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# Guidance Note

## Dealing with consumers

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Costs Lawyer Standards Board

CLSB



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This Guidance Note is intended to help Costs Lawyers recognise their obligations under consumer law and how these relate to their regulatory duties as Costs Lawyers. It is also intended to help ensure any clients, or potential clients, who are consumers are dealt with fairly and in line with their consumer rights.

## Who should read this Guidance Note?

1. Any Costs Lawyer who deals directly with consumers and/or who promotes their services to consumers.
2. Any organisation employing a Costs Lawyer who deals directly with consumers and/or promotes their services to consumers.
3. As explained at paragraph 13 below, for the purposes of this Guidance Note a consumer is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

## Brief overview and background

4. In 2016, the Competition and Markets Authority (CMA) carried out a market study into the supply of legal services in England and Wales, and published a number of recommendations. The CMA reviewed the implementation of its recommendations in 2020 and published a report of its findings.
5. A key finding of the CMA's market study was that the legal services sector was not working well for consumers. The CMA found that consumers generally lack the experience and information they need to find their way around the legal services sector and to engage confidently with providers. As a result, consumers find it hard to make informed choices because there is little transparency about price, service and quality.
6. Consequently, one of the CMA's key recommendations was that the regulators of legal services develop new minimum standards for the disclosure of price, service,

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redress and regulatory status, and require legal services providers to adhere to them. By improving transparency, it was expected that consumers would be more engaged when seeking and purchasing legal services, leading to better consumer decisions as well as better consumer outcomes in the market.

7. As part of its response the CMA's recommendations, in 2022 the Legal Services Board published a statutory [policy statement on consumer empowerment](#) with which all the regulatory bodies must comply. This Guidance Note supports the aims of the CMA's recommendations and the Legal Services Board's policy statement, in particular by contributing to your understanding of the minimum standards expected of you and how you can improve outcomes for consumers.
8. This Guidance Note sets out our views on some of your key legal obligations<sup>1</sup> under consumer law in relation to:
  - advertising and promoting your services to consumers;
  - the provision of information to consumers;
  - fair contract terms and conditions;
  - quality of services provided;
  - the consumer law concept of professional diligence; and
  - ADR and complaint handling.

## Why is this Guidance Note important?

9. When dealing with consumers you have a number of legal obligations under consumer protection law. While there are similarities between these obligations and the CLSB's regulatory rules,<sup>2</sup> it is essential that you and your firm recognise and understand these distinct consumer law rules.

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<sup>1</sup> This guidance is not intended to be a comprehensive account of the law and is not a substitute for reading the underlying law itself or taking your own legal advice where appropriate.

<sup>2</sup> For example, principles 1.3, 1.4, 3.4, 4.2, 4.3 and 4.6 of the [Code of Conduct](#).

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10. In some circumstances, compliance with our regulatory rules will mean you are compliant with your consumer law obligations. However, it is important to note that this will not always be the case. Similarly, just because you are compliant with consumer law does not mean you will satisfy your broader regulatory obligations. Consequently, each set of rules needs to be considered and applied to your practice separately.
  
  11. Good compliance with consumer law is likely to enhance your professional reputation and reduce potential disputes with clients. Non-compliance, on the other hand, could have a range of potential consequences, including but not limited to:
    - regulatory action by the CLSB<sup>3</sup> or by any other regulator of your firm, such as the Solicitors Regulation Authority (SRA);<sup>4</sup>
    - consumer law enforcement action (for example by Trading Standards or the CMA)<sup>5</sup> against your firm;
    - enforcement action by the Advertising Standards Agency (ASA), for example against misleading advertisements that contravene its Advertising Codes;<sup>6</sup>
    - dissatisfied clients, consumer complaints and cases before the Legal Ombudsman;
    - adverse findings by the Legal Ombudsman;
    - court proceedings by individuals – consumers may be able to sue for breach of contract or seek redress in relation to certain breaches of consumer law.

## Key concepts

12. **When does consumer law apply?** You will need to consider your obligations under consumer law in relation to all your engagement, or potential engagement, with consumers. In particular, the application of consumer law is not limited to

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<sup>3</sup> See the [disciplinary outcomes](#) page of the CLSB website.

<sup>4</sup> See, for example, the SRA's [investigation and enforcement guidance](#).

<sup>5</sup> See, for example, the CMA's [consumer enforcement guidance](#).

<sup>6</sup> See the ASA's [Advertising Codes](#).

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situations where you have been formally instructed by a consumer; crucially, it also applies in your dealings with consumers prior to any formal arrangement with them and in your dealings with potential consumer clients (even where they do not ultimately become your client).<sup>7</sup>

13. **Who is a consumer?** For the purposes of this Guidance Note, a consumer is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession. It is important to be aware that this includes individuals who are funded by legal aid and individuals you are advising on a pro bono basis. Note that while there is significant overlap between consumers and those who can complain to the Legal Ombudsman, the definition of a "complainant" under the Legal Ombudsman Scheme Rules is broader than the definition of a "consumer" under consumer law.<sup>8</sup>
14. **Vulnerable consumers.** As further set out in this Guidance Note, when considering the steps you should be taking to ensure consumer law compliance you will need to take into account the extent to which your consumer clients (or potential clients) may be vulnerable. As the Legal Services Consumer Panel has observed, the very nature of the legal services being provided may lead to consumer vulnerabilities, for example because:
- there is a big knowledge gap between members of the public and legal professionals;
  - people often need legal advice when they are experiencing stressful difficulties;
  - it can be hard for people to judge the quality of legal services, even after they have received them.

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<sup>7</sup> For example, consumer law will apply to general promotional material aimed at potential consumer clients.

<sup>8</sup> In addition to private individuals, the Legal Ombudsman's definition includes micro-enterprises, charities, clubs, associations or societies with an annual income of less than £1m, and trustees of a trust with a net value of less than £1m (but excluding regulated lawyers and law firms).

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15. However, the position is even more acute where your practice is focused on consumers who may be particularly vulnerable – such as those who have suffered personal injury or been the victim of clinical negligence – or where a particular commercial practice (such as the publication of an advertisement) is aimed at a specific group of vulnerable consumers.
  16. **Who is responsible for consumer law compliance?** Consumer law places legal obligations on traders that interact with consumers. In this context, a trader is a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf. Accordingly, in many cases it will be your firm who will be held to account for any consumer law breaches, although where you are acting in your own name (for example, as a sole practitioner) you may be personally responsible for any consumer law infringements.
  17. However, even where ultimate responsibility rests with your firm, each individual Costs Lawyer has an important role to play in ensuring consumer law compliance. In particular, this is because:
    - your actions can lead directly to liability attaching to your firm, for example because your actions cause your firm to be in breach of contract or the statements you make mislead consumers;
    - you may face regulatory action by the CLSB where you are responsible for causing your firm to be non-compliant with its consumer law obligations, for example if this constitutes a breach of the Code of Conduct.

## Interaction with other CLSB rules

18. Although this Guidance Note focuses on your obligations under consumer law, it is important to note that there is nothing new in terms of your legal obligations. To the extent you have been dealing with consumers to date, this Guidance Note

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should reflect what you have already been doing given you need to comply with consumer law in order to comply with the Code of Conduct.<sup>9</sup>

19. In any event, you will see that there are many similarities between the requirements of consumer protection law and the requirements of regulatory rules that apply to legal services and Costs Lawyers specifically. Although overlapping, it is important to recognise that the two regimes are distinct and you will need to consider your responsibilities separately under each to ensure full compliance.
20. This Guidance Note cross-refers to other CLSB documents in a number of places, which you still need to be familiar with. It does not cover other laws or rules enforced by the CLSB, SRA or other sector regulators and you must continue to comply with your broader legal sector regulatory obligations. The CLSB's core regulatory rules can be found in the [Costs Lawyer Handbook](#).

## Advertising and promotional materials

### Overview

21. It is important that you provide clients (and potential clients) with the information they need, at the time they need it and in a format that is clear and easy to understand. This is to help ensure consumers are in a position to make informed decisions when dealing with you and your firm, and it puts you in the best position to avoid infringing consumer law.

**Ask yourself:** Are you providing consumers with:

- the right information
- at the right time
- in the right format?

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<sup>9</sup> Principle 2.1 provides that you must at all times act within the law.



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22. If you fail to ensure that the information you provide to consumers is accurate and does not contain false information, you are at significant risk of breaching consumer law. Similarly, you may infringe the law if the information, or its overall presentation, in any way deceives or is likely to deceive potential or current clients (even if that information is factually correct).<sup>10</sup> Particular care should be taken in relation to information concerning your fees, your firm and the nature of the services being provided.
  23. These obligations apply in relation to all your interactions with consumers including, for example, adverts, website content and marketing materials. They can also apply when dealing with individual consumers.<sup>11</sup>
  24. While this section of the guidance focuses on your consumer law obligations, you will note the many similarities with your broader regulatory obligations.<sup>12</sup> However, it is important to note that compliance with our regulatory rules does not guarantee your compliance with consumer law. Neither does compliance with consumer law ensure broader regulatory compliance.

## Misleading by omission – in more detail

25. You are likely to infringe consumer law if the information you provide to consumers omits or hides material information.<sup>13</sup> Similarly, if you provide material information in a manner which is unclear, unintelligible, ambiguous or untimely, you are likely to infringe consumer law.<sup>14</sup>

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<sup>10</sup> Consumer Protection from Unfair Trading Regulations 2008, regulation 5.

<sup>11</sup> Note that where the information is being provided to consumers in a format that falls within the ASA's jurisdiction (for example, in adverts or on your website), the ASA may take action in relation to the provision of misleading information or the failure to provide material information properly.

<sup>12</sup> See, for example, paragraph 4.6 of the Code of Conduct which states: "You must ensure that clients are able to make informed decisions about the work being undertaken on their behalf throughout the lifetime of a matter, including how it will be priced, the costs incurred and the likely overall cost of the matter (including any potential liability for the costs of other parties)".

<sup>13</sup> Consumer Protection from Unfair Trading Regulations 2008, regulation 6.

<sup>14</sup> Consumer Protection from Unfair Trading Regulations 2008, regulation 6.

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**What do you mean by “untimely”?** This will change depending on the information.

Some information needs to be provided much earlier in your engagement with consumers than others. It may be useful to ask yourself whether your clients might make a different decision (for example, to shop around) if you provided certain information earlier. If the answer is yes, or maybe, there is a good chance you need to provide that information earlier in order for it to be timely.

26. Material information is information that the average consumer<sup>15</sup> needs – in the relevant circumstances – to take an informed transactional decision,<sup>16</sup> such as whether to instruct you or your firm, or whether certain services you offer are right for them. It is an intentionally broad concept and may vary from one firm to another depending on the services being offered to consumers and how they are offered to them. Accordingly, you should take care to consider what information your clients are likely to need based on how you are interacting with them, and you should be conscious of how your clients are likely to interpret the information you provide them with.

**How do I know if information is material?** It can be helpful to ask yourself whether your clients might make a different decision (for example, in relation to the services they instruct you to provide) if you told them a certain bit of information. If the answer is yes, or maybe, then there is a good chance that information would be considered material.

27. Our [Guidance Note on price transparency through websites and promotional material](#) contains further information and guidance in this regard.

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<sup>15</sup> See Annex 2, paragraph 5 for further information on who the average consumer is for these purposes.

<sup>16</sup> See Annex 2, paragraph 5 for the full definition, but this is a broad concept and includes the decisions a consumer takes in relation to whether, how and on what terms to purchase a product. This can also include decisions leading up to a decision to purchase (or a decision not to purchase) a product.

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28. In particular, you need to bear in mind that the average consumer you are dealing with is likely to be less familiar with legal processes, terminology and the services you provide than professional clients and so is likely to need different information presented in a more digestible form.
29. If your practice is focused on vulnerable consumers, adjustments will be necessary to reflect those vulnerabilities.<sup>17</sup> For these purposes, care is needed especially where consumers may be vulnerable, for example, because they are elderly or mentally or physically infirm. There is a heightened risk of infringing consumer law when a particular commercial practice (such as the publication of an advertisement) is aimed at a specific group of vulnerable consumers, and their vulnerabilities are not properly taken into account.
30. In all situations we would expect consumers to receive the following information in a timely manner:
- Key information about the services being offered or to be provided by you/your firm, including details of the proposed timeframes for the work.<sup>18</sup> This would normally be expected to be tailored to the individual case, rather than being generic.
  - The total price for the services (including all taxes), or where the total price is not known at the outset, how the price will be calculated<sup>19</sup> together with a genuine estimate of the likely total cost to the consumer.
  - Whether (and if so, when) any additional charges (such as disbursements) are to be incurred and, where these are known, what such charges will be. Again, where they are not known, you should explain how such charges will be calculated and provide a genuine estimate of the likely additional charges.

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<sup>17</sup> See Annex 2, paragraph 5 for further information.

<sup>18</sup> For example, where the work is to be completed in stages, it may be helpful to set out those stages. Remember that the client might not understand what the key stages are so you may need to explain them in simple language.

<sup>19</sup> For example, including hourly rates (by grade of staff where applicable).

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- Your firm's name (and trading name if different) and your contact details, including your postal address and telephone number.
  - Any information that is required to be provided to clients under the CLSB's regulatory rules or other regulatory requirements that apply to you.
  - Details of your complaint handling procedure.

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**What do you mean by the total price?** Where you cannot say in advance what your total fees will be, you should consider whether providing an indicative cost of your services would be helpful. This could be a range of likely total costs. You might also choose to provide a typical or average cost for the type of service, particularly if the range is quite large. If feasible, consider providing an indicative number of hours or a range of hours needed for different services. If the price is by stage, then it might be helpful to provide details on that basis. However, if it would not be obvious to a consumer what a stage of the service is, you will likely need to provide a simple explanation.

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## Examples of misleading information

**1.** If your advert states you're a signatory to a code of conduct, it may be misleading if you do not adhere to the standards set out in that code.

**2.** If your advert suggests that your firm, rather than you as an individual, is regulated by the CLSB this may be misleading, particularly if some costs advisers in your firm are not regulated.

**3.** If your promotional material encourages consumers to engage your services, but fails to mention that there are certain cases you will not take on, that may be material information and its omission may be misleading.

**4.** You should inform clients if anything that could reasonably be expected to be included in your stated fees is not. A failure to do so could be misleading and a breach of consumer law.

**5.** If you offer conditional fee agreements (CFAs) but fail to set out the circumstances in which clients might have to make any payments themselves, such as disbursements, this may be misleading.

**6.** If the type of service you are promoting involves a risk that the client will have to pay costs to the other side, you should indicate this and make it clear that this is additional to your fees, or this could be misleading.

**7.** If you provide your client with average timescales for dealing with different types of matters to indicate how long the work may take, but do not explain why this might not apply in their case, this could be misleading, especially where there is a material risk of not meeting the indicated average timeframes.

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## Pre-contractual information

31. Before a consumer becomes bound by a contract with you, consumer law requires that certain pre-contract information is provided to that consumer. What constitutes the contract for these purposes will be determined on the facts and by the form of your agreement with your client. In many cases, your contract is likely to be your client care letter, your terms of engagement, a letter confirming your instructions or some other similarly named document.
32. You are likely to satisfy many of the pre-contract information requirements naturally as part of your engagement with consumers, not least because there is considerable overlap between these requirements and those set out in the Code of Conduct<sup>20</sup> and other regulatory guidance.<sup>21</sup> However, as consumer law states that pre-contract information is to be treated as a term of the contract,<sup>22</sup> it is important you ensure this is given, or made available, to consumers before a consumer enters into a contract with you.
33. Although there is some overlap between the pre-contract information requirements and the material information referred to above, they stem from separate legal obligations and care should be taken to ensure compliance with both. In particular, it is worth noting that although providing some material information just before a consumer enters into a contract with you may satisfy your pre-contract information obligations, it may still leave you vulnerable to a breach for failing to provide material information in a timely fashion.
34. The pre-contract information that you need to provide to consumers, and the form in which you need to provide it, will depend on how the contract is entered into with the consumers. This is summarised in Annex 1. However, in all cases this

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<sup>20</sup> See, for example, principle 3.4.

<sup>21</sup> See, for example, the CLSB's [Guidance Note on client care letters](#).

<sup>22</sup> Consumer Rights Act 2015, section 50.

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information needs to be provided to consumers in a clear and comprehensible manner.

35. The law recognises three types of contract:

- **on premises** – for example where the contract is entered into in person at your offices or following a face-to-face meeting at your office (even if the contract is entered into online);
- **distance** – for example where the contract is entered into by email, online or over the phone and up to this point the contact with your client is exclusively through one or more means of distance communication;
- **off premises** – for example where the contract is entered into face-to-face, but in a location that is not your usual business premises (such as the consumer’s home or at another law firm’s offices).<sup>23</sup>

36. As noted above, consumer law provides that the pre-contract information you provide to prospective consumer clients is to be treated as a term of the contract that you subsequently enter into with them. It is therefore important for you to ensure that the pre-contract information is accurate and up to date, because otherwise you may breach the terms of your contract with your client. This may be particularly relevant, for example, where you are relying on pre-contract information that is provided on your website or in pre-printed leaflets and marketing.

37. Consumer law provides that you cannot rely on any change to the pre-contract information provided to a consumer (whether such change takes place before or after the contract is entered into) unless that change has been expressly agreed between you and that consumer client.<sup>24</sup> In practical terms, if changes are needed before entering into the contract, this means you will need to highlight changes

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<sup>23</sup> The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013, regulation 5.

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to pre-contract information promptly and obtain the client’s consent before seeking to enter into a contract with a consumer on the basis of the change. This may be particularly important, for example, if you are updating a standard fee list that has previously been provided to the consumer.

38. Where a change to pre-contract information is necessary after a contract has been entered into, there may be certain circumstances in which you can rely on a variation clause to agree such changes with a consumer client. However, any such clause must be fair in accordance with unfair terms legislation – see further paragraphs 42 to 54 below.

## Cancellation rights

39. Where you enter into a distance or off premises contract with a consumer, they will have a right to cancel. Under this right, the consumer may cancel the contract for any reason and may do so at any time during the “cancellation period” (being the period ending 14 days after the day on which the contract was entered into).<sup>25</sup>
40. Where the consumer exercises their right to cancel, the contract is cancelled and treated as if it was never entered into. Both parties are relieved from their obligations under the contract<sup>26</sup> and the consumer is entitled to a refund of any sums paid in advance for services yet to be performed.<sup>27</sup> If you have started to provide the services during the cancellation period, you will not be entitled to charge the consumer in the event they exercise the right to cancel, except where:
- the consumer has expressly requested that you provide some (or all) of the services during the cancellation period; and

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<sup>25</sup> The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013, regulation 30. This period is extended where the consumer is not informed of their right to cancel – see regulation 31.

<sup>26</sup> The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013, regulation 33.

<sup>27</sup> The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013, regulation 34.



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- in the case of an off-premises contract, the consumer has made such a request on a durable medium<sup>28</sup> (a durable medium could be an email or a written request made in hard copy).

41. In such cases you may charge the consumer a reasonable amount for the services provided, typically calculated by reference to what has been supplied as a proportion of the full service to be provided under the contract. If you have provided all the services under the contract during the cancellation period, the conditions in paragraph 40 above have been met and the consumer has acknowledged in advance that they would lose their right to cancel in such circumstances, the consumer will lose their right to cancel.<sup>29</sup>

**Example.** Your client has a hearing in two days and asks you to prepare points of dispute on a bill ahead of the hearing. If your client confirms in writing (for example, by email) that they want you to start work straight away, they will lose their right to cancel if you complete that work.

## Contract terms

42. Our [Guidance Note on client care letters](#) sets out the CLSB's broader expectations regarding your client care letters. While that guidance focuses on the key terms of your engagement – such as the services to be provided, your fees and timescales – it notes that you may wish to include more standard contract terms (or terms of business) within the document.<sup>30</sup> While it is obviously of paramount importance that consumers understand the key terms of your contract with them, consumer law goes further than this. In addition to requiring that all your contract

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<sup>28</sup> The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013, regulation 36.

<sup>29</sup> The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013, regulation 36.

<sup>30</sup> Where 'contract terms' are referred to in this section, this includes all wording which gives rise to an obligation or right between you and a consumer client, wherever those obligations/rights are set out (for example in the client care letter, separate contractual documents, conditions, policies or terms published on your website).

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terms are fair, consumer law also requires that you draft all your terms in such a way that consumers can be expected to understand the potential consequences to them of entering into a contract with you.

43. If a term is found by a court to be unfair, it will not be binding on a consumer and cannot be enforced. Consumers may also be able to rely upon unfair terms legislation in any legal proceedings they bring against you or in defence of a claim where you try to enforce an unfair term.

## Ensuring your contract terms are transparent

44. All contract terms should be easy to find and accessible by your clients. They should be brought to the attention of prospective clients in a timely manner before they agree to instruct you. Further, you need to afford your clients an appropriate opportunity to read and understand the contract terms before they become bound by them.<sup>31</sup> This is particularly important given that in many cases consumers are unlikely to be familiar with the nature of the services you provide and how your business operates.<sup>32</sup>
45. As such, it is important that you ensure your contract terms are clear and unambiguous. They should be written using plain and intelligible language<sup>33</sup> which is clear and informative. You should avoid the use of “legalese” or technical language as consumer law requires that clients must genuinely be able to understand their rights and obligations before agreeing to them. Paragraph 12 of our [Guidance Note on client care letters](#) provides some further information in this regard that you may find helpful to consider. Where you are dealing with vulnerable consumers, you will need to factor this into your approach.<sup>34</sup>

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<sup>31</sup> This was one of the principles underlying the original European legislation on which the Consumer Rights Act 2015 was based – see recital 20 of the [European Directive on Unfair Terms](#).

<sup>32</sup> Note that complying with these transparency obligations does not necessarily mean you are compliant with your other legal obligations regarding the provision of information to consumers, as set out elsewhere in this guidance. The various obligations are all distinct and need to be considered on their own merit to ensure compliance.

<sup>33</sup> Consumer Rights Act 2015, section 68.

<sup>34</sup> For further information, see our [Guidance Note on vulnerable consumers](#).

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46. You should be aware that where a contract term has more than one possible meaning, and so is ambiguous, it will be given the meaning that is most favourable to the consumer.<sup>35</sup>

## Ensuring your contract terms are fair

47. A term will be unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights under the contract to the detriment of the consumer.<sup>36</sup>
48. Whether a term is unfair is an assessment that must be considered in the round, taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed and to all the other terms of the contract or of any other contract on which it depends.<sup>37</sup>
49. That said, the fairness test includes the following two main elements: (i) significant imbalance to the detriment of the consumer; and (ii) good faith.
50. "Significant imbalance" is concerned with the parties' rights and obligations under the contract. There will be a significant imbalance if a term is so weighted in favour of a business that it tilts the rights and obligations under the contract significantly in its favour. This may be, for example, by granting the business undue discretion or imposing a disadvantageous burden on the consumer. It is important to note that:
- a contract term may be unfair if it has the potential to cause a significant imbalance to the detriment of consumers, even if it is not used in that way in practice; and

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<sup>35</sup> Consumer Rights Act 2015, section 69.

<sup>36</sup> Consumer Rights Act 2015, section 62. This is subject to certain exceptions, as further described in Annex 2, paragraphs 23 to 25.

<sup>37</sup> Consumer Rights Act 2015, section 62(5).

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- While a contract may purport to set out equal rights (for example, equal obligations in the event of cancellation), this may still cause a significant imbalance if the practical effect on consumers is significantly disadvantageous compared to that for the business.
51. The concept of “good faith” is intended to have a broad application and to ensure that the fairness assessment includes an overall evaluation of the different interests involved. The requirement of good faith embodies a general principle of “fair and open dealing”. It looks to good standards of commercial morality and practice.
  52. In terms of fair dealing, this requires that you do not, whether deliberately or unconsciously, take advantage of a consumer’s circumstances to their detriment. Accordingly, when setting your terms of business, you should factor in the typical characteristics of your consumer clients and potential consumer clients (for example, their lack of experience or unfamiliarity with legal processes, or particular vulnerabilities, such as disability). In addition, you also need to actively take the legitimate interests of consumers into account when setting your contract terms.
  53. In terms of open dealing, terms should be “expressed fully, clearly and legibly, containing no concealed pitfalls or traps”. Appropriate prominence should be given to terms that might operate disadvantageously to your clients. You should not assume that consumers can identify terms which are important or which may operate to their disadvantage.

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**Ask yourself.** When setting your contract terms, you need to ask yourself whether it is reasonable to assume that clients would agree to such terms if the respective negotiating positions of your firm and the consumer were equal. If not, the contract term is likely to be unfair and unenforceable.

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54. While the fairness test is deliberately broad and flexible in application, consumer law illustrates what “unfairness” means by listing some types of terms that are likely to be unfair. For example, your contract terms may be unfair if one or more of them has the following characteristics.

- It unduly excludes or restricts your liability to the consumer. Indeed, some such clauses are automatically unfair, for example those that seek to exclude or restrict your liability when you have failed to provide your services with reasonable care and skill.<sup>38</sup>
- It excludes or limits a consumer’s right to take legal action or exercise any other legal remedy. This would include a term that precludes the escalation of a complaint to the Legal Ombudsman or places more restrictive timeframes on a consumer to do so, or mandates the use of arbitration.
- It seeks to bind consumers to hidden terms; that is, contract terms that they have not had the chance to become familiar with or understand.
- It allows you to vary the service to be provided, without a valid reason. Particular fairness concerns are likely to arise where you have a wide discretion to impose changes, or where the consumer could not foresee the circumstances in which changes may be necessary or what the potential consequences of those changes might be.
- It allows you to increase the price<sup>39</sup> after the consumer is bound by the contract. Where a fixed fee has been agreed, it will be rare for there to be circumstances in which it would be fair to change that fee, particularly in relation to a short-term contract. Similarly, it is unlikely to be fair to change agreed hourly rates, particularly in relation to a short-term contract.
- It allows you the right to determine whether the services supplied are in conformity with the contract, or gives you the exclusive right to interpret any term of the contract.

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<sup>38</sup> Consumer Rights Act 2015, section 57.

<sup>39</sup> Or the way in which the price is to be calculated.

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- It purports to exclude liability for any statement (oral or written) made by you or someone on your behalf about the business or the service. Such statements are to be treated as a term of the contract if they are taken into account by the consumer when deciding to enter into the contract or, later, when making any decision about the service. Any attempts to exclude such statements (for example, the use of an entire agreement clause) are automatically unfair.

## While you are performing the services

55. In addition to the continued application of the rules set out in relation to misleading information and unfair contract terms (both above)<sup>40</sup> and professional diligence (below),<sup>41</sup> consumer law also sets out some specific requirements regarding the quality of the services to be provided.
56. In practice, there may be little difference between the standards expected under consumer law and under your broader regulatory obligations in relation to some aspects of your work.<sup>42</sup> However, it is important to ensure compliance with the standalone consumer law obligations, not least because if you breach those obligations the consumer is entitled to a number of statutory remedies that cannot be avoided or limited.
57. All services you provide must be performed with reasonable care and skill.<sup>43</sup> They must also adhere to the description of the services you provided to the consumer under your pre-contract information obligations, as well as any other statement that you have made to the consumer about the services that was taken into account by the consumer when deciding to enter the contract.<sup>44</sup>

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<sup>40</sup> See paragraphs 21 to 30 and paragraphs 42 to 54 respectively.

<sup>41</sup> See paragraphs 60 to 62.

<sup>42</sup> For example, principle 4 of the Code of Conduct requires you to provide a good quality of work and service to each client.

<sup>43</sup> Consumer Rights Act 2015, section 49.

<sup>44</sup> Consumer Rights Act 2015, section 50.

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58. A failure to do so is a breach of contract and in addition to any rights the consumer has under common law,<sup>45</sup> the consumer has a statutory right to repeat performance.<sup>46</sup> This is a right to require you to perform the service again, to the extent necessary to complete its performance in conformity with the contract, within a reasonable time and without cost or significant inconvenience to the consumer.<sup>47</sup>
59. In addition, if no timeframe is agreed with your client, the services must be performed within a reasonable time.<sup>48</sup> A failure to do so is a breach of contract and in addition to any rights the consumer has under common law,<sup>49</sup> the consumer has the right to an appropriate reduction in the price paid for the services.<sup>50</sup>

## Professional diligence

60. In addition to the more specific rules referred to above, it is worth noting that consumer law also contains a more general prohibition against commercial practices which contravene the requirements of professional diligence.<sup>51</sup>
61. Professional diligence is an objective standard of special skill and care which you/your firm are expected to exercise towards consumers and which is commensurate with honest market practices<sup>52</sup> or the general principle of good faith in the sector. It is an intentionally broad and flexible test and is intended to reflect what consumers would reasonably expect of you.

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<sup>45</sup> Save that the consumer is not entitled to any double recovery.

<sup>46</sup> Consumer Rights Act 2015, section 55, except where repeat performance of the contract is impossible.

<sup>47</sup> Where you fail to repeat performance within a reasonable time or without causing significant inconvenience to the consumer, the consumer is entitled to an appropriate price reduction. See Consumer Rights Act 2015, sections 54 to 56. A price reduction remedy is also available where repeat performance is impossible.

<sup>48</sup> Consumer Rights Act 2015, section 52.

<sup>49</sup> Save that the consumer is not entitled to any double recovery.

<sup>50</sup> Consumer Rights Act 2015, sections 54 to 56.

<sup>51</sup> Consumer Protection from Unfair Trading Regulations 2008, regulation 3.

<sup>52</sup> Note, however, that for there to be a breach you do not need to be acting dishonestly – the legal test is less strict.

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**Example.** While you have a published complaints procedure, in practice you fail to follow it adequately or your complaints procedure does not adhere to the CLSB's guidance. In both cases, in addition to any potential regulatory action, you may be contravening the requirements of professional diligence and so be in breach of consumer law.

62. While compliance with your obligations under the Code of Conduct is a good place to start, this will not guarantee compliance with your professional diligence obligations under consumer law. They are distinct obligations and should be considered separately. In this regard, it is important to note the following.
- You may infringe the rules on professional diligence either before, during or after you have been formally instructed by a consumer.
  - As is the case for other potential consumer law infringements referred to above, you may contravene the professional diligence requirements in relation to consumers who do not formally become your clients.<sup>53</sup>
  - It is not a defence that other firms engage in the same practices. If it is poor practice, it will not meet the objective standard of professional diligence as this is not what a reasonable consumer would expect of a firm acting in accordance with honest market practices or good faith, even though others are doing the same thing.
  - There is an enhanced risk of a breach where you are engaged in a practice that is taking advantage of, or may take advantage of, consumers. This may be because, for example, consumers are particularly vulnerable, are not familiar with the services you are providing, feel pressured into making decisions that they do not fully understand, or only receive pertinent information late in the day.

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<sup>53</sup> For example, due to the way in which you solicit new customers.



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**Example.** You have noticed that consumers who complain to your firm are less likely to complain to the Legal Ombudsman if the complaints process takes a long time. As a result, you decide that you will seek to string out consumer complaints as much as possible. This is likely to mean you are contravening the requirements of professional diligence and so will be in breach of consumer law.

## ADR and complaint handling

63. Under section 112 of the Legal Services Act 2007, it is a requirement that you have effective procedures in place for the resolution of service and conduct complaints. Further, under the Code of Conduct, you must provide for an effective first-tier complaints procedure which is simple and transparent, ensures that a complaint can be made by any reasonable means, and takes into account the individual needs of clients (in particular the needs of vulnerable consumers).
64. The CLSB has produced a [Guidance Note on complaints procedures](#) which sets out further information regarding its expectations from a regulatory perspective. However, when you are dealing with consumers, it is also important to ensure that your complaints procedure adheres to your consumer law obligations. While regulatory guidance is relevant to assessing the standards expected under consumer law, adhering to this guidance does not guarantee compliance with your consumer law obligations. For example, as noted above, consumer law requires you to give or make available to prospective consumer clients information about your complaint procedure before they become bound by any contract with you.
65. You are more likely to comply with your consumer law obligations if:
  - When establishing your internal policies and procedures, you ensure they do not have the effect of discouraging consumers from making complaints or escalating complaints where they are unsatisfied with your process. Similarly,

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as noted above in relation to unfair contract terms, the terms of your client care letter (or equivalent) should not have this effect either.

- Your complaints procedure is clear and simple with as few steps as possible, facilitating the early identification and resolution of complaints.
- You have a written complaints procedure which is easy to find, understand and use, for example:
  - it is clearly signposted (easy to find and access) on your website;
  - it is easy to navigate with the use of clear headings which are intuitive to consumers, for example reflecting the questions they are likely to have; and
  - you avoid the use of legalese and other overly complex language.
- When you receive complaints, you adhere to your complaints procedure such that complaints are dealt with fairly and effectively, and your procedure is applied consistently.
- You ensure that the information you provide consumers about your complaints procedure is accurate, complete, timely and not misleading. This applies throughout your dealings with consumers, whether in writing, in face-to-face discussions or on the telephone, and covers a range of information about the complaints procedure, including for example:
  - the existence of your complaints procedure;
  - how to follow the complaints procedure; and
  - when and how a consumer may escalate a complaint to the CLSB or Legal Ombudsman.
- You ensure that any investigation of a complaint is carried out by someone who is independent of (and not the direct subject of) the concerns raised, to help avoid potential conflicts of interest.

66. Finally, it is important to note that under consumer law it will be the firm that is responsible for the actions of anyone acting in the firm's name or on its behalf. Similarly, you may be responsible for anyone acting in your name or on your behalf. As it is crucial that any complaints procedure is followed in practice – it is

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not enough simply to have one, it is important that all relevant individuals are trained in and have a good understanding of your complaints procedure, how it works, their role and responsibility in reporting and resolving complaints raised with them, and their role in supporting people if they want to make a complaint.

## Further information and guidance

67. You may find the following general guidance helpful:

- The [business companion](#), which provides general guidance on a variety of matters, such as:
  - (i) pre-contractual information and [on-premises](#), [off-premises](#) and [distance contracts](#);
  - (ii) [consumer vulnerability](#);
  - (iii) [contracts for the provision of services](#); and
  - (iv) rules on [consumer protection from unfair trading](#).
- The [CMA's general guidance](#) on unfair contract terms.

## Annex 1 – Overview of pre-contract information requirements<sup>54</sup>

On Premises contract	Distance contract	Off-premises contract
<b>How the information is to be provided</b>		
Information to be given, or made available <sup>55</sup> to consumers in a clear and comprehensible manner if that information is not already apparent from the context.	Information to be given, or made available to consumers in a clear and comprehensible manner and in a way appropriate to the means of distance communication used.	Information to be given to consumers in a clear and comprehensible manner. It is to be on paper or, if the consumer agrees, on another durable medium and must be legible.
<b>Information to be provided</b>		
(a) the main characteristics of the services. (b) the identity, geographical address and telephone number of your firm. (c) the total price of the services inclusive of taxes, or where this cannot reasonably be calculated in advance, the manner in which the price is to be calculated. (d) where applicable, all additional delivery charges or, where those charges cannot	(a) the main characteristics of services. (b) the identity, geographical address, telephone number, fax number and email address of your firm. (c) the total price of the services inclusive of taxes, or where this cannot reasonably be calculated in advance, the manner in which the price is to be calculated. (d) where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.	

<sup>54</sup> The complete list can be found in The Consumer Contracts Information, Cancellation and Additional Charges Regulations 2013 - Annex 1 (for on-premises contracts) and Annex 2 (for distance and off-premises contracts).

<sup>55</sup> For these purposes, information is made available to the consumer only if the consumer can reasonably be expected to know how to access it.

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reasonably be calculated in advance, the fact that such additional charges may be payable.

(e) the arrangements for payment, delivery, performance, and the time by which you undertake to perform the services.

(f) your complaint handling policy.

(g) if the contract is of indeterminate duration, the conditions for terminating the contract.

(e) the arrangements for payment, delivery, performance, and the time by which you undertake to perform the services.

(f) your complaint handling policy.

(g) where a right to cancel exists, the conditions, time limit and procedures for exercising that right.

(h) that they will lose their right to cancel if (i) they expressly request the services are provided within the cancellation period; (ii) you provide all the services in the cancellation period and (iii) the consumer acknowledges that they will lose their right to cancel in such circumstances.

(i) that the consumer is required to pay reasonable costs for services already provided if they exercise their right to cancel having expressly requested that the services start during the cancellation period.

(j) the existence of relevant codes of conduct, and how copies of them can be obtained, where applicable.

(k) if the contract is of indeterminate duration, the conditions for terminating the contract.

(l) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

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## Annex 2 – Overview of key legislation in more detail

### Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

1. The CPRs prohibit traders from using unfair commercial practices towards consumers. The term ‘commercial practice’ is broad in scope and time, and includes any practice directly connected with the promotion, sale or supply of goods or services to consumers. It can be a single act or omission or be a course of conduct over time.
2. The CPRs define consumers and traders as follows:
  - **consumer** means an individual acting for purposes that are wholly or mainly outside that individual’s business;
  - **trader** means a person acting for purposes relating to that person’s business, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf, and includes a person acting in the name of or on behalf of a trader.
3. The CPRs set out broad rules outlining when commercial practices are unfair, including:
  - practices that contravene the requirements of professional diligence contrary to regulation 3;
  - misleading actions contrary to regulation 5;
  - misleading omissions contrary to regulation 6;
  - aggressive practices contrary to regulation 7; and
  - certain specific practices listed in Schedule 1 to the CPRs.
4. For there to be a breach of the CPRs, a commercial practice must have, or be likely to have, an effect on the ‘transactional decisions’ of the ‘average consumer’ (except in relation to the Schedule 1 practices, where no such effect needs to be demonstrated).
5. For these purposes:
  - **Transactional decision** means any decision taken by a consumer, whether it is to act or to refrain from acting, concerning:
    - (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
    - (b) whether, how and on what terms to exercise a contractual right in relation to a product.

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- **Average consumer** is construed in accordance with the following:
    - (a) where the practice reaches or is addressed to a consumer or consumers, account will be taken of the material characteristics of such an average consumer including their being reasonably well informed, reasonably observant and circumspect;
    - (b) where the practice is directed to a particular group of consumers, a reference to the average consumer will be read as referring to the average member of that group;
    - (c) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer will be read as referring to the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.
  
  - 6. **Professional diligence** – there will be a breach of regulation 3 if a commercial practice contravenes the requirements of professional diligence and it appreciably impairs (or is likely to appreciably impair) an average consumer’s ability to make an informed decision, causing them to take a different decision as a result.
  
  - 7. Professional diligence means the standard special skill and care which a trader may reasonably be expected to exercise towards consumers and which is commensurate with either honest market practice or the general principle of good faith in the trader’s field of activity.
  
  - 8. **Misleading actions** – there will be a breach of regulation 5 if a commercial practice:
    - contains false information and is therefore untruthful in relation to a number of specific matters (see below); **or**
    - if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of those matters, even if the information is factually correct; **and**
    - it causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.
  
  - 9. The specific matters covered by regulation 5 are listed in full in regulation 5(4) but include: the main characteristics of the product; the extent of the trader’s

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commitments; any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product; the price or the manner in which the price is calculated; the existence of a specific price advantage; the consumer's rights or the risks the consumer may face.

10. **Misleading omissions** – there will be a breach of regulation 6 if a commercial practice:
- omits or hides material information;
  - provides material information in a manner which is unclear, unintelligible, ambiguous or untimely; or
  - fails to identify its commercial intent (unless this is already apparent from the context),
- and as a result it causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.
11. Material information means the information which the average consumer needs, according to the context, to take an informed transactional decision, as well as any information requirement which applies in relation to a commercial communication as a result of a European Community obligation.<sup>56</sup>
12. When deciding whether there is a breach of regulation 6, account will be taken of:
- all the features and circumstances of the commercial practice;
  - the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
  - where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.
13. **Aggressive practices** – there will be a breach of regulation 7 where a commercial practice significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence, and it thereby causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

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<sup>56</sup> That is, information requirements established under EU law that continue to apply post-Brexit.



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14. In determining whether a commercial practice uses harassment, coercion or undue influence, account will be taken of a number of stated factors, including:
- its timing, location, nature or persistence;
  - the use of threatening or abusive language or behaviour; and
  - the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product.

### **The Consumer Rights Act 2015 (CRA)**

15. Part 1 of the CRA sets out various consumer rights and remedies relating to a contract with a consumer.
16. In relation to contracts for services, it provides that every contract to supply a service is to be treated as including a term:
- that the trader must perform the service with reasonable care and skill;<sup>57</sup>
  - that includes anything said or written to the consumer, by or on behalf of the trader, about the trader or the service, if it is taken into account by the consumer when deciding to enter into the contract or is taken into account by the consumer when making any decision about the service after entering into the contract;<sup>58</sup>
  - that includes any pre-contractual information required for on-premises, off-premises and distance contracts<sup>59</sup> (see Annex 1 for further details);<sup>60</sup>
  - that the consumer must pay a reasonable price for the service, and no more (unless the contract or pre-contractual information provided to the consumer expressly fixes a price or other consideration, or says how it is to be fixed);<sup>61</sup>
  - that the trader must perform the service within a reasonable time (unless the contract or pre-contractual information provided to the consumer expressly fixes a time, or says how it is to be fixed).<sup>62</sup>

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<sup>57</sup> Section 49.

<sup>58</sup> Anything taken into account by the consumer is subject to anything that qualified it and was said or written to the consumer by the trader on the same occasion, and any change to it that has been expressly agreed between the consumer and the trader (before entering into the contract or later): section 50.

<sup>59</sup> In accordance with regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).

<sup>60</sup> A change to any of this information made before entering into the contract or later is not effective unless expressly agreed between the consumer and the trader: section 50.

<sup>61</sup> Section 51.

<sup>62</sup> Section 52.

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17. Part 1 of the CRA also provides for certain statutory consumer remedies that apply in the event there is a breach of any of the contractual terms listed above.<sup>63</sup> In relation to services, these include a right to:
- **Repeat performance** where the trader has failed to provide the services with reasonable care and skill or in accordance with any information that has become a term of the contract under section 50 relating to the performance of the services (unless repeat performance is impossible, in which case a price reduction is to be provided).<sup>64</sup>
  - A **price reduction** where the trader has failed to provide the services within a reasonable time or in accordance with any information that has become a term of the contract under section 50 relating to matters other than the performance of the services.
18. Part 2 of the CRA protects consumers from unfair contract terms and notices. It also requires<sup>65</sup> that a written term of a consumer contract, or a consumer notice in writing, be transparent.<sup>66</sup> If a term in a consumer contract or a consumer notice could have different meanings, the meaning that is most favourable to the consumer will prevail.<sup>67</sup>
19. A term is unfair “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.<sup>68</sup>
20. If a term or notice is unfair, it will not be legally binding on the consumer<sup>69</sup> but the contract continues, so far as practicable, to have effect in every other respect.<sup>70</sup> However, this does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.<sup>71</sup>

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<sup>63</sup> Sections 54 to 56.

<sup>64</sup> Any repeat performance must be provided by the trader within a reasonable time and without significant inconvenience to the consumer, and the trader must bear any necessary costs incurred in doing so.

<sup>65</sup> Section 68.

<sup>66</sup> That is, legible and in plain and intelligible language.

<sup>67</sup> Section 69.

<sup>68</sup> Section 62(4). There is a similar provision in relation to notices (see section 62(6)).

<sup>69</sup> Sections 62(1) and (2).

<sup>70</sup> Section 67.

<sup>71</sup> Section 62(3).

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21. Whether a term is fair is to be determined:
    - taking into account the nature of the subject matter of the contract; and
    - by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.<sup>72</sup>
  22. Part 1 of Schedule 2 to the CRA contains an indicative and non-exhaustive list of terms that may be considered unfair. The CRA also ‘blacklists’ some terms, so that they are never binding on a consumer and are automatically unenforceable.<sup>73</sup> These include terms which have the effect of restricting the service provider’s liability if services are not provided with reasonable care and skill.
  23. However, a term of a consumer contract may not be assessed for fairness to the extent that it:
    - specifies 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 services supplied under it;
    - is transparent and prominent; and
    - is not a term which is listed in Part 1 of Schedule 2 to the CRA.<sup>74</sup>
  24. A term is transparent for these purposes if it is expressed in plain and intelligible language and (in the case of a written term) is legible. A term is prominent for the purposes of this section if it is brought to the consumer’s attention in such a way that an average consumer<sup>75</sup> would be aware of the term.
  25. Further, to the extent that a term reflects any mandatory statutory or regulatory provisions,<sup>76</sup> or the provisions or principles of an international convention to which the United Kingdom is a party, are not assessable for fairness.<sup>77</sup>

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<sup>72</sup> Section 62(5). There is a similar provision in relation to notices (see section 62(7)).

<sup>73</sup> Section 57.

<sup>74</sup> Section 64.

<sup>75</sup> That is, a consumer who is reasonably well-informed, observant and circumspect.

<sup>76</sup> This includes rules which, according to law, apply between the parties on the basis that no other arrangements have been established.

<sup>77</sup> Section 73.