

UK care home providers for the elderly – draft consumer law advice on the charging of fees after death

Helping care home providers comply with their
consumer law obligations

Consultation document

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1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft advice for providers of care homes and nursing home services to the over 65s in the UK (referred to in this document as ‘care home providers’). This is primarily in relation to the charging of fees following the death of a long-term resident¹, in particular:
- (a) residential fees (for care or accommodation or both) payable after the death of a self-funded or part-funded² resident; and
 - (b) fees payable to cover ‘shortfalls’ in any contributions which are no longer paid by the state on (or shortly after) the death of a resident³.
- 1.2 This draft advice also covers the treatment of the deceased resident’s possessions and the transparency of contract terms related to these issues.
- 1.3 The purpose of the advice is to help UK care home providers understand and comply with their responsibilities under consumer protection law.
- 1.4 The CMA is already taking forward action against certain care home providers that it considers are unfairly charging fees for extended periods after a resident has died, asking them not to enforce their terms. However, the CMA’s market study found that charging fees after death is widespread across the sector and that practices vary. In order to ensure that care homes take a consistent and lawful approach, the CMA is publishing compliance advice for the sector as a whole.
- 1.5 The CMA is continuing to monitor complaints and other intelligence and may decide to open further investigations against other providers before the publication of its final advice, if it identifies serious concerns regarding potential breaches of consumer law. The CMA will expect all other providers to review, and where necessary, change their terms in accordance with the advice when finalised or risk action being taken against them, as set out in section 3.

¹ The CMA’s focus is on long term residents as opposed to respite residents.

² Where a person is eligible for local authority funding but would like to move to a care home that costs more than the council will pay or secure a better room in the same care home, their family or friends (a ‘third party’) can pay a ‘top-up fee’ to make up the difference.

³ These might include a requirement to compensate for the discontinuance of NHS Funded Nursing Care (FNC) payments or local authority contributions, which are no longer paid by the state on (or shortly after) the death of a resident.

Scope of this consultation

- 1.6 The consultation and the draft advice are aimed primarily at UK care home providers.
- 1.7 They will also be of interest to care home residents and their representatives, consumer groups, charities representing the elderly, care home representative bodies such as trade associations, government departments, enforcers of general consumer protection law such as Local Authority Trading Standards Services, relevant ombudsmen schemes, and sectoral regulators.
- 1.8 The draft advice focuses on the charging of fees after a resident has died. To our knowledge, such fees might be charged to either or both of:
- (a) the deceased resident's estate; or
 - (b) a third party who has been making 'top-up' payments on behalf of a local authority funded resident, for an extended period of time.
- 1.9 We recognise that there is also a need for compliance advice (alongside enforcement action if appropriate) on the other consumer protection concerns found in the course of the CMA's recently-published market study into care homes⁴. The CMA is intending to consult on more comprehensive compliance guidance for care home providers (see paragraph 1.15 below) in Spring 2018⁵. The final advice on death fees will eventually be incorporated into the more comprehensive guidance (once this is published), so that advice on all the issues of concern, as identified in the CMA's market study, is conveniently set out in one place.
- 1.10 The draft advice sets out the CMA's views on the application of two consumer protection laws, namely Part 2 of the Consumer Rights Act 2015 (CRA) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). These laws are UK wide and therefore this draft advice is relevant in all nations. It does not provide advice on sector-specific rules which may also be

⁴ [CMA's market study](#)

⁵ The Office of Fair Trading published guidance on unfair terms in care home contracts in October 2003. Since then both the market and consumer law have moved on considerably. New business practices have also emerged amongst some care homes. The old Office of Fair Trading guidance has been formally withdrawn by the CMA. It should not be relied on either as a statement of the law or CMA policy. Current CMA Guidance on unfair contract terms can be found at [Unfair contract terms: CMA37](#), which replaced all previous OFT/CMA Guidance on unfair contract terms when the Consumer Rights Act came into force on 1st October 2015.

relevant to care home providers, such as sector regulations, standards and guidance.⁶

- 1.11 This draft advice is not a substitute for the law itself, and it does not replace the role of the courts which is to provide the definitive interpretation of consumer protection law. It sets out the views of the CMA. Care home providers, if in doubt, should seek their own legal advice on the interpretation and application of the law. The CMA is already taking forward action against certain care home providers that it considers are unfairly charging fees for extended periods after a resident has died, asking them not to enforce their terms. It may also decide to open further investigations against other providers before the publication of its final advice, if it identifies serious concerns about potential breaches of consumer law. However, the advice, when finalised, will set out the standard that the CMA will expect all care home providers to adhere to. Other care homes that use contract terms or practices which do not meet the standards may also face enforcement action; see section 3.

Background

- 1.12 The CMA is a non-ministerial government department, which took on its powers on 1 April 2014. It is a unified competition and consumer authority which took over a number of the functions formerly performed by the Office of Fair Trading and the Competition Commission. The CMA works to make markets work well for consumers, businesses and the broader economy and has powers to enforce consumer protection law.⁷
- 1.13 On 2 December 2016, the CMA launched a market study to consider whether the market for the provision of care home and nursing home services to over 65s in the UK was working well for residents and fairly competing businesses.
- 1.14 On 13 June 2017, the CMA opened a consumer protection case to investigate a number of care home providers due to concerns that some of their contractual terms and their practices might breach consumer protection law. The focus of this investigation is on certain care home providers requiring fees

⁶ Such as Regulations and standards enforced by the Care Quality Commission (England), the Care Inspectorate (Scotland), the Care (and Social Services) Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) and guidance such as in England the Department of Health's National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care and the NHS-funded Nursing Care Practice Guide.

⁷ Further details on the [CMA's consumer powers and its approach on their use](#).

to be paid for extended periods after a resident has died (in addition to concerns relating to care home providers charging large upfront fees).

- 1.15 On 30 November 2017, the CMA published the final report on its market study findings and announced that it would be consulting on new guidance on fees charged after death in early 2018 and also that it planned to consult on wider guidance⁸ to help improve compliance in the sector in Spring 2018.

Summary of evidence informing the CMA's views

- 1.16 In the following paragraphs, we summarise the evidence obtained during the CMA's market study about the practices adopted by care homes in relation to the charging of fees after the death of a resident. This evidence relates to the following concerns:

- (a) the extent to which care homes continue to charge residential fees after the death of the resident;
- (b) charging for any shortfall in NHS Funded Nursing Care (FNC) payments;
- (c) charging third parties for any shortfall in local authority funding;
- (d) the treatment of the deceased's possessions, and
- (e) the lack of clear and transparent contract terms.

Extent to which, if at all, care homes continue to charge residential fees after the death of a resident

- 1.17 The period for which fees are charged after death (the 'payment period') varies significantly between homes and between types of contracts, with self-funding residents sometimes being required to pay for much longer periods than local authorities:

- (a) Some care homes charge fees for extended periods of up to a month after a (self-funded) resident has died, and sometimes even when the room has been cleared of the resident's possessions and 'returned' to the care home within this period.

⁸ This wider guidance will address many of the other concerns identified during the market study such as in relation to the taking of deposits, requiring self-funding residents to guarantee payment of their fees for a minimum period, fee increases, ending the contract and asking residents to leave, and complaint handling.

- (b) In contrast, some care home providers do not charge fees at all following the death of a self-funded resident or only do so for a short time. For example:
- i. Information from 32 of the largest UK care home providers (defined in Appendix A) indicated that 15 of these providers charge no fee, or charge no fee once the room is cleared of possessions, or only charge fees for three days⁹ and 10 charge for periods ranging from five to seven days.¹⁰
 - ii. 69 out of 120 care home providers who responded to a CMA online survey said that they do not charge fees following the death of a self-funded resident, only charge for a period of up to three days, or only charge fees until the room is cleared of possessions.

(See Appendix A for further details on the variety of timescales notified to the CMA by providers.)

- (c) Further, based on the information provided by some care home providers and the examples of local authority contracts with care homes that we have seen, the majority of contracts indicate that the council's fees will stop on, or shortly after, the resident's death. For example, the Scottish National Care Home Contract states that the local authority's contribution shall be paid for three days after death (or up to such a date as may be agreed between the council and the provider) and the resident's contribution shall be due for three days after death.
- (d) On a related issue, some care home providers make no provision for a pro-rata refund of fees where the room is re-let to a new resident during the period after death for which fees remain payable. In contrast, many of the care home providers that provided information or responded to our online survey said that they do provide pro-rata refunds if the room is re-let.

Reasons given by some care home providers for charging fees for a lengthy period after the death of a resident

1.18 Providers have offered a number of reasons for charging fees for a period following the death of a resident. These reasons include:

⁹ Some of these will charge less if the room is cleared before three days.

¹⁰ Information from 32 of the largest UK care home providers (defined in appendix A), indicated that 15 of these providers charge for 3 days or less, 10 charge from 3 to 7 days and 7 charge 14 days or more. For some care home providers, the fees continue to be charged if the room has not been cleared within the stated timeframe.

- (a) the time required to prepare the room, for example deep cleaning or redecorating the room;
- (b) the time it takes to re-let the room to another resident; and
- (c) the need to refrain from hurrying grieving relatives and the need to give them sufficient time to clear possessions from the room.

1.19 In respect of (c) above, during the CMA's market study we were contacted by several relatives and representatives of deceased residents to report, or complain about, the length of time that fees continued to be charged after the death of their relative, with the sums involved amounting to several thousand pounds. The majority of these informed us that they had emptied the room of possessions within three days or less. In contrast, no one contacted us to report that the length of time the deceased's room remained available to them, for example to remove possessions, was too short.

Third parties paying top-up fees

1.20 In relation to part-funded residents, where third parties are paying 'top-up' fees directly to a care home (with the agreement of the local authority¹¹), we have found instances where the care home agreement obliges the third party to continue paying the top-up fee for a longer period after the resident's death than would be the case under the local authority's agreement with the care home. Although most providers we engaged with told us that in practice their policy was to enforce their contract with the third party in line with the terms of their placement agreement with the local authority (to ensure consistency), this did not always appear to be the case. This may result in the third party being subject to more onerous death fee terms than if they had paid the top-up through their local authority¹².

¹¹In such situations, the third party will typically have signed an agreement with the care home for the payment of the top-up fee in addition to the written agreement they have with the local authority. There will also be a contract between the local authority and provider in relation to the placement and funding of the resident.

¹² Under the statutory guidance to the Care Act 2014 in England, where a local authority is meeting someone's needs by arranging a care home, we understand it is responsible for contracting with the provider and for paying the full amount, including where a third party 'top-up' fee is being paid. The guidance says that where all parties are agreed the local authority may choose to allow the third party to pay the provider directly for the 'top-up' rather than paying it via the local authority, but it does not recommend this and makes clear that local authorities should deter such arrangements because 'multiple contracts risk confusion' and the local authority may be unable to assure itself that it is meeting its responsibilities.

Payment of fees after a resident's death to cover 'shortfalls' in state contributions

1.21 We have seen examples of contracts and practices that required the payment of fees to cover 'shortfalls' in any contributions which are no longer paid by the state on (or shortly after) the death of a resident, including:

- (a) Contracts that may give care homes scope to charge the deceased (self-funded) resident's estate for any shortfall in fees that had been covered by the state whilst the resident was alive – in particular the NHS FNC contribution of £155 a week for nursing services which we understand typically stops upon or within a short time after death.
- (b) Requiring a third party, who has been paying a top-up fee for a local authority funded resident, to make up any shortfall in local authority funding in respect of a period after which the local authority funding has ceased (which is typically at the time of the resident's death or shortly afterwards).

Treatment of the deceased resident's possessions

1.22 We have seen terms that allow the care home provider, in certain circumstances, to dispose of the deceased's possessions:

- (a) without providing adequate notice to the estate of its intention to do so; and
- (b) without setting out that any monies received from the sale of possessions, minus reasonable expenses, should be returned to the resident's estate or their personal representatives, within a reasonable timeframe.

Not clearly setting out practices in the contract terms

1.23 Finally, we have seen some examples of contracts that do not reflect accurately or at all what happens in practice. In some cases, we have been informed of care home providers' policies but these fuller policies or practices are not reflected in the terms. For example, some care home providers have told us that, in the rare instances that possessions are not collected in line with the period set out in the contract, they store possessions for free for a short while but the contract does not reflect such practices. Similarly, some providers told us their policy is to provide pro-rata refunds if a room is re-let during the payment period, but this was not stated in their contract terms.

2. Compliance advice

Introduction

- 2.1 In this section, we summarise the CMA's views on what care homes need to do to meet their consumer law obligations in relation to matters that may arise following the death of a resident. Full details of the CMA's legal reasoning, on which this draft advice is based, is set out in Appendix B.
- 2.2 This advice covers several matters that may arise following the death of a resident. The CMA considers that it is unfair under consumer law to continue to charge fees for a lengthy period after a resident has died. However, there may be some circumstances where charging for a limited period may be fair. We have set out here our views on this and a number of other matters and are seeking views from interested parties to inform our final advice.
- 2.3 The main issue, however, is the precise length of time, if any, for which full residential and care fees may be charged after a resident's death. For the purpose of this consultation, we have set out some examples of terms, at the end of this section, to illustrate in a practical way a range of potential options. We are seeking consultees' views on these options and on the other issues, as set out in section 3.

What does the advice cover?

- 2.4 This advice covers the following matters that may arise following the death of a resident,¹³ including terms which permit the home to:
- (a) continue to charge residential fees (see paragraphs 2.5 to 2.18);
 - (b) charge the residents' estate for any shortfall in NHS Funded Nursing Care (FNC) payments (see paragraphs 2.19 to 2.22);
 - (c) charge third parties for any shortfall in local authority funding (see paragraphs 2.23 to 2.25); and
 - (d) store and dispose of the deceased's possessions (see paragraphs 2.26 to 2.29).

¹³ The CMA's detailed views on compliance with consumer protection law can be found in Appendix B.

Charging residential fees after the death of the resident

Residential fees payable after the death of a self-funded resident

- 2.5 As a matter of law, terms which create a significant imbalance in the parties' rights and obligations, to the detriment of the consumer, and contrary to good faith, are unfair and therefore unlawful. In principle, a term which requires a resident to pay for services which are no longer required and can no longer be provided by the care home potentially creates an imbalance in the parties' rights and obligations to the detriment of the resident.
- 2.6 When assessing whether a term causes a significant imbalance, one approach often adopted by the courts is to consider what the position would be in the absence of the term under challenge. In other words, to consider the extent to which the term places the consumer in a legal position less favourable than that would be provided by the law. The CMA's view is that, in the absence of a term requiring the continued payment of fees after the death of the resident, the care home's obligation to provide care services and accommodation would cease, as would the (deceased) resident's obligation to pay for that care and accommodation. However, as the room would be expected still to contain the resident's possessions, a term would most likely be implied into the residential agreement which permits the resident's relatives time to access the room for a short period following the resident's death. During this (limited) period, **both parties** to the contract have a legitimate interest in the contract continuing, and therefore it could be acceptable for the care home to continue to charge a sum of money to reflect this. We do not think that a well-advised resident, dealing on equal terms with the care home provider, would agree to pay for a room beyond the end of this period.
- 2.7 This approach reflects what would be a reasonable expectation of the resident (or their family or other representative) at the time the contract was entered into. However, at the point that the resident's possessions are removed from their room, the deceased's family will no longer require the right to access the room (the room is 'returned to the home') and the contract for residential care will no longer be of any benefit to them.
- 2.8 Likewise, care homes have legitimate reasons for including terms in the contracts which help to ensure swift recovery of the room, following a resident's death. The care home needs to be able to get on with preparing the room for the next resident and may need some certainty as to when this process can start. Therefore, it is likely to be reasonable for homes to require the room to be cleared within a relatively short period of time. However, we do not think that care homes have legitimate reasons for passing the costs of

preparing the room for the next resident, or loss of income caused by a void in occupancy, onto the outgoing resident. Moreover, the death of a resident is an inherent risk of providing care home services, which care homes can factor into their financial modelling when setting residential fees. Care home providers can also take action to minimise the risk of a prolonged period of under-occupation. By contrast, the resident has no control over the re-occupation of their room or the timing of their death.

2.9 Taking into account the considerations set out in paragraphs 2.5 to 2.8 above, and taking into account the evidence summarised in sub-paragraphs (a) to (c) below, the CMA considers that including a term in the residential care contract which allows for fees to be charged for a period of no more than three days is likely to strike the right balance between the interests of the care home and the resident:

- (a) A significant proportion of care home providers who participated in the CMA market study said they charged fees for three days or less after the death of a self-funded resident (see paragraphs 1.17 (b) (i) – (b)(ii)). This demonstrates that it is commercially feasible for providers to charge for no more than three days (by factoring the potential loss of revenue arising from a resident’s death into their financial modelling), and that it is a relatively common practice across the sector to do so;
- (b) Based on the information provided by some care home providers and the examples of local authority contracts with care homes that we have seen, the majority of contracts indicate that the council’s fees will stop on or shortly after a resident’s death (see paragraph 1.17 (c)). This provides an illustration of what a well-informed party, on equal bargaining terms with a care home provider, would agree to; and
- (c) We have not received any evidence from relatives and representatives of deceased residents to suggest that they needed a lengthy period of time to clear possessions from their relative’s room (see paragraph 1.19). The majority of those who contacted us informed us that they had emptied the room of possessions within three days or less. In contrast, no one contacted us to report that this length of time was too short.

2.10 Whilst the CMA considers that three days is likely to be a sensible benchmark that strikes the right balance between the interests of the care home and the resident, we acknowledge that there is an argument that fees should cease completely on death. Nevertheless, we consider that a period of three days provides care homes with enough certainty to plan, whilst protecting the resident’s estate from being tied into continuing contractual payments for the provision of residence and care, when it is in substance over.

- 2.11 Further, if a room were to be re-occupied during the three days' period (for example, where another resident moves into the cleared room¹⁴), it is our view that fees should cease from the point the room is re-occupied. We can see no basis for terms providing for the deceased resident's estate to continue paying even after the room has been re-occupied by another resident to be fair, since this would permit the home to charge twice for the same room.
- 2.12 As many care home residents pay their residential fees in advance, in practice this means that care homes should refund any advance payments covering the remainder of the period beyond the three days following the resident's death. Such refunds should be timely.
- 2.13 We recognise that the death of a relative is a difficult time and that there may be occasions when relatives may need access to the room for longer than three days. It may therefore be appropriate for contracts to make provision for these circumstances, by setting out a longer stop date beyond the initial three days, during which payment must be made **if** the room remains uncleared. After this longer period, it would be appropriate for the care home to reserve the right to take reasonable steps to mitigate their loss, such as by removing the deceased's possessions themselves from the room, storing them safely and charging a reasonable storage fee. This would allow the home to get on with the process of preparing the room for the next resident. We discuss this further in paragraph 2.26 to 2.29 below.
- 2.14 To reflect this and for completeness, as set out in the consultation questions (question 4.5), we also seek views on a term which provides that fees are payable for the shorter of the following two periods, following the resident's death, namely: i) until possessions have been taken out of the room by the resident's representatives or ii) a slightly longer period than three days after death e.g. seven or ten days. Although this would mean greater flexibility for the resident's representatives in clearing the room it would mean less certainty for the care home. The care home would lose some certainty over the period of time for which it would receive fees, following a resident's death, and when it would be able to start preparing the room for the next resident.

Residential fees payable after the death of a part-funded resident

- 2.15 Where a person is eligible for local authority funding but would like to move to a care home that costs more than the council will pay or to secure a better room in the same care home, their family or friends (a 'third party') can pay a 'top-up fee' to make up the difference. If a local authority is meeting

¹⁴ That is a resident who is either new to the home or transferring from another room.

someone's needs by arranging a care home, it is responsible for contracting with the care home and paying the full amount, including where a third party top-up fee is being paid. But when all parties are agreed, the local authority may choose to allow the third party to pay the care home directly for the top-up rather than via the local authority.

- 2.16 Where third parties are paying 'top-up' fees directly to a care home (when such an arrangement has been agreed with the local authority) they will typically have an agreement with the care home in addition to a written agreement with the local authority. There will also be a contract between the local authority and the care home provider in respect of the placement and funding of the resident.
- 2.17 We understand that local authorities typically stop paying their part of the fees on, or shortly after, the death of a resident. We are aware of instances where the care home agreement with the third party obliges the third party to continue paying the top-up fee for a longer period after the resident's death than the local authority is obliged to pay for the placement under their contract with the care home. This will normally arise when the third party pays their top-up fee directly to the home rather than via the local authority.
- 2.18 It is the CMA's view that care home providers should not ask a third party to continue making top-up payments for a longer period than that for which local authority funding is made available to the care home. The effect of such a provision is to penalise the third party for making payments direct to the home rather than via the local authority. In order to be fair under consumer law, the CMA would generally expect the care home's terms governing the period for which top-up payments must be paid to be the same as those that apply to the contract between the home and the local authority, so as to ensure that the third party is not subjected to more onerous terms than if they were paying the top-up fee via the local authority.

Fees payable to cover 'shortfalls' in any contributions which are no longer paid by the state upon (or shortly after) the death of the resident

Charging for any shortfall in NHS Funded Nursing Care (FNC)

- 2.19 FNC is the contribution paid by the NHS to care homes in England and Wales providing nursing care, in order to support the provision of registered nursing care for eligible residents. The policy intention of the FNC contribution is that no resident should pay for the costs of nursing care by a registered nurse (as defined within legislation), as these costs should be paid by the NHS.

- 2.20 We understand this NHS contribution stops on, or shortly after, the death of a resident because the nursing care by a registered nurse is no longer needed and cannot be provided to the resident.¹⁵
- 2.21 We are aware of a few instances where a resident's estate, or the resident's personal representatives, have been required under the care home contract to pay fees for a period after death to cover what is described by the care home provider as the 'shortfall' in FNC contributions. This means in practice that the resident (through their estate) is required to pay more for their care after they have died than they were obliged to pay for it when they were alive, even though they cannot receive the nursing services which FNC is designed to fund.
- 2.22 Given that it is the intention that payment for specified nursing care by a registered nurse is the NHS's liability rather than the resident's, the CMA can see no legitimate grounds for care homes to require the resident's estate, or the resident's personal representatives, to pay sums that apply because FNC payments are no longer being made by the state. It is the CMA's view that terms which have the effect of transferring this liability onto the resident after their death (or onto their estate) are unfair.

Charging for any shortfall in local authority funding

- 2.23 As explained above, where a person is eligible for local authority funding but would like to move to a care home that costs more than the council will pay or secure a better room in the same care home, their family or friends (a 'third party') can pay a 'top-up fee' to make up the difference (see paragraph 2.15).
- 2.24 We are aware of instances where a third party has been required not only to pay their top-up fee after the local authority's contribution has ceased following the death of a resident but to also meet the 'shortfall' in the local authority's contribution for a lengthy period too.
- 2.25 The effect of such a provision, in an agreement between the home and the third party, is to require the third party to take on responsibility for residential fee payments which far exceed the top-up payments they agreed to pay whilst the resident was alive. A term which passes onto the third party the

¹⁵ In England the '[NHS-funded Nursing Care Practice Guide](#)' states that Clinical Commissioning Groups will need to agree a payment to cover the period after death in line with any agreements reached with providers and Local Authorities. In Wales, the relevant guidance ('NHS Funded Nursing Care in care homes guidance' 2004) states that a payment equivalent to the FNC rate in effect will be made by the NHS to the care home for a period following the death of a resident, and this will normally be four days or less, but may be co-ordinated with local authority contractual arrangements.

responsibility for covering the sums which the local authority stops paying upon the resident's death, is likely to create a significant imbalance in the agreement to the detriment of the third party, contrary to the requirement of good faith. It takes advantage of the third party's unfamiliarity with the subject matter, and is contrary to what a well advised third party, acting on equal bargaining terms, would agree to.

Treatment of possessions

- 2.26 It is reasonable for care homes generally to expect residents' possessions to be cleared within a short period of time after death. As we set out above, we consider three days is appropriate for this purpose. However, as we also note above, there may be occasions when this does not take place (for example, if relatives or the deceased's representatives are abroad, or lack transport or mobility), and consequently the contract should set out clearly what steps the home will take. These terms must also be fair.
- 2.27 In principle, we would not challenge a term that permits the home, for a short further period, to continue charging for the room while the resident's possessions remain in place (see paragraph 2.13). After such a period, we would expect the home to take steps, having notified the deceased resident's representatives or estate, to clear the room itself in order to be able to re-use it.
- 2.28 Terms which permit the home to clear the room should set out what, if anything, the home will charge for doing so, as well as what costs will be charged for storage thereafter. Those costs should be reasonable and no more than the care home itself is charged for storage (assuming the home does not store the items itself).
- 2.29 If it is necessary for possessions to be stored by the home and they remain uncollected, we recognise that ultimately a point could arise when it will become clear that possessions will not be collected at all. We consider it is reasonable for the home to make provision in the contract for such circumstances, for instance, by allowing disposal of residents' possessions, provided:
- (a) the timing of the sale is reasonable and clearly set out in the contract;
 - (b) the term makes provision for adequate notice to be given to the estate of the home's intention to sell the possessions;
 - (c) the home is obliged to obtain a reasonable price for the possessions; and

- (d) if any monies are received from the sale of possessions then the relevant term makes provision for such sums, minus reasonable expenses, to be returned to the resident's estate or their personal representatives, within a reasonable timeframe.

Clear and transparent contract terms

2.30 Prospective residents and their representatives need prominent, clear and full information about the terms that will apply in the event that the resident dies. Such terms should cover:

- (a) the length of time, if any, that the home will expect fees to be paid following death;
- (b) the deadline for personal possessions to be removed from the room and what the cost would be for the home to clear the room otherwise;
- (c) whether, if necessary, items can be stored, and if so for how long and for what charge; and
- (d) the steps the home will take to dispose of items which are not, or cannot be, removed within the home's required timescale.

2.31 As well as presenting these clearly in the contract, the home should also communicate clearly with the resident's representative or estate in good time before taking steps that may involve charges, and when a situation has arisen in which charges are being applied, so that the estate can take steps to avoid or reduce these charges.

Table 1 - Examples of term(s) which we may include in final guidance as less likely to be unfair¹⁶

2.32 In order to provide a practical illustration of the CMA's approach, we set out here some examples of possible terms (which are largely based on terms seen in contracts) and which we currently consider may be less likely to be successfully challenged as unfair (subject to further consideration as part of this consultation, including views received by the CMA on the fairness and

¹⁶ Although these illustrative example terms are largely based on terms in actual contracts used with self-funded permanent residents (which we have seen) and/or information that we have received on how terms are relied upon in practice, they have been drafted by the CMA for the purpose of assisting responses to this consultation document only. The CMA is **not** presenting these terms as fair (or likely to be fair) and immune from challenge. The CMA is unable to "approve" terms or recommend terms for use on the basis that they are fair and therefore will not be open to challenge by itself or other enforcers. This is underlined by the fact, for example, that fairness depends upon all the relevant circumstances when the term was agreed as well as other terms in the contract.

practicality of these examples). We may include all or some of these (or redrafted) terms in the final advice.

Example (a)

- 1.1 In the event of your death this agreement will end and payment of fees will cease on the date of death. We require that personal belongings be removed within three days following your death. If this is not possible, we will clear the room and store items. There will be a reasonable storage charge of £20 per day.
- 1.2 If personal possessions have not been collected after a month, we will provide 14 days' notice to your estate of our intention to dispose of the belongings, which may include their re-sale. Any costs associated with the disposal will be charged to your estate and any money obtained, if belongings are sold, will be credited to your estate.
- 1.3 If you have paid fees in advance, if you have made any overpayments or if we have been holding money on your behalf, then this will be refunded to your estate within 28 days of your death.

Example (b)

- 1.1 In the event of your death this agreement will end and payment of fees will cease 3 days following the date of your death, or less if your room has been cleared of your possessions **and** is re-occupied before the 3 days' period has expired. We require that personal possessions be removed within 3 days following your death. If this is not possible, we will clear the room and store items. There will be a reasonable storage charge of £20 per day.
- 1.2 If personal possessions have not been collected after a month, we will provide 14 days' notice to your estate of our intention to dispose of the belongings, which may include their re-sale. Any costs associated with the disposal will be charged to your estate and any money obtained, if belongings are sold, will be credited to your estate.
- 1.3 If you have paid fees in advance, if you have made any overpayments or if we have been holding money on your behalf, then this will be refunded to your estate within 28 days of your death.

Example (c)

- 1.1 In the event of your death this agreement will end and payment of fees will cease 3 days following the date of your death, or less if your room

has been cleared of your personal possessions **and** is re-occupied before the 3 days' period has expired. Subject to term 1.2, we require that your personal possessions be removed within 3 days following your death, and if this is not possible, we will clear the room and store items. There will be a reasonable storage charge of £20 per day.

- 1.2 If your relatives or representatives would like access to your room beyond the period set out Term 1.1 above, within 3 days following your death they may seek an extension in writing, setting down the longer period ("the longer period"), which we will not unreasonably refuse. Fees will remain due for the longer period. If at the end of the longer period, the room is not cleared of your personal possessions, we will clear the room and store items. There will be a reasonable storage charge of £20 per day.
- 1.3 If personal possessions have not been collected after a month following your death, or the expiry of any longer agreed period (1.2 refers), we will provide 14 days' notice to your estate of our intention to dispose of the belongings, which may include their re-sale. Any costs associated with the disposal will be charged to your estate and any money obtained, if belongings are sold, will be credited to your estate.
- 1.4 If you have paid fees in advance, if you have made any overpayments and/or if we have been holding money on your behalf, then this will be refunded to your estate within 28 days of your death.

3. What happens if providers do not comply with consumer law?

Action by consumer law enforcers

- 3.1 The CMA is already taking forward action against certain care home providers that it considers are unfairly charging fees for extended periods after a resident has died, asking them not to enforce their terms. It may also decide to open further investigations against other providers before the publication of its final advice, if it identifies serious concerns about potential breaches of consumer law. In relation to the issues covered in the draft advice, once it is finalised we will expect all other care home providers to review immediately and, where necessary, change their contract terms and practices or risk action. In order to comply care home providers may need to take steps such as:
- (a) reducing the duration of the period after the death of the resident during which they continue to charge fees;
 - (b) reducing the duration of the period after death of the resident during which they expect a third party to continue paying a top-up fee;
 - (c) stop charging the residents' estate, or their personal representatives, for any 'shortfalls' in FNC contributions;
 - (d) dealing fairly with the disposal of the deceased's possessions; and
 - (e) ensuring contracts terms are clear and transparent.
- 3.2 In addition to allowing action by public enforcers (see paragraph 3.3 below), the Consumer Rights Act enables individual consumers to benefit directly from its protections. A term (or consumer notice) which is found to be unfair is not enforceable against a consumer, and any money paid by a consumer because of that term is recoverable by them. A consumer may resist making payment on the basis that the term is unfair. Attempting to enforce an unfair term (for example by a care home claiming a deduction for fees charged after death is due from a deposit or pre-paid residential fees on the basis of the term) may amount to a misleading action under the CPRs.
- 3.3 Non-compliance with consumer protection law could result in enforcement action by the CMA, local authority Trading Standards Services or, in Northern Ireland, the Department for the Economy. All have powers to enforce the consumer protection legislation referred to in this advice and can bring civil proceedings or (in relation to certain breaches) criminal prosecutions, as

appropriate. Where appropriate, enforcers can also seek compensation or other remedies (such as the right for the resident to cancel the contract) where consumers have suffered loss as a result of the unfair terms or practices giving rise to the enforcement action.

- 3.4 This does not mean that enforcement action must or will be taken in respect of each and every infringement. Instead, enforcers will usually promote compliance by the most appropriate means, in line with their enforcement policies, priorities and available resources. There are a range of compliance options available to enforcers alongside enforcement, including education, advice and warnings. Further guidance on the CMA's approach to use of its consumer powers can be found on the CMA webpages.¹⁷

Action by sector bodies

- 3.5 Sectoral regulators, namely the Care Quality Commission (England), the Care Inspectorate (Scotland), the Care (and Social Services) Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) may also take action in respect of any breaches which fall within the scope of their respective remits. Use of contract terms or practices, which infringe consumer law, may therefore lead to regulatory action by these bodies (insofar as they contravene applicable regulations, standards or guidance).
- 3.6 The Local Government and Social Care Ombudsman in England may also take the CMA's compliance advice into consideration in reaching decisions on relevant complaints about care homes.

¹⁷ [CMA58 - Consumer protection enforcement guidance](#)

4. Questions for consideration

- 4.1 Does this draft advice cover all the relevant practices related to the charging of fees and handling of possessions after a resident has died? If not, what else should this advice include?
- 4.2 At paragraphs 2.5 to 2.14, in the context of determining the length of the period (if any) that fees can fairly be sought after the resident's death, we describe the legitimate interests of the resident/their representatives (e.g. a reasonable time for the resident's family to clear the resident's room) as well as those of the care home (e.g. including terms in the residential care agreement which ensure swift recovery of the room). In this context:
- (a) Do you agree that the draft advice has taken into account considerations which are relevant? If you think that some or all of the considerations taken into account are not relevant, please explain your reasoning, with any supporting evidence.
 - (b) Are there other considerations, which you consider are relevant, which we have not taken into account (either explicitly – see for instance paragraph 2.7- or by omission)? If you consider there are further relevant considerations, please provide details, with any supporting evidence.
- 4.3 In relation to the proposed three days' period for which payment of fees may be fairly permitted following the resident's death and therefore, during which, the resident's family will have continuing access to the resident's room, (see paragraph 2.9 onwards):
- (a) Do you agree that three days is likely to usually be a reasonable period for the resident's family to have access to the resident's room following their death, given for example their difficult circumstances and the need to remove possessions from the resident's room?
 - (b) If you consider the three days' period is too short or too long for the resident's representatives to pay fees and/or have access to the resident's room following the resident's death, please explain why and put forward your suggestion for what period would be more appropriate for the sector along with the supporting evidence for your suggestion;
 - (c) Please also set out at what rate you consider it would be reasonable for the resident's estate to continue paying for this period of ongoing access to the room, with supporting reasons and information.

- 4.4 Of the three example terms, as set out in the table in paragraph 2.32:
- (a) Are there any which you consider would not be workable based on your experience? Please give your reasons and any supporting information.
 - (b) Please provide us with any concerns or comments that you have on these illustrative terms.
- 4.5 As referred to at paragraph 2.14, a further approach which may also be acceptable could be for fees to be payable for the shorter of the following two periods: a) until possessions have been taken out of the room by the resident's representatives or b) a period (a "stop date") which could be 7 or 10 days after death.
- (a) Would this type of obligation be workable in practice based on your experience? Please give your reasons and any supporting information.
 - (b) What would be a reasonable "stop date" period in these circumstances? Please give your reasons and any supporting information.
- 4.6 Are there any circumstances in which it would be impossible or disproportionate for the home to store or attempt to sell items that have not been cleared?
- 4.7 Do you have any other comments about this draft advice or the supporting Appendix B attached to this consultation document?

5. Consultation process

- 5.1 We are publishing this consultation on the CMA webpages and sending it to a range of interested parties to seek views on the questions set out in [Section 4](#) of this document.

Duration

- 5.2 This consultation will run for four weeks, from 19 January to 16 February 2018. Responses should be submitted by post or email, by no later than **5pm on 16 February 2018** and should be sent to:

Care homes consumer consultation team
7th Floor
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD

Email: carehomesconsumer@cma.gsi.gov.uk

How to respond

- 5.3 Please respond to as many of the questions as you can and support your answers with any evidence or examples you may have.
- 5.4 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation (including those representing consumer or business interests). If the latter, please make clear who you are representing and their role. The data use statement below sets out how the CMA may use information provided to it as part of this consultation.
- 5.5 We have also produced a short online questionnaire which we would like relatives and representatives of deceased residents to complete to set out their experiences and views.

Data use statement for responses

- 5.6 This section sets out how the CMA may use the information provided to it during the course of this consultation.

- 5.7 The information you provide will help to inform the CMA's final advice for care home providers in relation to fees charged after death.
- 5.8 We may wish to refer to comments received in response to this consultation in future publications. Where appropriate, we may also use the information you provide in the carrying out of the CMA's other functions (for example, in enforcement action) or may share your information with another regulator or public authority (such as local authority Trading Standards Services). However, we may only publish or share information in specific and limited circumstances set out in legislation (principally Part 9 of the Enterprise Act 2002). In particular, prior to any publication or any such disclosure, we must have regard to (among other considerations) the need for excluding, so far as is practicable:
- (a) any information relating to the private affairs of an individual which might, in our opinion, significantly harm the individual's interests; or
 - (b) any commercial information relating to a business which, if published or shared, might, in our opinion, significantly harm the legitimate business interests of that business.
- 5.9 If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 5.10 Any personal data you provide to us will be handled in accordance with our obligations under the Data Protection Act 1998 and with other legislation designed to protect individual privacy.
- 5.11 Further details of the CMA's approach can be found in the Transparency and Disclosure: Statement of the CMA's Policy and Approach (CMA6)¹⁸ and the CMA's personal information charter.¹⁹
- 5.12 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of EA02.

¹⁸ See www.gov.uk/CMA-transparency-and-disclosure-statement

¹⁹ See www.gov.uk/CMA-personal-information-charter

Compliance with the Cabinet Office Consultation Principles

- 5.13 This consultation is compliant with the latest Cabinet Office Consultation Principles. The Cabinet Office Consultation Principles criteria can be found at www.gov.uk/government/publications/consultation-principles-guidance

After the consultation

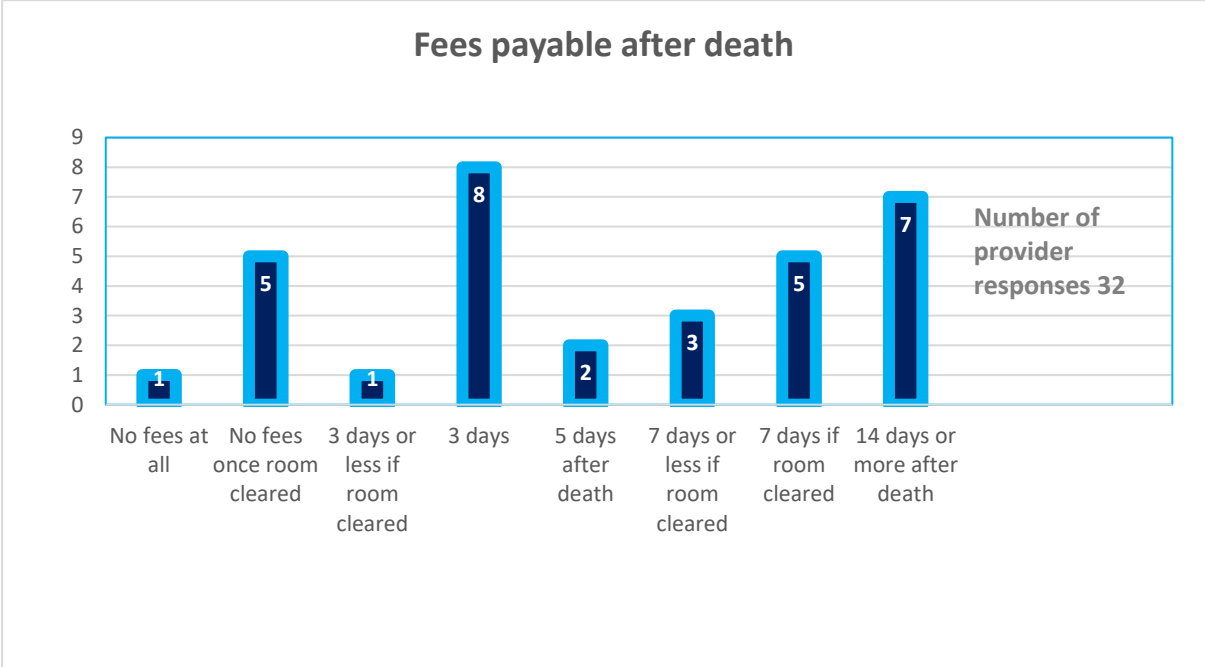
- 5.14 We intend to collate responses to the consultation and publish an anonymised summary of the responses received that fall within the scope of the consultation. At the same time, we intend to publish the final version of the compliance advice for care home providers in relation to fees charged after death, in Spring 2018. These documents will be available on our webpages at www.gov.uk/cma and respondents will be notified when they are available.

Appendix A: Overview of providers' terms and policies - charging fees after death

Questionnaires to largest providers

A1 As part of the CMA's market study, requests for information (RFIs) were sent to 32 of the largest care home providers,²⁰ which collectively account for 30% of total beds in the UK market. One of the questions asked related to the length of time fees remain payable after a resident has died. The responses, as illustrated in chart 1 below, indicate that a large number of providers charge no fee, or charge no fee as soon as the room is cleared of possessions, or only charge fees for three days²¹, following the death of the resident. By contrast, relatively few charge fees for 14 days or more.

Chart 1



Online survey

A2. Also as part of the market study, the CMA designed an online survey for care home providers, the aim of which was to gain some understanding from a larger number of providers about certain practices. This survey included questions about:

- (a) the length of time fees are charged after a self-funding resident has died; and

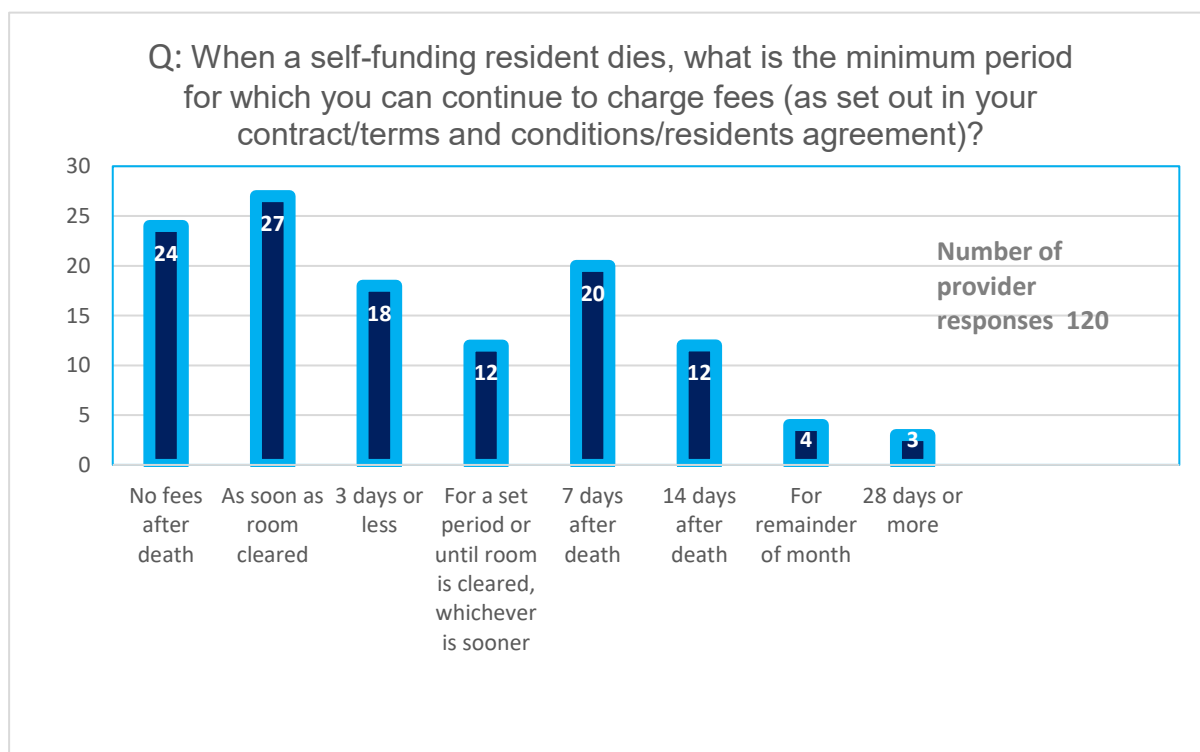
²⁰ Identified by the CMA based on a list of the care homes with 25 beds or more.

²¹ Some of these will charge less if the room is cleared before three days

(b) whether pro-rata refunds are provided if a room is re-let.

- A3. Invitations to take part in the survey were disseminated to care home providers by a number of trade associations, and 120 providers responded to question (a) above and 78 responded to question (b) above.²² Because this number represents a low proportion of the overall population of care home providers in the UK (which we estimate to be around 5,500²³), the results should be interpreted with caution and there is a heightened risk that respondents are not representative of providers across the UK as a whole. Consequently, we look only at broad patterns of responses rather than precise numbers.
- A4. As shown in chart 2 below, following the death of the resident, a large proportion of the respondents either charge no fee at all, or charge no fee as soon as the room is cleared of possessions or a fee for 3 days or less. By contrast, relatively few charge fees for 14 days or more. This is consistent with the responses to our RFIs to the 32 large suppliers.
- A5. Further, most respondents to the online survey also confirmed that they do provide a pro-rata refund if the room is re-let during the period for which fees are due for a period following the death of a resident.

Chart 2



²² A larger number responded to the survey but some did not answer this question.

²³ See paragraph 6 of the [care homes final report](#).

Appendix B: The relevant legislation and CMA's detailed views

Introduction

- B1. The purpose of this Appendix is to set out in detail the relevant consumer protection law and explain in detail how, in the CMA's current view, it applies generally to the charging of fees after the death of care home residents. It covers the application of the Consumer Rights Act 2015, Part 2 (the CRA), and selected provisions of the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) to:
- (a) Terms, in self-funded residents' contracts with care homes for long term residential care, which require all or part of the residential fees ("fees")²⁴ to be paid for a period following the resident's death.
 - (b) Terms requiring the self-funded resident's estate, or their personal representatives, to meet any shortfall in the fees payable during a period following the resident's death because Funded Nursing Care (FNC) contributions are no longer paid to the home, following the resident's death.
 - (c) Provisions made in an agreement between a home and a third party who is topping up the fees for a publicly funded resident which, for a period following the resident's death, oblige the third party to meet all or part of the local authority's contribution which has ceased on or shortly after the resident's death.
 - (d) Terms which cover the care home's right to deal with the deceased's uncollected possessions.

The relevant legislation

Consumer Protection from Unfair Trading Regulations 2008 (the CPRs)

- B2. The CPRs provide consumers with a range of protections from unfair commercial practices which distort their decision-making. The CPRs, for instance, prohibit commercial practices which fail to meet a standard defined particularly by reference to honest market practice, where there is likely to be an appreciable impact on consumers' ability to make an informed decision. They also prohibit practices which

²⁴ Reference to "fees" for the purpose of this Appendix means the monthly or weekly residential fees payable under the contract which cover the primary services of accommodation and care as well as such essential services as meals and laundry. If provision is made in the residential care agreement for only a proportion of such fees to be paid after the resident's death, for example to cover the accommodation element of the primary service only, then reference to "fees" [for the purpose of reading this Appendix] should be construed accordingly, unless specific reference is made to the accommodation or care element of the fees.

mislead, either by action or omission, where the consumer's decision making is likely to be affected²⁵.

Consumer Rights Act 2015, Part 2 (CRA)

- B3. Part 2 of the CRA applies to all terms (including negotiated terms) in contracts between a trader and a consumer. The CRA applies a test of fairness to terms in a consumer contract. 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**" (our emphasis)²⁶. The assessment of fairness takes into account the nature of the subject matter of the contract, all the circumstances existing when the term was agreed, and all the other terms of the contract or any other contract on which it depends. The CRA also applies substantially the same test of fairness to consumer notices.
- B4. Part 1 of Schedule 2 of the CRA illustrates the meaning of fairness by including a non-exhaustive and illustrative list of terms that may be unfair (the Grey List terms). All of the following Grey List terms may be relevant to post death charges:
- "(5) A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
 - (6) A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.
 - (11) A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.
 - (14) A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.
 - (15) A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price when the contract was concluded.
 - (18) A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

²⁵ For detailed guidance on the CPRs, there is a joint BERR/OFT document issued in 2008 - 'Guidance on the Consumer Protection from Unfair Trading Regulations 2008' (OFT1008).

²⁶ Section 62

- B5. An unfair term or notice is not legally binding on consumers and enforcement action can be taken to stop their use or recommendation for use. Where a consumer has paid money because of an unfair term, this money is recoverable by the consumer. Further, enforcers may seek an order requiring the trader to refund these sums, for example by means of an Enterprise Act Part 8 Enhanced Consumer Measure.
- B6. The CRA also requires that a written term of a consumer contract or a consumer notice is “transparent.” A key requirement of transparency is that consumers should be able to understand clearly the nature and extent of their rights and obligations.

Main Subject Matter and Quality/Price Exemption

- B7. The CRA includes an exemption from the fairness test in Part 2 for terms that deal with the main subject matter of the contract or the adequacy of the price, provided they are transparent and prominent.²⁷ The CMA’s view is that the exemption does not apply to the terms covered by this guidance.
- B8. The exemption in the legislation provides that a term may not be assessed for fairness to the extent that:
- it specifies the main subject matter of the contract; or
 - the fairness assessment would be of the appropriateness of the price payable under the contract, by comparison with the goods, digital content or services supplied.
- B9. Only terms which specify what the Court of Justice of the European Union (CJEU) has called the “very essence of the contractual relationship” fall within ‘the main subject matter of the contract’ part of the exemption. Such terms “must be understood as being those that lay down the essential obligations of the contract and, as such characterise it” as against terms which are “ancillary to those that define the very essence of the contractual relationship”²⁸.
- B10. A price-setting term, which falls within the second part of the exemption, can be assessed for fairness except to the extent that the assessment relates to the appropriateness of the price as against the services, goods or digital content

²⁷ Due to the nature of post death charges, the CMA considers that it is very difficult for care home providers to render them sufficiently prominent to benefit from the exemption. Lack of prominence is not a ground for challenge, but it does mean that the term is fully assessable for fairness. Based on the CMA’s understanding of how care home contracts are entered into, it is unlikely that the average consumer would be aware of the terms relating to post death charges, and we have seen no widespread evidence of these terms being actively brought to consumers’ attention before the contract is entered into, so that they are made aware of it.

²⁸ See the CJEU decision of C-26/13 *Aprad Kasler and Hajnalka Kasleme Rabai v OPT Jelzalogbank Zrt* at paragraphs 49 and 50.

supplied in exchange. This means that the level of the price cannot be assessed against the value of the product. Such a term may still be assessed, however, on grounds other than the appropriateness/adequacy of the price. The CJEU, for instance, has indicated that for an assessment to fall within the second part of the exemption it is necessary for there to be something (such as a service) provided in exchange for the price paid. Without this, the assessment of the term will not fall within the second part of the exemption, given that an assessment of the appropriateness of a charge against the services provided in exchange cannot arise.²⁹

- B11. Moreover, the CRA provides that this exemption does not apply to a term that corresponds to a term set out the Grey List (see paragraph B4 above). Such terms are always fully assessable for fairness even when they are transparent and prominent.

Terms which require fees to be paid following the resident's death

Applicability of the main subject matter and quality/price exemption

Not Main Subject Matter Terms

- B12. Terms which define the period of payment of fees following the resident's death cannot in the CMA's view benefit from "the main subject matter" part of the exemption. Such terms cannot be categorised as essential obligations, which characterise a contract for personal residential care. It is the CMA's view that the death of the resident strikes at the root of the contract, making the contract radically different to that contemplated by the parties at the time of contracting. Terms dealing with the parties' rights and obligations after the resident's death are therefore clearly ancillary matters. In addition, the obligation to make payment following the resident's death may not even arise, given that it is contingent upon the death of the resident occurring during performance of the contract.

Price/quality part of the exemption not applicable

- B13. Further the second part of the exemption does not apply. The price payable under the contract for the care and residential services that the resident contracted to receive is outside the scope of this Advice. Rather, the CMA is concerned with terms which set out the period of time, after the resident has died, which require fees to continue to be paid after the provision of the services contracted for has ceased.
- B14. In addition, we consider that it is relevant that where services are not provided in exchange for a fee then the term cannot benefit from the second part of the

²⁹ See *Kasler*, as above, at paragraph 58 and C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank Romania SA* at paragraphs 70 and 71.

exemption (see paragraph B10 above). Once the contract has ceased to be of any benefit at all to the resident's estate (for example, once the deceased's possessions have been removed from the room) then a term which permits fees to continue to be paid in these circumstances is fully assessable for fairness.

- B15. Furthermore, as indicated above, a term which specifies the main subject matter of the contract or sets down the price payable can only benefit from the exemption if it is both transparent and prominent. If such terms are not transparent and prominent, the exemption does not apply and they are fully assessable for fairness.

Grey List terms cannot benefit from the exemption

- B16. Moreover, regardless of their form or mechanism, terms requiring, part or full, fees to be paid for a period after the resident's death which have the object or effect of terms on the Grey List will be fully assessable for fairness (see paragraph B4 above).

Paragraph 5 (second half) of the Grey List

- B17. A term which has the object or effect of requiring the resident's estate to pay for services, which are not supplied by the home, are fully assessable for fairness. Therefore, terms that require, for example, the resident's estate to pay fees in exchange for care services, which can no longer be provided after the resident's death, are (to that extent) fully assessable for fairness. Similarly, so are terms which require the resident's estate to pay full fees, after the contract for the provision of residence and care has to all intents and purposes ended (see paragraphs B21 to 24 below).

Paragraph 18 of the Grey List

- B18. A term which requires the continual payment of full fees for a period following the resident's death potentially has the effect of requiring the resident (or their estate) to fulfil all of their obligations under the contract (namely the payment of full fees), whilst the care home is absolved from providing care services absolutely. It is the CMA's view that this is precisely the type of potential unfairness which is covered by paragraph 18 of the Grey List.

Paragraphs 5 (first half) and 6 of the Grey List

- B19. In addition, we consider that the following terms are likely to have the object or effect of the Grey List terms, paragraph 5 (first half) or paragraph 6 and therefore are fully assessable for fairness: namely terms that require fees to continue to be paid if the resident's estate fails to remove the deceased' possessions:
- within a reasonable period (following the resident's death); and/or
 - within a reasonable time, which is stipulated in the contract.

Such terms have the object or effect of imposing disproportionate financial sanctions onto the resident's estate, given that a point of time is likely to arise when the home should take reasonable action to mitigate their loss by removing and storing uncollected possessions themselves. In these circumstances, rather than continuing to charge fees, it seems more appropriate to require the resident's estate to pay a reasonable charge for storage. This is precisely the potential unfairness covered by paragraphs 5 and/or 6 of the Grey List.

Assessment of fairness: CMA's approach

- B20. A term is likely to cause a significant imbalance if it alters the balance in the rights and obligations that the law would have struck in the absence of the term³⁰.
- B21. The CMA considers that it is likely that absent a term specifically keeping the contract alive after the death of the resident, the common law would imply only those terms that are necessary for the effective operation of the contract, and which both parties would have agreed to if the term was suggested.
- B22. We consider the crux of this analysis is for what, if any, period would **both parties** to the residential care contract have a legitimate interest in the contract continuing, after the resident's death. For the reasons explained below, we consider that such a period is likely to be short.

The legitimate interests of the resident

- B23. Upon the conclusion of the contract, we consider that it would be a reasonable expectation of a resident (or their representatives) for the resident's family to have access to the room for a period after a resident's death. This would allow, for example, the usual arrangements regarding the removal of the resident's body (if they died in the home) to be completed and for the family to pack up or collect the resident's possessions.
- B24. On the basis of our current understanding of the usual activities and procedures following the resident's death, we find it difficult to see how the contract of residential care can continue to be of any benefit to the resident or the resident's family after the resident's possessions are removed from their room. At this point, the room can be described as "returned to the home", allowing the home to get on with the process of preparing the room for the next resident. The deceased's family will no longer require a right to access the room and their relationship with the home regarding the contract for the provision of residence and care is in substance normally over.

³⁰ See *ParkingEye Limited v Beavis* [2015] UKSC 67 at paragraph 105 and the CJEU Case C-415/11) *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* at paragraph 68.

The legitimate interests of the home

- B25. We consider that the home has a legitimate interest in charging some fees for a short period for which the resident's family (or representatives) need access to the room. Because no personal care services can be provided, there is an argument that the home has no legitimate interest in charging full fees, since the staff can be deployed in other ways. Indeed, there are homes which do not charge fees after death. However, where the payment period of time is very short, on the basis of the current information before us, we would not object to full fees continuing to be charged. It is our current understanding that upon the death of a resident, staffing levels and operational costs cannot be significantly reduced.
- B26. We also recognise that homes have good reasons for including a term which helps to ensure they can gain swift recovery of the room, subject to fair wear and tear³¹ but free from the deceased's possessions, following a resident's death. The care home provider has a legitimate interest in being able to get on with preparing the room for the next resident as soon as possible, and charging the resident's estate while the room remains unavailable, incentivises swift return of the room.
- B27. We have heard from some homes that they want the outgoing resident to pay because they need time to get the room ready for a new occupant, or may have a prolonged vacancy following the resident's death. We do not think that the common law would imply a term requiring a deceased resident, under a contractual licence, to continue paying beyond the time that the room has been cleared and handed back³². Nor do we consider it fair to do so. The death of a resident is an inherent risk of providing care home services, which care homes can and should factor into their financial modelling when setting the residential fees. Care home providers also have strategies at their disposal which allow them to minimise the risk of a prolonged period of under occupation following the death of a resident, such as marketing the home and keeping details of prospective residents. In contrast, the resident has no control over their death or its timing, or the re-occupation of the room. Therefore, after the death of the resident, we do not consider that it can be said that the home has a legitimate interest in keeping the contract alive, so as to ensure a resident and/or their estate share with the home the burden of a potential period of under-occupation arising from a resident's death.

³¹ We would be concerned if the resident's estate was required to compensate the home, in any way, for fair wear and tear to the room arising from the deceased's occupation. We are unlikely to object, however, to a term which requires the resident's estate to pay for any reasonable costs reasonably incurred by the home to rectify any damage to the room or the home's furniture (if supplied by the home) which was caused by the resident whilst they were alive.

³² The CMA is not aware of any type of licence agreement which obliges the occupant to continue to pay a fee when the contract is effectively over, on the basis that it allows the licensor time to prepare the room for the next occupant.

B28. In addition, a number of terms we have looked at provide for the deceased resident's estate to continue paying even after the room has been re-occupied by another person. We can see no basis for such terms being fair, since they permit the home to charge twice for the same room. Moreover, at this point we consider that under the common law the contract between the deceased resident's estate and the home will have clearly been determined early by verbal agreement or by conduct, even if it were kept alive beyond the death of the resident. No fee should be payable after this point or, if it has already been paid in advance, it should be refunded.

Other considerations

B29. We consider that the significant imbalance arising from a term, which extends the obligation to pay fees for longer than is necessary or proportionate is contrary to the requirement of good faith.

B30. The requirement of good faith requires a business "dealing fairly and equitably with the consumer" to be able to reasonably assume that the consumer would have agreed to the term had the contract been negotiated on equal terms. We do not think that a resident (or their agent), who has bargaining strength comparable to the home's, would agree to pay residential fees during a period when the contract ceases to be of any benefit to them or their estate³³.

B31. The fact that local authorities do not typically appear to continue to pay fees for any period following death, or at most do so only for a limited number of days (e.g. normally up to 3 days) provides some support for the contention that the well informed, who are on equal bargaining terms with the home, would not agree to terms which require payment for an extended period following the resident's death.

B32. Further the requirement of good faith embodies a principle of not only "fair dealing" but also "open dealing"³⁴. Prospective residents (and/or their agents) should not be assumed to be able themselves to identify terms which may operate to their disadvantage or which are likely to surprise them. As stated in the CMA's unfair terms guidance (CMA 37), it is our view that most consumers do not read standard written contracts thoroughly before making transactions³⁵. The chances of prospective residents finding and then focusing on payment obligations which apply if death arises, before entering an agreement for residential care appear to us to be

³³ See *ParkingEye v Beavis*, as above, at paragraph 108 and the CJEU case of *Aziz*, as above, at paragraphs 44, 45 and 69.

³⁴ See *The Director General of Fair Trading v First National Bank plc* 2001 UKHL 52, at paragraph 17.

³⁵ See CMA's unfair terms guidance (CMA 37) at paragraph 2.25

unlikely³⁶. Most people who are seeking a place in a care home are entirely unfamiliar with the subject matter, and therefore unlikely to be on the look out for post death charges. Such terms therefore exploit consumers' unfamiliarity with the subject matter³⁷.

- B33. In any event, even if the term was brought specifically to the prospective resident's (or their agent's) attention early in the resident's engagement with a home, it is unlikely that prospective residents would choose a care home based on the length of the payment period following their death. Given the pressure people are often under to find a care home place, they are also likely to be unable to spend time locating a care home with a more generous post death arrangement. We consider therefore that such terms exploit consumers' necessity.

The stopping of FNC payments, following death and the effect on the Resident's estate (or personal representatives)

- B34. FNC is the contribution paid by the NHS to care homes in England and Wales providing nursing care, in order to support the provision of registered nursing care for eligible residents. We understand FNC payments stop on, or shortly after, the death of a resident.
- B35. During the payment period following a resident's death, we consider that terms which have the effect of requiring the resident's estate (or personal representatives) to make up any shortfall caused by FNC payments stopping are likely to be unfair. The effect of such terms is that the resident, following their death, is subject to an increase in their liability. The resident's estate is obliged to pay more after the resident's death than the resident paid when they were alive. Such terms have the same result as a price variation term and, therefore, it is the CMA's view that these types of terms are fully assessable for fairness (see paragraph B4 above)³⁸. Moreover, such terms are highly unlikely to meet the requirements of transparency and/or prominence and therefore are fully assessable for fairness on this basis too.

³⁶ See for instance Ipsos Mori report, "Care Homes: Consumer Research", July 2017 at paragraph 6.13 onwards. A key finding of the report was prospective residents and their representatives lack of engagement with contracts and terms and conditions.

³⁷ Moreover, following the resident's death, we consider that any payment obligations should be brought to the attention of the appropriate representative of the resident in a timely manner. Failure to do so is likely to be a misleading omission contrary to Regulation 6 of the CPRs.

³⁸ For the avoidance of doubt, we consider this to be the case even when the contract provides for a gross monthly (or weekly) fee payable by the resident and, therefore, whilst the home is in receipt of the FNC payment (i.e. when the resident is alive) the resident's net weekly or monthly liability is calculated by deducting FNC payments received by the home from the gross fee agreed with the resident.

- B36. The policy intention of the FNC contribution is that no resident should pay for the costs of nursing care by a registered nurse (as defined within the legislation)³⁹. These costs should be paid for by the NHS, as underlined by the fundamental principle that health care in the UK is free at the point of use. Upon the death of a resident, the FNC payment is likely to cease or stop shortly thereafter. This is because the nursing care by a registered nurse is no longer needed and cannot be provided to the resident.
- B37. Given that it is the intention of the legislator that the payment of specified nursing care by a registered nurse is the NHS's liability rather than the resident's, it is the CMA's view that to transfer this liability onto the resident after their death (or onto their estate) causes a significant imbalance under the contract to the disadvantage of the resident⁴⁰.
- B38. The CMA considers that to retain the right to recover such payments from the resident's estate is contrary to the requirement of good faith. The practical effect of these types of terms is that the resident is required to pay more for their care after they have died than they were obliged to pay for it when they were alive. If the consequences of these terms were clearly explained to them, we consider that it is highly unlikely that a reasonable resident on equal bargaining terms with the care home would agree to such terms. Their notional lawyer would certainly press for their deletion.
- B39. Further and/or alternatively we consider that the commercial practice of requiring the resident's estate (or their personal representatives) to make up any shortfall in FNC, which cease on or shortly following the resident's death is likely to contravene the requirement of professional diligence of the CPRs. The FNC funding is not properly to be viewed as a subsidy for services that the resident would otherwise be paying for themselves, but rather as payment for nursing services which are appropriately funded by the NHS, above whatever else the resident is paying for. To impose a requirement to pay additional sums to match FNC payments which have ceased, be it through the use of contractual terms in the resident agreement (and/or presenting a final invoice to the FNC payments) falls below the standard of special skill and care to be expected in the field of care homes, not least because it involves charging a resident's estate for nursing care they are not receiving, and which it is the policy of the legislation should be paid for by the NHS. This practice exploits personal representatives' unfamiliarity with the legislation and practices in this field. This is

³⁹ See Section 49 of the Health and Social Care Act 2001 and *R (on the application of Forge Care Homes Ltd and others) v Cardiff and Vale University Health Board and others* [2017] UKSC 56.

⁴⁰ See the CJEU case of C- 226/12 *Constructora Principado SA v Jose Ignacio Menendez Alvarez*. The Court considered a term which obliged consumers to pay for expenses that by law need to be borne by the trader. The CJEU held that the significant imbalance may solely result from a "sufficiently serious impairment of the legal situation" of a consumer through "the imposition on him of an additional obligation not envisaged by national rules" (at paragraph 23).

likely to cause them to take a transactional decision that they would not have taken otherwise - namely to make the full payment of sums which they have no legitimate obligation to pay.

Publicly funded residents: local authority funding, following the resident's death, and the effect on Third Party Top-up Fee Payers

- B40. Similarly, the CMA considers that a provision in an agreement between a care home and a third party, who top-ups the publicly funded resident's fees, is likely to be unfair if it purports to require the third party to make up any of the shortfall in the local authority's contribution following the resident's death.
- B41. The starting point is that obligations and rights in an agreement between a third party top-up fee payer and a care home, in order to meet the requirement of fairness under the CRA, should be consistent with the contract between the home and the local authority. The local authority is likely to have contracted with the care home to stop making any contribution towards the resident's fees, after the resident's death, or to only pay fees for a brief period after death.
- B42. Consistent with the above approach, where the local authority's contribution ceases upon the resident's death or shortly thereafter, it would be inappropriate for the top-up fee payer to become liable to cover any shortfall because of the local authority's withdrawal of funding. This goes far beyond the liability which the third party agreed to - namely to cover the shortfall between the local authority's funding and the full cost of the care that the resident has chosen, while local authority funding continues to be paid.
- B43. At the time of entering the agreement with the home, third parties are unlikely to have understood that their liability would increase following the resident's death, and are unable to escape from, or mitigate against, their new liability at the time it arises⁴¹. It is the CMA's view that these types of provisions clearly take advantage of the third parties' weaker bargaining position as well as their good will to assist the resident while they were alive.
- B44. Further and/or alternatively we consider that the commercial practice of requiring the third party to make up any shortfall in the public funding, which cease on or shortly following the resident's death is likely to contravene the requirement of professional diligence in the CPRs. To impose such a requirement on the third party falls below

⁴¹ When assessing the fairness of variation terms, it is important to take into account the consumer's ability to escape the effects of variation - in particular whether the consumer can realistically escape the impact of the changes by terminating the contract. See in particular CJEU case of C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* at paragraph 54

the standard of special skill and care to be expected in this field, be it through the use of provisions included in their agreement with the care home and/or presenting a final invoice covering the third parties' payment for the period following death. If there are legitimate expenses to be covered, it is appropriate for the care home to negotiate with the local authority to continue to fund these, rather than to pass these costs onto the third party simply because they are less able to bargain.

Left possessions following the resident's death

- B45. Following the resident's death, if possessions are not removed from the home within a reasonable timeframe, which should be transparently set out in the contract, it is the CMA's view that a point of time will arise when the home should take reasonable and proportionate action to mitigate their potential loss arising from a vacant room. Such action includes removing and storing safely the uncollected possessions of the deceased, thereby allowing the home to get on with the process of preparing the room for a new occupant. In these circumstances, we are aware that some providers store items for free, but we would not object to a reasonable storage fee being levied on the resident's estate. We have seen examples of homes charging £20 per day for storage, which seems in principle to us to be a reasonable fee.
- B46. Ultimately, after the passing of a reasonable period, the CMA recognises that the home may have no choice but to sell the deceased's uncollected possessions. However, these items should be disposed of in line with section 12 of the Torts (Interference with Goods) Act 1977. The CMA considers that a term is likely to be unfair, for instance, if it excludes a duty on the home to return any proceeds of sale minus any costs reasonably incurred.
- B47. Details about storage, including if applicable any charges and any timeframes for storing possessions, as well as the process for ultimately disposing of the resident's possessions, should be clearly set out in the resident agreement, and brought to the representative's attention when costs are actually being incurred. We consider that failure to give this information in a timely manner to the appropriate representative of the resident is likely to be a misleading omission contrary to Regulation 6 of the CPRs.