

Chapter 10

Injunctions

10.6 Applications for injunctions under regulation 12 of the Unfair Terms Regulations or Schedule 3 to the CRA : the FCA 's policy

- 10.6.1** The *Unfair Terms Regulations* still apply to contracts entered into before 1 October 2015. Please read the pre-1 October 2015 version of this guide for the *FCA's* approach and policy relating to its powers under the *Unfair Terms Regulations*.
- 10.6.2** For a consumer contract term, if the *FCA* decides, after notifying the Competition and Markets Authority (the *CMA*), to the extent required by Schedule 3 to the *CRA*, to address issues using its powers under Schedule 3, if the contract term is within the *CRA's* scope, it will, unless the case is urgent, generally first write to a *person* using or proposing or recommending the use of that term.
- 10.6.3** When writing, the *FCA* will express its concerns about whether the term is or would be unfair within the meaning of sections 62 to 64 of the *CRA*, or non-transparent within the meaning of section 68 of the *CRA*, or purports or would purport to exclude or restrict any liability described in the sections of the *CRA* specified in paragraph 3(2) of Schedule 3 and will invite the *person's* comments on those concerns.
- 10.6.4** If the *FCA*, having considered those comments, remains of the view that the term is or would be unfair or non-transparent or purports, or would purport, to be exclusionary or restrictive, as described above, it will normally ask the person to undertake to stop using, relying on or recommending it or proposing its use. It should be noted that, under paragraphs 2(3), 6(3) and 7(1) of Schedule 3 to the *CRA*, such an undertaking must be notified by the *FCA* to the *CMA* and any relevant complainant and then the *CMA* is under a duty to publish it.
- 10.6.5** In relation to a notice to *consumers* within the *CRA's* scope, the *FCA* will generally, after notifying the *CMA*, request such an undertaking from the relevant *person*, if the notice causes the *FCA* relevant concerns, without first seeking comments. Although the *FCA* will, unless the case is an urgent one and time does not permit, then have regard to any representations responsive to that request.

- 10.6.6** If, whether in relation to such a notice or such a term, the *person* either declines to give such an undertaking, or gives such an undertaking and fails to follow it, the *FCA* will consider the need to apply to court for an *injunction* under Schedule 3 to the *CRA*. The *FCA* will, again, notify the *CMA* appropriately at this stage, as required by Schedule 3.
- 10.6.7** In determining whether to seek an *injunction* under Schedule 3 to the *CRA* against a *person*, after or, in an urgent case, instead of requesting such an undertaking, the *FCA* will consider the full circumstances of each case. A number of factors may be relevant for this purpose. The following list is not exhaustive; not all of the factors may be relevant in a particular case, and there may be other factors that are relevant such as:
- (1) whether the *FCA* is satisfied that the contract term or notice in question may properly be regarded, if it is used, as unfair, non-transparent and/or purportedly exclusionary and/or restrictive within the meaning of the *CRA*;
 - (2) the extent and nature of the detriment to *consumers* resulting from the term or notice, or the potential detriment which could result from the term or notice;
 - (3) whether the *person* has, if asked to do so, fully cooperated with the *FCA* in resolving the *FCA*'s concerns about the particular contract term or notice;
 - (4) the likelihood of success of an application for an *injunction*;
 - (5) the costs the *FCA* would incur in applying for and enforcing an *injunction* and the benefits that would result from that action; the *FCA* is more likely to be satisfied that an application is appropriate where an *injunction* would not only prevent the use of the particular contract term or notice, but would also be likely, as paragraph 5(3)(b) of Schedule 3 to the *CRA* envisages, to prevent the use of similar terms or notices, or terms or notices having a similar effect.
- 10.6.8** In an urgent case, the *FCA* may seek a temporary *injunction*, to prevent the continued or potential use of the term or notice until it can be fully considered by the court. An urgent case is one in which the *FCA* considers that the actual or potential detriment is so serious that urgent action is necessary. In deciding whether to apply for a temporary *injunction*, the *FCA* may take into account a number of factors, including one or more of the factors set out in paragraph ■ 10.6.7. In such an urgent case, the *FCA* may seek a temporary *injunction* without first consulting with the *person* or *persons* using or proposing to use, or recommending the use of, the relevant term or notice.
- 10.6.9** In deciding whether to grant an a final *injunction* under Schedule 3 to the *CRA*, the court will decide whether the term or notice in question is unfair, purportedly restrictive or exclusionary or non-transparent within the meaning of the *CRA*. The court may grant an *injunction* on such terms as it sees fit. For example, it may require the *person* to stop including a term in contracts with *consumers* or issuing, publishing, communicating or announcing a notice to *consumers* from the date of the *injunction* and to stop relying on the term in such contracts which have been concluded or on

the notice to the extent that it has already been issued, published, communicated or announced. If the *person* fails to comply with the *injunction*, the *person* will be in contempt of court.

10.6.10

The *CRA* provides that a term or notice that is unfair or a term that excludes or restricts liability in any of the ways specified in the *CRA* is not binding on the *consumer*. This is the case irrespective of whether there has been a decision of a court to that effect. To The *CRA* also provides that, to the extent that it is practicable, the rest of the contract continues in effect.

10.6.11

When the *FCA* considers that a case requires enforcement action under the *CRA*, it will take the enforcement action itself, after appropriately notifying the *CMA*, if the *person* against whom such action will be taken is a *firm* or an *appointed representative*.

10.6.12

Where that *person* is not a *firm* or an appointed *representative*, the *FCA* will liaise with the *CMA* or (as appropriate) another *CRA* regulator.