Business Consumer Co-ordination Group Consultation Response

BCCG Response to the CMA Consultation on the draft revised guidance on the unfair contract terms provisions in the Consumer Rights Act 2015 (CMA 37)

BCCG Group submission – the following organisations participate in the Group:

- TikTok Information Technologies UK Ltd
- EE Ltd
- British Retail Consortium
- British Vehicle Renting and Leasing Association
- The Society of Motor Manufacturers and Traders Limited
- Druces LLP

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Consultation response

Introduction

1. The Business Consumer Co-ordination Group welcomed the constructive Teams meeting with the CMA held on Thursday February 26th during the consultation period. In the paper that follows we have developed further some of the points we discussed at that meeting.

2. We welcome the opportunity to respond to the CMA's consultation on the draft revised guidance on unfair contract terms. Whilst we recognise the CMA's statutory role in safeguarding consumer interests, we are concerned that the Draft CMA2026 Guidance adopts an even greater asymmetric regulatory framework that places disproportionate burdens on businesses.

3. As the Business Consumer Co-ordination Group we are also unsure how this revised Guidance aids the CMA in achieving its overriding objective to foster growth within the British economy. In the response that follows we have focussed on where we believe the new CMA Guidance either overstates the legal protection available to consumers in law and/or by extension places burdens on business that are not supported by the underlying law which the Guidance purports to reflect.

4. We submit that the CMA's 2026 draft Guidance (**CMA 2026 Guidance**) as drafted is trying to achieve through guidance certain policy objectives that are not necessarily supported in law and we hope the CMA will take into account the points made in the submission.

The Vulnerable Consumer is misconceived in the CMAA 2026 Guidance.

5. In particular the CMA 2026 Guidance embeds an expansive conception of consumer vulnerability and a more onerous interpretation of trader obligations, creating uncertainty for businesses while offering a degree of protection for consumers not supported in law. We submit that the guidance requires greater balance and a more robust framework for achieving a balanced approach between the interests of consumers and businesses, consistent with the principles of legal certainty, proportionality and commercial practicability.

6. A central problem with CMA 2026 Guidance is the way in which it conceptualises the consumer as inherently vulnerable and the business as inherently powerful. Whilst this might have reflected historical market conditions, contemporary case law incorporated into the CMA 2026 Guidance demonstrates that consumers are already protected to an extremely high degree, often to the point where businesses, not consumers, now require protection from regulatory overreach, legal uncertainty and disproportionate burdens.

7. The CMA 2026 Guidance integrates extensive behavioural-economics reasoning to explain why consumers supposedly need protection — for instance, stating that consumers rarely read terms, are easily influenced by layout, and predictably misunderstand information. However, this doctrinal evolution places extraordinary compliance obligations on businesses while imposing virtually no reciprocal duties on consumers. If the guidance is to be balanced, fair, and workable, it must provide a framework for achieving a balanced approach between the interests of consumers and businesses, particularly given the scale of penalties and regulatory expectations introduced by the DMCC Act.

8. A more balance assessment would allow the CMA to appreciate more fully the “bounded rationality” of the consumer. Nobody would argue today in favour of the old-fashioned rational consumer, as conceived of in classical economics. But equally it would be incorrect to assume that all consumers are equally irrational or incapable of acting in their own best interests. Consumers are very savvy and more knowledgeable now than has ever been the case in the way that they exercise their rights. But the CMA 2026 Guidance makes no reference to this reality.

9. So, for example, it is quite normal now for consumers to return goods bought online and to buy those goods knowing that they will return them and will only choose maybe one item out of half a dozen items bought online. But nowhere in the CMA 2026 Guidance is any acknowledgement made of such sophisticated consumer behaviour as being routine and normal. It follows that there is no concept within the CMA 2026 Guidance of how businesses incur costs dealing with such savvy behaviours, or of how they have to build business processes to minimise the costs incurred by consumers routinely “misusing” their rights in this manner.

10. A more even- handed approach would enhance the ability of the CMA to discharge its overriding duty to foster growth in the British economy. The CMA 2026 Guidance should be more even handed and sophisticated in recognising the sophisticated behaviours and bounded rationality of consumers today in order to better regulate businesses tomorrow.

11. In our view the CMA 2026 Guidance has an overly legally paternalistic view of the consumer, a view that is neither supported in the underlying law and nor in the behavioural economic literature it marshals in defence of this conception

Consumers Already Benefit from Extensive Statutory and Judicial Protections

12. The Draft CMA 2026 Guidance incorporates a broad range of case law demonstrating the courts’ willingness to interpret consumer-facing terms strictly against traders and leniently in favour of consumers. For example, the guidance emphasises that consumers are not expected to read or thoroughly consider standard-form contract terms and may legitimately agree to contracts without reviewing them in detail. This approach is supported by the Court of Appeal

in Eternity Sky Investments v Zhang [2024] EWCA Civ 630, where the court held that an "average consumer" might well tick a box online without reading the terms, and that such behaviour remains within the expected consumer standard. This judicial stance has profound consequences: it means businesses can no longer safely rely on consumers having read or understood any term, regardless of the clarity of drafting.

13. Similarly, in Foxtons [2009] EWHC 1681 (Ch) it was held that the renewal commission term in a consumer landlord contract did not form part of the core bargain between the parties and was therefore subject to review for fairness under the Unfair Terms in Consumer Contract Regulations 1999. It was further held that the term itself was unfair on the basis that it was not in plain and intelligible language and had not been brought to the attention of the consumer landlord. The case illustrates that even though Foxtons were acting within market norms as they prevailed at the time, this was no defence and Foxtons was not entitled to rely upon the renewal commission term which until that point in time was in line with industry standards.

14. The reasonable consumer standard is now so forgiving to consumers that any misunderstanding is attributed to the business, creating a risk of enforcement even where the trader acted in good faith. This case-law landscape shows that consumers are already comprehensively protected under existing legal principles.

15. Guidance that further lowers the threshold for consumer responsibility while expanding business obligations risks creating an unbalanced regulatory framework, especially given the significant commercial consequences associated with findings of unfairness. We would suggest that more balanced guidance is needed to restore proportionality by re-introducing expectations that consumers should take some responsibility for the terms they agree to or that are presented to them in an accessible manner in accordance with the CRA.

16. If the CMA is going to foster the growth agenda required of it by Government, then it needs to create a legal environment for businesses to operate in where they know that the CMA 2026 Guidance reflects the underlying law, and allows businesses to operate within market norms that are already widely accepted by consumers and businesses alike on a sector by sector basis. Adopting guidance which offers consumers greater protection than they are afforded in law will only serve to create uncertainty for businesses, which may affect their willingness to co-operate constructively with the CMA.

17. The CMA has developed its 4P principles, (pace, predictability, proportionality and process) to align with the growth agenda. However the CMA 2026 Guidance introduces a regulatory framework that is, at times, incongruent with the established case-law – undermining predictability and proportionality for traders operating within it.

Behavioural-Economics Standards Are Applied One-Sidedly Against Businesses

18. The CMA 2026 Guidance introduces extensive behavioural-economics concepts, emphasising that consumers suffer from predictable biases such as present bias, information overload and poor risk forecasting. The guidance states that businesses must anticipate these limitations during contract design and presentation, and that failing to counteract these predictable consumer behaviours may constitute unfairness.

19. While we support the use of behavioural evidence where appropriate, the CMA 2026 Guidance applies these principles only to increase obligations on traders and not to impose any corresponding expectations on consumers. For example, CMA 2026 Guidance states that businesses must anticipate that consumers often do not read terms at all, yet the same behavioural vulnerabilities are not used to moderate consumer claims or mitigate trader liability.

20. This effectively makes businesses strictly liable for consumer irrationality, even though they cannot control whether consumers read documents, follow warnings, or behave prudently. This asymmetric application unfairly increases business exposure and suggests the need for a more balanced approach in the final guidance.

Suggested amendments:

4.16 Consumers "tend not to read standard written contracts…"
[DELETE] ~~This reflects inherent limitations in consumers' ability to process information.~~

[ADD] "Consumers' behaviour varies significantly across markets and contexts. While some consumers may not read all contractual terms in detail, the guidance does not proceed on an assumption that consumers are inherently vulnerable or uniformly inattentive. Contemporary consumer behaviour shows that many individuals engage actively and strategically with purchasing decisions, including through practices such as comparative shopping, routine exercising of return rights, and sophisticated use of digital platforms. These behaviours reflect a level of consumer awareness and market engagement that must be recognised in the fairness assessment."

"Behavioural-economics evidence may inform the assessment of fairness, but it does not impose on traders a duty to eliminate all possible consumer biases, nor does it relieve consumers of responsibility for reasonable attention when information is presented clearly and in good time. Businesses are not strictly liable for every instance in which a consumer elects not to read or engage with terms that have been made accessible, intelligible, and appropriately signposted."

This ensures the draft CMA 2026 Guidance does not treat all consumers as inherently vulnerable.

4.17 Traders must not exploit such biases…
[ADD] "*This requirement does not impose strict liability on traders for all consumer inattention. Where terms are transparent and reasonably accessible, traders are not responsible for consumers' elective disengagement."*

A Narrow Interpretation of the Core Exemption undermines legitimate Pricing Models

21. The CMA 2026 Guidance adopts a significantly narrower interpretation of the core exemption than CMA37, drawing heavily on authorities including Kásler (C-26/13), Matei (C-143/13) and Profi Credit Polska (C-84/19, C-222/19, C-252/19) which insist on a strictly narrow approach, limiting the exemption to essential exchange terms and excluding many familiar fees, such as administrative charges or processing fees, from the exemption altogether. It should be noted that Kasler, Matie and Profi Credit Polska are now only persuasive authorities and are not legally binding upon the courts. Recognition should be given in the Guidance that the UK courts are no longer bound by the extremely narrow approach to the core exemption taken in these CJEU cases.

22. The CMA 2026 Guidance narrows the exemption materially compared to CMA37. This restrictive approach creates uncertainty for businesses relying on long-established commercial practices such as administrative charges, cancellation fees, and other operational cost-recovery mechanisms.

23. The net result is that businesses now face regulatory challenge over every day commercial pricing models that consumers understand, expect, and routinely encounter. Without more balanced guidance, legitimate commercial practices may be unfairly categorised by the CMA following its CMA 2026 Guidance, as unlawful simply because within the CMA 2026 Guidance the concept of consumer vulnerability has expanded beyond what the underlying law would contemplate.

24. The CMA 2026 Guidance should provide clearer safe harbours and examples of acceptable pricing structures to avoid chilling effects on legitimate commercial activity which may serve in turn to undermine the push for growth.

    Suggested amendment:

    5.3 The core exemption must be "strictly interpreted" …
    [DELETE] ~~in line with CJEU case law such as Kásler and Matei.~~

    [ADD] "While pre-exit CJEU case law remains persuasive, the UK courts are no longer bound to apply the narrow interpretative approach previously adopted. The exemption should

therefore be interpreted in a manner consistent with UK contract law, commercial practice and competitive market functioning."

This implements our position that the guidance should not treat EU jurisprudence as binding.

5.10 A price-setting term cannot be assessed for fairness if… [ADD] "Transparent and prominent price components — including administrative fees, cancellation fees or industry-standard cost-recovery mechanisms — may fall within the core exemption where they form part of the overall exchange and are consistent with reasonable consumer expectations."

5.12 Examples of payment terms not within the exemption… [ADD] This does not preclude legitimate commercial fee structures from falling within the core exemption where they clearly form part of the exchange and are not disguised penalties. This responds directly to the risk of overly narrow treatment of fees.

Add examples making clear that transparent and prominent administrative fees, standard charges, and widely understood commercial pricing arrangements may fall within the core exemption.

On Transparency and Prominence

25. Expanding transparency and prominence standards beyond objective requirements creates practical difficulties for Businesses. The Draft CMA2026 Guidance incorporates case law such as Parker Grennan v Camelot [2024] EWCA Civ 185 (Camelot) and Foxtons, requiring that terms be not only clear but also "prominent" in the sense that the "average consumer" would actually notice and understand them in practice. Following Camelot, the CMA 2026 Guidance further requires businesses to account for layout, structure, consumer attention limitations and the sequencing of information.

26. Camelot and Foxtons illustrate the importance of signposting and transparency when it comes to assessing contract terms for unfairness. Camelot shows that clearly signposted, click-wrap online terms are valid and fair where consumers are given a real opportunity to read them, even if the terms are onerous, whereas Foxtons is cited in support of the proposition that hidden or surprising financial terms—especially those buried in small print and not brought to consumers' attention—are unfair and unenforceable because they create a significant imbalance and would "ambush" consumers.

27. Camelot and Foxtons sit within a wider line of unfair-terms authorities that show how UK courts balance notice, transparency, and substantive fairness. Like Camelot, cases such as

ParkingEye v Beavis [2015] UKSC 67 emphasise that even onerous terms can be enforceable when prominently disclosed. By contrast, Foxtons aligns with earlier decisions like First National Bank [2001] UKHL 52, where hidden or disproportionate obligations were struck down for creating an unfair imbalance. In essence, Camelot reflects the modern, digital-era approach—fairness through clear signposting—whereas Foxtons represents the classic unfair-terms violation grounded in concealment and surprise, consistent with the long-standing principles applied in these other key cases.

28. It follows then that CMA 2026 Guidance should be more explicit in acknowledging from a consumer behavioural perspective, it is unlikely and unreasonable to expect consumers to always read the small print. Businesses cannot compel consumers to read documents. Yes the CMA 2026 guidance says that to decide whether a term falls within the core exemption based on prominence requires considering whether any such formal prominence is likely to be practically effective and, if it is, whether the degree of prominence achieved is, in all circumstances, sufficient to bring it to the consumer's attention in such a way that an average consumer would be aware of the term. However, the CMA 2026 Guidance does not define clear, objective criteria for assessing "practical effectiveness", which rather sounds like a new test that can only serve to confuse how "prominence" under the Consumer Rights Act is already understood. Following the CMA 2026 Guidance a business may comply with textual clarity requirements yet still be judged non-compliant if a consumer can later argue they did not notice or appreciate the term.

29. We therefore recommend incorporating objective, predictable criteria for prominence, together with examples that distinguish between reasonable and unreasonable expectations on businesses. A more balanced approach is needed in the guidance to set objective, achievable standards rather than impossibly high behavioural-based ones.

Suggested amendment:

Modify 4.30–4.34 to clarify that: *"Traders are not required to counteract all behavioural biases; transparency is satisfied where terms are clear, intelligible, accessible and timely."*

5.21 Prominence must be "practically effective"…
[DELETE] Prominence depends on whether consumers actually notice the term.

[ADD] "Prominence is assessed objectively based on the manner in which the term is presented, not on whether particular consumers actually perceived or recalled it. Traders cannot be required to guarantee consumer engagement with every term."

5.22 Factors when assessing prominence…
[ADD] "Factors should include: (i) placement and proximity to the consumer's decision point,

(ii) formatting (size, contrast, labelling), and (iii) timing, particularly in digital environments. Behavioural-economics considerations should not override objective presentation standards."

This implements our proposal for objective, predictable criteria.

30. We would also suggest that it would be useful to add examples making clear that transparent and prominent administrative fees, standard charges, and widely understood commercial pricing arrangements may fall within the core exemption.

Are Notices equivalent to Contract Terms?

31. The CMA 2026 Guidance treats Notices as fully equivalent to contract terms which in turn imposes a disproportionate liability on businesses. The CMA 2026 Guidance treats consumer notices — including operational signage, website pop-ups, staff statements and interface text — as equivalent to contract terms for the purposes of the fairness and transparency assessments. This position is supported by references to <u>Foxtons</u>, which found that notices could operate as "hidden pitfalls" even when not part of the contractual document.

32. However, businesses rely on notices for operational clarity across diverse contexts, many of which cannot feasibly undergo the same level of legal drafting scrutiny as contractual terms. This approach exposes businesses to the risk of inadvertent non-compliance. We propose the guidance include guardrails and safe harbours, distinguishing between operational notices and contractual communications, thereby reducing disproportionate business liability.

<u>Suggested amendment:</u>

"2.19 A consumer notice is a notice that "relates to rights or obligations…
[ADD] "However, notices that do not purport to create, modify or restrict contractual rights or obligations — such as operational instructions, user-interface prompts, logistical signage or functional communications — should not be treated as contractual terms for the purposes of the fairness assessment."

This implements the distinction between contractual/legal notices and purely operational notices highlighted in our response.

2.21 Consumer notices also need to be fair and transparent.
[ADD] "Operational notices which do not alter legal rights are not subject to the same standards and should not attract enforcement risk unless they mislead consumers or purport to alter statutory entitlements."

The Severity of DMCC Penalties Necessitates Clearer, More Trader-Protective Guidance

33. Unlike CMA37, the CMA 2026 Guidance includes reference to the new powers the CMA has under the DMCCA 2024, which provides the CMA with powerful administrative enforcement tools, including penalties of up to 10% of global turnover for unfair terms or notices. When penalties of this magnitude apply to potentially ambiguous assessments of fairness, prominence and transparency, the guidance must provide businesses with clear, reliable and objective standards to avoid disproportionate regulatory action.

34. Consumers face virtually no countervailing risks; the entire compliance burden rests on businesses, making the need for robust trader-protective guidance unavoidable. We therefore urge the CMA to adopt a more balanced, proportionate approach that acknowledges the legitimate interests of businesses, the operational realities of commercial contracting, and the need for regulatory certainty.

    Suggested amendment:

    Add to Chapter 7 (Effect and Enforcement):

    "The introduction of significant administrative enforcement powers under the DMCC Act 2024—including the ability to impose penalties of up to 10% of global turnover—heightens the need for clarity and predictability in unfair-terms guidance. Traders must be able to understand, with reasonable certainty, the standards required for compliance."

    "The CMA will therefore frame its expectations in objective and accessible terms and will avoid interpretations of the Consumer Rights Act 2015 that extend beyond established statutory obligations or case law. Best-practice recommendations will be clearly distinguished from legal requirements to ensure that businesses are not discouraged from pro-competitive innovation or from cooperating with the CMA."

    This reflects our submission that the guidance must be precise given high penalty stakes.

BCCG – 19 March 2026