

# CONSUMER RIGHTS ACT 2015

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 2: Unfair Terms

##### Background and overview

287. [Part 2](#) of the Act clarifies and consolidates existing consumer legislation on unfair terms.
288. In 2005, the Law Commissions concluded, following an earlier consultation, that the law on unfair contract terms is particularly complex<sup>1</sup>. It is contained in two separate pieces of legislation– the UCTA and the UTCCR – that have inconsistent and overlapping provisions.
289. The UCTA applies to a broad range of contracts, including those between two businesses, contracts between businesses and consumers and even, to a limited extent, to contracts between two consumers. It applies to individually negotiated as well as non-negotiated terms. It focuses on exclusions, that is to say terms or notices which aim to exclude or restrict liability for: negligence causing death or personal injury; negligence causing other loss; and breach of contract. As a result, for example, traders are not permitted to exclude their liability for negligence causing death or personal injury. Other exclusions are only binding if they meet the ‘reasonableness requirement’. Some types of contracts are exempted, for example those relating to insurance contracts, interests in land or, other than in Scotland, intellectual property rights.
290. The UTCCRs implement the Unfair Terms in Consumer Contracts Directive (Council Directive [93/13/EEC](#)) (“UTCCD”), and only apply to non-negotiated (standard term) contract terms between a trader and a consumer. They provide that contract terms must be “fair” and written in “plain, intelligible language”. The definition of fairness differs from the reasonableness test in the UCTA, and while overall both pieces of legislation may in some cases achieve a similar effect, they do so in different ways. In their 2005 report, the Law Commissions concluded that the two overlapping and inconsistent pieces of unfair terms legislation have led to complexity and confusion about how the law should be applied.
291. A transposition note setting out how the main elements of this Directive are transposed in the Act is annexed to these explanatory notes – please see Annex B.
292. In 2012, BIS asked the Law Commissions to look again at how the legislation could be clarified in the light of some high profile legal cases. They therefore undertook a consultation in 2012<sup>2</sup>, to obtain up-to-date evidence and views on their proposals for reform.
293. The focus of the consultation was on two particular areas:

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<sup>1</sup> Their documents can be found at <http://lawcommission.justice.gov.uk/areas/unfair-terms-in-contracts.htm>

<sup>2</sup> *ibid*

- contract terms that are exempted from an assessment of fairness by the courts because they concern the essential bargain of the contract – the subject matter and the adequacy of the price (this is commonly referred to as “the exemption”); and
  - an indicative and non-exhaustive schedule of types of terms that may be considered unfair (this is commonly referred to as “the grey list”).
294. **Part 2** consolidates the UCTA and the UTCCR, to remove conflicting overlapping provisions and, in particular, to clarify and amend the law on the above-mentioned exemption and the “grey list”.

## **What contracts and notices are covered by this Part?**

### ***Section 61: Contracts and notices covered by this Part***

295. This section sets out the scope of Part 2 of the Act:
- It covers contracts between a trader and a consumer. For ease of reference, trader to consumer contracts are called ‘consumer contracts’ in this Part.
  - Whilst Part 2 concerns contracts, it also includes consumer notices – both contractual and non-contractual consumer notices. A consumer notice includes an announcement or other communication which it is reasonable to assume is intended to be read by a consumer. Non-contractual consumer notices (e.g. a sign in a car park) do not include an exchange of something in return for something else of value (known as “consideration”) as a contract does.
  - This Part does not cover employment contracts, as they are regulated by specific employment legislation.
296. This Part covers terms in End User Licence Agreements to the extent that they are either consumer contracts or consumer notices. Research<sup>3</sup> suggests that some End User Licence Agreements, for example those known as “click-wrap licences”, which the consumer must explicitly agree to before they are able to download digital content, may have contractual status. Consumer contracts are subject to the provisions of Part 2 and if they contain terms listed in Schedule 2, those terms are assessable for fairness. Other types of End User Licence Agreements, such as those known as “shrink-wrap” or “browse-wrap” licences, may not have contractual status but may alternatively be consumer notices, and therefore also be subject to the provisions in Part 2. End User Licence Agreements may also set out for the consumer legal provisions in other pieces of legislation, such as those in relation to intellectual property. Section 73 makes clear that the Act’s unfair terms provisions do not override legal requirements in other legislation, therefore if a term reflects other law, then it will be exempt from the provisions in Part 2.

## **What are the general rules about fairness of contract terms and notices?**

### ***Section 62: Requirement for contract terms and notices to be fair***

297. The effect of this section is that terms used in contracts and notices will only be binding upon the consumer if they are fair. It defines ‘unfair’ terms as those which put the consumer at a disadvantage, by limiting the consumer’s rights or disproportionately increasing their obligations as compared to the trader’s rights and obligations.
298. This section also sets out factors that a court should take into account when determining whether a term is fair, notably that it should consider the specific circumstances existing when the term was agreed, other terms in the contract and the nature of the subject matter of the contract. This assessment is known as the ‘fairness test’ (see also section 63

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3 [http://lawcommission.justice.gov.uk/docs/unfair\\_terms\\_in\\_consumer\\_contracts\\_appendices.pdf](http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_appendices.pdf)

as regards the list of terms that may be used to assist a court when considering the application of the fairness test).

299. For example, a contract to subscribe to a magazine could contain a term allowing the publisher to cancel the subscription at short notice. In deciding whether this is fair or not, the court could consider issues such as whether the subscriber can also cancel at short notice or obtain a refund if the publisher cancels the contract.
300. *Subsection (8)* explains that terms which are void will still be void regardless of the fairness test explained in this section. Terms which are void may still be subject to the fairness test and found to be unfair, however if they are found to be fair that does not prevent them from being void.
301. This section brings together sections 4 and 11 of the UCTA (for England, Wales and Northern Ireland), sections 17 and 18 of the UCTA (for Scotland), and regulations 5 and 6 of the UTCCR. This section also implements Articles 3, 4 and 6 of the UTCCD.

***Section 63: Contract terms which may or must be regarded as unfair***

302. This section introduces Schedule 2, which lists examples of terms which may be regarded as unfair (this list is known as the “grey list”). Schedule 2 is an indicative and non-exhaustive list. The terms on the list are not automatically unfair, but may be used to assist a court when considering the application of the fairness test in section 62 to a particular case. Equally, terms not found on the list in the Schedule may be found by a court to be unfair by application of the fairness test. This section and the Schedule are based on a copy-out of Article 3(3) of, and the Annex to, the UTCCD. Part 2 of the Schedule explains the scope of the list such that terms in Part 2 are not considered as part of the Schedule but are still assessable for fairness unless section 64 or section 73 applies. Part 2 of the “grey list” accounts, for example, for the specific nature of financial services contracts where fluctuations in the market may influence the price.
303. Terms on the “grey list” are assessable for fairness even if they would otherwise qualify for an exemption under section 64. Terms on the “grey list” are assessable even if they are “transparent” and “prominent” as defined in section 64.
304. For example, if a contract to subscribe to a magazine included a term which provided that the publisher, but not the subscriber, could cancel the delivery at short notice, that term may be regarded as unfair, as it is covered by paragraph 7 of the Schedule (which gives a term which authorises “the trader to dissolve the contact on a discretionary basis where the same facility is not granted to the consumer” as an example of a term which may be unfair). This does not mean that the term is automatically unfair, but the court must take this into account when assessing the term under the fairness test in section 62.
305. This reflects the case law of the EU Court of Justice on the effect of the list of terms in the Annex to the UTCCD. In Case C-478/99 *Commission v Sweden* (2002) ECR I-4147, the Court stated:
- “It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair... In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive... Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures.
- (paras.20-22)
306. In Case C-472/10 *Nemzeti* (judgment of 26 April 2012) the Court emphasised the importance of the list:

“If the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term.

(para.26)

307. Part 1 of Schedule 2 is as included in the UTCCRs and in the UTCCD, however the terminology has been brought in-line with the Act as a whole. In addition, three additional items have been added to the list (paragraphs 5, 12 and 14) as recommended by the Law Commissions in their report of March 2013<sup>4</sup>.
308. [Paragraph 5](#) adds to the grey list terms of a contract which have the object or effect of requiring that a consumer pay a disproportionate amount if they decide not to continue the contract. In this paragraph the phrase “decides not to conclude or perform” includes where a consumer cancels a contract (and is charged a so-called “termination fee”).
309. [Paragraph 12](#) adds to the grey list terms which have the object or effect of allowing the trader to determine the subject matter of the contract after the contract has been agreed with the consumer. In certain circumstances, defined in paragraph 23, this does not apply to contracts which last indefinitely.
310. [Paragraph 14](#) adds to the grey list terms which have the object or effect of allowing the trader to set (for the first time) the price under a contract (or the method for calculating the price), after that contract has been agreed with the consumer. The paragraph expressly provides that, in certain circumstances, defined in paragraphs 23, 24, and 25, it does not apply to contracts which last indefinitely, contracts for the sale of securities and foreign currency (etc), and price index clauses. This is only for the avoidance of doubt, because in most of these situations the price of the contract, or the method for calculating it, will be determined before the contract is agreed, so paragraph 14 would not be relevant.
311. This section also implements Article 15 of the Distance Marketing Directive (Directive [2002/65/EC](#) concerning the distance marketing of consumer financial services, implemented in the UK in the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#)). That Directive sets common minimum standards for the information that must be given to a consumer prior to a distance contract for financial services being concluded. There are also provisions for rights of withdrawal (‘cancellation rights’) in many circumstances, and provisions to protect consumers in relation to misuse of payment cards in connection with distance contracts for financial services, unsolicited supplies of financial services and unsolicited communications about such services. Article 15 provides that any contractual term or condition that puts the burden of proof on the consumer (rather than the trader) to show non-compliance with the Directive is an unfair term.

#### ***Section 64: Exclusion from assessment of fairness***

312. This section describes how the assessment of fairness of price and subject matter terms in consumer contracts is limited.
313. If a term is of the type listed in Part 1 of Schedule 2, it can be assessed for fairness. Other terms in a consumer contract can be assessed for fairness except to the extent that:
  - a) they specify the main subject matter of the contract (usually the goods, services or digital content being purchased); or
  - b) the assessment is of the appropriateness (usually the level) of the price payable under the contract compared with what is supplied under it.

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4 [http://lawcommission.justice.gov.uk/docs/unfair\\_terms\\_in\\_consumer\\_contracts\\_advice.pdf](http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf)

However, if such price or subject matter terms are not transparent and prominent (e.g. if they are in the small print) they are assessable for fairness.

314. Then, in order to determine whether it is assessable for fairness, the court will first consider whether a price or subject matter term is transparent and prominent. If such a term is not transparent and prominent (e.g. if it is in the 'small print'), it is assessable for fairness. If the term is transparent and prominent, it is exempt from assessment for fairness.
315. This provision replaces regulation 6(2) of the UTCCRs, and implements the exemption in Article 4(2) of the UTCCD. Regulation 6(2) was considered in *Office of Fair Trading v Abbey National plc* [2009] UKSC 6. The Supreme Court concluded that the concepts of main subject matter and price are to be narrowly construed as “*the two sides of the quid pro quo inherent in any consumer contract*”, that is, the goods or service that the trader agrees to provide, and the price that the consumer agrees to pay (Lord Walker at para.39). Lord Walker explained that the fact that other types of price terms appeared on the grey list reinforced this narrow construction of the exemption:
- “This House’s decision in *First National Bank* shows that not every term that is in some way linked to monetary consideration falls within Regulation 6(2)(b). Paras (d), (e), (f) and (l) of the “grey list” in Schedule 2 to the 1999 Regulations are an illustration of that. (Lord Walker, para.43)
316. Reflecting this case law, the effect of this section is that, if a term concerns other aspects of the price other than the amount, for example the timing of payment, the term may be assessed for fairness, but the amount of the price cannot be assessed (if it is transparent and prominent as defined here).
317. For example, if an individual contracts with a catering company to provide a buffet lunch, and the contract includes a term that the individual will pay £100 for a 3 course meal, the court cannot look at whether it is fair to pay £100 for 3 courses. It may, however, look at other things, such as the rights of the company and the individual to cancel the lunch, and when the price is due to be paid.

***Section 65: Bar on exclusion or restriction of negligence liability and Section 66: Scope of section 65***

318. **Section 65** provides that a trader cannot, in a consumer contract or consumer notice, limit liability for death or personal injury resulting from negligence.
319. With regard to other loss or damage (such as death or personal injury not resulting from negligence), the trader can only limit its liability if the clause is ‘fair’. Whether a term is fair is determined by the fairness test, set out in section 62.
320. For example, if an individual contracts with a catering company to provide a buffet lunch, and a term in that contract states that the catering company accepts no responsibility for death by food poisoning caused by their negligence, that term is not binding. The catering company can, however, and providing the clause is fair, limit liability if it breaks kitchen equipment.
321. This bar does not apply to a discharge or indemnity given as part of a compensation settlement. This allows parties to settle disputes which have arisen concerning the performance of an earlier contract. Section 66 expressly provides that this bar does not apply to agreements mentioned in section 4(2)(a) of the Damages (Scotland) Act 2011, because not all agreements to discharge liability will include compensation.
322. **Section 65** does not affect section 5 of the Damages (Scotland) Act 2011, which sets out special rules for settlement of mesothelioma claims in Scotland, and provides that relatives can still claim certain damages in some cases even if the original liability were discharged.

323. In some cases, under common law, if an individual is aware of a risk, but ignores it, he/she may be deemed to have taken on that risk. However, this provision explains that, in contrast, a consumer cannot be assumed to have taken on any risk by agreeing to a term which limits a trader's liability.
324. Terms which are barred under this section are still assessable for fairness under section 62.
325. This section reflects section 2 (for England, Wales and Northern Ireland) and section 16 (for Scotland) of the UCTA.

***Section 67: Effect of an unfair term on the rest of a contract***

326. As explained above, a court can find a particular term to be unfair, rendering it unenforceable. However, it may not be in the interests of the consumer or the business for the entire contract not to be binding any more. Therefore, in so far as is practical, the contract will continue even if one or more terms within it are deemed unfair.
327. This section reflects regulation 6(1) of the UTCCD, which is implemented by Article 8(2) of the UTCCR's.

***Section 68: Requirement for transparency***

328. Whilst previous sections explain that a term in a consumer contract or a consumer notice must be fair, and how that is determined, this section states that, in addition, written terms and written notices must be transparent (defined as legible and in plain and intelligible language). The trader has an obligation to ensure that such terms are transparent.
329. This requirement, like others in this Act, may be enforced by public bodies under the relevant provisions, including under Part 8 of the EA, if the conditions in that Act are met (for example, if the term harms the collective interest of consumers). It may also be enforced under Schedule 3.
330. This section reflects regulation 7(1) of the UTCCR's, which implements Article 5 of the UTCCD.

***Section 69: Contract terms that may have different meanings***

331. Contract terms can be ambiguous and capable of being interpreted in different ways, especially if they are not in writing or in an accessible format. In these cases, this section ensures that the interpretation that is most beneficial to the consumer, rather than the trader, is the interpretation that is used.
332. This section reflects regulation 7(2) of the UTCCR's, which implements Article 5 of the UTCCD.

**How are the general rules enforced?**

***Section 70: Enforcement of the law on unfair contract terms***

333. If traders do use (or propose to use or recommend the use of) unfair, void and/or non-transparent terms in consumer contracts or consumer notices, there are a number of means of enforcing this Part.
334. This section introduces Schedule 3 which sets out how this Part can be enforced. Schedule 3 explains that the Competition and Markets Authority ("CMA") and other Regulators (coordinated by the CMA) can investigate and apply for injunctions to prevent the use of certain terms. These are terms which the CMA or other Regulator considers might be unfair, not transparent or void (for example if they purport to exclude liability for death or personal injury through negligence). The CMA or other Regulator

may take action if it thinks that a term or notice falls into one or more of those three categories.

335. **Schedule 3** includes provisions for the CMA to collate and if appropriate make public information about actions taken against certain terms and notices. It also provides that the CMA may issue guidance if it considers it appropriate to do so.
336. There are other means of enforcement available, for example private action by the consumer through the courts or enforcement by a public body through Part 8 of the EA.
337. **Schedule 5** also includes one additional power made available to Unfair Terms enforcers. This is the power to require the production of information (Part 3 of Schedule 5). As set out in paragraph 6 of Schedule 5, this power is only available to those enforcers listed in Schedule 3 which are also public authorities (within the meaning of the Human Rights Act 1998). So, for example, this power is not available to the Consumers' Association (known as Which?).
338. This section reflects regulations 10 to 15 of the UTCCRs, which implement Article 7 of the UTCCD.

## **Supplementary provisions**

### ***Section 71: Duty of court to consider fairness of term***

339. Courts hear a wide variety of disputes between traders and consumers concerning contracts. However, courts are not always specifically asked to look at the fairness of a term in a consumer contract. This provision places a duty upon the courts to look at the fairness of terms even if the parties do not specifically ask the court to do so.
340. This section reflects the view of the EUCJ in Case C-168/05 *Mostaza Claro* (2006) ECR I-10421 that "the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair" (paragraph 38).
341. In fulfilling this duty, the courts would not have to look at the fairness of the term if they do not have adequate information to do so, as was emphasised by the Court of Justice in Case C-243/08 *Pannon* (2009) ECR I-4713 (at para.35). In addition, the courts would only have to look at the term or terms in question, not the entire contract; this reflects the principle in Case C-137/08 *VB Penzugyi v Schneider* in 2010.

### ***Section 72: Application of rules to secondary contracts***

342. This section clarifies that the requirement for terms to be fair, as set out above, extends to contracts agreed in addition to the original contract, whether or not they are contracts between a trader and a consumer. This provides additional protection for consumers, by ensuring that any agreements made after, before or in addition to the signing of a contract are also covered by these rules.

### ***Section 73: Disapplication of rules to mandatory terms and notices***

343. This section ensures that the new and amended provisions on unfair terms do not override legal requirements in other legislation. This may be relevant, for example, where several pieces of legislation affect a trader's business.
344. This section reflects regulation 4(2) of the UTCCRs, which implements Article 1(2) of the UTCCD.

***Section 74: Contracts applying law of non-EEA State***

345. The parties to a contract may agree that it is to be governed by the law of a particular country. This might be because the trader is based in a country other than the UK. This section provides that the consumer may not be deprived of the protection of this Part, where a contract has a close connection with the UK, even if the contract states that the law of a non-EEA State applies (the EEA is the EU Member States plus Iceland, Liechtenstein and Norway).
346. The Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations)<sup>5</sup>, governs which law applies to a consumer contract. See paragraph 27 above for more information on the Rome I Regulation.
347. Section 74 is based on regulation 9 of the UTCCRs, which implements Article 6(2) of the UTCCD; and sections 26 and 27 of the UCTA.

***Section 75: Changes to other legislation***

348. This section gives effect to Schedule 4 which lists amendments required to other legislation, including the UCTA, as a result of this Part.

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<sup>5</sup> For contracts entered into before 17 December 2009, the Rome Convention applies (Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980).