

10 April 2015

FAO: Andrew Hadley
Competition and Markets Authority
6th floor
Victoria House
37 Southampton Row
London
WC1B 4AD

Lynn Parker
Director, Consumer Protection
CCEA
Direct line: 020 7981 3092
Direct fax: 020 7783 4109

Lynn.Parker@ofcom.org.uk

By email: Andrew.hadley@cma.gsi.gov.uk

Dear Andrew

CMA Consultation - Guidance on Unfair Contract Terms

Ofcom welcomes the opportunity to respond to the Competition and Markets Authority ('CMA') consultation on draft guidance on Unfair Contract Terms. We have a particular interest in the issues raised as the independent regulator and competition authority for the UK communications industries and as one of the bodies who will be responsible for enforcing the Consumer Rights Act 2015 ("the Act") under Schedule 3 to the Act and through Part 8 of the Enterprise Act 2002. We have produced sector specific guidance on unfair terms in contracts for communications services.¹

In compiling our response, we have drawn on our experiences of monitoring compliance with and enforcing the Unfair Terms in Consumer Contracts Regulations 1999 in the communications sector through Part 8 of the Enterprise Act 2002. Likewise in connection with the General Conditions of Entitlement² that communications providers need to comply with in order generally to be authorised to act as such providers (which include some specific provisions relating to contract terms and conditions).

Our principal duty under Section 3(1) of the Communications Act 2003 is to further the interests of citizens in relations to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In performing this duty, we seek to ensure that communications markets work well both for consumers and for businesses that operate fairly and responsibly towards consumers.

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Guidance.pdf>

² http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/CONSOLIDATED_VERSION_OF_GENERAL_CONDITIONS_AS_AT_26_FEBRUARY_2015_.pdf

We would welcome the opportunity to review and comment on any further draft guidance that is developed in light of this consultation.

Ofcom's response to the consultation can be found in the Annex. We have sought to focus our response on the issues and proposals that are more likely to affect the communications sector.

Should you have any queries, please do not hesitate to contact Sean O'Hara (Sean.O'Hara@Ofcom.org.uk).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Lynn Parker', written in a cursive style.

Lynn Parker

Annex

Unfair contract terms guidance (detailed document to replace OFT311)

Q1. Is the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

Disproportionate financial sanctions

We suggest that it may be worth giving consideration to inclusion of the following in the guidance on “Disproportionate financial sanctions” at page 66:

- **Double recovery of costs:** we note that paragraph 4.14.3 explains that provisions may be unfair where they claim both costs and loss of profit where this would lead to being compensated twice over for the same loss. We think that the guidance might also benefit from an additional reference to being compensated twice over in two separate charges as also likely to be unfair. For example, where a customer is charged for an ETC in addition to another separate charge for ceasing a service. In the telecommunications sector such a separate charge could arise from the cost of ceasing a service at the wholesale level and a provider may pass this on to the consumer (a “Cease Charge”).
- **Net costs/direct costs:** the draft guidance says that provisions may be unfair where they “claim all costs and expenses, not just its net costs”. We consider that the guidance would benefit from clarity as to whether “net costs” mean the “direct costs” caused by the breach of contract. For example, Ofcom’s sector specific guidance on Unfair Terms indicates that cease charges are likely to be fair where they only reflect the direct costs associated with ceasing a service (paragraph 122 of our guidance).

We believe these changes would provide greater clarity and certainty for consumers and businesses, certainly in the communications industry, but possibly also in other sectors.

Disproportionate termination fees

We suggest that it may be worth giving consideration to inclusion of the following in the guidance on “Disproportionate termination fees” at page 69:

- **Recovery of anticipated profits:** Ofcom’s sector specific guidance on Unfair Terms sets out that that it is not likely to be fair to include in an early termination charge (‘ETC’) recovery of anticipated profits from charges for (optional extra) services, or other sources of revenue, which are not themselves part of the consumer’s contractual obligations (assuming the consumer would not do things, and incur charges where he is not required to do so under the contract) (paragraph 81 of our guidance). We mention this point in the context of charges outside inclusive bundles in the telecommunications sector. However, it may be relevant to other sectors. With

this in mind, we think that the guidance might benefit from greater certainty on this point and the CMA could consider including a reference in its guidance.

- **Recovery of losses:** Ofcom's sector specific guidance on Unfair Terms sets out that that only losses that would be recoverable from a consumer in damages for breach of contract were the ETC not a term of the contract should be recoverable as part of an ETC. We discuss this in the context of call termination charges (paragraph 82 of our guidance). However, as above, the general point may be relevant to other sectors; and the CMA may wish to consider including a reference to this in its guidance.

Q2. Is the format and presentation of the draft guidance helpful? Are there any changes to the format or presentation that you feel would improve it?

Yes – we think that the format and presentation of the guidance is helpful. We have no suggestions to change the format or presentation.

Q3. Are the tables in the guidance helpful? Are there any improvements to them that you can suggest that you feel would increase their clarity and/or usefulness?

Yes – we think that the tables in the guidance are helpful.

Q4. Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?

See response to Q1.

Q5. Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?

See response to Q1.

Q6. Are the sections on overlapping legislation helpful? Does their position in the document work well? Do you have any suggestions as to how they might be improved?

Yes these sections are helpful. We have no suggestions for improvement.

Unfair contract terms explained (guide aimed at business audiences, in particular)

Q7. Is the draft guide sufficiently clear? If there are particular parts of the guide where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

See response to Q1.

Q8. Is the format and presentation of the draft guide helpful? Are there any changes to the format or presentation that you feel would improve it?

Yes – we think that the format and presentation of the guidance is helpful. We have no suggestions to change the format or presentation.

Q9. Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?

See response to Q1.

Q10. Bearing in mind the target audience and the nature of the document, is the draft guide sufficiently comprehensive, and does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?

Subject to additional clarity we suggest in our response to Q1, we consider that the guidance is sufficiently comprehensive.

Unfair contract terms short guide (2-page guide)

Q11. Is this summary document sufficiently clear? If there are particular parts of it where you feel greater clarity, or detail, is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

Yes - so far as due prominence is given to the need to refer to the detailed guidance.

Q12. Is the format and presentation of the summary helpful? Are there any changes to the format or presentation that you feel would improve it?

Yes these sections are helpful. We have no suggestions for improvement.

What's new in unfair contract terms? (a guide to the anticipated changes in unfair terms law)

Q13. Do you consider that we have made any factual errors or significant omissions?

No

Q14. Is the document sufficiently clear?

Yes

Communication strategy on unfair contract terms

Q15. Do you agree with our communications approach? Are there any important elements missing? What else would you find useful?

We have no concerns with the CMA's communications approach.

Additional general questions

Q16. Do you feel that the first three documents, between them, provide appropriately tailored alternatives to meet the varied demands of different audiences across the spectrum of interest in unfair contract terms issues?

Yes

Q17. The CMA adopted various historical sector-specific pieces of guidance that can be found on GOV.UK: www.gov.uk/government/collections/cma-consumer-enforcement-guidance. How often, if at all, have you used these documents? If you have used them, how user friendly do you find them?

Ofcom refers to relevant guidance as and when required. We do not keep a record of how often the documents are used.

Q18. Do you have any other comments about the suite of guidance documents covered by this consultation?

No