

The Unfair Contract Terms Regulatory Guide

Chapter 1

The Unfair Contract Terms and Consumer Notices Regulatory Guide

1.1 Application and purpose

- 1.1.1** **G** 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** **G** 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** **G** 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** **G** In this Guide, 'consumer notice' has the same meaning as in section 61 of the *CRA*.
- 1.1.2** **G** 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** **G** 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** **G** 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*.

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This Guide uses "firm" to refer to all such persons.

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1.2 Introduction

- 1.2.1** **G** 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** **G** 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** **G** 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** **G**
- (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

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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* 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

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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.

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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*.

1.4 The CRA: the FCA's role and policy

1.4.1 **G** 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 **G** 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 **G**

- (1) 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 **G** 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

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- (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

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- (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

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- (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*.

