SMMT DRIVING THE MOTOR INDUSTRY

SMMT response to the consultation on CMA guidance on unfair contract terms (CMA37con)

19 March 2026

Introduction

1. The Society of Motor Manufacturers and Traders (SMMT) is one of the largest and most influential trade associations, representing the automotive industry in the UK.
2. The automotive industry is a vital part of the UK economy, integral to growth, the delivery of net zero and the UK as a global trade hub. It contributes £93 billion turnover and £22 billion value added to the UK economy, and invests around £4 billion each year in R&D. With 198,000 people employed directly in manufacturing and some 813,000 across the wider automotive industry. Many of these automotive manufacturing jobs are outside London and the South-East, with wages that are around 13% higher than the UK average. The sector accounts for 12% of total UK exports of goods with more than 140 countries importing UK produced vehicles, generating £115 billion of trade in total automotive imports and exports.
3. The UK manufactures almost every type of vehicle, from cars, to vans, taxis, trucks, buses and coaches, as well as specialist and off-highway vehicles, supported by more than 2,500 component providers and some of the world's most skilled engineers. In addition, the sector has vibrant aftermarket and remanufacturing industries. The automotive industry also supports jobs in other key sectors – including advertising, chemicals, finance, logistics and steel.

Executive Summary

4. This response highlights key concerns and practical recommendations on the consultation for CMA37con. Our focus is on ensuring any revisions of CMA37 align with case precedent thereby allowing businesses to operate with confidence.
5. In lieu of answering the specific questions of the consultation we highlight general concerns with the proposed approach, including risking guidance over- reach beyond legal requirements. We also raise key challenges, affecting innovation in the sector, such as variations due to over-the-air updates and in-app or “infotainment system” app purchases.
6. This response concludes with our recommendations to help ensure that there is a balance between consumer protection under both the Consumer Rights Act 2015 (CRA) & Digital Markets, Competition and Consumers Act 2025 (DMCCA) and the practicalities of businesses operating in the environment.

Key Points

General Considerations

Average Reasonable Consumer

7. The draft guidance introduces expectations on traders that exceed the legal requirements of fairness and transparency. While behavioural insights may be considered assessing a term, the guidance should avoid implying a presumption of consumer inattentiveness that would **lower the “average consumer” standard**.
8. The guidance dilutes the objective legal standard of the “average consumer”, who is **reasonably well-informed, observant and circumspect**. Emphasising consumers’ tendency not to read terms risks shifting the benchmark, expanding the scope of unfairness findings, and assumes a lower standard of understanding than case precedent.
9. Consumers are generally well-informed and observant, however the guidance suggests a significantly lower understanding of obligations, and an inability to understand concepts such as deferred gratification[1]. Accepting any **less-than average reasonable consumer** risks burdening businesses to over-explain contracts, creating complex onboarding procedures that would lead consumers to simply give up, as was considered in the Camelot[2] case at para 45 of the judgment.
10. The cumulative effect of lowering the expected standard of consumer understanding risks an increasing burden on businesses and an **assumption of unfairness that cascades throughout the guidance** and misaligns to the law.

[1] Paragraph 4.16 of CMA37con – *“consumers tend to be poor in predicting the future, and to overvalue immediate impacts and undervalue future ones (for example, preferring to receive £5 today than £25 next week).”*
[2] Parker-Grennan v Camelot UK Lotteries Ltd [2024] EWCA Civ 185 (“Camelot”)

Assessment of Fair Dealing

12. The draft guidance extends liability for traders beyond usual determinations of good faith, contrary to Camelot. The draft guidance suggests that any imbalance cannot be reset by a consumer's freedom of contract where the consumer requires a product. This unreasonably implies a starting point of detriment,rather than allowing for a full assessment of the relevant circumstances of the transaction...

13. We are concerned that the guidance factors into fairness assessments, consumers' inexperience in negotiating non-negotiable terms. This thereby wrongly presumes that most reasonable (even if onerous) terms could be considered unfair, especially considering the lower thresholds in paras 7 - 10.

14. While surprise can be a useful indicator of potential unfairness in any single term or its effect, the guidance risks treating any surprise by a consumer as a freestanding basis for intervention rather than part of the wider good-faith analysis.

15. Camelot confirmed unusual terms can still be fair where they are narrow, justified, and clearly communicated. The guidance's reliance on interpretations from Foxton's[3] risks overstating the relevance of whether a consumer's lawyer might have sought to remove a clause. A lawyer's preference to strike out a term does not necessarily make it unfair or contrary to good faith and Foxton's focused on terms that were camouflaged or created the risk of ambush, not the effect of hypothetical legal advice.

16. Also, CMA37con proposes consideration of how consumers "behave in practice". The examples given ignore crucial elements from Camelot – that it was not the trader's obligation to force a consumer to read the terms and understand them – but to present them clearly, provide every opportunity to read them easily, and flagging those terms that had changed or were important. The "consumer behaviour in practice" examples given in the draft guidance further feed an assumption of a lower standard of average reasonable consumer and implies vulnerability as standard, which is not reflected in case law.

Prominence and Transparency

17. The draft guidance expands transparency and prominence requirements in ways that may be impractical in real-world contracting environments, particularly digital interfaces. The implicit removal of any requirement on the consumer to exercise reasonable observation or rationality conflicts with rulings such as ParkingEye[4] which, similar to Camelot, established that even onerous terms can be fair and enforceable when prominently disclosed.

18. A requirement to explain any additional regulatory, market, or contextual implications on a contract or explain consumer's statutory rights without diluting the prominence of key or important terms risks traders being unable to meet two potentially conflicting approaches. Overwhelming consumers with guides, short form explanations, or simple summaries adjacent to or within existing contracts risks fragmentation or putting consumers off reading terms, or focusing on terms that are given prominence over those that to which they would have otherwise paid greater attention.

19. The guidance further notes that in highly technical areas, additional information or background reading may be necessary in which case consumers should be provided with additional rights in the form of cooling off periods to increase transparency. This clearly goes further than the statutory position and what was intended by Parliament and considered in case precedent.

20. Transparency assessments must continue to focus on clear, intelligible drafting and proportionate presentation, without implying mandatory summaries or extensive pre-contract explanations for all terms. Clearer proportionality of transparency and design would help maintain the intended balance between consumer protection and workable contract construction.

Core Exemption

21. The approach to the core exemption appears overly restrictive, particularly regarding integrated or bundled products where price and subject-matter elements are often interdependent. The guidance's reliance on Kásler, Matei and Profi Credit Polska[5] does not reflect that these CJEU authorities are now only persuasive for UK courts. Treating them as determinative overstates their relevance to support narrowing the exemption beyond the statutory position.

---

[3] Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681 (Ch) ("Foxton")
[4] ParkingEye v Beavis [2015] UKSC 67
[5] Case C-26/13 Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, Case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA, and Case C-252/19 Profi Credit Polska SA v QJ

22. The assessment of prominence in the guidance suggests a subjective test reliant on the sufficiency of awareness of the average reasonable consumer. These factors of transparency and prominence therefore suffer the same issues as the above paragraphs and create substantial risk to businesses in gauging whether any given approach is sufficient to meet the CMA's assessment in practice.
23. The guidance suggests achieving prominence "may not be possible" where there are numerous charges (paras 5.23–5.25) or where integrated digital-physical products may legitimately include connectivity, data or update elements. This risks a practical barrier to reliance on s.64 for legitimate, clearly priced feature bundles.
24. Established and widely understood commercial charges — including administrative, processing, cancellation fees or industry standard cost recovery mechanisms, and operational fees — risk falling outside the core exemption under the CMA's interpretation, despite forming part of standard consumer expectation.

Automotive Industry-Specific Considerations

Digital Platforms & in-app purchases

25. The approach to prominence and transparency in digital consumer journeys is one of balance – avoiding dark patterns or the subjective assessment of consumer behaviour or social science – and focusing on intelligible communication of the terms within limited user interfaces. The guidance does not cater for these nuances and applies a blanket approach that does not align with findings from Camelot.
26. The draft guidance treats consumer notices — including operational signage, interface text, pop-ups and in-app messaging — as equivalent to contract terms for fairness and transparency assessments. Relying on Foxtons, which predates modern digital interfaces risks a regulatory misstep. Treating notices as contract terms imposes disproportionate liability on traders and creates uncertainty for businesses designing practical, compliant in-app or platform-based disclosures.

Over the Air updates

27. Some consumer agreements may involve mixed goods, digital content and services. Security, safety and regulatory-driven over-the-air updates or feature adjustments can be necessary and legitimate. The draft guidance suggests that service changes or variation clauses, which are practical and necessary for many service based agreements may be onerous and require additional clarification, explanation, and prominence. This again risks overreaching the statutory position and overly restricts otherwise established and acceptable business practices.

Conclusion

28. **Average Consumer:** The assessment should remain grounded in the statutory definition and applicable case law. Behavioural insights should be used as context rather than risking substitution for the legal test or lowering the average consumer test. A clearer distinction between legal duties and CMA's recommended best practice would support practical compliance and maintain alignment with case law.
29. **Assessment of Fair Dealing:** Additional worked examples could demonstrate compliant incorporation of terms, including those less balanced or onerous on a consumer. The guidance should be clear that traders are not required to navigate all potential behavioural biases and that transparency is satisfied where terms are clear, intelligible, accessible and timely.
30. **The core exemption:** The guidance should avoid narrowing the exemption in imposing prominence standards that may be unrealistic for multi-component offerings. A more flexible interpretation and clear examples of accepted good practice in sufficient prominence of such exempt terms could help ensure the exemption continues to operate as Parliament intended.
31. **Digital Platforms & in-app purchases:** The guidance should clarify how prominence and transparency can be met through layered, short-form disclosures with click wrap full terms rather than lengthy explanations, fragmented consumer journeys, or offline brochures. Providing digital-specific examples could assist businesses in achieving compliance without overwhelming consumers.
32. **Over the Air updates:** The guidance should recognise the distinct remedial regimes and operational constraints this creates and practical examples could support consistent and proportionate application of legal tests.

Contact

[redacted]

[redacted]