

The Unfair Contract Terms Regulatory Guide

Chapter 1

The Unfair Contract Terms and Consumer Notices Regulatory Guide

1.3 The CRA

Terms and notices to which the CRA applies

1.3.1

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- (1) Part 2 of the *CRA* applies, with certain exceptions, to a contract between a trader and a *consumer*. Part 2 of the *CRA* also applies to consumer notices.
- (2) Terms or notices cannot be reviewed for fairness within the meaning of the *CRA* if they reflect:
 - (a) mandatory statutory or regulatory provisions; or
 - (b) the provisions or principles of an international convention to which the *United Kingdom* is a party.
- (3) Terms which are transparent and prominent (as defined in section 64 of the *CRA*) cannot be reviewed for fairness within the meaning of the *CRA* to the extent that:
 - they specify 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.

However, we can fully review terms concerning these matters for fairness within the meaning of the *CRA* if they are not transparent and prominent.
- (4) But, the subject matter and price exemption in (3) only applies to terms. It does not apply to a term of a contract listed in Part 1 of Schedule 2 to the *CRA*.
- (5) It is a requirement under section 68 of the *CRA* that a written term of a consumer contract, or a consumer notice in writing, is transparent.

When a term or notice is 'unfair' within the meaning of the CRA

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Terms or notices are unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations to the detriment of the *consumer*.

The main powers of the courts, regulators and unfair contract terms enforcers under the CRA

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- (1) As an unfair contract terms enforcer under Schedule 5, we have powers in relation to the production of information. Under

paragraph 14 of Schedule 5, an enforcer or an officer of an enforcer may give notice to a person requiring the person to provide the enforcer with the information specified in the notice.

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- (1) Unless the case is urgent, we will generally first write to a firm to express our concern about the potential unfairness of a term or terms (within the meaning of the *CRA*) and will invite the firm to comment on those concerns. If we still believe that the term is unfair, we will normally ask the firm to stop using or proposing or recommending the use of that term in a consumer contract. If the firm continues to rely on that term or declines to give an undertaking, or gives an undertaking but fails to follow it, the *FCA* will consider the need to apply to the courts for an injunction under paragraph 3 of Schedule 3.
- (2) In deciding whether to ask a firm to undertake to stop using or proposing or recommending the use of a term in a consumer contract, we will consider the full circumstances of each case. Several factors may be relevant for this purpose and the following list is not exhaustive, but will give some indication of the sorts of things we consider:
 - (a) whether we are satisfied that the contract term may properly be regarded as unfair within the meaning of the *CRA*;
 - (b) the extent and nature of the detriment to *consumers* resulting from the term or the potential harm which could result from the term;
 - (c) whether the firm has fully cooperated with the *FCA* in resolving our concerns about the fairness of the particular contract term.

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- (1) In relation to a consumer notice, where we are concerned about the potential unfairness of the notice, we will generally contact a firm to ask the firm to amend or withdraw the notice.
- (2) The *FCA* can also ask a firm to undertake to amend or withdraw a consumer notice. Under paragraph 6 of Schedule 3, a regulator may accept an undertaking from a *person* against whom it has applied, or thinks it is entitled to apply for an injunction or interdict. The undertaking may provide that the *person* will comply with the conditions that are agreed between the person and the regulator about the use of terms or notices, or terms or notices of a kind, specified in the undertaking.

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- (1) Under paragraph 3 of Schedule 3, a regulator may apply for an injunction or (in Scotland) an interdict against a *person* if the regulator thinks that:
 - (a) the *person* is using, or proposing or recommending the use of, a term or notice to which Schedule 3 applies; and
 - (b) the term or notice:
 - (i) purports to exclude or restrict liability of the kind mentioned in paragraph 3(2) of Schedule 3; or
 - (ii) is unfair to any extent; or

(iii) breaches the transparency requirement.

(2) A regulator may apply for an injunction or interdict in relation to a term, whether or not it has received a relevant complaint about the term.

(3) The *FCA* is a regulator for the purposes of Schedule 3. Our approach to seeking an injunction under the *CRA* is set out in EG 10.

1.3.6

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Under sections 62 and 67 of the *CRA*, an unfair term is not binding on the *consumer* but the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term. If the court finds that the term in question is unfair, the firm would have to stop relying on the unfair term in existing and future contracts governed by the *CRA*.

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Under section 62 of the *CRA*, an unfair consumer notice is not binding on the *consumer*.