

What's New?

An overview of changes to unfair contract terms law in the Consumer Rights Act, September 2014

DRAFT – for BIS use for testing

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Quick reference list of acronyms used in this document

BIS	The Department for Business, Innovation and Skills
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
OFT	Office of Fair Trading
UCTA	Unfair Contract Terms Act 1977
UTCCRs	Unfair Terms in Consumer Contracts Regulations 1999

What's New?

An overview of changes to unfair contract terms law in the Consumer Rights Act, September 2014

1.1 'What's new?' covers key changes to the law on unfair terms introduced by **the Consumer Rights Act 2014 ('the Act')**. It is expected that the Act will come into force on [X October 2015?]. Our aim is to provide readers with a factual introduction to the unfair terms Part of the Act in the context of the existing law on unfair terms – the [Unfair Terms in Consumer Contracts Regulations 1999 \(UTCCRs\)](#) and [Unfair Contract Terms Act 1977 \(UCTA\)](#). [Guidance covering other aspects of the Act](#) is available (see the further information section).

1.2 'What's New?' is not a comprehensive guide to unfair terms, for instance, it does not set out the CMA's views on terms which are covered by the Act nor the forms that unfairness can take. More detail will be provided in the CMA's reissue of its main guidance on unfair terms in advance of the Act coming into force. Please see the further information section of this guide which includes links to the [draft of the more detailed CMA guidance](#) which was published for consultation on [X January 2014]. If you need guidance on the current law on unfair contract terms please see the further information section which includes links to the [OFT's main guidance on unfair terms](#) which the CMA has adopted.

Summary of the unfair term provisions in Part 2 of the Act and key words

2.1 Part 2 of the Act consolidates the existing unfair terms legislation which applies to consumers when dealing with traders. The current law is found in [UCTA](#) and the [UTCCRs](#). The UTCCRs give effect to a European [Directive on unfair terms](#) (Council Directive 93/13/ EEC on unfair terms in consumer contracts - 'the Directive') in UK law.

2.2 The Act 'blacklists' some terms or notices so that they are never binding on the consumer (see paragraph [6.1](#))¹. The Act also provides that **a consumer** is not bound by a term in a contract with a trader **or a notice** issued by a trader if that term or notice is **unfair**. The fairness test in the Act reflects that in the [UTCCRs](#) (see paragraph [4.1](#)). Similarly to the approach in these Regulations, the application of the fairness test is subject to some exceptions.

2.3 The main exception for terms **relates to** those that specify the main subject matter of the contract or set the price payable under the contract ('the exemption', see paragraph [5.1](#))². Such terms will only benefit from the exemption if they meet two requirements. Firstly, they must be in plain and intelligible language. This is referred to in the Act as a term being **transparent** (see paragraph [4.5](#)). **Secondly**, main subject matter terms or those that set the price must be **prominent** in order to fall within the exemption (see paragraph [5.5](#)).

Key words

2.4 A Consumer is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession (Section 2(3)).

2.5 A Trader is a person acting for purposes relating to their business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf (Section 2(2)). This includes the activities of any government department or local or public authority.

¹ A number of the "blacklisted" terms are not included in Part 2 of the Act but in Chapters 2, 3 and 4 of the Act.

² Although referred to for the purposes of this document as the "the exemption", it should be noted that this is not the only limitation to the application of the fairness test in the Act. There is also "the mandatory statutory or regulatory" exemption which we refer to in paragraph 3.5 and see also [footnote 16](#).

2.6 “**Consumer notice**” see paragraph [3.4](#) below

2.7 “**Transparent**” see paragraph [4.5](#) below

2.8 “**The Exemption**” see paragraph [5.1](#) below

2.9 “**Prominent**” see paragraph [5.5](#) below

2.10 “**Blacklisted terms**” see paragraph [6.1](#) below

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Scope of the Consumer Rights Act

3.1 The Act covers contracts and notices between **traders** and **consumers** (a 'consumer contract' and a '**consumer notice**'). It replaces the provisions between traders and consumers previously found in [UCTA](#) and the [UTCCRs](#). One of the aims of the Act was to consolidate and simplify the UK law of business to consumer unfair terms issues by replacing 2 pieces of legislation with 1.

3.2 An objective was to ensure that in combining these laws, consumer protection was not reduced. This broadly means that, for example, where [UCTA](#) covers circumstances which the [UTCCRs](#) do not, the Act has the wider scope and vice versa. For example, negotiated terms are covered and so too are notices.³

Negotiated terms

3.3 The Act applies to all business to consumer contract terms, whether or not they are negotiated with the consumer, subject to certain exemptions (see paragraphs 3.4 and [5.1](#) below for more information on these exemptions).

Consumer notices

3.4 As indicated, the Act also covers **consumer notices** issued by a trader. A consumer notice is defined broadly as 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 (section 61(7) and 61(4)). A notice includes an announcement or other communication, whether or not in writing (section 61(8)). The Act makes clear that it does not matter whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume that it is intended to be seen or heard by one (section 61(6)). This may

³ See for instance the Department for Business Innovation & Skills, Consumer Rights Bill, [Table of responses to consultation, June 2013](#) at page 64, which states, "We agree that the current level of protection under the Unfair Contract Terms Act 1977 should not be reduced".

be taken to reflect the policy that these provisions would include, for instance, notices found in car parks as well as online⁴.

3.5 The Act makes clear that a **consumer notice** is subject to a test of fairness (see paragraph 4.1), subject to an exemption for notices (and terms) that reflect legal provisions (section 73). This exemption is commonly called ‘the mandatory statutory or regulatory’ exemption. It derives from the [Directive](#) and is included in the [UTCCRs](#), Regulation 4(2) (for more detail see the links to [the current CMA guidance](#) and [draft revised guidance](#) in the further information section).

Fairness

4.1 The test of fairness reflects that in the [Directive](#) and [UTCCRs](#), Regulation 5. A term is unfair ‘if, contrary to the requirement of good faith, it causes a significant imbalance, in the parties’ rights and obligations under the contract to the detriment of the consumer’ (section 62(4)).⁵ The fairness test for notices mirrors this test, except that it does not refer to ‘under the contract’ (section 62(6)).

4.2 Consistently with the [UTCCRs](#), the Act illustrates the meaning of ‘unfairness’ by listing some types of terms that ‘may be regarded as unfair’ in Part 1 of Schedule 2 of the Act. By way of shorthand the list is commonly referred to as the ‘grey list’ because the terms listed are not necessarily unfair – it is a ‘grey’ not a ‘black’ list. The list is still described as ‘an indicative and non-exhaustive list of terms’ (section 63(1)). A term may bear no resemblance to any of the terms listed but yet may be regarded as unfair under the test in section 62. Although the content of the ‘grey list’ in the Act is largely unchanged from the [UTCCRs](#), three new terms are added.

4.3 By way of a summary, these are terms which have **the object or effect**⁶ of:

⁴ See the [Law Commission’s, Unfair Terms in Consumer Contracts: Advice](#) to the Department for Business, Innovation and Skills (BIS) at paragraphs 7.26 to 7.32 in particular. The Advice, following a process of consultation, made recommendations to BIS on reforms to the unfair terms legislation.

⁵ An introduction to the test of fairness is [available in the short guide on unfair standard terms \(OFT 143\)](#) available from the CMA website – see the further information section at the back of this note for more details.

⁶ The CMA in its [current main unfair terms guidance](#) (OFT 311) provides, “... terms are under suspicion of unfairness if they either have the same purpose or can produce the same result as terms in the ‘grey’ list. They

- a. allowing disproportionate charges or requiring the consumer to pay for services which have not been supplied, if the consumer ends the contract (see Schedule 2, Part 1, paragraph 5).
- b. allowing the trader to decide the characteristics of the subject matter of the contract after the consumer is bound by the contract (see Schedule 2, Part 1, paragraph 12).
- c. allowing the trader discretion to set the price after the consumer is bound by the contract, where no price or method of determining the price is agreed when the consumer is bound (see Schedule 2, Part 1, paragraph 14).

4.4 Examples of the new 'grey list' terms include:⁷

- A term which imposes a disproportionate cancellation charge on the consumer when s/he decides to pull out of the contract early is likely to be covered by the first new grey list term above.
- In relation to b. and c., example terms are likely to include (as applicable) those which allow the trader to decide at his discretion the price or characteristics of the subject matter of the contract after the consumer is bound by the contract, when no other provision for either of these important aspects of the contract have been made between the parties.

Plain and intelligible language (Transparent)

4.5 A trader must ensure that a written term of a consumer contract or a **consumer notice** in writing is expressed in plain and intelligible language and it is legible (sections 68(1) and (2)). The reference to “plain and intelligible

do not have to have the same form or mechanism.” (p.10). The “object and effect” provisions are emphasised in the Act for each term on the grey list.

⁷ Note that these examples are not intended to be exhaustive and are based on the Law Commission’s policy for recommending the inclusion of these terms in their [advice](#) to BIS – see paragraphs 5.81, 5.97 and 5.113.in particular. For information on the CMA’s initial views on the types of terms covered by the new grey list terms we refer you to our [draft unfair terms guidance](#), which is subject to consultation and therefore change – see the further information section at the back of this note.

language” comes from the [Directive](#) and reflects Regulation 7 of the [UTCCRs](#). “Legible” was added to the test on the recommendation of the Law Commission⁸. Schedule 3, paragraph 3(5) of the Act makes clear that enforcement action can be taken by a ‘regulator’ (which includes the CMA and Local Trading Standard Services) if it thinks that a term or notice breaches the requirement of transparency set out in section 68 of the Act.

The exemption

5.1 As indicated above the Act includes an exemption relating to terms that specify the main subject matter of the contract or terms which set the price.

5.2 A term of a consumer contract may not be assessed for fairness (that is under section 62) **to the extent that** it specifies the main subject matter of the contract or the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it (section 64(1)). For example, in relation to terms that set the price, other aspects of the term are assessable for fairness such as the timing and method of payment (See, for example, the [Law Commission’s advice](#) to BIS, paragraphs 3.80 to 3.103).

5.3 **Relevant terms** (that is, those capable of benefiting from the exemption) can only fall within it if they are both **transparent** and **prominent**.

Transparent

5.4 For the purpose of the exemption this has the same meaning for written terms as explained in paragraph [4.5](#) above. In relation to terms communicated orally, they must be in plain and intelligible language - there is no requirement for oral terms to be ‘legible’ (section 64(3)). The requirement that terms must be in plain and intelligible language to benefit from the exemption reflects the [Directive](#) and the [UTCCRs](#), Regulation 6(2).

Prominent

⁸ See the [Law Commission’s, Unfair Terms in Consumer Contracts: Advice](#) to the Department for Business, Innovation and Skills (BIS) at paragraph 4.26.

5.5 However, if they are to fall within the scope of the exemption, the Act provides that in addition relevant terms must also be ‘prominent’.

5.6 The Act says that a relevant term is prominent for these purposes if it is brought to the consumer’s attention in such a way that an average consumer would be **aware** of the term (section 64 (4)). In this context, an average consumer is defined as a reasonably well-informed, observant and circumspect consumer (section 64(5)). This is an objective standard which is well established in European Law.

5.7 The Law Commission, who suggested the introduction of prominence into the wording of the exemption, indicated that one of the problems which ‘prominence’ should be intended to address is where traders offer low headline prices and then add hidden extras in the terms, which undermine the competitiveness of the market (see for instance [Law Commission’s Advice](#) to BIS at paragraph 2.39).

5.8 It is important to remember that if a **relevant** term is not prominent, that does not make it automatically unfair but it does mean that it is fully assessable for fairness. As the Law Commission explained, businesses may well include in their contracts charges which are not prominent and which are therefore assessable for fairness⁹ ([Law Commission’s Advice](#) to BIS at paragraph 3.48).

5.9 A provision is included in the Act which provides that the exemption does not apply to a term of a contract listed in the ‘grey’ list (section 64(6).) Thus, the legislation makes clear that terms of the type on the grey list cannot fall within the exemption even where such terms are transparent and prominent.

Blacklisted terms

6.1 The Act provides that some terms in consumer contracts and consumer notices are automatically unenforceable. For the purpose of this briefing, we

⁹ To this extent prominence can be contrasted with the requirement elsewhere in the Act (in section 68) for all written terms to be in plain and intelligible language and legible (see paragraph [4.5](#) above).

refer to these terms or notices as ‘blacklisted’¹⁰. Some of these provisions are a consolidation of those found in [UCTA](#).

6.2 An example of such a ‘blacklisted’ term or notice is found in Part 2 of the Act. Section 65(1) of the Act provides that a trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. This ‘blacklisted’ provision does not apply to certain contracts referred to in section 66, including, for instance, contracts so far as they relate to the creation or transfer of an interests in land or insurance contracts.

6.3 However, it should be noted that there is no exception made for these types of contracts from the [fairness test](#) found in section 62¹¹.

6.4 Parts of the Act covering goods, digital content and services also ‘blacklist’ various terms in consumer contracts which have the effect of excluding or restricting the trader’s liability¹². Broadly speaking, the ‘blacklisted’ terms covered outside of Part 2 of the Act are those which would exclude or restrict the trader’s liability arising from breach of certain consumer rights provided by the Act.

6.5 For instance, a term in a contract to supply paid-for¹³ digital content or in a contract to supply goods which excludes or restricts the trader’s liability for failing to supply digital content or goods of satisfactory quality would not be binding on consumers.

¹⁰ Note that other legislation includes provisions which effectively ‘blacklist’ terms, for example, notably under section 91 of the Arbitration Act 1996, a compulsory arbitration clause is automatically unfair if it relates to claims of £5,000 or less.

¹¹ Further, section 63(6) provides that a term must be regarded as unfair if it has the effect that the consumer bears the burden of proof regarding compliance by a distance supplier or an intermediary with an obligation under law implementing the Distance Marketing Directive (Directive 2002/65/EC concerning distance marketing of consumer financial services). This reflects Regulation 5(6) of the UTCCRs.

¹² For a list of all blacklisted terms excluding or restricting the trader’s liability in a contract for the supply of goods see section 31 of the Act. For blacklisted terms excluding or restricting the trader’s liability in a contract to supply digital content contracts see section 47 of the Act and for blacklisted terms excluding or restricting the trader’s liability in a contract to supply a service see section 57 of the Act.

¹³ See sections 33(1) and (2) of the Act for what digital content contracts are covered under the Act.

6.6 Similarly, in a contract to supply a service, a term is not binding on the consumer to the extent that it would restrict the trader's liability for failure to carry out the services with reasonable care and skill if, in an appropriate case, it would not allow the consumer to recover the price paid under the contract¹⁴. (See also paragraph [7.5](#) regarding the relationship between the blacklisted provisions and the fairness test in section 62).

Other Provisions

7.1 The Act includes provisions which are intended to simplify and clarify the law, for example by reflecting European case law or setting out how the law is already applied in practice. These provisions include:

Duty of a court to consider the fairness of terms

7.2 Section 71 of the Act says that a court must consider the fairness of terms in a consumer contract even if the parties to the case do not raise it as an issue, provided that the court has sufficient legal and factual information to allow it to do so. This reflects decisions of the Court of Justice of the European Union (CJEU) about the duties of national courts (see the further information section for examples of recent cases on this point).

Consumers can choose to rely on unfair terms or notices

7.3 Consistently with the [Directive](#) and [UTCCRs](#), the Act provides that an unfair term is not binding on a consumer. Similar provisions are made for notices. Section 62(3) of the Act provides that this does not prevent the consumer from relying on a term or notice which is unfair, if they choose to do so.

Application to secondary contracts

7.4 Section 72 allows for the unfair terms provisions in Part 2 of the Act to apply to secondary contracts even if the secondary contracts are not consumer contracts. Secondary contracts are ones which affect the rights and obligations of the consumer and trader under the main contract. This provision does not

¹⁴ Note that section 57(3) makes clear that a term limiting liability to the contract price would still be subject to the [fairness test](#) in section 62.

apply if the secondary contract is a settlement of a claim arising under the main contract.

Relationship of blacklisted terms and the fairness test

7.5 The Act allows that terms or notices which are blacklisted (see paragraph [6.1](#) above) are assessable for fairness under the fairness test in section 62. This is underlined by the fact that Schedule 3, paragraph 3(2) provides that a ‘regulator’ may apply for an injunction or an interdict if it thinks that the term or notice “falls within **any one or more**” of the following provisions – the blacklisted provisions as discussed above (sections 31, 47, 57 and 65(1) of the Act), it is unfair or it breaches the requirement of transparency (section 68). A consequence of this is, for example, that a court can prohibit the use of a term which is blacklisted on the basis that it is blacklisted under the Act or on the basis that it is unfair under section 62 of the Act. More information will be provided in the [CMA’s main guidance, currently available in draft](#) for consultation.

Sources of further information

Guidance

A range of guidance on the [current law](#) on unfair contract terms is available on the CMA's website at¹⁵:

<https://www.gov.uk/government/collections/cma-consumer-enforcement-guidance>

A re-issue of the CMA's main guidance on unfair contract terms, updated to reflect the changes introduced by the Consumer Rights Act, is available in draft, for consultation, at:

ADD link when available

Guidance on other aspects of the Consumer Rights Act, including goods and services and digital content, is available at:

ADD links when available

Information about the Consumer Rights Act

ADD link to the text of the Act once available.

Information about the Department for Business, Innovation and Skills policy for providing better information and protection for consumers and documents relating to the development of the Consumer Rights Act are available at:

<https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-bill-of-rights>

The proposals and recommendations from the Law Commission on unfair contract terms law, which Government to a large extent adopted in the Consumer Rights Act, are available at:

<http://lawcommission.justice.gov.uk/areas/unfair-terms-in-contracts.htm>

¹⁵ The majority of the guidance was issued by the OFT and adopted by the CMA when it gained powers to enforce unfair contract terms legislation. The CMA is the lead enforcer of unfair terms.

The Department for Business, Innovation and Skills: Consumer Rights Bill, Table of responses to consultations, June 2013:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf

Legislation

The Unfair Terms in Consumer Contracts Regulations 1999:

<http://www.legislation.gov.uk/uksi/1999/2083/contents/made>

The Unfair Terms Directive (Council Directive 93/13/ EEC on unfair terms in consumer contracts). It is a European law requirement that the minimum levels of protection provided by the Directive are given effect in UK law. The UTCCRs currently do this by mirroring very closely the provisions in the Directive. When the Act comes into force, it will give effect to the Directive in UK law in place of the UTCCRs. The full text of the Directive is available at:

<http://eur-lex.europa.eu/eli/dir/1993/013> *

The Unfair Contract Terms Act 1977 is available at:

<http://www.legislation.gov.uk/ukpga/1977/50/contents>

Some recent cases of the Court of Justice of the European Union (CJEU) on provisions in the Unfair Terms Directive

The cases listed below set out the CJEU's approach to particular aspects of the Directive. The cases chosen are relevant to understanding some of the Act's provisions referred to in this briefing note. They are included here to highlight the fact that since the last issue of the OFT's main guidance on unfair terms (adopted by the CMA) there have been a number of decisions from the CJEU on concepts in the Directive. This is not a comprehensive list of relevant cases and, similarly, the summaries of the cases do not attempt to summarise all issues discussed in them. Nevertheless, it is hoped that the list will provide a

useful starting point, on some issues, for those considering recent CJEU case law.

The CJEU's considerations include factors that the national courts should take into account when assessing the fairness of contract terms – looking particularly at “significant imbalance” and “contrary to the requirement of good faith”:

Aziz v. CatalunyaCaixa, Case C-415/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0415> *

Further criteria given to national courts, when considering ‘significant imbalance’:

Constructora Principado SA v José Ignacio Menéndez Álvarez, Case C-226/12

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0226> *

In both cases, the CJEU's considerations include the correct approach when assessing the fairness of price variation terms:

*RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V., Case C-92/11*¹⁶

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0092> *

Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, Case C-472/10

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0472> *

The CJEU considerations include the scope of the exemption (i.e. for the main subject matter and the adequacy of the price) as well as considering the meaning of plain and intelligible language:

Árpad Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank ZRT, Case C-26/13

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0026> *

¹⁶ In the case of RWE, the court also illuminates the scope of “the mandatory statutory or regulatory” exemption, see in particular, paragraphs 24 to 39 of the Judgment.

Some recent cases, where the CJEU's considerations include the duty of national courts to assess terms, whether or not the parties raise the issue:

Banco Espanol de Credito SA v Joaquin Calderon Camino, Case 618/10

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0618> *

Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai, Case C-472/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0472> *

Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV, Case C-488/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0488> *

Erika Jorös v Aegon Magyarország Hitel Zrt., Case C-397/11

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0397> *

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