Competition & Markets Authority

Unfair contract terms

Summary of responses to the consultation

22 July 2026

Contents

Page

1. Introduction

1.1 Earlier this year, the Competition and Markets Authority[1] (the 'CMA') consulted on draft revised guidance (the 'Draft Guidance') and an accompanying draft technical note (the 'Draft Technical Note') on the unfair contract terms provisions in Part 2 of the Consumer Rights Act 2015 (the Act). The Draft Guidance and Draft Technical Note updated the guidance which was published in 2015 (the 'Previous Guidance'). Following that consultation, the CMA has now published final revised guidance, replacing the Previous Guidance.

1.2 Part 2 of the Act sets out the law on unfair contract terms and notices, requiring that terms in contracts and notices used by traders with consumers be fair and transparent. The legislation has not changed since 2015. Therefore, the consultation on the Draft Guidance and Draft Technical Note primarily covered their simplification, presentation, style and readability. The CMA generally did not revise its interpretation of the law though it did set out developments in case law.

1.3 The final guidance sets out the CMA's understanding of the provisions in Part 2 of the Act. It aims to make it easier for businesses to understand unfair contract terms law and to help them to comply. It is streamlined to make it more accessible, in line with the Government's Strategic Steer to the CMA and the CMA's 2026-2029 strategy, and reflects other developments relevant to the application of unfair contract terms law in the last decade.[2]

The consultation

1.4 On 22 January 2026 the CMA published the Draft Guidance and Draft Technical Note for consultation. Changes included streamlining and restructuring the main guidance document; splitting out technical content in a separate document; simplifying technical language; consolidating or removing duplicative content; reorganising commentary into clearer and more actionable explanations of the law and different types of potentially unfair

[1] The CMA is the UK's primary competition and consumer enforcement body. It helps people and the UK economy by promoting competitive markets and tackling unfair behaviour. More information about the CMA and its powers can be found here: About us - Competition and Markets Authority - GOV.UK.

[2] This includes the UK's exit from the European Union (EU) and additional case law. In addition, while the substantive law remains the same, the powers of enforcement authorities to enforce unfair terms law have been enhanced. The Digital Markets, Competition and Consumers (DMCC) Act 2024 introduced direct enforcement powers for the CMA in relation to some pieces of consumer protection legislation, including Part 2 of the Act; and enhanced the powers of the civil courts to impose monetary penalties for breaches of a range of consumer protection legislation, including Part 2 of the Act.

terms; integrating examples contextually and more prominently; updating and adding references to court decisions that have developed how unfair contract terms law applies in practice; and updating outdated legislative references.

1.5 The consultation was open for 6 weeks and closed on 19 March 2026. The CMA received 11 formal responses from a range of stakeholders including businesses, business representative organisations, consumer representative organisations, enforcement authorities, individuals, and law firms. The CMA thanks all those who responded to the consultation – see below for the list of respondents.

1.6 The CMA also received a range of informal comments and views as part of discussions and informal submissions during the consultation. That feedback is a useful complement to the formal written consultation responses received, particularly where the CMA was able to engage with stakeholders who were unable to provide formal written responses.

1.7 The consultation document set out the following questions on which respondents' views were sought:

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.

Purpose of this document

1.8 The CMA is grateful for the responses it received to the consultation which it has reviewed carefully. This document summarises the key feedback received from respondents about the Draft Guidance and Draft Technical Note, the CMA's views on this feedback and the main changes the CMA has made to the final guidance as a result.

1.9 This document is not intended to be a comprehensive response to all individual views. Non-confidential responses to the consultation are available on the consultation page.

1.10 This document should be read together with the final guidance.

Summary of responses

1.11 The consultation responses indicate broad support for the CMA's objective of making the guidance clearer, more accessible and easier to navigate. Respondents welcomed the streamlined structure, the separation of technical material, the retention of practical examples and the continued focus on helping businesses understand how to comply with unfair contract terms law.

1.12 At the same time, respondents raised a number of concerns, points for consideration and suggestions which the CMA has used to further improve the guidance.

1.13 First, some respondents were concerned that the Draft Guidance could be read as expanding businesses' legal obligations or going beyond the Act and relevant case law. The underlying Part 2 obligations have not changed, although both the enforcement context and the relevant case law have developed since the CMA last updated its guidance. In order to be of assistance to as many businesses as possible, the final guidance sets out the CMA's understanding of the law in general terms, including of what is more likely or less likely to be fair, ensuring it does not go beyond it. However, it is not a substitute for the law and, given the principles-based nature of the legislation which requires consideration of the specific context, businesses may wish to seek independent legal advice.

1.14 Second, respondents asked for greater predictability about how businesses can comply, particularly in light of the CMA's direct consumer enforcement powers under the DMCC Act. The CMA recognises the importance of predictability, in line with its 4Ps (pace, predictability, proportionality and process) framework. The final guidance therefore:

- provides clearer navigation,
- separates legal principles from practical considerations in key areas,
- includes further examples and practical techniques,
- 'promotes' key practical points from cited court decisions from footnotes to the main text,
- clarifies a range of points, including the interaction between the Act, the CMA's guidance and sectoral rules; the standalone nature of the transparency requirement under the Act; and how the Act may apply to businesses overseas.

1.15 The final guidance explains the substantive requirements of unfair contract terms law; separate CMA guidance and statements explain how the CMA prioritises and exercises its enforcement powers.

1.16 Third, respondents highlighted the need to balance comprehensiveness with accessibility. The CMA has retained the detailed guidance needed to explain a complex and fact-sensitive area of law, while improving readability as described above at paragraph 1.14 and through a separate technical note for more specialist users. The CMA is also publishing a short guide for businesses as a practical starting point, particularly for small, time-poor or non-specialist businesses.

1.17 Finally, respondents sought more examples of (un)fair and transparent terms, including sector-specific and digital-context examples. The CMA has added targeted examples and clarifications where these illustrate issues of wider relevance across sectors, including on price variation, cancellation and jurisdiction terms. However, the CMA has not sought to provide exhaustive or prescriptive examples, because the fairness of terms must be assessed in light of the facts and context of each case. The CMA has added techniques for how to present terms transparently and prominently in digital contexts but has not added examples of prescriptive interface designs as these may quickly become outdated or create false certainty.

1.18 Overall, the CMA considers that the final guidance responds appropriately to the feedback received. It improves clarity and predictability for businesses while avoiding false certainty in an area of law that necessarily requires a case-by-case assessment.

The final guidance

1.19 The final guidance is published alongside this document and takes effect from the date of publication, replacing the Previous Guidance. The final guidance comprises:

- **a revised version of the Draft Guidance published for consultation (the 'Final Guidance').** The CMA recommends that businesses dealing with consumers read this document to understand what contract terms and notices they cannot use and/or may be unfair to consumers. While it is more likely that businesses who follow the principles set out in the guidance would be acting lawfully, the guidance is not a substitute for, or definitive interpretation of, the law and should be read alongside it. Businesses should review their terms and notices and, if necessary, revise them, seeking independent legal advice as needed.

- **a revised version of the Draft Technical Note published for consultation (the 'Final Technical Note').** The Final Technical Note is not intended as mandatory reading for businesses. Instead, it may be of use to legal advisers and enforcement authorities to understand the evolution of the law on unfair contract terms and relevant related law. Businesses may wish to use the Final Technical Note as an overview of – but not a definitive guide to – other applicable consumer protection legislation (in addition to unfair contract terms law) with which they must comply. Businesses should read relevant other laws and guidance for a fuller understanding of their obligations under other legislation.

1.20 While not part of the Final Guidance, the CMA has also published a short guide for businesses. This resource is targeted at anyone looking for a quick-start guide to unfair contract terms law, especially small and time-poor businesses. This helps to implement clearer and more accessible web content, in line with the CMA's commitment to transform its engagement with a greater range of stakeholders as part of process improvements under the 4Ps.

2. Structure and clarity of the Draft Guidance (consultation question 1)

Structural features

Summary of responses

2.1 Six respondents commented on this topic. Five respondents considered the Draft Guidance to be clear and accessible, noting that it is easier to navigate while retaining beneficial explanations and significant information. A respondent noted that presenting core concepts – such as transparency – earlier helps users understand the framework before engaging with more detailed legal discussion.

2.2 One respondent took a different view, stating that the Draft Guidance was less user-friendly and accessible, particularly due to the length of footnotes, which they considered overly detailed relative to the main text, and because the explanation of the analytical steps for assessing whether a term is lawful is spread across several chapters.

2.3 Several respondents proposed further structural improvements. These included:

- more clearly separating the explanation of legal tests and principles from practical guidance for businesses. In particular, one respondent considered that relevant chapters should have subsections on (a) the legal framework and (b) practical considerations for traders. Another respondent suggested short ‘practical compliance’ summaries at the end of sections and further strengthening the links between the legal test for transparency, the practical objective of ensuring consumers can understand the implications of a term before agreeing to it and the steps a firm may need to take (including testing and monitoring consumer comprehension) to ensure communications are likely to be understood and inform a consumer’s decision in practice.
- introducing further visual aids such as flow diagrams, a ‘quick start’ index mapping business sectors to relevant guidance content and a Red-Amber-Green (RAG) system to distinguish between terms that are more or less likely to be fair; and
- including a glossary of key terms.

2.4 One respondent supported an update of shorter guide options for businesses and a refresh of the supporting videos.

The CMA's views

2.5 The CMA welcomes the positive feedback received and has decided to maintain the revised chapter structure.

2.6 The Draft Guidance included an overview of how the Act works upfront (see the flowchart in Figure 1). The CMA has reorganised and more clearly split content in subsections on what, respectively, fairness, transparency or prominence requires and how it is assessed under the law on the one hand and how traders are more likely to achieve it in practice on the other. See Chapters 4 and 5 of the Final Guidance.

2.7 With respect to the request to draw out and further explain the practical objective of ensuring that consumers can understand the implications of a term before agreeing to it, the CMA considers that paragraphs 2.29, 4.33, 4.35 and 5.15 in the Draft Guidance already accounted for this (see paragraphs 2.30, 4.33, 4.37 and 5.14 in the Final Guidance). Regarding the suggestion to draw out steps that businesses should take to monitor consumer comprehension, the CMA does not consider it appropriate to prescribe this given the principles-based nature of the transparency requirement under the Act.

2.8 Given that Part 2 of the Act applies across all sectors of the economy, the CMA considers it would not be appropriate to introduce an index signposting to parts of the guidance that may be more relevant to particular sectors. While Chapter 6 (Examples of potentially unfair terms and notices) of the Final Guidance includes a cross-section of illustrative examples that cover different sectors, both the law and the guidance apply to all sectors, regardless of whether a sector-specific example is given. The CMA has not included a RAG rating system for examples. This is because a RAG rating of examples risks being interpreted as definitive while the assessment of fairness will be fact- and context-specific.

2.9 Chapter 2 (Key concepts) contains all definitions subsequently used and discussed in the Final Guidance except those of 'goods' and 'digital content' which are in Chapter 3 (Prohibited terms and notices) given their direct relevance to the discussion of statutory rights, remedies and prohibited terms. Therefore, to avoid duplication of definitions, the CMA has decided not to include a separate glossary.

2.10 The CMA recognises the value of short-form materials in helping businesses, especially time-poor or less well-resourced businesses, understand how they can comply with the law. The CMA has published a short guide for businesses.

2.11 In addition, the CMA will be updating its unfair contract terms videos to reflect the revisions made in the Final Guidance. The CMA aims to publish these in the Autumn.

Other topics

Summary of responses

2.12 Two respondents commented on the presentation of examples. One respondent suggested that a separate background document with examples covering a variety of possible situations could be useful. Another respondent recommended that the CMA maintain a live database to host illustrative examples.

2.13 Two respondents commented on the status of the guidance. One respondent raised concerns that describing the document as 'guidance' may risk some traders treating it as optional. They suggested clarifying its role in supporting action by other enforcers and explicitly encouraging businesses to review their terms and conditions. One respondent called for the guidance to more clearly distinguish between explanations of the law and statements of regulatory expectation, to help businesses identify what constitutes binding legal obligations and what represents good practice.

The CMA's views

2.14 The CMA considers that minimising the number of documents on a given topic would help businesses get to grips with their obligations and examples of best practice more readily. Therefore, the CMA has decided not to move the examples out of the main guidance document, ensuring businesses have comprehensive one-stop access to relevant content.

2.15 The CMA is also committed to providing as much up-front certainty as possible about what complying with the law entails. Therefore, the CMA considers that a live database of examples or other compliance advice, while agile, may inadvertently create uncertainty for businesses about what is expected of them at any given point. The CMA will ensure timely guidance maintenance while providing predictability for businesses, in line with its 4P's framework.

2.16 Guidance for businesses is one of several potential routes available to the CMA to achieve impactful outcomes as quickly and proportionately as possible and is often the most effective for the vast majority of well-intentioned businesses. Therefore, the CMA does not consider that it needs to change its characterisation of the Final Guidance and continues to encourage businesses to use it to review their terms carefully, as set out in its update Direct consumer enforcement: one year on – Competition and Markets Authority.

2.17 The CMA does not have the ability to bind other enforcement authorities to its guidance, but it will continue to work closely with them to maximise the coherence and impact of unfair contract terms actions. For further information on how the CMA works in partnership with other agencies see the CMA's Consumer protection: enforcement guidance (CMA58).

2.18 The Final Guidance sets out the CMA's understanding of the provisions in Part 2 of the Act. However, given the principles-based nature of the Act, businesses should seek independent legal advice if they are in doubt about how to comply with the law.

3. Comprehension and readability of the Guidance (consultation question 2)

Summary of responses

3.1 Three respondents stated that the Draft Guidance strikes an appropriate balance between comprehensive explanation of the legal provisions and readability for non-specialist users. One respondent stated that the Draft Guidance is generally accessible and written in clear language. Respondents suggested that the Draft Guidance could go further in terms of improving accessibility, specifically through including a plain English summary at the start of each chapter and simplifying complex sentences.

3.2 Three respondents commented on the suitability of the Draft Guidance for its users, with mixed views on who those users are likely to be. One respondent stated that businesses get compliance advice almost entirely from in-house legal experts or external expert legal advisers so simplification of the Draft Guidance should not detract from the detail and that it should remain comprehensive for the benefit of legal experts. On the other hand, another respondent noted that the Draft Guidance is probably too long and technical for most non-specialist users and the general public. The respondent considered that the guidance should enable senior company personnel to identify where a company's terms may need to be revised and help them discuss with legal advisers.

3.3 One respondent suggested rewording is needed in parts of the Draft Guidance to ensure readability does not undermine legal accuracy, specifically to amend paragraph 3.7 (and equivalent provisions for digital content and services) of the Draft Guidance to avoid implying that traders are giving the consumer the rights listed, which are statutory rights provided to consumers in Part 1 of the Act.

3.4 One respondent commented on the use of footnotes, suggesting keeping footnotes brief and not putting detailed information there.

The CMA's views

3.5 The CMA welcomes positive feedback on the balance between comprehensive explanation of the legal provisions and readability for non-specialist users. The Draft Guidance already included plain English summaries of detailed chapters, which have been retained in the Final Guidance. The CMA considers that these features enhance the utility of the Final Guidance to non-specialist users, which are a key audience, but acknowledges that some technical and complex content remains and is unavoidable given the conceptually complex nature of unfair contract terms law. As set out above, the CMA has also published a short guide which is not intended to replace the Final Guidance but provides a more accessible starting point.

3.6 The CMA has updated Chapter 3 of the Final Guidance to make clearer that traders are not *giving* consumers the statutory rights listed in that chapter. Rather, consumers are *legally entitled* to those rights and businesses must comply with and not restrict them through contract terms.

3.7 The CMA has reviewed the use of footnotes and identified a number of points containing elaboration on practical obligations, examples or implications for businesses which it has promoted to the main body of the text – see paragraphs 1.5, 3.5, 4.19 and 5.10 in the Final Guidance. This ensures that actionable explanations of requirements and obligations are set out prominently while preserving citations that can be consulted if readers need more detail or context.

4. Illustrative examples included in the Draft Guidance (consultation question 3)

Summary of responses

4.1 Overall, respondents found the examples of contract terms that are unlikely to be fair and more likely to be fair valuable as a way of translating legal principles into tangible insight for businesses reviewing their terms, thereby improving adoption of best practice.

Alternative examples and explanation of problematic examples

4.2 Three respondents commented on the rewritten versions of problematic terms, suggesting providing examples in pairs which illustrate a corresponding ‘more likely to be fair’ version of the ‘unlikely to be fair’ example where there is not one already.

4.3 Two respondents said the examples were helpful and valuable but called for a clearer explanation of why particular terms may be problematic. They asked for greater clarity on whether concerns behind examples reflected lack of transparency (for example, due to issues with intelligibility, prominence and the ability to assess practical consequences), significant imbalance, excessive financial consequences for consumers or restrictions of statutory rights.

The CMA’s views

4.4 The CMA has updated the Final Guidance to provide additional ‘more likely to be fair’ examples to accompany ‘unlikely to be fair’ examples. Importantly, both types of examples remain non-exhaustive and illustrative.

4.5 The CMA considers that the examples in the Draft Guidance are already set out in the context of specific potential indicators of unlawfulness (noting that determining if any term or notice is unlawful for any reason will depend on the facts and circumstances relevant to the contract or notice in each case). For example:

- there are illustrative examples in each of the bullet points describing how significant imbalance could arise in paragraph 4.6 of the Draft Guidance (see paragraph 4.5 of the Final Guidance).

- the Draft Guidance sets out in various places in Chapter 6 where terms that are potentially unfair are or may be also prohibited because of their interference with consumers’ statutory rights. This has been retained in the

Final Guidance – see, for example, paragraphs 6.13, 6.16, 6.18 and 6.24 of the Final Guidance.

- the illustrative examples in Chapter 6 of the Draft Guidance of contract terms that are unlikely to be fair and more likely to be fair are preceded by detailed discussion of how unfairness could arise.

4.6 Therefore, the CMA has not made further changes to the Final Guidance. However, the CMA has also set out illustrative reasoning for what makes a term unlikely or more likely to be fair in the short guide accompanying the Final Guidance.

Status of examples

4.7 Two respondents commented on the status of examples. They asked for the Draft Guidance to make clearer whether examples are intended to show unfairness or best practice to avoid, and to emphasise that examples are illustrative rather than definitive. One respondent noted that definitive findings on unfairness are for the courts, and that examples described as 'more likely to be fair' may still be challenged.

The CMA's views

4.8 Paragraph 6.4 of the Draft (and Final) Guidance states that the examples provided are non-exhaustive and illustrative and that, in practice, whether such terms are unfair, or the only suitable way of achieving fairness is using some or all the alternatives set out in the guidance, will depend on the facts of each case. Paragraph 1.4 of the Draft (and Final) Guidance states that the guidance may be revised from time to time, including to reflect changes in the interpretation of the law as a result of enforcement action taken by the CMA or others. The CMA considers these statements to address the points raised by respondents and has not made further changes to the Final Guidance.

5. Other examples sought by respondents (consultation question 4)

5.1 Respondents made various suggestions about additional examples, including about illustrating terms they considered to be potentially unfair or using examples to clarify if certain types of terms might be considered fair. This section of the document sets out the key suggestions and explanations for whether and how the CMA has updated the Final Guidance in response. As a general principle, when asked to provide additional examples, the CMA must balance the utility of an additional example with overall length and utility of the guidance as a whole. The CMA is more likely to include additional examples where they illustrate a general principle and less likely to include them where they relate to specific sectors or circumstances.

Transparent and prominent presentation of terms

Summary of responses

5.2 Three respondents commented on this topic. Two respondents called for further examples of what would be an acceptable transparent and prominent presentation of terms, particularly in digital environments. They asked for best practice examples to cover layered interfaces such as expandable sections, hyperlinks, or mobile-first interfaces, illustrating how prominence and intelligibility can be achieved in those environments, including how to deal with the tension between comprehensive terms and limited screen space.

5.3 Another respondent highlighted that The British Standards Institution (BSI) has developed guidance for organisations to increase consumer understanding of online terms and conditions (BSI ISO 21800) and stated that this was influenced by the Government's 2019 guide for businesses on how to help their customers better understand their contractual terms and privacy policies: Contractual terms and privacy policies: how to improve consumer understanding - GOV.UK. The respondent noted that the BSI standard does not deal with issues of fairness but offers guidance to businesses on how they can make their terms more accessible and transparent and suggested this could be referenced in the section of the Draft Guidance on transparency.

The CMA's views

5.4 The CMA recognises the appetite for further practical illustrations of how businesses may fulfil the requirements of transparency and prominence in presenting their terms. However, transparency (as a standalone requirement) and prominence (as a condition for the exemption from the fairness assessment) are principles-based, contextual and fact-sensitive. An important indicator of transparency and prominence, besides the readability and positioning of terms, is consumers’ understanding of the effects of the term. Transparency and prominence must be considered holistically, meaning the whole consumer journey, not just individual presentational features, should be assessed (including any marketing and promotional materials at the pre-contract stage).

5.5 Therefore, the CMA does not consider that illustrative examples, particularly visual ones, can fully capture relevant considerations in a way that would help businesses understand how to achieve transparency and prominence in presenting their specific terms in a digital context. However, the CMA has updated the Final Guidance to illustrate:

- the difference between a term being readable and its practical effects being comprehensible – see paragraph 4.34 in the Final guidance.
- further techniques that may be used to achieve transparency in a digital environment – see paragraph 4.42 in the Final Guidance.

5.6 While not part of the Final Guidance and not endorsed by the CMA as guidance for compliance with Part 2 of the Act, the Government’s 2019 guide and the BSI standard cover a similar range of techniques for drafting and presenting terms. Businesses may find these helpful resources to consult in considering concrete design or drafting to boost consumer engagement and comprehension of terms and notices.

Variation of terms

Summary of responses

5.7 Four respondents commented on this topic. One respondent called for further clarification on variation terms, including:

- whether business needs can justify variation,
- whether notification of variation is required for non-material changes and where changes are beneficial to consumers,
- how to draft an acceptable price variation term where a business cannot account for every possible circumstance that may arise, and

- whether it is fair or unfair for a business to bring an offer to an end where a subscription is not a long-term or high-value contract and can be cancelled by the consumer at any time (for example, 'subscribe and save' models).

5.8 Another respondent argued that the Draft Guidance risks overly restricting established and acceptable business practices of using variation terms to make security, safety and regulatory-driven 'over-the-air' updates or feature adjustments.

5.9 Other variation-related examples that respondents suggested included:

- illustrating that 'dynamic contracts' which allow unilateral, post-purchase updates to terms and conditions are in breach of the Act unless the consumer explicitly agrees to the specific changes.

- in-contract price rises through complex fee structures and follow-on fees such as new 'service fees,' 'administration fees' or 'technology charges' without genuine justification or consumer benefit.

The CMA's views

5.10 In general, the CMA considers that the safest way to comply with the Act is to follow the principles articulated in the Final Guidance, particularly the sections on how certain types of terms could be used fairly. These will be relevant in relation to reasons and notice for variation and when varying or cancelling a contract of any duration or value. However, it will be the business's responsibility to decide whether and how to use any terms, so a business may choose to take a risk-based approach to applying the principles in the Final Guidance.

5.11 On some of the specific points raised by respondents:

- The Draft Guidance already accounted for several potentially valid drivers of variation terms which are retained in the Final Guidance and therefore the CMA has not made further changes in response to points seeking clarity on what may justify variation terms.
  - Paragraph 6.47 of the Draft Guidance referenced variations due to changes in the law or to meet regulatory requirements and connected to external events.
  - Paragraph 6.51 of the Draft Guidance referenced changes required by necessity such as 'in the case of digital content, a term designed to address a genuine security threat to a consumer's digital content or device in a proportionate way is more likely to be fair'.

- In relation to 'dynamic contracts', the Draft Guidance provided an 'unlikely to be fair' example in the 'Binding consumers to hidden terms' section about updating terms over time and placing the onus on the consumer to check these periodically. In addition, paragraph 6.47 of the Draft Guidance also set out how a variation term is more likely to be fair, including clearly setting out when and why it can be used and giving notice of any variation prior to it taking effect. These points are retained in the Final Guidance and the CMA did not consider it necessary to make further changes.

- The CMA has updated the Final Guidance to include an 'unlikely to be fair' example of in-contract price increases, including via follow-on fees, in Chapter 6 – see page 101 of the Final Guidance.

Other topics

Summary of responses

5.12 Respondents sought a range of additional examples across other areas, including:

- an example of a term that could be used legitimately to refuse sales or to close an account where the consumer's attitude may cause serious concern,

- an example addressing terms in the holiday accommodation sector allowing the business to cancel a booking that has been confirmed because of actions by consumers in the past or their anticipated actions in the future,

- an example addressing terms in the holiday accommodation sector requiring consumers to forfeit all the money when they cancel a booking despite not receiving the service,

- an example addressing terms in the holiday accommodation sector allowing consumers more limited time to identify errors in bookings than is allowed for traders to identify errors in pricing,

- examples addressing 'hidden' terms in the holiday accommodation sector for no refunds when amending a booking for a less expensive or shorter period or for additional payments for alternative accommodation,

- an example addressing terms in the holiday accommodation sector allowing traders to make demands for proof from consumers to justify deductions from damage deposits,

- examples of unfair insurance requirements, such as clauses mandating original receipts, that allow providers to arbitrarily reject valid claims at their discretion,

- examples of variations to interest rates and early termination charges in financial services contracts,

- when variation clauses in the telecom sector are more likely to be fair or unfair, 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,

- when terms requiring consumers to contact traders via an online form or AI systems that do not allow the consumer to keep a copy of the message sent or to upload attachments are more likely to be fair or unfair, given potential impacts in relation to the exercise of time-limited consumer rights such as cooling off rights or rejecting goods,

- when exclusive jurisdiction and choice of law terms are more likely to be fair or unfair,

- when terms are more likely to be fair or unfair regarding free trials for 'add-on' services distinct from the main service being supplied,

- the practice of using terms and conditions to delay the formation of a sales contract (so called 'deferred acceptance'), specifically to set an expectation for businesses to clearly and transparently explain what this means for consumers and themselves within the terms of the contract.

The CMA's views

5.13 While the CMA appreciates the value that examples can offer to businesses, it would be impractical to address all the situations raised by respondents. In selecting additional examples to include in the Final Guidance, the CMA has prioritised examples which raise new issues or could serve to illustrate how the Act applies to certain terms that may be used in a variety of sectors and circumstances. The CMA has generally not provided examples pertaining to the regulated sectors where other authorities, for example the Financial Conduct Authority in relation to financial services and insurance contracts, may be better placed to provide more detailed guidance on the application of unfair contract terms law in those sectors specifically.

5.14 The CMA has made the following changes and additions to the Final Guidance:

- amended the description of when terms giving the trader a right of final decision are more likely to be unfair in relation to prospective breaches by the consumer – see paragraph 6.83 in the Final Guidance,

- added text describing an example of a termination fee that was found to be fair – see paragraphs 6.66-7 in the Final Guidance,

- added an example of a more likely to be fair term describing a termination fee – see page 110 of the Final Guidance,

- added an example of an unlikely to be fair term requiring consumers to pay for cancelled bookings – see page 111 of the Final Guidance,

- added an example of unlikely and more likely to be fair terms related to damages deposits to illustrate how final decision terms are more likely to be fair if drafted in a way that will not allow the trader to act unreasonably – see page 122 of the Final Guidance,

- added examples of unlikely and more likely to be fair jurisdiction terms – see page 125 of the Final Guidance.

6. Content to retain from the Previous Guidance (consultation question 5)

Summary of responses

6.1 Respondents identified several features of the Previous Guidance that they considered should be retained, including:

- the clear statement that transparency and fairness are separate legal requirements,
- the original flowchart providing an overview of how the Act works, which a respondent suggested might be supplemented by additional short flowcharts on specific areas of the guidance,
- more of the examples included in Annex A to the Previous Guidance on excessive trader enforcement (particularly in relation to accessing a consumer's home or land to remove products that have been installed) and cancellation terms,
- various indexes and annexes, including the table of statutory rights and remedies (Figure 4) in Chapter 4 of the Previous Guidance, the Grey List index of common terms (Figure 5) in Chapter 5 of the Previous Guidance, Annex A (historic examples of fair and unfair terms) and Annex B (new elements of unfair terms law) to the Previous Guidance, and the Grey List analysis in Chapter 5 of the Previous Guidance.

The CMA's views

6.2 The CMA has updated the Final Guidance to centre the standalone nature of the transparency requirement earlier on as follows:

- amended the final bullet in paragraph 1.10 of the Final Guidance to read 'they consider to be in breach of the transparency requirement (even if they do not consider it to be unfair)'.
- further clarified, in paragraph 2.30 of the Final Guidance, that the 'specific transparency requirement is a standalone legal obligation, though it sits alongside and reinforces the more general fairness requirement.'

6.3 The CMA has not included additional short flowcharts in specific areas of the guidance as it considers that this would duplicate the summary-at-a-glance sections in the detailed chapters. The CMA has retained the flowchart that it consulted on, which was based on and simplified the original flowchart in the

Previous Guidance. It has made some further minor changes to it for a more precise depiction of how the various provisions of the Act work – see page 5 in the Final Guidance. The flowchart should not be used in isolation to determine if a particular term or notice is lawful and should be read in light of the guidance as a whole.

6.4 The Previous Guidance was accompanied by an annex (Annex A) of actual terms used by businesses before 2015, which the Office of Fair Trading (the CMA's predecessor organisation) challenged as potentially unfair under the predecessor legislation to the Act, and which were either deleted or amended by businesses. Given that a key objective of revising the Previous Guidance has been to streamline it, the CMA:

- decided not to revise and consult on Annex A in its entirety but to draw on it to include within the Draft Guidance a smaller subset of updated examples and to present them contextually, so businesses have explanations of the law and relevant examples in one place. The CMA considers it would be impractical to retain the full range of examples from the Previous Guidance and considers that the examples of terms included in the Draft Guidance are sufficient.

- has left Annex A to the Previous Guidance available on its webpages, noting that it is a record of past enforcement action but not part of the Final Guidance and not endorsed as representative of the CMA's views on the lawfulness of the terms included in it.[3]

6.5 The other content identified by respondents for retention had already been streamlined and included in the Draft Guidance or the Draft Technical Note, to improve its accessibility and navigability. See the following parts of the Final Guidance and Final Technical note for:

- the table of statutory rights and remedies (Figure 4) in Chapter 4 of the Previous Guidance which has been condensed and split into Tables 1, 2 and 3 – one for goods, digital content and services, respectively – in Chapter 3 of the Final Guidance.

- the Grey List terms index which has been replaced within Chapter 1 and the summary-at-a-glance and longer subsections of Chapter 6 of the Final Guidance by the clickable signposts to each of the subsections in Chapter 6.

[3] The Previous Guidance also stated that Annex A did not necessarily reflect the views of the CMA and the 'revised' terms within it should not be seen as 'cleared' for use by the CMA.

- the analysis of Grey List terms which has been organised thematically,[4] instead of by reference to individual terms set out in the Grey List, removing some duplication given the overlaps between many Grey List items but otherwise preserving the analysis.

- Annex B to the Previous Guidance which has been included in the Final Technical Note as Annex A: Elements of unfair contract terms law introduced by the Consumer Rights Act as of 1 October 2015.

6.6 The CMA considers that this approach, supported by the generally positive reception to the structure and accessibility of the Draft Guidance and Draft Technical Note, ensures the key elements from the Previous Guidance were maintained.

[4] Chapter 6 of the Final Guidance is organised in the following seven thematic sections discussing types of potentially unfair terms:

- binding consumers to hidden terms,
- exclusion and limitation of rights and duties,
- variation terms,
- termination and breach by consumers,
- termination and breach by traders,
- automatic renewal terms, and
- dispute resolution terms.

7. Technical note (consultation questions 6 and 7)

Summary of responses

7.1 Respondents raised a range of points on the content and status of the Draft Technical Note.

Usefulness and presentation

7.2 Respondents said the Draft Technical Note provides useful legal context and helps explain how the Draft Guidance relates to case law and legal interpretation. Suggestions for improvement included shorter summaries of the practical implications of legal principles, a clearer explanation of how courts access intelligibility and foreseeability, and examples showing how legal principles translate into the drafting and presentation of terms.

Status and scope

7.3 One respondent said the Draft Technical Note should be retained but should state clearly that it is not a substitute for independent legal advice and reflects the CMA’s interpretation of the legislation at the time of publication. The respondent stated that it should be clarified which document prevails in the event of an inconsistency between the Draft Guidance and the Draft Technical Note. The respondent also said the ‘legislative background’ section did not appear relevant to the Draft Technical Note and suggested moving paragraphs 2.1 to 2.4 to an annex.

Definitions, references and additional examples

7.4 One respondent said that the Draft Technical Note usefully explains how the Act interacts with other consumer protection legislation and suggested cross-references in the ‘Key concepts’ chapter of the Draft Guidance to pre-contract information requirements, suggesting this is not always provided and giving the example of failing to provide the identity (and contact details) of the owner of the property that is being let out as part of holiday let contracts.

7.5 One respondent suggested including full citations for secondary legislation in footnotes and setting out definitions in a glossary at the end of the Draft Technical Note with hyperlinks to direct the user to the glossary. The respondent also called for non-exhaustive examples of ‘trader’ and ‘consumer’.

7.6 One respondent also suggested including worked examples that could not be accommodated in the main guidance in an annex to the Draft Technical Note.

The respondent suggested including a specific example of 'confirmshaming', a practice when consumers are seeking to cancel online contracts and are required to do this via the use of negatively framed decline buttons or visual cues such as a sad character, to illustrate the relationship of such potentially unfair commercial practices to consumer contracts.

Place of the technical note

7.7 Six respondents commented on this. Four respondents expressed support for keeping the Draft Technical Note separate to the Draft Guidance due to the length of the Draft Guidance and the more technical nature of the content in the Draft Technical Note. Two respondents wanted the Draft Technical Note to be incorporated in the Draft Guidance, citing that it would erase some duplication and reduce the number of reference documents.

The CMA's views

7.8 The CMA welcomes positive feedback on the usefulness of the Draft Technical Note. The CMA has decided to keep it as a separate document as it is not intended as mandatory reading for businesses.

7.9 With respect to the suggested additions to the Draft Technical Note, the CMA has:

- included a statement in paragraph 1.3 of the Final Technical Note that it is not a substitute for the law.
- updated the Final Technical Note to include a footnote at paragraph 1.1, signposting readers to the Chapter 2 (Key Concepts) of the Final Guidance which defines concepts such as 'consumer' and 'trader', stating that these terms have the same meaning in the Final Technical Note. This ensures appropriate cross-referencing without duplication of content between the two documents.
- included full citations of the statutory instruments cited in both the Final Technical Note and the Final Guidance.
- included 'the identity of the trader' as another non-exhaustive mention of pre-contract information (PCI) required under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs). It should be noted this list is non-exhaustive and anyone looking to understand the CCRs PCI requirements must consult the CCRs. Footnote 60 in Chapter 3 of the Final Guidance provides further

signposting to CCRs PCI requirements to the extent they are relevant to the prohibited terms discussed in that chapter.

7.10 The CMA has not:

- elaborated on the points about practical implications of legal principles, how appropriate authorities apply relevant legal concepts and how legal principles translate into the drafting and presentation of terms. These are discussed in the Final Guidance as they relate to what unfair contract terms law entails. However, the CMA has added some text in paragraph 3.1 of the Final Technical Note to bring out the practical implication for businesses, stating that 'Traders need to ensure they comply with other applicable consumer protection legislation as well as with unfair contract terms law'.

- moved the 'legislative background' section of the Draft Technical note to an annex, given the positive feedback received on the usefulness of the content of the Draft Technical Note.

- added examples of further potentially unfair commercial practices as the Final Technical Note is not intended to cover unfair commercial practices law in detail. The CMA's Unfair commercial practices guidance provides further explanation of unfair commercial practices law.

8. Other comments (consultation question 8)

8.1 Comments that respondents made on topics not covered by the specific consultation questions can be grouped as follows:

- comments on the interpretation of the Act set out in the Draft Guidance, including suggestions that the Draft Guidance misstates or overreaches the law in respect of what certain concepts mean and creates unduly onerous obligations for businesses to meet required compliance standards, and
- chapter-specific and other clarifications.

Interpretation of the Act

Summary of responses

General comments

8.2 One respondent said that the Draft Guidance should state more clearly that the law has not changed and explain where changes have been made for reasons other than presentation, and why.

8.3 Four respondents expressed concern that the Draft Guidance expands businesses' obligations and overstates the legal protection available to consumers beyond the Act and case law.

'Average consumer' and behavioural economics

8.4 Five respondents expressed concerns that the Draft Guidance unduly emphasised behavioural economics concepts. They stated that, by treating the 'average consumer' as inherently vulnerable and inattentive, the Draft Guidance lowered the legal standard and imposed disproportionate burdens on businesses. These respondents suggested amending the Draft Guidance in places to ensure it does not treat all consumers as inherently vulnerable.

8.5 Points raised by one or more of these respondents included calling for:

- further explanation and examples of the application of the 'average consumer' standard,
- greater clarity that behavioural insights are only to be used as a contextual aid rather than as an organising principle for interpreting the Act or a basis

for lowering the ‘average consumer’ standard by implying a lower level of consumer attentiveness,

- more explicit reference to expecting that the average consumer be ‘observant’ and acknowledging that businesses are not required to actively compensate for consumer behavioural biases (for example, through over-explaining contracts or creating complex onboarding procedures) and will not be held liable for consumers’ irrationality or inattentiveness,
- a more balanced approach between the interests of consumers and businesses, recognising:
  - that consumers already benefit from strong statutory protections and that courts interpret terms strictly against businesses and leniently in favour of consumers,
  - the sophisticated behaviours and bounded rationality of consumers today, and
  - the scale of potential penalties under the DMCC Act.

Reliance on and implications of case law

8.6 Two respondents said that some of the case law cited in the Draft Guidance – namely, *Zhang*[5] and *Foxtons*[6] – means that businesses can no longer safely rely on consumers having read or understood any term and shows that consumers are already comprehensively protected under existing legal principles. They argued that the CMA should take a more balanced approach by recognising that consumers should take some responsibility for the terms that they agree to or are presented to them accessibly.

8.7 One respondent said that, by relying on *Foxtons* about consumer surprise or a lawyer being likely to press for the deletion of a term being indicative of lack of fair dealing, the Draft Guidance extends trader liability beyond the usual approach to good faith, contrary to *Camelot*.[7] They said that, in line with their understanding of *Camelot*, the Draft Guidance should clarify that:

- unusual terms can still be fair where they are narrow, justified and clearly communicated, and

[5] *Eternity Sky Investments Ltd v Zhang* (CMA intervening) [2024] EWCA Civ 630.
[6] *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch).
[7] *Parker Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185.

- traders are not required to navigate all potential behavioural biases and that transparency is satisfied where terms are clear, intelligible, accessible and timely.

8.8 Three respondents commented on the expectations set out in the Draft Guidance for what prominence and transparency entail in practice. They suggested that the Draft Guidance should better reflect their understanding of more recent case law, including *ParkingEye*[8] and *Camelot* which reflect the modern, digital era approach and, according to the respondents' reading of the cases, emphasise that even onerous terms can be enforceable when prominently disclosed. They variously stated that:

- 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 or additional cooling-off rights.

- the Draft Guidance should provide digital-specific examples to clarify how prominence and transparency can be achieved in practice, including through layered-short form disclosures with click wrap full terms.

- the Draft Guidance should provide objective, predictable criteria for prominence, with examples that distinguish between reasonable and unreasonable expectations on businesses.

The CMA's views

8.9 The CMA notes the feedback on the interpretation of the Act. In general:

- the CMA notes that unfair contract terms law, by its nature, makes assumptions about the power disparity between traders and consumers and puts in place robust protections of consumers' interests. This is established in the 9th Recital[9] of the EU's Unfair Contract Terms Directive 93/13/ECC which the Act, as one of its principal purposes, gives effect to in the UK. It is also discussed in a landmark case – *First National Bank*[10] – which elaborates that the directive 'treats consumers as presumptively weaker parties and therefore fit for protection from abuses by stronger

---

[8] *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67.

[9] This states: "Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'.".

[10] *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

contracting parties'.[11] Therefore, the CMA considers that it is appropriate for its guidance to reflect the underlying purpose and presumptions of the Act.

- while the law on unfair contract terms has not changed, its interpretation has been developed since 2015 through case law. Thus, the CMA considered it appropriate to reflect that in the Draft Guidance published more than a decade on from the Act coming into force. The CMA considers that having the guidance reflect court decisions (both binding and persuasive ones) aids predictability, in line with its 4Ps framework.

8.10 On some of the points raised by respondents:

- Paragraphs 2.5 and 2.6 of the Draft (and Final) Guidance gave the statutory definition of the 'average consumer' and explained that the courts have interpreted the nature of the average consumer as dependent on the situation and contract in question. This means that the attentiveness of the average consumer will also vary from contract to contract, as reflected in the CMA's commentary in respect of:
  - factors relevant to the fairness assessment, in particular considerations about 'the nature of the subject matter of the contract'. See paragraph 4.25 in the Final Guidance which states that 'In general, consumers are presumed to be in a weaker position compared to traders, both in terms of their bargaining power and their level of knowledge, though the extent of the disparity may be more significant depending on the features of the contract. It therefore may be relevant to consider, as part of the fairness assessment, whether consumers who typically enter into a given type of contract might be in a particularly weak position in the context of specific types of transaction (for example, when they make infrequent or expensive purchases or are in a vulnerable position).'
  - the transparency assessment – see paragraph 4.36 in the Final Guidance which states that transparency is assessed through the lens of the average consumer 'taking into account the type of contract, the level of attention that an average consumer can reasonably be expected to show, together with whether it is reasonable to expect them to have read any or all of the terms thoroughly'. The CMA notes that the judgments in *Camelot* largely concerned the test for

---

[11] Per Lord Steyn in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 31.

incorporation, which is different from the test for transparency (as well as the tests for prominence and fairness).

Therefore, the CMA considers that the Final Guidance appropriately balances the presumptions underlying the Act about the asymmetrical power of traders over consumers, and the variability of how this might manifest in relation to different contracts, but does not suggest that traders are dependent on or responsible for consumer behavioural biases.

While the Draft (and Final) Guidance referenced the courts' interpretation, alongside findings of economic research, of how consumers behave in practice, these general, starting-point considerations (and the general need for businesses not to exploit consumer behaviour) do not displace the contract-specific consideration of the fairness or transparency of terms. The CMA has therefore not made changes to the Final Guidance in response to these points. However, the CMA has amended the Final Guidance to include further non-exhaustive techniques that may be used to achieve transparency in a digital environment – see paragraph 4.42 in the Final Guidance.

- The CMA considers that the Draft Guidance built on the Previous Guidance by providing additional commentary, rooted in case law, about the assessment of good faith requiring a consideration of traders' legitimate interests. The Draft (and Final) Guidance made clear that terms that safeguard the trader's legitimate interests can be consistent with the requirement of good faith and provided illustrative examples of those. It also reiterated that assessing good faith (and hence the fairness of a term) involves considering whether the term protects the trader's legitimate interests more stringently than necessary. The CMA considers that this approach appropriately acknowledges and balances the interests of consumers and businesses in the context of the fairness test.

- The CMA considers the Draft Guidance is consistent with case law, including *Camelot* and *ParkingEye*, as well as other relevant case law on unfair contract terms. The CMA notes the judgments in *Camelot* were fact-specific (see for example paragraphs 56 and 62 of the Court of Appeal judgment), and the case sits in a line of cases in which the courts have considered unfair contract terms law and the requirement for good faith. The CMA acknowledges that it may be consistent with the requirement for good faith for terms to be accessible via hyperlinks in some cases, however the analysis will depend on the circumstances, including how any hyperlinks are presented to consumers, how certain terms are presented and signposted, and the nature of the terms in question. This includes considering not only whether an unusual or onerous term has been incorporated into the contract, but also whether such a term is fair – which is a separate legal assessment.

The CMA notes in particular that in *Camelot* the courts found that that there was nothing onerous or unusual about the various contractual provisions on which Camelot sought to rely, and it is therefore not authority for how onerous or unusual terms should be brought to consumers' attention in order to be incorporated. Where a term has been incorporated, this means it is assessable for fairness and transparency as a contractual term (rather than as a notice) in the usual way under the Act. This is what the courts went on to do in *Camelot*, finding in particular that there was no significant imbalance. Where there is significant imbalance, the assessment of good faith is likely to include considerations about how the term is presented to consumers. For example, the courts have held in other cases, including recent cases involving digital environments (such as *Green*[12]), that hyperlinked terms were not transparent, and that the failure adequately to signpost the terms and explain their consequences were inconsistent with fairness[13] (and in *Camelot* the Court of Appeal and High Court expressly acknowledged the differences in the accessibility and presentation of the relevant terms in *Green*).

Chapter-specific clarifications

Chapter 1

Summary of responses

8.11 One respondent said the Draft Guidance should explain the relationship between obligations under it and contract-related rules in specific sectors and suggested the CMA reviews its Memorandums of Understanding with sector regulators on unfair terms cooperation and enforcement. The same respondent also asked for clarification of the word 'using' in paragraph 1.12 of the Draft Guidance, which states 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.' They considered the word 'using' potentially ambiguous in terms of whether it means 'relying on' or alternatively 'including' (in contract terms).

[12] *Green v Petfre (Gibraltar) Ltd* (trading as Betfred) [2021] EWHC 842 (QB).
[13] See also *Durber v PPB Entertainment Ltd* [2025] EWHC 498 (KB) where the High Court held certain hyperlinked terms were not incorporated and were unfair.

The CMA's views

8.12 The CMA has updated the Final Guidance to cross-refer to the CMA's Consumer protection: enforcement guidance (CMA58) which is relevant to how enforcer collaboration operates in relation to unfair contract terms law. The CMA has also noted that neither Part 2 of the Act nor the Final Guidance replaces relevant obligations under sectoral rules, where those exist (such as in the regulated sectors including telecoms, financial services etc.). Similarly, compliance with sectoral rules does not replace compliance with Part 2 of the Act. See footnote 6 in the Final Guidance.

8.13 The word 'using' reflects the terminology in Schedule 3 to the Act. In *Foxtons* the scope of 'using' was clarified to include inserting terms into new contracts, as well as relying on or otherwise enforcing terms in existing contracts.

Chapter 2

Summary of responses

8.14 Five respondents commented on this chapter. Points raised included:

- consumer notices being treated as equivalent to contract terms for the purposes of fairness and transparency, calling for guardrails distinguishing operational notices from contractual communications, thereby reducing disproportionate business liability. Some respondents questioned the scope of what could be considered a consumer notice and whether statements in advertisements and on websites and notices for a promotion constitute consumer notices.

- the need to address interlinked contracts (such as involving a consumer, the owner of a holiday let property, a letting agency working on behalf of the owner and a booking platform that may be working for the owner or letting agency) and how they should be reflected in terms and conditions, and to address both explicit and implied elements to the contracts such as matching the description of what is being provided in the contract.

The CMA's views

8.15 The definition of 'consumer notice' in section 61 of the Act is broad. Paragraph 295 of the explanatory notes to the Act states that Part 2 of the Act covers both 'contractual and non-contractual consumer notices'. To constitute a consumer notice, a notice need only 'relate' to rights and obligations between a trader and a consumer. Therefore, the CMA has not made changes to the Final Guidance on this point.

8.16 The CMA has updated the Final Guidance to include a promotions-related consumer notice example in paragraph 2.21. Additionally, the CMA would encourage traders to consider the Advertising Standards Authority's guidance on Promotional marketing to assess what to do and not do regarding communications referring to promotions.

8.17 The Draft Guidance addressed various points related to agents (or others) working on a trader's behalf and interlinked contracts, including in paragraphs 2.10, 4.29, 6.11 and 6.41 in the Draft Guidance. These points have been retained in the Final Guidance (see paragraphs 2.10, 4.28, 6.11 and 6.41 in the Final Guidance) and therefore the CMA has not made further changes in response to this point.

8.18 The CMA has not made changes in the Final Guidance to address both explicit and implied elements to the contracts such as matching the description of what is being provided in the contract as it considers that this pertains to the consumer's statutory rights discussed in Chapter 3 of the Draft (and Final) Guidance on which the Government has published separate guidance.[14] Inconsistency between marketing or sales claims and the terms, could give rise to an unfair commercial practice under Chapter 1 of Part 4 of the DMCC Act. See the CMA's guidance on Unfair commercial practices.

Chapter 3

Summary of responses

8.19 One respondent proposed addressing the position where goods are left on doorsteps, in bins or gardens in the commentary on liability of risk for deliveries in paragraph 3.7 of the Draft Guidance.

The CMA's views

8.20 The Draft Guidance already cited section 29 of the Act that provides for the goods to remain at the trader's risk until they come into the physical possession of the consumer or a person identified by the consumer. Therefore, the CMA has not made any changes to the Final Guidance in response to this point.

[14] Consumer Rights Act: Goods - Guidance for Business
Consumer Rights Act: Digital Content - Guidance for Business
Consumer Rights Act: Services - Guidance for Business

Chapter 4

Summary of responses

8.21 Two respondents commented on this chapter. One respondent asked for the Draft Guidance to include additional advice on complying with the transparency requirement, specifically in relation to how consumers should be given the opportunity to examine and understand terms in contracts made over the phone and where there is no legal requirement for a 14-day cooling off period. Another respondent said the Draft Guidance should make clearer that transparency is about consumers understanding how a term affects them, rather than whether the wording simply appears clear and to provide examples that demonstrate that distinction.

The CMA's views

8.22 As the transparency requirement under the Act only applies to written terms, the CMA has not added detail in the Final Guidance on how traders should ensure that consumers examine and understand terms of contracts made over the phone. Nevertheless, terms communicated over the phone still need to be fair and should follow the principles for achieving fairness set out in the guidance, including ensuring that consumers have a real opportunity to become acquainted with and understand in practice what they are agreeing to before becoming bound (see amended paragraphs 6.5 and 6.6 in the Final Guidance). Note that for distance contracts, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 also apply to contracts made over the phone.

8.23 The CMA has included an example in the Final Guidance to illustrate the difference between a term being readable and its practical effects being comprehensible – see paragraph 4.34 of the Final guidance.

Chapter 5

Summary of responses

8.24 Four respondents commented on the core exemption. Three respondents considered that the Draft Guidance adopts a narrower interpretation of the core exemption than the Previous Guidance, limiting the exemption to essential exchange terms and excluding many familiar fees, such as administrative charges or processing fees, from the exemption altogether. They considered that this would result in legitimate commercial practices being categorised as unlawful. Respondents stated that the Draft Guidance:

- should reflect their view that UK courts are no longer bound by narrower CJEU approaches, and
- should provide clearer safe harbours and examples of acceptable pricing structures, including transparent and prominent administrative fees, standard charges, and widely understood commercial pricing arrangements.

8.25 One respondent stated that the Draft Guidance should acknowledge the fact-sensitive nature of assessing whether a term counts as the main subject matter of the contract for the purposes of the core exemption, referencing *Van Hove*.[15]

The CMA's views

8.26 The CMA considers that the interpretation of the core exemption set out in the Draft Guidance is in accordance with pre-EU Exit case law. As set out in the Draft Technical Note, the Act is to be interpreted in accordance with that case law, except if relevant courts expressly depart from it. Given this position, the CMA has not made changes to the Final Guidance or Final Technical Note in respect of the treatment of the core exemption under applicable case law.

8.27 Importantly, it is possible that a term is assessed for fairness because the core exemption is given a restrictive interpretation but is found not to be unfair because it does not create significant imbalance to the detriment of the consumer, contrary to the requirement of good faith. Therefore, whether a term falls within the core exemption does not determine its lawfulness.

8.28 The CMA has amended the Final Guidance to acknowledge that whether a term counts as the main subject matter of the contract should be assessed on a case-by-case basis having regard to the nature, general scheme and the stipulations of the contractual framework of which it forms part and to its legal and factual context, in line with *Van Hove*. See paragraph 5.8 in the Final Guidance.

Chapter 6

Summary of responses

8.29 Comments from respondents on this chapter included:

---

[15] Case C-96/14 *Van Hove v CNP Assurances.*

- One respondent seeking clarification or making observations about several issues related to holiday accommodation contracts, including:
  - whether consumers should have an ability to vary bookings if the business can do so and how transferring responsibilities from one trader to another may typically happen,
  - trader cancellation notification obligations and consumer compensation rights,
  - suggested requirement for all holiday letting contracts to have a 48-hour window in which a consumer can cancel and receive a full refund (including any booking fee) provided that the booking is made 30 days before the holiday period is due to start.
- One respondent requesting clearer guidance on exclusive jurisdiction and choice of law terms, including clearer distinctions between the two, additional explanations and examples of terms that are unlikely or more likely to be fair, and clarification on differences between intra-UK and non-UK choice of law terms – particularly to confirm their view that intra-UK choice of law terms in receivables contracts are more likely to be fair.
- One respondent seeking clarification about whether practices discussed in Chapter 6 of the Draft Guidance are included in the 'Grey List', suggesting that otherwise readers may wrongly assume that they are.
- One respondent asking for it to be clarified that businesses should not unlawfully use internal policies to restrict consumer's statutory rights, including examples demonstrating that terms denying remedies for faulty goods are unfair and deceptive.

The CMA's views

8.30 The CMA considers that a range of points raised in respect of the holiday accommodation sector were already addressed in the Draft Guidance more generally, including:

- Paragraphs 6.71-6.76 in the Draft Guidance discussed how excessive rights for the trader could be used unfairly and how fairness is more likely to be achieved when a trader ends or withdraws from the contract (including in relation to cancellation reasons, notification and refunds),
- Paragraphs 6.60-6.62 in the Draft Guidance addressed retention of prepayments when the consumer cancels. While the CMA cannot set out prescriptive requirements for the holiday let sector specifically, these

principles may be relevant to consider in relation to the fairness of terms found in holiday let contracts (among other types of contracts).

8.31 The CMA has updated the Final Guidance to more clearly distinguish between exclusive jurisdiction and choice of law terms. In particular, it has referenced the relevant provisions in the Civil Jurisdiction and Judgments Act 1982 which govern the appropriate jurisdiction for disputes arising in consumer contracts, with an example of an unlikely and more likely to be fair term. It has also set out in more detail the rules relating to the law governing a contract, including how those apply to situations involving a choice between the laws of England and Wales, Scotland and Northern Ireland. See paragraphs 6.89 to 6.92 in the Final Guidance.

8.32 The CMA's approach to the Draft Guidance has been to de-emphasise the distinction between terms contained in the Grey List and others, given that neither are necessarily unfair, but could be, depending on the circumstances. Therefore, the CMA considers that a thematic discussion of potentially unfair terms provides more seamless and accessible guidance. However, the CMA has footnoted all the Grey List terms relevant to each thematic category of potentially unfair terms discussed in Chapter 6 of the Draft (and Final) Guidance, to provide visibility of them given their link with the core exemption (namely, any term which operates like those on the Grey List cannot be exempt from a fairness assessment).

8.33 With respect to respondents' feedback on businesses using internal policies to restrict consumer statutory rights, the CMA has updated the Final Guidance to clarify that 'Any policies that traders have about returns or rights of redress and timing for exercising those cannot override the trader's legal obligations in relation to faulty goods.' in footnote 212.

Chapter 7

Summary of responses

8.34 Five respondents commented on the enforcement of unfair contract terms law discussed in Chapter 7 of the Draft Guidance. Three respondents noted the severity of consequences (including penalties of up to 10% of global turnover) for non-compliance with the Act in light of the CMA's new powers under the DMCC Act. They argued that, given the scale of potential penalties, the Draft Guidance should provide clearer and more predictable explanations of the standards traders are expected to meet, particularly in relation to fairness, transparency and prominence. One respondent stated that they were not convinced that the Draft Guidance had adequately addressed the statutory basis on which penalties may be imposed in relation to unfair contract terms breaches.

8.35 Three respondents also commented on the CMA's approach to enforcement prioritisation. One respondent said the Draft Guidance should better explain when direct enforcement action and penalties may be pursued, including through an illustrative example. Another respondent said the Draft Guidance should explain more clearly whether factors such as the number of affected consumers and the value of contracts are relevant to decisions about enforcement action. Another respondent expressed concern that the statement at paragraph 7.10, that 'The CMA will be selective in taking enforcement cases, focusing particularly on those which have market-wide impact or precedent-setting value' could send a message to traders that enforcement will be limited in practice, and not encourage compliance.

8.36 Other comments suggested that the Draft Guidance should better reflect the role of private enforcement, including collective actions and acknowledge the role of ombudsmen and trade associations in resolving disputes and providing guidance in some sectors.

The CMA's views

8.37 The CMA acknowledges the feedback received on enforcement and recognises that stakeholders want as much clarity as feasible on when and how the CMA may take enforcement action. In line with its 4Ps framework, the CMA is committed to providing clarity on its approach and expected outcomes. The CMA has not added further information about its approach to enforcement in the Final Guidance, which intends to provide an overview of the available enforcement powers, with other guidance and statements discussing the CMA's approach to their use. The CMA has set out:

- the principles and considerations that it takes into account when deciding what enforcement action is most appropriate in its Consumer protection: enforcement guidance (CMA58),
- its enforcement approach to case selection in the CMA prioritisation principles which consist of 5 key considerations: strategic significance, impact, is the CMA best placed to act, resources and risk,
- its approach under the new consumer protection regime in The CMA's approach to direct consumer protection and various statements on progress and priorities, including the CMA Annual Plan, Consumer protection under the DMCCA: progress and priorities and Direct consumer enforcement: one year on.

8.38 The statutory basis for the CMA's direct enforcement powers, including the power to impose penalties, is contained in Part 3 of the DMCC Act. Chapter 4 of Part 3 of the DMCC Act contains the CMA's direct enforcement powers in respect of a 'relevant infringement'. Where the relevant conditions for the exercise of those powers are met, the CMA can open an investigation, give a provisional infringement notice and give a final infringement notice which may include requirement to comply with directions and/or to pay a monetary penalty.

8.39 Chapter 2 of Part 3 of the DMCC Act contains the definition of a 'relevant infringement', which must meet the criteria in section 148(1). One of the criteria is that the commercial practice in question meets the specified prohibition condition (sections 148(1)(c) and 150). Section 150(2) states that a commercial practice meets the specified prohibition condition for the purposes of section 148 as it applies for the purposes of Chapter 4 if it is in breach of an enactment listed in Schedule 16 to the DMCC Act (to the extent specified). Schedule 16 includes the following parts of the Act: Parts 1 and 2, Chapter 5 of Part 3, and Schedules 2 and 3.

8.40 As set out in paragraph 1.3 of the Draft (and Final) Guidance, it is not a guide to the private rights of individuals under the Act. Therefore, the CMA has not provided further details on the range of private enforcement and dispute resolution mechanisms available in relation to contractual issues.

Other comments

Summary of responses

8.41 One respondent recommended that a concise, practical guide for consumers be published alongside the final guidance. They considered that this would provide a roadmap to assist consumers in identifying their rights and offer a clear process for contacting relevant enforcement authorities.

8.42 Two respondents asked for clarification on how UK unfair contract terms law, the Final Guidance and the Final Technical note apply to traders outside the UK selling to or targeting UK consumers.

The CMA's views

8.43 The CMA does not generally publish practical guides for consumers but will keep the case for doing so under review. Consumers may wish to consult the CMA's Help for consumers webpage to find out where they can get help with their issues (including in relation to whether terms in contracts they have entered into, or may enter into, are fair).

8.44 The CMA has updated the Final Guidance to address how, depending on the facts, Part 2 of the Act may apply to traders outside the UK selling to or targeting UK consumers. See:

- paragraph 2.16 in the Final Guidance which sets out that section 74 of the Act governs whether Part 2 of the Act will apply to contracts applying law of a country other than the UK.

- paragraph 7.19 in the Final Guidance which sets out when the enforcement powers in Part 3 of the DMCC Act may also apply to commercial practices occurring as part of activities directed to consumers in the UK by any means.

9. List of respondents

1. Amplified Global
2. Anonymous 1
3. Business Consumer Coordination Group
4. British Retail Consortium (BRC)
5. Chartered Trading Standards Institute (CTSI)
6. Individual 1
7. Individual 2
8. Mitsubishi HC Capital UK
9. Shepherd and Wedderburn LLP
10. Society of Motor Manufacturers and Traders (SMMT)
11. Which?