



Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015: Consultation – FCA

Summary:

This [consultation](#) focuses on the fairness of variation provisions in contracts and the FCA requirements that firms ensure that the terms of consumer contracts, in general, are fair and drafted in plain language. Where the FCA considers a variation term to be unfair or lacking in transparency, it may take action to prevent a firm from relying on that term.

The new guidance outlines factors that firms should consider as they operate under the [Consumer Rights Act 2015](#). This replaced the Unfair Terms in Consumer Contracts Regulations 1999.

The FCA, in its proposed guidance, sets out 16 examples of what it considers good practice for firms and 5 examples of what it considers bad practice for firms. Good examples include:

- Frequent reviews of all consumer contracts for fairness and transparency.
- Reviewing contracts after having received complaints.
- Assessing contracts as part of regular product reviews throughout the product life cycle to ensure a firm can demonstrate it is treating customers fairly.
- Improving staff training to ensure staff meet the required standards set out in product literature.

Bad examples from the FCA's list include:

- Being passive and relying on external publications through monthly emails.
- Internally-focused reviews of consumer contracts of what looks fair without consideration of external information.
- Not assessing contracts for fairness - frequently resulting in contracts containing out-of-date material.
- Relying on external compliance films without checking or evaluating their work.

The FCA has also listed what they view as factors relevant to determine whether a variation term is fair or not. The list is included below as an annex.

One of the responses the FCA lists as often presented by firms to justify contract changes is changes to the cost of funding. They acknowledge that these are likely to fall directly outside of the control of the firm and may include the credit rating of the firm, the base rate, other interbank lending rates, liquidity rates, cost of capital, cost of fundraising, cost of attracting retail deposits and regulatory changes impacting funding costs. But, the FCA concludes that evidence "to date suggests, in general, firms' adaptation to the changing costs of their funding over time has not led to widespread harm to consumers" and that variation terms have not been used in a manner likely to cause harm to the consumer. However, the FCA is clear that where "it (the FCA) considers that firms have been relying on such terms to the detriment of customers, the FCA will challenge firms accordingly".

The closing date for this consultation is 7th September 2018. The FCA plans to publish a response to this consultation in December 2018 and finalise the guidelines shortly after.

We believe this could be an opportunity to highlight to the UTA how Council standards ensure that consumer interest is placed at the core of decision making and members ensure that consumers have clarity over how contracts will apply to them.

Annex 1:

1. Has the firm included the variation term to achieve a legitimate objective?
2. In this guidance we refer to the reasons that a firm uses to justify amending contract terms using the variation term as 'the reasons'. Are the reasons no wider than is reasonably necessary to achieve a legitimate objective?
3. The variation term permits a change to the contract. Is the extent of that change no wider than is reasonably necessary to achieve a legitimate purpose?
4. Are the reasons objective?
5. Will it be possible to verify whether or not the reasons have arisen (i.e. whether or not the firm is entitled to vary the contract when it invokes the variation term)?
6. Does the variation term allow for:
 - a. variations in favour of the consumer where the reasons may in some circumstances justify changes in favour of the firm but in other circumstances justify changes in favour of the consumer (e.g. price decreases as well as increases)?
 - b. variations in only the consumer's favour?
7. Are the reasons clearly expressed?
8. Will the consumer understand at the time the contract is concluded the consequences that a change to the terms might have for him or her in the future? In particular, for a variation term that entitles the firm to vary the price:
 - a. does the contract (or other information provided to the consumer before the contract is concluded) set out the method for varying the price?
 - b. will the consumer understand the economic consequences of the variation term?
9. What, if any, notice of any variation does the contract require the firm to give the consumer?
10. Does the contract give the consumer the right to terminate the contract before or shortly after any variation takes effect? To what extent could that right be freely exercised in practice?
11. Does the term strike a fair balance between the legitimate interests of the firm and the legitimate interests of the consumer (taking into account any notice provisions, rights the consumer may have to terminate the contract, and the extent to which such rights could be freely exercised in practice)?