Unfair contract terms

CMA37

Guidance on the unfair contract terms provisions in the Consumer Rights Act 2015

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1. Overview

1.1 The Consumer Rights Act 2015[1] (the Act) sets out consumer rights when purchasing goods, digital content and services. The focus of this guidance is on the provisions in Part 2 of the Act, which protect consumers from unfair contract terms and notices used between businesses and consumers. These provisions are relevant to contracts entered into, and relevant notices issued, on or after 1 October 2015 in any part of the United Kingdom (UK).

1.2 The Competition and Markets Authority[2] (CMA) has primary responsibility for the enforcement of unfair contract terms legislation and for providing guidance for businesses in this area of law.[3] This guidance aims to help businesses, referred to in the Act as 'traders', to comply with unfair contract terms law.[4] It will also be of use to advisers and enforcers in understanding what contract terms and notices cannot be used by traders and/or may be unfair to consumers.

1.3 This guidance may also assist consumers considering whether terms in contracts they have entered into, or may enter into, are fair. But this is not a guide to the private rights of individuals under the Act. If you are involved in a contractual dispute with a trader, you should seek independent legal advice or advice from the relevant consumer advice organisation in your area.[5]

1.4 This guidance explains how unfair contract terms law may apply in practice. It is not a substitute for, or definitive interpretation of, the law and should be read in conjunction with it. The examples used in the guidance are non-exhaustive. 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. In specific sectors with their own

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[1] Consumer Rights Act 2015.
[2] The CMA is the UK's primary competition and consumer enforcement body. It helps people, businesses 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.
[3] The CMA was given this lead responsibility in 2012 as part of the outcome of the Government's consultation on reforming the provision of consumer protection information, advice, education, representation and enforcement. More information can be found here: Empowering and protecting consumers - GOV.UK. Chapter 7 of this guidance provides further details about the enforcement powers of the CMA and others in relation to unfair contract terms law.
[4] In this guidance, the words 'trader', 'business' and 'supplier' are from time to time used interchangeably, but with the same meaning.
[5] Consumer advice - GOV.UK.

regulatory authorities, traders should consider the views of those authorities as to how unfair contract terms law applies to issues within their remit.[6]

1.5 The CMA will have regard to this guidance when it exercises its direct consumer enforcement powers under Chapter 4 of Part 3 of the Digital Markets, Competition and Consumers (DMCC) Act 2024 in respect of unfair contract terms law. However, a determination by the CMA of whether a term or notice is unlawful will be made on a case-by-case basis and depending on the facts at hand.

What does the Act apply to?



1.6 The unfair contract terms provisions in the Act apply to any terms, written or not, contained in contracts used by traders with consumers, whether those terms are individually negotiated or in standard form. They also apply to the wording of any written or verbal announcements or other communications, namely 'notices', intended to be seen or heard by a consumer.

1.7 Chapter 2 of this guidance explains core concepts of the Act – 'consumer', 'average consumer', 'trader', 'consumer contract', 'term', 'consumer notice', 'fairness' and 'transparency'.

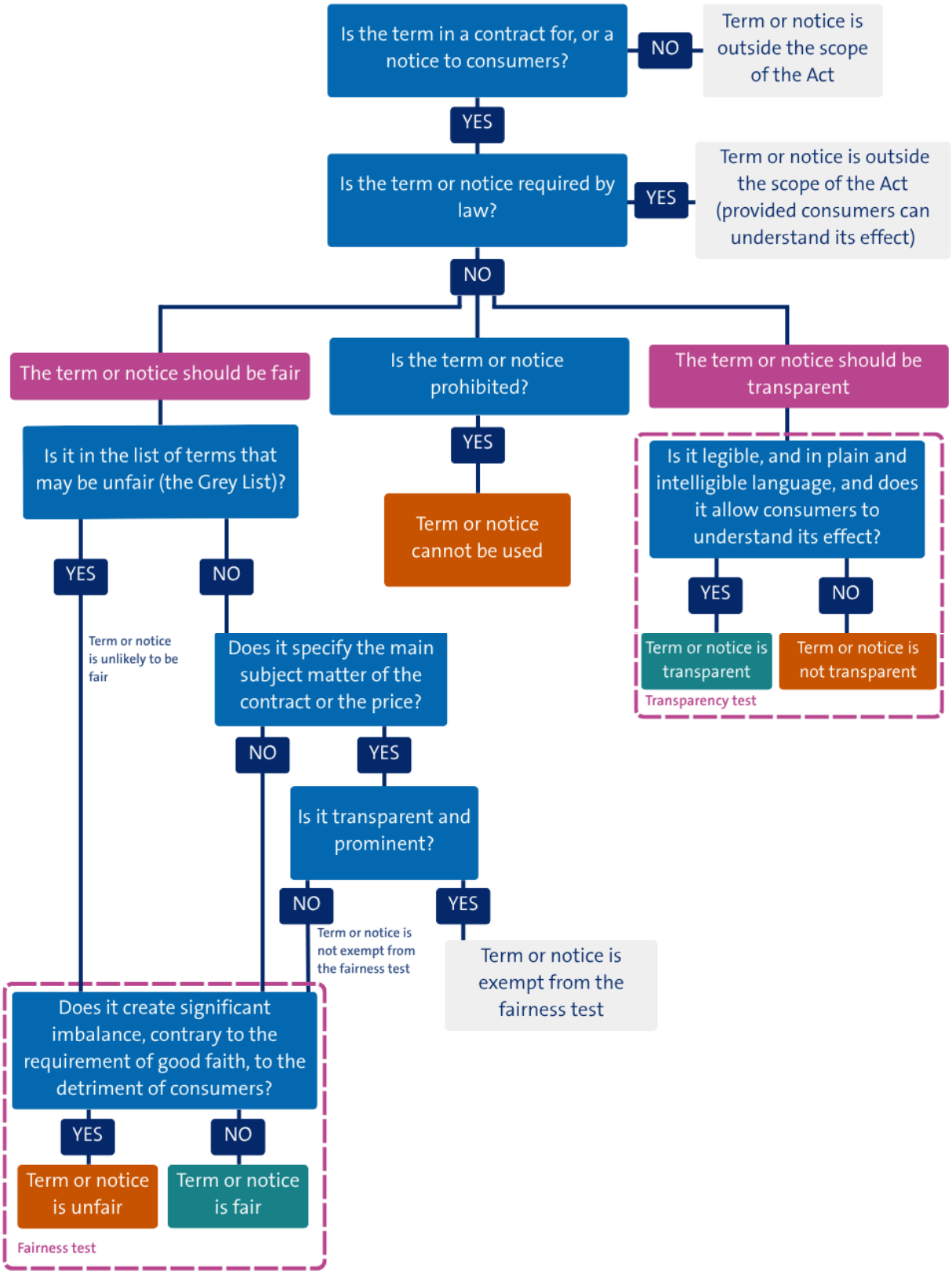
How does the Act work?



1.8 The flowchart below provides a simplified overview of the unfair contract terms provisions in Part 2 of the Act. It 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. It is not a substitute for legal advice.

[6] For further information on how the CMA works in partnership with other agencies see the CMA's Consumer protection: enforcement guidance (CMA58). Neither Part 2 of the Act nor this 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.

Figure 1: Flowchart for how the Act works



1.9 See:

- Chapter 3 for details on what rights and remedies consumers are legally entitled to, and what associated and other terms and notices are prohibited,[7]
- Chapter 4 for details on the fairness and transparency assessment of terms and notices,
- Chapter 5 for the exemptions from the fairness assessment,
- Chapter 6 for explanation and examples of potentially unfair terms, such as:
  - 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,
  - dispute resolution terms.

What happens if terms and notices do not comply with the Act?



1.10 The CMA and other authorities can take enforcement action to stop the use of terms or notices which:

- are prohibited,
- they consider to be unfair, or
- they consider to be in breach of the transparency requirement (even where they do not consider them to be unfair).

[7] Such prohibited terms and notices have also been known as 'blacklisted' given they are unsuitable for use with consumers in any circumstances.

1.11 The CMA and other relevant bodies can take enforcement action against unlawful terms and notices through court-based enforcement[8] and, in the case of the CMA, through direct enforcement. Traders who use such terms and notices may get a penalty of up to 10% of their business' global turnover or £300,000 (whichever is greater). See Chapter 7 for details on the effect and enforcement of unlawful terms and notices.

1.12 Unfair and prohibited terms and notices are not binding on consumers, which means traders cannot rely on those terms, and may have to repay money paid by consumers under such terms. Traders remain otherwise bound by their contracts.

What other relevant legislation must traders comply with?



1.13 In cases involving contract terms and notices, the general law of contract and other legislation are also applicable alongside the Act. In particular, traders should ensure they understand and comply with:

- the unfair commercial practices provisions in Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers (DMCC) Act 2024.[9] These provisions cover marketing and other trader activity that has an impact on consumers before and at the time they agree to any contract terms, and their treatment following any purchases they make. 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. More details can be found in the CMA's Unfair commercial practices guidance (CMA207) and the technical note.

[8] The following enforcement authorities can take injunctive action in relation to unlawful terms and notices under Schedule 3 to the Act: the CMA; the Department of Enterprise, Trade and Investment in Northern Ireland, a local weights and measures authority in Great Britain; the Financial Conduct Authority; the Office of Communications; the Information Commissioner; the Gas and Electricity Markets Authority; the Water Services Regulation; Authority; the Office of Rail and Road; the Northern Ireland Authority for Utility Regulation; or the Consumers' Association. The following enforcement authorities can also take enforcement action in relation to unlawful terms and notices under Chapter 3 of Part 3 of the DMCC Act: the CMA; every local weights and measures authority in Great Britian; the Department for the Economy in Northern Ireland; the Civil Aviation Authority; the Financial Conduct Authority; the Gas and Electricity Markets Authority; the Department of Health in Northern Ireland; the Department for Infrastructure in Northern Ireland; the Northern Ireland Authority for Utility Regulation; an enforcement authority within the meaning of section 120(15) of the Communications Act 2003 (regulation of premium rate services); the Information Commissioner; the Maritime and Coastguard Agency; the Office of Communications; the Office of Rail and Road; the Office for the Traffic Commissioner; the Secretary of State; the Water Services Regulation Authority; and the Consumers' Association.

[9] Digital Markets, Competition and Consumers Act 2024.

- the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs)[10] which, among other things, require traders to provide certain pre-contract information to consumers in contracts covered by the Regulations,[11] and to do so 'in a clear and comprehensible manner'.

1.14 Further information on other legislation particularly relevant to unfair terms can be found in the technical note. Traders also must abide by other consumer protection measures. General and sector-specific consumer protection guidance for businesses can be found on the CMA's webpages.

[10] The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).
[11] A number of contracts are excluded from the Regulations including financial services (albeit in certain circumstances they will be affected by other parts of the Regulations) and rental accommodation for residential purposes.

2. Key concepts

Summary at a glance

The provisions of the Act use the following core concepts, namely:

- **Consumer:** an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.
- **Average consumer:** a consumer who is reasonably well informed, observant and circumspect.
- **Trader:** a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf. This includes both natural persons (such as sole traders) and legal persons (such as companies or not-for-profit organisations).
- **Consumer contract:** a contract between a trader and a consumer, excluding employment and apprenticeship contracts.
- **Consumer notice:** includes an announcement or other communication, written or not, which it is reasonable to assume is intended to be seen or heard by a consumer, such as a sign on display in a shop.
- **Unfair terms and notices** are weighted against the consumer to their detriment and go against the requirement for traders to deal with consumers in good faith.
- Terms and notices are **transparent** if they are clear and enable the consumer to make informed choices.

2.1 Part 2 of the Act applies to terms in contracts[12] between traders and consumers and certain consumer notices.[13] It applies in the context of all kinds of sales involving consumers, including sales of goods, digital content and services. The concepts discussed in this chapter set out what and whose activities are in scope of the Act.

[12] Section 61(1) of the Act.
[13] Section 61(4) of the Act.

Who counts as a consumer?

2.2 A consumer is **'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'** in the context of the contract in question.[14] This means that a consumer is a natural person rather than a legally incorporated organisation such as a company. The Act's protection for consumers does not apply to small and micro businesses while they are engaging in business activities.[15]

2.3 A person may be in business when entering into some contracts, but a consumer when entering into other contracts. The words 'wholly or mainly' in the definition of consumer mean that an individual is still a consumer when acting for dual purposes (a consumer purpose and a business purpose) as long as the consumer purpose is the main purpose. This means, for example, that:[16]

- a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer under the contract to buy the kettle.
- conversely, a sole trader that operates from a private dwelling who buys a printer of which 95% of the use is for the purposes of the business, is not likely to be a consumer under the contract to buy the printer.

2.4 The fact that someone hopes to make money from a transaction does not necessarily mean they are a trader for the purpose of the Act. If a trader claims that an individual was not acting as a consumer, the trader has to prove this.[17]

Who counts as an average consumer?

2.5 The average consumer is a **'consumer who is reasonably well informed, observant and circumspect'**.[18] This is an objective standard, not dependent on the characteristics or perceptions of any individual or group of individuals.

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[14] Section 2(3) of the Act.
[15] Paragraph 36 of the Act's explanatory notes.
[16] Paragraph 36 of the Act's explanatory notes.
[17] Section 2(4) of the Act.
[18] This is the definition under section 64(5) of the Act for the purposes of assessing whether a term is prominent. It is also the same definition used by the Court of Justice of the European Union (CJEU) in applicable case law assessing transparency.

2.6 The nature of the average consumer is context-specific and can change depending on the situation and contract in question.[19] This is because contracts vary in complexity and financial significance, so the attention and understanding expected of the average consumer will differ between contracts and the category of goods or services in question.[20] The variable nature of the average consumer can be illustrated by reference to a case involving the sale of loans with a linked insurance contract as part of a single transaction. It was found that the average consumer in that case 'cannot be required … to have the same vigilance' as regards the insurance element of the transaction as he [sic] would if he [sic] had entered into it separately.[21]

2.7 The average consumer is the standard by which to assess transparency and prominence.[22] See Chapter 4 and Chapter 5.

Who counts as a trader?



2.8 A trader is **'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'**.[23]

2.9 'Business' is defined broadly and includes **'the activities of any government department or local or public authority'**,[24] for example charging a fee to get a passport or renew a driving licence.

2.10 The concept of 'trader' is defined broadly and includes both natural persons (such as sole traders) and legal persons (such as companies). The definition of 'trader' also includes those acting in their own capacity or through another person acting in the trader's name or on the trader's behalf, such as a trader's employees, agents, subcontractors, representatives or other associates.

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[19] See *Eternity Sky Investments Ltd v Zhang* (CMA intervening) [2024] EWCA Civ 630, at paragraph 115.
[20] See Joined Cases T-183/02 and T-184/02 *El Corte Inglés v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2004] ECR II-965, at paragraph 68.
[21] See Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, at paragraph 48.
[22] See *Eternity Sky Investments Ltd v Zhang* (CMA intervening) [2024] EWCA Civ 630, at paragraph 39, applying Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, at paragraph 74, which confirms that the standard of the average consumer is the correct standard to apply when assessing if a contract term is transparent.
[23] Section 2(2) of the Act.
[24] Section 2(7) of the Act.

2.11 Not-for-profit organisations, such as charities, mutuals and cooperatives, also come within the definition of a trader. For example, if a charity shop sells t-shirts or mugs, they would be acting as a trader.[25]

2.12 Whether a person is a trader is assessed on a case-by-case basis. When deciding if a person is acting as a trader, a number of factors are likely to be relevant. These include:

- whether the activity is their regular commercial activity or is otherwise being carried out for profit,
- the number and frequency of transactions, and
- the time between the purchase and sale of products.

2.13 A person may be a trader in some transactions and a consumer in other transactions. For example, someone who purchases items to resell them would be likely to fall within the definition of 'trader'. An individual person selling unwanted goods on the internet from time to time would not be likely to fall within this definition.[26]

What is a consumer contract?



2.14 A consumer contract is one between a trader and a consumer, excluding employment and apprenticeship contracts given those are subject to employment law.[27] Consumer contracts can be written or verbal legally binding agreements.

2.15 Part 2 of the Act applies to contracts agreed in addition to the main contract, whether or not they are contracts between a trader and a consumer.[28] This provides additional protection for consumers, by ensuring that any agreements made after, before or in addition to the signing of a contract are also covered.[29]

2.16 Where a contract has a close connection with the UK, Part 2 of the Act applies even if the contract states that the parties agree that it is to be

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[25] Paragraph 35 of the Act's explanatory notes.
[26] There are different rules for who counts as a trader in relation to consumer protection law and other areas of law, such as tax law. This guidance does not affect other applicable legislation and guidance.
[27] Section 61(2) of the Act.
[28] Section 72 of the Act. This provision does not apply if the secondary contract is a settlement of a claim arising under the main contract. It also does not apply to notices.
[29] Paragraph 342 of the Act's explanatory notes.

governed by the law of another country.[30] There is likely to be a close connection to the UK where:

- the contract has resulted from the trader directing commercial activities to consumers in the UK,[31]
- the contract is otherwise concluded or performed in the UK (for example the product is delivered to the consumer in the UK), or
- the impact of enforcement of the contract will be felt substantially in the UK.[32]

The place of residence of the consumer may be relevant, but it is not determinative.[33]

What is a contract term?

2.17 Part 2 of the Act applies to all consumer contract terms, including those that have been individually negotiated by the consumer and trader, not just to those contained in standard form contracts.

2.18 A term is a provision in a contract that creates or relates to the rights and obligations of the trader or the consumer. Terms can be:

- express, meaning they are stated explicitly, whether in writing or verbally, such as what goods the trader is selling to the consumer; or
- implied, meaning they are treated as incorporated in the contract by law or custom, such as the implicit requirement for traders to supply goods of satisfactory quality.

2.19 A term is not limited to what is said in a particular numbered clause or paragraph in the contract.[34] Rather, a term is comprised of all the provisions

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[30] Section 74 of the Act.
[31] *Soleymani v Nifty Gateway LLC* (CMA intervening) [2022] EWCA Civ 1297, at paragraphs 136–139. In *Payward, Inc. and other companies v Chechetkin* [2023] EWHC 1780 (Comm), at paragraph 127, there was a close connection where a UK national, domiciled in England, entered into a contract with a company incorporated in England, for services that were paid for in UK sterling and paid for under transactions to and from English bank accounts.
[32] *Eternity Sky Investments Ltd v Zhang (CMA intervening)* [2024] EWCA Civ 630, at paragraph 92 and *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm), at paragraph 107.
[33] *Eternity Sky Investments Ltd v Zhang (CMA intervening)* [2024] EWCA Civ 630, at paragraph 95. See also *Payward, Inc. and other companies v Chechetkin* [2023] EWHC 1780 (Comm), at paragraph 127, where the nationality of the consumer was referred to as relevant factor.
[34] See *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraphs 67–69.

in the contract documents which give rise to a particular obligation or right. It does not matter whether the obligation or right is found in a single clause, part of a clause or various paragraphs of the contract documents.

What is a consumer notice?



2.20 A consumer notice is a notice that **'relates to rights or obligations between a trader and a consumer'**, or a notice which appears **'to exclude or restrict a trader's liability to a consumer'**.[35] It includes an announcement or other communication, in writing or otherwise, that it can be reasonable to assume is intended to be seen or heard by a consumer.[36] As with contracts, notices that relate to employment relationships are excluded.[37]

2.21 Examples of consumer notices may include:

- a notice on a till setting out a customer's refund rights,
- a sign in a car park setting out how customers must pay for parking,
- a list of rules inside a swimming pool or gym setting out how customers are expected to behave,
- a notice on a till or a banner on the 'sale' page of a website setting out a promotion for a discounted item which carries certain returns conditions,
- software and other digital products sold to consumers subject to End User Licence Agreements (EULAs).[38]

2.22 Consumer notices also need to be fair and transparent. This means that, in a broad sense, any wording directed by traders to consumers which has a similar effect to that of a potentially unfair contract term can be addressed in the same way as a term. Non-contractual consumer notices do not include an exchange of something in return for something else of value (known as 'consideration') as a contract does.[39]

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[35] Section 61(4) of the Act.
[36] Section 61(6) of the Act.
[37] Section 61(5) of the Act.
[38] For legal purposes, the terms of EULAs may not in all cases be part of the contract with the consumer. The effect of the Act is to establish that, even if they are not, they are still assessable for fairness and transparency, as consumer notices. See paragraph 296 of the Act's explanatory notes.
[39] Paragraph 295 of the Act's explanatory notes.

2.23 This guidance covers both contract terms and consumer notices.[40]

What is an unfair term or notice?



2.24 A term of a contract or notice is unfair **'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations' to the detriment of the consumer**.[41]

2.25 This guidance uses 'fairness assessment' to refer to the legal test used to determine if a term or notice is unfair within the meaning of the Act.

2.26 Broadly, terms and notices are more likely to pass the fairness assessment if they are drafted and presented in a way that respects consumers' legitimate interests. See Chapter 4 for details on how fairness is assessed.

2.27 The Act includes an indicative and non-exhaustive list of terms that may be unfair. See Chapter 6 for explanation and examples of potentially unfair terms. This indicative list, referred to below as the 'Grey List', does not apply to notices. However, since the fairness provisions under the Act apply to terms and notices in largely the same way, the Grey List can also illustrate the forms that unfairness can take in non-contractual notices.

2.28 Terms that specify the main subject matter of the contract, and the appropriateness of the price payable under the contract by comparison with what is supplied, are exempt from a fairness assessment (provided terms are transparent and prominent).[42] Terms and notices that are mandatory (for example because they are required by legislation) are also exempt from a fairness assessment.[43] However, terms that work like those specified in the Grey List are always assessable for fairness. See Chapter 5 for details on these exemptions.

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[40] This guidance identifies any points that apply only to one of contract terms or notices.
[41] Section 62(4) and (6) of the Act.
[42] The exemption from the fairness assessment for terms dealing with the 'core' contractual issues such as the price does not apply to notices – see section 64 of the Act.
[43] The exemption from the fairness assessment applies to terms and notices which reflect mandatory statutory or regulatory provisions or the provisions or principles of an international convention to which the UK is a party. See section 73 of the Act.

What is the transparency requirement?

2.29 Traders **'must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent'**.[44] Written terms and notices need to be expressed in plain and intelligible language and be legible.[45]

2.30 To meet the requirement of transparency, obligations and rights should be set out fully, and in a way that is not only comprehensible but puts the consumer into a position where they can understand their practical significance and consequences.[46] See Chapter 4 for details on how transparency is assessed. This specific transparency requirement is a standalone legal obligation, though it sits alongside and reinforces the more general fairness requirement.[47] The fairness test is more likely to be met where there is transparency.

[44] Section 68(1) of the Act.
[45] Section 68(2) of the Act.
[46] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraphs 72-75. See also *R on the application of Emmet Donegan v Financial Services Compensation Scheme Ltd* [2021] EWHC 760, at paragraphs 137–139.
[47] The key role of transparency in assessing fairness was underlined in Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.,* at paragraphs 49-55.

3. Prohibited terms and notices

Summary at a glance

- Consumers are legally entitled to certain rights when traders supply them with goods, digital content or services, and to certain remedies if their rights are breached.
- Traders must comply with and not restrict the consumer's statutory rights and remedies. The Act prohibits terms in contracts that seek to override or hinder these rights and remedies.
- The Act also prohibits:
  - terms or notices that exclude or restrict liability for death or personal injury resulting from negligence,
  - terms that shift the burden of proof onto the consumer (rather than the trader) to show non-compliance with rules concerning the distance marketing of consumer financial services.

What are 'goods', 'digital content' and 'services'?



3.1 What a trader supplies to the consumer under a contract falls into one or more of the following three categories: 'goods', 'digital content' and 'services'. Where what is supplied falls within more than one category, the contract is a 'mixed contract'.

3.2 The Act defines goods as **'any tangible moveable items, but that includes water, gas, electricity if and only if they are put up for supply in a limited volume or set quantity'**.[48] This means anything physical which can be moved, hence excluding immovable property such as land or a house. However, goods can include certain utilities such as a gas cylinder, a bottle of water or a battery.[49]

[48] Section 2(8) of the Act.

[49] Paragraph 38 of the Act's explanatory notes.

3.3 Digital content means **'data which are produced and supplied in digital form'**.[50] The digital content may be contained within a physical product, as is the case with, for example, music, films, games or software contained on a CD or DVD. Alternatively, it may be supplied in a non-tangible form, such as a music download to a computer, apps on a mobile phone/tablet, or a film that is streamed.

3.4 Digital content may be supplied to consumers in different ways. Often the consumer is purchasing only the right to use digital content under the terms of a standard form licence, commonly called an end-user licence agreement (EULA).

What rights and remedies are consumers legally entitled to?



3.5 When traders supply goods, digital content and services to consumers, consumers are legally entitled to certain statutory rights.[51] Where a contract is for the supply of any combination of goods, digital content or services (a 'mixed contract'), the rights for each of those elements will apply so far as relevant.[52]

3.6 These rights can be included as specific contract terms. If they are not, the contract is read to include them – they are implied into the contract. The Act also gives consumers certain statutory remedies[53] in the event of a breach of any of these statutory rights.

3.7 Below is an overview of the rights and remedies in relation to goods, digital content and services that consumers are legally entitled to. More details can be found in the Government's guidance on the Act:

- Consumer Rights Act: Goods - Guidance for Business,
- Consumer Rights Act: Digital Content - Guidance for Business,
- Consumer Rights Act: Services - Guidance for Business.

[50] Section 2(9) of the Act.
[51] Part 1 of the Act.
[52] Sections 1(4)-(6) of the Act and paragraph 32 of the Act's explanatory notes.
[53] While preserving most legal remedies available to consumers other than through the Act.

Goods

3.8 Consumers are entitled to and traders must comply with and not restrict the following rights under contracts for the supply of goods:[54]

- goods must be of satisfactory quality,[55]
- goods must be fit for their purpose, including any particular purpose the consumer made known to the seller before the contract,[56]
- goods must match the description given to them by the trader (for example when marketing them)[57] and any sample[58] or model[59] by reference to which they were supplied,
- the contract must be consistent with certain information that must be provided before the contract is made,[60]
- goods must be installed correctly (where goods are installed by the supplier or under their responsibility),[61]
- where goods are an item including digital content, the digital content must conform with the rights under the Act in relation to digital content,[62]
- the trader must have the right to supply the goods,[63]
- the trader must deliver the goods to the consumer unless otherwise agreed and do so without undue delay. The trader must deliver the goods to the consumer within 30 days of contract if no time is agreed for delivery.[64]

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[54] These rights apply to all consumer contracts for goods, whether the goods are supplied by sale, hire, hire-purchase or in any other way, provided the consumer pays for them, or gives something else in exchange.
[55] Section 9 of the Act.
[56] Section 10 of the Act.
[57] Section 11 of the Act.
[58] Section 13 of the Act.
[59] Section 14 of the Act.
[60] Section 12 of the Act. Where regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) requires the trader to provide information to the consumer before the contract becomes binding, any of that information is treated as included as a term of the contract. See section 9 of the Consumer Rights Act: Goods - Guidance for Business for a summary of this required information.
[61] Section 15 of the Act.
[62] Section 16 of the Act.
[63] Section 17 of the Act.
[64] Section 28 of the Act.

- goods remain at the trader's risk until they are delivered to the consumer or someone else that the consumer requests them to be delivered to. Where a carrier has been arranged by the trader the trader remains responsible for them.[65]

3.9 Consumers are legally entitled to a range of specific remedies if these rights are breached, set out in Table 1 below.

Table 1 – Statutory rights and remedies in contracts for the supply of goods

Rights	Remedy for breach
• Goods to be of satisfactory quality • Goods to be fit for particular purpose • Goods to be as described • Goods to match a sample • Goods to match a model seen or examined • Goods not conforming to contract if digital content does not conform • Correct installation of goods by trader or under trader's responsibility (but there is no short-term right to reject) • Trader to have right to sell or transfer the goods or to transfer possession (only the right to reject applies)	• Short-term right to reject[66] • Right to repair or replacement[67] • Right to a price reduction or final right to reject[68] • Other remedies available in law (but note that there is no right to terminate the contract except as indicated above)[69]

[65] Section 29 of the Act. The Act provides that where goods are delivered to a carrier who (a) is commissioned by the consumer to deliver the goods, and (b) is not a carrier the trader named as an option for the consumer, the goods are at the consumer's risk on and after delivery to the carrier. However, this does not affect any liability of that carrier to the consumer in respect of the goods.
[66] Section 19(3) of the Act.
[67] Section 19(3) of the Act.
[68] Section 19(3) of the Act.
[69] Section 19(11) makes clear that these could include (where appropriate): damages (monetary compensation), specific performance/specific implement (a court order requiring the business to fulfil its contractual obligations), and relying on the breach against a claim by the trader for the price.

• Conformity with contract information provided before the contract is made	• Right to recover costs incurred as a result of the breach, up to the price of the goods[70] • Other remedies available in law (but note that there is no right to terminate the contract except as indicated above)[71]
• Delivery of goods to the consumer	• Right to treat the contract as terminated in some cases or to specify a further period for delivery[72] • If further delivery period missed, right to terminate the contract[73]

Digital content

3.10 Consumers are entitled to and traders must comply with and not restrict the following rights under contracts for the supply of digital content:

- digital content must be of satisfactory quality,[74]
- digital content must be fit for a particular purpose,[75]
- digital content must match its description and must comply with certain information that has to be provided before the contract is made,[76]
- other pre-contract information (not about the digital content) that has to be provided before the contract is made is treated as an implied term of the contract,[77]
- the statutory rights of satisfactory quality, fitness and description must apply to modified digital content as they do to original digital content,[78]

[70] Section 19(5) of the Act.
[71] As above, these could include (where appropriate): damages (monetary compensation), specific performance/specific implement (a court order requiring the business to fulfil its contractual obligations), and relying on the breach against a claim by the trader for the price.
[72] Section 28(6)-28(8) of the Act.
[73] Section 28(6)-28(8) of the Act.
[74] Section 34 of the Act.
[75] Section 35 of the Act.
[76] Section 36 of the Act.
[77] Section 37 of the Act.
[78] Section 40 of the Act.

- the trader must have the right to supply the digital content.[79]

3.11 Table 2 below sets out all digital content-related remedies that consumers are legally entitled to. These are similar to the remedies for goods, but there are some differences reflecting the special nature of digital content, in particular there is no right to reject substandard digital content.

Table 2 – Statutory rights and remedies in contracts for the supply of digital content

Rights	Remedy for breach
• Digital content to be of satisfactory quality • Digital content to be fit for a particular purpose • Digital content must match its description and must comply with certain information that has to be provided before the contract is made • Statutory rights applicable to modified content	• Right to repair or replacement[80] • Right to a price reduction[81] • Other remedies available in law (but note that there is no right to terminate the contract except as indicated above)[82]
• Conformity with contract information (not about the digital content) provided before the contract is made[83]	• Right to recover costs incurred as a result of the breach up to a maximum of the contract price for the digital content or facility (but note that there is no right to terminate the contract except as indicated above)
• Trader to have the right to supply digital content	• Right to a refund[84] • Other remedies available in law (but note that there is no right to terminate the contract except as indicated above)

[79] Section 41 of the Act.
[80] Section 42(2) of the Act.
[81] Section 42(2) of the Act.
[82] Section 42(7) of the Act makes clear that these could include (where appropriate): damages (monetary compensation), specific performance/specific implement (a court order requiring the business to fulfil its contractual obligations), seeking to recover money paid where the consideration for payment of the money has failed, and relying on the breach against a claim by the trader for the price.
[83] Section 37 of the Act.
[84] Section 45 of the Act.

• Right to a remedy for damage to the consumer's device or other digital content caused by digital content (whether paid for or not) supplied under a contract	• Right to repair or compensation[85] • Right to bring a claim in civil proceedings to enforce that right[86]

Rights and remedies for digital content used through licences and for 'free'

3.12 Consumers are entitled to the statutory rights and remedies set out above where the digital content has been paid for either directly or indirectly and the terms of a consumer's licence to use digital content form part of the contract. This will typically be the case in an online transaction where the consumer is instructed to read the terms and has to click a box designed to indicate acceptance of them before going on to agree the contract.[87]

3.13 However, the rights and remedies set out above may not apply for legal reasons where licence terms do not form part of the supplier's contract with the consumer.[88] An example would be where the consumer, though able to see the licence terms, is not asked to indicate acceptance of them.[89]

3.14 In some cases, digital content may have been supplied in return for something other than money – for instance where a consumer gives the trader access to their personal data. In such cases, the consumer does not enjoy the rights and remedies set out above, except where damage has been caused by the digital content supplied.

3.15 Any consumer contract or notice used in connection with digital content, whether it is paid for or supplied free, must still meet the requirements of fairness and transparency under Part 2 of the Act. This may be of particular relevance to 'free' software that can only be used subject to the terms of a licence.

Services

3.16 Consumers are entitled to and traders must comply with and not restrict the following rights under contracts for the supply of services:

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[85] Section 46 of the Act.
[86] Note that section 42(7) does not apply in the case of the consumer's right to a remedy under section 46.
[87] Such a licence may be described as a 'click-wrap' licence.
[88] The question of whether licence terms (which the consumer does not formally accept) form part of a contract would be a matter for specialist advice taking account of the circumstances of the case.
[89] As may be the case with online 'browse wrap' licences.

- the service must be performed with reasonable care and skill,[90]
- if a trader makes statements about themselves and their services, which the consumer is likely to see, it is treated as a term of the contract,[91]
- pre-contract information that has to be provided before the contract is made is treated as an implied term of the contract,[92]
- if no price for the service has been agreed, only a reasonable price is payable,[93]
- if no time for performance has been agreed, the service must be performed within a reasonable time.[94]

3.17 Table 3 below sets out all services-related rights and remedies that consumers are legally entitled to.

Table 3 – Statutory rights and remedies in contracts for the supply of services

Rights	Remedy for breach
• Service to be performed with reasonable care and skill	• Right to require repeat performance[95] • Right to a price reduction[96] • Other remedies under general law[97] including the right to terminate the contract

[90] Section 49 of the Act.
[91] Section 50 of the Act.
[92] Section 50 of the Act.
[93] Section 51 of the Act.
[94] Section 52 of the Act.
[95] Section 54(3) of the Act.
[96] Section 54(3) of the Act.
[97] Section 54(7) of the Act makes clear that these could include (where appropriate): damages (monetary compensation), specific performance/specific implement (a court order requiring the business to fulfil its contractual obligations), relying on the breach against a claim by the trader under the contract, and exercising a right to treat the contract as terminated.

• Anything said or written about the trader or service to be treated as term of contract • Conformity with contract information provided before the contract is made	For service not performed in line with information provided about the service: • Right to repeat performance[98] • Right to a price reduction[99] For service not performed in line with information provided about the trader: • Right to a price reduction[100] Other remedies under general law[101] including the right to terminate the contract
• If no time for performance has been agreed, the service must be performed within a reasonable time	• Right to a price reduction[102] • Other remedies under general law including the right to terminate the contract.

What terms related to the supply of goods, digital content and services are prohibited?

3.18 It is prohibited for traders to include any terms in contracts for the supply of goods, digital content and services that seek to override, or to procedurally hinder consumers enforcing, any statutory rights and remedies.[103]

3.19 Some prohibitions contain specific exceptions to their scope such that if the term appears in a certain context (for example an insurance contract), it is not prohibited outright. However, just because a term falls within an exception (and is therefore not automatically prohibited) does not mean it is fair. It can still be assessed for fairness under Part 2 of the Act. This is also true of notices which have the same effect as prohibited terms, but which in most cases are not expressly prohibited.

What other terms and notices are prohibited?

3.20 The following are prohibited by the Act:

[98] Section 54(3) of the Act.
[99] Section 54(3) of the Act.
[100] Section 54(4) of the Act.
[101] Section 54(7) of the Act.
[102] Section 54(5) of the Act.
[103] Sections 31, 47 and 57 of the Act.

- terms or notices that exclude or restrict liability for death or personal injury resulting from negligence.[104] For example, if a consumer contracts with a catering company to provide a buffet lunch, and a term in that contract states that the catering company accepts no responsibility for death by food poisoning caused by their negligence, that term is prohibited.[105]

- terms in consumer financial services contracts marketed at a distance that require the consumer to prove either that: (i) a financial services provider or intermediary failed to provide the consumer with the pre-contractual information required by the Distance Marketing of Financial Services Directive; or (ii) that the consumer did not agree to enter into the contract (both of which, under the terms of the relevant law, the financial services provider is required to prove).[106]

3.21 There are other terms which are prohibited or made unenforceable by various UK laws, such as certain terms relating to arbitration and submitting to alternative dispute resolution,[107] and terms which discriminate against people with protected characteristics.[108] In addition, where legislation requires a trader to take certain steps, and sets out that it is an implied term that the trader does so, the trader should not seek to exclude that term from their contracts.[109]

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[104] Sections 65 and 66 of the Act. This prohibition does not apply in all cases – the exceptions include contracts for insurance.
[105] Paragraph 320 of the Act's explanatory notes.
[106] Sections 63(6) and (7) of the Act.
[107] See for example section 91 of the Arbitration Act 1996, relating to disputes which renders automatically unfair certain terms which bind a consumer to go to arbitration, where the sum of money in dispute does not exceed £5,000 and regulation 14B of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542).
[108] See section 142 of the Equality Act 2010 which makes any contractual or non-contractual term unenforceable against a person, 'in so far as it constitutes, promotes or provides for treatment of that person that is of a description prohibited by' the Equality Act 2010.
[109] For example, Chapter 3 of Part 4 of the DMCC Act makes it an implied term of every consumer savings scheme contract that the trader complies with the requirements of a number of the sections in that chapter. There is no provision permitting the trader to exclude those terms, and doing so would frustrate the purpose of the legislation.

4. Determining if terms and notices are fair and transparent

Summary at a glance

- The Act requires that terms and notices are fair and transparent.
- Whether a term or notice fails the fairness assessment depends on:
    - whether it creates significant imbalance to the detriment of the consumer, **and**
    - is contrary to the requirement of good faith.
- Terms and notices are transparent if they are expressed in plain and intelligible language and are legible **and** they are presented and explained in a way that enables the average consumer:
    - to understand their rights and obligations,
    - to assess how the contract will operate in practice, and
    - make informed choices about whether to enter into the contract.

The fairness assessment



4.1 To determine if a term or notice is fair, it has to be formally assessed by the appropriate authorities (for example, the court or the CMA). The elements of the fairness assessment – causing 'a significant imbalance to the detriment of the consumer' and being 'contrary to the requirement of good faith' – can overlap with each other. However, the test is cumulative, meaning that a term or notice will not be unfair if it satisfies only one of these elements. For example, it will not be unfair if it causes a significant imbalance but this is not contrary to the requirement of good faith.[110] When assessing these two

[110] For example, in *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, a term which imposed a parking charge exceeding the consumer's liability to the landowner in tort for trespass was held not to be unfair because it was not contrary to the requirement of good faith.

elements, the facts and circumstances relevant to the contract or notice in question have to be considered.

4.2 The rest of this section discusses:

- how appropriate authorities determine whether a term or notice is fair, including considering:
  - when a term or notice might cause a significant imbalance to the detriment of the consumer,
  - when a term or notice might be contrary to the requirement of good faith,
  - factors relevant to the fairness assessment.
- how, in general, traders are more likely to achieve fairness. Chapter 6 discusses in more detail particular types of potentially unfair terms and notices and how traders could make them fairer, with examples.

When might a term or notice cause a significant imbalance to the detriment of the consumer?

4.3 The concept of 'significant imbalance' requires objectively weighing the parties' rights and obligations under the term in the contract or notice. A significant imbalance occurs if a term or notice is so weighted in favour of a trader that it tilts the rights and obligations under the term or notice significantly in their favour.[111] It is an assessment of whether the particular term is imbalanced, not of the balance in the contract as a whole.

4.4 An imbalance must be practically significant,[112] but it is not necessary to prove that a term or notice has already caused or will cause actual harm for it to be unfair.[113] The fairness test is concerned with rights and duties, and therefore its focus is on potential not actual outcomes. A term may be

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[111] Per Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 17.

[112] In some cases, a term or notice may create an imbalance in the parties' rights and obligations, but it might not be a significant imbalance. See, for example, *Longley v PPB Entertainment Ltd* [2022] EWHC 977, at paragraph 102.8, where a term which excluded the consumer's right to hold the trader to a contract which had been entered into upon the basis of an error (but which would not be a void contract under the common law) was held to create an imbalance. However, the imbalance was not significant because it applied only in 'limited, defined circumstances in which, objectively viewed, such an error had occurred'.

[113] See *Spreadex v Cochrane* [2012] EWHC 1290 (Comm), at paragraph 19.

assessed for fairness if it *could* cause consumer detriment even if it is not at present being used to do so.

4.5 Significant imbalance could arise because of factors such as one or more of the following:[114]

- **Rights not being equivalent/balanced on the face of the contract.** Where the trader has rights that the consumer does not have, this is likely to create a significant imbalance – for example, if the trader can cancel or alter the contract but the consumer cannot.

- **Rights not being equivalent in practice even if they are equivalent on paper.** Significant imbalance cannot be avoided just by ensuring a merely mechanical or formal equivalence in rights and obligations. For example, it cannot be avoided by giving the same rights where in practice that right is more likely to be of benefit to the trader, or imposing the same sanctions where they are more likely in practice to fall on the consumer.

- **Placing the consumer in a legal position less favourable than ordinarily provided for by the law**.[115] This includes restricting or excluding the consumer's normal legal rights, for example by saying the consumer has no right to seek damages where the trader is at fault.

- Imposing on the consumer:

    - **disadvantageous financial burdens**, such as excessive financial sanctions on the consumer for breaching the contract. Linked to this, it should not be assumed that a reduction in the price will necessarily remove or reduce the effect of a detrimental imbalance. For example, a term allowing the trader to keep all prepayments where the consumer terminates the contract, regardless of the circumstances, could be unfair even if the overall service provided is good value for money.

    - **non-financial disadvantages**, such as a term which enables the trader to determine in a final and binding way a dispute arising between them and the consumer.

[114] This is a non-exhaustive list.

[115] See Case C-415/11 *Mohamed Aziz v Caixa D'Estalvis de Catalunya, Tarragona i Manresa*, at paragraph 68.

- **additional obligations** which are not in accordance with fair and equitable practices which prevail in the relevant field.

- **inappropriate risks that the trader is better able to bear**, such as making consumers bear the risk of damage to equipment used by the trader.

- **Small print removing or inappropriately curtailing more prominent claims**. Terms and conditions should be consistent with the marketing and sales claims and not contain surprises for the consumer.[116]

When might a term or notice be contrary to the requirement of good faith?

4.6 A term or notice is unfair if it causes a significant imbalance **'contrary to the requirement of good faith'**.[117] 'Good faith' is not a technical concept and should be understood broadly.[118] It reflects:

- a general principle of fair and open dealing and good standards of commercial morality and practice.[119] This includes how contracts and notices are drafted and presented, as well as the way in which they are negotiated.

- a consideration of consumers' legitimate interests, including how consumers behave in practice and whether the trader could reasonably assume that a well informed and well-advised customer might reasonably be expected to agree to them if they had the chance to influence terms or notices.[120]

- a consideration of traders' legitimate interests, and whether the term protects these more stringently than necessary.[121]

4.7 These elements are discussed in turn below. The purpose of the requirement of good faith is to ensure that the fairness assessment includes an overall

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[116] Where small print contains a surprising onerous term, this needs to be 'spelled out to [the consumer] in some way. In the absence of that it becomes a trap, or a time bomb.' See *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 91. See also paragraph 98, where the judge assessed terms to be 'severely camouflaged,' creating a 'risk of ambush, or time-bombs, or any other similarly graphic surprise metaphor.'
[117] Sections 62(4) and (6) of the Act.
[118] Per Lord Steyn in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 36.
[119] Per Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 17.
[120] See *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, at paragraph 108; and *Glaser KC and another v Atay* [2024] EWCA Civ 1111, at paragraph 109.
[121] For example, see *R v Hunter and another* [2021] EWCA Crim 1785, at paragraphs 163-165.

evaluation of the different interests involved. Unfair contract terms law treats consumers as presumptively weaker parties compared with traders on the basis there is an asymmetry of information and/or bargaining power in relation to terms and notices.[122] Generally therefore, acting in good faith requires that, in formulating their terms and notices, traders must take consumers' legitimate interests into account.

Openness

4.8 Openness requires that terms should be 'expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously' to the consumer.[123] Traders should not assume that consumers are able to identify terms (particularly in longer contracts) which:

- are important,
- may operate to their disadvantage, or
- would be likely to surprise them if drawn to their attention.[124]

4.9 In addition to being presented prominently and clearly, the overall effect of terms must be clear. Therefore, the contract or notice should also set out information that enables the consumer to understand and evaluate their consequences and practical significance.[125]

4.10 In practice, the approach necessary to comply with openness will overlap with steps necessary to meet the transparency requirement under the Act (see The transparency test section below).[126] While a term or notice which is not transparent is not necessarily unfair, such a term or notice is less likely to be consistent with good faith.

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[122] Per Lord Steyn in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 31.
[123] Per Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 17.
[124] See, for example, *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), and *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm), at paragraph 21.
[125] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*., at paragraphs 72-75, and *R on the application of Emmet Donegan v Financial Services Compensation Scheme Ltd* [2021] EWHC 760, at paragraphs 137–139, referring to the decision in Case C-186/16 *Ruxandra Andriciuc v Banca Românească SA*, at paragraph 45.
[126] It is important to keep in mind that the requirement for openness goes further than the test for incorporation of terms in a contract and applies even if a term is incorporated – see for example *Parker Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185, at paragraphs 5 and 51.

Fair dealing

4.11 Openness is not enough on its own, since good faith relates to the content of terms as well as the way they are expressed. Fair dealing requires that, in drafting and using terms and notices, a trader at a minimum 'should not, whether deliberately or unconsciously, take advantage' of the consumer's circumstances to their detriment.[127] Relevant circumstances may – depending on the facts of each case – include consumers':

- weaker bargaining position,
- asymmetry of information available to them compared to traders,
- lack of financial resources,
- need for the product they are buying,
- lack of experience of negotiation, and
- relative unfamiliarity with the subject matter of the contract.

4.12 An indication of lack of fair dealing is whether, if it were drawn to their attention, the typical consumer(s) would likely be surprised by a term, or if advised, their lawyer would press for its deletion.[128]

4.13 Consumers routinely take legal advice prior to entering some kinds of contracts, but having access to legal advice in relation to a contract does not necessarily make a term fair, especially where:

- the legal advice consumers get about the contract is unrelated to its fairness (for example, conveyancing), or
- the parties contract on the trader's standard terms.

4.14 Whether legal advice has been obtained by the consumer may be taken into account in the overall assessment of good faith.[129] However, consumers having legal advice does not necessarily put them on an equal footing with the trader in terms of bargaining power or level of knowledge.

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[127] Per Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 17.

[128] See *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 93.

[129] This is in line, for instance, with the approach taken in *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm), see in particular paragraphs 372–381. See also *Harrison and others v Shepherd Homes Ltd and others* [2011] EWHC 1811 (TCC), in particular paragraphs 103–123.

How consumers behave in practice

4.15 Part of the consideration of consumers' legitimate interests is understanding how consumers generally behave in practice, including their inherent biases and limitations on their ability to make assessments or choices. In particular:

- most consumers do not read standard written contracts thoroughly before making a purchase,[130,131]
- consumers tend to be strongly influenced by how things are presented,
- 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). This may lead consumers not to pay close attention to terms dealing with issues that at the time of contracting may seem to them to be remote or unlikely to arise – for example, termination or renewal fees – even when they are not in any obvious sense hidden from view.[132]

What the trader may reasonably expect consumers to agree to

4.16 A key consideration as part of assessing whether an imbalance arises contrary to the requirement of good faith is determining whether the trader, dealing fairly and equitably with the consumer, could reasonably assume that

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[130] This reflects the courts' interpretation in case law. See, for instance:

- *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 92: 'Of course the theory is that the typical consumer, and particularly the circumspect one, will read all the standard terms. But the practice is that even the circumspect one will be unlikely to do so with a great degree of attention.'
- *Eternity Sky Investments Ltd v Zhang* (CMA intervening) [2024] EWCA Civ 630, at paragraph 112: 'The judge gave the example, at one end of the spectrum, of a consumer making a modest purchase online who ticks the box confirming agreement to the trader's terms, without reading them. That is often what a consumer who is reasonably well-informed, observant and circumspect will do.'
- *Parker-Grennan v Camelot Lotteries Ltd* [2024] EWCA Civ 185, at paragraph 45: 'I do not accept that forcing a consumer to go through that exercise would make it any more likely that they would read the Terms and Conditions. Being forced to scroll through several pages of "small print" before it is possible to click the box or button accepting the terms, is more likely to cause them to become fed up and quit the website. If they were to scroll through the terms and conditions, this would be simply to reach the point at which they could accept them. In neither event would the terms and conditions actually be read.'
- *Durber v PPB Entertainment Ltd* [2025] EWHC 498 (KB), at paragraphs 90-91: 'I take into account the long-held understanding, ever since train tickets with terms on their rear, was that only a small percentage of customers will actually read the terms either in part or in full.'

[131] This is also consistent with the findings of economic research. See the Office of Fair Trading's market study on consumer understanding of contracts OFT 1312 (2011), at paragraph 2.23. See also *Improving consumer comprehension of online contractual terms and privacy policies*, (Literature review by BIT, 2019, page 5); and *Boilerplate: What Consumers Actually Think About It*, (Snyder & Mirabito, 2019).

[132] See the Office of Fair Trading's market study on consumer understanding of contracts OFT 1312 (2011), at paragraph 3.42.

the consumer would have agreed to the term concerned in individual contract negotiations.[133]

4.17 In certain cases, it may be relevant to consider whether the terms have been individually negotiated or are standard written terms. Any contention that a particular consumer has influenced the substance of a term has to be tested in the context of the circumstances existing at the time the contract was concluded and the significance of any real negotiation that has taken place. Individual consumers rarely in practice have the required knowledge and bargaining power to ensure that contractual negotiations involving them are effectively conducted on equal terms.

Whether terms go further than necessary to protect traders' legitimate interests

4.18 As explained above, the fairness assessment requires an overall evaluation of the different interests involved. Therefore, assessing good faith requires considering whether a particular term or notice is necessary for protecting or achieving the trader's legitimate interests. For example, terms that allow traders to charge reasonably for dealing with problems which arise because of the consumer's fault or misconduct, or to protect themselves from problems beyond their control, may be fair. Therefore, terms that safeguard the trader's legitimate interests can be consistent with the requirement of good faith.

4.19 For example, a term requiring the payment of a penalty for overstaying a two-hour free parking limit at a car park was found not to be contrary to the requirement of good faith. This was because the car park operator had a legitimate interest in imposing the liability – to induce users to observe the two-hour limit for free parking so that the retail park customers and other members of the public could use the available parking space for two hours for free – and because overstaying penalties are important for the efficient management of the space in the interests of users and the shops they are visiting. The amount of the charge was not higher than necessary to achieve that objective, nor was it exorbitant compared with other similar charges imposed for parking infractions. The signage was clear, the motorist could

[133] See *Eternity Sky Investments Ltd v Zhang* (CMA intervening) [2024] EWCA Civ 630, at paragraph 131, applying the position of the CJEU in Case C-415/11 *Mohamed Aziz v Caixa D'Estalvis de Catalunya, Tarragona i Manresa*, at paragraph 69.

easily avoid the charge and a parking code provided some protection for those who overstayed for a very short time.[134]

4.20 However, the fairness test is concerned with the effect terms can have, not with the intentions behind them.[135] Therefore, it is important that terms do not go beyond what is necessary to achieve the trader's legitimate interests. If the potential effect of a term goes further than is intended or necessary, the breadth of this scope may make it unfair.

Factors relevant to the fairness assessment

4.21 When deciding if a term is fair, the following factors must be taken into account:[136]

- the nature of the subject matter of the contract,
- all the circumstances existing when the term was agreed,[137]
- all the other terms of the contract, and
- all the terms of another contract on which it depends.

4.22 When deciding if a notice is fair, the following factors must be taken into account:[138]

- the nature of the subject matter of the notice,
- all the circumstances existing when the rights or obligations to which it relates arose, and
- the terms of any contract on which it depends.

4.23 This assessment requires establishing the facts and circumstances relevant to the contract or notice in question. Below are some non-exhaustive examples

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[134] See *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, at paragraphs 107 to 114. See also *R v Hunter and another* [2021] EWCA Crim 1785, at paragraph 163-6, and *Longley v PPB Entertainment Limited and others* [2022] EWHC 977 (QB), at paragraph 102.10.

[135] See, for example, *Glaser KC and another v Atay* [2024] EWCA Civ 1111, at paragraph 109.

[136] Section 62(5) of the Act.

[137] In the case of a challenge brought by an enforcement authority, this refers to the *typical* circumstances of the contract – see *The Director General of Fair Trading v First National Bank* [2001] UKHL 52, at paragraphs 20 and 33.

[138] Section 62(7) of the Act.

of such facts and circumstances; their relevance would depend on the facts of each case.

Considerations about 'the nature of the subject matter of the contract'

4.24 The assessment of fairness is generally in the context of a contract for a specific product, rather than in the abstract. This means that, for example, the complexity, necessity or other characteristics of the goods, services or digital content being provided under the contract might be relevant to consider.

4.25 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).

Considerations about 'all the circumstances existing when the term was agreed'

4.26 A term must be assessed taking account of all the circumstances existing when it was agreed. Where a challenge to a contract term is made by an enforcement authority such as the CMA, the focus will be on the typical circumstances of the contract.[139] The circumstances of the contract may include:

- **the circumstances in which the contract is concluded**, such as the specific setting or situation (for example, where a contract is signed in the presence of a representative of the trader in the consumer's home or when consumers are short of time or inclined to be distracted such as the recently bereaved) or the contract is made with consumers of a certain type (for example, young consumers who lack the benefit of experience).

- **whether the consumer was given a genuine opportunity to understand and consider the term.** This may include the ability to access the terms before signing up and whether sufficient time was provided for a meaningful assessment.

[139] Per Lord Steyn in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 33: 'the effects of contemplated or typical relationships between the contracting parties'.

- **the effects the parties contemplated at the time of agreeing the term**.[140] Fairness is assessed by reference to the circumstances that existed when the term was agreed, including those that may foreseeably give rise to an imbalance between the parties which would only manifest itself during the performance of the contract. However, the fairness assessment does not allow for a term to be treated as unfair only because of the trader's subsequent approach to applying it, where that approach was not foreseeable at the time the contract was agreed. Conversely, the trader's later restraint when enforcing an unfair term does not make the term fair.[141]

Considerations about 'all the other terms of the contract'

4.27 Fairness has to be considered in the context of the contract as a whole and all the other terms of the contract. This is because the cumulative effect of all the terms may mean that a term which by itself appears fair, is unfair in the context of the contract.[142] Conversely, this might mean, for example, that a term may not cause a significant imbalance if its effect is mitigated by another term. However, such potentially offsetting legal safeguards are unlikely to be relevant unless they are known and understood by consumers. Consumers may be unaware of, or unable in practice to rely on, protections that are found elsewhere in contractual small print or in the general law, and they are not presumed to conduct legal research, for example.

Considerations about 'all the terms of another contract on which it depends'

4.28 In certain cases, the rights and obligations of the consumer and trader under the one contract may be affected by another contract.[143] The content of dependent or interlinked contracts is likely to be relevant to the assessment of fairness. For example, where a consumer is required to enter into contract B as a condition of contract A, contract B's terms may be considered.

How are traders more likely to achieve fairness?

4.29 Broadly, terms and notices are more likely to pass the fairness assessment if they are drafted and presented in a way that respects consumers' legitimate

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[140] Section 62(5)(b) of the Act. See also Lord Bingham in *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, at paragraph 13.
[141] See Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García*, at paragraph 74.
[142] See Case C-738/19 *A v B*, *C,* at paragraph 30.
[143] See *Boyd and others v Burton Waters Moorings Ltd* [2024] EWHC 138*,* at paragraph 97.

interests and do not go further than what is necessary for traders' own legitimate interests.

4.30 While each fairness assessment will depend on the facts of the case, traders are more likely to achieve fairness of their terms and notices if they:

- do not grant the trader rights or discretion that could be used to favour them disproportionately, for example by increasing the benefits they enjoy or imposing a disadvantageous burden on the consumer.
- do not treat the consumer less favourably than they would otherwise be treated under the law.
- do not use 'small print' that might surprise consumers or undercut more prominent claims.
- do not exploit consumers' circumstances, biases and limitations to the trader's advantage when setting or presenting the parties' rights and obligations in contracts or notices.[144] Traders need to think carefully about how to communicate the substance of rights and obligations to consumers.

  Terms should be transparent so that important or surprising terms are clearly flagged and consumers can be fully informed. Where terms are likely to have a significant impact on the consumer, it is not sufficient for traders only to include these somewhere in contractual documents – especially in lengthy contracts that include many less practically important terms (see The transparency test section below).

4.31 See Chapter 6 for non-exhaustive and illustrative explanation of how a particular type of term could be unfair and could be used fairly, and examples of terms that are unlikely and more likely to be fair.

[144] See *Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch), at paragraphs 162–173.

What does transparency require?

4.33 A written consumer contract term or written consumer notice must be transparent.[145] Terms and notices must be expressed in plain and intelligible language, and if in writing, be legible.[146,147] However, while important, legibility and clarity of language are not enough to ensure compliance.[148] The transparency test requires that terms are presented and explained in a way that enables the average consumer to understand their rights and obligations, assess how the contract will operate in practice, and make informed choices about whether to enter into the contract.[149,150,151]

4.34 While a term can be grammatically simple and precise, and therefore readable, it may not be comprehensible to a consumer if its practical effects and implications cannot be understood. For example, a term which enables the trader to vary the price in a contract with a consumer 'upon reasonable notice' may seem simple, but it is difficult to understand the practical effects of this since the term does not enable the consumer to understand how much the price may increase, how often, and why.

4.35 The contract term must also be considered in the context of the surrounding information provided (or not provided) by the trader to the consumer. This is because it is important for consumers to have all the necessary information, before concluding the contract, about the terms within the contract and the consequences of entering into the contract. The information provided to the consumer, both directly within the contract and in accompanying material, is

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[145] Section 68(1) of the Act.
[146] Section 68(2) of the Act.
[147] See section 64(3) of the Act for the definition of transparency as it relates to terms.
[148] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*., at paragraph 75.
[149] Although the focus in this chapter is on standard terms, the Act's transparency test, like its fairness test, applies to all written consumer contract terms, including those that are individually negotiated.
[150] The Act's transparency requirement applies alongside other legal requirements for traders to enable consumers to make an informed choice. For instance, Chapter 1 of Part 4 of the DMCC Act prohibits business practices that mislead consumers and which are likely to cause the average consumer to take a different decision, such as buying a product they would not otherwise have bought or not exercising a legal or contractual right which they otherwise may have exercised (see technical note).
[151] The requirement for transparency goes further than the test for incorporation of terms, and applies even where terms have been properly incorporated into the contract. See for example *Parker Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185, at paragraph 5, for the distinction between incorporation and enforceability of a term.

what a consumer uses to make an informed decision about whether they wish to be bound by the terms.[152]

4.36 Transparency is assessed through the lens of the average consumer, and the following elements are likely to be considered:

- whether the average consumer is likely to understand the meaning and practical effect of the term, taking into account how the relevant market functions,
- whether there has been an opportunity for the average consumer to review all the terms of the contract before agreeing to it,
- 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.[153]

How are traders more likely to achieve transparency?

4.37 While each transparency assessment will depend on the facts of the case, traders are more likely to achieve transparency if they take as their starting point that consumers must be able to understand their rights and obligations and the practical scope and consequences of terms before entering into a contract.[154] This requires that contract terms are intelligible to the average consumer, considering the nature of the contract.

4.38 When providing information to the consumer, the trader should be careful not to assume that the average consumer has a general level of awareness of technical information about how a particular transaction or market operates, or how regulatory rules function. Therefore, where appropriate, the trader generally must provide adequate information about such details (for example, in accompanying content) to ensure the average consumer can understand the terms, their practical implications, and their relationship with other rights and obligations. This may include explaining the mechanics of the term, how the term might impact the consumer in the future if things change and spelling out the risks the consumer will face.[155]

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[152] See Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 44.
[153] See section above on how consumers behave in practice.
[154] See *Andrew Gilchrist v Govan Dental Centre* [2024] SC GLA 5, at paragraph 142.
[155] See Case C-186/16 *Ruxandra Andriciuc v Banca Românească SA*, at paragraphs 49-51.

4.39 Traders must set out clearly and transparently the reason for the term and its relationship with other terms.[156,157] For example, where a contract contains a termination term, the trader should clearly explain the nature and effect of the term and signpost any related terms – such as those setting out what fees are payable, what amounts will be refunded, or how any outstanding balance will be calculated – so that the consumer can easily understand how the terms operate together.

Plain and intelligible language

4.40 Transparency is more likely to be achieved where terms and notices:

- **use everyday words** in their normal sense.
- **do not use vague or ambiguous wording** which might mislead consumers or obscure the meaning of a term. Terms expressing concepts such as 'indemnity' and 'force majeure' may seem straightforward but can have significant implications that must be made clear to consumers. This means that traders should anticipate where terms may have consequences the average consumer would not expect and set these out in a way which they can understand, particularly for terms which are complex in nature.
- **summarise or explain the effect of references to 'statutory rights' or to legislation or regulation included in a contract in a clear and simple way.** This is because consumers rarely rely on legal advice before entering a contract, and cannot be expected to conduct their own legal research, so complex or overly technical drafting often hinders comprehension. Where consumer protection depends on the awareness of legal provisions, the trader must inform the consumer of the substance and implications of those provisions and not merely reference them.[158] Consumers must be put in a position of being able to understand the effects of legal provisions.

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[156] See 20th Recital of the European Union's Unfair Contract Terms Directive 93/13/ECC (the Directive) which the Act, as one of its principal purposes, gives effect to in the UK.
[157] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraph 75. See also Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA,* at paragraphs 73–77, and Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, at paragraphs 40–49.
[158] See Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 50.

Structure, organisation and visual presentation

4.41 Legibility is an essential part of transparency in contracts and notices. Written terms and notices must be easy to read, meaning that the font, size, colour, spacing, and background should all ensure clarity and readability. Poor quality paper, low contrast, or small print may render terms or notices effectively unreadable and therefore non-transparent.

4.42 Where contracts or notices are provided electronically, traders should also consider accessibility requirements as well as how to achieve transparency in a digital environment. This may be achieved in various ways and includes, but is not limited to[159]:

- **providing contracts or notices in multiple formats, such as HTML-based text or PDF,** to help vulnerable consumers with reading and understanding the terms of the contract.
- **ensuring digital contracts are made accessible and readable regardless of the device used to access them**, such as smartphones, computers, or tablets.
- **making terms readily and easily available at all times on the website or app**, such as by making them accessible via single click from the home page, though this alone is unlikely to be sufficient (e.g. for surprising or onerous terms). Such terms should be presented during the consumer journey, as part of the consumer's decision-making process, and clearly flagged prominently by the trader.
- **providing information about terms in smaller pieces throughout the consumer journey.** For example, through use of pop-ups or hover-over text at opportune moments, such as providing information in a pop-up which explains how terms related to personal data are used at the point at which the consumer inputs their personal information. This can help consumers engage with information at the right time, but the consumer should always have easy access to the full terms of the contract in a single place so that they are able to consider and assess

[159] While not part of this guidance and not endorsed by the CMA as guidance for compliance with Part 2 of the Act, traders may find the following helpful resources to consult in considering concrete design or drafting to boost consumer engagement and comprehension of terms and notices: the UK government's 2019 guide for businesses on how to help their customers better understand their contractual terms and privacy policies; and the British Standards Institution's guidance for organisations (paid resource) to increase consumer understanding of online terms and conditions.

all the terms of the contract together, particularly where terms are interdependent.

- **displaying key terms in a frequently asked questions (FAQ) format.** Terms could be explained using simple FAQs which can help with consumer understanding. While FAQs can be a helpful tool to assist consumer understanding, they should not become a replacement for terms in the contract, and any information presented in this format should be consistent with and not contradict the terms set out in the full contract. Where terms are surprising or onerous, the trader may not be able to rely on FAQs alone but should instead clearly flag and explain them.

4.43 Transparency depends not only on the words used but also on how the contract is structured and presented. This means that:

- **terms should be logically organised, grouped under clear and descriptive headings, and written in short, simple sentences**. Text that is densely written, heavily cross-referenced, or cluttered with statutory references and elaborate definitions is more likely to confuse the average consumer. It therefore is more likely to fail the transparency test.

- **important, onerous, or unusual terms need to be given appropriate emphasis and highlighted in any accompanying or pre-contractual literature**. This helps the consumer to quickly and easily discover surprising or complex provisions.[160] This does not mean that making all terms equally prominent is a solution. Doing so risks overwhelming consumers, reducing comprehension, and thereby undermining the effect of transparency. Instead, terms that may disadvantage the consumer, impose unexpected costs or otherwise have significant implications must be emphasised appropriately. Such terms might include fees for early termination, automatic renewals, or complex pricing arrangements. Transparency may require using headings, boxes, bold or italic text, or clear summaries highlighting key obligations or risks. However, highlighting alone is not sufficient if the underlying wording remains difficult to understand or unclear. Therefore, traders must explain these provisions and their significance.

4.44 Transparency is more likely to be achieved where:

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[160] See *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 74.

- **traders provide succinct explanatory notes, key information summaries, or other forms of accessible guidance such as FAQs which can help** to clarify the meaning and effect of important terms, being careful to avoid overburdening the consumer with information.

- **important information in contracts is shared earlier on**, in brochures and even advertisements.

Opportunity to examine and understand terms

4.45 Traders should ensure consumers are given an appropriate opportunity to read, examine and understand all the terms of a contract before agreeing to them.[161] However, there are circumstances where a contract is long or detailed, or covers technical or complex issues that need to be explained elsewhere (for example, in accompanying literature), and so would take longer to read and understand than is practically available to the consumer.

4.46 In these cases, the trader should provide key information as part of the sales process and could also provide other documentation (key summaries, explainers, FAQs etc.) to aid consumers in understanding the contract and their obligations. Traders should ensure that the most important terms are highlighted, summarised and brought to consumers' attention. It may also be appropriate to give consumers a post-contract cooling-off period with a cancellation right. This helps to mitigate potential transparency issues and allow for a reasonable time for consumers to read the terms, consider their position, and pull out if they find the agreement is not what they expected. The law requires provision of a cooling-off period in some situations.[162]

4.47 Traders should ensure that consumers have a genuine opportunity to consider the terms before the contract becomes binding – whether it is for a quick purchase or a more considered transaction – taking into account the practical context in which the agreement is made.

4.48 For example, in online purchasing environments traders should not use false time pressures – such as countdown timers or automatic removal of items from a shopping basket after a short period – where these would discourage

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[161] See the 20th Recital of the Directive.

[162] The CCRs (SI 2013/3134) require a cooling-off period where a contract is entered away from the trader's place of business or at a distance, for example by post, telephone, text messaging or internet. Chapter 2 of Part 4 of the DMCC Act provides a right to two 14-day cooling-off periods for subscription contracts: during the initial cooling-off period and during any renewal cooling-off period. See sections 264-266 of the DMCC Act for more information on cooling-off rights. Note that these provisions in the DMCC Act, at the time of publication of this guidance, are not yet in force.

consumers from reviewing terms properly. Such behaviour could also constitute an unfair commercial practice (see Unfair commercial practices guidance).

4.49 Transparency, like fairness, is not a matter of rigid requirements. Transparency requires that consumers have a real chance to learn and understand, by the time the contract becomes binding, the nature and consequences of their obligations including those whose effect might otherwise come as an unpleasant surprise. Traders need to facilitate the consumer's ability to examine and understand all the terms of the contract.

5. Exemptions from fairness assessment under the Act

Summary at a glance

- Most terms can be assessed for fairness. However, two types of terms are exempt from the fairness assessment under:
    - the 'core' exemption – those which set out the main subject matter of the contract or the price, and
    - the 'mandatory statutory or regulatory' exemption – those which are required in the contract by legal provision.
- To fall within the core exemption, terms must be transparent and prominent.

What is the core exemption?

5.1 Subject to certain requirements described below, a term may not be assessed for fairness to the extent that:

- it specifies the main subject matter of the contract, or
- the assessment would be of the appropriateness of the price payable under the contract, by comparison with the goods, digital content or services supplied.[163]

5.2 This exemption only applies to terms, not to notices. It is referred to in this guidance as the 'core exemption' because it relates to the core of the contract, meaning the 'essence of the contractual relationship'.[164] The primary purpose of Part 2 of the Act is to protect consumers from one-sided contracts that are detrimental to them due to unfair terms. Exemptions from the fairness test must therefore be 'given a restrictive interpretation' in line with this

[163] Section 64 of the Act.

[164] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraphs 49 and 50.

purpose.[165] The core exemption permits terms to be assessed for other reasons.

5.3 The core exemption is not absolute – its application is subject to terms being transparent and prominent. Only if such headline terms are transparent and prominent can consumers make meaningful comparisons between competing offers across the market and make the best choices available to them in deciding which contracts to enter.

5.4 It also cannot apply to a term that corresponds to a term in the Grey List – such terms are always fully assessable for fairness even when they are transparent and prominent.[166]

5.5 A term will not fall within the core exemption simply because it has been labelled as such by the trader in the contract.

What counts as the 'main subject matter' of the contract?

5.6 Only terms without which the contract would not be capable of existing legally fall within the main subject matter of the contract. In other words, they are terms which set out 'the essential obligations of the contract' as opposed to those which are 'ancillary'.[167]

5.7 For example, in a contract for the sale of goods, terms which describe the nature of the goods to be sold are likely to be seen as setting out essential obligations. Such terms could, provided they are transparent and prominent, fall within the core exemption. By contrast, a term describing the arrangements for delivery of the same goods would likely be considered ancillary and not fall within the exemption[168] (see also below on the 'exchange approach').

5.8 Whether a term counts as the main subject matter of the contract is fact-specific and should be assessed on a case-by-case basis having regard to

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[165] See *The Director General of Fair Trading v First National Bank* [2001] UKHL 52, at paragraph 34; see also paragraph 12. See also *Green v Petfre (Gibraltar) Ltd (trading as Betfred)* [2021] EWHC 842 (QB), at paragraph 182, *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), at paragraph 175, and *Office of Fair Trading v Abbey National* [2009] UKSC 6, at paragraph 104. See also Case C-143/13 *Matei v SC Volksbank Romania*, at paragraph 49, and Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.* at paragraph 42.

[166] This position was also recognised by the courts, see *Office of Fair Trading v Abbey National* [2009] UKSC 6, at paragraph 101.

[167] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraphs 49 and 50.

[168] See *Office of Fair Trading v Abbey National* [2009] UKSC 6, paragraph 46.

'the nature, general scheme and the stipulations of the contractual framework of which it forms part, and to its legal and factual context'.[169] Examples of what the courts have considered to constitute main subject matter, as opposed to an ancillary term, include:

- the insurer's promise under an insurance contract to provide the agreed service if the insured event occurs.[170]
- the package of services supplied under a contract for a bank current account, such as payment of cheques, ATM machines, money transmission services, and statements.[171]
- the currency term of a loan agreement denominated in a foreign currency, where the loan is both advanced and repayable in that currency.[172] Terms that set out the consequences of how exchange rate changes are managed (such as rules on repayment allocation, loan extensions, or adjustments to instalments) have been considered ancillary.[173]
- the advance for a loan and the debtor's obligation to repay it (typically with interest).[174]
- the term within a gym subscription contract which allows the consumer to become a member of the gym and use its facilities for a minimum period, and the term which requires the consumer to pay a monthly subscription fee for that same minimum period.[175]

What price-setting terms fall within the core exemption?

5.9 A price-setting term cannot be assessed for fairness if the assessment relates to the price compared to the value of the goods, digital content or services supplied in return. A term is not unfair under the Act just because a customer

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[169] See Case C-96/14 *Van Hove v CNP Assurances*, at paragraph 50.
[170] See Case C-96/14 *Van Hove v CNP Assurances*, at paragraphs 34–35.
[171] See *Office of Fair Trading v Abbey National* [2009] UKSC 6, per Lord Walker at paragraphs 39–40 and per Lord Phillips at paragraph 53.
[172] See Case C-186/16 *Ruxandra Andriciuc v Banca Românească SA,* at paragraphs 38–41. See also Case C-38/17 *GT v HS,* at paragraph 30 and (post-EU Exit) Case C-609/19 *BNP Paribas Personal Finance SA v VE,* at paragraph 35.
[173] See Case C-609/19 *BNP Paribas Personal Finance SA v VE,* at paragraph 36.
[174] See Case C-143/13 *Matei v SC Volksbank Romania,* at paragraph 54.
[175] See *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), at paragraph 152.

has made a bad bargain.[176,177] Whilst a price-setting term cannot be assessed where it relates to the level of the price compared to the value in exchange, other elements of the term, such as timing, method, or variation of payment can still be assessed for fairness.[178]

The exchange approach

5.10 To fall within the exemption, there must be something supplied to the consumer under the term, that is solely in the consumer's interests. Where a term makes a charge payable, but not in return for any separately identifiable goods, services or digital content, it is unlikely that it will fall within the core exemption, even if it is transparent and prominent.[179] To be transparent, the term must set out with sufficient precision what the particular products are that are being supplied for the fee in question. If, for example, a consumer is charged an administration fee during the performance of a contract, but no service is provided specifically to the consumer in exchange for that fee, then such an ancillary term is unlikely to fall within the exemption.[180]

5.11 Examples of payment terms which have been found not to fall within the price-setting limb of the core exemption include:

- a clause in a letting agreement entered into by a consumer landlord which required payment of sales commission to the letting agent if the landlord sold the property to the tenant, but where no selling service was offered or provided.[181]

- terms in consumer loans which impose costs other than the repayment of principal interest if those terms 'do not specify either the nature of those costs or the services which they are intended to remunerate'.[182]

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[176] See the 19th Recital of the Directive.
[177] This is distinct from any assessment of excessive pricing under the Competition Act 1998.
[178] See Case C-143/13 *Matei v SC Volksbank Romania*, at paragraphs 56 and 63. See also Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios* AG's Opinion, at paragraph 70, fn 41, and Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska SA v QJ,* at paragraph 80.
[179] See Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraph 58 and Case C-143/13 *Matei v SC Volksbank Romania*, at paragraphs 70 and 71.
[180] It is not sufficient merely to make clear that a particular fee is payable, and to include this in the total price as required by the unfair commercial practices provisions in Chapter 1 of Part 4 of the DMCC Act. These provisions are discussed further in the CMA's Price transparency guidance (CMA209).
[181] See *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), at paragraph 103.
[182] See Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska SA v QJ and BW,* at paragraph 86.

How do transparency and prominence function in relation to the core exemption?

5.12 To fall within the core exemption, terms must be both transparent and prominent. Prominence is discussed in detail below since it is a specific condition solely relevant to the core exemption. Transparency applies more broadly than the core exemption and is explained in more detail in Chapter 4.

What does transparency mean?

5.13 **Transparent** for the purpose of the core exemption has the same meaning as explained in Chapter 4 in relation to the Act's specific requirement of transparency for written terms. For the purposes of the core exemption the transparency requirement applies to both written and oral terms.[183]

5.14 As explained in more detail in Chapter 4, transparency must be understood broadly. Terms should not only be comprehensible but drafted to ensure that consumers can make an informed choice about whether to enter the contract, based on a proper understanding of the term's practical purposes. Contracts should be structured clearly and explained in accompanying literature as necessary. Consumers need to be able to see and understand terms that could disadvantage them. In relation to the core exemption, the requirement of transparency is supplemented by an additional condition of prominence.

What does prominence mean?

5.15 A relevant term is prominent **'if it is brought to the consumer's attention in such a way that an average consumer would be aware' of it**.[184] The requirements of transparency and prominence are both set by reference to the average consumer[185] and are related in other respects too. For example, a term that is concealed or hidden away is unlikely to be either transparent or prominent.

5.16 To fall within the exemption, terms need to be brought to the consumer's attention prior to the conclusion of the contract in a way that enables the average consumer to understand and appreciate the nature and effect of the

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[183] Oral terms do not (for obvious reasons) have to be legible.
[184] Section 64(4) of the Act.
[185] See Chapter 2. The average consumer is explicitly referred to in section 64(4) and (5) of the Act in relation to prominence. However, the courts have confirmed that the average consumer is the correct standard by which to assess transparency too. For example, see *Eternity Sky Investments Ltd v Zhang* (CMA intervening) [2024] EWCA Civ 630, at paragraph 39, applying Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraph 74.

term, so that they can make a properly informed decision about the product on offer.

5.17 Determining whether a term is prominent may include considering one or more of the following:

- **all the information given to the consumer prior to the conclusion of the contract.** This includes information that explains the parties' rights and obligations under the contract (for example, leaflets, summaries of key information documents or upfront information on the website), and the content of terms and conditions and the way they are communicated to the consumer at the pre-contract stage. It is relevant, for example, how the terms and conditions are made available, their structure and length. If a term is not flagged up in the accompanying literature this could indicate that it lacks prominence.

- **the nature of the term and how it relates to the other terms of the contract** (and of other contracts, if there are more than one). A term which is objectively straightforward to understand may be more easily made prominent than one which is complex or relies on words defined elsewhere.

- **relevant aspects of the sales process leading up to the conclusion of the contract**, including the content and nature of the trader's advertising materials, as well as what the trader or their sales representatives say or are instructed to say to customers.

- **what will have been the average consumer's reasonable expectations** when deciding whether to enter the contract.[186] However, a term cannot be treated as prominent because some consumers might be aware of it from their general knowledge.[187]

How are traders more likely to achieve prominence?

5.18 Prominence requires the term to be brought to the consumer's attention, which suggests actively highlighting and flagging these. The extent of highlighting required in practice is likely to relate to how onerous or surprising the term is.

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[186] As to the importance of reasonable expectations, see the Law Commission's Issues paper, '*Unfair Terms in Consumer Contracts: a new approach?*', at paragraph 8.72.

[187] See Case C-565/21 *Caixabank SA v X*, at paragraph 41, and Case C-300/23 *NB v Kutxabank SA*, at paragraphs 80–84.

5.19 A term that is potentially surprising or particularly onerous is likely to require greater prominence. For example, a term which requires the consumer to pay disproportionate or surprising charges if a future unexpected event occurs is likely to require particular flagging. When considering the level of prominence needed, traders should consider:

- the likely reasonable expectations of the average consumer when it comes to their obligations and liabilities when entering the contract,
- whether the charge is disproportionately high or unusual compared to the charges imposed by terms of similar types of contract, and
- the subject matter of the contract (for example, whether the charge is proportionate in relation to the nature and value of the contract).

5.20 It is not enough to make a term prominent in a merely formalistic way. To decide whether a term falls within the core exemption based on prominence requires considering:

- whether any such formal prominence is likely to be practically effective; and, if it is,
- whether the degree of prominence achieved is, in all circumstances, sufficient to bring it to the consumer's attention in such a way that an average consumer would be aware of the term.

5.21 Through their terms and sales processes, traders need to ensure that the average consumer can make informed purchasing decisions. In practice, this means that traders should ensure that consumers have clear, accessible information about the key features and implications of the contract before they agree to it and actively make efforts to make consumers aware of them. This may include:

- providing explanatory materials, FAQs or summaries of key terms,
- highlighting any significant or unusual provisions during the sales process,
- allowing sufficient time for consumers to review the contract, and
- ensuring that staff or online interfaces can explain terms simply and clearly.

5.22 It may not be possible for all terms to be given the prominence necessary to enable them to fall within the core exemption.[188] For example, where there are numerous charges for various services under the contract, which will or might be payable depending on the choices of the consumer or external events.

5.23 Prominence cannot be achieved in such cases simply by bringing all the terms in question to the consumer's attention in the same way. Any single approach to highlighting is likely to lose its effectiveness when applied to more than a small number of terms. Where a contract includes many terms which potentially fall within the core exemption, which may therefore make it difficult to give sufficient prominence to all of the terms, the prominence requirement still applies, and the standard of prominence remains the same. The requirement to achieve prominence still applies even where it may be difficult to achieve in practice – for example, where the medium of communication used is a very small screen.

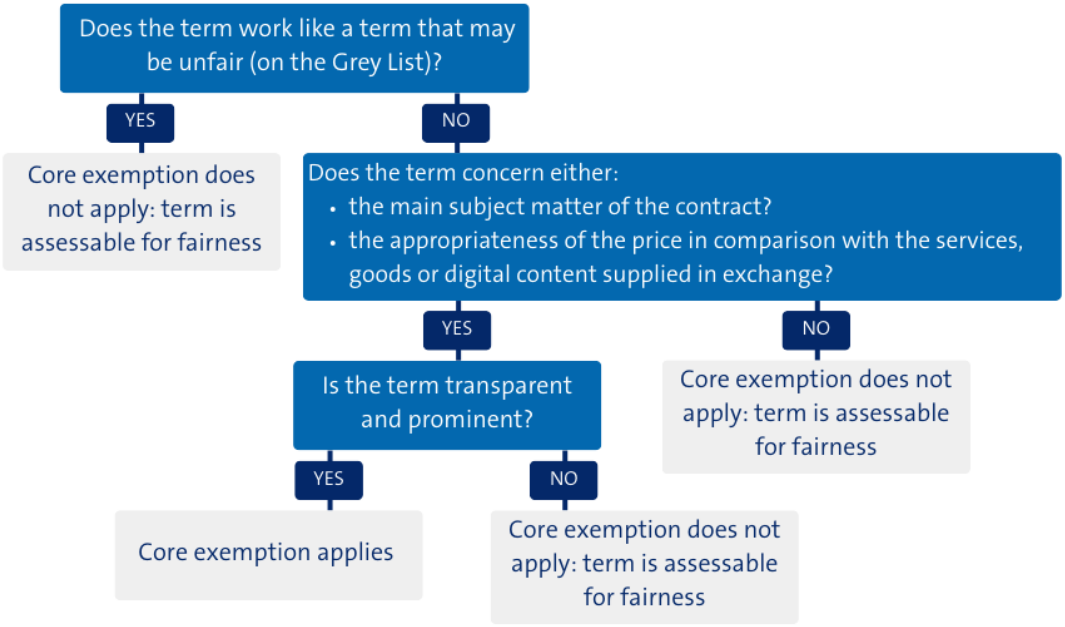
5.24 Terms which cannot be made meaningfully and effectively prominent will not benefit from the core exemption and will remain assessable for fairness as a non-exempt term. However, just because a term falls outside the exemption because it is not prominent, does not mean that it is automatically unfair.

Flowchart for the Act's 'core exemption'

5.25 The flowchart below aims to provide a simplified overview of the core exemption. It should be read in light of the guidance as a whole. It is not a substitute for legal advice.

[188] This was recognised by the Law Commission – see '*Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills*,' March 2015, at paragraph 3.48.

Figure 2: Chart for the Act's core exemption



What is the mandatory statutory or regulatory exemption?

5.26 Terms and notices that reflect:

- mandatory statutory or regulatory provisions; and
- the provisions or principles of international conventions

are exempt from both the fairness and transparency tests in Part 2 of the Act.[189]

5.27 This exemption is referred to in this guidance as the 'mandatory statutory or regulatory' exemption. As with the core exemption, the mandatory statutory or regulatory exemption needs to be interpreted narrowly.[190, 191]

5.28 It covers wording that is included in contracts and notices because of legislative requirements (such as Acts of Parliament or Statutory Instruments), or rules made by statutory authorities.[192] It also includes rules which apply between the parties in the absence of other arrangements (such as terms implied by statute).[193] It also refers to the provisions of international obligations which determine contractual rights or obligations.

5.29 For a term or notice to fall within this exemption, the actual content must be prescribed by law.[194] It is not enough for it merely to resemble what is provided for by law in a different context, or for wording merely to include some elements that reflect legal requirements (where those requirements do not have to take a particular form).[195] It is also not enough if the rule in

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[189] Section 73 of the Act.
[190] See Case C-186/16 *Ruxandra Andriciuc v Banca Românească SA,* at paragraph 31.
[191] The exemption assumes that the legislative intent seeks to balance the rights and obligations of parties in the context of particular contracts but does not intend to permit unfairness. See Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 28. The Directive, in its 13th Recital, states that 'it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions' to a test of fairness, on the basis that these provisions are 'presumed not to contain unfair terms'.
[192] In Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 26, the CJEU has held that 'the exclusions in Article 1(2) of that directive extends to terms which reflect provisions of national law that apply between the parties to the contract independently of their choice or provisions that apply by default in the absence of other arrangements established by the parties'. This could for example include Orders made by the CMA under Part 4 of the Enterprise Act 2002.
[193] Section 73(2) of the Act.
[194] This may include mandatory statutory terms with retroactive effect: see Case C-38/17 *GT v HS*, at paragraphs 24-25.
[195] See *Longley v PPB Entertainment Ltd* [2022] EWHC 977, at paragraph 102.1.

question leaves some choice or discretion to the trader.[196] While it is not necessary for a term or notice to directly quote the corresponding mandatory provision or to refer expressly to it, it must – at the very least – be 'substantively equivalent to that mandatory provision'.[197]

5.30 Mere inclusion in contracts or notices of a reference to a legislative or regulatory provision is unlikely to mean that they fall within this exemption. The content and effects of the legislative or regulatory provision must therefore be set out in a way that consumers can understand.[198]

[196] For example, in Case C-779/18 *Mikrokasa S.A. and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty v XO*, a contractual term which established non-interest credit costs in accordance with a ceiling value set in national legislation did not fall within the mandatory statutory exemption [in Article 1(2) of the Directive].

[197] See Case C-593/22 *FS and WU v First Bank SA*, at paragraph 28.

[198] See Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 50: 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned'. The CJEU clarified that this does not require a trader to do more than what can be reasonably expected: see Case C-34/18 *Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt* and Case C-593/22 *FS and WU v First Bank SA*.

6. Examples of potentially unfair terms and notices

Summary at a glance

- Schedule 2 to the Act includes a 'Grey List' of potentially unfair terms. This list is illustrative and non-exhaustive.
- Potentially unfair terms are terms that are not necessarily unfair, but could be, depending on the circumstances.
- This chapter discusses several types of potentially unfair terms, with examples:
    - binding consumers to hidden terms,
    - exclusion and limitation of rights and duties,
        - exclusion of liability for death or personal injury
        - exclusion of liability for faulty or misdescribed goods or digital content
        - exclusion of liability for poor service
        - exclusion of liability for failure to perform contractual obligations
        - exclusion of liability for delay
        - entire agreement terms
        - time limits on claims
        - terms excluding the right of set-off
        - formality requirements
        - guarantees and warranties operating as exclusion terms
        - limitations of liability
        - exclusion of other legal rights

- variation terms,
  - trader's right to vary terms generally
  - right to determine or change what is supplied
  - price variation terms
  - trader's right to transfer their responsibilities to a third party without consent
- termination and breach by consumers,
  - retention of prepayments when the consumer cancels
  - disproportionate termination fees and financial sanctions
  - requiring consumers to pay for services not supplied
  - unfair enforcement powers
- termination and breach by traders,
- automatic renewal terms, and
- dispute resolution terms.

6.1 Unfairness for the purposes of the Act can take many different forms. Schedule 2 to the Act illustrates the meaning of fairness by including a non-exhaustive and illustrative list of terms that may be unfair.[199,200] This is referred to as the 'Grey List' because it does not prohibit terms outright, but they must be assessed for fairness. Similarly, a term may bear no

[199] The Grey List in Schedule 2 refers to contract terms but not notices. However, the Act applies in substance the same test of fairness to notices and terms, and notices can have an effect like a contract term, for instance, if they exclude liability. Therefore, the Grey List also serves to illustrate the forms that unfairness can take in non-contractual notices, and the concerns discussed in this chapter in relation to terms may be relevant to consumer notices (except when reference is made to terms which are implied into contract by law and to the prohibited terms in Part 1 of the Act).

[200] Schedule 2 to the Act is divided in two parts. Part 1 of Schedule 2 contains the illustrative list of potentially unfair terms. Part 2 of Schedule 2 addresses the scope of the Part 1 terms in certain specific contexts, particularly financial services contracts, ongoing contracts, sales of securities and foreign exchange, and other transactions where recognised price indexes are available. The Act specifically states in section 63(2) that a term listed in Part 2 of the Schedule 'may nevertheless be assessed for fairness'.

resemblance to any of the terms listed and yet be unfair if it fails the fairness test.

6.2 This chapter discusses potentially unfair terms thematically. However, it is important to note that any term which operates like those on the Grey List cannot be exempt from a fairness assessment (see Chapter 5). Therefore, each theme discussed below specifies which Grey List terms correspond to it.

6.3 The types of terms overlap with each other, but may cause or allow one or more of the following common problems:

- consumers being bound to hidden terms,
- the trader not having to perform their expected obligations,
- the trader varying the terms after they have been agreed, for example to supply a different product, raise the price or reduce consumer rights,
- consumers losing prepayments or being subject to disproportionate financial sanctions, if the contract is ended,
- the trader being able to cancel contracts at will or without reasonable notice,
- consumers being tied into the contract beyond what they would normally expect,
- the trader being able unilaterally to decide disputes over the meaning and application of contract terms or to limit consumers' ability to exercise their legal rights.

6.4 These types of terms are discussed below, with non-exhaustive and illustrative explanation of how a particular type of term could be unfair and could be used fairly, and examples of terms that are unlikely and more likely to be fair. 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 this guidance, will depend on the facts of each case. This chapter provides guidance of general application and does not displace any guidance by the CMA for particular sectors, which may set out more detailed and specific compliance expectations to reflect the conditions in the relevant sector.[201]

[201] The CMA has published a range of sectoral guidance on various consumer protection matters: Consumer protection guidance for businesses - GOV.UK.

Binding consumers to hidden terms[202]

6.5 It is a fundamental requirement of fairness that consumers should always have a real opportunity to read (or hear, if the contract is made over the phone) and understand contracts before becoming bound by them (see Chapter 4 which discusses the fairness test; hidden terms discussed below also risk failing the transparency test).

How could binding consumers to hidden terms be unfair?

6.6 Terms that subject consumers to obligations which they can have no real opportunity to become acquainted with and understand in practice are more likely to be unfair. Any provision or notice which seeks to bind the consumer to accept or comply with terms which are 'hidden' – or 'incorporated' in the contract solely 'by reference' – is potentially unfair, but the risk is most pronounced where the hidden term is surprising or otherwise onerous. Such terms should be properly highlighted and flagged. This issue may arise in the context of:

- online or phone transactions – for example, where consumers must accept terms and conditions to receive digital content by ticking a box, or by giving verbal confirmation, that binds the consumer to terms of the agreement when the consumer has no reasonable prospect of reading or hearing and understanding them.[203]
- different terms being provided in a variety of locations, such as on a trader's website, in separate documents provided to consumers and/or verbally during face-to-face meetings, making the terms difficult to find and review and making it unclear which apply.
- terms which require consumers to accept that they are bound by the terms of other linked contracts (for example, insurance contracts) or rules or regulations, or to agree to the terms of privacy policies, which they are not given an appropriate chance to become acquainted with.
- declarations that the consumer has read and/or understood the terms or agreement. In practice, most consumers do not read standard

[202] See paragraph 10 of the Grey List: A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.
[203] Such general 'contract terms' may, in any case, not be binding under the general law especially if they are onerous in character. Their use may also involve breach of the unfair commercial practices provisions in Chapter 1 of Part 4 of the DMCC Act.

written contracts thoroughly before making a purchase. Including a declaration of this kind in a contract effectively requires consumers to say that these conditions have been met, whether they have or not.

How is compliance more likely to be achieved?

6.7 It is not necessary for all details of, or information about, an agreement to be included in a single contract document. Relying solely on lengthy terms and conditions to communicate with consumers is neither helpful nor fair. Instead, consumers must be effectively alerted to any important terms that could significantly affect their legitimate interests or that could otherwise come as a surprise to them, during the marketing process, so they can understand their practical consequences.[204] Therefore:

- terms should not contain hidden surprises. They must be consistent with the consumer's expectations based on the marketing and sales claims during the sales process.
- all key important, onerous or potentially surprising terms should be brought to the consumer's attention during the sales process in a timely manner – for example using face-to-face explanation, brochures, executive summaries and checklists.
- all the contractual documents should be made available and highlighted to the consumer from the earliest stage (including for example on the trader's website where contracts are in standard form) so the consumer can have time to read them in advance if they wish.
- all the contractual documents should be presented in a manner that the consumer can save or keep a copy for reading at their leisure.
- traders should never put pressure on consumers to conclude the transaction without giving time to read all the terms. For example, traders should not use checkout timers which are shorter than the time required to read all the contractual documentation.

6.8 Where contract documentation is lengthy and unavoidably complex, or there are other reasons why consumers are less likely to fully understand and consider all relevant information provided to inform their decision-taking, a contractual right to cancel may assist in mitigating potential unfairness. This

[204] Failing to highlight key terms in the marketing process, or 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.

would allow for a specified reasonable period in which consumers can read the terms, consider their position, and pull out without financial sanction or loss of prepayments if they find that the agreement is not what they expected. The law requires provision of a cooling-off period in some situations.[205]

*Example*s

Unlikely to be fair

This contract shall be subject to terms and conditions as updated from time to time by the company. Please ensure that you periodically check the company's website for any updates to the terms and conditions.

Unlikely to be fair

I/we the undersigned hereby agree to enter this agreement upon the terms and conditions set out on the company's website which I/we acknowledge have been drawn to my/our attention and which I/we have read.

More likely to be fair

This document comprises the terms and conditions that will apply to this contract. It is important that you read and understand the terms and conditions that will apply to this contract before signing. If there is any term that you do not understand or do not wish to agree to, then please discuss it with the sales representative before signing.

[205] The CCRs (SI 2013/3134) require a cooling-off period where a contract is entered away from the trader's place of business or at a distance, for example by post, telephone, text messaging or internet. Chapter 2 of Part 4 of the DMCC Act provides a right to two 14-day cooling-off periods for subscription contracts: during the initial cooling-off period and during any renewal cooling-off period. See sections 264-266 of Chapter 2 of Part 4 of the DMCC Act for more information on cooling-off rights. Note that these provisions, at the time of publication of this guidance, are not yet in force.

Exclusion and limitation of rights and duties[206]

What do exclusion and limitation terms do and how could they be unfair?

6.9 Exclusion and limitation terms (also referred to as disclaimers or exemption clauses) serve to remove or reduce a trader's liability to consumers. They do this by preventing or hindering the consumer from getting recourse from a trader who has not complied with their duties.

6.10 This section covers how exclusion and limitation terms could fail the fairness assessment. In some cases, such terms may be prohibited for reasons set out in Chapter 3.

6.11 In general, exclusion and limitation terms are more likely to be unfair where:

- **they have effects beyond what is necessary to protect the trader's legitimate business interests.** While a term may be intended only to deal with unjustified demands, if it could be used to defeat legitimate claims or override consumers' statutory rights, it is more likely to be unfair.

- **their scope and potential application is broad**. Blanket or excessively broad general exclusions should not be used, and any exclusion term should be drafted with precision. A statement such as 'the company does not accept responsibility for the failure of any fire protection equipment in the event of a fire' should not be used. It may be possible to make some exclusion or limitation terms fair by limiting their scope so that they can apply only in specific circumstances which are clear to both parties when the contract is entered into.

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[206] See paragraphs 1, 2, 3, 17 and 18 of the Grey List respectively:

- A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.
- A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.
- A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.
- A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.
- A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

- **they seek to ensure that no liability arises in the first place.** This could apply, for example, to terms which 'deem' things to be the case or get consumers to declare that they are satisfied with what they have received – whether they are or not. Similarly, this could occur where the trader has contracted with other traders and seeks to exclude their responsibility for anything done by such third parties. For example, a term stating that a holiday cottage booking platform acts as agents for the cottage owners and the platform can never be held responsible for the actions of the cottage owners should not be used.

- **they are accompanied by vague saving clauses or jargon such as** 'the customer's statutory rights are not affected' or 'liability is excluded so far as the law permits'.[207] An unfair disclaimer is not made acceptable if it is partially contradicted by unexplained legal jargon whose practical effect only a lawyer is likely to understand.

- **they are included in contracts that the trader uses with trade customers as well as consumers.** While it may be acceptable sometimes to use certain exclusions in contracts with other traders, the same rules do not apply to consumer contracts. Traders need to ensure that if they enter into contracts with consumers, their contracts are drafted so that they comply with Part 2 of the Act. The fact that certain customers – even a majority – are not consumers does not justify exclusion or limitation terms that could affect consumers. Relatedly, any provision that seeks to exclude consumer law protections by making consumers self-certify that they are not a consumer would be prohibited.

6.12 Exclusion and limitation terms can take many different forms. Common forms are discussed below, namely terms that:

- exclude a trader's liability for:
  - negligently causing death or personal injury to the consumer,
  - faulty or misdescribed goods or digital content (including loss, theft or damage to goods in transit),
  - poor service,

[207] The purpose of the fairness provisions in Part 2 of the Act is to give consumers additional protection against terms which may be unfair even if they are not prohibited outright. Therefore, terms which exclude liability 'as far as the law permits' are still potentially unfair.

- failure to perform contractual obligations,
- delay,
- anything outside the written contractual agreement,

- impose inappropriate time limits on consumers wishing to make claims against traders,
- prevent consumers from withholding payments if they have an arguable claim against the trader,
- subject rights and duties to formality requirements,
- limit the rights consumers normally have under the law to the terms of guarantees or warranties,
- limit a trader's liability, even if they do not exclude it altogether,
- deprive consumers of protection they normally have under the law.

Exclusion of liability for death or personal injury

6.13 It is prohibited for any contract term or notice to exclude or restrict a trader's liability for a consumer's death or injury caused by the trader's negligence save in certain specific circumstances.[208] Such terms in consumer contracts are not binding on the consumer. As well as being prohibited, such terms are likely to fail the fairness test and therefore be unfair.[209]

How could exclusions of liability for death or personal injury be unfair?

6.14 Terms are more likely to be unfair where their language or potential effects are broad. General disclaimers that cover liability for death or personal injury (whether caused by the trader's negligence or any other act or omission of the trader) are likely to be unfair because they are too broad in scope. For example, a term in a gym contract or a sign displayed at a gym saying that customers use equipment or premises 'at their own risk' or that the gym does

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[208] Section 65 of the Act. Note that section 66 of the Act states that section 65 does not apply to certain contracts (for example of insurance, or so far as they relate to the creation or transfer of an interest in land), or liability (for example certain categories set out in the Damages (Scotland) Act 2011).

[209] Prohibited terms do not have to be assessed for fairness. However, the fairness test applies to terms that are not prohibited but may nonetheless be unfair. For example, the prohibition on excluding or restricting liability for death or personal injury resulting from negligence does not apply to insurance contracts. However, such a term can still be assessed for fairness under Part 2 of the Act.

not assume liability for injuries ‘in any circumstances’ might be intended to stop consumers trying to sue for loss of or damage to their clothes or other property which is the result of the consumer’s own carelessness or for misuse of gym equipment. However, such a term is too broad because it purports to excuse the trader even when the trader is at fault. The fact that the intention behind a term is more limited than its potential effects does not make it fair.

How could exclusions of liability for harm to the consumer be used fairly?

6.15 Accepting liability for negligence alone may not be sufficient to achieve fairness. Disclaimers seeking to address harm, loss or damage to the consumer are more likely to be fair if:

- they are narrow and qualified so that liability for loss or harm is excluded or restricted only where the trader is not at fault.
- where a contract involves an inherently risky activity, the trader uses prominent warnings against hazards which provide information and make clear the consumer needs to take sensible precautions, but do not have the effect of excluding or restricting liability.

Examples

Unlikely to be fair

The use by the member of any of the company's equipment or machinery or the facilities of any gym owned by or occupied by the company is entirely at the member’s own risk.

More likely to be fair

You must act safely and follow the instructions provided when using any of the company’s equipment or machinery or the facilities of any gym owned or occupied by the company. If you do not know how to use equipment, machinery or facilities, please seek advice from a member of staff.

Unlikely to be fair

The company will not be responsible for injuries or consequences to flying in a hot air balloon for passengers who are pregnant or have any physical or mental infirmity.

More likely to be fair

You must ensure that you are fit to fly in a hot air balloon. You must not fly if you are suffering from any serious medical condition or have recently undergone surgery unless you have a certificate of your fitness to fly from your doctor. You must not fly if you are pregnant or under the influence of alcohol or drugs.

Exclusion of liability for faulty or misdescribed goods or digital content

How could exclusions of liability for faulty or misdescribed goods or digital content be unfair?

6.16 Contract terms which seek to deny consumers their statutory right to remedies where goods or digital content are misdescribed or defective are both prohibited[210] and potentially unfair.

6.17 Several types of terms can have the effect of excluding liability for unsatisfactory goods or digital content. For example:

- **terms saying that the goods must be examined by the consumer, or by someone on their behalf.** Consumers cannot be deprived of statutory rights to redress for faults in goods. Where consumers are asked to inspect a product, they must be genuinely able to examine it before purchase (or conclusion of the contract) and should not be expected to identify faults that are not obvious or specifically drawn to their attention.

- **declarations written into consumer contracts.**[211] For example, delivery terms which require the consumer to give a declaration that the consumer has inspected their purchase and found it to be free from faults. If they then subsequently discover defects, they could be told or believe that they have 'signed away their right' to make any

[210] See Chapter 3.

[211] Where declarations are not considered to be incorporated for legal purposes into the contract, they could still be in scope of the legislation as 'notices'. In any case, declarations of this kind will have no legal force if the recipient did not believe the statement to be true and did not act upon it (see *Lowe v Lombank* [1960] 1 All ER 611). The misleading use of such wording is also potentially an unfair commercial practice under Chapter 1 of Part 4 of the DMCC Act.

claim. Comparable problems can be caused by any enforced declaration indicating that the consumer has been dealt with fairly and properly or is not a consumer. Declarations are more likely to be fair if they are about matters wholly and necessarily within the consumer's knowledge (for example, their age), and the consumer has a free choice as to what (if anything) to say.

- **terms saying that goods or digital content only have the description and/or purpose stated on the invoice.** Consumers cannot be deprived of redress where goods or digital content, which is paid for either directly or indirectly,[212] do not meet the description under which they were actually sold, nor if they are not reasonably fit for all the purposes for which goods or digital content of the kind are commonly supplied. For example, this could include advertising paper as suitable for printing photographs but stating on the invoice that it is suitable only for printing text.

- **terms which seek to pass on the risk of damage or loss before the goods are delivered** – for example, from when the trader notifies the consumer that the goods are available or have been dispatched. Consumers cannot be deprived of recourse where goods are destroyed, stolen or damaged before the consumer has accepted delivery of them. The fact that a term may be meant to apply only when the consumer fails to collect or take delivery as agreed does not make it fair.

- **terms requiring that the goods are accepted as satisfactory on delivery or imposing unreasonable conditions on the consumer's right to return them**. Consumers normally have a short-term right to examine goods and reject them if faulty. This right normally lasts for 30 days. Consumers cannot be deprived of this right by being required to sign 'satisfaction notes' on delivery, or by being required to make no use of the defective product pending its return. Likewise, traders should not attempt to curtail consumers' statutory rights to cancel distance contracts and receive a full refund by unduly restricting the ability to inspect the product on receipt, or by requiring goods to be returned in a way that may not be possible – for example, in the original packaging if that packaging is disposable and they are likely to discard after opening.

[212] Section 33 of the Act.

- **terms disclaiming liability for 'sale' goods or saying that sale goods cannot be returned.** Consumers have the same statutory rights whether they buy goods at a reduced price or not.

- **terms which end rights to redress 30 days after delivery of the goods.** Even where the consumer has lost the short-term right to reject defective goods, the trader remains legally obliged to provide other redress if the goods subsequently prove to have been defective when sold.[213]

- **liability disclaimers whose use is restricted to second-hand or damaged goods**, for example using the phrase 'sold as seen'. It is appropriate to warn the consumer when the standard of quality that can reasonably be expected is lower, and to point out specific defects, and this may be taken into account when deciding what the satisfactory standard of the product is. But terms which disclaim all responsibility for failure to meet relevant statutory standards are likely to be unfair.[214]

Examples

Unlikely to be fair

Unless expressly stated in writing to be accurate, no representation or warranty is given as to the accuracy of any instrument purporting to record the vehicle's mileage or any record or other statement as to such mileage.

Unlikely to be fair

Whilst every effort is made to ensure that your carpet is in perfect condition, no complaints can be accepted after the carpet has been cut into – you cut it, you own it.

[213] 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.
[214] These include being of satisfactory quality, fit for purpose, and as described: see sections 31 and 47 of the Act.

Unlikely to be fair

You shall be responsible for any loss or damage to the equipment however caused.

More likely to be fair

You are responsible for any loss or damage to the equipment except if such loss or damage is: (i) caused by us or our employees or (ii) due to a manufacturing design or design fault.

Exclusion of liability for poor service

How could exclusions of liability for poor service be unfair?

6.18 A term which could serve to relieve a trader of the obligation to take reasonable care in carrying out services under consumer contracts is prohibited[215] as well as potentially unfair.

6.19 In particular, the following two kinds of disclaimer are likely to be unfair:

- **disclaiming liability where the consumer is at fault**, if it could deprive the consumer of all redress in the event of a trivial or technical breach, or if the trader may be partly responsible for loss or harm suffered by the consumer. For example, failure to take specified precautions against the risk of damage or theft by third parties should not enable the trader to escape all liability where they are negligent or dishonest, or where the specific precaution was not relevant to the damage or loss. That is especially so if the precautions consumers are required to take are unnecessary, unusual or onerous or not stated with sufficient clarity.

- **disclaiming liability for gratuitous services**. Sometimes services are provided to consumers without charge alongside products or services being sold, even where these are not covered by the contract or requested by the consumer – for example, advice as to how to use a product, or help with installation. The consumer is generally entitled to rely on these in the context of their purchase, and the trader still has to take care not to cause harm to the consumer or their property when providing gratuitous (that is free or unpaid) services.

[215] See Chapter 3.

How could exclusions of liability for poor service be used fairly?

6.20 Terms of this kind are more likely to be fair where:

- their scope is narrowed, so that their effect is to exclude liability only for clearly defined losses the trader is not legally responsible for, and which the consumer clearly understood when the contract was entered into.
- the contract clearly states that gratuitous services are not provided, as long as this is really the case. To ensure that it is, traders may need to take steps to ensure that employees know that they are not authorised to, and should not, provide additional services.

Examples

Unlikely to be fair

All reasonable care will be taken but the company shall not be under any responsibility whatsoever for damage to internal or external decoration caused by the installation.

More likely to be fair

We will make good any damage caused during installation to roof tiles, slates, render, brickwork and so on. You accept that the installation may cause damage to exterior decoration and, except for damage caused by our negligence, we do not undertake to carry out any redecoration.

Unlikely to be fair

We will not be liable for any monetary loss.

More likely to be fair

Medication, money and valuable items should not be stowed in the luggage hold under any circumstances but should be taken on board. Such items may be placed in the overhead lockers or under the seat but should not be left unattended by the passenger. Money and small valuables (such as jewellery) should be always retained on the person.

Unlikely to be fair

If any of our staff does this kind of work for you without our written agreement, we will not be liable for any loss or damage.

More likely to be fair

Our staff are not authorised or qualified to carry out such work. We recommend that a properly qualified person is separately employed by you to carry out these services.

Exclusion of liability for failure to perform contractual obligations

How could exclusions of liability for failure to perform contractual obligations be unfair?

6.21 A term which could allow the trader not to meet one of their obligations under the contract, at their discretion and without liability, is more likely to be unfair. Such terms include:

- **giving the trader choice about whether to do anything under a contract while the consumer continues to be bound by the contract**, including where the consumer is required to go on paying when goods, digital content or services are not provided as agreed. That kind of term excludes the trader's liability to provide compensation for breach of contract but may prevent the consumer from ending the contract. This could include, for example, a term in a contract for the supply of goods by instalments, which does not allow the consumer the right to cancel if the trader fails to make delivery of an instalment. It could also include a term in a contract for digital content (such as a film streaming subscription) which permits the trader to change what is included in the package without giving the consumer the right to terminate the contract and get a refund if appropriate.

- **allowing the trader to suspend or modify performance of their contractual obligations in the event of a breach of contract on the part of the consumer**. Opting out of carrying out the trader's side of the bargain may be disproportionate where there has been only a minor or technical breach. Any term allowing the trader to withhold a significant benefit under the contract where that would not be allowed by the general law is potentially unfair as it may amount to a disproportionate sanction or a trader having inappropriate discretion to decide whether the consumer is in breach.

- **allowing the trader to stop providing any significant benefit under the contract** except where necessary (for example to deal with technical problems or other circumstances outside its control, or protect the interests of other innocent third parties). If an exclusion clause goes further than is strictly necessary to achieve a legitimate purpose it could be open to abuse and could be unfair in effect, regardless of its intent.

How could exclusions of liability for failure to perform contractual obligations be used fairly?

6.22 Such terms are more likely to be fair if:

- they are qualified in a way that consumers will know when and how they are likely to be affected. For example, this could be done by specifying exactly the circumstances in which it can be used. But fairness is unlikely to be achieved where the circumstances in question are effectively under the control of the trader.
- the consumer does not have to continue to pay during periods of suspension.
- the contract period is extended without additional cost to ensure that the consumer receives what they have contracted for.
- there is a duty on the trader to give notice of any proposal to rely on the term, and a right for the consumer to cancel before being affected by it, without the imposition of a financial sanction or otherwise being worse off for having entered the contract.

Examples

Unlikely to be fair

We reserve the right to refuse to hand over a boat to any person who, in our opinion, is not suitable to take charge of it.

More likely to be fair

We reserve the right to refuse to hand over a boat to any person who, in our reasonable opinion, is not suitable to take charge of it because of being under the influence of alcohol or drugs.

Unlikely to be fair

The company may suspend the services in any of the following circumstances without prejudice to the liability of the subscriber to continue to pay the minimum charge.

More likely to be fair

During any period of suspension, you will not be required to continue to pay the monthly charge.

Exclusion of liability for delay

How could exclusions of liability for delay be unfair?

6.23 The law requires that goods should be delivered,[216] and services carried out,[217] on time, meaning that:

- where the trader agreed a time with the consumer, it is bound to meet that deadline.
- where no date was set, any goods ordered generally have to be delivered within the standard 30-day period generally applicable for delivery of goods, and services must be performed within a reasonable time.

6.24 A term which allows the trader to fail to meet this requirement of timeliness is potentially unfair (and may also be prohibited[218]). This applies:

- to terms which simply exclude all liability for delay.
- to standard terms allowing unduly long periods for delivery or completion of work, or excessive margins of delay after an agreed date.
- to terms that exclude liability for all delays however caused, whether the trader is at fault or not.

[216] Section 28 of the Act.
[217] Section 52 of the Act.
[218] See Chapter 3.

- to terms that say that ‘every effort’ will be made to meet agreed deadlines yet exclude all liability for any delay. This leaves the consumer with no right to redress if no effort is actually made.

How could exclusions of liability for delay be used fairly?

6.25 Terms excluding liability for delay are more likely to be fair where:

- they are restricted in scope to delays of a limited period caused by factors beyond the trader’s control.[219] Where examples of such factors are stated, they should only be matters which are genuinely outside the trader’s control (and the control of any agents they use, such as the delivery company), not situations such as shortage of stock, labour problems, etc., which can be the fault of the trader.

- they do not enable the trader to refuse compensation where it is at fault, for example in not taking reasonable steps to prevent or minimise delay.

- the consumer is given a right to cancel without penalty where there is a delay.

Examples

Unlikely to be fair

Dates specified for the commencement and completion of the work are estimates only and time shall not be of the essence of the contract.

More likely to be fair

If we do not start or complete the work within 5 days of any date included in our estimate or quote you may nominate a date on which you want us to start the work or by which you want us to complete the work. If we have not started or completed the work by the date you have nominated, you may cancel the agreement and receive a full refund.

[219] The term ‘force majeure’ to describe events which are completely outside the trader’s control is sometimes used in terms of this kind. It is legal jargon and best avoided and should never be used without clear explanation.

Unlikely to be fair

The company will make all reasonable endeavours to start and complete the works by the dates given but will not accept liability for delays, including in the event of supplies or labour being adversely affected by strikes, lockouts or any other disruptions or contingencies beyond the company's control.

More likely to be fair

The company will do all that it reasonably can to meet the date given for delivery and/or installation. In case of delays due to weather or circumstances beyond the reasonable control of the company, the company will contact the customer and agree an alternative date.

Entire agreement terms

How could entire agreement terms be unfair?

6.26 'Entire agreement' terms are terms saying that the (written) agreement constitutes the entire agreement, such that anything outside that is not part of the agreement, for example oral statements a trader has made to the consumer when entering into an agreement. Consumers often rely on what is said to them when they are entering a contract. Entire agreement terms are more likely to be unfair where:

- they enable the trader to disclaim liability for oral promises or other statements even when they have been relied on by the consumer reasonably and in good faith.[220] For example, this includes terms that say that employees or agents have no authority to make binding statements or amendments to the contract, or that contract changes may only be made in writing, or that they must be signed by a Director.

- they deprive consumers of their ordinary legal protections.[221] For example, while under contract law there is a presumption that a contractual document is intended to contain all the terms of the agreement,[222] a party can still produce evidence to prove that the document is not a complete record of the contract and the court may

[220] For an example of such a term which was held to be unfair see *Financial Services Authority v Asset LI Inc (trading as Asset Land Investment Inc) and Others* [2013] EWHC 178 (Ch).
[221] As set out in Chapter 4, significant imbalance in the parties' rights and obligations under the term in the contract or notice could arise by placing the consumer in a legal position less favourable than that ordinarily provided for by the law.
[222] This is known to lawyers as the 'parol evidence' rule.

also take the other statements into account.[223] In addition, Part 1 of the Act prohibits the use of entire agreement terms in contracts for the supply of services,[224] and it enables pre-contract statements to be taken into account when assessing matters such as whether goods are satisfactory, fit for purpose or as described.

Examples

Unlikely to be fair

No verbal agreements will be honoured.

More likely to be fair

The services are provided to you on the basis of these written terms together with any previous written or verbal representations made to you by the company or its duly authorised agents.

Unlikely to be fair

The company takes no responsibility for any verbal claims, or other offers made in conjunction with this offer by its distributors or agents, which are not included in this promotion.

More likely to be fair

The company accepts responsibility for its commitments to you. It also accepts responsibility for commitments made to you by its duly authorised agents. If you require any changes, please make sure you ask for these to be put in writing. In that way, we can avoid any problems surrounding what the company and you (the customer) are expected to do.

Time limits on claims

How could time limits on claims be unfair?

6.27 If a contract is to be considered balanced, parties must be able to enforce their rights against each other for as long as they would be entitled to under

[223] For Scotland see the Contract (Scotland) Act 1997 section 1.

[224] Section 50 of the Act says that any statement (oral or written) made by the business or someone on its behalf about the business or the service is to be treated as a term of the contract if it is taken into account by consumer when deciding to enter the contract or, later, when making any decision about the service.

the law generally. In general, a claimant has six years (five years in Scotland) to make a claim in court for breach of contract.[225]

6.28 A term that excludes or limits the business's responsibilities towards the consumer where the consumer does not make a complaint immediately or within an unduly short period of time is likely to be unfair. This applies particularly where:

- a time limit is so short that consumers could easily miss it or overlook it because of circumstances outside their control.
- faults the trader is responsible for may only become apparent after a time limit has expired.

6.29 Where the consumer's statutory rights are at issue,[226] any fault found in goods or digital content (which is paid for either directly or indirectly) within six months of the date of sale is generally assumed to be the business's responsibility unless it can prove otherwise. After this, the consumer continues to have statutory rights, which cannot be excluded by contract terms.

How could time limits on claims be used fairly?

6.30 Making complaints and bringing claims promptly is desirable because it encourages swift and successful resolution. Ways to do so without restricting consumers' legal rights include:

- encouraging consumers to check to the best of their ability for any defects or discrepancies at the earliest opportunity, so long as there is no suggestion that the trader disclaims liability for problems which consumers do not notice.
- requiring notification of a complaint within a 'reasonable' time after discovery of a problem.
- using clear and prominent language to encourage consumers to act promptly.

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[225] Note that the law relating to limitation periods is complex, and limitation periods can in particular cases be longer or shorter. The limitation period for personal injury claims is three years.

[226] This refers to the consumer's right to a remedy under Part 1 of the Act for breach of rights where goods or digital content that has been 'paid for either directly or indirectly' are faulty, or otherwise do not conform to the contract, *other than* the short-term right to reject goods.

Examples

Unlikely to be fair

All claims shall be absolutely barred and all remedies excluded unless legal proceedings are brought within one year from the date on which the goods have been delivered or should have been delivered.

More likely to be fair

If you think there is something wrong with the goods, you should notify us of any damage or defect as soon as reasonably practicable after discovering this. Doing so will enable us to tell you what to do next so your claim is resolved as swiftly as possible.

Unlikely to be fair

Written notice of any defect in the goods when delivered shall be served upon the company within 7 days of delivery. The customer shall be deemed to have accepted the goods 7 days after delivery.

More likely to be fair

The customer is asked to examine the goods as soon as reasonably possible after delivery and notify the company of any fault or damage as soon as reasonably possible.

Terms excluding the right of set-off

How could terms excluding the right of set-off be unfair?

6.31 One legitimate way for the consumer to obtain compensation from a trader is by exercising the right of set-off. Where a consumer has an arguable claim under a contract against a trader, the law generally allows the consumer to deduct the amount of that claim from anything they have to pay. This helps prevent unnecessary legal proceedings.

6.32 If the right of set-off is excluded, consumers may have (or believe they have) no choice but to pay in full, even when there is something wrong with what they are buying. To obtain redress, they then have to go to court. The costs, delays, and uncertainties involved may in practice therefore deprive them of their rights.

6.33 Terms are more likely to be unfair:

- **if they say, or clearly imply, that the consumer must in all cases pay the whole contract price, without any deduction, as soon as the business considers it has finished carrying out its side of the contract.** They are likely to be seen as excluding the right of set-off even if they do not actually mention that right.

- **where consumers are required to pay in full (or nearly in full) before the business has finished carrying out its side of the contract.** For example, this includes where a substantial amount of work is carried out for the consumer after full, or nearly full, payment has been made. Generally, payment for services falls due after the service has been carried out and an invoice is given, so any term which requires substantial earlier payment may be unfair. For example, the consumer could lose their payment if the trader becomes insolvent before completion of the contract. Such terms also tend to remove or weaken the trader's proper incentive to perform work with reasonable care and skill.

- **where terms demand all or most of the full contract price if the consumer breaches a contractual obligation** – for example, the consumer does not allow work to start on or by a certain date, or does not make payment when due. These are also known as 'accelerated payment' clauses.

- **where the consumer is not fully protected by the short-term right to 'reject'** – that is to return goods for a full refund if they are unsatisfactory.[227] Where differences from the promised specification are minor, accepting the product but paying a reduced price for it may be preferable and consumers should not have their right to exercise that option removed or reduced.[228]

- **where the trader can impose a sanction on the consumer (without first going to court) where a consumer is in breach.** For example, where a term removes guarantee rights, or an agreed discount of the price if the consumer does not pay the whole contract price when the trader demands it.

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[227] See section 20 of the Act. The short-term right to reject can be exercised only in relation to goods but it is available for the goods element of a purchase where the consumer has bought the goods along with services or digital content.

[228] Even where the consumer can reject goods, a term excluding the right of set-off could be unfair. For example, the consumer may in practice have no time to start looking again for a new car or wait for delivery of a replacement computer.

How could payment demand terms be used fairly?

6.34 Terms which demand that payments are made in full are more likely to be fair where:

- they reflect the consumer's normal legal obligation to pay promptly and in full what is properly owed – that is, the full price, on satisfactory completion of the contract.
- the wording used makes clear that it is designed only to deter consumers from withholding disproportionate sums – for instance, the whole contract price where any faults in the goods or services are merely minor – so that it does not stop consumers from withholding reasonable amounts.
- there is a clear and fair process for the consumer and the trader to follow to resolve disputes about how much the final price should be. Depending on the sums at stake and the nature of the product, this might have to be an independent adjudication – see Dispute resolution section below.
- any 'stage payment' arrangements reflect only the trader's spending in carrying out the contract and consumers can retain an amount that is reasonably sufficient to enable them to exercise an effective right of set-off.
- if exceptionally there is a good reason why full payment is required in advance, such an amount is held under secure arrangements which protect it in the event of the trader's insolvency and guarantee that it will not be released until any dispute is resolved.

Examples

Unlikely to be fair

Payment is due on completion of the installation. The purchasers shall not be entitled to withhold payment by reason of any alleged minor defect.

More likely to be fair

Payment is due on completion of the installation. The purchaser shall not be entitled by reason of any alleged minor defect to withhold more than a proportionate amount of the sum due.

Unlikely to be fair

On completion of the work the client hereby agrees to pay the balance due to the site foreman.

More likely to be fair

On satisfactory completion of the work the client hereby agrees to pay the balance due to the site foreman.

Formality requirements

How could formality requirements be unfair?

6.35 Contracts normally remain binding on both parties unless a breach by one of them threatens the whole value of it for the other. The loss of contractual rights is a severe sanction. It should not be imposed on consumers for failure to comply with formalities where it is merely a minor or technical breach or otherwise does not go to the heart of the contract.

6.36 There may be administrative advantages in requiring consumers to comply with certain formalities – for example, procedures involving paperwork. But a term that imposes severe sanctions for breaches of formality requirements is more likely to be unfair, particularly where:

- the consumer fails to comply with a minor or procedural requirement and commits a trivial breach.
- a breach may be committed inadvertently. Unless the need to observe a formality is obvious and important, or is prominently drawn to the attention of consumers, they may overlook or forget it. That risk is particularly significant if they have to comply with the formality sometime in the future without any reminder.
- compliance with a formality involves disproportionate costs or inconvenience. For example, this includes a requirement to use registered post for written notification when notification by ordinary post or email would be adequate.

How could formality requirements be used fairly?

6.37 A formality requirement is more likely to be fair if the following three conditions are all met:

- it requires a consumer to do no more than is reasonably necessary,
- non-compliance does not lead to the consumer losing important rights, and
- the need to comply with the formality is adequately drawn to the consumer's attention at a time and in a manner that acts as an effective reminder to help the consumer comply with it.

Examples

Unlikely to be fair

Please keep this invoice in a safe place as it will be required should a need for after sales service arise in the future too.

More likely to be fair

Please keep the invoice in a safe place as it will assist should a need arise in future for after sales service.

Guarantees and warranties operating as exclusion terms

How could guarantees and warranties operating as exclusion terms be unfair?

6.38 Sometimes guarantees or warranties offer more limited rights than are available under the law, either because the benefits of the warranty are less, or because they are subject to special conditions or restrictions.

6.39 As a starting point, the terms and scope of the guarantee must be clearly set out and conform to any specific legal requirements. For example, a trader who provides a consumer guarantee for goods at no extra charge must give certain information that a consumer needs to know before making a claim under it, including that the consumer's statutory rights regarding the goods are not affected by the guarantee.[229] Any term which seeks to exclude or restrict benefits consumers normally have, including their statutory rights, is likely to be unfair.[230,231]

[229] Section 30 of the Act. These obligations are also enforceable under the Act.
[230] Simply including the words 'your statutory rights are unaffected' cannot make an unfair exclusion fair.
[231] Where a guarantee presents rights given to consumers by law as a distinctive feature of the trader's offer, this is likely to infringe the unfair commercial practices provisions in Chapter 1 of Part 4 of the DMCC Act.

How could guarantees and warranties be used fairly?

6.40 Guarantees and warranties are more likely to be fair if they:

- do not reduce consumers' rights and simply indicate what sort of protection is involved and/or where advice on it can be obtained.
- simply increase the scope of the consumer's ordinary legal rights – for example, by offering refunds or exchanges for an extended period on a no-fault basis or offering repairs regardless of the cause of the problem.

Examples

Unlikely to be fair

All hardware sold by the seller is guaranteed only to the extent of the original manufacturer's warranty.

More likely to be fair

All hardware sold by the seller is supplied with the benefit of the manufacturer's warranty. This warranty is in addition to, and does not substitute, the customer's legal rights relating to faulty or misdescribed goods.

Limitations of liability

How could limitations of liability be unfair?

6.41 If a contract is to be fully and equally binding on both trader and consumer, each party should be entitled to full compensation where the other fails to honour their obligations. Terms which limit the trader's liability, like those which exclude it altogether, are potentially unfair. Many types of terms – not just terms which simply place an overall cap on available compensation – can have the effect of limiting a trader's liability. They include, for example, terms which:

- **require consumers to meet costs that fall to the trader** to pay if what is supplied breaches the statutory standards – for example, by making call-out charges for rectifying the trader's defective work non-

refundable, obliging the consumer to meet the costs of returning faulty goods to the trader, or remedying defects in digital content.[232]

- **impose on the consumer a risk that the trader is better able to bear**,[233] including by taking reasonable care. For example, this includes making consumers bear the risk of damage to equipment used by the trader or the risk of encountering structural problems that the trader should have identified in advance of undertaking home improvement work. Similarly, in the case of risks outside the trader's control (for example, weather damage), the trader should not make the consumer its insurer. Even if the use of such terms enables a trader to keep prices down, unless suitable insurance is easily available to consumers at reasonable cost, they are still likely to be worse off.

- **say the trader must be 'indemnified'**[234] for costs which could arise through no fault of the consumer, particularly where the trader could be at fault.

- **say that the trader is not liable for problems caused by a trader's agents**, such as suppliers or subcontractors**.**

- **say the trader is liable only to the extent that it can claim against someone else**, such as the manufacturer or a subcontractor.

- **limit redress** so that consumers may not have (or may mistakenly believe they do not have) full access to their statutory remedies. This could include, for example:

    - limiting redress to what is available under the terms of a guarantee or warranty,

    - allowing only credit notes, not cash refunds, or otherwise giving the trader the choice as to what type of redress to give when the law would otherwise let the consumer choose.

[232] Consumers' statutory rights under Part 1 of the Act cannot be excluded – see Chapter 3.
[233] This includes risks within the trader's control or which the consumer cannot be expected to know about.
[234] The word 'indemnify' itself is legal jargon which, if understood at all by a consumer, could be taken as a threat to pass on legal and other costs incurred without regard to reasonableness.

- inappropriately **limit the kinds of loss for which redress is given**, for example by excluding 'consequential' losses[235] (or 'indirect losses') to protect traders from liability to pay damages for remote 'knock-on' consequences of breaches of contract on their part.

How could limitation of liability terms be used fairly?

6.42 Generally, limitation of liability terms are more likely to be fair where:

- consumers are only responsible for losses that are their own fault (provided they are not subjected to excessive sanctions).
- the term is narrowed in scope, so it relates only to risks against which consumers are likely to be already insured – for example, the risk of loss or damage to goods while they are in the consumer's home – or can easily insure against, such as the risk of illness while abroad.[236]
- consequential loss exclusions are limited to losses that were not foreseeable by either party when the contract was formed, losses that were not caused by any breach on the part of the trader and business losses, and/or losses to non-consumers.

[235] The use of the technical legal term 'consequential loss' in standard contracts may lead to consumers thinking – and being told – that they have no claim for any loss which is a consequence of a trader's breach of contract. In the absence of legal advice, this misunderstanding may have the effect of preventing them from claiming any compensation at all. It is also possible that such a term would have the effect in law of excluding or limiting liability for losses arising out of less obvious risks, which were not reasonably foreseeable at the time of the trader's breach, even if the consumer actually told the trader about them and asked them to take care to avoid them.

[236] If a risk is transferred to consumers on the basis that they can themselves reasonably control it or that insurance is available at reasonable cost, such terms must be adequately drawn to their attention, and they need to be aware of what steps they are supposed to take.

Examples

Unlikely to be fair

We shall only be liable for damage to premises caused by our negligence and our liability will then be limited to a maximum of £200 unless Premises Damage Insurance has been arranged.

More likely to be fair

We will not be liable for any damage to premises because of moving goods under your express instruction, against our advice.

Unlikely to be fair

The company reserves the right in the event of a fault to exchange the unit or part of the unit, or issue a credit note to cover the cost.

More likely to be fair

In the event of a fault due to product failure, we will repair or replace the item, or part of it, or refund the purchase price, at the discretion of the purchaser.

Unlikely to be fair

Any goods delivered to the customer's premises shall be entirely at the purchaser's risk and the customer will indemnify the company for any loss or damage thereto.

More likely to be fair

After delivery of any units to be installed you will be responsible for their safe keeping and you should make sure that you are adequately insured against any damage or loss which may occur to those units.

Unlikely to be fair

In respect of any direct damage to property caused by the negligence of the company or the negligence or willful default of its servants or agent, the company's liability hereunder shall not exceed £1,000.

More likely to be fair

We will pay for any damage caused by our employees.

Unlikely to be fair

If either you or we are in breach of the arrangements under this agreement, neither of us will be responsible for any indirect or consequential losses that the other suffers as a result.

More likely to be fair

If either you or we are in breach of the arrangements under this agreement, neither of us will be responsible for any losses that the other suffers as a result, except those losses which are a foreseeable consequence of the breach.

Unlikely to be fair

In no event shall the company or its suppliers be liable for lost profits or indirect, consequential, incidental, special or punitive damages arising out of any breach or failure of the company, even if the company or its suppliers have been advised of the possibility of such dangers.

More likely to be fair

The company's and its suppliers' liability shall not in any event include losses related to any business of the customer such as lost data, lost profits or business interruption.

Unlikely to be fair

The company's entire liability and your exclusive remedy shall be, at the company's option, either a) return of the price paid or b) repair or replacement of the software or hardware that does not meet our warranty and which is returned to us with a copy of your receipt.

More likely to be fair

If the software or hardware does not meet our warranty and you return it to us with a copy of your receipt, you can choose between getting a refund or a repair or replacement of the product. This is in addition to other remedies you are legally entitled to if the software or hardware is, for example, faulty or not as described.

Exclusion of other legal rights

How could exclusion of other legal rights be unfair?

6.43 Any term which could have the effect of depriving consumers of protection normally afforded to them under the law is potentially unfair. Non-exhaustive examples of relevant other legal provisions that give consumers rights include:

- **the law relating to data protection and ePrivacy.** The UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 protect individuals from inappropriate use of personal information about them (their personal data) by others. In addition, the Privacy and Electronic Communications Regulations (PECR) contain rules giving people other specific privacy rights, including in relation to the use of technologies (such as 'cookies') to store or access information on people's devices and direct marketing calls and emails.[237] A term or statement which could permit a trader to deal more freely with a consumer's personal data (particularly 'special category data' or other sensitive information about them) than the law allows – for example, to pass it on more widely – is potentially unfair.[238] It could also be unfair to require consumers to 'opt out' of giving their consent to their data being collected, especially if this is in small print that may be missed or misunderstood. Under data protection law, consent requires clear affirmative action.

- **the law relating to 'unsolicited' products and services in the context of mail-order or online transactions**. Generally speaking, consumers have the right to treat what they have not asked to receive as a gift, and cannot be made to pay for it.[239] Any term which could result in consumers receiving goods or services they were not expecting, and paying for them contrary to their right not to do so, is likely to be unfair.

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[237] The Information Commissioner's Office (ICO) is responsible for monitoring and enforcing the UK GPDR, the Data Protection Act 2018, and PECR. The ICO publishes guidance on its website about how these laws apply.
[238] 'Special category data' is defined in the UK GDPR and, among other things, includes personal data revealing racial or ethnic origin, data concerning health or sexual orientation, and biometric data (where used for identification purposes). Processing special category data is subject to additional safeguards. Other personal data that may be regarded as particularly sensitive includes location data, private communications, or financial data.
[239] See section 236 and paragraphs 24 and 31 of Schedule 20 to the DMCC Act. See also CCRs Regulation 40.

- **legislation relating to 'off-premises' contracts such as 'doorstep selling'**.[240] This legislation gives the consumer a right to cancel a purchase within a 'cooling-off' period (time for reconsideration or for examination of goods supplied) where the sale was made away from the trader's business premises, for example on the street or in the consumer's home. Any term which could deprive consumers of this right is likely to be unfair. For example, this includes a statement in contractual documentation to the effect that the contract has been made at the trader's place of business, a term which says or gives the impression that the consumer has to comply with a specific formality, such as return a form by post, in order to enjoy the cancellation right, or a term which waives the consumer's cooling off rights.

- **legislation relating to distance sales**. Consumers entering contracts 'at a distance', for example by post, over the telephone or on the internet usually enjoy legal protection equivalent to that for 'off-premises' contracts.[241] In particular, they have a right to receive certain information before the contract is concluded and normally have a right to cancel during a 'cooling-off' period and get a full refund. Terms in distance contracts which seek to exclude or restrict these rights are prohibited and likely to be unfair – for example a term which reduces the consumer's refund if the consumer opens the packaging of a product.

- **the consumer's right to transfer (or 'assign') to someone else what they bought.** Making guarantees non-transferable is a restriction on this right and is likely to be unfair. Guarantees can add substantial value to the contract. If consumers cannot sell something still under guarantee with the benefit of that guarantee, they are effectively deprived of part of what they may reasonably feel they have paid for. A term is more likely to be fair if it allows a subsequent purchaser (or 'assignee') of goods to rely on the guarantee and ensures any procedural requirements to establish that it was properly assigned are reasonable.

[240] See the CCRs.
[241] See the CCRs.

Variation terms[242]

What are some examples of variation terms?

6.44 Examples of variation terms include terms that allow the trader to:

- change any of its terms,
- change the description or nature of the product from what was previously agreed,
- change the price of what is supplied without seeking the consumer's agreement before doing so or being unclear as to what increases they can expect,
- transfer their responsibilities to a third party without the consent of the consumer.

Trader's right to vary terms generally

How could variation terms be unfair?

6.45 A right for one party to alter the terms of the contract after it has been agreed, where the other party has not consented to that change, is potentially unfair. A variation term is more likely to be unfair if:

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[242] See paragraphs 11, 12, 13, 14, 15 and 19 of the Grey List respectively:

- A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract. Note that there are carveouts from paragraph 11 in relation to certain types of terms in financial services contracts and certain types of terms in contracts which last indefinitely. However, if something is within the carveout, this does not exempt a term from a fairness assessment and does not make such a term fair.
- A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
- A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.
- A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.
- A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.
- A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.

- **it could be used to force the consumer to accept unanticipated costs or penalties, new requirements, or reduced benefits.** This applies particularly to variation terms in contracts for a fixed or minimum contractual period. Where a consumer enters a contract for a defined period (especially if it is short), they will likely expect that the terms of the contract are fixed for that period. However, even where a contract is open-ended in duration, variation terms may still be unfair.

- **its wording means it could be used to impose substantial changes** even though it may have been intended solely to facilitate minor adjustments or corrections.

6.46 Consideration must be given to all circumstances in which the variation could occur, and what the cumulative effect of multiple such variations over the life of the contract would be. Factors that may indicate the unfairness of a variation term include:

- **its breadth** – the extent of the changes that it allows, and particularly changes that are exclusively in the interest of the trader.

- **its transparency** – how far it can result in changes that are unexpected to and unforeseeable by the consumer. A qualification that variations will only be 'reasonable' or will only be made 'reasonably' without further clarity as to what sort of variation such wording allows and in what circumstances is unlikely to make a term fair on its own. Where there are insufficient details in the term, consumers will not be able to predict the impact of the change on them at the time they sign up.

- **its effect on the consumer in practice** – in particular, whether consumers can realistically escape the impact of the changes by cancelling the contract, or whether the consumer will be able to access alternatives.

How could variation terms be used fairly?

6.47 A variation term is more likely to be fair if:[243]

- **it is narrow in effect**, so that it cannot be used at the discretion of the trader to put the consumer at a disadvantage. Such terms may include allowing variations to reflect changes in the law or to meet regulatory

[243] This is a non-exhaustive list.

requirements (such as new health and safety requirements), and terms which connect the change exclusively to specific criteria set by a third party (for example, the Bank of England base rate). However, allowing variation merely by reference to technical legislative or regulatory provisions, without the trader providing any information to enable consumers to understand what this is likely to mean for them in practice, is unlikely to be fair.[244]

- **its effect is objectively reasonable,** for example it does not create knock-on problems for consumers or operate in circumstances where the change is not justified or would otherwise be surprising.

- **it is clear about when it can be used.** This may be achieved through transparency,[245] meaning that the contract and surrounding literature set out the circumstances, method and valid reasons for using the right of variation in a clear and specific way, so that consumers entering contracts are able to foresee changes that can be made and understand their implications.[246] A reason is more likely to be valid where it is connected to an external event that is unconnected with commercial decisions the trader may make, such as changes to an index published by a government agency. A variation term is more likely to be fair where the parties to the contract would be likely to share a common view that the proposed changes are reasonable and expected.[247]

- **it requires the trader to give notice of any variation prior to it taking effect in a way and with enough time** to allow the consumer to consider how that change may affect their rights and obligations

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[244] See Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 50: 'it is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned'.
[245] However, transparency alone is not sufficient to make a term fair.
[246] See for instance Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraphs 43 and 44, and 55 in particular, where the CJEU followed its earlier approach to price variation terms in Case C-472/10 *Nemzeti Fogyasztovedelmi Hatosag v Invitel Tavkozlesi Zrt.* (referred to below as *Invitel*, see paragraphs 21–31 of the latter case and paragraphs 27 and 28 in particular). Variation terms, like all written terms, must in any case, meet the requirements of transparency, see Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.* at paragraph 73 and Case C-143/13 *Matei v SC Volksbank Romania*, at paragraph 74, which build upon the earlier cases cited of *Invitel* and *RWE*.
[247] Traders also need to comply with the requirements of price transparency set out in the DMCC Act. See the CMA's Price transparency: CMA209 - GOV.UK guidance for details.

under the contract before deciding whether to accept it or to end the contract.[248]

- **it includes a right for the consumer to cancel** without being adversely affected. The right to cancel must be genuine and not merely a formal right: the consumer must be able to exercise it in practice without loss or serious inconvenience. Where there is (formally or in effect) a financial sanction for exercising the right to cancel or the consumer will otherwise be worse off by doing so, a cancellation right is unlikely to make a variation term fair.

Examples

Unlikely to be fair

The company may at any time vary or add to these conditions as it deems necessary.

More likely to be fair

The company may change or add to conditions where required to do so for legal or regulatory reasons. We will give you at least one month's notice of any changes or additions alongside an explanation of what they mean for you. You may end this contract at any time by giving one month's notice, if we tell you we are going to change these conditions.

Unlikely to be fair

Any typographical, clerical or other error or omission in any sales literature, quotation, price list, acceptance of offer, invoice or other document or information issued by the seller shall be subject to correction without any liability on the part of the seller.

More likely to be fair

We have the right to correct any error or omission in any information or document issued by us, provided that the correction does not materially affect the subject matter, price and rights of the contracting parties.

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[248] See Case C-472/10 *Nemzeti Fogyasztovedelmi Hatosag v Invitel Tavkozlesi Zrt*, particularly at paragraph 24, and Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, particularly at paragraphs 51 and 52.

Unlikely to be fair

The executor services we provide will be subject to the terms and conditions in place at the time of your death.

More likely to be fair

The executor services will be provided in accordance with the terms and conditions contained in this agreement.

Right to determine or change what is supplied

How could a right to determine or change what is supplied be unfair?

6.48 Terms that allow the trader to substitute something different for what the consumer agreed to are likely to be unfair where they are not consistent with the consumer's statutory right to receive something that is in all significant respects what the trader stated would be supplied,[249] not merely something similar or of equivalent standard or value.

6.49 A term allowing the trader to vary what is supplied at will is unlikely to be fair even if customers have a right to cancel and get a refund. The consumer should not generally have to choose between accepting a product that is not what was agreed, or suffering the inconvenience of unexpectedly not getting, for example, a product for which they may have an immediate need, or a long-planned holiday, just because it suits the trader not to supply what was promised.

6.50 Similarly, where the trader and consumer have not agreed on all the details of what is to be supplied, a term that gives the trader the sole right to determine what is supplied is likely to be unfair. Such a term, especially if widely drafted, could be used to deny consumers what they expected to receive under the contract.

[249] This reflects the provisions of the CCRs (SI 2013/3134) under which, for many types of contract, certain pre-contract information must be provided by the trader and is to be treated as constituting a term of the contract, irrespective of whether it appears in a contract document as such. Any variation term needs to be reflected in the pre-contract information itself.

How could a right to determine or change what is supplied be used fairly?

6.51 A term which allows the trader to determine or change what is supplied is more likely to be fair if it complies with the principles for fair variation set out above. This includes, for example, ensuring that:

- **the term is clear and restricted to allowing either minor technical adjustments** which can be of no real significance to the consumer or changes required by law or necessity. For example, 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.

- **the contract sets out clearly what variation might be made, in what circumstances and how far it can go**, for example if the consumer orders goods of a certain colour but agrees to accept one of a range of others if the original colour is not available.

- where circumstances could prevent the supply of the goods, digital content or services agreed (or a version of them that the consumer has indicated is acceptable), the consumer has **a genuine right to cancel the contract, receive a refund of any prepayments and claim appropriate compensation**. Where it is known that a chosen item could be unavailable from the manufacturer, that risk should be drawn to the consumer's attention before the contract is concluded. However, if the trader has agreed to supply it, only flagging the risk of non-availability is not enough.

Examples

Unlikely to be fair

The company reserves the right to vary design and/or specification of any installation and/or product used without prior notice to the customer.

More likely to be fair

As it is our policy to continually improve products, methods and materials, we reserve the right to change specifications from time to time. We will not make any significant variations without your agreement.

Unlikely to be fair

In the event of the manufacturer altering the specification of the goods, the seller reserves the right to deliver, in fulfilment of this contract, goods conforming to the manufacturer's specification prevailing at the time of delivery in which case such goods shall be deemed to be within the description of the goods contained in these conditions of sale.

More likely to be fair

If a significant change in specification will prevent us from supplying a vehicle which precisely meets the specification detailed overleaf, we will offer you an alternative vehicle of comparable specification, on the understanding that you have the option of accepting it or cancelling this agreement without penalty.

Price variation terms

How could price variation terms be unfair?

6.52 Terms that are more likely to be unfair include:

- terms that have the effect of leaving the trader free to decide when to vary the price or to calculate or determine the price so that the consumer cannot work out in advance of entering the contract how much they will have to pay under it.
- giving the trader a purely discretionary right to set or vary a price after the consumer has become bound to pay, including terms that:
    - are unclear about what will be payable and when, if the effect could be to allow the trader to make unexpected demands for money at its discretion.
    - allow a trader to increase their price where the product the consumer is receiving is unchanged and the price increase is unrelated to the trader's actual costs or is otherwise arbitrary.
    - give the trader the right to increase prices to cover any increased costs incurred by the trader. This is especially true for short fixed-term contracts. Generally, traders are much better able to anticipate and control changes in their own costs than consumers.

- adjusting the price where the consumer has an expectation that the price will remain fixed (for example during a fixed rate period of a contract).

- terms that do not oblige the trader to reduce the price promptly if their costs reduce, or which set a price floor or cap that means that if an underlying index changes to the consumer's advantage, they will not benefit fully from the effect of the change.

How could price variation terms be used fairly?

6.53 Traders can agree prices with consumers up front, which are transparent, prominent and fall within the core pricing exemption. Price variation terms are more likely to be fair if they follow the principles set out below.

6.54 Any term which can be used to vary the price should set out clearly the circumstances in which a variation may occur, and the method of calculating the price variation, so that the consumer can foresee, on the basis of clear, intelligible and objective criteria, the changes that may be made and evaluate the practical implications for them.[250] Similarly, a price determination term should clearly set out the information which will enable the consumer to foresee what price will be payable depending on the circumstances.[251]

6.55 A price variation term is more likely to be fair in the following circumstances, if transparency criteria have been met so that consumers are able to make an informed choice about whether to enter the contract in the first place:

- **where the consumer has a clear expectation that the price will increase**. This is less likely to be achieved where a contract is for a fixed or short duration. It is more likely to be achieved where a contract sets out staged payments clearly, or where it is a contract of indeterminate duration and the measures discussed below apply. In any event, where a price variation is a possibility, traders should make consumers aware of this.

- **where the level and timing of any price increases are specified.** The greater the certainty the consumer can have about what they will

[250] Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 49.
[251] Chapter 1 of Part 4 of the DMCC Act prohibits misleading pricing and sets out what pricing information traders must give consumers in an invitation to purchase. Traders must comply with these requirements when their contracts provide pricing information, including about how a price might be varied. See the CMA's Price transparency: CMA209 - GOV.UK guidance for details.

have to pay, the more likely a term is to be fair. This can be achieved by setting out specific staged payments for example.

- **where there is an objective, clear and specific justification for the price increase,** such as where specified costs to the trader of providing a service to the consumer can be expected to increase over time. Where the increase simply generates an income stream for the trader, there is unlikely to be any justification for it.[252]

- **where the increase is linked to a relevant published price index which can be expected to relate to the trader's actual costs of providing the service,** such as the Bank of England base rate in the context of a loan interest rate. Any index used should be capable of independent verification, and be described with sufficient clarity in the contract, so that people can genuinely understand and predict the likely impact of the fee variation term on them over the course of the contract. The more complex an index is, the harder it will be to explain, meaning that it may be unfair for lack of transparency. Clarity and fairness may also require worked examples of increases to help consumer comprehension and increases may need to be capped at a specified level. However, as noted above, an increase that does not correspond to a specific service provided by the trader, even if linked to an index, is unlikely to be justified.

- **where the term also provides for the price to decrease** if costs go down. This mechanism should work at least as effectively as the price increase mechanism.

- **consumers are genuinely free to escape the effects of a price variation term** by ending the contract. To allow genuine freedom to end the contract, a term must not confer just a formal right to exit without penalty, but one that can be exercised freely. Whether such a right is genuine will depend significantly on the practical possibility of actually exiting the contract, such as whether the consumer would need to move assets or digital content to another provider (and how difficult this would be), any practical difficulties in finding an alternative supplier, and whether the market is competitive.[253] The consumer

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[252] For example, ground rent payments which doubled less than every 20 years but where there was no corresponding increase in costs to the freeholder.

[253] As per Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, at paragraph 54, where the CJEU indicated the type of factors which are relevant when considering if the right to cancel can be exercised following a price rise for the supply of gas.

should not be left worse off for having entered the contract, whether by experiencing financial loss (for example, loss of a prepayment) or serious inconvenience, or any other adverse consequences.

- **the consumer is given sufficient and effective advance notice** of the price increase, to enable them to take action to avoid the price increase and exit the contract if they wish to.

Examples

Unlikely to be fair

Prices applicable shall be the price at the date of dispatch. The company therefore reserves the right to amend prices quoted at the date of the placing of an order.

More likely to be fair

The price applicable to an order will be the price confirmed at the time the order is placed. The company may only vary the price after an order has been placed where this is necessary due to an obvious pricing error. The customer will be notified of any price change prior to dispatch and may cancel the order without charge and receive a full refund.

Unlikely to be fair

The company may increase the price for the service at any time after a period of one year from the installation date by giving notice in writing stating the increase and the date it shall become effective. The subscriber may within one month after the service of any notice of increase give three months' notice in writing terminating this agreement.

More likely to be fair

The company may change the price for the service once annually to reflect increases or decreases in the costs we are charged by our suppliers in the course of providing the service. Any increase will not be higher than the increase in the Consumer Prices Index. The company will give one month's notice in writing of the change, stating the level of the change and basis for it, and the date it shall be effective. The subscriber may cancel this agreement by giving one week's notice in writing within one month after the service of any notice of increase.

Unlikely to be fair

Membership subscription rates may be changed from time to time in accordance with the rules of the relevant club and the member agrees to pay any increased subscriptions which may be due during the continuance of this contract.

Unlikely to be fair

The company may increase the service charge at any time after 12 months from the agreement date by giving notice in writing to the customer stating the new service charge and the date (not being earlier than the date of the notice) on and after which the new service charge shall become effective.

More likely to be fair

We can change our service or monitoring charge after 12 months from the date of this agreement by giving notice in writing to the customer. The notice will state the new service charge and the date on which it will be effective (which will be at least 28 days after date of the notice). Our new charges will be index-linked. The index we use is the latest monthly BEAMA index (electrical engineering) published before the date we send you the invoice. You may, within one month after notice, cancel this agreement by giving give one week's notice in writing. We will make only one such change in any 12-month period.

Unlikely to be fair

We may introduce additional charges at any time during the term of this contract, (such as administration charges, technology charges, or service charges) in such amounts at our sole discretion. Any such fees will be payable immediately and form part of the amounts due under this contract.

Trader's right to transfer their responsibilities to a third party without consent

How could the trader's right to transfer their responsibilities to a third party be unfair?

6.56 A transfer of rights under a contract to a new owner is an 'assignment' (or in Scotland an 'assignation'). If a business changes hands, then rights and obligations under any contracts with consumers are likely to transfer with it.[254]

[254] In law, only the rights under the contract can be 'assigned' and not the obligations/burdens under the contract, for instance the provisions of goods or services by the trader to the consumer. In practice, parties often behave

As a result, the consumers affected may find themselves dealing with a different trader, if their contract was a continuing one (like an insurance contract) or, if it was for a single transaction, when any problem arises with the goods, services or digital content that were supplied to them under that transaction.

6.57 A term is more likely to be unfair if it allows for the 'transfer' of rights and obligations that could result in:

- the consumer having to deal with a different trader who, for instance, offers a poorer service or imposes extra costs or charges on them; or
- complications, such as a need for the consumer to deal with two traders.

How could the trader's right to transfer their responsibilities to a third party be used fairly?

6.58 Terms of this kind are more likely to be fair if, for example:

- consumers are consulted in advance and the 'transfer' of rights and obligations affecting them is permitted only if they consent before it proceeds and they are otherwise allowed to continue dealing with the original trader or they have the option of terminating the contract.
- consumers have a penalty-free right of exit if they object to the new trader, where services, goods or digital content are being provided and paid for on a continuing basis (as, for example, with membership of a club).
- the term operates only in limited circumstances, where the consumer's rights under the contract are unlikely to be prejudiced.

as though the burden of the contract can also be assigned. This may be classified in legal terms as a novation (that is the old contract is replaced with a new contract between the consumer and the new trader) or as an assignment of the benefit of the contract coupled with the subcontracting of the obligations to the new business. What is said above applies whether assignment or novation is involved.

Examples

Unlikely to be fair

The company shall be entitled to assign this agreement either in whole or in part.

More likely to be fair

The company may transfer its rights and obligations under this agreement either in whole or in part to a third party, if you have agreed to the transfer. If you do not agree to the transfer, you have the option of cancelling this agreement without penalty.

Termination and breach by consumers[255]



6.59 There are several types of potentially unfair terms related to consumers terminating or breaching contracts, including:

- terms that allow traders to retain consumer prepayments when the consumer cancels,
- disproportionate termination fees and financial sanctions,
- requiring consumers to pay for services not supplied,
- unfair enforcement powers.

Retention of prepayments when the consumer cancels

How could retention of prepayments when the consumer cancels be unfair?

6.60 In many cases, consumers are entitled to receive a refund of prepayments made under a contract which does not go ahead, or which ends before the consumer receives any significant benefit. A term which makes any substantial prepayment entirely non-refundable, regardless of the circumstances or the amount of costs and losses caused by termination, potentially allows the trader to make an unjustified gain and is more likely to be unfair.

6.61 Generally, where the trader breaches a contract for goods or services in a way that entirely negates its value to the consumer, the consumer is likely to have the right to end the contract and would normally be entitled to a swift, full refund of any prepayments (and possibly compensation as well).[256] If the

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[255] See paragraphs 4, 5 and 6 of the Grey List respectively:

- A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.
- A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
- A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.

[256] Generally, this also applies where a contract can no longer be performed at all or as agreed because of something that happened after the contract began that was no fault of the parties (such that the contract is 'frustrated'). There may be some circumstances in which a consumer is not entitled to a full refund. For example, where an ongoing contract has been frustrated but where the consumer has already received something of value,

contract is for paid digital content, the consumer's ability to terminate the contract is more restricted but the consumer can still recover payments in full in certain cases, particularly when the trader has completely failed to supply the digital content under the contract.

How could retention of prepayments be used fairly?

6.62 Terms that allow traders to retain consumer prepayments when they cancel are more likely to be fair if:

- the consumer is at fault for ending the contract and the trader retains sums that are reasonably needed to cover either their unavoidable net costs or the net loss of profit resulting directly from the default.
- a prepayment is set at a level that reflects the ordinary expenses of the trader when a consumer cancels. A genuine deposit may legitimately be kept in full as long as it operates as a binding reservation and the trader makes clear to the consumer at the earliest opportunity that a deposit is required, and the precise circumstances in which it would be non-refundable. Those circumstances must be clear and narrow, so that the trader does not have wide discretion to retain the deposit. But such a deposit will not normally be more than a small percentage of the price. A larger prepayment is more likely to be unfair as it may amount to a disguised penalty.

Examples

Unlikely to be fair

Please note that in the event of unsatisfactory references or aborted transactions, there is no refund of the holding deposit.

More likely to be fair

If false information or references are submitted, the company has the right to withhold reasonable costs incurred. If the landlord withdraws the property from the transaction, a full refund is given.

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a partial refund may be lawful. There may also be rare cases where a trader may be able to deduct a limited amount from the refund to contribute to costs it has already incurred in relation to the performance of the specific contract in question where it cannot recover them from elsewhere. The CMA's Statement on coronavirus (COVID-19), consumer contracts, cancellation and refunds sets out how the law operates in the context of frustrated contracts.

Disproportionate termination fees and financial sanctions

How could disproportionate termination fees and financial sanctions be unfair?

6.63 Terms must not go beyond what is necessary to achieve their objectives. Terms are therefore more likely to be unfair if they have the effect of imposing disproportionate fees or charges on a consumer who decides to end the contract early, or of imposing disproportionate sanctions for breach of contract. This includes:

- **a term requiring payment of all the outstanding sums due on termination of a contract of minimum duration,** where
    - the trader does not have to supply the product for the remaining duration, and
    - the required payments exceed the benefit the consumer gained by signing up to the contract (instead of for example, a contract with a shorter duration or different payment plan) or exceed any costs incurred by the trader as a direct result of the consumer's termination.
- **a term requiring a payment for terminating the contract early that does not appropriately reflect:**
    - any savings for the business associated with no longer having to provide the goods, digital content, or services,
    - any ability of the business to mitigate (reduce) any loss following the cancellation, for instance by finding another customer, and
    - any benefit to the business of receiving a payment earlier than it would otherwise have done.

- **a requirement to pay more as compensation for a breach than a reasonable pre-estimate of the loss caused to the trader**.[257, 258] This includes terms saying that the trader can claim:
    - a fixed arbitrary sum for any breach, which is disproportionate to any losses from potential breaches,
    - all its costs and expenses, not just its net costs resulting directly from the breach,
    - both its costs and any loss of profit where this would lead to being compensated twice over for the same loss, and
    - its legal costs on an 'indemnity' basis, that is all costs, not just costs reasonably incurred.[259]
- **a requirement to pay unreasonable interest on outstanding payments**, such as at a rate excessively above the clearing banks' base rates. This makes the consumer pay more than the cost of making up any loss caused by the consumer's default.
- **a requirement to pay excessive storage or similar charges** where the consumer fails to take delivery as agreed.
- **a term allowing the trader excessive discretion to decide the level of a financial sanction**, or a term that could have that effect through being vague, or unclear, or misleading about what consumers will be required to pay in the event of default.
- **a term which**, in combination with any other term in the contract, **permits double recovery**.

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[257] Such a requirement may be void to the extent that it amounts to a penalty under English common law. However, a term may still be considered unfair separately, if it has a penal purpose or effect. For example, in *Munkenbeck and another v Harold* [2005] EWHC 356 (TCC), a clause requiring a consumer to pay interest at 8% above the Bank of England base rate on sums due to a trader was found to be unfair, even though it constituted a genuine pre-estimate of damage and was not a penalty at common law.

[258] The fairness of any term is assessed having regard to the other terms of the contract, and even if not excessive when considered separately, may be unfair if it could operate together with another term or terms in a way that would lead to the trader being compensated twice for the same loss.

[259] The words 'indemnity' and 'indemnify' are legal jargon and should be avoided.

How could termination fees and financial sanctions be used fairly?

6.64 Termination fee terms are more likely to be fair if, in plain language, they require the consumer to pay a stated sum which represents a genuine pre-estimate of loss the supplier is likely to suffer. It may be acceptable for a contract to contain a sliding scale of termination or cancellation charges but there must be no circumstances in which they are likely to be disproportionate or punitive. Such a scale, if given appropriate prominence, can provide consumers with certainty and clarity as to their position if they need to cancel.

6.65 Financial sanctions are more likely to be fair if:

- the term sets out a sum which is objectively proportionate and appropriate for the objective it seeks to achieve.
- the circumstances in which the sanction will become due are clear, upfront and objectively reasonable.
- the consumer can easily avoid the sanction becoming due.
- the consumer obtained a clear benefit by submitting to the term.

Example of a term found to be fair

6.66 In one case the courts considered the fairness of a cancellation term which set out a sliding scale of sums payable by the consumer in the event they decided not to proceed with a sailing adventure after booking.[260] At the stage the consumer cancelled, the term stated that 75% of the contract price was payable. The Sheriff Principal held this was fair, viewed in the context of the contract as a whole. It related to a specialised round the world yachting trip requiring significant commitment, compulsory training, adherence to safety and conduct obligations, and the maintenance of a minimum number of trained crew members, making it different from an ordinary consumer contract such as a package holiday. The term reflected the legitimate commercial interests of Clipper Ventures Plc in ensuring committed crew participation and addressing the consequences of cancellations where replacement crew might need to be recruited at additional cost. The Sheriff Principal found that the clause was clear, open and legible, prominently setting out cancellation consequences through an ascending “sliding scale” of cancellation charges in

[260] See *Clipper Ventures Plc v Boyde [2013] S.C.L.R. 313*, at paragraphs 43-44.

a table that gave participants clarity and certainty about their liability for cancellation at different stages of the contract.

6.67 The Sheriff Principal noted that, "The terms of the agreement are entirely straightforward on the cancellation penalty. It is shown not in small print but in a very clear form, namely a table of cancellation charges in ascending scale. The layout of the table and ascending nature of the charges introduces clarity and certainty which is desirable in consumer contracts."[261]

Examples

Unlikely to be fair

The company may in its absolute discretion agree to the cancellation of the contract provided that the customer reimburses the company for all expenses actually incurred together with the anticipated gross profit had the contract been completed.

Unlikely to be fair

If the purchaser shall fail to perform any of their obligations, the purchaser shall become liable to the seller for the loss of profit upon this agreement, and such other losses as the seller may have suffered. A written statement of the amount of such damages prepared and signed by or on behalf of the seller shall be conclusive proof of such loss.

Unlikely to be fair

The company reserves the right to charge a cancellation fee, the minimum being 30 per cent of the order value. This does not represent a penalty and serves to liquidate the company's costs.

Unlikely to be fair

Interest will be charged at the rate of 10 per cent per month or part thereof on any sum outstanding for more than seven days following the delivery and installation of the goods.

[261] See *Clipper Ventures Plc v Boyde [2013] S.C.L.R. 313*, at paragraph 44.

More likely to be fair

You may terminate this Agreement at any time by giving written notice to the Company. If you terminate more than [x days] before the Event, no charge is payable. If you terminate after this date, you should pay the cancellation charge specified below, which represents a proportionate contribution towards the costs incurred by the Company in organising and staffing the Event.

Date written notice of cancellation is received:

More than [X] days before commencement of the Event: No charge

[X] days to commencement of the Event: [A]% of the Total Fee.

Requiring consumers to pay for services not supplied

How could requiring consumers to pay for services not supplied be unfair?

6.68 Terms can operate to create a fixed or 'tie-in' minimum contract period, hence effectively locking consumers into paying for services, if they:

- do not allow consumers to cancel within the 'tie-in' period, so that the consumer who terminates has to make all, or nearly all, the payments that would have been made had the contract remained in place, or
- allow consumers to cancel, but only on payment of a charge or fee equivalent to all, or nearly all, of the payments.

6.69 A service contract does not necessarily have to provide a formal right of cancellation without liability to be fair. However, a term is more likely to be unfair if the consumer who chooses to stop receiving the service is always required to pay in full or nearly in full, regardless of whether allowance could be made for savings or gains available because of the contract's early termination.

6.70 In some situations, there may be less scope for the business to reduce its loss. In such cases, the focus of the fairness assessment will necessarily be on the period for which the consumer is tied in. For example, tie-ins of over 12 months have been found to be unfair based on the inability of consumers to

plan and assess what their circumstances would be in more than a year's time.[262]

Examples

Unlikely to be fair

After termination of this agreement, the customer should pay on demand all charges outstanding at the time of disconnection, including a £150 plus VAT disconnection fee.

Unlikely to be fair

If the customer cancels their holiday let booking at any time after confirmation, they will not be entitled to a refund and we reserve the right to retain all payments made to us.

Unfair enforcement powers

6.71 A term is more likely to be unfair if it seeks to give the trader the power to impose disproportionate sanctions on the consumer, or if it misleadingly threatens sanctions over and above those that it can legally impose. This includes terms that seek to allow the trader to resort directly to a sanction that can normally and properly only be authorised by court order, such as:

- **rights of entry:** for example, a term that purports to give the right of entry without consent to private property, whether to repossess goods for which consumers have not paid on time, to evict the consumer, or for any other purpose.
- **sale of the consumer's goods (as being subject to 'lien'):** for example, a term permitting the trader to sell goods belonging to the consumer but which the trader has in its possession. The law makes detailed provision as to how such goods should normally be treated.[263] A contract does not need to reflect these rules in detail but should not

[262] See *Office of Fair Trading v Ashbourne Management Services Ltd and others* [2011] EWHC 1237 (Ch), at paragraphs 162–174, in particular paragraph 169. The gym operators were in a position to argue that they were never in practice so oversubscribed that they could not take on new members. Thus, it could not be said that any individual member's early termination created a vacancy which they could then fill. Note also, minimum tie-in periods of 12 months were held to be unfair where the consumer could not end the agreement in certain circumstances including medical reasons which stopped the consumer using the gym, or loss of livelihood.
[263] In particular, the Torts (Interference with Goods) Act 1977, sections 12 and 13. The legislation does not apply to Scotland, where the position is governed by the common law.

override or contradict them. Terms are unlikely to be fair if they indicate that goods may be sold immediately, or without the trader giving adequate notice of the date and place of the sale, and particularly if they exclude the duties to obtain the best price that the trader reasonably can and to refund any surplus on the price the consumer paid originally.

Examples

Unlikely to be fair

In the event of cancellation, we may require the customer to deliver the goods to us, failing which we shall be entitled to remove the goods from the customer's premises and for such purpose may enter those premises without being liable for any damage caused by such removal.

More likely to be fair

In the event of cancellation, you must return and deliver the goods to us within 28 days, failing which we shall take legal proceedings to recover the goods or their value.

Unlikely to be fair

The company reserves the right to dispose of any article left for examination or repair which is not claimed within 6 calendar months from the date of this document.

More likely to be fair

If you do not collect your article within 6 calendar months of the 'to be ready' date as shown above, we may dispose of it to recover our costs and notify you of our intention to do so.

Termination and breach by traders[264]

6.72 Fairness requires that consumers and traders enjoy rights of equal extent and value in relation to ending or withdrawing from the contract.[265] The trader's rights should not be excessive.

How could excessive rights for the trader be used unfairly when ending, withdrawing from or breaching the contract?

6.73 Traders cancelling or breaching a contract can leave the consumer facing inconvenience and sometimes costs or other problems. A unilateral right for the trader to cancel or otherwise fail to deliver what they had agreed is more likely to be unfair, particularly in cases where:

- terms explicitly say that the trader can cancel or not deliver at will, without having any valid reason or without reasonable notice.
- terms allow the trader to cancel or not deliver for vaguely defined reasons, or in response to any breach of contract (even if minor or technical) by the consumer.
- terms allow the trader to cancel without acknowledging any right of consumers to receive a refund of prepayments. This applies equally to deposits and sums paid when (or after) the contract is entered into.
- terms allow the trader to retain prepayments for which the consumer has received no benefit.
- terms undermine the consumer's rights to end the contract, such as where the trader breaches a contract for goods, digital content or services (see Chapter 3).

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[264] See paragraphs 7 and 8 of the Grey List respectively:

- A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.
- A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

[265] What is said in this paragraph assumes that there are no special statutory provisions governing cancellation rights, such as apply under legislation to 'distance' or 'off premises' contracts, consumer credit and other particular areas.

How is fairness more likely to be achieved when ending or withdrawing from the contract?

6.74 Terms are more likely to be fair where they reflect normal rules of contract law, by allowing the trader to end the contract if the consumer is in serious breach. In some cases there might be a real risk of loss or harm to the trader or others if the contract continues for even a short period – for example, where there is a reasonable suspicion of fraud or other abuse. Where a trader terminates the contract in response to a serious breach by the consumer, they may be entitled to retain all or some consumer prepayments, particularly as compensation for any loss directly caused by the breach.

6.75 A term is also more likely to be fair when it draws the consumer's attention to any specific risks of cancellation if it is a real possibility and gives a clear indication as to the nature of any 'serious grounds' based on which the trader can cancel. Terms permitting the trader to cancel without advance notice and giving the consumer a reasonable opportunity to rectify the issue should be used only where absolutely necessary. Traders should nonetheless promptly notify the consumer of what is happening.[266]

6.76 A right to cancel where the consumer is not at serious fault is more likely to be fair if it is not discretionary. This means that the trader can cancel where circumstances make it impossible or impractical for them to complete the contract or for the consumer to receive the product (such that the contract is 'frustrated'). Such circumstances should be clearly and specifically described and exclude matters that could be within the trader's control, such as industrial disputes with the trader's own employees, equipment breakdown, or transportation difficulties.

6.77 Generally, where a contract is frustrated, the consumer should be entitled to a swift, full refund of any prepayments and not required to make any further payments.[267] This should include a refund of deposits or fees described as 'non-refundable'. Traders should not require consumers to comply with

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[266] In contracts for financial services – for example, banking and credit contracts – there may be no need for notice at all (see paragraph 21 of Schedule 2 to the Act). These are not exemptions from the fairness provisions of the Act. Any 'cancellation without notice' term may still be unfair if it fails the test of fairness set out in section 62 of the Act.

[267] There may be some circumstances in which a consumer is not entitled to a full refund. For example, where an ongoing contract has been frustrated but where the consumer has already received something of value, a partial refund may be lawful. There may also be rare cases where a trader may be able to deduct a limited amount from the refund to contribute to costs it has already incurred in relation to the specific contract in question where it cannot recover them from elsewhere. The CMA's Statement on coronavirus (COVID-19), consumer contracts, cancellation and refunds sets out how the law operates in the context of frustrated contracts.

formalities that involve disproportionate costs or inconvenience to obtain a refund, and traders should not charge any administration or processing fee to provide the refund.

6.78 Additionally, a cancellation term is more likely to be fair where the contract is constructed so that, if the trader must carry out preliminary works to see if the main work is viable[268] and it is not, the consumer is not made liable for any costs in relation to the main work. In addition, the trader should inform the consumer of the outcome as soon as possible with an explanation of the reasons why the contract cannot proceed.

Examples

Unlikely to be fair

The club reserves the right to render an individual's membership null and void without any reimbursement of the member's subscription.

Unlikely to be fair

The right is specifically reserved to terminate this engagement at any time, where in the estate agents' opinion, the asking price is unrealistic in the light of the prevailing market conditions or the vendor later raises any additional point which is unacceptable to the estate agents.

More likely to be fair

We can end this agreement by giving 14 days' notice in writing to you at any time in the following circumstances: a) if we believe that the price at which you require us to market the property is unrealistic; or b) if you require us to take any step which may put us in breach of our legal or professional obligations.

[268] Such as by conducting a survey or otherwise considering whether it is practicable to undertake work.

Unlikely to be fair

We reserve the right to cancel an order and refund all monies deposited in respect thereof in the case of either an unsatisfactory surveyor’s report or unsatisfactory installation price check on the property at which the installation is to be made**.**

More likely to be fair

After signing the contract, we will carry out a survey for the proposed work within 10 days or a mutually agreed period. If the survey report is unsatisfactory, we reserve the right to cancel the contract, after having given you a written explanation of the adverse structural conditions encountered. We will also refund all money deposited by you.

Automatic renewal[269]

How could automatic renewal terms be unfair?

6.79 A term which states how long a contract runs is more likely to be unfair if it can be used to extend the contract period beyond what the consumer would reasonably expect, or where it is not appropriate to renew the contract onto a fresh minimum term. In particular, the following terms are more likely to be unfair:

- **a term in a contract for a fixed period which automatically commits the consumer to a renewed fixed term if**:
    - the consumer has to give unreasonably early notice of their desire not to extend the contract.
    - the consumer has to comply with formalities that involve disproportionate costs or inconvenience to cancel.
    - the consumer's interest in continuing the contract could be appropriately met by renewing them onto a periodic rolling contract.[270]
- **a term which operates by relying on a consumer's inertia[271] or lack of information.** This includes the trader not giving effective reminders where it is not straightforward for the consumer to turn off automatic renewal. It also includes the trader turning automatic renewal back on without express consent (after the consumer has asked to turn it off).
- **a term requiring an excessively long notice period for cancellation in a contract which continues indefinitely.** Consumers entering such contracts normally expect to be able to end it at a reasonable time after they decide they no longer want or can no longer afford what is

[269] See paragraph 9 of the Grey List: A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early. The DMCC Act also contains new provisions on subscription contracts under Chapter 2 of Part 4 which are yet to come into force. These provisions will not apply to contracts that are 'excluded contracts'. These provisions, once in force, will apply in addition to the requirements of Part 2 of the Act, and compliance with these provisions may be relevant to the fairness assessment under the Act. See section 255 and Schedule 22 to the DMCC Act.
[270] This does not necessarily require a trader to offer a periodic rolling contract where they do not do so already.
[271] Note that inertia selling (including demanding payment for supplying products to a consumer that they have not requested) is an unfair commercial practice under paragraph 31 of Schedule 20 to the DMCC Act.

provided under it. If they are required to make a cancellation decision too far in advance, they might forget to do so at the required time or incorrectly anticipate their future needs. In either case, the effect of the term is the same as that of an automatic renewal clause – consumers have their payment obligations extended without wanting that.

How could automatic renewal terms be used fairly?

6.80 A term which could have the effect of automatically renewing a contract is more likely to be fair if:

- the consumer is sent appropriate reminders at a reasonable time before the renewal takes effect, which bring the fact and terms of the renewal to their attention effectively and enable them to take action.[272]
- the consumer is given clear information about the proposed automatic renewal and gives their express consent to sign up to it.[273]
- the contract allows an appropriate cooling-off period following renewal.
- the contract renews onto a rolling contract which can be cancelled by the consumer with a reasonable period of notice.
- it is easy for the consumer to switch off automatic renewal at any time.

6.81 Such a term is also more likely to be fair if there are reasonable procedures which allow for cancellation of the contract during the renewed period provided that:

- the consumer is not subject to any financial sanction for cancellation,
- any requirement to give notice of cancellation is reasonable and does not have the effect of tying the consumer unfairly into the contract, and

[272] The DMCC Act also contains new provisions on the content and timing etc. of reminder notices and what information must be contained in a reminder notice. See Chapter 2 of Part 4 of the DMCC Act, in particular section 259 and Part 3 of Schedule 23.
[273] Regulation 40 of the CCRs (SI 2013/3134) is also relevant as it specifies that no payment is payable in addition to the remuneration agreed for the trader's main obligation unless, before the consumer became bound by the contract, the trader obtained the consumer's express consent.

- it is easy for consumers to obtain a refund (either full or pro-rata) following cancellation if they want it.[274]

Examples

Unlikely to be fair

This agreement shall commence on the connection date and shall continue for the minimum period of 12 months and thereafter until terminated by no less than 3 months' notice in writing given by either party to the other. Such notice is to be given not before the expiry of the minimum period.

More likely to be fair

This agreement is for a minimum period of 12 months. It may be terminated by giving one month's notice, which commences on or after the end of the initial 11 months by following the instructions available at this link.

Dispute resolution[275]



Trader's right of final decision

How could a term giving the trader a right of final decision be unfair?

6.82 Terms are more likely to be unfair if they allow a trader unilaterally to decide whether and how the law applies to them. Disputes over the meaning and application of contract terms can normally be referred to the courts if either

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[274] The DMCC Act also contains provisions on arrangements for consumers to exercise the right to end a contract including the requirement for traders to allow consumers to cancel in a way which is straightforward and without taking any steps which are not reasonably necessary. See section 260(1) of the DMCC Act.

[275] See paragraphs 16 and 20 of the Grey List respectively:

- A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.
- A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—
  (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
  (b) unduly restricting the evidence available to the consumer, or
  (c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

The DMCC Act also introduced provisions relating to ADR – see Chapter 4 of Part 4 of the DMCC Act.

party so chooses. The following types of terms seek to take away this right from the consumer:

- **terms that give traders the right to determine whether they are themselves in breach of their contractual obligations**, potentially resulting in traders refusing to acknowledge that they have broken them and denying redress to the consumer.[276] This includes, for example, a term allowing the trader to test or inspect goods that a consumer claims are faulty and make a final determination of whether the complaint is well-founded.

- **terms that give traders the right to decide the meaning of terms**, so traders are effectively able to alter the way terms work to their advantage. It is not necessarily sufficient to say that the trader will act 'reasonably'.[277]

6.83 Terms are also more likely to be unfair where they:

- **enable the trader to determine how their own obligations are performed.** Contract law allows traders a reasonable degree of flexibility as to how and when they carry out obligations, if they have made no specific promises about them. However, a term giving traders complete freedom, whether for performing services or delivering goods, allows them to disregard customers' needs. For example, consumers may need to be able to make arrangements depending on when goods are due to arrive but can be hindered by a term allowing the trader to deliver goods in consignments as they think fit. This is not to say that delivery terms either can or should reflect only the convenience of the consumer, but rather that they should strike a reasonable balance.

- **allow the trader to decide when the consumer is or might be in breach** of their obligations and whether the consumer should be subject to a financial or other sanction or should be deprived of any benefits under the contract.

How could dispute resolution and final decision terms be used fairly?

6.84 Dispute resolution terms are more likely to be fair if they involve an element of independent adjudication. Final decision terms are more likely to be fair if

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[276] Such terms can have an effect comparable to terms unfairly excluding liability for poor service or faulty or misdescribed goods or digital content.

[277] Such a term potentially might work (and could be similarly unfair) as a right to vary terms generally.

drafted in a way that will not allow the trader to act unreasonably. For example:

- where a consumer complains about faulty goods, the contract provides for independent inspection or testing – if consumers are not required to meet the costs of this where it turns out that their complaint is well-founded.
- if a consumer who is unhappy with the trader's interpretation of the contract can decide to refer the matter to an independent expert or arbitrator. However, such terms should not compel the consumer to resolve the issues in this way.

Examples

Unlikely to be fair

The company shall not be responsible for scorch marks, stains, spillages or any other event causing damage which it deems as unavoidable in the circumstances prevailing at the time of the work.

Unlikely to be fair

Any dispute or difference which may arise about the interpretation of the rules shall be determined by the management, whose decision shall be final.

Unlikely to be fair

The company shall be entitled to make delivery of the goods by instalments.

More likely to be fair

Delivery of any units to be installed will be on mutually agreed date(s).

Unlikely to be fair

The company reserves the right to withdraw or suspend membership when, in its sole opinion, a member is misusing the service or behaving inappropriately.

More likely to be fair

The company may revoke a person's membership if a member has misused the service or behaved in way which objectively could be regarded as inappropriate. The company will first provide the member with written reasons for the revocation. If the member so chooses, they will be entitled to challenge the company's decision by referring the matter to the trade body responsible for the industry Code of Practice that the company is bound by.

Unlikely to be fair

We reserve the right to collect some or all of the security deposit for loss or damage found in the property after your departure.

More likely to be fair

You should notify us as soon as reasonably practicable after checking in if you discover anything missing or damaged at the property. We may deduct money from the security deposit only where we can reasonably demonstrate that loss or damage occurred during your stay and was not present before your arrival or due to fair wear and tear. Before making any deduction, we will notify you of the proposed deduction, the reasons for it, and provide supporting evidence where appropriate (for example, photographs and inventories). You will have at least 7 days to respond and, if you disagree with our decision to make deductions after we have considered your response, you may refer the matter to the arbitration scheme which is administered by an independent body. We will comply with any decision the arbitrator makes, but if you are still dissatisfied you may be able to take legal action in court.

Compulsory arbitration and alternative dispute resolution terms

How could compulsory arbitration and alternative dispute resolution terms be unfair?

6.85 Generally speaking, contract law allows contractual disputes to be resolved through arbitration, rather than going to court, where the parties agree it after

the dispute has arisen.[278] Agreement to go to arbitration should be genuine, not forced. A compulsory arbitration clause is likely to be unfair.[279]

6.86 Arbitration is not the only form of alternative dispute resolution (ADR).[280] A mandatory requirement to refer disputes to an ADR process of any kind is more likely to be unfair if its effect is to remove or limit the consumer's right to take legal action before the courts.

How could arbitration and alternative dispute resolution terms be used fairly?

6.87 If an arbitration term is to be used with consumers, it must not force consumers to use arbitration, or otherwise deprive them of access to the court. An arbitration or other ADR term is more likely to be fair where, for example, it makes clear that consumers have a free choice, when a dispute arises, as to whether to go to ADR.

6.88 Arbitration and ADR terms of this kind need to be transparent and are more likely to be fair if they:

- set out as fully and transparently the practical implications for the consumer of using ADR.
- offer consumers an affordable, fair and impartial dispute resolution mechanism.

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[278] New requirements for Alternative Dispute Resolution for Consumer Contract Disputes in Chapter 4 of Part 4 and Schedules 25-27 of the DMCC Act came into force on 6 April 2026 (see The Digital Markets, Competition and Consumers Act 2024 (Commencement No. 3 and Transitional Provisions) Regulations 2026, subject to the transitional provisions in those Regulations).

[279] If it relates to claims of £5,000 or less, a compulsory arbitration clause is automatically unfair under section 91 of the Arbitration Act 1996. A compulsory arbitration clause is defined as 'an agreement to submit to arbitration present or future disputes or differences (whether or not contractual)' (section 89(1) of the Arbitration Act 1996).

[280] For example, a comparable process, adjudication is also used particularly in the building industry where parties to a construction contract have a statutory right to refer a dispute to adjudication unless it is a construction contract with a residential occupier: see part II of The Housing Grants, Construction and Regeneration Act 1996. See also Chapter 4 of Part 4 of the DMCC Act in relation to ADR for Consumer Contract Disputes, where ADR is defined for the purpose of that Chapter as "*any method of securing or facilitating an out-of-court resolution of a consumer contract dispute that is carried out by an independent third party acting in relation to both parties to the dispute*" (section 291(2) of the DMCC Act), and provides as examples mediation; arbitration; early neutral evaluation; action under an ombudsman scheme (section 291(4) of the DMCC Act).

Examples

Unlikely to be fair

Any disputes, difference or question between the parties shall be referred to the arbitration of a single arbitrator.

More likely to be fair

If there is a dispute arising from this agreement which cannot be resolved, either you or we may refer it to arbitration by mutual consent.

Exclusive jurisdiction and 'choice of law' terms

How could exclusive jurisdiction and 'choice of law' terms be unfair?

6.89 Consumers must not be prevented from starting legal proceedings in their local courts through using exclusive jurisdiction terms.[281, 282] This includes, for example, a term requiring disputes to be resolved in the courts of England and Wales despite the fact that the contract is being used in another part of the UK which has its own courts. An exclusive jurisdiction term will be unenforceable except where a consumer voluntarily submits to the jurisdiction of that court.[283] It is not fair for the consumer to be forced to travel long distances and use unfamiliar procedures to defend or bring proceedings,[284] and a UK court is likely better placed to apply UK law than an overseas court or tribunal.[285]

6.90 It may in some circumstances be fair for a contract to specify the applicable law using choice of law terms. However, the Act will apply where the 'consumer contract has a close connection with the United Kingdom', even if

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[281] Under section 15B(2) and (3) of the Civil Jurisdiction and Judgments Act 1982:

- where the consumer is domiciled in the UK, the consumer can bring a claim in the part of the UK in which they are domiciled; and
- where the other party is domiciled in a part of the UK other than the part in which the consumer is domiciled, the consumer can also bring a claim in the courts of the other party. However, the consumer can only be sued in the courts of the part of the UK in which they are domiciled.

[282] In relation to jurisdiction of the courts, rules such as those in the recast Brussels Regulation, the Brussels I Regulation and the Lugano Conventions make provision as to where proceedings may be brought, and include provisions specifically relating to consumer contracts.

[283] Section 15B(6) and section 15D(1) of the Civil Jurisdiction and Judgments Act 1982.

[284] See *Payward, Inc. and other companies v Chechetkin* [2023] EWHC 1780 (Comm), at paragraphs 138-144.

[285] See *Soleymani v Nifty Gateway LLC* (CMA intervening) [2022] EWCA Civ 1297, at paragraph 152; and *Payward, Inc. and other companies v Chechetkin* [2023] EWHC 1780 (Comm), at paragraphs 150-151.

the parties have chosen for the law of a country or territory other than the UK to apply.[286]

6.91 Further, international conventions set out rules on this issue, which are part of UK law.[287] Terms which conflict with them are also likely to be unenforceable. The general rule is that a consumer contract will be governed by the law of the consumer's habitual residence. The parties can agree to a different governing law, but that choice does not deprive the consumer of mandatory protections which would be available to the consumer under their home law. This means that the court of one jurisdiction (including a constituent part of the UK) would apply its own law in any dispute but would also have to apply the laws of the consumer's home jurisdiction (which may be the law of another part of the UK) where that law gives the consumer additional protections.

6.92 Specifying a law other than that of the consumer's home may not be unfair in all circumstances but any assessment will be fact specific, taking into account matters such as whether the two potentially relevant legal systems differ (risking unforeseen outcomes potentially detrimental to the consumer) or if adding another law to the court hearing will be difficult, complex and costly for a consumer involved in a dispute.

*Example*s

Unlikely to be fair

Any dispute arising out of this agreement shall be subject to the jurisdiction of the courts where the company is located.

More likely to be fair

If you want to take court proceedings for disputes arising out of this agreement, you may do so in the courts of the part of the UK where you live or, if you live in a different part of the UK from that where the company is located, you can choose to bring proceedings in the courts of the part of the UK where the company is located.

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[286] See section 74 of the Act and paragraph 2.16 in this guidance for further details of what may constitute a close connection with the UK. See also *Soleymani v Nifty Gateway LLC* (CMA intervening) [2022] EWCA Civ 1297, at paragraph 86.

[287] Rules such as those in the Rome I Regulation set out the appropriate governing law for certain disputes and include provisions relating to disputes involving consumers. The Rome I Regulation also applies to situations involving a choice between the laws of England and Wales, Scotland and Northern Ireland.

7. Effect and enforcement of unlawful terms and notices

Summary at a glance

- The effect of unlawful terms and notices depends on whether they are prohibited outright, unfair or not transparent.
- The CMA and other relevant bodies can take enforcement actions against unlawful terms and notices through a court-based regime and, in the case of the CMA, through direct enforcement.
- Enforcers can also use investigatory powers to obtain information in connection with any enforcement action they take.
- Enforcement can also be done privately by individual consumers.

What is the effect of unlawful terms and notices?



7.1 The practical effect of contract terms and notices depends on whether:

- **they are prohibited outright:** these are not binding on and unenforceable against consumers.
- **they are unfair:** if they fail to meet the fairness test in the Act,[288] terms and notices are not binding on or enforceable against the consumer.[289] This means that consumers can resist an unfair demand by the trader or can insist that the trader acts in a particular way. This does not, however, prevent consumers from relying on such terms and notices if they wish.[290] Where a term is unfair, and consequently unenforceable against the consumer, the rest of the contract remains in effect if this is possible.[291] The unfair term cannot be re-written to make it 'fair'. Where consumers pay sums of money under an unfair term, these sums should be repaid by the trader.

[288] Section 62 of the Act.
[289] Section 62(2) of the Act.
[290] Section 62(3) of the Act.
[291] Section 67 of the Act. The unfair term is effectively severed from the contract, unless the consumer chooses to rely on it.

If consumers think certain terms or notices are unfair, they may wish to consider whether they have a legal case against the trader. Before taking any steps that will, or may, involve not complying with contract terms or taking legal proceedings, consumers are encouraged to always seek legal advice. The use of unfair terms or notices may also be stopped, rectified and penalised by public authorities and the courts on behalf of consumers in general.

- **they are not transparent:** a term or notice that only fails to meet the transparency test[292] is not (unlike a term or notice that fails to meet the fairness test) non-binding and unenforceable against the consumer. However, where a lack of transparency results in ambiguity, such that there is more than one possible meaning and/or confusion as to its scope and effect, the Act requires that an interpretation which is most beneficial to the consumer has to be used.[293]

  In addition, transparency of terms and notices is a legal requirement in its own right, breach of which can also lead to enforcement action. Such action may be taken where a term or notice is ambiguous even if one of its potential meanings is not unfair.

Who can enforce against unlawful terms and notices and how?



7.2 Traders that use prohibited, unfair or non-transparent terms and notices (together referred to below as 'unlawful terms and notices') can face enforcement action. Use of an unfair term may also be a misleading action under the unfair commercial practices provisions in Chapter 1 of Part 4 of the DMCC Act.

7.3 The unfair contract terms provisions of the Act may be enforced in several ways:

- by enforcement authorities through civil proceedings under the Act,
- by individual consumers under the Act,
- by enforcement authorities through civil proceedings under the Digital Markets, Competition and Consumers (DMCC) Act 2024. The DMCC Act enables the CMA, Trading Standards and sector regulators such as Ofcom to take action under a court-based enforcement regime. Additionally, the

[292] Section 68 of the Act.
[293] Section 69 of the Act.

DMCC Act also empowers the CMA alone to take action without going to court under a direct enforcement regime.

Public enforcement under the Act

7.4 The CMA and other relevant bodies (see the list below) may take enforcement action under the Act where a term or notice is considered by the enforcement authority to be:

- unfair to any extent,
- in breach of the transparency provisions in the Act, and/or
- prohibited outright by virtue of the provisions in the Act.

7.5 A term may be challenged if it is, or is proposed to be, used in a consumer contract, or if a third party (for example, a sales agent or trade association) recommends it being used in a consumer contract.

7.6 Under Schedule 3 to the Act, the CMA and other enforcement authorities have a discretion to consider any complaint received about terms and notices used by traders in their dealings with consumers.[294] However, enforcement authorities are not restricted to only taking action where they have received complaints.

7.7 If, following consideration of a complaint, an enforcement authority decides not to seek a court order, it must give reasons to the complainant for its decision.[295]

Enforcement means and outcomes under the Act

7.8 Under Schedule 3 to the Act, enforcement action may be taken to stop the use of unlawful terms or notices. This can be achieved by:

- enforcement authorities seeking a court order – this may result in the court[296] issuing an injunction or, in Scotland, an interdict. An order can apply to the use of terms in existing as well as future agreements. It can apply not only to those terms or notices identified specifically by the enforcement authority in its application but also to any term or

[294] Paragraph 2(1) of Schedule 3 to the Act.
[295] Paragraph 2(3) of Schedule 3 to the Act.
[296] In England and Wales, and Northern Ireland, any county court or the High Court. In Scotland, any sheriff court or the Court of Session.

notice of a similar kind or with a similar effect.[297] An enforcement authority can also seek a temporary order to prevent further use of the term or notice until the case can be fully argued in court.[298]

- enforcement authorities accepting binding commitments, known as undertakings, from traders.[299] If a trader gives and abides by a satisfactory undertaking to stop using a term or notice, or to revise it to meet the concerns raised, then court action will be unnecessary.

Coordination of enforcement action under the Act

7.9 Enforcement authorities (other than the CMA) taking action in respect of potentially unlawful terms or notices under Schedule 3 to the Act are required to notify the CMA of their intentions and the outcomes they secure. In particular, they must notify the CMA of any plans to apply for a court order and must either obtain the CMA's consent to make the application, or wait for a minimum period to expire (14 days beginning with the day on which the enforcement authority notified the CMA).[300] In addition, enforcement authorities must notify the CMA of the outcome of any court case they bring,[301] and/or the details of any undertakings they accept.[302]

7.10 The CMA will be selective in taking enforcement cases by reference to its published prioritisation principles and its Annual Plan. It will typically focus particularly on those cases which have a market-wide impact or precedent-setting value. The CMA will consider a number of factors in deciding whether it or one of its UK or international partners is best placed to act. These will include the facts of the case and the characteristics of the market in question, as well as the CMA's policies and other commitments. The CMA will then discuss the issue with relevant partners and agree with them who is best placed to act.

7.11 Working closely with other enforcement authorities avoids duplication of effort and maximises the impact of interventions for consumers. To this end, for

[297] Paragraph 5(3) of Schedule 3 to the Act.
[298] Paragraph 9 of Schedule 3 to the Act.
[299] Paragraph 6 of Schedule 3 to the Act.
[300] Paragraph 4 of Schedule 3 to the Act.
[301] Paragraph 5(5) of Schedule 3 to the Act.
[302] Paragraph 6(3) of Schedule 3 to the Act.

example, the CMA has agreed Memoranda of Understanding with several sector regulators to ensure a joined-up approach.[303]

Publication of enforcement actions taken under the Act

7.12 The CMA collates and publishes details of any undertakings and injunctions that it, or another enforcement authority, has obtained under the Act (including the details of any applications made to the court) on its webpage: www.gov.uk/cma.[304]

List of enforcement authorities under the Act

7.13 The following enforcement authorities have the power to enforce unfair contract terms law under Schedule 3 to the Act. They also have concurrent powers to take action against unlawful terms and notices under Part 3 of the DMCC Act.[305]

- the CMA: www.gov.uk/government/organisations/competition-and-markets-authority
- the Department for the Economy in Northern Ireland: www.economy-ni.gov.uk
- a local weights and measures authority in Great Britain (also known as Trading Standards): www.gov.uk/find-local-trading-standards-office
- the Financial Conduct Authority: www.fca.org.uk
- the Office of Communications: www.ofcom.org.uk
- the Information Commissioner's Office: ico.org.uk
- the Gas and Electricity Markets Authority: www.ofgem.gov.uk
- the Water Services Regulation Authority: www.ofwat.gov.uk
- the Office of Rail and Road: www.orr.gov.uk
- the Northern Ireland Authority for Utility Regulation: www.uregni.gov.uk

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[303] For further information on the CMA's approach to enforcement and how the CMA works in partnership with other agencies see the CMA's Consumer protection: enforcement guidance (CMA58).
[304] Paragraph 7 of Schedule 3 to the Act.
[305] Digital Markets, Competition and Consumers Act 2024, Part 3.

- the Consumers' Association (Which?): www.which.co.uk

7.14 The Civil Aviation Authority (www.caa.co.uk) is also a relevant authority but can only enforce the Act by means of Part 3 of the DMCC Act.

Private enforcement under the Act

7.15 Although enforcement authorities under the Act can seek to protect consumers in general, they do not have the power to take up consumers' individual cases for them or provide advice on private disputes. However, individual consumers can take action based on their legal rights under the Act independently of any action by the CMA or other enforcement authorities.

7.16 If a trader refuses to accept that a term or notice is unlawful, consumers may resist legal proceedings brought by the trader against them and may bring proceedings themselves. Before doing so, however, they should seek legal advice. If the court agrees with the consumer, the trader will not be allowed to rely on that term or notice against the consumer and may have to repay any money the consumer has paid under the unfair term. If the court agrees with the trader, the consumer may face a liability for the trader's legal costs.

7.17 Where any proceedings are brought which relate to a term in a consumer contract, the court has a duty to consider whether the term is fair.[306] This duty applies even if neither of the parties raises the issue, provided the court has enough information to make a fairness assessment.

Enforcement under the Digital Markets, Competition and Consumers Act 2024

7.18 Unfair contract terms law can also be enforced under the DMCC Act. Part 3 of the DMCC Act sets out two enforcement mechanisms available to relevant enforcers which can be used to protect the collective interests of consumers:[307]

- a **court-based enforcement regime** which replaces, simplifies and enhances the predecessor regime in Part 8 of the Enterprise Act 2002.[308] Under this regime, the CMA and other enforcement authorities[309] may seek several types of court orders from a civil court if

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[306] Section 71 of the Act. Note that this provision does not apply to notices.
[307] As with public enforcement under Schedule 3 to the Act, it is not permitted to use the enforcement powers under the DMCC Act to deal with consumers' individual cases or private disputes.
[308] This regime is set out in Chapter 3 of Part 3 of the DMCC Act.
[309] These are specified in section 151 of the DMCC Act. They include the CMA, Trading Standards, and sector regulators such as Ofcom and the Financial Conduct Authority.

they consider that there has been, or is likely to be, a breach of the unfair contract terms provisions in the Act. If the court finds that the law has been broken, it can issue orders requiring traders to stop and rectify their conduct (including by ordering traders to compensate consumers) or to pay a penalty of up to £300,000 or, if higher, 10% of global turnover. An enforcer, or the court, can accept undertakings from traders instead of, respectively, making an application for a court order or making an order. Further information about this regime can be found in the CMA's Consumer protection: enforcement guidance (CMA58).

- a **direct enforcement regime**, where the CMA may investigate, determine and take enforcement action (including imposing penalties) to address breaches of the unfair contract terms provisions in the Act.[310] The CMA is the only enforcer with these direct enforcement powers. Further information about this regime can be found in the CMA's Direct consumer enforcement guidance (CMA200).

7.19 Unfair terms law may be enforced under Part 3 of the DMCC Act against traders outside the UK where the trader has a place of business in the UK, carries on business in the UK or the trader is carrying out activities directed to consumers in the UK such as selling to UK consumers.[311]

Investigatory powers

7.20 Enforcement authorities have a range of powers to obtain information in connection with any enforcement action they take, or consider taking, under Schedule 3 to the Act or under Part 3 of the DMCC Act. These powers are set out in Schedule 5 to the Act and include powers to require traders to provide information necessary to identify whether, for instance, unfair terms and notices are in use, or whether a person is complying with an undertaking or injunction.

7.21 Enforcement authorities can use one or more of the following investigatory powers:

- sending written information notices,

[310] This regime is set out in Chapter 4 of Part 3 of the DMCC Act.
[311] See section 149 of the DMCCA and paragraphs 914 to 918 of the DMCC Act's explanatory notes for further explanation of considerations relevant to establishing if the trader's relevant activities are directed to consumers in the UK.

- purchasing products,
- observing business conduct,
- entering premises.

7.22 Enforcement authorities specified under Schedule 3 to the Act are limited to using the power to send written information notices. Enforcers specified in section 151 of the DMCC Act can use any of the investigatory powers above. Further information about the investigatory powers of consumer enforcers can be found in the CMA's Consumer protection: enforcement guidance (CMA58).