Joint Communications Sector Follow Up response to CMA's consultation: Guidance on Unfair Contract Terms provisions in the Consumer Rights Act 2015 submitted by UKCTA, Mobile Broadband Group and BT, pursuant to joint meeting held on April 16th with BIS, CMA and Ofcom

Submitted to CMA: 14th May 2015

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Further to our recent meeting we thought it would be useful to capture the areas we discussed in relation to the Guidance to be issued.

1. **Prominence.** We suggested that the extensive pricing structures used in the communications sector should be considered exempt from an assessment for fairness. By way of example a contract with a Communications Provider (CP) is a services contract under which many different services can be provided for the prices set out in a "Tariff Guide". The example of an international phone call to Namibia serves as an analogy for all services that might be provided. The consumer will be able to assess the price for the service provided by reading the prominently signposted Tariff guide before electing to consume that service for the price stated. A consumer would usually have a choice of different ways to make a call (e.g. by using, carrier pre-selection ("CPS"), Skype or Facetime as an alternative. They would not be bound in any event, over and above their minimum core subscription price, to utilise any other services from the CP with whom they have their principal contract for communications services. The challenge is that at the initial point of sale it is impossible for the consumer or the CP to know which services the consumer may purchase from the CP at different points in the future. It would not be practical to read out over the phone or list on the main webpage all the permutations of different services available which may the customer may or may not use during the lifetime of their contract. We consider that provided the core subscription price (being the minimum commitment that the consumer has made) is made prominent and further optional services are clearly signposted, then the pricing for those services those services should be regarded as sufficiently prominent and therefore exempt from a test of fairness, as the "reasonably well-informed, observant and circumspect consumer" would be able to find the price before choosing to consume the service offered.

2. **As an additional point, it should be noted that customers who have purchased a basic package for line and call bundle are not tied into that provider for making all outbound calls.** They can make calls over other networks without upfront costs – through what are known an as indirect access models, for both international and domestic calls. Thus, not only is there a competitive market in the bundles market but also in the 'per call' market. In recent times, the market has been further shaken up by Voice over IP products such as Skype and Facetime.

3. For certain calling categories such as premium rate services and roaming, price is very directly and prominently notified at or very close to the time of consumption. These prices should also be excluded from an assessment of fairness, even though the customer may

not have directly considered or viewed the pricing information at the point of signing up the contract.

4. **The average consumer**. The CMA guidance reflects what the CMA believes case law currently says about a consumer who acts in a circumspect manner. However as this is a new standard, set out in s64(5) of the Consumer Rights Act, we submit that greater emphasis needs to be given to how the test works on the face of the wording in the Act, than to previous High Court decisions by judges who have not (yet) had the opportunity to interpret the provisions of the Act in practice. It would appear to us to be inappropriate to restrict or lessen the burden upon the consumer, as the wording of the Act defines the "average consumer" as "a consumer who is reasonably well-informed, observant and circumspect". The guidance should therefore make clear that a term can only be considered to have not been prominent enough if it was not prominent to the "reasonably well informed observant and circumspect" consumer. The Guidance at paragraph 5.21 fails to make this clear. It states:

   "In any case, however, as explained above in paragraph 2.28, the CMA considers that the average consumer cannot generally be expected to read thoroughly terms in the small print of standard contracts"

   The CMA Guidance here effectively defines "the reasonably well informed observant and circumspect consumer", as a consumer who would not be expected to read thoroughly terms and conditions and therefore not to be observant or to behave in a circumspect manner. It is difficult to reconcile the concepts in the Act of the consumer as reasonably well informed, observant and circumspect with the description of the average consumer as described by the CMA Guidance.

5. The definition of the reasonable consumer in s64(5) of the Act serves to offer businesses some protection from price terms being assessed for fairness, by effectively saying that a term is prominent if the "reasonably well informed observant and circumspect consumer" could reasonably be expected to read and understand price terms that the Trader is seeking to rely upon. Our concern is that the Guidance does not accurately reflect the higher standard that is set out in Part II of the Act in relation to the average consumer. In doing so the Guidance may create uncertainty for Traders and Consumers by creating the impression that certain price terms may be challenged for fairness, when in fact a court will have to consider what "reasonably well informed, observant and circumspect" would mean in practice. It is our submission that an average consumer who is reasonably well informed observant and circumspect, could be expected to read a clearly written tariff guide setting out charges for additional services they may wish to purchase and consume under a services contract, provided it has been brought to their attention in such a way that they are aware of its existence, and that it is easy to find and is easy to navigate. We would therefore submit that the CMA Guidance should not suggest that extensive price

lists by definition are always going to be assessable for fairness. There are circumstances where clear signposting will make them sufficiently prominent for the average "reasonably well informed observant and circumspect" consumer.

6. **Unilateral Right to Vary.** We discussed the severe practical difficulties for the communications sector in relation to making it clear before a contract is concluded the many ways that a contract may be varied during its term. We discussed the provisions in the CCRs, and the corresponding provisions as re-stated in the CRA, which are reflected in the CMA Guidance where the Guidance says "***Pre-Contract Information is to be treated as legally binding on the business in the same way as what is said in the contract itself***" and that "***any change will not be effective unless expressly agreed between the consumer and the trader***". The Guidance goes onto acknowledge that a "***variation provision in the Pre Contract Information is to be treated, under the CCRs as a term of the contract with the consumer,***"[i] and that any such term will need to be brought to the consumer's attention before the contract is concluded if it is to avoid being treated as an unfair term.

7. We acknowledged the difficulty the CMA had with this particular part of the Guidance in light of how the Government has chosen to implement the CCRs and the fact the that Government's implementation appears to conflict with the approach adopted in the DG Justice Guidance supporting the Consumer Rights Directive. The relevant part of the DG Justice guidance states that "***The provisions under Article 6(5) would not apply to any changes made by the trader to the terms of the contract after the contract has been concluded. The Unfair Contract Terms Directive 93/13/EEC14 would be relevant regarding such changes***."[ii]

   The difficulty for the communications sector is that the contracts for services we put in place with our customers consumers are necessarily complex. They involve the provision of a range of different communication and content services at multiple price points. It is quite possible now to obtain from one CP telephony, broadband, mobile and television services in a range of different packages and for different prices. Equally, CPs during the course of the contract may vary the terms upon which all of these services are provided in many different ways which cannot be ascertained or known, at the point in time at which the consumer contracts. If we are obliged by the Guidance to state in great detail all of the *possible* changes that *might* take place under our contracts we will be overloading consumers with too much information at the point of sale. In practice, this will mean exceptionally long and detailed phone calls and page after page of information for online sales journeys. Customers already get frustrated with the length of phone calls or by sales processes that require numerous clicks and pop-ups. We are extremely concerned that the unintended consequence of the CMA's Guidance will lead to excessively long sales processes and customers simply "zoning out" and feeling confused by the volume of information already provided and overlaid with the huge volume that will be required to explain the various different ways in which a contract

may or may not vary over the course of its minimum term. Our experience is that our customers' primary objective is often just to choose their service and conclude the contract (i.e. finish the call) We consider that provided customers are informed of any proposed variations to their contract as and when they become relevant and meaningful and are given the right to terminate that contract without penalty if they consider the change causes them material detriment, then that ensures that a fair balance is struck. We are extremely concerned that to do otherwise will obscure the information that customers really need when they sign up to a service and will lead to information fatigue.

8. As an alternative, we suggested instead that it would be possible to explain the principle of a contract variation before the contract is concluded and that more information would be made available in a durable medium in the confirmation communications that are sent to customers after the contract is concluded. Such confirmation communications must in any event contain all the information required by Schedule 2 to the CCRs. We ask that the Guidance reflects the practical difficulties of explaining to a consumer all the possible variations that may occur to their contract before the contract is concluded. We believe that the consumer is still protected by the operation of the CCRs provided that the information about variation is made sufficiently prominent in the confirmation communications.

[i] See paragraphs 1.49 and 1.50 in the CMA draft Guidance.
[ii] See paragraph 4.2.5 of the DG Justice guidance available here: http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf