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Consultation Response

Which? response to the CMA's draft revised guidance on the unfair contract terms provisions in the Consumer Rights Act 2015 (CMA37con)

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Summary

Which? welcomes this opportunity to respond to the publication of the draft revised guidance on the unfair contract terms provisions in the Consumer Rights Act 2015. The Guidance is a critical component that should help ensure that the Act delivers a high level of business compliance and therefore improved consumer protection.

We are supportive of this guidance as we believe it is clear and well structured, however, given the increased prevalence of such practices in recent years, we have suggested that some areas of the guidance are expanded. This will help ensure businesses are clearly informed of the steps necessary to avoid actions that mislead and distort consumer choice. These suggestions include:

- Examples of statutory rights vs. companies' policies: the guidance must provide clear examples illustrating how businesses should not unlawfully use "policies" (such as voluntary return windows) to block consumers' statutory rights under the Consumer Rights Act 2015. It should include specific examples demonstrating that terms citing company policy to deny legal remedies for faulty goods are unfair and deceptive.
- Examples of unfair digital contract updates: to address the imbalance in the digital space, the guidance should feature examples of unfair "dynamic" contracts that allow unilateral, post-purchase updates to terms and conditions. These examples must clearly illustrate that such modifications are in breach of the act unless the consumer explicitly agrees to the specific changes, rather than being bound by hidden, after-the-fact updates.
- Examples of opaque pricing and auto-renewals: the guidance should include specific examples of unfair transparency practices, such as telecom providers hiding the scale of price hikes or "free trial" add-ons triggering automatic charges without express consent. The examples should clarify that these practices are deemed

unfair unless they demonstrate full transparency and utilize an active "opt-in" mechanism.
- Examples of unfair insurance terms: the guidance should include explicit examples of unfair insurance requirements, such as clauses mandating original receipts, that allow providers to arbitrarily reject valid claims at their discretion.
- Examples for non-UK entities: to ensure consistent consumer protection across the global e-commerce landscape, the guidance should provide illustrative examples of how UK consumer law and fairness tests apply to non-UK entities targeting domestic consumers.

To maximize the utility of these illustrative examples, we recommend that the CMA establish a live, searchable database to host them. Rather than relying on static, PDF-based guidance that may only be updated sporadically, a dynamic repository would allow for the real-time addition of new examples drawn from recent case law, regulatory decisions, and emerging market practices.

We strongly recommend that the final Guidance for businesses be published simultaneously with a concise, practical guide for consumers. This additional document would not be a substitute for improving compliance, but should provide a practical roadmap to assist consumers in identifying their rights and offer a clear, accessible process for contacting relevant enforcement authorities. Crucially, it should empower consumers to raise concerns about potentially unfair terms and provide a simple mechanism for them to verify whether a specific contractual provision meets the legal standard for fairness.Therefore, ensuring the CMA's initiative to review the guidance as an opportunity to create a proactive tool to enhance consumer rights.

Full response

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.

We welcome the clarity and structure of the Draft Guidance, which serves as a practical tool to help businesses to comply with the law. This guidance is a crucial step in ensuring that businesses understand their statutory obligations, and consumers are protected from unfair contract terms and notices.

The thematic breakdown is an improvement over previous iterations of the Guidance, allowing for easier navigation. However, to further improve the document's utility, we recommend including further structures and visual aids, particularly for SMEs and non-specialist users who require quick access to specific provisions, for example:

- An integrated "quick-start" index that maps specific business sectors, such as digital services, gyms, or travel, to the most relevant chapters.

- Further use of visual aids, such as pictograms and flow diagrams, to help illustrate some of the processes discussed.
- Internal hyperlinks as cross-references within the digital version of the document. Specifically, the list of potentially unfair terms highlighted in blue at paragraph 1.8 (page 7) should link directly to their corresponding detailed analyses in Chapter 6.
- A RAG (Red-Amber-Green) color-coding system to distinguish between examples that are "Unlikely to be fair" versus those that are "More likely to be fair."

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.

The Draft Guidance strikes a good balance between legal precision and accessibility. The shift away from overly dense legalese is a positive step toward ensuring non-specialist users can understand and implement these standards, and reduce the need for third party advice, which could act as a barrier to their implementation.

That said, we recommend that the CMA includes a plain English summary at the start of each chapter. This would reinforce the key consumer protection objectives before diving into the more nuanced legal explanations, ensuring the spirit of the law is not lost in technical application.

There are also some specific clarifications which we would recommend to include in the document as follows:

- Chapter 1 (overview) : we note the reference at para 1.4 that '*In specific sectors with their own regulatory authorities, traders should consider the views of those authorities as to how unfair contract terms law applies to issues within their remit.'* We think it would be helpful for the guidance to expand on this, for example to explain the relationship between the obligations that are the subject of this guidance, and the contractual rules in specific sectors e.g. telecoms (Ofcom rules) and insurance (the FCA Handbook). We would also suggest reviewing the MoUs between the CMA and sector regulators to ensure that they adequately deal with cooperation on, and enforcement of, unfair contract terms law.
- Chapter 1 (overview): we note the reference at para 1.12 that '*Using, recommending or enforcing a contract term that is unfair under the Act is also inherently likely to be considered an unfair commercial practice under the DMCC Act.'* We would suggest that the word 'using' should be clarified, as it is potentially ambiguous and might be understood to mean 'relying on' or alternatively 'including' (in contract terms).
- Chapter 3: In the interest of ensuring the Draft Guidance reflects the most current regulatory landscape, we would welcome an update to the references in Note 102. Specifically, it would be beneficial to incorporate the latest regulation to replace regulation 14B of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, SI 2015/542.
- Chapter 6: Regarding paragraph 6.85, we recommend updating the terminology to align with current legislative standards. The Guidance currently refers to 'certified' ADR bodies; however, the applicable law now utilizes the term 'accredited'. To

ensure legal accuracy and avoid confusion for both businesses and consumers, we suggest the wording be updated to reflect this shift in statutory language.

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?

We are pleased to see the inclusion of illustrative examples of unfair contract terms in the Draft Guidance as these can be highly effective in demonstrating how the provisions apply in real-world scenarios, thereby improving their adoption.

We would like to see more examples, or clarifications, provided by the CMA in the guidance regarding the following areas:

- Chapter 6 (examples of potentially unfair terms and notices): we think it should be made clearer whether the practices discussed are or are not included in the 'Grey List'. The introduction to Chapter 6 gives the impression that the practices that follow are all from the Grey List, when our understanding is that this is not the case, and this could therefore result in confusion. For example, in the section on 'termination and breach by consumers', it would be helpful if the fact that rights of entry and sale of the consumer's goods are not on the Grey List was mentioned - otherwise readers may wrongly assume that they are.
- In Chapter 6: We observe that businesses can present an unfair term as a non-negotiable policy, thereby discouraging consumers from exercising their statutory protections and rights. We believe additional illustrative examples in Chapter 6 could be included in the 'Exclusion and limitation of rights and duties' in relation to the practice when traders present an unfair term as a non-negotiable "policy" to discourage consumers from exercising rights. The guidance should explicitly list as unfair any term that allows a trader to cite internal policy as a justification for denying a statutory remedy for faulty goods.
- Chapter 6: We frequently see businesses telling consumers they cannot return faulty items because it violates company policy contrary to the consumers statutory rights.. We recommend that the section on 'Time limits on claims' in Chapter 6 explicitly clarifies the difference between a trader's voluntary "change of mind" policy and a consumer's statutory rights regarding timeframes for returning goods. Consumers are frequently told they have "no rights" to a refund once a company's 14 or 30-day voluntary return window has closed, even when consumers are within their statutory rights, for example if the product is faulty or non-compliant with the Consumer Rights Act 2015. In addition, we believe that presenting an internal policy as an absolute barrier to a legal remedy contrary to their statutory rights should be categorised as a deceptive practice that distorts consumer behavior.
- Chapter 6: we note that the section relating to 'exclusion of liability for delay' does not make reference to the fact that such exclusions may be prohibited in any event - on the basis that they seek to restrict consumers' ability to rely on statutory rights (see, for example, s.31 CRA 2015). We think it would be helpful to note this under that heading, in line with the wording for several of the other types of exclusions.

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?

We suggest adding examples addressing:

- Unilateral variation of contract terms: We are concerned by businesses forming contracts relying upon 'live' website T&Cs that businesses can update unilaterally after a purchase. Updating these terms without the consumers' knowledge can create a significant imbalance. Thereby giving the trader a de-facto ability to revise obligations after the fact, which may lead to consumers being bound by a contract to obligations they would not have accepted at the outset. This practice can not only distort the original agreement but are increasingly difficult for the consumer to identify or challenge after the fact. The CMA should confirm with an example that post-agreement updates, unless clearly agreed upon as specific modifications, are likely unfair and unenforceable.

- Variation clauses in the telecom sector: some communication providers use contract terms that enable them to increase prices at any time and for any reason. Exercising such a price-variation clause usually triggers a right for customers to exit their contract penalty-free within a one-month period. However, when a customer signs up for a contract they may not be informed about when a price increase will take effect or the level of the increase. Instead, a notification is sent to the customer with a minimum of one month's notice before any changes take effect. Although it is common practice for telecoms price increases to take effect in April, this may not be specified in the contract or communicated to the customer when they sign up. Even if such terms permit a customer to leave their contract penalty-free within a defined exit window, the CMA should clarify whether these terms are fair to consumers, particularly regarding the provision of information about the expected level and timing of any in-contract price increases, and the time window provided for consumers to exit the contract penalty-free.

- Automatic renewal: Some communication providers include 'free-trials' for subscription services that are provided as an 'add-on' to the core subscription. An example is when a customer purchases a broadband package that includes a free-trial for an anti-virus software programme. Usually, once the free trial period ends, the subscription automatically renews as a paid subscription. Including a free trial is fair, provided customers give express consent and can easily cancel within the trial period. However, it is problematic when a 'free trial' is triggered automatically or requires the customer to proactively opt out during the purchasing journey. If the 'free trial' expires and automatically renews as a paid subscription, customers may have to continue paying recurring subscription charges for the add-on service or face additional charges to exit the contract. We welcome examples from the CMA of when terms are more likely to be fair or unfair regarding free trials for 'add-on' services distinct from the main service being supplied.

- Cross-border elements: Given the exponential rise in global e-commerce, UK consumers routinely engage with businesses based outside the jurisdiction. However, consumers are often unaware that purchasing from a non-UK entity does not necessarily strip them of their domestic legal protections. It is essential that the updated guidance explicitly clarifies how UK consumer law applies to terms set by foreign entities targeting UK consumers

- Insurance policies creating a significant imbalance in the parties' rights and obligations: In some insurance policies, the need for original receipts, proof of ownership and proof of usage for items covered on travel insurance imposes a significant burden on consumers and third-parties. It could also create an easy discretionary basis for a provider to reject a claim. Similarly, in home insurance policies the definition of a 'storm' used by some providers enables them to refuse many claims in a manner which arguably creates a significant imbalance. For example, where rigid wind speed, rainfall or hail measurements are specified, without a corresponding obligation on the insurer to apply reasonable margins to these where appropriate (e.g. based on a property's exposed location). We would recommend the CMA to include examples where such requirements create a 'significant imbalance… to the detriment of the consumer' and provide examples of how providers can take a reasonable approach to such evidence.

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.

n/a

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

See below our response

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

The technical note is clear and provides necessary legal grounding. We would prefer the technical note to remain separate from the main Draft Guidance given it serves as a specialized resource for legal practitioners and policy experts.

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.

Enforcement: we are concerned that the statement at paragraph 7.10, that '*The CMA will be selective in taking enforcement cases, focusing particularly on those which have a market-wide impact or precedent-setting value*' could send a message to traders that enforcement will be limited in practice, and not encourage compliance.

In para 5.9, in relation to the core exemption, the draft guidance lists examples of what constitutes main subject matter - including ‘*the insurer’s promise under an insurance contract to provide the agreed service if the insured event occurs*’. Our understanding, taking into account the judgment of the CJEU in Van Hove v CNP Assurance SA (case C-96/14, April 2015) is that the assessment of whether a term falls within the core exemption is very fact sensitive, and should be assessed on a case-by-case basis having regard to "*the nature, general scheme and the stipulations of the contract and its legal and factual context..."*. (In addition, as stated elsewhere in the guidance, the questions of transparency and prominence are also particularly relevant.) We would propose that the guidance should acknowledge the fact-sensitive nature of this assessment, potentially in the accompanying footnote where the *Van Hove* case is mentioned.

In addition to improving compliance and to ensure these regulatory improvements translate into tangible public benefits, we strongly recommend that the final Guidance for businesses be published simultaneously with a concise, practical guide for consumers. This document should provide a practical roadmap to assist consumers in identifying their rights and offer a clear, accessible process for contacting relevant enforcement authorities. Crucially, it should empower consumers to raise concerns about potentially unfair terms and provide a simple mechanism for them to verify whether a specific contractual provision meets the legal standard for fairness. This concise Consumer Rights summary would serve as a high-impact tool to inform consumers that:

- A trader’s internal policy is not the final word on the law.
- Even if terms appear to support the trader’s argument, they may be legally unfair and unenforceable.
- The consumer has a clear right of challenge that overrides "no refunds" signs or digital disclaimers.

Ultimately, this approach ensures that the CMA's initiative to review the guidance serves not merely as a procedural update, but as a proactive tool to meaningfully enhance consumer rights.

Furthermore, to maximise the utility of the illustrative examples outlined in the Guidance, we recommend that the CMA establish a live, searchable database to host them. Rather than relying on static, PDF-based guidance that may only be updated sporadically, a dynamic repository would allow for the real-time addition of new examples drawn from recent case law, regulatory decisions, and emerging market practices.

About Which?

Which? is the UK’s consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We’re the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we’re not for profit and all for making consumers more powerful.

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