

# Technical note: unfair contract terms

**Draft note supplementing guidance on the unfair  
contract terms provisions in the Consumer Rights  
Act 2015**

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# 1. Introduction

- 1.1 Part 2 of the Consumer Rights Act 2015 (the Act) sets out the law on unfair contract terms and notices, requiring that terms in contracts and notices used by traders with consumers be fair and transparent. In addition, in cases involving contract terms and notices, the general law of contract and other legislation are also applicable alongside the Act.
- 1.2 This technical note provides:
- an overview of the legislative background to the Act and the relevance of earlier unfair contract terms case law, and
  - a non-exhaustive summary of other relevant legislation relating to and complementing the Act.
- 1.3 This note is intended to help legal advisers and enforcement authorities to understand the evolution of the law on unfair contract terms and relevant related law. It is not intended to be an exhaustive source of information about the earlier or related legislation. It supplements, and should be read alongside, the Competition and Markets Authority's (CMA) [draft guidance](#).

## 2. Legislative background to Part 2 of the Consumer Rights Act

- 2.1 The Act sets out a framework that consolidates in one place:
- key consumer rights relating to contracts for goods, digital content and services (Part 1 of the Act), and
  - the law relating to unfair contract terms and notices used between traders and consumers (Part 2 of the Act).
- 2.2 Parts 1 and 2 of the Act consolidated and replaced the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) and provisions of the Unfair Contract Terms Act 1977 (UCTA) which related to consumer contracts.
- 2.3 The Act applies to relevant contracts entered into and notices issued on or after 1 October 2015.<sup>1</sup>
- 2.4 Generally, Part 2 of the Act carries forward the protections provided to consumers under earlier legislation rather than changing them. The fairness and transparency provisions of Part 2 of the Act are substantially the same as those of the UTCCRs, but apply to consumer notices and negotiated terms as well as contract terms which have not been individually negotiated. The Act clarified and narrowed other exemptions to the fairness assessment contained in the UTCCRs. Similarly, Part 1 of the Act largely reflects the UCTA, save that the scope of its protection is extended to some services and digital content. [Annex A](#) to this note provides a non-exhaustive list of changes to unfair contract terms law introduced by the Act as of 1 October 2015. For more information about the earlier legislation see the Act's explanatory notes.<sup>2</sup>
- 2.5 One of the principal purposes of the Act was to give effect in the UK to the European Union (EU) Unfair Contract Terms Directive (the Directive).<sup>3</sup> The Act's explanatory notes include a transposition note setting out how the main elements of the Directive were transposed in the Act.<sup>4</sup>

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<sup>1</sup> The UTCCRs and the UCTA apply to relevant contracts entered into and notices issued before 1 October 2015.

<sup>2</sup> [Consumer Rights Act 2015 - Explanatory Notes](#).

<sup>3</sup> Council Directive 93/13/ECC on unfair terms in consumer contracts.

<sup>4</sup> Annex B: Transposition Notes, [Consumer Rights Act 2015 - Explanatory Notes](#).

## ***Relevance of case law***

- 2.6 Unfair contract terms law has been developed not only by Parliament, but through decisions of both UK and EU courts.

### ***Case law predating the Act***

- 2.7 UK case law under the UTCCR's relating to the requirements of fairness and transparency remains relevant to understanding the corresponding requirements of the Act.

### ***Pre-EU Exit case law***

- 2.8 The Act is UK primary legislation and remains in force after the UK's exit from the EU on 31 December 2020.<sup>5</sup> The Act was derived from EU legislation and is to be interpreted in accordance with Court of Justice of the EU (CJEU) decisions handed down on or before 31 December 2020. However, the UK Supreme Court, and certain other courts, may depart from such case law.<sup>6</sup>

### ***Post-EU Exit case law***

- 2.9 In interpreting the Act UK courts may have regard to CJEU case law handed down on or after 1 January 2021, so far as this is relevant to the matter before the court, but such case law is not binding.<sup>7</sup> Where they were originally enacted to implement the Directive, however, the unfair contract terms provisions of the Act should be interpreted in accordance with the Directive's purposes, which include the effective protection of consumers against unfair trade practices.<sup>8</sup> Insofar as the post-EU Exit caselaw of the CJEU articulates

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<sup>5</sup> Section 2 of the European Union (Withdrawal) Act 2018 (EUWA).

<sup>6</sup> In accordance with sections 6(3) to 6(6) of the EUWA, any question as to the validity, meaning or effect of unmodified assimilated EU law (which Part 2 of the Act is) is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020. The Supreme Court is not bound by any such retained EU case law and may depart from it applying the same test as it would in deciding whether to depart from its own case law. The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 permit a number of appellate courts (such as the Court of Appeal of England and Wales, the Inner House of the Court of Session in Scotland and the Court of Appeal of Northern Ireland) to depart from such CJEU case law. Such courts must apply the same test as the Supreme Court applies when deciding to depart from its own case law. This power is set out in the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. These appellate courts will however be bound by retained EU case law so far as there is post-transition case law which modifies or applies that retained EU case law and which is binding on the relevant court.

<sup>7</sup> Section 6 of the EUWA.

<sup>8</sup> See *Eternity Sky Investments Ltd v Zhang (CMA intervening)* [2024] EWCA Civ 630, at paragraph 42.

the meaning and purpose of the Directive, this continues to be relevant to the construction of the Act.

- 2.10 The CMA's guidance for traders on unfair contract terms is without prejudice to the case law of the UK courts and post-EU Exit case law of the CJEU (to the extent relevant and binding) concerning the application of the Act and (where relevant) the Directive.

### 3. Other legislation relevant to unfair terms and notices

- 3.1 Below is an overview of the relationship between the unfair contract terms provisions in Part 2 of the Act and selected other legislation that may be particularly relevant.

#### ***Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers Act 2024: Unfair commercial practices***

- 3.2 The provisions in Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers (DMCC) Act 2024<sup>9</sup> prohibit unfair commercial practices (UCP), replacing and updating the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs).<sup>10</sup> These provisions came into force on 6 April 2025 and apply to commercial practices that take place on or after that date. The CPUTRs continue to have effect in relation to any commercial practices which took place before then.
- 3.3 The UCP provisions in Chapter 1 of Part 4 of the DMCC Act provide consumers with a range of protections from practices which involve a trader misleading consumers (by action or omission), behaving aggressively, or otherwise acting unfairly towards consumers. There are two main types of unfair commercial practice:
- practices that are prohibited regardless of impact on consumers' transactional decisions, and
  - practices that are only unfair if they are likely to cause the 'average consumer' to take a 'transactional decision' they would not have taken otherwise.
- 3.4 For more details, see the CMA's [Unfair commercial practices guidance \(CMA207\)](#).
- 3.5 Collectively, the UCP provisions and the unfair contract terms provisions in the Act provide protection to consumers at all stages of their dealings with traders. The UCP provisions cover marketing and other trader activity that has an impact on consumers both before and at the time of their agreement to any contract terms, and interactions between consumers and traders following any

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<sup>9</sup> Digital Markets, Competition and Consumers Act 2024.

<sup>10</sup> The Consumer Protection from Unfair Trading Regulations 2008.



purchases. The unfair contract terms provisions in the Act deal with the fairness and transparency of contracts and notices.

- 3.6 The UCP provisions may overlap with the requirement that written terms or notices are transparent. For instance, a term which is not transparent may in some instances be challenged as unfair or as a breach of the transparency requirement in the Act as well as, or alternatively, a breach of the UCP provisions (for example, a misleading omission or omission of material information from an invitation to purchase).
- 3.7 The use of terms that are unfair under the Act may also amount to an unfair commercial practice under the UCP provisions. For example, the UCP provisions prohibit commercial practices which are misleading and/or which fail to meet the requirements of professional diligence (defined particularly by reference to honest market practice and the general principle of good faith), where the average consumer is likely to take a different decision as a result. Using, recommending or enforcing a contract term that is unfair under the Act is inherently likely to be considered an unfair practice under the UCP provisions, and be subject to enforcement action. This is both because it is a misleading statement of the consumer's rights or obligations and because it is not in accordance with the standard commensurate with honest market practice.<sup>11</sup> Demanding payment of sums due under an unfair term may also be an aggressive practice.<sup>12</sup>

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

- 3.8 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013<sup>13</sup> (the CCRs) apply to contracts concluded on or after 13 June 2014. Among other things, the CCRs require traders 'to provide certain Pre-Contract information to consumers, and to do so in a clear and comprehensive manner.' This information includes 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),

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<sup>11</sup> See, for example, *The Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch), at paragraph 227.

<sup>12</sup> See for example *R v Christopher Whatcott* [2019] EWCA Crim 1889, at paragraphs 2–3

<sup>13</sup> [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).

- the total price, and
  - in the case of digital content, its functionality and compatibility.
- 3.9 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 binding unless expressly agreed between the consumer and the trader. Businesses cannot contract out of this obligation and any term purporting to do so is automatically prohibited under the Act.
- 3.10 The provisions of the CCRs are particularly relevant where contract terms could be used to allow a trader to change any details as to (for example) the product or its price set out in the Pre-Contract Information. For such terms to be legally binding when used with consumers, the Pre-Contract Information must make clear that the potential changes envisaged may be made. For example, this applies to a contract where the trader wishes to be able to increase the price payable by the consumer during the period of the contract (assuming any such change to the price is otherwise substantively fair under the Act). 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 element covered in it – that variation is unlikely to be enforceable unless the consumer expressly agrees to it, independently of any questions of fairness that may arise under the Act.
- 3.11 However, a variation provision in the Pre-Contract Information should 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 be subject, along with the contract terms themselves, to the requirements of fairness and transparency under the Act. Meeting these requirements means that traders must put the consumer in a position where they can foresee the likelihood, nature and extent of any changes.

***Chapter 2 of Part 4 of the Digital Markets, Competition and Consumers Act 2024: Subscription traps***

- 3.12 The provisions in Chapter 2 of Part 4 of the DMCC Act create a new regime for subscription contracts and impose specific duties on traders supplying subscription contracts relating to pre-contract information, reminders, and cancellation and refund rights. These provisions sit alongside the general obligations imposed by the Act, namely, that contract terms must be fair and

transparent. These provisions are currently not in force and will commence no earlier than Autumn 2026.

### ***Consumer Credit Act 1974***

- 3.13 The Consumer Credit Act 1974 (CCA), the Financial Services and Markets Act 2000 (FSMA) and provisions of the Financial Conduct Authority's (FCA) Handbook regulate 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. Under the CCA, borrowers also have a number of rights and protections including the courts having 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.<sup>14</sup>
- 3.14 FSMA sets out the wider regulatory framework for firms including the powers of the FCA and the activities that require authorisation. The FCA is responsible for regulating the conduct 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 and supervisory powers under FSMA and the DMCC Act.

### ***The Provisions of Services Regulations 2009***

- 3.15 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.<sup>15</sup> 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 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.

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<sup>14</sup> See sections 140A-140C of the Consumer Credit Act 1974. For further information on the CCA, see the [FCA website: Consumer credit](#).

<sup>15</sup> The PSRs apply to all businesses operating in a service sector but there are some important exclusions, including financial services.

- 3.16 The requirements of the PSRs are enforceable under the DMCC Act alongside the unfair contract terms provisions of the Act.

***The Electronic Commerce (EC Directive) Regulations 2002***

- 3.17 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, services or digital content to consumers and businesses via the internet, email and text messaging are subject to information requirements under which they must make available, among other things, pre-contract information.
- 3.18 In addition to the above, there are other provisions which may be relevant to cases involving issues of contractual fairness including, for example:
- [The Consumer Rights \(Payment Surcharges\) Regulations 2012](#),
  - [The Financial Services \(Distance Marketing\) Regulations 2004](#), and
  - [The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010](#).

## Annex A: Elements of unfair contract terms law introduced by the Consumer Rights Act as of 1 October 2015

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

- **Negotiated terms:** extension of fairness and transparency requirements to cover all consumer contract terms, not just standard pro forma terms.
- **Consumer notices:** confirmation that fairness and transparency requirements cover consumer notices as well as contract terms.
- **Enforceability of the transparency requirement:** confirmation that enforcement action can be taken by specified enforcement authorities in relation to alleged breaches of the Act's transparency requirement.
- **Definition of 'consumer':** extension of scope to an individual acting for purposes wholly or mainly outside their trade, business, craft or profession.
- **Prominence:** modification/clarification that contract terms must meet a condition of prominence as well as of transparency in order to fall within 'the core exemption'.
- **Scope of 'the core exemption':** confirmation that terms corresponding to those in the Grey List cannot fall within the 'core exemption'.
- **New Grey List terms** added to Schedule 2.
- **Provision for the Secretary of State to amend the Grey List** by statutory instrument.<sup>16</sup>
- **Secondary contracts:** fairness and transparency requirements apply to terms in 'secondary contracts' where these affect the rights and obligations of the consumer and the trader under a main contract to which the Act applies.
- **Goods:** modification of the scope of prohibiting certain terms in contracts for a trader to supply goods to a consumer.

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<sup>16</sup> Section 63(3) of the Act.

- **Digital content:** new provisions made for certain terms in contracts for a trader to supply digital content to a consumer.
- **Services:** selective extension of the scope of prohibiting certain terms in contracts for a trader to supply a service contract to a consumer.
- **Resold tickets:** confirmation that certain terms used in consumer contracts which allow an event organiser to cancel it or blacklist the seller where the ticket is being resold or offered for resale are subject to the fairness and transparency requirements.

### **Links to legislation**

- Historic [Unfair Terms in Consumer Contracts Regulations 1999](#) (UTCCRs)
- Historic [Unfair Contract Terms Act 1977](#) (UCTA)
- [Consumer Rights Act 2015](#)