

Unfair contract terms explained

Draft for consultation

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General point to note: Words in bold indicate entries in the glossary.

Introduction

1. The Consumer Rights Act 2015 (the Act) has important implications for businesses entering contracts with **consumers**. It applies to both contract **terms** and consumer **notices** (definitions are provided in the glossary). Broadly, Part 2 of the Act protects the **consumer** against contractual wording that could be used to give the **business** an unfair advantage. It requires that such wording should be:
 - fair – not weighting the contract unfairly against the **consumer, or hidden away**; and
 - transparent – written in clear, jargon-free language that **consumers** can understand.
2. If any of your **terms** or **notices** are unfair under Part 2 of the Act, you could find that they are not legally binding on **consumers**, and you could face enforcement action if they fail either the fairness or transparency tests.
3. The Act also ‘blacklists’ certain unfair **terms** and **notices**, making them unenforceable in all circumstances – whether or not they pass the fairness and transparency tests.
4. This guide is intended to provide **businesses** with a short overview of the types of **terms** and **notices** that the CMA considers are open to challenge under the Act. It covers:
 - when the fairness provisions will apply;
 - the test of fairness;
 - the test of transparency;
 - ‘blacklisted’ **terms** and **notices**;
 - examples of types of wording that the CMA might consider unfair;
 - the possible consequences for your business of using unfair terms or notices; and
 - references to some related consumer law.
5. It also includes links to other documents you may find helpful.

6. This guide provides an introduction to the legislation and the forms that unfairness can take. The final decision on whether a **term** or **notice** is unfair rests with the courts, and reading this guide cannot be a substitute for taking independent legal advice.

Using this guide

7. Certain words are selectively presented in **bold**. They are defined in the glossary at the end of this guide.
8. In order to avoid undue repetition, this guide does not refer at every point to both **terms** and **notices** when making points that cover both. The Act's requirements for terms and notices are very similar, and it should generally be assumed that what is said about terms also covers notices unless otherwise indicated. 'Contractual wording' refers to both terms and notices. In sections with headings that refer to notices, terms and notices are dealt with separately.
9. A list of the changes to the law made by the Act in this area can be found in *What's new?* In addition, the CMA has produced more detailed general guidance on types of **terms** and **notices** that are unfair.
10. Neither this guide, nor the CMA's more detailed guidance, is intended as a full interpretation of the legislation. The CMA's guidance is not a substitute for the Act itself and the underlying EU Directive; independent legal advice should be sought if court proceedings are potentially in prospect.

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

11. The provisions in Part 2 of the Act apply to all contracts between a **consumer** and a **trader** (whether written or not). Consumer-to-consumer and business-to-business contracts are not covered. Its requirements also apply to a **notice** issued by a trader that is intended for consumers, even if it is not part of the contract.
12. The additional materials available on the [CMA's webpages](#) can help you check how the law applies to your contract **terms** and **notices**.¹

¹ This link is provided for consultation purposes only – these materials are yet to be updated in light of changes to the Act.

Which terms or notices can be assessed for fairness?

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

Exemption for terms or notices reflecting the law

14. This exemption applies to wording that is legally required in **terms** and **notices** having a particular purpose, *where it is used for that purpose*. It does not protect any use of wording that goes beyond what is required or expressly permitted under the law.
15. Where **consumers** need information in order to understand the effects of such wording, in particular about the law that requires or permits its use, this needs to be provided in or with the contract. It is not sufficient for the wording used just to mention the relevant legal provisions by name.

Exemption for price and main subject matter

16. An assessment of fairness cannot relate to (a) the definition of the main subject matter of the contract, or (b) the adequacy of the price. For the purpose of the guide, this exemption is called the ‘core exemption’ because it covers the essential features of the bargain. It means that a **term** is not unfair simply because it sets a price that is higher than other **businesses** charge, or describes a product that the **consumer** considers represents poor value for money. However, terms dealing with these issues may still be assessed on other grounds, for example, as regard the timing of a payment, and whether the main subject matter or price can be varied.
17. Where terms of these kinds do not meet the requirements of prominence and transparency, the ‘core exemption’ does not apply and they are subject to a full assessment for fairness (see also the paragraph entitled ‘Grey List’ below).

Transparency

18. To benefit from the 'core exemption', a price-setting or 'main subject matter' term must be expressed in plain and intelligible language and (if in writing) legible. This transparency requirement is explained further below ('Transparency' at page 8).

Prominence

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

What is an unfair term?

22. A **term** in a consumer contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the **consumer**.
23. Transparency is also fundamental to fairness. The Act requires that a written **term** of a consumer contract is expressed in plain and intelligible language and is legible. This is, however, only one element of a more general requirement that **consumers** are given a real chance, before entering a

contract, to see and understand all terms that could operate to their disadvantage.

24. The CMA considers that the Act's effect is to apply in substance the same tests of fairness and transparency to **terms** and **notices**.

Fairness

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

Factors in assessing fairness

30. The Act requires fairness to be assessed taking into account:
- the nature of the subject matter of the contract;

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

The Grey List

31. The Act illustrates what ‘unfairness’ means, by listing some types of **terms**² that may be unfair in Schedule 2 (sometimes known as the ‘Grey List’). Wording is under suspicion of unfairness if it has the same purpose, or can produce the same result, as these terms.
32. The Grey List is so called because it is not a blacklist; **terms** like those included in it are not necessarily unfair. It is also, however, non-exhaustive – terms that do not appear in it may still be unfair.
33. The types of **terms** in the Grey List overlap with each other, but may cause or allow one or more of the following common problems:
 - **Consumers** being denied full redress if things go wrong.
 - Consumers being tied into the contract unfairly.
 - The **business** not having to perform its obligations.
 - Consumers unfairly losing prepayments if the contract is cancelled.
 - The business unfairly varying terms after they have been agreed, for instance so as to supply a different product, raise the price or reduce consumer rights.
 - The business determining the price or subject matter of the contract after the consumer has become bound by it.
 - Consumers being subject to unfair penalties.
34. It is important to note that **terms** with the object or effect of those on the Grey List cannot benefit from the ‘core exemption’.

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

Transparency

35. As indicated above, Part 2 of the Act includes a specific requirement that all written **terms** have to be transparent – they must be expressed in plain, intelligible language and (if written) be legible.
36. Legibility and simple clarity of language are not enough to ensure compliance. Contractual documentation needs to be drafted so as to put **consumers** into a position where they can make an informed choice whether or not to make a contract.
37. The contract should set out all obligations in a clear and comprehensible way, so that the **consumer** can see how they relate to each other, and can foresee and evaluate any future consequences of entering the agreement. Wording that could act disadvantageously to them must not be concealed, but on the contrary should be drawn to their attention.
38. Where the meaning of a **term** or **notice** is ambiguous (so there is more than one possible meaning), the interpretation that is most favourable to the **consumer** prevails. This rule is intended to benefit consumers in any private disputes they may have with **businesses**. It does not give businesses a defence against regulatory action.
39. The following can help you improve the transparency of your consumer contracts. They should be:
 - jargon free – as far as possible using ordinary words in their normal sense;
 - unambiguous – clear and not open to misinterpretation or differing interpretations;
 - reader-friendly – organised so as to be easily understood (using, for example, short sentences and subheadings);
 - legible – for example in a suitable font size and of appropriate print quality;
 - comprehensible – the meaning of the words or concepts used should be explained if they are not capable of being readily understood by **consumers**;
 - informative – a **consumer** should, on the basis of the information provided – if necessary in pre-contractual literature – be able to foresee and evaluate the consequences of all wording used; and
 - accompanied by pre-contractual literature as necessary – if, for instance, the contract is complex or lengthy.

40. Before moving on to provide practical examples of terms that may be open to challenge as unfair under the Act's fairness and transparency provisions, it is important to note that the Act also 'blacklists' certain **terms** and **notices**, making them automatically unenforceable and open to challenge, without the need to consider those provisions.

Blacklisted terms and notices

41. The Act provides that some **terms** and **notices** are automatically unenforceable against **consumers**. The CMA refers to these as 'blacklisted' to distinguish them from terms on the Grey List. An example of blacklisting found in Part 2 of the Act is wording that would exclude or restrict liability for death or personal injury resulting from negligence.
42. Part 1 of the Act also 'blacklists' various **terms** in consumer contracts. The kinds of terms covered include those which aim to relieve traders from their ordinary obligations under the Act – for instance, to ensure that their products are of satisfactory quality and that their services are provided with reasonable skill and care.
43. **Terms** and **notices** that are blacklisted are open to challenge either on that basis in itself, or on the grounds that they fail to meet the requirements of Part 2. Any wording that is blacklisted is in practice very likely to be unfair.

Terms that may be considered unfair

44. The following examples are intended to provide an insight into the types of wording that could be unfair. They are based on the Grey List **terms** listed in Schedule 2 to the Act, but they also include some additional terms that the CMA considers may also be unfair. This is not an exhaustive or definitive list. Other terms than those listed can be unfair if they upset the balance of the contract, and wording that has the same object or effect as a listed term may be unfair in some circumstances, but not in others. Whether a term is unfair depends in large part on how it is presented – any wording is more likely to be unfair if it is unclear or hidden away.

Terms and notices excluding or limiting liability

45. Unfairness is likely to arise when a **business** uses wording that seeks to limit or exclude its liability to the consumer. Terms of this kind are often called disclaimers or exemption clauses.
46. If wording could be used to reduce or remove **consumers'** ability to seek redress to which they would otherwise be legally entitled, it is likely to be

considered unfair, even if that was not the intention. For example, a **term** that states customers use facilities ‘at their own risk’ covers liability for death or personal injury, even if the main concern of the **business** may be something else.

47. No wording can exclude or restrict liability for death or personal injury resulting from the **trader’s** negligence. As well as being unfair, **terms** and **notices** of this kind are blacklisted under Part 2 of the Act. Such wording should not be used in consumer transactions.
48. 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 (if paid for) must match the description given to them, and be of satisfactory quality and fit for their purpose. Contract **terms** which deny consumers the right to their full available legal remedies where goods or digital content are misdescribed or defective are blacklisted under Part 1 of the Act.
49. Similarly, a **business** that supplies services to **consumers** accepts certain contractual obligations as a matter of law. In particular, consumers can normally expect services to be carried out to a reasonable standard – that is with ‘reasonable care and skill’. A **term** in a contract which could relieve the trader of this obligation, or limit the remedies available to the consumer for failure to meet this standard, is blacklisted and very likely to be considered unfair.
50. There are many other kinds of disclaimers, which may also be considered unfair and may be blacklisted when used in business-to-consumer contracts, including those that may have the effect of:
 - excluding the **business**’ liability for its delay;
 - excluding the business’ liability for failing to perform its obligations (for example, ‘management reserves the right to suspend services without liability’);
 - reducing the amount or availability of consumer redress (for example, ‘liability accepted up to the value of the goods only’);
 - placing unreasonable time limitations on consumer claims;

- excluding the **consumer's** right of set-off³ (for instance, where the consumer is required to pay in full, even if they have a legitimate complaint about the goods, services or **digital content**); and/or
- excluding liability by conferring guarantee rights that are narrower or weaker than the consumer's statutory rights (for example, 'we will repair or replace (at our option) any item found faulty within three months').

51. In all cases the same concerns arise where a term *restricts* liability rather than excluding it altogether, particularly if the **consumer** could be left worse off than the law normally allows.

Non-returnable consumer prepayments

52. **Consumers** sometimes make pre-payments in advance of receiving products or services. Generally, when a contract is cancelled, consumers shouldn't end up paying for what has not been supplied. This is especially true where there is no fault on the part of the consumer and the contract is ended by the **business**. A **term** that states no refund is available in this circumstance is likely to be considered unfair (see also unfair cancellation clauses below).

53. Even where the **consumer** causes the cancellation, the **business** should only keep an amount of any prepayment that is needed to cover any resultant losses – for example arising from costs they have reasonably incurred – which cannot reasonably be reduced (by, for instance, selling to someone else).

54. **Terms** should not interfere with other rights that the **consumer** may have regarding cancellation, for example when a contract is entered other than at the trader's business premises. See under the heading 'Exclusions and reservations of special rights' below.

Disproportionate sanctions

55. **Terms** that permit the **trader** to impose disproportionately severe sanctions for breach of contract are likely to be unfair. This applies particularly to financial penalties, which may also be unenforceable under general law. **Consumers** should not have to pay more than is really and reasonably needed to cover the actual costs or loss of profit they have caused.

³ The deduction that may be allowable from payments due under a contract, where one party (for example, the consumer) has an arguable claim under the contract against another (for example, the business).

56. A **term** imposing unreasonable interest rates on outstanding payments, for example, at a rate excessively above a bank's base rate, is likely to be regarded as an unfair.
57. Other kinds of financial sanctions that could be unfair include those that might:
- mislead **consumers** into thinking they are required to pay more compensation than is required by law; and/or
 - impose a disproportionate cancellation charge on the consumer when he or she decides to pull out of the contract early.
58. Over-severe sanctions of other kinds are also likely to be considered unfair. An example would be a term allowing the trader to use enforcement methods which could involve violation of the consumer's privacy or property rights.

Unfair cancellation clauses

59. Cancellation of a contract by the **business** can leave the **consumer** seriously inconvenienced, and potentially facing costs. If this is the case, then a **term** stating that a **business** can cancel for any reason (even if it allows for refund of the **consumer's** prepayments), is likely to be considered unfair. There is also potential for unfairness if the **business** can cancel without notice, except on serious grounds.⁴
60. Wording that restricts the **consumer's** ability to cancel might be unfair too – for example, a clause which states or implies that the consumer cannot cancel the contract in any circumstances or only with the **trader's** agreement. In law, where the trader breaks the contract, the consumer has remedies which may include a right to cancel it – if, for example, the trader's breach threatens its whole value to the consumer.
61. Termination charges and over-lengthy notice periods can also have similar effects – tending to force **consumers** to continue with contracts, or renew them, when they have no wish to do so. They may therefore also be unfair.

Binding consumers to hidden terms

62. **Consumers** should always have a real opportunity to become acquainted with and understand contract **terms** before they are bound by them. If a term

⁴ In contracts for financial services – for example banking and credit contracts – the legislation indicates that the trader may need only to have a 'valid reason' for cancellation without notice, and to inform the consumer as soon as possible. But this does not mean a term meeting these minimum criteria is necessarily fair.

serves to require consumers to accept wording of which they have no prior knowledge, it could be challenged as unfair.

63. The **consumer's** opportunity to examine **terms** can be extended by provision of a cooling-off period – a specified time after a contract has been entered during which the consumer can cancel without penalty. This may be helpful, and in some kinds of contract is required by law, but it is not a substitute for giving consumers full and clear information before entering the contract.

Variation clauses

64. A **term** that gives a right to change the contract after it has been agreed is known as a variation clause. A term giving the **business** the right to make changes regardless of the consent of the other party is under strong suspicion of unfairness and may be blacklisted for the purposes of Part 1 of the Act.
65. Variation clauses are likely to be unfair if they could be used to force the **consumer** to accept increased costs, new requirements or reduced benefits. For instance in contracts where important elements of the contract – for instance the price – have not been fully agreed at the time the contract is concluded, terms that give the trader the sole right to determine these matters are likely to be unfair. So too are terms that give the business the right to change, at its discretion, elements which have been agreed.
66. **Terms** allowing variation of the price raise obvious concerns, but other variation clauses can also be unfair. For example, a **term** stating that all materials used may vary in colour and finish is liable to conflict with the customer's legal right to receive something that is (in all significant respects) what the trader stated.
67. A variation clause is less likely to be unfair if:
- it is clear and appropriately restricted – for instance allowing for either minor technical adjustments which can have no real significance to the **consumer**, or changes required by law;
 - the wording sets out the circumstances, method and reason for the right of variation in a clear and specific way which allows the **consumer** to foresee the changes that can be made and understand the implications for them – for instance where there is a link to a valid price index;⁵ and/or

⁵ This applies particularly to terms in a range of specialised financial transactions: terms allowing price variations due to fluctuations in an independent index, or published market rates, or currency values.

- there is a duty on the trader to give notice of the variation (in good time before it takes effect) and the **consumer** has a genuine right to cancel the contract, capable of being exercised without loss or serious inconvenience.

Right of final decision

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

Denying liability for statements made by agents or employees

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

Unbalanced assignment clauses

73. It may be unfair for a **business** to reserve the right to transfer the agreement to a third party without the consent of the **consumer** – particularly when the business to which it is assigned could provide a poorer quality of product or service.

74. For example, a **term** stating that a **business** 'may at any time assign this agreement to a third party' may be unfair.
75. **Terms** that unduly restrict the **consumer's** freedom to transfer their rights under the contract to someone else raise comparable concerns. An instance is a guarantee covering goods or work on the consumer's property. There are usually fairer and less restrictive ways of protecting the **business's** interests than refusing to honour a guarantee if a claim is made by anyone but the consumer.

Hindering or preventing consumers from taking legal action

76. A **term** is likely to be unfair if it seeks to remove the **consumer's** right to seek redress when the trader is in default, or could have the effect of hindering legitimate efforts to seek redress. Such a term may be blacklisted under Part 1 of the Act as well as unfair under Part 2.
77. For instance, a clause stating that disputes must be heard in remote or inappropriate courts could unfairly limit the **consumer's** ability, in practice, to initiate legal proceedings where the trader is in breach of contract.
78. Clauses which require (rather than allow) **consumers** to submit disputes over sums under £5,000 to arbitration are always unfair.⁶

Allowing excessive burdens or requirements to be imposed on the consumer

79. Wording may be unfair if it could allow excessive and unexpected financial burdens to be imposed on the **consumer**. These have a similar effect as a price variation clause.
80. For example, an explicit right to demand payment of unspecified amounts at the **business's** discretion (such as a security deposit).
81. However, unfairness is much less likely if, for instance:
- the **consumer** has agreed to pay a specific amount, in specified circumstances;⁷
 - the consumer is given a genuine and practical right to cancel the contract (without any penalty or otherwise being left worse off).

⁶ Section 91 of the Arbitration Act 1996.

⁷ Note, however, that a term may meet these requirements but still be unfair if, for instance, its real purpose is to act as penalty and it is disproportionately high.

Requiring the consumer to bear inappropriate risks

82. It may be unfair for a **business** to use wording that passes risks onto the **consumer**, which the business is better able to bear.
83. Indemnity clauses⁸ that protect the **business** in this way from its own negligence, or **terms** that transfer a risk to the consumer when the business can insure against it and the consumer cannot, are particularly liable to be considered unfair.

Requiring the consumer to make disadvantageous declarations

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

Exclusions and reservations of special rights

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

What happens when terms or notices are unfair?

88. Using unfair or blacklisted contractual **terms** or **notices** can have a number of consequences for your **business**. For instance:

⁸ 'Indemnity' clauses generally state or imply, often using legal jargon, that the business can simply pass on to the consumer any costs incurred whether reasonable or not.

- they are not legally binding on the **consumer**;
- you could be asked to stop using and relying on them;
- a court **injunction** might be sought.

Enforcement powers

89. The CMA, Trading Standards services and other relevant bodies have powers to pursue legal action to stop you using **terms** and **notices** that are unfair or unclear, as well as those that are blacklisted.
90. Under the Act, if you are using or recommending wording that appears to be unfair or blacklisted under the Act, the CMA or another listed '**regulator**' can seek an injunction (or interdict in Scotland) from the court against your **business**.
91. Under the Act **traders** can be required to provide information necessary to identify whether, for instance, unfair terms are in use or whether a person is complying with an undertaking or injunction.
92. If a **business** gives a satisfactory undertaking to stop using wording, or to revise it, court proceedings won't be necessary, provided that the agreed course of action is fulfilled.
93. Part 8 of the Enterprise Act 2002 gives the CMA and other enforcers⁹ separate powers to investigate and seek enforcement orders in relation to breaches of consumer law generally, including the Act. Use of these powers may be appropriate where, for instance, issues arise under several different pieces of consumer legislation.
94. Where an undertaking or enforcement order is sought under the Enterprise Act the enforcer may, in certain circumstances, ask the court to include provisions for redress for **consumers** who have suffered loss (which can include monetary compensation).
95. In addition, individual **consumers** have their own legal rights under the Act, independently of the powers of the CMA or other enforcers. If a business seeks to rely on unfair or blacklisted wording, the consumer can refuse to comply with it. If necessary, they can take or defend proceedings in court.

⁹ Including all Regulators for the purposes of the Act – see the definition of Regulators in the Glossary for details of who can take action under the Enterprise Act 2002 in relation to unfair terms and notices.

However, a consumer should seek legal advice before taking any step that is liable to result in court proceedings.

96. The CMA has no power to take up **consumers'** individual cases for them, or to provide advice on private disputes.

Other relevant laws

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

The Consumer Protection from Unfair Trading Regulations 2008

98. Generally, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) give broad protection for **consumers** against unfair business practices, and they can apply to the use of unfair contract **terms** or **notices**. One effect of these Regulations is that the use of certain kinds of contractual wording is prohibited – for example, notices that mislead consumers and thereby distort their decisions. In some situations, an unfair term or notice might be subject to enforcement action under the CPRs instead of, or as well as, the provisions of the Act.
99. For more information, see guidance on [consumer protection from unfair trading](#).

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

100. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the CCRs) replace earlier legislation on 'distance' and 'doorstep' sales, providing **consumers** with cancellation and other rights when entering contracts other than on the trader's business premises – for instance, by telephone, or in their own home. However, certain requirements of the CCRs apply also to some transactions concluded on business premises. For instance, in such transactions the CCRs require **traders** to provide certain pre-contract information to **consumers**, and to do so in 'a clear and comprehensible manner'. This information includes, in particular, details of:
- the main characteristics of the goods, services or **digital content**;
 - the arrangements for carrying out the contract;

- the total price; and
 - in the case of digital content, its functionality and compatibility.
101. This statutory Pre-Contract Information is legally binding on the **trader** in the same way as what is said in the contract. The goods, services or **digital content** must be provided as stated in the Pre-Contract Information, and any change will not be effective unless expressly agreed between the **consumer** and the trader. Traders cannot contract out of this obligation and any term that purports to permit contracting out is blacklisted.
102. These provisions of the CCRs should particularly be borne in mind where terms such as variation clauses could be understood as allowing changes to be made to any of the details set out in the Pre-Contract Information. This is a complex area, and for more information on this point see the CMA's main guidance on unfair terms.

Glossary

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

Business

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

Consumer

105. A **consumer** is defined in the Act as an individual (that is a natural person rather than a legal entity such as a company) who is acting for purposes wholly or mainly outside his or her trade, business, craft or profession. Some transactions could be for a mixture of personal and business reasons. In cases of doubt, an individual is presumed to be a consumer until shown not to be. If a **trader** claims in court proceedings that an individual is not a consumer, the trader has to prove this.

Digital content

106. The term **digital content** in the Act relates to any data produced and supplied in digital form. It may be contained within a physical product (for example music, films, games or software contained in CD or DVD) or in a non-tangible

form (for example, a download onto a computer, apps on a mobile phone/tablet and streaming a film).

107. The statutory rights under Part 1 of the Act for the most part do not apply to **digital content** which has not been paid for. However, the requirements of fairness and transparency apply to contractual wording used in relation to digital content whether monetary payment has been made or not.

Notice

108. A consumer **notice**, for the purposes of Part 2 of the Act, is wording that relates to rights or obligations between a **trader** and a **consumer**, or which appears to exclude or restrict a trader's liability to a consumer. It includes an announcement or other communication, whether or not in writing, and whether or not expressed to apply to a consumer, as long as it is reasonable to assume that it is intended to be seen or heard by one. Consumer notices are often used, for instance, in public places such as in shops or car parks, as well as online and in contractual documentation.
109. **Notices** can, depending on the circumstances, be regarded by the law as having contractual force, and have previously been treated by enforcers as subject to unfair contract terms legislation. Indeed, there may be a notice but no contract between the parties. The fact that consumer notices are now expressly covered in their own right clarifies that it does not matter whether or not they form part of the contract as a matter of law.
110. All references to **notices** in this guide are to consumer notices. References to contractual 'wording' are meant to cover both **terms** and notices.

Regulator

111. Bodies having powers under the Act to enforce its fairness provisions (including taking action against blacklisted wording) alongside the CMA are defined as **regulators** and listed in Schedule 3 of the Act. The CMA and regulators also have separate powers to act under Part 8 of the Enterprise Act 2002, as do certain other authorities.
112. The Schedule 3 regulators include:
- local authorities that provide a Trading Standards service;
 - the Information Commissioner;
 - the Office of Gas and Electricity Markets (Ofgem);

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

Term

114. There is no definition of '**term**' in the Act. Any wording in a contract that gives rise to a particular obligation or right is liable to be treated as a term, whether or not it appears in written form as a paragraph or clause. Wording that has this legal effect could appear in only one part of a clause, or may be spread over more than one clause.
115. Where there is any doubt as to what constitutes a **term**, it should be resolved having regard to matters of substance rather than form. The fact that a **trader's** contractual wording is described or regarded by the **trader** as a **term** does not necessarily make it so.
116. Wording can be used in connection with a consumer contract that is not, for legal purposes, treated as forming part of it. Where such wording could have an effect similar to a term on consumers, it is likely to be regarded as

constituting a **notice** – see above under Notice. As such it will be subject to very similar requirements, in relation to fairness and transparency, to a term.

Trader

117. For the purposes of the Act, ‘trader’ is defined as a legal person (which includes both natural and legal persons such as companies) acting for purposes relating to their trade, business, craft or profession. ‘Business’ includes the activities of any government department or local or public authority. The definition of ‘trader’ also includes those acting in a trader’s name or on a trader’s behalf, such as a trader’s employees or agents.
118. In this guide, the word ‘business’ is used to mean the same as the technical term ‘trader’, as explained above under **Business**.

Sources of information

119. The Act can be viewed in full and downloaded here:¹⁰
120. The EU Directive, which the Regulations implement, is [available to download here](#).
121. Other documents which may help **businesses** to check how Part 2 of the Act applies to their contract **terms** and **notices** can be found on the [CMA's webpages](#).¹¹

¹⁰ Link will be provided when available.

¹¹ This link is provided for consultation purposes only – these materials are yet to be updated in light of the changes in the Act.