

**ENFORCEMENT MANUAL (UNFAIR CONTRACT TERMS)
INSTRUMENT 2003**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the power in section 157(1) of the Financial Services and Markets Act 2000 (Guidance).

Commencement

- B. This instrument comes into force on 1 April 2003.

Amendments to the Handbook

- C. (1) The Enforcement manual is amended in accordance with Annex A to this instrument.
- (2) The Supervision manual, Decision making manual, Credit Unions sourcebook and the Glossary are amended in accordance with Annex B to this instrument.

Citation

- D. This instrument may be cited as the Enforcement Manual (Unfair Contract Terms) Instrument 2003.

By order of the Board
20 March 2003

Annex A

Amendments to the Enforcement Manual

In this Annex underlining indicates new text and striking through indicates deleted text. Where an entire section is inserted, the place that it goes is indicated and the text is not underlined.

1.2.1 G The *FSA's* effective and proportionate use of its enforcement powers to enforce the requirements of the *Act*, the *rules*, the *Statements of Principle* and other relevant legislation (for example, the Criminal Justice Act 1993, ~~and~~ the *Money Laundering Regulations 1993* and the *Unfair Terms Regulations*) play an important role in the pursuit of its *regulatory objectives*.

...

1.2.2 G Schedule 1 to the *Act* (The Financial Services Authority) states that the *FSA* must maintain arrangements for enforcing provisions of, or made under, this *Act* (see paragraph 6(3) of Schedule 1). The Enforcement manual describes the *FSA's* policies and procedures for the exercise of the enforcement powers given to it by the *Act* and the *Unfair Terms Regulations*, as set out in *ENF 1 Annex 1G*. ...

...

1.2.6 G The Authorisation manual (*AUTH*), the Supervision manual (*SUP*), the Enforcement manual (*ENF*), and the Decision making manual (*DEC*) form the regulatory processes part of the *Handbook*:

...

- (4) *DEC* is principally concerned with and sets out, the *FSA's* decision making procedures for decisions that involve the issue of *statutory notices*. It also gives *guidance on the FSA's* procedures for using its powers under Part XXIV of the *Act* (*Insolvency orders*), Part XXV of the *Act* (*Injunctions and restitution*), Part XXVII of the *Act* (*Criminal Offences*) and the *Unfair Terms Regulations* (see *DEC 1.1.3G* and *DEC 4.6G*).

...

ENF 1 Annex 1

Table of powers referred to in the Enforcement manual

G

ENF

1 Table: G

1

This table gives the main location in the Enforcement manual where *guidance* appears on those powers referred to in the *Act*, in secondary legislation made under the *Act*, or the *Unfair Terms Regulations* and in other legislation listed below. In many instances the powers will be referred to in other locations.

ENF

2

Table: Powers referred to in the Enforcement manual

Subject	Part and section of the Act	Enforcement manual location
...		
Directions against incoming ECA provider		
Power to make a direction against an incoming ECA provider	ECD Regulations	ENF 19
<u>Unfair Terms Regulations</u>		
<u>Power to seek injunctions under the Unfair Terms Regulations</u>	N/A	<u>ENF 20 (Unfair terms in consumer contracts)</u>

...

6.1.2 G This chapter explains the *FSA's* powers to apply to court for *injunctions* and gives *guidance* on how the *FSA* intends to use these powers. The *FSA's* effective use of these powers will help it work towards its *regulatory objectives* of protecting *consumers*, maintaining confidence in the *financial system* and reducing *financial crime*. This chapter does not explain the use of the *FSA's* power to seek *injunctions* under the *Unfair Terms Regulations*. This is explained in *ENF 20 (Unfair terms in consumer contracts)*.

...

6.2.3 G ~~*ENF 6.9 to ENF 6.10 give guidance on the circumstances in which the FSA may use its power to apply to court for an order under Regulation 12 of the Unfair Terms in Consumer Contracts Regulations 1999.*~~
[deleted]

...

~~**6.9 Injunctions under the Unfair Terms in Consumer Contracts Regulations 1999: the power-**~~ [deleted]

This section is deleted in its entirety.

~~6.10 — Injunctions under the Unfair Terms in Consumer Contracts Regulations 1999 FSA policy [deleted]~~

This section is deleted in its entirety.

After ENF 19, insert the following new chapter:

Chapter 20 Unfair terms in consumer contracts

20.1 Application and purpose

20.1.1 G This chapter explains the *FSA*'s policy on how it will use its powers under the *Unfair Terms Regulations*.

20.1.2 G The *FSA* has agreed with the Office of Fair Trading that the *FSA* will consider the fairness within the meaning of the *Unfair Terms Regulations* of financial services contracts for carrying on:

- (1) any *regulated activity*;
- (2) general insurance, including broking;
- (3) lending, administration, advising and arranging in respect of mortgages where the lender takes a first legal charge over property in the United Kingdom and the property is at least 40% occupied by the borrower or by a member of his immediate family.

20.1.3 G The Office of Fair Trading will consider the fairness within the meaning of the *Unfair Terms Regulations* of other financial services contracts involving carrying on activities governed by the Consumer Credit Act 1974, including second charge mortgage loans, buy to let mortgages, and non-mortgage personal loans (including credit cards). Further, where the firm concerned is not a *firm* or an *appointed representative*, the Office of Fair Trading may take enforcement action under the *Unfair Terms Regulations* in respect of financial services contracts involving the carrying on of activities within ENF 20.1.2G (see ENF 20.4.6G (5) and (6)).

20.1.4 G This chapter therefore applies to:

- (1) *firms*;
- (2) *appointed representatives*; and

- (3) other *persons*, whether or not a *person* with *permission*, who are using, or recommending the use of contracts, for carrying on the activities set out in *ENF* 20.1.2G.

20.1.5 G This chapter uses 'firm' to refer to all *persons* covered by *ENF* 20.1.4G.

20.2 Introduction

20.2.1 G This chapter contains *guidance* on the *FSA*'s formal powers under the *Unfair Terms Regulations*. This chapter does not contain comprehensive *guidance* on the Regulations, and the reader should refer to the Regulations themselves for further details.

20.2.2 G This chapter also gives *guidance* on the approach the *FSA* expects to take before considering whether to exercise its formal powers under the *Unfair Terms Regulations*.

20.2.3 G The *FSA* has powers as a qualifying body under the *Unfair Terms Regulations*. The Regulations are not made under the *Act*. However, the Regulations say that the *FSA*'s functions under the Regulations are treated as functions under the *Act*. This:

- (1) makes the *regulatory objectives* relevant to the formulation of policy governing the discharge of the *FSA*'s functions under the Regulations;
- (2) means that any complaints about the *FSA*'s activities under the Regulations can be referred to the *Complaints Commissioner*;
- (3) allows the *FSA* to make full use of its information disclosure powers;
- (4) allows the *FSA* to use its power to give *guidance*;
- (5) protects the *FSA* against liability in damages in respect of its activities under the Regulations; and
- (6) allows the *FSA* to raise fees to fund its activities under the Regulations.

20.2.4 G The *FSA* will publish on its Internet site details of cases that result, through either an undertaking by a firm or injunction obtained from the courts, in a change in the contract terms used by it. The name of the firm will be included. Additionally, the Office of Fair Trading publishes similar details of cases that it and other qualifying bodies have dealt with in accordance with their duties under regulation 15 of the *Unfair Terms Regulations*. The *FSA* may therefore pass such details of cases to the Office of Fair Trading for publication on the Office of Fair Trading Internet site.

20.3 The Unfair Terms Regulations

Terms to which the Unfair Terms Regulations apply

- 20.3.1 G
- (1) The *Unfair Terms Regulations* apply, with certain exceptions, to terms in contracts concluded between a seller or supplier and a *consumer* which have not been individually negotiated.
 - (2) Terms cannot be reviewed for fairness within the meaning of the *Unfair Terms Regulations* if they are terms which reflect:
 - (a) mandatory statutory or regulatory provisions; or
 - (b) the provisions or principles of international conventions to which the *EEA States* or the European Community as a whole are party.
 - (3) Terms which are written in plain, intelligible language also cannot be reviewed for fairness within the meaning of the Regulations if they relate to the main subject matter of the contract or the adequacy of the price or remuneration, as against the goods or services supplied in exchange. However, the *FSA* can review terms concerning these matters for fairness within the meaning of the Regulations if they are not written in plain, intelligible language. The *FSA* does not consider that it is enough that a lawyer could understand the term for the term to be excluded from review for fairness within the meaning of the Regulations. The term must be plain and intelligible to the *consumer*.

When is a term “unfair ” within the meaning of the Regulations?

- 20.3.2 G
- Terms to which the *Unfair Terms Regulations* apply are regarded as 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 and qualifying bodies under the Regulations

- 20.3.3 G
- (1) Regulation 12 of the *Unfair Terms Regulations* states that:

“(1) The [Office of Fair Trading] or [...] any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to them to be using, or recommending the use of an unfair term drawn up for general use in contracts concluded with consumers.

...

"(3) The court, on an application under this regulation, may grant an injunction on such terms as it thinks fit."

(2) The *FSA* is a qualifying body for the purposes of regulation 12.

20.3.4 G (1) In deciding whether to grant an *injunction*, the court will decide whether the term in question is unfair within the meaning of the *Unfair Terms Regulations* (see *ENF* 20.3.2.G).

(2) If the court were to grant an *injunction*, the seller or supplier or recommender would have to stop including the unfair term in contracts it concluded with *consumers* from the date of the *injunction*.

(3) If the seller or supplier or recommender fails to comply with the *injunction*, it will be in contempt of court.

20.3.5 G The *FSA* also has the power under regulation 13 of the *Unfair Terms Regulations* to require for certain purposes that the seller or supplier or recommender supply the *FSA* with certain information or documents relating to pre-formulated standard contracts.

20.3.6 G If the court finds that the term in question is unfair, the seller or supplier or recommender would also have to stop relying on the unfair term in existing contracts governed by the *Unfair Terms Regulations*. This is because regulation 8 of the Regulations provides that an unfair term is not binding on the *consumer*. To the extent that it is possible, the existing contracts would continue in effect without the unfair term.

20.4 The Unfair Terms Regulations: the FSA's role and policy

20.4.1 G The *FSA* may consider the fairness of a contract within the meaning of the *Unfair Terms Regulations* following a complaint from a *consumer* or other person or on its own initiative if the contract is within its scope according to *ENF* 20.1.2 G.

20.4.2 G There are three main ways in which the *FSA* might receive a complaint from a *consumer* or other person. These are:

(1) directly; or

(2) from another qualifying body which considers that the *FSA* should deal with the complaint; or

(3) from the Office of Fair Trading.

- 20.4.3 G
- (1) The principal way in which the *FSA* would act on its own initiative is to undertake a review of contracts in a particular area of business on its own initiative. This might involve investigating the contract terms used by several firms in a particular sector, rather than waiting for complaints regarding a particular firm.
 - (2) The *FSA* will, for example, consider launching such a review if multiple *consumer* contract complaints or other intelligence lead it to believe that under the *Unfair Terms Regulations* there may be a contractual issue of wider significance to firms and *consumers*.

20.4.4 G If, following either a complaint or an own-initiative review, the *FSA* considers that a term in a contract which is within its scope as described in *ENF* 20.1.2 G is unfair within the meaning of the *Unfair Terms Regulations*, it may challenge firms regarding their use of the term, as described in *ENF* 20.4.6 G.

Interaction with the FSA's powers under the Act

- 20.4.5 G
- (1) The *FSA* will consider using its functions under the *Unfair Terms Regulations* in the context of its wider regulatory powers under the *Act*.
 - (2) In some cases, it might be appropriate to use other powers to deal with issues identified under the *Unfair Terms Regulations*. The powers available to the *FSA* under the *Act* may vary depending on the *regulated activities*, if any, which the firm carries on (see *ENF* 20.1.2G). For example, the use of the unfair term might involve a breach of a *rule* in *COB*, and, if so, it would also be open to the *FSA* to address the issue as a *rule* breach.
 - (3) The *FSA* may, in some circumstances, consider treating the matter under its powers in the *Act* and under the *Unfair Terms Regulations*.
 - (4) The use of powers under the *Act* will not be possible in all cases in which a firm uses an unfair term. If the *FSA* is considering using an enforcement power under the *Act*, it will do so in accordance with the policy relating to that power as set out in *ENF*.

FSA policy on obtaining injunctions

- 20.4.6 G
- (1) If the *FSA* decides to address issues using its powers under the *Unfair Terms Regulations*, and the contract is within its scope as described in *ENF* 20.1.2 G, it will, unless the case is urgent, generally first write to a firm expressing its concerns about the

potential unfairness within the meaning of the *Unfair Terms Regulations* of a term or terms in its contract and inviting the firm's comments on those concerns. If the *FSA* remains of the view that the term is unfair within the meaning of the *Unfair Terms Regulations*, it will normally ask the firm to undertake to stop including the term in new contracts and stop relying on it in contracts which have been concluded.

- (2) If the firm either declines to give an undertaking described in (1), or gives such an undertaking and fails to follow it, the *FSA* will consider the need to apply to court for an *injunction* under regulation 12 of the *Unfair Terms Regulations*, described in *ENF 20.3.3 G*.
- (3) In determining whether to seek an *injunction* against a firm, the *FSA* 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:
 - (a) whether the *FSA* is satisfied that the contract term which is the subject of the complaint may properly be regarded as unfair within the meaning of the *Unfair Terms Regulations*;
 - (b) the extent and nature of the detriment to *consumers* resulting from the term or the potential detriment which could result from the term;
 - (c) whether the firm has fully cooperated with the *FSA* in resolving the *FSA*'s concerns about the fairness of the particular contract term;
 - (d) the likelihood of success of an application for an *injunction*;
 - (e) the costs the *FSA* would incur in applying for and enforcing an *injunction* and the benefits that would result from that action; the *FSA* is more likely to be satisfied that an application is appropriate where an *injunction* would not only prevent the continued use of the particular contract term, but would also be likely to prevent the use or continued use of similar terms, or terms having the same effect, used or recommended by other firms concluding contracts with *consumers*.
- (4) In an urgent case, the *FSA* may seek a temporary *injunction*, to prevent the continued use of the term until the fairness of the term could be fully considered by the court. An urgent case is

one in which the *FSA* 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 *FSA* may take into account a number of factors, including one or more of the factors set out in (3). In such an urgent case, the *FSA* may seek a temporary *injunction* without consulting with the firm in the manner described in (1).

- (5) When the *FSA* considers that a case requires enforcement action under the *Unfair Terms Regulations*, it will take the enforcement action itself if the firm is a *firm* or an *appointed representative*.
- (6) Where the firm is not a *firm* or an *appointed representative* (see *ENF* 20.1.4G (3)), the *FSA* will pass the case to the Office of Fair Trading, with a recommendation that it take the enforcement action. The Office of Fair Trading may then decide whether or not to take enforcement action.

Risk management

- 20.5.1 G (1) Where a firm has given an undertaking as described in *ENF* 20.4.6G (1), or a court has ruled the firm's term unfair, then the *FSA* considers it desirable that the firm should notify promptly clients with whom it has already concluded contracts of the effect 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 requiring mitigation. This may involve the firm contacting existing customers in due course to request that they agree to an amended contract, though such amendments will themselves need to avoid unfairness within the meaning of the *Unfair Terms Regulations* and comply with the law of contract generally.
- (3) As part of their risk management, firms that have not themselves given an undertaking or been subject to a court decision should remain alert to undertakings or court decisions concerning other firms, since these will be of potential value in indicating the likely attitude of the courts, the *FSA*, the Office of Fair Trading or other qualifying bodies to similar terms or terms with similar effects.

Redress

- 20.6.1 G (1) The *FSA* does not have the power under the *Unfair Terms Regulations* to grant redress to *consumers* who have suffered loss as a result of an unfair term. *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 (see *ENF 20.4.5G (2)*) and that breach causes loss to *consumers*, the *FSA* can apply to court for restitution or require restitution. The *FSA* will consider whether to use these powers in accordance with the policy in *ENF 9* (Restitution and redress).

Annex B

Amendments to other parts of the Handbook

In this Annex underlining indicates new text and striking through indicates deleted text.

Amendments to the Supervision manual

SUP 2.1.4 G The *FSA* receives information in *SUP 2.1.3G* through a variety of means, including notifications by *firms* (see *SUP 15*) and regular reporting by *firms* (see *Sup 16*). This chapter is concerned with the methods of information gathering that the *FSA* may use on its own initiative in the discharge of its functions under the *Act*. This chapter does not deal with the information gathering powers that the *FSA* has under the *Unfair Terms Regulations*. These are dealt with in *ENF 20.3.5G*.

Amendments to the Decision making manual

DEC 1.1.1 G This manual gives *guidance* on the *FSA*'s decision making and other procedures for giving *statutory notices* listed in *DEC 2 Ann 1G* and *DEC 3 Ann 1G*. This manual also gives *guidance* on the *FSA*'s procedure for using its powers under Part XXIV of the *Act* (Insolvency), Part XXV of the *Act* (Injunctions and restitution), ~~and~~ Part XXVII of the *Act* (Criminal Offences) and the *Unfair Terms Regulations*. ...

Amendments to the Credit Union sourcebook

CRED 15.2.1 G The *FSA*'s investigation and enforcement powers in the Industrial and Provident Societies Act 1965, the Friendly and Industrial and Provident Societies Act 1968 and the Credit Unions Act 1979, although its main powers derive from the *Act* and the *Unfair Terms Regulations*.

CRED 15.2.2 G For ease of reference:

...

- (2) Annex 2 to this chapter (*CRED 15 Ann 1G*) contains a table of the main relevant investigation and enforcement powers under the *Act* and the *Unfair Terms Regulations*, showing where they are considered in the Enforcement manual (*ENF*).

...

Credit unions

CRED 15 Annex 2

Enforcement Powers

G

CRED

1 Table: G

This table gives the main location in the Enforcement manual where *guidance* appears on the powers referred to in the *Act* and the *Unfair Terms Regulations* list below.

This is an edited version of the table given at *ENF* 1 Annex 1 G

CRED

2 Table: Table of Powers referred to in the Enforcement manual

Subject	Part and section of the Act	Enforcement manual location
PROSECUTION OF CRIMINAL OFFENCES		
Power to prosecute offences under the <i>Act</i> and subordinate legislation	Part XXVII, s. 401	<i>ENF</i> 15
Power to prosecute other offences	Part XXVII, s. 402	<i>ENF</i> 15
<u>UNFAIR TERMS REGULATIONS</u>		
Power to seek injunctions under the <i>Unfair Terms Regulations</i>	N/A	<i>ENF</i> 20 (<u>Unfair terms in consumer contracts</u>)

Amendments to the Glossary

Insert the following new definition in the appropriate alphabetical position:

Unfair Terms Regulations the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), as amended by SI 2001/1186 and SI 2001/3649.

Amend the following definition as shown:

<i>consumer</i>	<p>(1) (in relation to the <i>FSA's</i> power to make general <i>rules</i> (section 138 of the <i>Act</i> (General rule-making power)))...</p> <p>...</p> <p><u>(4) (in <i>ENF 20</i>) any natural person who, in contracts covered by the <i>Unfair Terms Regulations</i>, is acting for purposes which are outside his trade, business or profession.</u></p>
-----------------	---