

Payment Services Directive 2 and Consumer Rights Act 2015

Implications for mobile payments and digital content services

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Payment Services Directive 2

Mobile payment services and digital content exemptions

PSD2 - Mobile Payments and Digital Content

- **Payment Services Directive 2 – PSD2 - Autumn 2015**
 - Third Party Payment Providers - access rights
 - What are the carve-outs for digital content?
 - Charitable donations and digital ticket purchases
- **Consumer Rights Act 2015**
 - Implied terms and remedies for services and digital content

PSD2 - Mobile Payments and Digital Content

- Parliament will consider the proposed PSD2 in its plenary session to be held from 5 to 8 October 2015
- Transposed into national laws and regulations in 2016
- Seeks to clarify and extend PSD1 provisions and close loopholes
- Foster payment innovation and growth in mobile payment services

PSD2 - Mobile Payments and Digital Content

- **New regulation of certain payment services performed by Third Party Payment Service Providers (TPPs)**
- **TPP Type 1 - Payment Initiation Service**
 - "payment service enabling access to a payment account provided by a third party payment service provider, where the payer can be actively involved in the payment initiation or the third party payment service provider's software, or where payment instruments can be used by the payer or the payee to transmit the payer's credentials to the account servicing payment service provider".
 - "Access to Accounts' (XS2A) rule, will force banks to facilitate access via API to their customer accounts and provide account information to third party apps if the account holder wishes

PSD2 - Mobile Payments and Digital Content

- **New regulation of certain payment services performed by Third Party Payment Service Providers (TPPs)**
- **TPP Type 2- Account Information Service**

"payment service where consolidated and user-friendly information is provided to a payment service user on one or several payment accounts held by the payment service user with one or several account servicing payment service providers".

PSD2 - Mobile Payments and Digital Content

- **Restricting exemptions currently available under PSD1**
 - **Commercial agents exemption:**
 - PSD1 does not apply to *“payment transactions from the payer to the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee.”*
 - **Limited network exemption:**
 - PSD1 does not apply to, *“services based on instruments that can be used to acquire goods or services only in the premises used by the issuer or under a commercial agreement with the issuer either within a limited network of service providers or for a limited range of goods or services.”*

PSD2 - Mobile Payments and Digital Content

- **Digital downloads - PSD 2**
- **Article 3 - Negative Scope - Clarification of exemptions**
- EU Commission considers exemption should focus on low value payments for digital content:
 - **Focus specifically on micro-payments for digital content and voice based services**
 - E.g. ringtones, music, games, videos or applications provided as ancillary services to electronic communications services (that is, the main business of a telecoms operator).
- Payment instruments for goods or services in the premises of the issuer or within a limited network of service providers under an agreement with an issuer
- Payment instruments for purchase of very limited range of goods or services

PSD2 - Mobile Payments and Digital Content

- **PSD2 Negative Scope**
- **Payment transactions by a telecoms provider:**
 - to purchase digital content and voice-based services and charged to the related bill for the telecoms service
 - performed from or via an electronic device and charged to the related bill for
 - **Charitable donations**
 - **Ticket purchases**

but

- subject to €50 limit for a single transaction per subscriber
- and
- a €300 limit on the cumulative monthly payment value per subscriber

PSD2 - Mobile Payments and Digital Content

- PSD2 - PSP liability and security requirements
- Except in the event of fraud or gross negligence, the maximum amount a payment user could be obliged to pay in the event of an unauthorised payment transaction is decreased from €150 under the current PSD to €50 under PSD2.
- PSD2 introduces new requirements relating to operational and security risks
- Notify its customers directly and without undue delay if a security incident might impact the financial interests of those customers
- Notify its customers directly and without undue delay if a security incident might impact the financial interests of those customers
- SecuRe Pay forum

Consumer Rights Act 2015

Implied terms, unfair terms and
Consumer remedies

Consumer Rights Act 2015 - Overview

Implied terms and unfair terms

- **Implied terms**

- **Who is a consumer?**
- **Implied terms in financial services contracts**
- **Implied terms when supplying digital content as part of a service**
- **Remedies for breaches of implied terms**

- **Unfair terms**

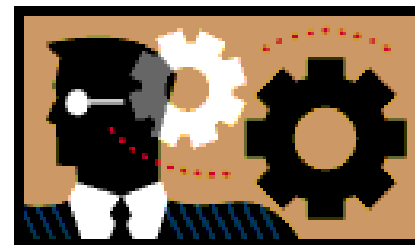
- **General rules about fairness of contract terms and consumer notices**
- **Core terms exclusion**
- **Transparent and prominent requirement**
- **Expanded "Grey List" of terms which may be regarded as unfair**
- **CMA unfair terms guidance**

Consumer Rights Act 2015 - Overview

- Consolidates existing legislation from a variety of sources into a single code for business to consumer transactions, superseding:
 - Sale of Goods Act 1979
 - Supply of Goods and Services Act 1982
 - Supply of Goods (Implied Terms) Act 1973
 - Unfair Contract Terms Act 1977
 - Misrepresentation Act 1967
 - Unfair Terms in consumer Contract Regulations 1999 (**UTCCRs**)
 - Sale and Supply of Goods to Consumer Regulations 2002
- Applies to contracts entered into, and relevant notices issued, on or after 1 October 2015
- Replaces UTCCRs governing unfair terms, but UTCCRs continue to apply to contracts entered into before 1 October 2015

Who is a consumer?

- **CRA Consumer:** an individual acting for the purposes that are wholly or mainly outside that individual's trade, **business**, craft or profession.
- **Under UTCCRs** - only individuals acting wholly outside their business.



Contracts for services - implied terms

- Key CRA implied terms are:
 - to perform contract with reasonable care and skill - s.49
 - **information about the trader or service to be binding - s.50**
 - **reasonable price to be paid for service if no price agreed - s.51**
 - **service to be performed within a reasonable time if no time agreed - s.52**
 - consumer's rights to enforce terms - s.54
 - right to repeat performance - s.55
 - right to a price reduction - s.56

Binding pre- and post- contract information - s.50

- **Marketing and pre-contract and post-contract information that becomes a binding term:**
- s.50 (1) Every contract to supply a service is to be treated as including as a term of the contract
 - anything that is said or written to the consumer, by or on behalf of the trader, about
 - the trader
 - or
 - the service
- if —
 - (a) it is taken into account by the consumer when deciding to enter into the contract
 - or
 - (b) it is taken into account by the consumer when making any decision about the service after entering into the contract

Binding pre- and post- contract information - s.50

- **What information could become a term of the agreement if taken into account by a client when making a decision about a service?**
- **Pre-contract**
 - Advertisements
 - Direct marketing material
 - Verbal statements by employees or agents
 - Written communications from employees or agents
 - Pre-contract disclosures
- **Post-contract**
 - Welcome packs
 - Periodic statements
 - Upgrade offers
 - Contractual variation letters
 - Downloaded apps
 - Pop-up offers/banners

Reasonable price if no price agreed - s.51

- **A reasonable price to be paid for a service where no price fixed**

(1) This section applies to a contract to supply a service if—

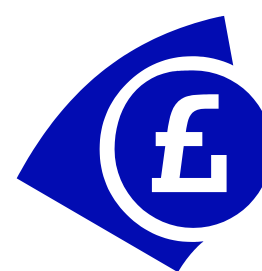
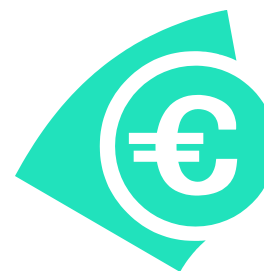
(a) the consumer has not paid a price or other consideration for the service,

(b) the contract does not expressly fix a price or other consideration, and does not say how it is to be fixed, and

(c) anything that is to be treated under section 50 as included in the contract does not fix a price or other consideration either.

(2) In that case the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more.

(3) What is a reasonable price is a question of fact.



Reasonable time to perform a service - s.52

- **Service to be performed within a reasonable time if no time fixed**

(1) This section applies to a contract to supply a service, if—

(a) the contract **does not expressly fix the time for the service to be performed, and does not say how it is to be fixed**, and

(b) information that is to be treated under section 50 as included in the contract does not fix the time either.

(2) In that case the contract is to be treated **as including a term that the trader must perform the service within a reasonable time**.

(3) What is a reasonable time is a question of fact.

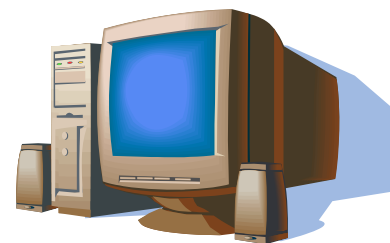


Remedies for breaches of implied terms

- In addition to express contractual rights
- s.54(3) If the service does not conform to the contract, the consumer's rights are—
 - (a) the right to require repeat performance (s.55);
 - (b) the right to a price reduction (s.56)
- s.54(4) If the trader is in breach of a term that section 50 requires to be treated as included in the contract but that does not relate to the service, the consumer has the right to a price reduction
- S.54(5) If the trader is in breach of what the contract requires under section 52 (performance within a reasonable time), the consumer has the right to a price reduction

Digital Content - Implied terms

- **Similar implied terms for digital content as sale of goods contracts**
- **“Digital content” means data produced and supplied in digital form**
 - Digital content to be of satisfactory quality - s.34
 - Fit for particular purpose - s.35
 - To be as described - s.36
 - Remedies for breaches of implied terms as to digital content
 - repair damage to a device
and
 - repair damage to other digital content
or
 - an "appropriate payment" in compensation for damage



Fair contract terms and consumer notices

- **s.62 Requirement for contract terms and notices to be fair**

- (1) An unfair term of a consumer contract is not binding on the consumer

- (2) An unfair consumer notice is not binding on the consumer

- (4) A term is 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

- Fairness has to be considered in the context of the contract as a whole and all the circumstances in which the contract is entered into (CMA Guidance, paragraph 2.18)

- A term is unfair if it causes an imbalance as described '*contrary to the requirement of good faith*' (Unfair Contract Terms Directive 1993)

Fair contract terms and consumer notices (2)

- **How is fairness assessed?**

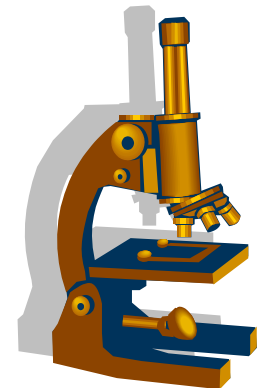
- The CRA requires the fairness of a term to be assessed taking into account:
 - the nature of the subject matter of the contract
 - all the circumstances existing when the term was agreed
 - all the other terms of the contract
and
 - all the terms of any other contract on which it depends



Core terms exclusion - transparent and prominent

- **s.64 - Exclusion from assessment of fairness**

- (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
 - (a) it specifies the main subject matter of the contract, or
 - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
- s.64(2) a term is only excluded from s.62 fairness assessment **if it is transparent and prominent (and also not on the Grey List)**
- **What does transparent and prominent mean?**



Blacklisted terms and new Grey List unfair terms

- **Blacklisted terms -**
 - s.57 CRA 2015 - liability that cannot be excluded or restricted
 - CMA Guidance Table of Blacklisted terms that seek to limit the trader's liability, or the consumer's rights and remedies
- **Grey List - New contract terms that may be regarded as unfair**
 - **Early termination clauses - (para 5)**
 - where a consumer decides not to conclude or perform the contract, they must pay the business a **disproportionately high sum in compensation** or for pay for **services not supplied**.
 - **Post-contract determination - (para 12)**
 - which has the object or effect or permits the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound to it.
 - **Unilateral variation of services without a valid reason - (para 13)**
 - term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

CMA unfair terms guidance - common examples

- **Disproportionate financial sanctions - paragraph 6**

- Penal provisions which state a firm can:
 - claim all its costs and expenses, not just its net costs resulting directly from the breach
 - claim both its costs and its loss of profit where this would lead to being compensated twice over for the same loss
 - claim its full legal costs on an 'indemnity' basis not just costs reasonably incurred
- NB. Words 'indemnity' and 'indemnify' are also objectionable as legal jargon (i.e. not transparent as fail the "plain and intelligible requirement")
- **Terms requiring payment of a fixed or minimum sum**, in all circumstances, are open to challenge if the sum could be too high in some cases
- **Termination charges** - inflated sums can be claimed (or retained from prepayments) if the consumer ends the contract

CONCLUSIONS - Implied terms - Practical steps

1. Review pre-contract information

Consider statements about:

- the firm
or
- the services to be provided

that will bind the firm if they be taken into account by a consumer in deciding whether to enter into a contract or make post-contract decisions on services

2. Review post-contract information

Consider statements about the firm or services that will bind the firm if used by a consumer to make a decision after they have entered into a contract

3. Where possible, fix a price - s.51

4. Where possible, fix a time - s.52

CONCLUSIONS - Unfair terms - Practical steps

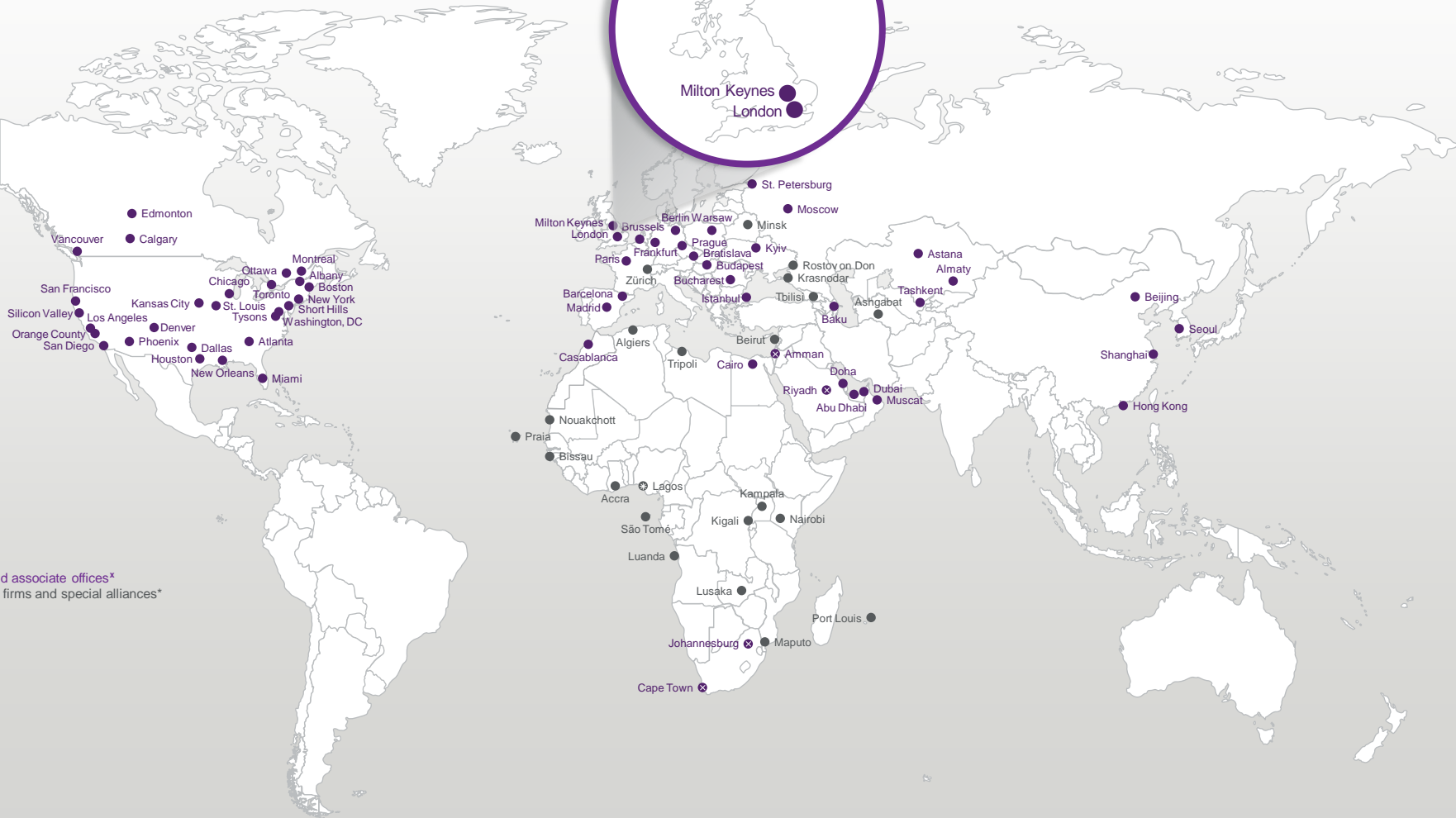
- 1. Review standard consumer contracts for transparency and prominence of terms**
 - a) Appropriate prominence should be given to terms which might operate disadvantageously to the consumer
 - b) Consumers should not be assumed to be able to identify (particularly in longer contracts) terms which are important, which may operate to their disadvantage, or which would be likely to surprise them if drawn to their attention
 - c) Plain and intelligible language = Plain English, No Legal Jargon
 - d) Legible = Avoid small print
- 2. Variation clauses to be limited and specify valid reasons**
- 3. Avoid wide variation clauses in fixed or short term contracts**
- 4. Avoid high fixed sum charges not clearly linked to costs (if not core price terms)**
- 5. Avoid disproportionate early termination/exit charges**
- 6. Consider separate terms for business to business (non-CRA) contracts**

Questions?



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United Kingdom focus



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