The Competition and Markets Authority's consultation on its draft revised guidance on the unfair contract terms provisions in the Consumer Rights Act 2015 (CMA37con)

Response of the banking and finance team at Shepherd and Wedderburn LLP, dated 13 March 2026

Consultation closes: 19 March 2026

Introduction

Our response to this consultation represents the views of the banking and finance team at Shepherd and Wedderburn LLP ("S+W"). It does not represent the views of any other group or organisation. It does not contain any information that we regard as sensitive and would not wish to be published.

The banking and finance team at S+W welcomes the opportunity to input into this consultation.

S+W is an independent law firm, headquartered in Scotland, delivering high-quality legal advice and services to its clients. With over 500 personnel, including 91 partners, it supports innovation and economic growth across key sectors, from financial services and technology to clean energy and infrastructure. Its lawyers advise clients operating in over 120 jurisdictions worldwide, including many industry leaders and high-growth businesses.

Established in 1768, S+W has a long-standing reputation for delivering legal advice and client service of the highest quality. From offices in Edinburgh, Glasgow, Aberdeen, London and Dublin, it supports a wide range of organisations and individuals.

The banking and finance team at S+W is the largest in Scotland, and one of its most highly rated. Advising clients across the UK, we are known as industry leaders in the delivery of the sector's highest value and most complex financial transactions.

Within the debt capital markets industry, we are responsible for the creation of the first Scottish securitisation structures which are now adopted across the Scottish market. Our team is comprised of unparalleled technical experts in structured and specialist sector financing arrangements, and within Scotland we have the largest market share and the highest level of expertise in securitisation and other asset-backed finance transactions; the most technically complex areas of banking and finance.

Our response to this consultation is limited to the specific issue of exclusive jurisdiction and choice of law terms within the context of receivables financing. In this regard, our key message is that intra-UK choice of law terms in receivables contracts are 'more likely to be fair' and that the draft revised guidance should be amended to clarify this position and to explain the distinction between exclusive jurisdiction and choice of law terms. Our responses to Q4 and Q8 below provide further detail on this.

Background to receivables financing

Our response focuses on choice of law terms in the context of receivables financing in the UK. In this regard, a reference to **receivables** is a reference to the right of a trader to receive amounts owed by a consumer under a debt. This typically includes cashflows from retail customers, such as the payments due under credit cards, consumer loans and auto loans and leases (including PCP and hire-purchase arrangements). The **receivables contract** is the contract, or loan agreement, under which the receivables are payable by the consumer to the trader. A **trader** in this context is typically a provider of consumer credit or consumer hire and may be a financial institution.

9 Haymarket Square **Edinburgh** **EH3 8FY** **DX 551970 Edinburgh 53** **T +44 (0)131 228 9900** **F +44 (0)131 228 1222**	1 West Regent Street Glasgow G2 1RW DX GW409 Glasgow T +44 (0)141 566 9900 F +44 (0)141 565 1222	1-6 Lombard Street London EC3V 9AA DX 98945 Cheapside 2 T +44 (0)20 7429 4900 F +44 (0)20 7329 5939	37 Albyn Place Aberdeen AB10 1YN DX AB103 Aberdeen 1 T +44 (0)1224 621 166 F +44 (0)1224 623 103

shepwedd.com

Receivables financing refers to the form of asset-based finance whereby a trader uses their receivables to raise finance from a wholesale funder or other institutional investors, including by issuance on public markets. A securitisation is an example of one such arrangement. Such arrangements are complex, high value transactions involving numerous parties, extensive documentation and, in many cases, multiple jurisdictions. Within the UK, Scottish assets typically form part of large, nationwide portfolios and are therefore commonly pooled alongside English assets in UK-wide transactions.

Our response

	Consultation Question
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.
	Our response: *We do not have any comments on this question.*
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.
	Our response: *We do not have any comments on this question.*
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?
	Our response: *We do not have any comments on this question.*
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?
	Our response: *In our view, it would be useful if the structure of paragraphs 6.88 and 6.89 of the draft revised guidance more closely followed the proposed approach set out in paragraph 6.4 i.e. " with non-exhaustive and illustrative explanation of how a particular type of term could be unfair and could be used fairly, and examples of terms that are unlikely and more likely to be fair".* *For example, with regard to paragraph 6.88 of the draft revised guidance, it would, in our view, be useful to include (a) an illustrative explanation as to how exclusive jurisdiction terms could be unfair and could be used fairly, and (b) illustrative examples of exclusive jurisdiction terms that are unlikely and more likely to be fair. We note that no such explanation or examples are currently given in the draft revised guidance.* *Likewise, with regard to paragraph 6.89 of the draft revised guidance, it would, in our view, be useful to include (a) an illustrative explanation as to how choice of law terms could be unfair and could be used fairly, and (b) examples of choice of law terms that are unlikely and more likely to be fair. We note that no such explanation or examples are currently given in the draft revised guidance.*
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.
	Our response: *We do not have any comments on this question.*

Q6.	Do you have any comments on the usefulness and clarity of the technical note accompanying the Draft Guidance?
	Our response: *We do not have any comments on this question.*
Q7.	Would you prefer the technical note to be incorporated in the Draft Guidance or to remain separate?
	Our response: *We do not have any comments on this question.*
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
	Our response: ***Chapter 6: Exclusive jurisdiction and 'choice of law' terms*** *In our view, the guidance on exclusive jurisdiction and choice of law terms at paragraphs 6.88 and 6.89 of the draft revised guidance requires further clarification.* *<u>Exclusive jurisdiction vs choice of law</u>* *As currently drafted, it is not clear that paragraph 6.88 relates to exclusive jurisdiction only. In our view, it would be sensible to clarify that the guidance stating that "Consumers should not be prevented from starting legal proceedings in their local courts" is intended to deal with the issue of exclusive jurisdiction only and not to imply that a legal agreement with a consumer, such as a receivables contract, must also be governed by law of the place where the consumer resides. Choice of forum and choice of law are distinct legal concepts and need not always align. It is therefore possible for a contract to provide for English law to govern the contract, but for the Scottish courts to have jurisdiction to hear disputes, for example. As regards fairness, choice of forum and choice of law should therefore be considered separately.* *To provide greater clarity, we would suggest that the question at paragraph 6.88 be amended to read "How could exclusive jurisdiction terms be unfair?" and that a new question - "How could 'choice of law' terms be unfair?" – be inserted at paragraph 6.89.* *In line with our response to Q4 above, it would also be useful to insert two new questions: "How could exclusive jurisdiction terms be used fairly?" and "How could 'choice of law' terms be used fairly?".* *In terms of any illustrative explanations or examples that are to be inserted – please see our response to Q4 above – it would be useful if these could likewise be categorised (i.e. any such explanations or examples should be considered separately under the relevant question, rather than being dealt with collectively). While it is common for exclusive jurisdiction and choice of law terms to be dealt with in the same clause or same part of a legal agreement, it would be useful if the draft revised guidance were to separate these out, or made clear which concept was being considered, under each question.* *Different issues of fairness arise when considering exclusive jurisdiction and choice of law terms.* *<u>Intra-UK vs UK/Non-UK choice of law provisions</u>* *As currently drafted, the draft revised guidance does not adequately differentiate between intra-UK choice of law terms and UK/Non-UK choice of law terms. Indeed, the current draft appears only to consider UK/Non-UK choice of law terms. It would be useful if the position in relation to intra-UK choice of law terms were to be explicitly considered.* *In this regard, an **intra-UK choice of law term** seeks to regulate a situation where a consumer who is located in one part of the UK enters into a legal agreement that is expressed to be governed by the law of another part of the UK. This could be, for instance,*

a term which provides for a contract to be governed by English law, notwithstanding that the consumer is located in Scotland or Northern Ireland. Intra-UK choice of law terms are commonly found in receivables contracts and many other types of contracts.

*A **UK/Non-UK choice of law term**, on the other hand, seeks to regulate a situation where a consumer who is located in the UK enters into a legal agreement that is expressed to be governed by the law of a jurisdiction other than the UK. This could be a term which provides for a contract to be a governed by New York law, notwithstanding that the consumer is located in the UK.*

Different issues of fairness arise when considering intra-UK choice of law terms and UK/Non-UK choice of law terms.

In the context of receivables financing in the UK, it is common for receivables contracts to include an intra-UK choice of law term; such that the contract will be governed by English law, notwithstanding that the consumer is located in Scotland or Northern Ireland. This often occurs when the trader has its principal place of business in England, with an English business that has a predominance over its business in the other parts of the UK. This approach makes it more straightforward and cheaper for businesses of all types based in England to take on business with Scottish and Northern Irish customers, benefitting both them and those customers. The converse situation obviously also arises where a business based in Scotland or Northern Ireland may trade throughout the UK using standard terms of business governed by the same law.

In our view, an intra-UK choice of law term in the context of a receivables contract (and many other types of contract) is more likely to be fair than not.

In this regard, we would highlight that the same consumer protection regimes apply throughout the UK. For example, the Consumer Credit Act 1974 and its secondary legislation, the Consumer Credit Sourcebook (CONC) and the Consumer Rights Act 2015 all operate in substantially the same manner in Scotland, England and Wales and Northern Ireland as regards the level of protection afforded to consumers. This includes, for example, matters which may render an agreement unenforceable; such as those relating to the form, content and execution of an agreement, its related pre-contractual disclosures, and any post-contractual notices. Likewise, the principal requirements relating to unfair terms, and the relief available where there is deemed to be an unfair relationship, operate in substantially the same manner. The law of each part of the UK provides substantially the same level of protection to consumers and substantially the same outcomes in consumer disputes.

The substantive law of contract is otherwise quite similar in the different parts of the UK, with similar contractual provisions having similar effects under the laws of different parts of the UK where similar patterns of facts present themselves, particularly in relation to contracts, such as receivables contracts, that are relatively simple in legal terms.

Consumers that are familiar with common consumer contracts, such as receivables contracts, and their legal effects in one part of the UK will generally also find their legal effects in other parts of the UK to be similarly familiar, whether as a matter of consumer protection or general contract law.

Consumer advice services and lawyers in different parts of the UK will normally be similarly competent to advise in relation to such contracts governed by the law of another part of the UK and most law firms employ or have ready access to lawyers qualified in other parts of the UK. An intra-UK choice of law term in a common consumer contract, such as a receivables contract, should not, therefore, force a consumer to travel long distances to obtain legal advice in the manner in which a choice of court jurisdiction in another part of the UK may do so. In addition, advice is not required or sought in relation to most consumer contracts entered into when compared with consumer contracts on which disputes arise or which end up in court.

There is arguably little or no detriment to the consumer in an intra-UK choice of law term. An intra-UK choice of law term does not raise the same potential risk of detriment as may arise with a UK/Non-UK choice of law term. The practical benefits to businesses based and

	trading mainly in one part of the UK from using standard form contracts governed by a single law should have a bearing on this assessment of fairness. *The question of the fairness of intra-UK choice of law terms in receivables contracts and, in particular, whether the Scottish courts would recognise the choice of English law in a receivables contract as an enforceable choice of law term is also relevant to the financing of various types of businesses, and in particular consumer finance businesses. Accordingly, the legal analysis of the essential validity of the transfers of receivables due under receivables contracts underpins the structure of receivables financings (including securitisations).* *Any guidance issued by the CMA that creates uncertainty as to the fairness of intra-UK choice of law terms would have an impact on the ability of consumer finance businesses to include in receivables financings any receivables owing by consumers that are resident in Scotland.* *Uncertainty could result in receivables financings requiring to be restructured to accommodate additional Scottish transfer mechanisms (including periodic additional Scottish trust documentation signed in wet ink); adding unnecessary complexity, and expense, to transactions. As Scottish receivables in UK-wide receivables financings tend to form only 10%-15% of the asset pool, this could cause a disproportionate level of additional expense and could lead to the exclusion of receivables due from Scottish customers in those financings, potentially reducing the attractiveness of Scotland as a trading location for the relevant business.* *It is our view that the draft revised guidance is likely to cause such uncertainty. Paragraph 6.89 states that "It may <u>in some circumstances</u> be fair for a contract to specify the applicable law". It follows that a choice of law term will be unfair, other than in certain circumstances. In the absence of an illustrative example or explanation as to what these circumstances may be – please see our response to Q4 above – there will be legal uncertainty as to whether the CMA views the choice of English law in a receivables contract with a Scottish consumer to be fair or unfair. Any uncertainty as to the enforceability of a choice of law term would, in turn, cause uncertainty as to what law will apply to the essential validity of the transfers which underpin the structure of receivables financings.* *We would therefore reiterate our response in Q4 that illustrative explanations and examples should be included to more clearly demonstrate what considerations apply when determining the fairness of a choice of law term. In this regard, it is our strong view that intra-UK choice of law terms in relation to receivables contracts should normally fall within the 'More likely to be fair' category, and we would suggest that this be made clear within the draft revised guidance.* *If the draft revised guidance remains in its current form, this could also have a negative impact on existing receivables financings. The legal analysis as to the essential validity of the transfers which underpin the structure of those transactions could then be called into question.*