The Unfair Contract Terms Regulatory Guide
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Chapter 1

The Unfair Contract Terms and Consumer Notices Regulatory Guide
1.1 Application and purpose

1.1.1 This Guide explains the FCA's policy on how it will use its powers under the CRA in relation to unfair terms and consumer notices.

1.1.1A The Unfair Terms Regulations will continue to apply to contracts entered into before 1 October 2015. Firms (see 1.1.5G) should refer to the previous version of this Guide for an explanation of the FCA's policy regarding the Unfair Terms Regulations.

1.1.1B The unfair terms provisions in Part 2 of the CRA apply to consumer contracts entered into on or after 1 October 2015 and consumer notices issued on or after 1 October 2015.

1.1.1C In this Guide, 'consumer notice' has the same meaning as in section 61 of the CRA.

1.1.2 We have agreed with the Competition and Markets Authority ("CMA") that the FCA will consider the fairness (within the meaning of the CRA) of those financial services contracts and consumer notices specified in the Memorandum of Understanding between the CMA and the FCA on the use of concurrent powers under consumer protection legislation [http://www.fca.org.uk/fca-cma-consumer-protection-mou].

1.1.3 Where the firm concerned is not a firm or an appointed representative, the FCA will liaise with the CMA or (as appropriate) another CRA regulator (see EG 10.19).

1.1.4 This Guide applies to:

(1) firms;

(2) appointed representatives;

(3) other persons, whether or not a person with permission, who use, or recommend the use of, contracts to carry on regulated activities;

(4) electronic money issuers; and

(5) payment service providers.
1.1.5 This Guide uses "firm" to refer to all such persons.
1.2 Introduction

1.2.1 This Guide explains the FCA's formal powers under the CRA in relation to unfair terms and consumer notices. It does not contain comprehensive guidance on the CRA itself, and you should refer to the CRA for further details.

1.2.2 This Guide also provides guidance on the approach we take before considering whether to exercise our formal powers under the CRA in relation to unfair terms and notices.

1.2.3 The FCA has powers as a regulator and an unfair contract terms enforcer under the CRA. Under the CRA our functions are treated as functions under the Act. This:

   (1) makes the statutory objectives relevant to forming policy that governs the discharge of our functions under the CRA;

   (2) means that any complaints about the FCA's activities under the CRA can be referred to the Complaints Commissioner;

   (3) allows the FCA to make full use of its information disclosure powers;

   (4) allows the FCA to use its power to give guidance;

   (5) protects the FCA against liability in damages in respect of its activities under the CRA; and

   (6) allows the FCA to raise fees to fund its activities under the CRA.

1.2.4 (1) As such, we may publish on our website details of cases that result in a change in the terms and notices used by the firm. This may happen through either an undertaking by a firm or injunction obtained from the courts.

   (2) Under paragraphs 4(1) and 6(3) of Schedule 3 to the CRA, the FCA has a duty to pass details of these cases to the CMA.

   (3) The CMA also publishes details of cases that it, and other regulators, have dealt with in accordance with the CMA's duties under paragraph 7 of Schedule 3 to the CRA.
1.3 The CRA

Terms and notices to which the CRA applies

1.3.1  
(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 or the EU 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

1.3.2  
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

1.3.3  
(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.

1.3.4

(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.

1.3.4A

(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.

1.3.5

(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 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.

1.3.6A Under section 62 of the CRA, an unfair consumer notice is not binding on the consumer.
1.4 The CRA: the FCA's role and policy

1.4.1 The FCA may consider the fairness of a term or notice within the meaning of the CRA following a complaint from a consumer or other person or on its own initiative if the term or notice is within its scope.

1.4.2 There are three main ways in which we might receive a complaint from a consumer or other person. These are:

   (1) directly; or

   (2) from another regulator which considers that the FCA should deal with the complaint; or

   (3) from the CMA.

1.4.3 The main way in which we would act on our own initiative is to undertake a review of contracts or consumer notices in a particular area of business. This might involve looking at the terms or notices used by several firms in a particular sector.

   (2) We will, for example, consider launching such a review if multiple consumer complaints or other intelligence lead us to believe that under the CRA there may be an issue relating to contracts or notices of wider significance to firms and consumers.

1.4.4 If, following either a complaint or an own-initiative review, we consider that a term or notice is unfair, we may challenge firms about their use of that term or notice.

Interaction with the FCA's powers under the Act

1.4.5 (1) The FCA will consider using its powers under the CRA in the context of its wider regulatory powers under the Act.

(2) In some cases, it might be appropriate for us to use other powers to deal with issues identified under the CRA. The powers available to the FCA under the Act may vary depending on the regulated activities which the firm carries out. For example, the use of an unfair term might involve a breach of a Principle or a rule in BCObS, CoBS, CoNC, MCoB or ICObS and the use of an unfair notice might involve a breach of the financial promotions rules. If so, the FCA might also address the issue as a rule breach.
(3) We may, in some circumstances, consider treating the matter under our powers in the Act itself and also under the CRA.

(4) However, the use of our powers under the Act will not be possible in all cases where a firm has used an unfair term. If we consider using an enforcement power under the Act, we will do so in accordance with the policy relating to that power as set out in EG.
1.5 Risk Management

1.5.1 Where a firm has given an undertaking or a court has ruled the firm's term unfair, then the FCA considers it desirable that the firm should promptly notify clients with whom it has already concluded contracts of the effect the undertaking or ruling will have on their contracts.

(2) The firm should also, as part of its risk management, consider the effect on its own business, including whether there are relevant risks which need mitigation. For example, firms should consider the effect of section 62 of the CRA which provides that an unfair term or consumer notice is not binding on the consumer.

(3) Section 67 of the CRA provides that where a term of a consumer contract is not binding on the consumer, the contract continues, so far as practicable, to have effect in every other respect. Mitigation may involve the firm contacting existing customers to ask that they agree to an amended contract, although any such amendment will itself need to avoid unfairness within the meaning of the CRA and to comply with the law of contract generally.

(4) As part of their risk management, firms that have not given an undertaking or been subject to a court decision should remain alert to undertakings or court decisions about other firms, since these will be of potential value in indicating the likely attitude of the courts, the FCA, the CMA or other qualifying bodies to similar terms or notices or those intended to have similar effects.
1.6 Redress

1.6.1 (1) Under the CRA, the FCA (as a regulator and an unfair contract terms enforcer) does not have the power to grant redress to consumers who have suffered loss because of an unfair term or notice. Consumers may choose to complain to the firm and to seek redress from it. If the firm does not satisfy the consumer’s complaint, the consumer may choose to refer the complaint to the Financial Ombudsman Service, if appropriate.

(2) If the use of an unfair term also amounts to a rule breach, and that breach causes loss to consumers, the FCA can apply to court for restitution or require restitution. The FCA will consider whether to use these powers in accordance with the policy in ■ EG 11.

(3) The FCA can use its powers under section 404 of the Act to make rules requiring authorised persons, electronic money issuers and payment service providers to establish and operate consumer redress schemes. The FCA can also impose a requirement on an authorised person, electronic money issuer and payment service provider under section 404F(7) of the Act to establish and operate a scheme that corresponds to, or is similar to, a consumer redress scheme under section 404 of the Act.
Chapter 2

Unfair Contract Terms material published by the FCA
2.1 Statements of Good Practice on fairness of terms in consumer contracts

2.1.1 In the Unfair Contract Terms Library [https://small-firms.fca.org.uk/unfair-contract-terms/unfair-contract-terms-library](https://small-firms.fca.org.uk/unfair-contract-terms/unfair-contract-terms-library) you will find Notices of Undertakings, Statements, Speeches and other publications where we have set out our views on the likely application of the *Unfair Terms Regulations* and the CRA in relation to certain types of clause in standard form consumer contracts. We will add further publications to the Unfair Contract Terms Library as and when they are published.
## UNFCOG TP 1
### Transitional Provisions

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<td><strong>UNFCOG</strong> takes effect on 1 October 2015, save to the extent described below. In relation to a contract entered into before 1 October 2015, <strong>UNFCOG</strong> should apply in the form it was in at 30 September 2015.</td>
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