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CONSUMER RIGHTS ACT: GUIDANCE ON UNFAIR TERMS

Financial Services



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The Consumer Rights Act 2015 comes into force on 1 October 2015 in respect of updated consumer rights and protection from unfair terms. The Competition and Markets Authority's guidance on the unfair terms provisions in the Act, which was published on 31 July 2015, sets out its understanding of their effect, as well as providing detailed suggestions about how consumer contracts can be drafted to comply with the law.

Background

Part 1 of the Consumer Rights Act 2015 (CRA) updates and modernises consumer rights in contracts for goods, digital content and services. Part 2 of the CRA will replace the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), in its entirety, and the Unfair Contract Terms Act 1977 (UCTA) in so far as it affects consumer contracts. UK legislation on unfair terms law will, therefore, be updated and consolidated in one place.

The Competition & Markets Authority (CMA) is the UK's national competition and consumer authority, having replaced the Office for Fair Trading (OFT) and is responsible for enforcing this legislation. When referring to the CMA's guidance, it is important to remember that as well as considering the meaning of the CRA, it draws on the CMA's understanding of how the EU Court of Justice has interpreted the EU Directive on Unfair Contract Terms which national legislation implements. There have been a number of decisions in recent years on, for example, variation clauses, where consideration has been given to what the fairness test requires in practice.

The guidance replaces that previously issued by the OFT (OFT311) in 2001, which was adopted by the CMA in 2014 and its purpose is to set out the CMA's understanding of the CRA. The changes in this legislation are mainly in scope rather than substance and must be understood and interpreted in the light of both UK and European Union case law. The guidance is aimed, primarily, at in-house advisers and trade associations for businesses. Additionally, it is intended to assist public authority regulators, in particular, Trading Standards Services which has published separate guidance on its "*Business Companion*" website on the statutory rights and remedies enjoyed by consumers under the CRA.

Alongside the guidance, historic guidance on unfair terms first published by the OFT in September 2008 has been made available, which has been republished as "Annex A".

FCA Unfair Terms Contract Guidance & Library

Early in 2015, the Financial Conduct Authority (FCA) withdrew the majority of its sector specific guidance to financial services firms. This was on the basis that it no longer adequately reflected the case law of the EU Court of Justice, which has adopted an activist consumer stance, and that it required review in anticipation of the coming into force of the CRA and the CMA's guidance. The FCA material included undertakings given by firms in relation to the use of specific terms and, while still binding on relevant firms, they no longer reflect the FCA's view on unfair terms. Given the necessarily generic nature of the CMA's guidance it is hoped that updated financial services specific guidance will be provided in early course. As of now the FCA has not done so.

Applicability of the Consumer Rights Act

The CMA guidance confirms that the CRA has prospective effect from 1 October 2015, superseding the UTCCRs, and in respect of consumer contracts, the UCTA. As stated, the changes in respect of the law on unfair terms are best characterised as mainly consisting of changes in scope rather substance. In this regard, the CRA and the guidance seek to reflect developments in both UK, but also in EU case law. While the UTCCRs and the UCTA will still apply to contracts entered into before 1 October 2015, in so far as the substance of the law is concerned, businesses would be best placed not to distinguish between the legislation.

Unfair Terms & CMA Guidance

The Fairness Test

As discussed, the general rules about fairness are unchanged. A term will be unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Whether a term is fair is determined by taking into account the nature of the subject matter of the contract and by reference to all the circumstances existing when the term was agreed, and to all the other terms of the contract, or any other contract on which it depends.

In its guidance, the CMA explains that a significant imbalance cannot be avoided just by ensuring that there is a mechanical or formal equivalence in rights and obligations. While an imbalance must be practically significant, it is not limited to purely financial considerations. Moreover, a finding of unfairness does not require proof that a term has caused actual harm, rather that it could potentially cause consumer detriment.

The requirement of good faith, according to the CMA, entails a general principle of "fair and open dealing". Contracts should be drawn up to respect the legitimate interests of consumers and the CMA goes as far as to refer to "good standards of commercial morality and practice". Referring to the decision in *The Office of Fair Trading v Foxtons* [2009] EWHC 1681 (Ch), the guidance restates the words of Lord Bingham, that a trader "should not, whether deliberately or unconsciously, take advantage of the consumers' circumstances to their detriment". In this context, the CMA refers to economic research about how consumers behave in practice where they do not always read (or it is impractical to do so) the terms of all contracts they enter into.

Consumer vulnerability

Early this year, the FCA published an Occasional Paper on consumer vulnerability. This aims to broaden understanding and stimulate interest and debate around vulnerability, while providing practical help to firms in developing and implementing a vulnerability strategy. In this context, firms should take note that the guidance refers to the need to take particular care in communicating key terms to consumers who might have "greater difficulty than others in collecting, processing and acting upon information and thus in exercising choice effectively". Consumers may also be vulnerable when making infrequent or expensive purchases – a scenario relevant to some financial services sectors.

Core exemption

A term may not be assessed for fairness to the extent that it concerns the main subject matter of the contract or the appropriateness of the price (the core exemption), providing it is *transparent* and *prominent* (the latter requirement is new and represents a significant change from the UTCCRs – see below) and is not on the Grey List.

The guidance refers to the judgment of the EU Court of Justice in *Árpád Kásler v OTP Jelzálogbank Zrt.* Case C-26/13 which described those terms falling into the core exemption as the "very essence of the contractual relationship". Where a term imposes a payment or charge, then a service, goods or digital content must be provided in return. In the EU Court of Justice, in Case C-472/10: *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, terms providing for variation of such charges were said not to be core terms and could be assessed for fairness. Moreover, the core exemption in the view of the CMA must be interpreted narrowly and is not there to circumvent the requirement of fairness.

Grey List

The Grey List is an indicative and non-exhaustive list of terms that may be potentially regarded as unfair. While the Grey List contains exceptions, some of which are relevant to financial services, the CMA considers that the list is not to be interpreted widely, nor that the carve outs provide exemptions from the requirement of fairness. The CRA largely leaves the Grey List as it was under the UTCCRs but has added three new items concerning disproportionate termination fees, rights to determine or change what is supplied and price variation clauses. A price variation clause is particularly relevant to long term or indefinite period contracts in financial services. The CMA guidance explains that, while such clauses are not necessarily unfair because they are discretionary, they must be clear as to what consumers can expect and not be open to abuse. Reference is made to the judgment of the EU Court of Justice in *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, C-92/11 (21 March 2013).

Terms in the Grey List may, for example, involve a trader arbitrarily varying the terms after the contract has been made, or raising the price. Such instances commonly occur in financial services in terms and conditions for payment accounts, credit cards and mortgage products. In this regard, in July 2014, the FCA published a discussion paper, DP14/2, setting out how it assesses the fairness of changes made by lenders to regulated mortgage contracts. In addition to firms' obligations under unfair terms law, the FCA will consider whether the change satisfies the Principles for Businesses (PRIN) 6 – *a firm must pay due regard to the interests of its customers and treat them fairly* - and 7 – *a firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading* - and other rulebook

requirements (e.g. MCOB). It will consider the reasons for making the change, a customer's reasonable expectations, what customers were told about the product features and the affect on customers of the change.

Transparency

The CRA requires that a written term of a consumer contract or a consumer notice is transparent. A term which is not transparent cannot benefit from the core exemption, but is otherwise not automatically treated as unfair. Rather, in line with normal rules of construction, where there is ambiguity it will give the most favourable interpretation to the consumer.

A term fulfils the requirement of transparency, if it is expressed in plain and intelligible language and it is legible. The guidance states that transparency is "fundamental to fairness in a general sense". The EU Court in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, held that in a consumer contract where the supplier may unilaterally vary fees, and statute or regulation gives the consumer a right to terminate if the supplier does so, the supplier must state this right in the contract in plain and intelligible language. However, going beyond the language of the Act and drawing on the decision of the EU Court of Justice in *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, the CMA considers that legibility and clarity of language are not enough; rather, terms should be drafted to ensure that consumers can make informed choices. In the context of a term purporting to allow a firm to vary the price unilaterally, the Court asked "whether the contract [set] out in transparent fashion the reason for and method of the variation of those charges, so that the consumer [could] foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges". This language is not too far removed from the FCA's treating customers fairly approach. Expanding on this theme, in *Árpád Kásler v OTP Jelzálogbank Zrt.*, the EU Court said that "plain and intelligible" meant that the "consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it". The CMA suggest that firms may seek to make significant terms more transparent by providing explanatory material, for example, a summary or a "cooling-off" period. It goes without saying that a disadvantageous term should not be hidden.

Prominence

Unlike "transparency", which derives from the Directive, "prominence" is a UK concept included in national legislation for the first time. The CRA provides that a term is prominent if it is brought to the consumer's attention in such a way that the average consumer would be aware of it. The guidance states that, in the CMA's view, consumers cannot generally be expected to read thoroughly the small print of standard contracts. Therefore, suitable prominence ought to be given to terms depending on their importance and, where necessary, critical terms highlighted. The guidance accepts that it may not always be possible to give a large number of terms suitable prominence and that this might mean, in certain cases, that businesses cannot now benefit from the core exemption to the extent they would wish. While the addition of this requirement may appear to represent a significant departure, in reality the CRA and the guidance are reflecting recent case law.

Smarter Consumer Communications

When considering the requirements of transparency and prominence, firms also need to consider their inter-relationship with other regulatory initiatives. In June 2015, the FCA published a discussion paper on Smarter Consumer Communications, DP15/5, and is encouraging firms and other stakeholders to work together to deliver information to consumers in more effective ways. The publication explains that the FCA wishes to start a debate and identifies a number of areas which could benefit from a new approach. These include firms' terms and conditions which the FCA says are too legalistic and lengthy. The regulator will also look at its own rules and requirements in a Handbook review and, where permitted by EU legislation, will seek to remove unnecessary provisions. In doing so it will consider the extent to which disclosure requirements have actually helped customers make informed decisions about their money.

EXAMPLES IN BRIEF		
CRA REQUIREMENT	ISSUE	POTENTIAL MITIGATION BY FIRMS
Fairness Test element 1 – Significant Imbalance	<ul style="list-style-type: none"> ► Is the term/notice weighted in favour of the business? ► Ensure both parties to the contract have rights of equal extent and value in reality ► A significant imbalance cannot be avoided just by ensuring a merely mechanical or formal equivalence 	<ul style="list-style-type: none"> ► Redress balance in contract – equal footing ► Redress balance - appropriate to each party's circumstances (i.e. same sanctions cannot apply to both trader and consumer). Think through each party's position and consumer's legitimate interests

EXAMPLES IN BRIEF

CRA REQUIREMENT	ISSUE	POTENTIAL MITIGATION BY FIRMS
	<p>in rights and obligations. Terms cannot alter the balance in rights and obligations that the law would have struck if left to itself</p> <ul style="list-style-type: none"> ▶ Terms cannot restrict legal rights and resort to the courts ▶ Terms cannot impose additional obligations or risks not envisaged by law or that unreasonably go beyond what is expected. 	<ul style="list-style-type: none"> ▶ Do not necessarily mirror rights and obligations of the parties but tailor to the circumstances of each.
Fairness Test element 2 – Good Faith	<ul style="list-style-type: none"> ▶ Terms /notices must not to take advantage of the consumers' circumstances to their detriment ▶ Dealing with concerns around termination and renewal fees ▶ If trader's representative is present when a contract is entered into, consumer vulnerability will need to be considered in all cases. 	<ul style="list-style-type: none"> ▶ Openness – ensure appropriate prominence is given to disadvantageous terms ▶ In formulating contract terms/notices – firms should take the legitimate interests of the consumer into account.
Transparency – a lack of transparency will not render a term or a notice unenforceable but ambiguity will be interpreted in favour of the consumer	<ul style="list-style-type: none"> ▶ Plain and intelligible language ▶ Legibility of written terms ▶ Consumer must be able to evaluate the economic consequences of a contract ▶ Liability cannot simply be excluded "to the extent permitted by law/ statute" ▶ A consumer must be aware of the term or notice. 	<ul style="list-style-type: none"> ▶ Terms should be drafted to ensure consumers can make informed choices. Disadvantageous terms must be given appropriate prominence. Consider using: <ul style="list-style-type: none"> ▶ Ordinary words ▶ Restricted not vague words ▶ Short sentences ▶ Sub-headings ▶ No statutory references ▶ No elaborate definitions ▶ Avoid extensive cross-referencing ▶ Consider providing a "cooling-off" period (including a cancellation right).

Key Changes Reflected in Guidance

Generally speaking, the scope, rather than the substance of the law, on unfair terms has changed and this is reflected in the CMA's guidance:

Consumer notices

- In addition to consumer contracts, consumer notices are brought unequivocally within the fairness regime. A consumer notice is any notice to the extent that it relates to rights or obligations as between a trader and a consumer or purports to exclude or restrict a trader's liability to a consumer. A notice is said to include an announcement (whether or not in writing), and any other communication or purported communication, which does not have to be expressed to apply to a consumer, so long as it is reasonable to assume it is intended to be read by a consumer. This extends the scope of the fairness regime to non-contractual communications. The CMA considers that that consumer notice provisions in the CRA are particularly important in the context of transactions involving digital content. Software and other digital products are sold to consumers subject to End User Licence Agreements (EULAs). For legal purposes, the terms of the EULAs may not, in all cases, be clearly part of the contract with the consumer. But if they are not, they are very likely to be covered by the CRA's unfair terms provisions as consumer notices.

Individually negotiated contracts

- A significant change in the CRA from the UTCCRs is the application (for the first time) of the fairness test to individually negotiated contracts and not just standard form contracts. The CMA guidance nonetheless considers that the contention that customer has influenced the substance of the terms needs to be treated with caution and tested against a detailed consideration of the circumstances surrounding the entering into of the contract.

The Core Exemption

- In order for a term to benefit from the core exemption from the fairness test it must now satisfy not only the requirement of transparency, but that of "prominence" as well as being legible, if in written form. The guidance provides a flow chart which helps to determine if the exemption applies in various given scenarios. The core exemption does not apply to consumer notices because this concept is limited to core contractual terms or, as described by the EU Court of Justice, as those forming "the essence of the contractual relationship".

Services & digital content

- Part 1 of the CRA extends the law relating to and clarifies consumer rights to digital content. To the extent that a term purports to exclude or restrict a statutory right, for example, that digital content is to be of satisfactory quality, it will be not be binding (i.e. blacklisted).

Amendments to the Grey List

- As discussed above, there are three additions to the Grey List concerning: 1) disproportionate termination fees and requiring consumers to pay for services not supplied, 2) rights to determine or change what is supplied, and 3) price variation clauses.

The average consumer

- Reflecting the CRA and EU case law, guidance is given as to who the "average consumer" is (this being an objective test), who is described as *"a consumer who is reasonably well informed and observant and circumspect"*. Reference is also made in the guidance to "awareness". This is taken to denote awareness for practical purposes. The CMA considers that businesses, when formulating their terms and sales processes, need to focus on ensuring consumers are in a position to make informed purchasing decisions. The guidance also makes clear that in assessing fairness the circumstances existing when the term was agreed must be examined.
- In this respect, the guidance now includes an explanation of behavioural economics and how the average customer behaves in practice. This reflects an important change in the approach of UK regulators which have moved beyond reliance on simple disclosure as a means of consumer protection. A further issue is the relationship between the average customer and the requirement on firms with respect to treating vulnerable customers appropriately. The FCA's Occasional Paper on consumer vulnerability provides a very wide definition of "someone who, due to their personal circumstances, is especially susceptible to detriment..." and where many customers can, potentially, during a product lifecycle, be considered vulnerable. Firms needs to give careful consideration this issue.

Secondary contracts

- As a tool to prevent evasion, the scope of the fairness regime is extended to terms in secondary contracts which reduce rights or remedies or increase the obligations of consumers under a consumer contract. This provision extends the scope of protection to contracts agreed in addition to the original consumer contract, whether made before, after or in addition to it. The secondary contract does not need to be a consumer contract and it could be a contract between different parties.

Annex A Examples

Annex A complements the CMA guidance providing examples of terms which are regarded as unfair and suggests ways in which firms can satisfy the fairness test. Originally prepared as an annex to the OFT's guidance on unfair terms, it has been republished as an annex to the CMA's guidance because it is considered capable of illustrating the practical impact of the fairness provisions in the CRA (in particular the Grey List) which remain substantially the same as drafted previously. It must, however, be read in conjunction with the main text of the CMA guidance and does not necessarily reflect that authority's view. We include a few examples from this annex by way of illustration.

Example 1 – CMA Approach to Statutory References

Original Term

The Insurers shall not be liable for claims directly or indirectly arising from Financial circumstances or employment other than redundancy (where the Insured Person qualifies for payment under the Redundancy Payments Legislation).

New term

The Insurers shall not be liable for claims directly or indirectly arising from your financial circumstances or employment other than redundancy (if you qualify for payment under the Redundancy Payment legislation, that is, you are under 65 and have 2 years' continuous employment).

- Page 93, Annex A, CMA Guidance on unfair terms provisions in the Consumer Right Act, 31 July 2015

Example 2 – CMA Approach to Financial Penalties

Original term

In the event of legal action ... for breach of payment, the customer shall be responsible for all costs and disbursements incurred by A&S on a full indemnity basis.

New term

In the event of legal action ... for breach of payment, the customer shall be responsible for all costs allowable by the courts if an award is made in A&S's favour.

- Page 39, Annex A, CMA Guidance on unfair terms provisions in the Consumer Right Act, 31 July 2015

Example 3 – CMA Approach to Binding Customers to Hidden Terms

Original term

All orders shall be subject to these Conditions. The acceptance by the Seller of any order shall be deemed to incorporate these Conditions.

New term

All orders are subject to these conditions. If this is not acceptable the Seller should be contacted within 7 days and a full refund will be given for unopened and unused goods.

- Page 53, Annex A, CMA Guidance on unfair terms provisions in the Consumer Right Act, 31 July 2015

Impact on FCA rules

The FCA has powers under the current UTCCRs to challenge unfair terms in standard form consumer contracts entered into by firms that undertake regulated activity. The CMA is the principal enforcer of the UTCCRs and will keep that role under the CRA. To reflect the introduction of the CRA, the FCA in its consultation paper, CP15/19, proposes to make changes to its

Unfair Contract Terms Regulatory Guide (UNFCOG) which sets out how it uses its powers under the UTCCRs, for example, to obtain undertakings and seek information from firms. The amendments reflect those matters highlighted in the CMA guidance, such as the removal of all UTCCR references and the inclusion of "consumer notices" to sit alongside contract terms. Other parts of the FCA Handbook will also be updated, for instance, to reflect the new wider definition of "consumer". These changes will most notably be seen across the Conduct of Business Sourcebook (COBS), the Mortgage and Home Finance: Conduct of Business Sourcebook (MCOB) and the Consumer Credit Sourcebook (CONC).

Under Schedule 3 of the CRA, the FCA will be afforded equivalent enforcement powers to enable it to apply for injunctions in relation to contract terms and notices that are unfair. The FCA's investigatory powers will, however, be widened under Schedule 5 and Part 8 of the Enterprise Act 2002. The Enforcement Guide will be updated to reflect the position and an updated version of the Memorandum of Understanding between the FCA and CMA will be released in due course.

As referred to above, the FCA has yet to issue revised and updated guidance over how it expects the financial services sector to comply with the unfair terms regime in the CRA and reflecting developments in case law.

How may financial services firms be affected?

The CMA's guidance will help businesses understand what makes terms and notices unfair and how to address these. The guidance identifies key steps that businesses should take to ensure that they communicate clearly with consumers and avoid disputes arising from unfair terms. Alongside specific advice such as avoiding using legal jargon in contracts, the guidance urges businesses to deal "openly and fairly" with consumers and not to use terms that you "would not like to sign up to yourself".

Less positively, the guidance adopts an activist consumer stance in its approach to fairness and good sense with its references to "morality" and its demanding standards in respect of transparency and prominence. Furthermore, given its generic nature, the realities of the financial services sector are not always adequately recognised. It is to be hoped that the FCA will publish new guidance in the near future.

The updating and strengthening of the consumer rights and unfair terms law should be seen by firms as one, but a very significant, regulatory development that requires a consistent and complementary response.

Key Take-aways

- ▶ Review existing literature, terms & conditions and notices to ensure they are fair and transparent to the average consumer
- ▶ Train compliance and customer dealing staff on the requirements of the legislation and guidance
- ▶ Refer to the guidance and Annex A for real-life examples of unfair terms and how these can be mitigated
- ▶ Take note of the FCA's new enforcement powers and civil remedies
- ▶ Review customer journey and take holistic approach to communicating information to clients.

How can Addleshaw Goddard help?

Addleshaw Goddard's consumer and financial services specialists can advise you on your client documentation together with systems and controls to ensure compliance with legal and regulatory obligations. We can undertake to complete a review of your current terms and conditions, from an unfair terms perspective, together with a review of your customer journey. We have a wealth of experience in conducting regulatory reviews of business functions so as to provide senior management the comfort that there are compliant systems and controls in place. Our approach is forensic, applying the minimum necessary resource required to provide you with appropriate assurance. However, where needed, we have access to a dedicated pool of over 100 specialist paralegals in our Transaction Support Team.

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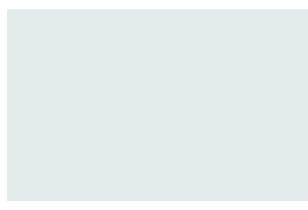
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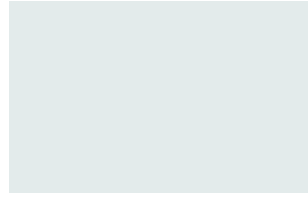
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