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ALL MAY BE FAIR IN LOVE AND WAR BUT NOT IN FINANCIAL CONTRACTS WITH CONSUMERS

SUMMARY

The Consumer Rights Act 2015 (the Act) comes into force on 1 October 2015 and applies to contracts entered into after this date. Though the Act is generally an evolution of existing legislation in the area, it extends the scope of protection consumers are afforded from unfair terms in a number of important ways. For example, for the first time the fairness test applies not just to standard terms but also to negotiated terms. The regime applies to consumer notices as well as contractual terms and there is a new prominence requirement that terms must meet in order to fall within the "core terms" exemption. In future, the regulator is able to take action where a term fails the transparency requirement independently of the overarching fairness requirement. This briefing discusses these and other changes relating to fairness in more detail.

BACKGROUND

The Consumer Rights Act 2015 comes into force on 1 October 2015. The Act supersedes the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) and the Unfair Contract Terms Act 1977 (UCTA), though these pieces of legislation will continue to apply in respect of contracts entered into before 1 October 2015.

Those familiar with the current regime will recognise many concepts in the new one. In essence, the Act is intended to modernise existing consumer protection legislation. As before, the Act provides the bones of the regime which is fleshed out in considerably more detail by guidance produced by the Competition and Markets Authority (CMA) (the Guidance).[1] The Guidance in particular has been produced with an eye on recent judgments from the Court of Justice of the European Union (CJEU) in this area.

THOUGH THE FUNDAMENTAL STANDARD OF FAIRNESS IS THE SAME, IT WILL BE INTERPRETED DIFFERENTLY

The fairness test remains unchanged; a term is considered unfair *"if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer"*. The term need not have been actually invoked; it must simply be capable of being used unfairly. The Guidance contains some new points for firms to consider.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf

"Significant imbalance"

"Significant imbalance" in the fairness test should not be measured purely in financial terms. A non-financial imbalance is enough. Neither should it be assumed that just because a service is provided at low cost, this is enough to compensate for such an imbalance. Guidance is given on the application of the Act's mostly familiar "Grey List" of the types of terms where a significant imbalance is likely to arise.

"Good faith"

It is clear that the CMA takes a broad approach to interpreting this requirement following a recent CJEU ruling which directed the national court to consider whether the business *"dealing fairly and equitably with the consumer"* could reasonably assume that the consumer would have agreed to the term had the contract been negotiated on equal terms. The CMA states that this requires businesses not just to avoid taking advantage of consumers but places a positive obligation on them to take the interests of consumers into account.

From the Guidance, it is evident that the CMA regards "behavioural economics" as potentially relevant to the assessment of whether or not a particular term is fair. How terms are presented and where they appear in documentation, therefore, is likely to assume greater importance in future. In addition, special care should be taken when dealing with vulnerable consumers.

"Plain and intelligible" requirement replaced by a transparency obligation

Instead of the current requirement for terms to be "plain and intelligible", the new regime requires terms to be "transparent", which is potentially broader. In this regard, the CJEU has said that terms should not only make grammatical sense to the average consumer but must put the consumer into the position of being able to *"evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [the term]"*. Further, the reason for the term and its relationship with other terms should be transparently set out.

In the Guidance, the CMA makes the point that particular care must be taken where complex and technical issues are covered. It states that accompanying literature should be used to explain the practical implications of any unavoidably difficult terms. The CJEU has stated that it is especially important to bear in mind that consumers are unlikely to pay the same attention to documentation where several products are being sold at the same time as part of a single transaction.

AT THE SAME TIME, THE SCOPE OF THE REGIME BECOMES WIDER

Firms should be aware that the scope of the regime is extended in a number of important ways, for example:

- **Consumer:** A consumer is defined as an individual acting for purposes wholly or mainly outside his or her trade or profession. The words "wholly or mainly" are new and the CMA believes that this leaves the door open for bringing mixed use contracts (that is, those contracts which are entered in both a personal and business capacity) within the regime. An individual is rebuttably presumed to be a consumer.

- **Negotiated terms:** The Act extends to all consumer contract terms (including those that have been individually negotiated and where legal advice has been obtained), not just standard contractual terms.

- **Consumer notices:** The regime applies to consumer notices as well as contractual terms since consumer notices may encourage consumers to act in ways that cause them detriment. A consumer notice relates to rights or obligations between the firm and consumer or it appears to exclude or restrict liability. It may be oral or written (for example, announcements and promotions online and in public places) as long as it is reasonable to assume it is intended to be seen or heard by a consumer.

- **Transparency:** The regulator may take action for breach of the transparency requirement alone, independently from the over-riding fairness test; though satisfying the transparency requirement in itself is an important aspect of meeting the fairness test.

- **Prominence:** As before, there is an exemption for "core terms" which go to the heart of the contract (such as terms which relate to the quality / price ratio of the services supplied). However, in order to fall within this exemption, core terms must be both transparent and prominent. What degree of prominence is required will depend on the subject matter and complexity of the term in question. Those that carry a greater risk of consumer detriment will require greater prominence.

WHAT SHOULD FIRMS DO?

Before 1 October 2015, firms should make sure that they understand the scope of the new regime and its potential impact on their customer documentation. In particular, they should ensure that any consumer notices that they draft or make comply with the new regime. They should be prepared for greater challenge from the regulator on the grounds of fairness.

Practical steps firms may wish to consider taking include:

- ensuring that they have policies and procedures in place to ensure that all communications that could fall within the new regime are considered;

- communicating to staff that, in future, customer notices and negotiated terms will be subject to the new regime;

- reviewing their existing standard documentation to ensure that they meet the requirements of the new regime, particularly in terms of transparency and prominence; and

- conducting training for relevant staff to ensure that they are aware of the scope and requirements of the new regime.

CONTACT DETAILS

If you would like further information or specific advice please contact:

MICHELLE KIRSCHNER
PARTNER
FINANCIAL SERVICES REGULATION
DD +44 (0)20 7849 2227
michelle.kirschner@macfarlanes.com

PAUL ELLISON
PARTNER
FINANCIAL SERVICES REGULATION
DD +44 (0)20 7849 2744
paul.ellison@macfarlanes.com

ROMIN DABIR
SENIOR SOLICITOR
FINANCIAL SERVICES
DD: +44 (0)20 7849 2458
romin.dabir@macfarlanes.com

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MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT
T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com