CMA Consultation – CMA37 (Unfair Contract Terms Guidance)

Introduction

We welcome the opportunity to comment on the Competition and Markets Authority's (**CMA**) consultation on the draft revised guidance CMA37 concerning unfair contract terms under Part 2 of the Consumer Rights Act 2015 (**Draft Guidance**).

Our organisation operates across consumer finance, business finance and fleet leasing markets and therefore regularly relies on standard form consumer contracts. Clear and practical guidance on the interpretation of unfair contract terms legislation is essential to ensure that we can structure our contractual documentation in a compliant manner and thus reduce the risk of causing detriment to our customers.

In particular, we welcome the interaction between the Consumer Rights Act 2015, the Digital Markets, Competition and Consumers Act 2024 (**DMCCA**), and sector-specific regulation (including oversight by the Financial Conduct Authority).

While the draft guidance contains useful clarifications and incorporates relevant case law developments, we are concerned that in several areas the document adopts an interpretation of the law that risks expanding trader obligations beyond what is required by the Consumer Rights Act 2015 and existing case law. In particular, the guidance often emphasises behavioural economics concepts and broad notions of consumer vulnerability in a way that may create uncertainty for businesses and impose expectations that are in practice, difficult to operationalise.

Given the CMA's expanded enforcement powers under the DMCCA), including the ability to impose significant financial penalties, it is especially important that the final guidance provides clear, objective and commercially workable standards.

Consultation Questions

We set out our responses to the following questions in this document:

Q1. Do you have any comments on the new structure and presentation of the Draft Guidance? If any, please be specific about the areas of the Draft Guidance that you think could be restructured and the changes you feel would improve them.

Q2. Does the tone strike the right balance between comprehensive explanation of the legal provisions and readability for non-specialist users of the Draft Guidance? If not, please specify what changes you would like to see.

Q3. Do you have any comments on the usefulness, relevance and clarity of the illustrative examples in the Draft Guidance of contract terms that are unlikely to be fair and more likely to be fair?

Q4. Are there any areas where you think other examples could be added to the Draft Guidance, particularly for terms which may have arisen since 2015 and were therefore not reflected in the Current CMA37?

Q5. Is there anything in the Current CMA37 you wish to retain in the Draft Guidance that has not been included? If yes, please explain your reasoning.

Q6. Do you have any comments on the usefulness and clarity of the technical note accompanying the Draft Guidance?

Q7. Would you prefer the technical note to be incorporated in the Draft Guidance or to remain separate?

Q8. Do you have any other comments on topics not covered by the specific questions above? If so, please structure your responses to separate out your views in relation to each of the Draft Guidance's chapters

Responses:

Q1. Structure and Presentation of draft guidance

Overall we find the draft guidance less user friendly and harder to navigate, this guidance should be easy to find information quickly. By way of example:

- in some cases the footnote at the bottom of the page was nearly as long as the information contained in the draft guidance. For example, page 30 and page 32 contain detailed footnotes; and
- if businesses wanted to check what is contained on the "Black List", the table of contents in the current guidance was very clear that information around the "Black List" can be found in section 4 from page 50 onwards. This is not the case in the draft guidance. If businesses wanted to find out more information about the "Black List" quickly, we are unsure how and where they would find this in the draft guidance.

We'd recommend separation of legal explanation to practical guidance. Some chapters combine the two.

As an example, Chapter 4 discusses both the legal fairness assessment and practical considerations around drafting and transparency.

We suggest introducing two sub-sections within relevant chapters:

- Legal framework
- Practical considerations for traders

The guidance would benefit from a clearer decision making framework setting out the analytical steps for assessing whether a term is lawful. At present, these steps are spread across several chapters. A consolidated framework would assist businesses in understanding the order in which issues should be considered namely:

- whether the provision is a consumer contract term or notice;
- whether the term is prohibited outright;
- whether the core exemption applies; and
- whether the term meets the fairness and transparency tests.

Providing such a framework at the outset would improve usability, particularly for businesses seeking to assess contractual provisions in practice.

Further, the guidance could more clearly distinguish between explanations of the law and statements of regulatory expectation. In several places the text moves from describing the legal test to describing how traders "should" behave, without clarifying whether this reflects legal requirements or CMA policy views. Given the potential enforcement consequences under the DMCCA , it is important that businesses can clearly identify what constitutes binding legal obligations and what represents good practice.

Q2. Tone, legal explanation and readability

The draft guidance is generally accessible and written in relatively clear language. However, the document sometimes moves beyond explaining the legal test and appears to embed a broader regulatory philosophy regarding consumer protection.

In particular, the guidance frequently emphasises behavioural economics research suggesting that consumers do not read contractual terms, are influenced by presentation effects, and may struggle to evaluate future risks. While such insights may be relevant when considering transparency and fairness, the guidance appears to treat these behavioural assumptions as a central organising principle for interpreting the legislation.

The difficulty with this approach is that it risks shifting the focus away from the statutory test under the Consumer Rights Act 2015, namely whether a term causes a significant imbalance contrary to the requirement of good faith and towards a more general expectation that businesses must actively compensate for consumer behavioural biases.

A more balanced tone would recognise that:

- consumers already benefit from substantial statutory protection;
- courts interpret consumer-facing terms strictly against traders; and
- the fairness assessment remains rooted in legal principles rather than behavioural assumptions.

Maintaining this distinction would ensure that the guidance remains closely aligned with the statutory framework.

References to case law and key concepts from the same are buried in footnotes at the bottom of the page. If you compare this approach to the approach taken by the Office of Fair Trading (OFT) in their 2011 guidance, you will see the OFT just cited the name of the case and drew out the key findings from the case in the guidance with very little use of detailed footnotes. Taking the approach of putting key information in footnotes means it could be missed or not given the weight it should especially by a non-specialist user.

Q3 Usefulness, relevance and clarity on illustrative examples

The examples included in the guidance are generally helpful and provide useful illustrations of how certain types of terms may be assessed for fairness. In particular, the comparison between terms that are "unlikely to be fair" and those that are "more likely to be fair" provides practical insight for businesses reviewing contractual drafting.

However, in some areas the examples could benefit from additional contextual explanation. For example, it would be helpful if the guidance clarified whether the concern arises primarily from:

- lack of transparency;

- disproportionate allocation of risk (significant imbalance);
- excessive financial consequences for consumers;
- restriction of statutory rights.

Providing a short explanation alongside each example would assist businesses in understanding the legal reasoning underlying the CMA's assessment.

It would also be useful if the guidance emphasised more clearly that the examples are illustrative rather than definitive. Whether a term is fair will always depend on the specific factual context, including the nature of the product or service, the circumstances of the transaction and the wider contractual framework. Further, it should be noted that it will ultimately be for the discretion of the court to determine what is fair or not but based on what the CMA have seen or taken action on, they can provide examples of what are more likely than not i.e. on the balance of probabilities be considered more fair.

In the past the FSA were able to challenge firms under Unfair Terms in Consumer Contracts Regulations 1999 and seek undertakings from firms to change their terms. Undertakings were published on the FSA website setting out the example of the offending clause and how a firm had amended it. These served as a precedent for other firms who might have similar clauses and could be used as a benchmark to assess terms against and gave a clear steer as to what could be done to make a clause more fair in the eyes of the regulator.

Without a decision of court or a return to an undertakings style of regulation in respect of unfair contract terms , it is hard to take any comfort that the examples listed in the guidance as "more likely to be fair" will actually be treated that way if challenged.

Further, it would be useful if specific examples as to financial services were included, which could help align contractual drafting. Many businesses rely on standard terms for variations to interest rates and early termination charges in financial services.

Q5. Retaining CMA37 content

The table at figure 4 on page 58 onwards in the current guidance helpful to refer to summarise the backlisted terms, the remedy etc. This appears to missing from the draft guidance.

Likewise the table at figure 5 setting out the index of Gery List Terms is a section often referred to when navigating the guidance as it cross-referred to the relevant paragraph in the guidance so it was easy to use and assisting with finding the relevant section of the guidance quickly.

Also the index of common types of terms in alphabetical order was useful on page 127 of the current guidance. An equivalent cannot be seen in the draft guidance.

Annex A and B are missing from the draft guidance. Annex A is useful and should be retained in the draft guidance.

The analysis section on the Grey List on page 67 of the current guidance was useful to have detailed commentary. Without this detailed analysis to refer to, the section on the examples of unlikely to be fair/more likely to be fair is meaningless because there is no analysis anymore to support what is more likely to be fair/more likely to be unfair.

Q6. Usefulness and clarity of the technical note

The technical note is useful and should be retained. However, the technical note should come with a clear statement that it is not intended to be a substitute for obtaining independent legal advice on unfair contract terms and that it is based on the CMA's interpretation and understanding of the legislation at the time of publication. Perhaps this provision could be included at new paragraph 1.4 of the Introduction section of the technical note.

From an interpretation perspective, it would help users if the documents were to state the order of priority and which document prevails in the event of an inconsistency between the draft guidance and the technical note.

Part 2 of the technical note re legislative background does not appear relevant to the technical note. Paragraphs 2.1 to 2.4 of the technical note could be moved into an annex at the end of the document so that users could read this if they wish to understand the background to how the Consumer Rights Act 2015 came into being and how it has evolved from the now repealed UTCCR 1999.

Where secondary legislation is cited, the technical note should by way of a footnote for ease of reference, include the full legal citation. I say this because the technical note is aimed at "legal advisers" (see paragraph 1.3) and legal advisers would be interested in reading the primary, source legislation so to the extent secondary legislation is cited, the full legal citation should also be included. For example The Consumer Protection from Unfair Trading Regulations 2008 should include the following legal citation:

"SI 2008/1277".

Whilst hyperlinks have been included in the technical guidance to the secondary legislation found on legislation.gov.uk, such links these can easily "break" or become outdated. Having the full legal citation included when referencing secondary legislation would mean users can find the source legislation without having to rely on hyperlinks.

Given the number of definitions that are used in the technical guidance to help users navigate the meaning of these definitions it would be easier to set these definitions out in a Glossary of Definitions at the end of the technical note rather than define them in the body of the technical note, with hyperlinks in the technical note so that a user can either hover over the definition to check what it means or click on the hyperlink which would take the user to the Glossary of Definitions.

The current guidance has an abbreviations section on page 4 so that could be replicated in the technical note.

"Traders" are referred to throughout the technical note. To avoid confusion on what is meant by a "trader" the technical guidance should give some non-exhaustive examples what is meant by a "trader" or cross-refer to where it is discussed in the draft guidance so users understand who falls into the scope of this term. Whilst there is a footnote on page 3 of the draft guidance that states such words are used interchangeably with "businesses" and "suppliers", my view is that this does not go far enough.

Likewise "consumers" is referred to throughout so from an interpretation perspective, the technical note should include non-exhaustive examples of who the legislation considers who a "consumer" is.

The "Grey List" is referred to in Annex A. It is unclear why the "Black List" is not referred to here. If anything the "Black List" is more important to refer to than the "Grey List" as these terms that are more likely to be considered unfair and are automatically unenforceable. Terms in the "Black List" are not subject to the fairness test in the same way the terms in the "Grey List" are. They are automatically enforceable and should be avoided so it is surprising the CMA has not also expressly referred to the Black List in Annex A.

Q7. Incorporation of technical note into the guidance

Overall, we would prefer that the technical note is kept separate from the main guidance. But, in paragraph 1.3 of the technical note, reference is made to it being read alongside the draft guidance. There should be an equivalent note in the draft guidance that should say the guidance should be read in conjunction with the technical guidance. There is no such reference in the draft guidance and this reference should be included in paragraph 1.4 of the draft guidance.

On the basis that the two documents refer to each and state they should be read in conjunction with the other, then our view is that the technical note can remain separate from the draft guidance. The draft guidance is already quite long, by incorporating the technical note into the draft guidance this would increase the length of the guidance by a further 14 pages.

Q8. Other comments

There is no section on how the draft guidance or technical note applies to traders situated outside of the UK that provide goods and services to consumers situated in the UK. On-line traders such as Shein and Temu are popular with UK consumers and sell to consumers situated in the UK.