business to opt out of carrying out its side of the bargain. Any term allowing the trader to withhold a significant benefit under the contract where that would not be allowed by the general law is liable to meet the same objection as other terms that permit imposition of disproportionate sanctions – see under the heading 18(c) in Part 4A of the guidance below – or which reserve to the trader the right to decide whether the consumer is in breach – see under the heading 18(g) in Part 4A below.

4.10.5 See examples of terms considered by the OFT at Annex A under Group 2(g).

2(h) Guarantees and warranties operating as exclusion clauses

4.11.1 A guarantee or warranty might be worded in such a way that, if successfully relied on, it would leave consumers less well able to seek redress, in the event of default by the trader, than they would be under Part 1 of the Act or the general law. Using of wording of this kind will raise the same concerns as exclusion or limitation clauses can do (see paragraphs 4.2.1 to 4.2.10.

4.11.2 There is no objection to guarantees or warranties that simply enlarge the scope of the consumer's ordinary legal rights – for example, by offering refunds or exchanges on a no-fault basis, or offering repairs regardless of the cause of the problem. But sometimes guarantees or warranties offer more limited rights than are available under the law, either because the benefits are less, or because their availability is made subject to special conditions or restrictions. These are highly likely to be unfair and blacklisted

if they could have the effect of reducing the benefit provided to consumers by their legal protections.

4.11.3 Certain fundamental legal rights are treated as included in all consumer contracts by Part 1 of the Act. In general, these statutory rights cannot be excluded by any form of contractual wording or notice – see above, in Part 3 of the guidance on blacklisted terms. But inappropriately restrictive guarantees may still be challenged as unfair, particularly if they could deprive consumers of other legal protections. Such wording is also likely to mislead consumers into assuming that it represents the full extent of their rights, and cause them to refrain from exercising their statutory rights, which may be actionable as a breach of the CPRs.[63]

4.11.4 Consumer contracts often include statements that statutory rights are unaffected. The aim is to achieve minimum compliance with legislation[64] designed to protect consumers by ensuring they are not misled into thinking these rights have been removed. But simply including those words cannot be relied upon to achieve fairness under Part 2 of the Act. The CMA considers that adding an unexplained piece of legal jargon to contradict the effect of an unfair term does not result in fairness, and indeed is likely to involve a breach of the requirement to use plain and intelligible language – see Part 2 of the guidance under the heading 'transparency'.

4.11.5 Where a business has not reduced the consumers' rights, and merely wishes to put beyond doubt that its guarantee is not intended to have any such effect, any kind of wording that is used for that purpose about the consumer's legal rights needs to have some practical meaning for the ordinary consumer. This may be achieved by, for example, giving an indication as to what sort of protection is involved and/or indicating where advice on it can be obtained. See examples given at Annex A under Group 2(h) (guarantees) and under Group 19(b) ('statutory references').

4.11.6 Any guarantee or warranty which gives consumers less protection than their ordinary rights is unlikely to be made fair merely by addition of a qualifying statement of any kind. In the CMA's view, such a guarantee should be discontinued altogether, or its terms should be brought into line with the

[63] See paragraph 1.42 above. Note that, in addition, even in the absence of any attempt to reduce the rights conferred on consumers, it is illegal under the CPRs to present rights given to consumers in law as a distinctive feature of the trader's offer.
[64] Under section 30 of the Act, consumer guarantees in contracts to supply goods have to contain a statement that the consumer has statutory rights which are not affected by the guarantee. See paragraph 4.35.11 below on rights that consumers have in relation to guarantees.

consumer's legal rights. See OFT examples given at Annex A under Group 2(h) (guarantees) and under Group 19(b) ('statutory references').

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

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

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

4.12.1 Terms which give the trader the choice whether or not to do anything under a contract that involves provision of a service or services in any form, whilst the consumer continues to be bound by the contract are clearly open to objection as potentially unfair.

4.12.2 A term, which for example, requires customers to go on paying when services are not provided as agreed is clearly open to even stronger objection than the exemption clauses considered under the heading 2(g) above. That kind of term excludes the trader's liability to provide compensation for breach of contract but does not prevent the consumer cancelling.

4.12.3 In general, clauses allowing a business some flexibility in the performance of its duties under the contract are more likely to be fair where they specify the circumstances in which any contractual obligations may not be observed and these are reasonable in nature – see, for example, paragraphs 4.10.2 and 4.10.3. But fairness is unlikely to be achieved where the circumstances in question are effectively under the control of the trader.

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

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

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

4.13.1 Terms are always likely to be considered unfair if they seek to exclude the consumer's rights under contract law to the advantage of the trader. A basic right of this kind is to receive, in many cases, a refund of prepayments made under a contract which does not go ahead, or which ends before any significant benefit is enjoyed. A term which makes any substantial prepayment or deposit entirely non-refundable, whatever the circumstances, potentially allows the trader to make an unjustified windfall gain.

4.13.2 In certain circumstances consumers are entitled to a refund even where they themselves bring the contract to an end. Generally, where the trader breaks a contract for goods or services in such a way as to threaten its whole value to the consumer, the consumer is likely to have the right to cancel it (see Part 3 of the guidance). In this case, the consumer would normally be entitled to a full refund of any prepayments (and possibly compensation as well). If the contract is for digital content, cancellation rights are more restricted but there is still scope for the consumer to recover payments in full in certain cases, particularly when the trader has completely failed to supply the digital content under the contract (see Part 1 above for the definition of digital content, and Part 3 consumer rights and remedies).

4.13.3 Where customers cancel without any justification, and the trader suffers loss as a result, they cannot expect a full refund of all prepayments.[65] But a term under which they always lose everything they have paid in advance, regardless of the amount of any costs and losses caused by the cancellation, is at clear risk of being considered an unfair financial sanction – see paragraph 6 of the Grey List, discussed at paragraph 4.14.1 of the guidance onwards.

4.13.4 The Grey List term quoted above may be read as indicating there is no objection to a financial sanction for pulling out of the contract that applies equally to both parties. However, in practice such an ostensibly 'balanced solution' is unlikely to achieve fairness. Whether or not such a provision is fair depends on a number of factors, and in particular on whether it confers any real benefit on the consumer, comparable to that enjoyed by the trader. A 'balanced' solution is likely to be acceptable only where there is a roughly equal risk to each party of losing out as a result of the other's cancelling. In many forms of contract, the business has no particular interest in being able to cancel, and therefore its agreeing to accept a severe penalty for doing so

[65] What is said in these paragraphs assumes that there are no special statutory provisions governing cancellation rights, such as apply under legislation relating to distance or off premises contracts (see below paragraphs 4.35.6 to 4.35.9), consumer credit and other particular areas. Such provision might allow for no-fault cancellation and recovery of prepayments even where the trader is not at fault.

does not 'balance' fairly a term imposing a heavy penalty on the consumer for cancelling.

4.13.5 Fairness is more likely to be achieved for such a term by ensuring that it does not go beyond the ordinary legal position. Where cancellation is the fault of the consumer, the business is entitled to hold back from any refund of prepayments what is likely to be reasonably needed to cover *either* its net costs *or* the net loss of profit resulting directly from the default (see below at paragraph 4.14.3 on the need to avoid double counting). There is no entitlement to any sum that could reasonably be saved by, for example, finding another customer.

4.13.6 Alternatively, there may be no objection to a prepayment which is set low enough that it merely reflects the ordinary expenses necessarily entailed for the trader. A genuine 'deposit'– which is a reservation fee not an advance payment – may legitimately be kept in full, as payment for the reservation. But of course such a deposit will not normally be more than a small percentage of the price. A larger prepayment is necessarily more likely to give rise to fairness issues, for instance being seen as a disguised penalty (see paragraph 4.14.9) or even as undermining the consumer's right of set-off (see paragraph 4.8.8).

4.13.7 Terms of this kind are illustrated by examples of terms published at Annex A under Group 4.

Disproportionate financial sanctions, Schedule 2, Part 1, paragraph 6

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

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

4.14.1 It is unfair to impose disproportionate sanctions for breach of contract. A requirement to pay more in compensation for a breach than a reasonable pre-estimate of the loss caused to the trader is one kind of disproportionate sanction. Such a requirement will often be void to the extent that it amounts to a penalty under English common law, but (as the courts have recognised[66]) may still be considered unfair even if it does not, if it has a penal

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

purpose or effect. Other types of disproportionate sanction are considered in paragraphs 4.15.1 to 4.15.6 below.

4.14.2 A requirement to pay unreasonable interest on outstanding payments, for example at a rate excessively above the clearing banks' base rates, is likely to be regarded as unfair. It makes the consumer pay more than the cost of making up the deficit caused by the consumer's default. The same applies to a requirement to pay excessive storage or similar charges where the consumer fails to take delivery as agreed.

4.14.3 Other kinds of penal provisions which may be unfair are clauses saying that the business can:

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

4.14.4 **Potentially penal terms**. A disproportionate financial sanction involving requirement to pay a fixed or minimum sum, in all circumstances, will be open to challenge if the sum could be too high in some cases.

4.14.5 Assessment of unfairness focuses on the effect terms could have, not just the purposes they are intended to serve. Thus a clause may be unfair if it allows the trader excessive discretion to decide the level of a penalty, or if it could have that effect through being vague, or unclear, or misleading about what consumers will be required to pay in the event of default. Consumers rarely know about technical issues such as 'mitigation' of loss (see paragraph 4.14.6 below), and so can easily be misled into thinking that the trader can claim more than is really the case.

4.14.6 **Cancellation penalties and charges**. A term which says, or is calculated to suggest, that inflated sums could be claimed (or retained from prepayments) if the consumer cancels the contract is likely to be challenged as unfair. For example, a charge for wrongful cancellation that requires payment of the whole contract price, or a large part of it, is likely to be unfair if in some cases the business could reasonably reduce ('mitigate') its loss. If, for example, it could find another customer, the law would allow it to claim no more than the likely costs of doing so, together with any difference between the original price and the resale price.

4.14.7 There is unlikely to be any objection to terms which fairly reflect, in plain language, the ordinary legal position – that is:

- requiring the consumer to pay a stated sum which represents a real and fair pre-estimate of the costs or loss of profit the supplier is likely to suffer; or
- stating simply that the consumer can be expected to pay reasonable compensation, or compensation according to law.

Note, however, that if a term purports to reflect the law on damages in a way that is potentially misleading, its use may be open to challenge, both as involving contractual unfairness under the Act and as an unfair commercial practice under the CPRs (see paragraph 1.42).

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

4.14.9 **Disguised penalties**. The Act is concerned with the intention and effects of terms, not just their mechanism. If a term has the effect of a penalty, it will be regarded as such, and not as term which can benefit from 'the core exemption'. For instance, a disproportionate sanction cannot be made fair by transforming it into a provision requiring payment of a fee for exercising a contractual option (see the discussion of paragraph 5 of the Grey List, at paragraph 4.15.1 and following below).

4.14.10 See examples of terms considered by the OFT at Annex A under Group 5.

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

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

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

4.15.1 Terms are always at risk of being considered unfair if they have the effect of imposing disproportionate sanctions onto the consumer who decides to

cancel the contract early. Paragraph 5 illustrates two different kinds of terms, which are calculated to have this effect – disproportionate termination fees and requiring consumers to pay for services not supplied.

4.15.2 **Disproportionate termination fees**. A term which imposes disproportionate penalties on consumers who cancel their contracts early will fall under suspicion of unfairness even if it does not have the formal mechanism of a penalty clause. It is particularly to be noted that, like all wording having the object or effect of terms listed in Schedule 2, it cannot benefit from the 'core exemption' (see Part 5 below).

4.15.3 Where a payment is required for exercising a contractual right to terminate the contract early, the CMA considers that it is likely to be open to challenge as excessive where it does not appropriately reflect:

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

4.15.4 **Requiring consumers to pay for services not supplied**. The final words of paragraph 5 recognise that unfairness can arise from actually or effectively locking consumers into contracts for services that they no longer need or want. In contracts where the consumer agrees to make regular payments for services over a fixed or 'tie-in' minimum period of months or years, terms will particularly be open to scrutiny if they:

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

4.15.5 Whether a minimum 'tie-in' period clause is fair is to be assessed in the usual way according to whether, in all the circumstances, its use weights the contractual relationship as a whole to the advantage of the trader and the detriment of the consumer. The CMA does not consider that such a term is necessarily immune from a successful challenge solely because the business can argue, as a matter of English contract law, that it is unable to 'mitigate' the loss caused by the consumer's early cancellation, for instance

by finding another customer to take the place of the customer who has cancelled early.

4.15.6 Such terms are particularly open to objection where they have the effect of committing consumers to pay for services for an unduly lengthy tie-in period. Among the factors to be considered in assessing whether such a period is fair are consumers' ordinary expectations, and any inherent practical limitations on their ability to plan ahead and assess what their circumstances and needs will be in the longer term. This was recognised by the High Court following proceedings brought by the OFT. The court held that a period of over 12 months in gym contracts was unfair.[67]

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

Unequal cancellation rights

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

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

4.16.1 Fairness and balance require that consumers and traders enjoy rights of equal extent and value in relation to ending or withdrawing from the contract.[68] The trader's rights should not be excessive, nor should the consumer's be over-restricted, and the balance between their rights should be real, not a matter of mere formal equivalence.

4.16.2 **Excessive rights for the trader**. Cancellation of a contract by the trader can leave the consumer facing inconvenience at least, if not costs or other problems. Where that is so, a unilateral right for the trader to cancel without any liability to do more than return prepayments is likely to be considered unfair (see the discussion of the second half of paragraph 7 of the Grey List at paragraph 4.17.1 below and following, on terms which exclude even that liability).

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[67] *The Office of Fair Trading v Ashbourne Management Services Ltd and others [2011]* EWHC 1237. In reaching its conclusion, the court took account of how consumers tend to overestimate their likely use of a gym when entering the contract and not take into account unforeseen circumstances which may make their use of the gym impractical. It was also noted that the terms providing for the minimum membership were highly advantageous to the gyms in this case because they were rarely so oversubscribed that they could not take on new members (see paragraphs 162–174 in particular).

[68] What is said in this paragraph assumes that there are no special statutory provisions governing cancellation rights, such as apply under legislation to 'distance' or 'off premises' contracts, consumer credit and other particular areas (see, for instance, paragraphs 4.35.6 to 4.35.9 below).

4.16.3 This applies particularly to terms which explicitly say that the trader can cancel at will, without having any valid reason. But it also applies to terms which permit cancellation for vaguely defined reasons, or in response to any breach of contract (however trivial) by the consumer. Such terms may be intended to allow the business to do no more than protect itself legitimately from problems beyond its control, or from serious misconduct by the consumer. But the potential effect as well as the purpose of terms is relevant to fairness, and if wording is loosely drafted and open to abuse it is liable to be seen as unbalancing the contract.

4.16.4 Fairness is more likely to be achieved where terms reflect fairly the ordinary law, by allowing the trader to end the contract if the consumer is in serious breach. See the discussion of paragraph 6 of the Grey List above at paragraph 4.14 of the guidance and following on the potential for unfairness for terms dealing with claims in damages in such circumstances.

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

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

4.16.6 **Inadequate rights for the consumer**. A term can also be unfair if it undermines the consumer's legitimate cancellation rights. Clauses frequently state or imply that the consumer cannot cancel the contract in any circumstances, or only with the trader's agreement. In law, where the trader breaks a contract for goods, services or digital content, the consumer has remedies which may include a right to cancel it (see the table in Part 3 of the guidance, at paragraph 3.27). A term that purports to deny the consumer those

remedies, and in particular to rule out all possibility of cancellation by the consumer is potentially misleading and unfair.

4.16.7 Again, fairness is more likely to be achieved if cancellation terms merely reflect the way in which the ordinary law would apply in any event. A cancellation clause, for instance, is unlikely to raise concerns if it fairly forbids consumer cancellation where the trader is not in breach of the contract, and alerts the consumer to his or her liability in damages for wrongful cancellation (see paragraphs 4 and 6 of the Grey List on what is unlikely to be unfair).

4.16.8 Examples of both fair and unfair cancellation clauses of various kinds can be found at Annex A under Group 6.

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

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

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

4.17.1 Cancellation clauses which allow the trader to cancel without acknowledging any right on the part of consumers to a refund of prepayments can be particularly open to abuse. This applies equally to pre-contractual deposits and sums paid when (or after) the contract is entered into.

4.17.2 As with cancellation rights generally, concern arises particularly where such a term could be used at the discretion of the trader. But even a more restricted right to cancel, for example, along lines indicated in paragraph 4.16.5, is likely to be unfair if it could allow retention of prepayments for which the consumer has received no benefit.

4.17.3 Where a business cancels in response to a serious breach of the contract (see paragraph 4.16.4) by the consumer, it may be entitled to retain all or some monies prepaid by the consumer by way of compensation for any loss directly caused by the breach (see the guidance on paragraphs 4 and 6 of the Grey List (see paragraphs 4.13.1 and 4.14.1) on what is unlikely to be unfair). However, a term is likely to be unfair if it makes a substantial prepayment non-refundable in all cases of cancellation on consumer default, regardless of whether any such loss has occurred.

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

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

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

4.18.1 In most kinds of contract, a sudden and unexpected cancellation by the trader may cause inconvenience, and sometimes expense, for the consumer. Even in a 'continuing' contract, which either party is entitled to cancel at any time – for example a contract for cloud services – the trader should normally give reasonable notice of termination.

4.18.2 A right for the trader to cancel a contract without notice is less likely to raise concerns if its use is effectively restricted to situations in which there are 'serious grounds' for immediate termination. These might be circumstances in which there is a real risk of loss or harm to the trader or others if the contract continues for even a short period – for example, where there is a reasonable suspicion of fraud or other abuse.

4.18.3 However, fairness is likely to require that clear indication is given of the nature of any 'serious grounds' for cancellation without notice. If the consumer will be unaware whether an immediate cancellation is or is not contractually justified, he or she is in no position to seek redress if it is not, and the term will in practice be open to abuse.

4.18.4 In contracts for financial services – for example, banking and credit contracts – the Act, Schedule 2, Part 2 indicates that there may be a need only for the trader to have a 'valid reason' for cancellation without notice, and to inform the consumer of the decision to cancel as soon as possible.[69] Such a term should, however, not be drafted in such a way that it could in practice be used arbitrarily to suit the interests of the trader – see paragraph 4.22.5 to 4.22.6 on what may be considered to constitute 'valid reasons'.

[69] Schedule 2, Part 2, paragraph 21. In a few stated specialised areas, there may be no need for notice at all. These are not exemptions from the control of the unfair terms provisions of the Act, but examples of circumstances in which there is unlikely to be risk of significant detriment to consumers. Any 'cancellation without notice' term may still be unfair if it satisfies the test of unfairness set out in section 63 of the Act.

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

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

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

4.19.1 A clause which states how long a contract has to run is likely to be among its most important provisions for consumers. If a term can be used – relying on a consumer's inertia or insufficient information – to extend the contract period beyond what the consumer would normally expect, it is liable to be considered unfair.

4.19.2 Particular suspicion attaches to a term in a contract for a fixed period which, if early notice to cancel is not given, automatically commits the consumer to a renewed fixed term.

4.19.3 A term which could have the effect of automatically renewing a contract is more likely to be fair if the renewal term is properly brought to the consumer's attention before entering the contract (see Part 2 of the guidance on transparency) and the contract requires that the consumer is sent a reminder a reasonable time before the renewal takes effect, provided it is accompanied by appropriate information covering, in particular:

- the terms of the proposed renewal of the contract; and
- any steps consumers are reasonably required to take to notify the trader of their intention that the contract should not be renewed.

4.19.4 Such a term may also be more likely to be fair if there are reasonable procedures which allow for cancellation of the contract during the renewed period provided that

- the consumer is not subject to any penalty for cancellation, or a charge that has the effect of a penalty; and
- any requirement to give notice of cancellation is reasonable and in particular does not have the effect of itself tying the consumer unfairly into the contract.

4.19.5 The CMA considers that an over-long cancellation notice term may also be unfair in a contract which continues indefinitely rather than for a fixed term. Consumers entering such contracts normally expect to be able to end it a reasonable time after they decide they no longer want or can no longer afford what is provided under it. If they are required to make a cancellation decision too far ahead of time, they are liable either to forget to do so when they need to, or wrongly to anticipate their future needs. In either case, the effect of the term is the same as that of an 'automatic renewal' clause – consumers experience an unintended extension of their payment obligations.

4.19.6 Terms of this kind are illustrated at Annex A under Group 8.

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

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

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

4.20.1 It is a fundamental requirement of contractual fairness that consumers should always have a real opportunity to read and understand contracts before becoming bound by them (see Part 2 of the guidance on transparency). Terms whose purpose is to subject consumers to obligations of which they can have no knowledge at the time of contracting are open to serious objection. The underlying principle that consumers need full information about the agreements they are entering is mentioned frequently in this guidance and also reflected in, for instance, the CCRs (see paragraph 1.47 above).

4.20.2 Any provision or notice which seeks to bind the consumer to accept or comply with terms which are 'hidden' – or, in legal jargon, 'incorporated' solely 'by reference' – is liable to challenge. This issue commonly arises in the context of online transactions – for example, where a condition of receiving digital content is the acceptance of terms and conditions which the consumer has no reasonable prospect of reading and understanding. Such terms may, in any case, not be binding under the general law especially if they are onerous in character. Their use may also involve breach of the CPRs (see paragraph 1.42).

4.20.3 The same objections apply to terms which require consumers to accept that they are bound by the terms of other linked contracts (for example, insurance contracts) or rules or regulations or agree to the terms of first or third party privacy policies unless they are given an appropriate chance to become acquainted with them.

4.20.4 This is not to say that every detail of information about an agreement must always be included in a **single** contract document. Indeed, relying solely on lengthy terms and conditions to communicate with consumers may be positively unhelpful. Face-to-face explanation serves a valuable purpose, as do brochures, executive summaries, and other forms of written guidance – particularly as a means of drawing attention to the more important terms. The overriding requirement is that consumers are effectively alerted – before committing themselves – to all contractual provisions that could significantly affect their legitimate interests.

4.20.5 **Cooling-off periods**. Where contract documentation is lengthy and complex, or there are other reasons why consumers are likely to be unable to understand and consider all relevant information provided in order to inform their decision-taking, a 'cooling off' period may be one way to help achieve fairness. This means a specified reasonable period of time in which consumers can read the terms, consider their position, and pull out without penalty or loss of prepayments if they find that the agreement is not what they expected. The law requires provision of a cooling-off period in some situations, particularly where a contract is entered away from the trader's place of business or at a distance, for example by post, telephone, text messaging or internet. It should not be assumed that a cooling-off period can 'cure' serious lack of transparency.

4.20.6 Terms of this kind are illustrated at Annex A under Group 9.

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

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

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

4.21.1 A right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party, is under strong suspicion of unfairness and may well, in any case, be blacklisted for the

purposes of Part 1 of the Act. A contract can be considered balanced only if both parties are bound by their obligations as agreed.

4.21.2 A right of variation is likely to be at risk of being considered unfair depending on:

(a) its breadth – the extent of the changes that it allows, and particularly changes that are exclusively in the interest of the trader;

(b) its transparency – how far it can result in changes that are unexpected to and unforeseeable by the consumer; and

(c) the vulnerability of the consumer – in particular, whether consumers can realistically escape the impact of the changes by cancelling the contract.

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

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

4.21.5 A variation clause is more likely to be found fair if it is narrow in effect, so that it cannot be used at the discretion of the trader to change the balance of advantage under the contract to the consumer's detriment. An example would be a term allowing variations to reflect changes in the law, or to meet regulatory requirements. But it should be noted that allowing variation by reference to technical legislative or regulatory provisions, without any information to enable consumers to understand what this is likely to mean for consumers in practical terms, is unlikely to suffice.[70]

4.21.6 Where a term leaves some discretion in the hands of the business, the chances of it being considered fair can still be increased provided it cannot

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[70] *RWE* (as referred to above in Part 2, under the heading 'transparency'): 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned', (paragraph 50).

be used unexpectedly and to the detriment of consumers. This may be achieved through full transparency – namely where the contract sets out the circumstances, method and reasons for use of the right of variation in an appropriately clear and specific way. The CJEU has strongly emphasised the need for this kind of full transparency in the use of variation clauses, so that consumers entering contracts are able to foresee the changes that can be made and understand the implications for them (see paragraph 4.22.6).[71]

4.21.7 As previously noted (see paragraph 2.63), however, transparency – even in the fullest sense – is not the sole criterion of fairness. If it remains the case that a term permitting unilateral contractual variation could operate to the detriment of the consumer, fairness can only be achieved via other elements of the term or the contract to which regard will be had in making an assessment of fairness, most notably the consumer's right to cancel.

4.21.8 A variation clause may also be more likely to be found fair if it includes a duty on the trader to give notice of any variation in good time prior to it taking effect and a right for the consumer to cancel without being adversely affected. However, in the same way that steps to achieve transparency as set out in paragraph 4.21.6 will not necessarily suffice to achieve fairness, so also the provision of notice and cancellation rights cannot be relied upon in itself, independently of other factors, always to make a widely drafted variation clause fair. The CMA considers that fairness is particularly unlikely to be achieved via inclusion of cancellation rights in the following two kinds of case:

(a) Where there is (formally or in effect) a penalty for exercising the right to cancel, or the consumer will otherwise be worse off as a result of doing so. The right to cancel must be genuine, and not merely a formal right: it must be capable of being exercised in practice without loss or serious inconvenience (see paragraph 4.23.6).

(b) Where the circumstances in which a variation could occur have not been made sufficiently clear as mentioned in paragraph 4.21.6 above. Fairness requires that the consumer should be able to foresee and evaluate the implications of the fact that he or she may at some point have to

[71] For instance see C -26/13 *Kasler* at paragraph 73 and see the CJEU case of C- 92/11 *RWE* at paragraphs 44 and 55 in particular, where the Court of Justice followed its earlier approach to price variation terms in C-472/10 *Nemzeti Fogyasztovedelmi Hatosag v Invitel Tavkozlesi Zrt*. (see paragraphs 21 to 31 of the latter case). Variation terms, like all written terms, must in any case, meet the requirements of transparency set down in the legislation (see Part 2 of the guidance, paragraph 2.44 onwards).

choose between accepting a variation and abandoning the bargain altogether (see paragraph 4.22.6).[72]

4.21.9 **Reasonableness requirements**. A term which merely says that variations will only be 'reasonable', or will only be made 'reasonably', is unlikely to be any fairer than one which contains no such qualification, unless there can be little doubt in a reasonable consumer's mind as to what sort of variation such wording allows, and in what circumstances. Where the criteria of reasonableness are vague, or clearly meant to include the best commercial interests of the business, there will be scope for the business to change the bargain unexpectedly and potentially to the detriment of consumers, simply on the basis that it needs to protect its profit margins.

4.21.10 A reasonableness requirement is more likely to be acceptable where fair-minded persons in the position of the consumer and trader would be likely to share a common view as to what would be 'reasonable' – for example, where a 'reasonable charge' clearly means a charge sufficient to meet specific and verifiable open-market costs.

4.21.11 Examples of general variation clauses which have been considered unfair, and of acceptable amendments, are illustrated at Annex A under Group 10.

4.21.12 When considering paragraphs 12 to 15 of the Grey List terms, we set out our objections to other particular kinds of variation clause, and suggest ways in which they can be modified to achieve fairness.

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

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

(12) A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.

(13) A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

4.22.1 Concerns regarding terms that allow the trader to substitute something different for what the consumer actually agreed to, or reasonably understood

[72] See *RWE*, particularly at paragraphs 51 and 52.

as having been agreed, are set out on a general basis in paragraphs 4.21.1 to 4.21.12. This section considers two particular kinds of term that give rise to these concerns.

4.22.2 Variation clauses, illustrated in paragraph 13 of the Grey List, are more commonly encountered than determination clauses as illustrated in paragraph 12 of the Grey List, and are therefore dealt with first, but in any event both kinds of term have the same potential effects, and what is said applies to both of them equally.

4.22.2 The use of terms that allow the trader to change what is supplied conflicts with the consumer's legal right to receive something that is in all significant respects what the trader stated[73] would be supplied, not merely something similar or equivalent. Consumers are legally entitled to expect satisfactory quality in goods and digital content which they have paid for, and that services will be provided with reasonable skill and care, but this does not mean it is fair to reserve a right to supply something that is merely of equivalent standard or value. Terms should respect *both* the right to receive products that are as described *and* the right to satisfactory quality*, not* one or the other.

4.22.3 A clause which allows the trader to vary what is supplied is more likely to be considered fair if it is clear and restricted to allowing either minor technical adjustments which can be of no real significance to the consumer, or changes required by law or necessity. In the case of digital content, an acceptable term might be designed, for example, to address a security threat to a consumer's digital content or device. Conversely, more open-ended terms which permit wide-ranging variations for unspecified reasons are more likely to be considered unfair.

4.22.4 If the intention is to permit changes that are more significant, but still only limited in scope, another approach is possible. This is to ensure that, as far as possible, the consumer fully understands and agrees to the change in advance. The contract will need, as a minimum, to set out clearly what variation might be made, and in what circumstances, and define how far it can go, for example if the consumer orders goods of a certain colour but agrees to accept one of a range of others if that is not available. However, even in these circumstances, a genuine right to cancel the contract as described above (paragraphs 4.21.8) and below (paragraph 4.23.6) may be

[73] What is said here reflects the provisions of the CCRs under which, for many types of contract, certain pre-contract information must be provided by the trader and is to be treated as constituting a term of the contract, irrespective of whether it appears in a contract document as such. It is the CMA's view that any provision made for variation of the contract needs to be reflected in the pre-contract information itself (see above, paragraph 1.47 and see also the table in Part 3 of the guidance at paragraph 3.27).

needed to achieve fairness, for example, where there is a risk that consumers will not be fully aware of and may not have accepted the clearly defined variation.

4.22.5 **Valid reasons**. Stating a valid reason in the contract as to why a particular change may be made can also help if it serves to ensure that customers can, when deciding whether to enter the contract, foresee the circumstances in which the changes to it may occur and understand how these changes may affect their rights and obligations under the contract.

4.22.6 A reason can be considered 'valid' only if its inclusion in the contract offers real protection to the consumer against encountering unexpected and unacceptable changes in his or her position. Vague or unclear reasons are most unlikely to be considered valid. In any case, no statement of reasons can justify making consumers pay for a product that is substantially different from the one they agreed to buy.

4.22.7 **Rights to cancel**. Where circumstances could prevent the supply of the goods, digital content or services agreed (or a version of them that the consumer has indicated is acceptable) then fairness is likely to require that the consumer should have a meaningful right to cancel the contract,[74] and receive a refund of any prepayments. Transparency requires that the consumer should be given appropriate information, before the contract is concluded, as to what these circumstances are. Where it is known that, for example, a chosen item could be unavailable from the manufacturer, that risk should be drawn to the consumer's attention.

4.22.8 A term which has the effect of allowing the trader to vary what is supplied at will – rather than in circumstances described in the contract – is unlikely to be fair even if customers have a right of cancellation and refund. The consumer should never have to choose between accepting a product that is not what was agreed, or suffering the inconvenience of unexpectedly not getting, for example, a product for which he or she may have an immediate need, or a long-planned holiday, just because it suits the trader not to supply what was promised.

4.22.9 **Notice of variation**. If a right to cancel is to be of any value in connection with the use of a variation clause, consumers need to be given notice of a proposed variation in good time so that they can consider their position before deciding whether to accept it or to end the contract. However, as

[74] On what makes a cancellation right meaningful, see paragraph 4.23.6. Note that cancellation rights that exist independently of a variation clause may not suffice to make the variation clause fair if that clause could itself be used to remove or change them.

explained in paragraph 4.21.8, a requirement to provide notice of the variation and a cancellation right cannot be relied upon in itself to make a variation clause fair, independently of the breadth of the variation right conferred on the trader and the extent to which it can be exercised at discretion rather than in line with information and reasons stated in the contract. Both cancellation rights and rights to receive advance notice must actually enable the consumer to take a decision in his or her best interests if they are to increase the likelihood of a variation clause being considered fair.

4.22.10 **Right to determine what is supplied**. Paragraph 12 of the Grey List clarifies the legal position in connection with contracts where the trader and consumer have not agreed, by the time a contract is concluded, on all the details of what is to be supplied. In such cases, a term that gives the trader the sole right to determine the characteristics of the subject matter of the contract will be under strong suspicion of unfairness.

4.22.11 The effect of such a term is, for practical purposes, likely to be very similar to that of a variation clause or an exclusion clause (see paragraph 2 of the Grey List). It is liable to be capable, especially if widely drafted, of being used to deny consumers the full enjoyment of benefits they reasonably expected to enjoy under the contract. That being so, fairness is more likely to be achieved if such a term is worded in such a way as to address the detailed points made above, so that any scope for consumers to be taken by surprise as regards what they receive under the contract is removed or at least minimised.

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

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

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

(14) A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

(15) A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

4.23.1 Concerns arising in relation to terms that allow the trader to substitute something different for what the consumer actually agreed to, or reasonably understood as having been agreed, are set out on a general basis in paragraphs 4.21.1 to 4.21.12 above. If a contract is to be considered balanced, the consumer should be sure of getting what he or she was promised in exchange for paying an agreed price. Paragraphs 14 and 15 of the Grey List illustrate two kinds of term which give rise to particular concerns in this connection.

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

4.23.3 Any term which can be relied on as a basis for varying the price should set out clearly the circumstances in which a variation may occur, and the method of calculating the price variation, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made and evaluate the practical implications for them.[75] Similarly a price determination clause should clearly set out the information to enable to the consumer to foresee what price will be payable depending on the circumstances.

4.23.4 A price clause is not necessarily fair just because it is not on its face discretionary. Using a term that, for example, gives a right to increase prices to cover any increased costs experienced by the trader fails to recognise that traders are much better able to anticipate and control changes in their own costs than consumers can possibly be. Such a clause is both unclear as to what the consumer can expect and open to abuse if (as will normally be the

[75] Per *RWE,* paragraph 49.

case) the consumer can have no reasonable certainty that the increases imposed on them actually match net cost increases.[76]

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

- Where the level and timing of any price increases are specified (within narrow limits if not precisely) they may effectively form part of the agreed price. As such they are acceptable, provided the details are clear and adequately drawn to the consumer's attention before entering into the contract in a way which allows the consumer to foresee and evaluate the practical implications on them of the variation.

- Terms which permit increases linked to a relevant published price index such as the RPI are likely to be acceptable, as Part 2 of Schedule 2, paragraph 25 of the Act indicates, subject to the same proviso as above.

- Any kind of variation clause may in principle be fair provided that, in line with what is said in paragraph 4.21.8 above, consumers are genuinely free to escape its effects by ending the contract, and that transparency criteria have been met so that they are able to make an informed choice whether to enter the contract in the first place.

4.23.6 To allow genuine freedom to end the contract, a term must not confer just a formal cancellation right, but one that is capable of being exercised freely. The consumer should not be left worse off for having entered the contract, whether by experiencing financial loss (for example, forfeiture of a prepayment) or serious inconvenience, or any other adverse consequences. Factors relevant to the genuineness of a right to cancel are likely to include whether the consumer was given sufficient notice of the alteration, any practical difficulties in finding an alternative supplier and whether the market is competitive.[77]

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

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[76] A right to pass on VAT increases does not attract these objections, since such changes are *(a)* outside the supplier's control; *(b)* publicly known and verifiable; and *(c)* universally applicable, so that the consumer would not be any better off with a right to cancel.
[77] As per *RWE*, paragraph 54, where the CJEU indicated the type of factors which are relevant when considering if the right to cancel can be exercised following a price rise for the supply of gas.

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

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

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

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

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

4.24.3 An example would be a term allowing the business or its agent, if the consumer complains that goods are faulty or work has not been properly carried out, to undertake their own test or inspection to determine whether the complaint is well-founded. Such a term is more likely to be fair if it provides for independent inspection or testing – provided that consumers are not required to meet the costs of this where it turns out that their complaint is well-founded.

4.24.4 Terms allowing the trader to decide when the consumer is in breach of his or her obligations are open to comparable objection.

4.24.5 **Right to decide the meaning of terms**. Similarly, if traders reserve the right to decide what a term in a contract means, then they are effectively in a position to alter the way it works so as to suit themselves. It is not necessarily sufficient to say that the trader will act ‘reasonably’. Such a term potentially gives rise to the same objections as a right to vary terms generally, dealt with under paragraph 11 of the Grey List.

4.24.6 This second kind of 'final decision' term, too, is more likely to be considered fair if an element of independent adjudication is introduced into it – if, that is, a consumer who is unhappy with the trader's interpretation of the contract can decide to refer the matter to an independent expert or arbitrator. However, such terms should not **compel** the consumer to resolve the issues in this way as compulsory arbitration clauses involving sums £5,000 or less are always unfair and those involving sums of more than £5,000 may also be unfair – see paragraphs 4.29.2 to 4.29.4.

4.24.7 Relevant examples of terms, and amendments that were acceptable to the OFT, are listed at Annex A in Group 13.

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

Entire agreement clauses

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

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

4.25.1 Good faith demands that each party to a contract is bound by his or her promises and by any other statements which help secure the other party's agreement. If a contract excludes liability for words that do not appear in it, there is scope for consumers to be misled with impunity.[78]

4.25.2 These objections apply equally to other types of wording which have the same effect. Examples are clauses saying that employees or agents have no authority to make binding statements or amendments to the contract, or that contract changes may only be made in writing, or that they must be signed by a Director. Such terms all enable the trader to disclaim liability for oral promises even when they have been relied on by the consumer reasonably and in good faith.

4.25.3 Consumers commonly and naturally rely on what is said to them when they are entering a contract. If they can be induced to part with money by claims and promises, and the trader can then simply disclaim responsibility by using an entire agreement clause, the scope for unfair detriment is clear. False or

[78] For an example of such a term which was held to be unfair see *The Financial Services Authority v Asset LI.Inc (trading as Asset Land Investment Inc) and Others* [2013] EWHC 178 (Ch). Note that a term of this type is automatically unenforceable in a service contract – see paragraph 4.25.6

misleading statements that affect their decisions are liable to involve breach of the CPRs and to give rise to remedies accordingly (see paragraph 1.42). But even if such a term is not deliberately abused, its use weakens the traders' incentive to take care (and to ensure that employees and agents take care) in what they say to consumers before contracts are concluded, and thus tends to impair the quality of pre-contract information for consumers.

4.25.4 Such terms are often defended on the grounds that they achieve 'certainty' as to what statements bind the parties. But they are liable to do so at the unacceptable price of excluding the consumer's right to redress for mis-representation or breach of an obligation, which the consumer relied upon when entering the contract (see above on unfair exclusion of liability clauses as illustrated by paragraphs 1 and 2 of the Grey List).

4.25.5 The ordinary law of contract strikes a fairer balance. It respects the need for certainty, in that it assumes that a coherent contractual document normally contains all the terms of the agreement.[79] But it allows for the possibility that the court may have to take other statements into account in order to work out the real intentions of the parties, and to prevent bad faith.[80]

4.25.6 In addition, it should be noted that separate provision is made in Part 1 of the Act that blacklists the use of terms of this kind in contracts for the supply of services, rather than just indicating that they *may* be unfair. It says that:

- any statement (oral or written) made by the business or someone on its behalf about the business or the service is to be treated as a term of the contract if it is taken into account by consumer when deciding to enter the contract or, later, when making any decision about the service; and

- any term that purports to exclude liability for such statements is black-listed and automatically unenforceable under Part 1 of the Act (see Part 3 of the guidance).

4.25.7 The OFT's specimen terms listing provides examples of other ways in which terms of this kind have been revised to meet objections under the UTCCRs – see Annex A, under Group 14(a).

[79] This is known to lawyers as the 'parol evidence' rule.
[80] For Scotland see the Contract (Scotland) Act 1997, section 1.

Formality requirements

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

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

4.26.1 If a contract is to be considered balanced, the rights it confers must be secure and enforceable, not vulnerable to being lost without good reason. Under the general law, contracts normally remain binding on both parties unless a breach by one of them threatens the whole value of it for the other. The loss of contract rights is a severe penalty which should not be imposed on consumers for merely technical breaches.

4.26.2 There may be administrative advantages in requiring consumers to comply with certain formalities – for example, procedures involving paperwork. But these do not justify a business opting out of important obligations where the consumer fails to comply with a minor or procedural requirement and commits a trivial breach.

4.26.3 A term that imposes severe penalties for trivial breaches is open to particularly strong objection where these may be committed inadvertently. Unless the need to observe a formality is obvious and important, or is prominently drawn to the attention of consumers, they may overlook or forget it. That risk is particularly significant if it has to be complied with sometime in the future without any reminder.

4.26.4 Obviously where compliance with a formality involves disproportionate costs or inconvenience, the potential for unfairness is also increased. An example would be a requirement to use registered post for written notification when notification by ordinary post would be perfectly adequate.

4.26.5 A formality requirement has a better chance of being considered fair if the following three conditions are all met:

(a) it requires a consumer to do no more than is reasonably necessary;

(b) non-compliance does not involve loss of important rights for the consumer; **and**

(c) the need to comply with the formality is adequately drawn to the consumer's attention as close as possible to the time when it has to be complied with.

4.26.6 Terms of this kind, and acceptable amendments, are illustrated in Group 14(b) of Annex A.

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

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

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

4.27.1 A term binding customers to go on paying when goods, digital content or services are not provided as agreed is clearly open to even stronger objection than the exemption clauses which exclude the business's liability when it fails to perform its obligations (under the heading 2(g) at paragraph 4.10.1), or terms allowing the trader to cancel at will – see the discussion of paragraph 7 of the Grey List above. Those terms exclude the trader's liability to provide a remedy for breach of contract, but do not require the consumer to continue to perform his or her side of the bargain.

4.27.2 An example of this type of provision is a clause in a contract for the supply of goods by instalments, which does not allow the consumer the right to cancel if the trader fails to make delivery of an instalment.

4.27.3 Similar objections are likely if consumers are tied in to a continuing contract for services despite the trader exercising a power to suspend provision of some benefits under the contract, unless the circumstances in which suspension can take place are strictly limited and certain other conditions are met (the same as those set out in paragraphs 4.10.2 and 4.10.3).

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

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

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

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

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

4.28.1 When rights under a contract are transferred to a new owner, this is known as an 'assignment' (or in Scotland an 'assignation'). If a business changes hands, then rights and obligations[81] under any contracts with consumers are likely to transfer with it. As a result the consumers affected may find themselves dealing with someone else if their contract was a continuing one (like an insurance contract) or, if it was for a single transaction, where any problem arises with the goods, services or digital content that were supplied to them under that transaction. A term is unlikely to be fair if it allows for the 'transfer' of rights and obligations that could result in:

- the consumer having to deal with someone who, for instance, offers a poorer service; or
- legal complications, such as a need for the consumer to deal with two traders.

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

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

4.28.3 Note that Schedule 2 mentions only traders' rights to assign. Consumers also have the right to transfer their rights under contracts, and sometimes will reasonably expect that they can. Terms which might unfairly affect the consumer's ability to assign are therefore dealt with separately in paragraphs 4.33.1 to 4.33.4.

4.28.4 Group 16 of Annex A illustrates one relevant term.

Restricting the consumer's remedies – Schedule 2, Part 1, paragraph 20

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

(20) A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by –

(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,

(b) unduly restricting the evidence available to the consumer, or

(c) imposing on the consumer a burden of proof which, according to applicable law, should lie with another party to the contract.

4.29.1 Terms covered by paragraph 20 of the Grey List have an effect similar to that of exclusion and limitation clauses – see under paragraphs 1 and 2 of the Grey List above. As noted there, any term which could be used – even if that is not the intention – to prevent or hinder customers from seeking redress when the trader is in default is likely to upset the balance of the contract to the consumer's disadvantage. Such terms may well be blacklisted if they interfere with certain rights.

Compulsory arbitration clauses

4.29.2 The law allows contractual disputes to be resolved through arbitration, rather than going to court, where the parties agree. Fairness requires that agreement to go to arbitration should be genuine, not forced. Under section 91 of the Arbitration Act 1996, a compulsory arbitration clause is automatically unfair if it relates to claims of £5,000 or less. This is an example of a term that is always unfair under the Act regardless of circumstances. A compulsory arbitration clause forbidden by the 1996 Act is therefore both legally ineffective and open to regulatory action in all cases.

4.29.3 If an arbitration clause is to be used with consumers, it must be free from the element of compulsion, and in the view of the CMA this is necessary to ensure fairness even if it relates to claims higher than the £5,000 threshold sum in the 1996 Act. When entering contracts, ordinary consumers are most unlikely to consider detailed legal issues connected with the possibility of a dispute arising unless they have the benefit of legal advice on this issue. The consequences of the inclusion of such a clause are thus liable to surprise them unfairly if such a dispute does arise.

4.29.4 With a view to ensuring that it complies with the requirements of fairness, an arbitration clause can, for example make clear that consumers (or both parties) have a free choice as to whether to go to arbitration or not. Such non-compulsory arbitration clauses are less likely to encounter objections provided they offer a consumer an affordable fair and impartial dispute resolution, they are in clear language and set out fully its effects.[82]

Exclusive jurisdiction and 'choice of law' clauses

4.29.5 **Exclusive jurisdiction:** Consumers should not normally be prevented from starting legal proceedings in their local courts – for example, by a term requiring resort to the courts of England and Wales despite the fact that the contract is being used in another part of the UK having its own laws and courts. It is not fair for the consumer to be forced to travel long distances and use unfamiliar procedures to defend or bring proceedings.

Choice of Law: A contract may specify the applicable law that purports to govern the contractual relationships between the trader and the consumer. The Act makes provision to ensure that the consumer may not be deprived of the protection of the unfair terms provisions of Part 2 of the Act, where the 'consumer contract has a close connection with the United Kingdom' but the contract states the law of a non-EAA state applies. In these circumstances, the unfair provisions of the Act will apply. Further, international conventions lay down rules on this issue, which are part of UK law.[83] Terms which conflict with them are also likely to be unenforceable.

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[82] Note the minimum requirements of the Alternative Dispute Resolution Directive 2013/11/EU must be given effect within the UK by 9 July 2015. The principal obligation on the UK Government under the Directive is to ensure that Alternative Dispute Resolution (ADR) provided by a certified ADR body is available for any dispute concerning contractual obligations between a consumer and a business. Subject to the UK's implementation of the Directive, where arbitration is an option for the consumer, the CMA would be concerned if consumers are denied the option of using a certified ADR provider.

[83] In relation to jurisdiction of the courts, rules such as those in the Brussels I Regulation and the Lugano Conventions provide where proceedings may be brought, and include provisions specifically relating to consumer contracts. In relation to the law governing a contract, rules such as those in the Rome I Regulation set out the appropriate governing law for certain disputes, and include provisions relating to disputes involving consumers.

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

Part 4A – Analysis of other terms considered potentially unfair

Some terms or consumer notices fail the test of fairness set out in section 63 without falling obviously within any of the categories set out in the Grey List (the Act, Schedule 2, Part 1).

The Grey List predominantly reflects the Annex to the Directive. As this implies, the types of term featured are those commonly used over the EU as a whole, not in any one member state. The list is expressly said to be non-exhaustive. The OFT found a range of different types of term being used in the UK which have a potential for unfairness comparable to that illustrated by items in Schedule 2, but which operate in different ways (see the table at paragraph 4.1.12 above (a to g) and the terms numbered below 18 (a) to (g))).

Some of the more commonly occurring kinds of term not obviously illustrated by examples in the Grey List are commented upon below.

We continue below to refer to the Annex of the guidance, which includes examples of these kinds of terms encountered by the OFT and of amendments to them which the OFT considered acceptable. In addition, the Annex provides examples of terms which are considered to be in breach of the transparency requirements in the Act and these too are referenced below.

What is said below generally applies to consumer notices as well as contract terms (see paragraphs 1.17 to 1.20 above on this distinction). As explained in the introduction to Part 4 of the guidance references to 'terms' in this part of guidance should generally be taken to include consumer notices.

18(a) Allowing the trader to impose unfair financial burdens

4.30.1 If a contract is to be considered balanced, each party must be subject only to obligations which he or she has agreed to accept. Any kind of term which has the object or effect of allowing the trader to impose an unexpected financial burden on the consumer gives rise to concern. Such a term operates in a way similar to a price variation clause (see paragraphs 14 and 15 of the Grey List considered above) and, like such a clause, cannot be considered to fall within the 'core exemption' because it does not clearly set an agreed price (see Part 5 of the guidance).

4.30.2 An explicit right to demand payment of unspecified amounts at the trader's discretion – for example, by way of advance payment or security deposit – is particularly open to challenge. But the same objections may apply if terms are merely unclear about what will be payable and when, if the effect could be to allow the business to make unexpected demands for money at its discretion.

4.30.3 These objections are less likely to arise if for instance – as with a price variation clause – a term is narrowed in effect by being sufficiently specific and transparent as to what must be paid and in what circumstances (see paragraph 4.21.5). As explained in Part 2 of this guidance, consumers need to be put into a position where they can make an informed choice whether or not to enter the contract. (Note, however, that a term may meet these requirements but still be unfair if, for instance, its real purpose is to act as a penalty and it is disproportionately high, see paragraph 4.14.9.)

4.30.4 Where a business has to meet specific costs in performing the contract, but it is not certain that these will arise, fairness is more likely to be achieved where the contract makes clear the circumstances and amount in which they may be passed on. This is likely to be an option where the incidence and level of such costs is likely to be within the knowledge of the consumer, or is verifiable in cases of doubt. The term should not allow for such costs to be invented or inflated. It is neither fair nor economically efficient for traders to offer products and services at unrealistically low headline prices and then seek to compensate themselves by making charges that consumers have no reason to expect to pay or at levels beyond their reasonable expectations.

4.30.5 Where it is not possible to state a precise amount for such costs, compliance is more likely to be achieved if it is clear how the charge to be imposed will be set. It may in some circumstances be enough merely to say that it will be reasonable, but only where fair-minded persons would have little doubt as to what would be a reasonable sum. This is likely to be the case where the costs involved are identifiable and verifiable. Again, the point is that the term should not allow for imposition of a charge that exceeds the costs that have to be covered.

4.30.6 These types of clauses are also more likely to be regarded as fair if consumers are genuinely free, for instance under a cancellation clause, to escape its effects by ending the contract before it is applied to them without suffering any penalty (such as loss of prepayments) or otherwise being left worse off (see paragraph 4.23.6). However, this will not be the case where it is impracticable or would be disadvantageous for the consumer to bring an end to the contract. Annex A gives relevant examples under heading Group 18(a).

18(b) Transferring inappropriate risks to consumers

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

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

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

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

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

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

4.31.4 Generally such clauses are more likely to be fair where consumers are merely made responsible for losses caused by their own fault (provided they are not subjected to excessive penalties). Alternatively, fairness is more likely to be achieved if the term is narrowed in scope, so as to relate only to risks against which consumers are likely to be already insured – for example, the risk of loss or damage to goods while they are in the consumer's home – or can easily insure, such as the risk of illness while abroad.

4.31.5 If a risk is transferred to consumers on the basis that they can themselves reasonably control it or that insurance is available at reasonable cost, they need to be aware of what steps they are supposed to take. To be useful, provision along such lines must be adequately drawn to their attention. If the contract is short and simple, this may require only the use of bold print and appropriate highlighting – otherwise warnings separate from the main body of the contract will be needed. Effective highlighting of such clauses is essential if they require – rather than merely advise – the consumer to do anything.

4.31.6 **Advance payments**. One kind of risk that should not be unfairly imposed on the consumer is that of the trader's own insolvency. This may occur where the purchase price of goods, services or digital content, or a large part of it, is demanded substantially earlier than is needed to cover the trader's costs. Such a prepayment assists the cash flow of the business, but is liable to be lost to the consumer if the business becomes insolvent before completion of the contract (see paragraphs 4.8.8 and 4.8.9).

4.31.7 **Indemnities against risk**. Terms under which the trader must be 'indemnified' for costs which could arise through no fault of the consumer are open to comparable objections, particularly where the business could itself be at fault. The word 'indemnify' itself is legal jargon which, if understood at all by a consumer, is liable to be taken as a threat to pass on legal and other costs incurred without regard to reasonableness. Clearer and fairer wording to replace legal jargon of this kind is illustrated in 19(b) of Annex A.

4.31.8 Annex A gives relevant examples under heading Group 18(b).

18(c) Unfair enforcement powers

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

4.32.2 **Rights of entry**. An example is a term which purports to give the right of entry without consent to private property, whether to repossess goods for which consumers have not paid on time, to evict the consumer, or for any other purpose. Such a term seeks to permit direct resort to a sanction that can normally and properly only be authorised by court order.

4.32.3 There is even less justification for terms which purport to exclude liability for causing property damage in the course of exercising such rights. Such a

term would appear to be designed to permit wilful or even criminal damage and does not, in the CMA's view, have any place in a consumer contract.

4.32.4 **Sale of the consumer's goods (as being subject to 'lien'**). Similar principles apply in relation to other kinds of term, which purport to allow traders to take direct action to secure redress that the court would not necessarily allow. An example would be a term permitting the sale of goods belonging to the consumer which the business has in its possession.

4.32.5 The law[84] makes detailed provision as to how such goods should normally be treated. A contract need not reflect these rules in detail, provided it does not override or contradict them. Terms are unlikely to be considered fair if they indicate that goods may be sold immediately, or without adequate notice of the date and place of the sale, and particularly if they exclude the duties to obtain the best price that can reasonably be got and to refund any surplus obtained.

4.32.6 The term 'lien' itself is legal jargon, which should be avoided in consumer contracts. Clearer alternative wording is possible, see 19(b) in Annex A. Examples of terms relevant to enforcement clauses generally may be found in Group 18(c) of Annex A.

18(d) Excluding the consumer's right to assign

4.33.1 Contract law ordinarily allows purchasers to transfer (or 'assign') to someone else what they bought. Terms which seek to restrict this right are considered to be open to scrutiny as regards fairness.

4.33.2 One form of restriction on the consumer's right to assign is to make guarantees non-transferable. Guarantees, while they remain current, can add substantial value to the main subject matter of the contract. If consumers cannot sell something still under guarantee with the benefit of that guarantee, they are effectively deprived of part of what they may reasonably feel they have paid for.

4.33.3 Traders have a legitimate interest in ensuring that they are not subject to baseless claims under guarantee. There are unlikely to be objections to terms which require the purchaser (or 'assignee') of goods, if he or she wishes to rely on the guarantee, to establish that it was properly assigned, as long as the procedural requirements involved are reasonable.

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[84] In particular, the Torts (Interference with Goods) Act 1977, sections 12 and 13. The legislation does not apply to Scotland, where the common law applies.

4.33.4 Examples may be found in Group 18(d) of Annex A.

18(e) Consumer declarations[85]

4.34.1 If a declaration is written into a consumer contract, particularly a standard form contract used with all customers, it is liable to be made whether or not consumers fully understand its significance and know the facts stated to be true. They are likely to regard it as a mere formality, which must be completed for the contract to go ahead. Yet it could put them at a disadvantage.

4.34.2 For example, consumers are sometimes sold goods on written terms which include a declaration that they have inspected their purchase and found it to be free from faults. If they then subsequently discover defects, they are at risk of being told, or of believing without being told, that they have 'signed away their right' to make any claim. Comparable problems can be caused by any enforced declaration indicating that the consumer has been dealt with fairly and properly. Declarations as to facts that could be established with certainty only by an expert – such as the condition of a property – are particularly open to objection.

4.34.3 Use of such declarations may be intended only to stop consumers making baseless allegations, but it could be used to bar legitimate as well as unfounded claims. As such their use gives rise to broadly the same objections as exclusion clauses, see paragraphs 1 and 2 of the Grey List. Misleading or aggressive reliance on such terms with a view to depriving consumers their legal rights is likely to amount to an unfair commercial practice which could attract enforcement action under the CPRs (see paragraph 1.42).

4.34.4 Declarations are more likely to be acceptable if they are about matters wholly and necessarily within the consumer's knowledge (for example, their age), and a free choice is given to the consumer as to what (if anything) to say. But whether any declaration is in fact fair will depend on how it is used. If consumers are routinely told or given to understand that they must say one thing for the contract to go ahead, the declaration is just as likely to be considered unfair and legally ineffectual as if the written words gave no apparent choice. The legislation applies to unwritten as much as to written terms.

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

4.34.5 **'Have read and understood' declarations**. Declarations that the consumer has read and/or understood the agreement give rise to special concerns. The legislation implements an EU Directive saying that terms must be plain and intelligible and that consumers must have a proper opportunity to read all of them (see the discussion of 'transparency' in Part 2 of the guidance at paragraphs 2.44 and following). Including a declaration of this kind in a contract effectively requires consumers to say that these conditions have been met, whether they have or not. This tends to defeat the purpose of the Directive, and as such is open to serious objection.

4.34.6 In practice consumers often do not thoroughly read, and rarely understand completely, any but the shortest and simplest contracts. In an ideal world, it might be better if they tried to do so, but that does not justify requiring them to say they have done so whether they have or not. The purpose of declarations of this kind is clearly to bind consumers to wording regardless of whether they have any real awareness of it. Such statements are thus open to the same objections as provisions binding consumers to terms they have not seen at all – see paragraph 10 of the Grey List (see paragraphs 4.20.1 to 4.20.5).

4.34.7 What such declarations do not do, which needs to be done, is effectively to draw attention to any important terms that could otherwise come as a surprise to the consumer. Unless such terms are properly flagged up, they are unlikely to be binding on the consumer. An appropriate warning that the consumer should read and understand terms before signing them can contribute to the transparency of the terms in question, in the interests of both parties. This is subject to the proviso that the terms are clear and that reading them is likely to be practically feasible for a consumer in the circumstances.

4.34.8 See Annex A, Group 18(e), for illustrative examples of wording relevant to declarations in general.

18(f) Exclusions and reservations of special rights

4.35.1 Any contract wording which could have the effect of depriving consumers of protection normally afforded to them under the law is liable to be considered unfair as well as being potentially blacklisted under Part 1 of the Act (see Part 3 of the guidance) and as such legally ineffective. The Grey List indicates specifically that terms excluding rights to redress for breach of contract may be unfair. But consumers also enjoy protection under legislation that operates separately and independently of contract law.

4.35.2 An example is the law relating to data protection. The Data Protection Act 1998 protects individuals from inappropriate use of personal information about them (their personal data) by others. A term or statement which could be understood as permitting a trader to deal more freely with a consumer's personal data (particularly sensitive personal data) than the law allows – for example, to pass it on more widely – is likely to be open to challenge as unfair.

4.35.3 Provisions of this kind may be acceptable if they are modified so as not to diminish the protection offered by the law – if, for instance, a genuine choice is allowed as to whether or not to give consent to data being collected. But note that compliance with unfair contract terms law is much less likely where consumers are merely given a purported chance to 'opt out' of their legal protection in small print that may be missed or misunderstood. In any case, the chances of fairness will be increased if the significance of the choice is in some meaningful way drawn to the consumer's attention.

4.35.4 In the context of mail-order transactions, regard needs to be had to the law relating to 'unsolicited' products and services. Generally speaking, consumers have the right to treat what they have not asked to receive as a gift, and cannot be made to pay for it.[86] There is a risk of unfairness if contractual wording about possible future offers that the consumer can expect to receive could operate in such a way as to undermine this right.

4.35.5 There is unlikely to be objection to consumers being given a clear option, accompanied by appropriate explanation, to request more items to be sent on approval. But unclear wording might be used which looks to the consumer as if it is merely designed to indicate his or her willingness to consider further purchases, but is capable of being treated by the trader as a definite request for goods. Any term which could result in consumers being sent goods they were not expecting, and paying for them in breach (or in ignorance) of their right not to do so, is likely to be considered unfair.

4.35.6 Another example of additional statutory consumer protection is legislation relating to 'off-premises' contracts such as 'doorstep selling'.[87] This legislation gives the consumer a right to cancel a purchase within a 'cooling-off' period (time for reconsideration or for examination of goods supplied) where the sale was made away from the trader's business premises, for example on the consumer's doorstep or in his or her home. The protection given should not be undermined by the use of any form of wording.

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[86] Regulation 27M and Paragraph 29 of Schedule 1 to the CPRs.
[87] See the CCRs, referred to in paragraph 1.47 above.

4.35.7 An example is a statement in contractual documentation to the effect that the contract has been made at the trader's place of business. There is of course no objection to use of such a declaration where it is true, but it needs to be true in all cases if its use as a standard term or notice is to be fair. If it is not necessarily true in every case, it is likely to be unfair, since it may, in practice, have the effect of unjustifiably depriving some consumers of their rights.

4.35.8 Another form of wording that can undermine the protection conferred by this legislation is a term which says or seeks to give the impression that the consumer has to do something, for example return a form by post, in order to enjoy the cancellation right. Such wording is also open to objection.

4.35.9 **Distance sales**. Consumers entering contracts 'at a distance', for example by post, over the telephone or on the internet, where the trader's distance selling is being operated in an organised way, enjoy legal protection equivalent to that for 'off-premises' contracts as mentioned above.[88] They have, in particular, a right to receive certain information before the contract is concluded and normally have a right to cancel during a 'cooling-off' period.

4.35.10 Terms in distance contracts which seek to exclude or restrict these rights, or which could have the practical effect of depriving consumers of the protection they are intended to confer, are likely to be unfair and mislead consumers about their rights and as such potentially give rise to breaches of the CPRs (see paragraph 1.42).

4.35.11 **Guarantees**. A trader who provides a consumer guarantee at no extra charge must ensure that it sets out the contents of the guarantee in plain intelligible language and gives certain information that a consumer needs to know before making a claim under it. This information must include the duration of the guarantee, and the name and address of the person providing it.[89] Consumer guarantees also have to contain a statement that the consumer has statutory rights in relation to the goods and that those rights are not affected by the guarantee – note, however, that simply including the words 'your statutory rights are unaffected' cannot be relied upon to achieve fairness (see above, paragraphs 4.11.4 and 4.11.5).

4.35.12 The rights that consumers enjoy in relation to guarantees are enforceable separately, using powers similar to those which deal with unfair terms. However, in addition, any term which seeks to exclude or restrict these

[88] Again see reference to the CCRs in paragraph 1.47 above.
[89] Section 30 of the Act.

rights, or which could have the practical effect of depriving consumers of the protection they are intended to confer, is likely to be unfair.

18(g) Trader's discretion in relation to obligations

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

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

4.36.2 The ordinary law allows traders a reasonable degree of flexibility as to how and when they carry out obligations, where they have made no specific promises on the subject. A term giving complete freedom to make arrangements, whether for the carrying out of services or delivery of goods, allows the customer's needs to be disregarded, and has practically the same effect as an exclusion of liability for causing loss and inconvenience. Such provision is likely to be fair only if it is drafted so as not to allow the trader to act unreasonably.

4.36.3 An example is a term allowing the trader to deliver goods in such consignments as he or she thinks fit. Consumers may need to be able to make arrangements depending on when goods are due to arrive, and to be brought into use, which can be hindered by lack of clarity as to the schedule of delivery, or by changes made without consultation, especially at short notice. This is not to say that delivery terms either can or should reflect only the convenience of the consumer, but rather that they should strike a reasonable balance. Often, such issues as the timing of deliveries are best left to individual agreement rather than being made the subject of any kind of standard contractual provision.

Rights to determine whether the consumer is in breach

4.36.4 Suspicion of unfairness falls on any term giving to the business, or its agent, excessive power to decide whether the consumer ought to be subject to a penalty, obliged to make reparation of any kind, or deprived of any benefits under the contract. An example of this kind of unfairness is a term in a contract with a club giving the management undue freedom to suspend or expel a member for misconduct, especially if the criteria of misconduct are left unstated or are vaguely defined.

4.36.5 Terms of this kind in effect allow traders to reserve the right to decide what the term in the contract means, putting them in a position where they can alter the way it works to suit themselves. They therefore strongly resemble ‘final decision’ terms (see paragraph 16 of the Grey List). As with such terms, fairness is more likely where there is a clear procedure under which the consumer, if unhappy with the decision as to whether he or she is in breach, can refer the matter to an independent expert or arbitrator. Note, however, that compulsory arbitration clauses are unfair – see paragraphs 4.29.2 to 4.29.4.

4.36.6 For relevant examples of terms, see Annex A, Group 18(g).

5. The exemptions

This part of the guidance sets down the CMA's views as to the scope of the exemptions from the fairness assessment in Part 2 of the Act.

The exemption for price-setting and main subject matter terms is covered first – covering the purpose and objectives of this exemption and then the detail of the legislation.

The second section covers the exemption for terms and notices which are required or expressly permitted by the law – the 'mandatory statutory or regulatory' exemption.

'The core exemption'

Purpose of 'the core exemption'

5.1 The Act includes an exemption from the fairness test (but not the transparency test) in Part 2 for certain terms that deal with the main subject matter of the contract or the price. This is referred to in this guidance as 'the core exemption' because it can be said to relate to the core of the contract – what the CJEU has called the 'essence of the contractual relationship'. In the guidance we use the phrase 'core exemption' by way of shorthand.

5.2 The primary purpose of the Directive is to protect consumers, from one-sided contracts and from distortions in competition that are detrimental to them. Legislation giving effect to the Directive has to be interpreted and applied so as to operate consistently with that purpose. This applies to exemptions as to other kinds of provision. The CMA considers that exemptions are not intended to ensure that in certain areas the Directive's need to protect consumers can be ignored (still less positively undermined), but rather to recognise that, in those areas, the Directive's purposes may be considered to be as well or better served by other means. At all events, it is settled law that any exemption from the Directive's central fairness requirement 'must be strictly interpreted'.[90]

[90] The CJEU in *C-26/13 Kasler* states, 'Article 4(2) of Directive 93/13 thus laying down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, that provision must be strictly interpreted' at paragraph 42. This is consistent with the approach of the UK Courts, see *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 at paragraphs 12 and 34, and *The Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6 at paragraph 43.

5.3 It follows that no interpretation of 'the core exemption' provision is likely to be correct that would allow use of mere drafting techniques to remove from an assessment of fairness terms which have as their object or effect the creation of an unfair imbalance – such as, for example, exclusion clauses, cancellation provisions, penalty charges or other terms included in the Grey List. This would allow 'the main purpose of the scheme to be frustrated'.[91]

5.4 'The core exemption' serves to remove any risk of unnecessary regulation of the principal obligations or price in the contract. Its inclusion in the Directive represents a recognition that, 'in a free market economy parties to a contract are free to shape the principal obligations as they see fit. The relationship between the price and the goods or services provided is determined not according to some legal formula but by the mechanism of the market'.[92] In the CMA's view, only terms that are subject to and constrained by competition have any realistic chance of being seen to fall within the 'core exemption'.

5.5 Under the Directive, if terms that determine the 'principal obligations' or price are not in plain and intelligible language 'the core exemption' does not apply – they are fully assessable for fairness. This is consistent with what is said above. It is only if such terms are transparent that consumers are able to compare what is on offer across the market and make the best choices available to them in deciding which contracts to enter.

5.6 A requirement of prominence has been added to the provisions implementing the Directive's core exemption in UK legislation. This will help to ensure that only those 'principal obligations' or price terms which are subject to the correcting forces of competition and genuine decision-making are not fully assessable for fairness.[93]

'The core exemption' in the Act

5.7 The exemption in the legislation provides that two kinds of term in a consumer contract may not be assessed for fairness:

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[91] *Director General of Fair Trading v First National Bank* [2001] UKHL 52 at paragraph 34.
[92] Brandner and Ulma, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 *Common Market Law Review* 647, p656.
[93] The Law Commission, which recommended the addition of prominence into the core exemption into the UK legislation giving effect to the Directive, stated: 'If a term is transparent and prominent, a consumer should be aware of it, which means it will form part of the "essential bargain". By contrast, other terms are not subject to the same competitive pressures, and should be assessed for fairness'. See Law Commission, 'Unfair Terms in Consumer Contracts: a new approach? Issues Paper, 25 July 2012, paragraph 8.3.
Note as explained below, the CMA considers that being subject to competition is necessary but not sufficient for inclusion of certain types of terms to full within 'the core exemption'.

- A term that describes what the consumer is buying, to the extent that it specifies the main subject matter of the contract.

- A term setting the price the consumer will pay, to the extent that any assessment (that is as to its fairness) would be of the appropriateness of the price payable by comparison with the goods, digital content or services supplied.

5.8 However, a term which specifies the main subject matter of the contract or sets the price payable can benefit from the exemption only if it is both transparent and prominent. If the relevant terms are not prominent and transparent, the exemption does not apply and they are fully assessable for fairness.

5.9 The Act also makes clear that 'the core exemption' does not apply to a term that corresponds, as regards either its object or its effect, to a term set out in the Grey List (see paragraph 2.40 of the guidance onwards). Such terms are always fully assessable for fairness even when they are transparent and prominent. This confirms rather than changes the position as it was previously understood by the OFT and the CMA.[94]

'Main subject matter'

5.10 Only terms which specify what the CJEU has called the 'very essence of the contractual relationship' fall within the first part of 'the core exemption', which refers to the 'the main subject matter of the contract'. Such terms 'must be understood as being those that lay down the essential obligations of the contract' as against terms which are 'ancillary to those that define the very essence of the contractual relationship'.[95] The CMA considers that in a contract for the sale of goods, for instance, terms which describe the nature of the goods to be sold are likely to be seen as setting out 'essential obligations' and able (provided they are transparent and prominent) to benefit from 'the core exemption'. By contrast, a term describing the arrangements for delivery of the same goods would (depending on the circumstances) be likely to be considered to be ancillary and not able to benefit from the exemption (see also paragraph 5.14 below).

Price/quality assessment

5.11 A price-setting term can be assessed for fairness **except to the extent** that the assessment relates to the appropriateness of the price as against the

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[94] This position has been recognised by the courts, see the *Office of Fair Trading v Abbey National Plc* [2009] UKSC 6 at paragraph 101.
[95] *Kasler*, as above, at paragraphs 49 and 50.

services, goods or digital content supplied in exchange. This means that the level of the price cannot be assessed against the value of the product. A relevant term may still be assessed on grounds other than the appropriateness/adequacy of the price. This could include, for instance, the timing, method or variation of the payment (see also paragraph 5.14 below).

The exchange approach

5.12 Where a separate charge is payable, but not in relation to any separately identifiable goods, services or digital content, there is a risk that the term which sets that charge may not benefit from 'the core exemption', even if it is transparent and prominent. A price-setting term is capable of falling clearly within the exemption where a service, goods or digital content must be provided to the consumer in **exchange** for that charge.[96] For example, even in a complex service contract, with multiple charges payable both immediately and in the future, a term setting a charge can benefit from the exemption if a particular service is provided to the consumer in exchange for the particular charge provided it is transparent and prominent. If, for instance, a consumer is charged an administration fee during the performance of the contract but no service is provided particularly to the consumer in exchange for that fee, then in our view there is more likely to be doubt as to the applicability of the exemption. A case in which the exemption was found not to apply involved a clause in a letting agreement entered by a consumer landlord which required payment of sales commission to the letting agent if the landlord sold the property to the tenant, but where no selling service was offered or provided.[97]

Grey List terms and 'the core exemption'

5.13 The legislation makes clear that terms with the object or effect of those on the Grey List **cannot** fall within the exemption.

5.14 A term will not benefit from the price-setting limb of 'the core exemption' merely on the basis that it may be said to have an impact on the price. This is underlined by the exclusion from the exemption of the Grey List terms which have a clear impact on the price. Similarly, terms may have an impact on the definition main subject matter of the contract without benefiting from the exemption. Terms granting unilateral discretion enjoyed by the trader to vary the price or the definition of the main subject matter provide obvious examples

[96] See *Kasler*, at paragraph 58.
[97] See The *Office of Fair Trading v Foxtons Limited* [2009] EWHC, 1681 [Ch] at paragraph 103.

of terms that are open to, and indeed particularly liable to, come under scrutiny as regards compliance with the requirements of fairness.

An overview of 'the core exemption'

5.15 The chart below provides an overview as to whether terms are subject to the core exemption.

Chart for core exemption

*Start with Question 1 (Q1) and work through the chart to see whether a term falls within the core exemption.**

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

*The chart is based on the assumption that the 'mandatory statutory or regulatory' exemption is not relevant (see paragraphs 5.31 onwards for an explanation of that exemption).

Transparency and prominence

5.16 **Relevant terms** (that is, those capable of benefiting from the exemption) can only fall within 'the core exemption' if they are both **transparent** and **prominent**.

Transparent

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

5.18 As explained in paragraphs 2.44 onwards, in line with the Directive, the requirement of transparency has to be understood as demanding transparency in a full sense. Terms should not only be comprehensible and make grammatical sense but should be drafted to ensure that consumers are put in a position where they can make an informed choice about whether or not to enter the contract, on the basis of a proper understanding of the terms for sensible and practical purposes. Contracts should be structured clearly, and explained in accompanying literature as necessary. Having regard to the requirement of good faith, steps may need to be taken to ensure that consumers see and understand terms that could disadvantage them, as explained in paragraph 2.26 above. However, in relation to 'the core exemption', there is also a specific requirement of prominence.

Prominent

5.19 If they are to fall within the scope of 'the core exemption', the legislation provides that relevant terms must be 'prominent' as well as transparent.

5.20 The legislation says that a relevant term is prominent for these purposes if it is brought to the consumer's attention in such a way that an average consumer would be **aware** of the term. In this context, an average consumer is defined in section 65(5) as a 'reasonably well-informed, observant and circumspect consumer'.

5.21 The term 'average consumer' denotes an objective standard which is well established in European law. The average consumer test is a variable one to the extent that the average consumer's 'level of attention is likely to vary according to the category of goods and services in question'.[98] For example, in a case considering the terms in certain gym contracts, the average consumer has been taken to mean 'a member of the public interested in using a gym which is not a high end facility and who may be attracted by the relatively low monthly subscriptions.'[99] In any case, however, as explained

[98] See Joined Cases T- 183/02 and T184/02 *El Corte Inges v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2004] ECR II-00965 at paragraph 68.
[99] *The Office of Fair Trading v Ashbourne Management Services Ltd* [2001] EWHC 1237 (Ch), at paragraph 155.

above in paragraph 2.28, the CMA considers that the average consumer cannot generally be expected to read thoroughly terms in the small print of standard contracts.

5.22 Generally, a term that meets the requirement of transparency is more likely to be sufficiently prominent than one which does not, and vice versa. But this should not distract from the fact that the legislation requires that a relevant term must be both transparent **and** prominent to benefit from the exemption.

Awareness

5.23 Although ultimately a matter for the courts, the CMA's view is that 'awareness' in the context of 'the core exemption' should be taken to mean that the average consumer is aware of the relevant terms for practical purposes, so that **he or she can make an informed purchasing decision**. Such terms need to be brought to the consumer's attention prior to the conclusion of the contract in a way that is likely to enable the average consumer to understand and appreciate the essential features of the bargain when making purchasing decisions.

5.24 In determining whether a term is prominent, it is the CMA's view that regard will need to be had, in particular, to all the information given to the consumer prior to the conclusion of the contract, the relevant aspects of the sales process as well as the nature of the term, its relationship to other terms and the consumer's reasonable expectations when deciding to enter contracts (see paragraphs 5.28 to 5.30).

5.25 The CMA considers that a proper focus on awareness for the purpose of enabling the average consumer to make informed purchasing decisions will help to ensure that:

- the UK courts interpret the scope of the core exemption consistently with the Directive, which intended that terms must be subject to effective competitive pressures to fall within 'the core exemption' (see paragraphs 5.4 to 5.6 above); and

- the approach to interpreting prominence is consistent with that required for the closely related and, in some circumstances, overlapping provision requiring transparency in the core exemption and with the requirement of good faith (see paragraph 5.18 above).

5.26 In line with this approach, the CMA considers that different levels of prominence are likely to be needed for terms which entail different levels of risk of

detriment to the consumer.[100] If traders have regard to this, there should be less risk of the practical benefits of prominence being lost through adoption of crude or simplistic methods of achieving prominence – for instance, making numerous terms in the same document equally prominent via a particular typeface, regardless of their nature and type.

5.27 A term that is potentially surprising, or particularly onerous, or inherently difficult to understand, is likely to require greater prominence than terms which are none of those things, if it is to benefit from 'the core exemption'. Terms of this kind may include price-setting terms that are tied into complex pricing structures, and terms that require the consumer to pay charges on the occurrence of a future event that the consumer may, at the date of the contract, not be expecting to occur.

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

- whether any such formal prominence is likely to be practically effective in the transaction; and, if it is,

- whether the degree of prominence achieved is, in all the circumstances, sufficient to meet the requirements of the legislation. As noted above, these embody a recognition that terms need to be subject to the correcting forces of competition if they are to be appropriately treated as not assessable for fairness (see paragraph 5.4).

5.29 The CMA considers that, in assessing whether formal prominence achieves practical and effective prominence, regard will need to be had to all the information given to the consumer prior to the conclusion of the contract as well as relevant aspects of the sales process. In an enforcement case this may include considering one or more of the following:

- The way in which the terms and conditions are laid out, taking into account, for instance, their structure and length.

- What the trader says, and what their sales representatives say or are instructed to say to consumers, during the sales process.

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[100] This approach is consistent with both the common law see for instance the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 and the approach suggested by the Law Commission when advocating the introduction of prominence into the core exemption. In relation to the latter see the Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills, March 2013, paragraph 4.45.

- The content and nature of the trader's advertising material.
- Any information provided to consumers before entering the contract, including the terms and conditions themselves, and any material that explains the parties' rights and obligations under the contract, for example leaflets, summaries of key information documents or upfront information provided on the website.
- The amount of time generally given to consumers to consider such material before agreeing to the contract.

5.30 The CMA considers that, in assessing whether a term is not only practically prominent but also sufficiently prominent to warrant it being treated as outside the fairness test, regard will need to be had particularly:

- to the nature of the relevant term and its relationship to the other terms of the contract – for instance, any complexity in charging structures generally; and
- to what will have been the consumer's reasonable expectations when deciding whether to enter the contract.[101]

Mandatory terms and notices – the 'mandatory statutory or regulatory' exemption

5.31 Section 74 of the Act provides for an exemption from both the fairness and the transparency tests in Part 2 for contract terms and notice provisions that reflect:

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

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

[101] The Law Commission considered a 'reasonable expectations' test when considering the introduction of the prominence and concluded '… the reasonable expectations test and the prominence test are the same. A reasonable or average consumer's expectations are formed by the deal which is presented – that is by the prominent terms.' The Law Commission's Issue paper, as above, paragraph 8.72.

5.32 In line with its approach to exemptions from the assessment of fairness generally (see paragraph 5.2 above), the CMA considers that this exemption needs to be interpreted restrictively, taking account of the purpose of the Directive, which is to protect consumers as the weaker party from one-sided contracts. This particularly applies to the interpretation of the word 'reflects'. Recital 13 of the Directive indicates that terms must be 'directly or indirectly' **determined** by 'statutory or regulatory provisions' to benefit from the exemption. It is not enough, for instance, that a term or notice merely resembles what is provided for by law in a different context or includes only some elements that reflect legal requirements. The CJEU has emphasised that the exemption applies where and to the extent that 'it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts'.[102]

5.33 It is clearly not the intention of this exemption to permit unfairness, even within a limited context. The Directive states that 'it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions' to a test of fairness, on the basis that these provisions are 'presumed not to contain unfair terms'.[103] The CMA would expect arguments to the effect that a term falls within the exemption to be treated with suspicion if it appears to have the effect of creating an unfair imbalance to the detriment of the consumer.

5.34 It is similarly not the intention of this exemption to permit lack of transparency in certain contract terms. Consistently with the purposes of the legislation, mere inclusion in contracts or notices of a reference to a legislative or regulatory provision is unlikely to ensure that they benefit from this exemption. Where the protection of consumers requires that they be made aware of relevant legal provisions, the CJEU has stated that 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned'.[104] It follows necessarily that the provisions' effects must be set out in a way that consumers can understand.

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[102] *RWE*, as above, at paragraph 28.
[103] Recital 13 of the Directive. Recital 14 adds that 'Member States must however ensure that unfair terms are not included'.
[104] See *RWE,* as above, at paragraph 50.

6. Enforcement

6.1 The CMA was given a lead role in the enforcement of unfair terms law, comparable to that formerly taken by the OFT, under legislation which reshaped the UK's consumer landscape in 2013/14. Those reforms reflected the Government's aim of giving TSS a central role in consumer enforcement whilst ensuring that the CMA takes forward its predecessor's unfair terms leadership work, in partnership with TSS, and targets its action where it can secure wide-ranging changes to markets.

6.2 As the UK's lead national enforcer of unfair terms law, the CMA will act in cooperation with UK and international partners, and expects to be selective in taking enforcement cases, focusing particularly on those which have a market-wide impact or precedent-setting value. In deciding whether the CMA or one of its partners is best placed to act in any particular case, the CMA will consider the facts of the case and the characteristics of the market in question, having regard to its policies and commitments – particularly its published prioritisation principles and its Annual Plan.[105]

6.3 The CMA shares most of its consumer powers not only with TSS but with a number of other agencies, many of which have enforcement responsibilities for particular economic sectors such as Ofcom and the Financial Conduct Authority (see paragraph 6.27). The CMA works closely with the concurrent regulators, as it is important to avoid duplication of effort and to maximise the impact of interventions for consumers. To this end, for instance, the CMA has agreed Memoranda of Understanding with a number of sector regulators to ensure a joined-up approach.[106]

Enforcement powers

6.4 As indicated above, the CMA, TSS and sector regulators all have powers to enforce the unfair terms provisions in the Act. The following paragraphs provide an overview of these formal enforcement powers.

6.5 It is important to note that these enforcement powers are discretionary and do not mean enforcement action must or can properly be taken against each and every unfair contract term or unfair consumer notice.[107] Compliance with unfair terms law will be promoted by the most appropriate means, in line with relevant enforcement policies, priorities and available resources. In addition to

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[105] CMA Prioritisation Principles and Annual Plan.
[106] [For further information on how the CMA works in partnership with other agencies see the CMA's webpages at XX.]
[107] Or those terms or notices that are blacklisted under the Act.

formal action, there are a number of informal routes which the CMA may use to promote and ensure compliance with the unfair terms provisions of the Act, including, for example, issuing targeted guidance aimed at specific traders or sectors.

6.6 It should also be noted that in addition to allowing intervention by public enforcers, the Act enables individual consumers to benefit directly from its protections. It provides that they are not bound by unfair terms or notices, and they can rely on this point in any dispute with a business regarding wording that they consider to be unfair (see paragraphs 6.18 and 6.19 below). A consumer should, however, seek legal advice if it becomes clear that such a dispute could lead to court proceedings.

Enforcement powers under the Act

6.7 The CMA and other relevant bodies – referred to as 'regulators' in the Act (see paragraph 6.27 below for a list) – may take enforcement action under the Act where a term or notice is considered by the 'regulator' to be:

- unfair;[108] and/or
- in breach of the transparency provisions in the Act;[109] and/or
- 'blacklisted' by virtue of the provisions in the Act.[110]

6.8 Regulators are not restricted to taking action in cases in which they have received complaints. However, under Schedule 3 to the Act, the CMA and other regulators have a discretion to give detailed consideration to any complaint received about terms and notices used by traders in their dealings with consumers (see paragraphs 1.8 onwards of Part 1 of the guidance for an explanation of the terms 'consumer contracts' and 'consumer notices').[111]

6.9 Under Schedule 3 to the Act, enforcement action may be taken to stop the use of such terms or notices, if necessary by seeking a court order – an injunction or, in Scotland, an interdict. An order can apply to the use of terms in existing as well as future agreements. A 'regulator' can also seek a temporary order to prevent further use of the term or notice until the case can be fully argued in court. Action can be taken in any county court or the High Court or, in Scotland, in any sheriff court or the Court of Session.

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[108] See Part 2 of the guidance.
[109] See Part 2 of the guidance at paragraphs 2.44 onwards.
[110] See Part 3 of the guidance.
[111] Note that Schedule 3 covers consumer notices, terms in consumer contracts, terms proposed for use in consumer contracts as well as terms which a third party recommends for use in consumer contracts.

Part 8 of the Enterprise Act 2002

6.10 In addition, Part 8 of the Enterprise Act 2002 (the Enterprise Act) gives the CMA and certain other bodies separate powers against traders who breach consumer legislation generally including the Act (see paragraphs 6.27 and 6.28). It enables them to seek **enforcement orders** against traders who breach UK laws that protect consumers, and particularly those giving effect to specific European Directives, where there is a threat of harm to the collective interests of consumers. The Directive is a specified Directive for these purposes.

6.11 The CMA and all other 'regulators' under the Act are able to take enforcement action under Part 8 of the Enterprise Act for all relevant infringements that involve breach of the Act as of other consumer legislation. Therefore, the Enterprise Act provides an alternative or further enforcement mechanism to that provided in Schedule 3 to the Act itself, and one that is of particular value in cases involving issues arising under several different pieces of consumer law.

Undertakings in lieu of court proceedings

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

Investigatory powers

6.13 Under Schedule 5 to the Act the CMA, as well as other 'regulators', can require traders to provide information necessary to identify whether unfair terms and notices are in use or whether a person is complying with an undertaking or injunction. Enterprise Act enforcers also have additional investigatory powers.

6.14 Although the CMA and other enforcement bodies can seek to protect consumers in general (as described above) neither the Act nor the Enterprise Act give them a power to take up consumers' individual cases for them or provide advice on private disputes. However, an undertaking or enforcement order under the Enterprise Act may, in certain circumstances, include provisions where consumers who have suffered loss as a result of breaches of consumer law, including the use of unfair terms, could be offered redress. Individual redress (including provision of monetary compensation where appropriate) is

one of the 'enhanced consumer measures' provided for under Schedule 7 to the Act which can be added to an enforcement order or undertaking. Other such measures are also available for the purposes of improving consumer choice or business compliance.

Publications

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

Duty to give reasons

6.16 If a 'regulator' exercises its power to give full consideration to a relevant complaint about a term or notice (covered by Schedule 3) (see paragraph 6.8 above), those who have made the complaint are entitled to be given reasons by the 'regulator' to which the complaint was made for any decision not to seek an order. When and how the reasons are given will depend on the circumstances of the case.

Coordination of enforcement action

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

Private action under the Act

6.18 In addition to public enforcement action, as mentioned above, individual consumers have certain legal rights under the Act. They can take action on the basis of these rights independently of any action by the CMA or other 'regulators' as defined under the Act.

6.19 If a trader refuses to accept that a term or notice is unfair or blacklisted, consumers may therefore choose, on the basis of their rights under the Act, either to resist legal proceedings brought by the trader against them, or to instigate proceedings themselves. Before doing so, however, they should seek legal advice. If the court agrees with the consumer, the trader will not be allowed to rely on that term or notice against the consumer, but if the court agrees with the trader, the consumer may face a liability in costs.

6.20 Where any proceedings are brought which relate to a term in a consumer contract, the court is, in any case, under a duty consider whether the term is fair. This duty applies even if none of the parties raises the issue, provided the court has enough information to make an assessment of fairness.[112]

Other relevant law

6.21 In some cases, other relevant legislation might be used in conjunction with the Act to protect consumers. For details of the relationship between the unfair terms provisions in the Act and the CPRs and the CCRs, see Part 1 of the guidance at paragraphs 1.42 and 1.47. The following paragraphs give details of three further areas of law that may be relevant to cases involving issues of contractual fairness.

Consumer Credit Act 1974, as amended

6.22 Generally, the Consumer Credit Act 1974 (CCA) regulates the way in which consumer credit businesses carry on business. For example, there are rules on advertising, pre-contract disclosure, credit agreements and post-contractual information. In addition, the CCA confers certain rights on consumers, including in relation to withdrawal from a credit agreement and early settlement. Under the CCA, the courts have a wide discretion to determine whether the relationship between the borrower and a lender arising out of a credit agreement (or the agreement taken with any related agreement) is unfair to the borrower because of, among other things, any of the terms of the credit agreement or any related agreement.[113]

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

The Provision of Services Regulations 2009

6.24 The Provision of Services Regulations 2009 (PSRs) contain provisions relating to the supply of information, which traders need to comply with if they supply services. Under the PSRs, businesses should provide certain information to consumers in a clear and unambiguous way and in good time before the contract is concluded or before the service is provided if there is no

[112] See section 72 of the Act, which reflects European case law.
[113] See sections 140A–140C of the Consumer Credit Act 1974.

written contract. This includes information about the identity of the business, the nature of the service, general terms and conditions and the price. The PSRs also prohibit certain service providers from discriminating against consumers on the basis of their place of residence.

6.25 The requirements of the PSRs are enforceable alongside the unfair terms provisions of the Act under the Enterprise Act.

The Electronic Commerce (EC Directive) Regulations 2002

6.26 Nearly all commercial websites will be subject to the Electronic Commerce (EC Directive) Regulations 2002 (ECRs). The requirements of the ECRs apply to all traders who provide online services with an economic value, including services provided free to the consumer at the point of use, such as search engines or online auctions. In particular, businesses which market or sell goods or services or digital content to consumers and businesses via the internet, email, text messaging and interactive television are subject to information requirements under which they must make available, among other things, pre-contract information.[114]

List of regulators

6.27 The following bodies are listed in Schedule 3 to the Act as having the power to enforce the law on unfair contract terms and notices alongside the CMA. They also have the power to take action against unfair terms under Part 8 of the Enterprise Act.[115]

- The Department of Enterprise, Trade and Investment in Northern Ireland
- A local weights and measures authority in Great Britain
- The Financial Conduct Authority
- The Office of Communications
- The Information Commissioner
- The Gas and Electricity Markets Authority
- The Water Services Regulation Authority

[114] For further information on the ECRs see [add link].
[115] [Insert links to regulators' website and any specific policies suggested in consultation.]

- The Office of Rail Regulation
- The Northern Ireland Authority for Utility Regulation
- The Consumers' Association (Which?)

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

- The Civil Aviation Authority
- PhonepayPlus
- The Secretary of State for Health
- Department of Health, Social Services and Public Safety in Northern Ireland