

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

Response to Consultation

31 May 2018

CMA80

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1. Introduction

Background

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority. It is a public authority, which from 1 April 2014 took over many of the functions formerly performed by the Office of Fair Trading (OFT) and the Competition Commission. It aims to make markets work well for consumers, businesses and the broader economy.
- 1.2 Effective enforcement of the law is central to the CMA's purpose. It has powers to enforce a range of consumer laws to tackle practices and market conditions that make it difficult for consumers to exercise choice – this includes powers to protect consumers from unfair contract terms (for which it has the lead role) and unfair business practices.¹ These enforcement powers are shared with other bodies, such as local authority Trading Standards Services.
- 1.3 The CMA also shares with the Chartered Trading Standards Institute (CTSI) the role of providing advice to businesses to drive up standards through clarifying their legal obligations. The CMA generally focusses on sector-specific issues that have emerged from a market study or other in-depth analysis of business practices in a particular market where it has obtained relevant expertise.²
- 1.4 On 2 December 2016, the CMA launched a market study into how well the market for the provision of care home and nursing home services to the over 65s in the UK was working for residents and competing businesses.
- 1.5 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 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 Further details on the CMA's consumer powers and its approach on their use can be found in [Consumer protection enforcement guidance: CMA58](#)

² The CMA primarily provides guidance to businesses on specific issues identified in the course of its market studies, in connection with Part 2 of the Consumer Rights Act 2015 and issues where its particular knowledge of the market makes it best placed to advise business. Other business guidance on consumer law is produced by the CTSI and more information is available on the [Business Companion website](#).

1.6 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 guidance³ to help improve compliance in the sector in Spring 2018.

Consultation

1.7 On 19 January 2018, the CMA launched a consultation on draft advice for providers of care home and nursing home services to the over 65s in the UK.⁴

1.8 The draft advice was primarily in relation to the charging of fees, following the death of a long-term resident,⁵ in particular:

(a) residential fees (for care or accommodation or both) payable after the death of a self-funded or part-funded⁶ 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 resident.⁷

1.9 The draft advice also covered the treatment of the deceased resident's possessions and the transparency of contract terms related to the above issues.

1.10 The draft advice took into account the information obtained by the CMA during its market study work,⁸ in particular from care homes and from relatives and representatives of current and past care home residents.

1.11 We received 28 consultation responses in total. The list of respondents is at Appendix A. We would like to thank all respondents for their constructive engagement in this consultation.

1.12 Alongside the consultation, we sought information from the relatives and representatives of deceased care home residents through an online

³ 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.

⁴ [Care Homes for the elderly – charging fees after death](#)

⁵ The CMA's focus is on long-term residents as opposed to respite residents.

⁶ 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.

⁷ 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.

⁸ [Care homes market study - Final report](#)

questionnaire, to which we received a total of 571 responses. The main questions we asked included:

- (a) How long, after the resident died, did the care home continue to charge fees?
- (b) Did the level of fees change, after the resident's death, and if so did they increase or decrease?
- (c) How long did it take to clear possessions from the deceased's room?
- (d) After the resident's possessions had been removed, did they receive any further services from the home?

1.13 We have carefully considered the consultation responses, the answers to the relatives and representatives online questionnaire and other information received. In section 2 of this document we have summarised the key points made by respondents during the consultation process on the draft advice. Where relevant, section 2 also refers to the responses received to the relatives and representative questionnaire. It then summarises the CMA's response to the points made and advises on the main changes that have been made to the final compliance advice in response to them.

1.14 The final version of the compliance advice can be found on the CMA's care homes case page.

2. Issues raised by the consultation and our response

Introduction

2.1 The CMA's consultation on draft compliance advice for care homes on the charging of fees after death invited responses to the questions shown in bold below. The key points made by consultation respondents are summarised below each question, followed by the CMA's response.

Question 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?

2.2 The majority of respondents agreed that the draft advice covered all the relevant practices.

2.3 Some respondents, however, identified other practices that should be included in the advice. These related to the advice needing to:

- (a) also cover the terms in the agreements between the Local Authority (LA) and the care home, which set down the LA's liability to continue to pay fees after the death of a resident who was fully funded by the LA;
- (b) cover further specific situations relating to the care home's handling of possessions, for instance, including the need for an inventory of possessions, where care homes have limited storage and may need to use third parties, where the residents' possessions are unwanted or of no value and where the resident does not have any family;
- (c) cover further transparency points including advising care homes that they should make a clear distinction in their residential care agreement between the terms that oblige a living resident to terminate the agreement by serving notice and the terms that apply when a resident dies;
- (d) set out a reasonable and specific timescale as to when refunds must be made to residents' estates; and
- (e) provide clarification as to how quickly the CMA expects care homes to update their Terms and Conditions in compliance with the new guidance, recognising the impact this will have on some providers' financial models.

CMA response

- 2.4 We respond to each of the issues summarised above.
- 2.5 Reflecting the clear scope of the legislation which the CMA enforces, the CMA's draft advice focussed on the contract between the care home and those acting as consumers. Albeit a secondary consideration, we also note that the potential for **financial** detriment is unlikely to arise for fully funded residents, following their death. This is because any liability to continue to pay a fully publicly funded resident's fees following their death is met either by the LA or the National Health Service (NHS).⁹
- 2.6 We have considered the detailed points made relating to a care home's handling of a resident's possessions, but are not taking a position on each of these points in the final advice. This is in line with our objective to keep the final advice focused on broad principles that can be easily applied to care homes, regardless of their specific circumstances.
- 2.7 Notwithstanding this approach, following consideration of the representations made, the final advice acknowledges more clearly the important issue, for some care homes, of the limited availability of storage for uncollected possessions. The final advice therefore makes clear that we are unlikely to object to terms which permit the charging of fees until possessions are removed by a resident's representative, subject to safeguards. In relation to uncollected items of no value, the final advice recognises the possibility of a care home disposing of uncollected items, where appropriate.
- 2.8 In relation to how quickly the CMA expects care homes to act on the final advice, if the term is unfair we would expect care homes to stop enforcing the term immediately. As the final advice notes, in this context, an unfair term is not enforceable against a consumer, who has themselves the right to challenge a payment obligation under unfair terms legislation. The CMA considers that the final advice makes sufficiently clear review and amendment should be undertaken without delay, that is as soon as possible.
- 2.9 We have considered the transparency points raised by respondents and clarified in the final advice that terms relating specifically to the resident's rights and obligations following their death should be brought to the

⁹ The NHS arranges and funds care for individuals who are not in hospital but have been assessed as having a 'primary health need'; this is called Continuing Health Care (CHC). Unlike the LA process, CHC is not means-tested as it is part of the NHS commitment to health care that is free at the point of delivery. The NHS also contributes to the nursing care costs of some other people who are not in a care home primarily because of health issues. This is through funded nursing care (FNC) contributions, which are flat rate contributions to fees, paid directly to care homes.

prospective resident's attention. We have also ensured that all references to the payment period for refunds are time limited to 'a 28-day period'. More substantially, we have also accommodated the fact that delays may arise, where the person to whom refunds are to be made has not been identified by the care home.

Question 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 (eg a reasonable time for the resident's family to clear the resident's room) as well as those of the care home (eg 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 2.7¹⁰ – or by omission)? If you consider there are further relevant considerations, please provide details, with any supporting evidence.***

Question 4.2 (a)

2.10 The majority of respondents either agreed that the draft advice was in the main based on relevant considerations or made no comment. However, alongside this consensus, some respondents identified a number of issues that were taken into account by the CMA in its draft advice, and which they considered to be irrelevant. They are summarised below.

Period for which LAs pay

2.11 A substantial number of respondents disagreed with the CMA that the period after death for which LAs continue to pay fees is a relevant consideration when setting a benchmark for the period for which self-funded residents (or their estate) should continue to pay fees following their death. Contrary to the

¹⁰ The reference to paragraph 2.7 should have stated paragraph 2.8.

CMA's statement that the LA is a '*well informed party on equal bargaining terms with a care home provider*' (paragraph 2.9 (c) of the draft advice), it was submitted that the LA is in fact in a dominant position to the care home, imposing upon care homes terms which determine the LA's continued liability (if any) following a publicly funded resident's death. One respondent noted that this was clearly the case for a small care home. It was also highlighted by some respondents that Clinical Commissioning Groups ('CCGs') operate similarly, imposing these types of terms onto care homes.

2.12 When taking issue with the draft advice's reference to terms agreed between LAs and care homes, various respondents also submitted one or more of the following points:

- (a) The CMA said, in its market study findings, that LAs are paying fees below the true cost of delivering care and one respondent noted that this was particular true for premium homes;
- (b) When determining the level of fees, LAs have to take into account a variety of competing interests on public funding, which means compromises need to be made including the fact that fees following a resident's death do not, or do not necessarily, align with the interests of the resident's family; and/or
- (c) Some LAs do pay fees for longer than the three day period, which is the payment period referred to by the CMA.

Evidence relied upon by CMA

2.13 A number of respondents disagreed that it was relevant for the CMA to consider the evidence obtained from care homes, as part of its Market Study (see paragraph 2.9 of the draft advice) because the evidence was insufficient to justify the CMA's position. One or more of the following points were submitted by a number of respondents, in support of their view:

- (a) The reference to the survey results of "the largest UK care home providers", relied upon by the CMA only related to 32 providers and these providers were selected on the basis that they had more than 25 beds. Therefore, it was unclear whether the survey represented a significant proportion of providers providing private self-funded residential care in the UK.
- (b) The CMA misleadingly concluded that "a large number of [the 32] providers charge either no fee, or charge no fee as soon as the room is

cleared of possessions, or only charge for three days”¹¹ given that less than half of the 32 providers (ie 15) fall within this category.

(c) It was not clear whether those that “only charge fees until the room is cleared of possessions”, charge for a short or a long period.

2.14 Some respondents also considered that the results from the CMA’s online survey, in which 120 care homes took part,¹² illustrate that the number of care homes who charge seven days fees following a resident’s death was not disproportionate to the number of care homes, when taken separately, who charge no fee, no fee once the room is cleared or only charge for three days.

2.15 A few respondents disagreed that it was relevant for the CMA to consider the evidence and feedback from relatives and representatives of the deceased, as cited in the draft advice (see paragraph 2.9(c)), because:

(a) The evidence was said to be very limited, it was not proactively sought by the CMA and not sufficient for advice which will apply across the care home sector;

(b) No attempt had been made by the CMA to try to understand how the amount of time needed by residents’ families, following a resident’s death, may vary between the different types of homes offered in the market (eg premium or standard);

(c) The evidence was at odds with the respondents’ own experience, given that many resident’s families are willing to pay fees for an extended period following the resident’s death, particularly when their circumstances mean that the family needs a longer period to access the resident’s room; and/or

(d) It was not clear whether the information related to self-funded residents as, in their experience, it usually takes longer to clear their rooms than publicly funded residents, as they have more possessions.

Question 4.2 (b)

2.16 Some respondents cited one or more other considerations as being relevant, but not taken into account, or not sufficiently taken into account, by the CMA when determining the length of the period for which fees can fairly be sought after the self-funded resident’s death. These considerations include the

¹¹ Appendix A of the draft advice at paragraph A1

¹² Appendix A of the draft advice at paragraph A2

following, starting first with the perspective of residents, before turning to the interests of the care homes and finally setting out general considerations put forward by respondents:

Residents

- (a) Residents are told about the relevant terms prior to admission and agree to pay fees for a certain period following their death;
- (b) Contrary to the draft advice at paragraph 2.8, a resident can plan for their death upon entering a home;
- (c) Insufficient weight had been given to the fact that the family needs to go through this extremely difficult time without any time pressure; and/or
- (d) The draft advice showed a lack of understanding that families' circumstances vary and it may be impractical for them to clear the resident's room within short time frames. For example, some families do not live locally to the care home and difficulties may arise in cases where a professional is dealing with the resident's affairs, especially when death has occurred over a weekend.

Care homes

- (e) The CMA's approach does not recognise¹³ that after the death of a resident, care and accommodation services continue: for example, the care home provides support to the grieving family, various notifications are required by the regulator, possessions are checked and the room has to be cleaned;
- (f) High fixed costs remain after a resident's death, so, for instance, the charging of fees after death should be viewed by the CMA as analogous to a reasonable notice period, which contributes towards the recovery of a care home's fixed costs;
- (g) Reference was also made to the fact that in other markets or sectors, if an individual dies then charges still continue, and in particular when a tenant in the private rented sector dies, their rent liability continues;
- (h) The ability of the care home to mitigate the loss of income from an unoccupied room is minimal (see paragraph 2.8 of the draft advice). One

¹³ Reference was made specifically to paragraph B18.

respondent, for example, referred to an average period well in excess of a month to re-let a room;

- (i) Following a period of long term occupation, there is a transition period to get the room ready for a new resident which includes redecoration, refurbishment and deep cleaning. One respondent advised that prospective residents want to see their future room before accepting an offer of a place, which cannot be done if the room has not been prepared; and
- (j) It was also submitted that the costs of preparing the room for the new resident should not be borne solely by the home.

General

- (k) The draft advice fails to take account of the significant differences in the sector between the types of consumers and care homes, particularly between those homes at the premium end of the market (where residents furnish their rooms) and those at the standard end;
- (l) An inevitable consequence of the CMA's draft advice would be an increase in the weekly or monthly residential fees paid by self-funded residents, which would disadvantage, in increasing scale, those that reside in the home the longest; and
- (m) The withdrawn Office of Fair Trading's guidance on unfair terms in care home contracts (OFT 635), sought to limit post death charges to 4 weeks and the CMA has failed to give a clear rationale as to why it disagrees with that view.

CMA response

2.17 The CMA has carefully taken into account all respondents' views on the relevant considerations that should be taken into account when determining the length of the period (if any) for which fees can fairly be sought after the resident's death. Below we illustrate how the considerations referred to above have been taken into account when formulating the final advice or where they have not been considered relevant, we provide reasoning for this. The order in which we cover the respondents' points mirrors the summary above.

LA's payment period

2.18 We recognise that LAs have a strong bargaining power in this market and that when entering contracts with care homes they will need to take into account a

number of considerations. The draft advice however also referred to the Scottish National Care Home Contract (“NCHC”),¹⁴ which provides for a payment period of three days following death. We have been informed that this is generally a workable and acceptable period. Therefore, we consider that the NCHC term is of some assistance when considering what would be a reasonable duration for which to continue to charge fees in a self-funded resident agreement, albeit we accept it is not enough by itself, or a decisive factor, to determine this.

Evidence relied upon in draft advice

- 2.19 In relation to the survey results of the 32 care homes, we note that these homes collectively account for 30% of the total number of beds in the sector. Taking into account the representations made on the CMA’s interpretation of this data as presented in the draft advice, we consider that it is relevant and it can be clearly surmised from the survey that of the 32 care home providers, 15 charge no fee, or charge no fee as soon as the room is cleared of possessions, or only charge fees for three days.
- 2.20 In relation to the online survey of 120 care homes, we agree that the number of care homes who charge fees for seven days following a resident’s death (20) is not significantly higher or lower than the number of care homes, when taken separately, who either charge no fee (24), no fee once the room is cleared (27) or only charge for three days (18). Nevertheless, 42 care homes (35%) either charge for three days or less or do not charge fees at all.

Evidence from former residents’ relatives

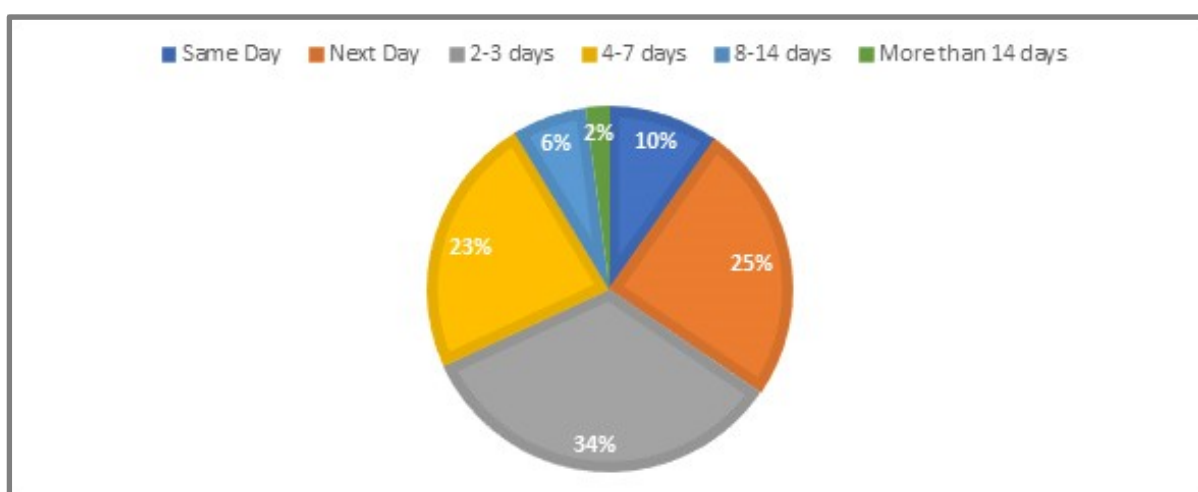
- 2.21 We recognised that the evidence received from members of the public as part of the market study could be viewed as somewhat anecdotal, and, as part of the consultation on the draft advice, we gathered more evidence from relatives and representatives of deceased residents, through a short online questionnaire. We received 571 responses in total.¹⁵ Most of the responses related to self-funded residents, 23% related to part-funded residents and just under 10% related to fully State funded residents.
- 2.22 The CMA acknowledges that the results from this online questionnaire have limitations, not least because it is plausible that those who felt that the payment period following the resident’s death was too long may have been

¹⁴ See paragraph 1.17 (c)

¹⁵ However, some respondents chose not to answer all the questions, in part this may have been because some questions may not have been relevant to their circumstances. 410 responses were received in relation to the question about the funding status of the resident.

more likely to respond to a questionnaire of this kind. Nevertheless, we note that the advice, which we have finalised after considering all the consultation responses, is supported by and consistent with the questionnaire results. For example, the final advice provides that the CMA is unlikely to object to terms which permit a care home to charge fees for a fixed period of up to 3 days, following the resident's death. In response to the question about how long it had taken to clear the room of possessions, out of the 534 respondents to this question, 69% cleared the room in three days or less, as follows:

- Same day (52 Responses) - 10%
- Next day (132 Responses) – 25%
- Within 2-3 days (179 Responses) – 34%



Other considerations

Residents

2.23 When entering care home contracts, we consider that usually the primary focus of the resident and their representative will be to find the best home available to them. Most residents and their representatives when seeking a place in a care home are unlikely to be focused upon or look out for the period for which fees are payable following the resident's death.

2.24 The final advice recognises that it is not unfair per se to oblige the resident to continue to pay fees for a period following the resident's death. As the final advice states, this recognises that when the contract is entered into, it is likely that residents would have a reasonable expectation that their representatives will continue to have access to their room for a short period following their death. We accept that it is reasonable for care homes to continue to charge fees during this period.

2.25 After careful consideration of all responses received, the CMA considers that the final advice appropriately balances the legitimate interests of residents to not be obliged to continue paying for a service which they can no longer benefit from at all and the need to ensure that their representatives have a reasonable opportunity to grieve and clear the resident's possessions from the room, without undue pressure. For example, the final advice recognises that the standard periods, under both types of terms which the advice indicates as being acceptable to the CMA,¹⁶ can be extended upon the written request of a resident's representatives. Moreover, in relation to the acceptable type of term in the final advice which links the payment period with the time it takes a resident's representatives to clear the room, this type of term has the effect of putting the resident's representatives in a position of control, being able to determine themselves how long fees should be paid, depending on how quickly they are able to clear the resident's room.

Care homes

2.26 The CMA considers that the flexible approach provided for in the final advice has the effect of enabling each care home to determine which approach best suits its business model:

(a) A fixed three days payment period, for example, provides certainty for care homes regarding the level of income they will receive after a resident's death. It also offers care homes certainty as to when the room will be returned to them, and thereby allowing them to prepare/plan for new admissions; and

(b) Terms which define the payment period by reference to when possessions are removed, accommodate more fully the potential variations in the accommodation offered by homes, particularly at the premium end of the market, which we understand may offer both furnished and unfurnished rooms. Moreover, this type of term may be considered by smaller homes as helpful, given that a few respondents noted that such care homes would have to make arrangements with third parties to store uncollected possessions.

2.27 We accept that there is no flexibility or little flexibility for care homes' staffing levels and fixed operational costs following the death of a resident to be reduced. Nonetheless, we have not been persuaded to change our view that it

¹⁶ The final advice provides that the CMA is unlikely to object to contract terms which permit a care home to charge fees either for a period of up to **three days** from the day following the resident's death, or until possessions are cleared from the resident's room by their representatives, provided that a **reasonable backstop period of no more than ten days** is included in the contract term for fees to cease from that point.

is not proportionate or legitimate for care homes to determine a period for which fees continue to be paid on the basis that time is needed to prepare the room for the next resident. Also, we consider that it is not reasonable to take into account the potential losses incurred by a care home, arising from a period of vacancy, following the death of a resident.

- 2.28 Whilst the time taken to prepare the room for the next resident is clearly a necessary task, which the care home has to undertake to secure the next fee paying resident following a resident's death, it is not work which directly benefits the resident or their representatives, who would reasonably expect that the fees paid whilst the resident was residing in the home sufficiently covered their use of the room including any fair wear and tear.¹⁷
- 2.29 In relation to the potential losses arising from a period of vacancy, the care home is the party to the contract that has strategies at its disposal that would allow it to minimise the risk of a prolonged period of under occupation following the death of the resident. One of these strategies is to use contract terms which incentivise resident's representatives to clear the room and hand it back to the home as soon as reasonably possible. Both the types of terms reflected in the final advice proportionately achieve this legitimate objective of care homes.
- 2.30 We are not persuaded by the comparison made by some respondents between, for example, care home contracts and tenancy agreements. Following the death of a tenant, during a periodic tenancy agreement, if the landlord does not agree a surrender of the tenancy, the tenant's personal representative would be required to give appropriate notice (eg of four weeks) to determine the tenancy, following the tenant's death. However, we cannot see how this position can reasonably be said to be of relevance to care home contracts. The primary purpose of a care home agreement is the provision of personal and 24-hour residential or nursing care to a particular individual. Consistent with this purpose, care home agreements, in the main, are licence agreements and not tenancies. The distinction is important in law. Unlike tenancies, licence agreements, for instance, invest no interest in land to a resident or, after their death, to the resident's estate. In addition, albeit care home residents are offered protection under the Protection from Eviction Act 1977, the notice to quit provisions relating to periodic licences (section 5) are not applicable when the licensee has died.

¹⁷ This is supported by the fact that residents who give notice to terminate the agreement whilst they are alive are normally able to remain in residency during the notice period.

General

- 2.31 The CMA's approach in the final advice does differ from the OFT's guidance on unfair terms in care home contracts. However, this guidance was published in October 2003 and has not been updated. Over the past 15 years, the market has changed and the relevant consumer law has also changed or been clarified, which is reflected in the CMA's approach in its final advice.
- 2.32 As for the impact of the CMA's final advice on the residential fees paid by self-funded residents, we would be concerned if widely drafted and unfair price variation clauses in care home contracts, were relied upon by some care homes to increase residential fees for existing residents on the basis of their contractual terms needing to be amended in line with the final advice. We consider that, as in any market, there are a range of possible of outcomes and that it is not an inevitable consequence of the CMA's final advice that residential fees will increase across the sector.

Question 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.***

Representations in response to Questions 4.3 (a) and 4.3 (b)

- 2.33 Albeit over a third of respondents agreed 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 the resident's death, the majority of respondents disagreed. The reasoning for objecting to the three days period is consistent with those representations, which have been summarised in the context of Question 4.2 above. In brief, the main objections included:

- (a) The three days' timeframe fails to take into account the reasonable amount of time that the resident's representatives need to remove possessions, thereby it would lead to unacceptable pressure being put on families at a difficult time;
- (b) It fails to take into account the differences in the types of care homes operating in the market as well as the wide range of circumstances and wishes of representatives. For example, some representatives may not want to remove possessions until after the funeral;
- (c) The relationship between the home and the resident continues for much longer than three days;
- (d) Such a short, fixed period to remove possessions will lead to a rise in complaints from residents' representatives including from those who will be distressed that the resident's possessions have been packed up, without a reasonable opportunity to remove the items themselves;
- (e) The period will lead to care homes being accused of being insensitive, focusing on turnover rather than recognising appropriately that the room was the resident's home; and
- (f) There will be an increase in the monthly or weekly residential fees for self-funders.

2.34 Of those that disagreed, some put forward alternative timeframes including:

- (a) No fixed period – instead fees will be charged until the room is cleared of possessions, which some care home respondents said was workable and provides the necessary flexibility for residents' representatives whilst incentivising them to remove possessions quickly;
- (b) Fees should be required for a period of three or, in case of another respondent, five days after the room is cleared of possessions; it was submitted that this gives flexibility to accommodate the differing needs of the deceased's family or representative and enough time for refurbishment of the room;
- (c) Fees should be required for seven days, or less if possessions are removed before then;

- (d) Fees should be required for a period of seven days, irrespective of when possessions are removed - it was submitted for instance that this balances the needs of both parties and provides certainty and simplicity as well as allowing sufficient time for representatives to move possessions;
- (e) Fees should be required for a period of 14 days, with some flexibility for this period to be less or more on a case by case basis; it was submitted that this is appropriate and proportionate and based on experience of the average number of days needed for discussions between the home and families, clearance of possessions and funeral arrangements; and
- (f) Fees should be payable for a period of 14 days minimum and then until possessions are removed, with an end date of 28 days. It was argued that this gives enough time for clearing and redecorating the room before it can be viewed for re-occupation. This approach also recognises that fixed costs of the care home remain the same and the approach is sympathetic to the needs of the family.

2.35 Despite variations in what the length of the period should be, many respondents were in favour of fees being charged for a fixed period following the resident's death. Reasons given for this included the need for care homes to have certainty regarding the income which they will receive following a resident's death, the certainty of knowing when the room will be handed back to them so that preparations/planning can be undertaken for new admissions and the simplicity which this approach offers at a difficult time for residents' families and representatives.

2.36 A number of these respondents, who preferred a fixed period, however, caveated their views by agreeing with the CMA's draft advice that terms must reflect the fact that fees will be reimbursed, if the room is re-occupied before the expiration of any fixed payment notice period.

2.37 Some of these respondents also emphasised that provision still needs to be made in the contract for terms which accommodate the specific and varied circumstances and wishes of the representatives by including provisions which allow for the extension of the payment period at the request of the resident's representatives. Other respondents submitted that this type of provision would undermine the clarity and certainty provided by the fixed period (these representations are summarised further under Question 4.4, paragraph 2.51 below refers).

2.38 One respondent advised that account must be taken of sector regulation, when determining a reasonable period for the resident's family to have access

to the resident's room. In this regard they referred to the Care Quality Commission's Key Lines of Enquiry (KLOEs) and to the need for care homes *'to support families in their grief, allowing them space to come to terms with what has happened'*.¹⁸ Further, they advised that care home responsibilities outlined in the KLOEs ought to be regarded as a component element of fees and that whilst care homes' interactions with and support for family and friends are not easily quantifiable, in their view this plainly exceeds the three day period suggested by the CMA.

Representations in response to Question 4.3 (c)

- 2.39 The majority of respondents suggested that the fee rate should remain the same as when the resident was alive. Whilst a few respondents acknowledged that no meals or care would be provided during this time, the majority all pointed out that high fixed costs,¹⁹ which account for most of the fee, remain the same. As any savings would be minimal, respondents suggested that a balanced and proportionate approach would be to retain the fee at the same level. One respondent, whilst acknowledging that there will be ongoing costs to the home, said that the fee should be reduced given some services are no longer being provided, such as meals and laundry services.
- 2.40 Some respondents made clear in their responses that when they referred to the fee rate remaining the same after death, this was in relation to the fee that the resident had been paying, and did not include any State contributions ie from the LA or NHS.
- 2.41 Some respondents took the opportunity to confirm that they do not increase the fee after death, to make up for any shortfalls in State contributions²⁰ that have ceased. In contrast we were informed by some residents' relatives and representatives (through our online questionnaire) that they had been charged for such shortfalls.

CMA response

- 2.42 The CMA recognises from the range of views expressed by respondents that circumstances and preferences may vary between care homes, with some care homes preferring the certainty of a fixed end date for the payment of fees, whilst others prefer the flexibility of linking the payment of fees to the point at which the possessions are cleared from the resident's room. The

¹⁸ [Care Quality Commission's Key Lines of Enquiry](#), R 3.5

¹⁹ For example, staffing and operational costs

²⁰ State contributions might include (a) NHS Funded Nursing Care (FNC) contribution, this is currently £155 a week for nursing services, and/or (b) local authority contributions.

CMA has taken this into account when setting out some options in its final advice for the timeframes that it considers balances the interests of both parties to the care home contract.

- 2.43 Given that any usual timeframes will apply to all residents, regardless of their circumstances, we consider that fairness requires that any fixed period needs to be a short one and no more than three days. Generally, an obligation to pay fees for a longer period following the resident's death is likely to give rise to a significant imbalance in the parties' rights and obligations by extending the payment obligation beyond the point of time when the contract is of no benefit at all to the resident or their representatives. It is the CMA's view that three days is likely to give, ordinarily, residents' representatives reasonable time to remove possessions, without undue pressure. This reflects the type of accommodation offered by care homes (a room) and the nature of possessions that residents can and do normally bring into their rooms.
- 2.44 In arriving at the three days period, the CMA has also taken into account that a number of respondents, including care homes, have agreed that this is usually a sufficient and reasonable amount of time for residents' representatives to remove possessions. Our approach is consistent also with the CMA's online questionnaire to residents' relatives and representatives, undertaken during the consultation period, which indicated a majority of individuals removed possessions within this timescale. Moreover, some care homes are currently charging fees for a period of three days or less following the resident's death, without reporting difficulties arising from such an approach.
- 2.45 Nonetheless, recognising that there was not a consensus amongst respondents on this issue and consistent with some respondents' views, the final advice provides that the CMA would not object to provision being included in the contract for the fixed timeframe to be extended at the written request of the representative, following the death of the resident. Provision is also made in the advice for a term which fixes the payment period by reference to when possessions are removed (see Question 4.5 below).
- 2.46 The CMA is very alert to this being a sensitive time for relatives and specifically, as referred to by one respondent, the Care Quality Commission's KLOEs. Nonetheless, the final advice makes clear discussions with resident's representatives about their rights and obligations should take place as soon as possible after the resident's death.
- 2.47 Further, the final advice, in line with the CMA's draft advice, provides that provision should be made in the care home contract for fees ceasing to be charged if the room is occupied by a new resident.

2.48 Subject to the position set out in the advice on FNC payments for self-funded residents, the final advice has not extended to whether care homes may charge the full residential fee, in any payment period following death, or charge a fee at a reduced rate.

Question 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.

2.49 To aid understanding of the following responses, the table at paragraph 2.32 of the draft advice, is replicated below.

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 three days following the date of your death, or less if your room has been cleared of your possessions **and** is re-occupied before the three days' period has expired. We require that personal possessions 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 (c)

- 1.1 In the event of your death this agreement will end and payment of fees will cease three 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 three days' period has expired. Subject to term 1.2, we require that your personal possessions be removed within three 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 three 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.

- 2.50 Of those respondents who commented specifically on the example terms, the majority was critical of at least one aspect of all examples or concluded that they were all unworkable in practice. Nonetheless some respondents were in favour of at least one example term, expressing a preference for example (b) or (c). None of these respondents indicated that they were in favour of example (a), that payment of fees will cease on the date of death.
- 2.51 The criticism of the example terms cited by respondents included one or more of the following:
- (a) Charging no fees after death, as per example (a), will lead to shortfalls in revenue, meaning fees may or will need to increase;
 - (b) It is unfair to expect the care home to potentially provide free storage for three days, as market conditions are very challenging, especially for those with a large number of public funded residents;
 - (c) The timeframe of three days (in all example terms) does not give families enough time to grieve before having to think about such matters or make the necessary preparations;
 - (d) Particularly in relation to example (b), the timeframe is inflexible and does not recognise the differing needs of families or representatives, who may want access to the room for a longer period;
 - (e) Linking the payment of fees to the room being re-occupied, as options (b) and (c) do, puts unnecessary pressure on all parties;
 - (f) In relation to example (c), specifically, some respondents noted it:
 - i. is inappropriate to put the onus on a discussion about negotiating an extension to the timeframe for access to the room onto others such as a family member at such a difficult time;
 - ii. creates more uncertainty for the care home, this would potentially delay the entry of a new resident and mean that there was always a period of vacancy; and/or
 - iii. is unlikely that such a request will be made in writing, given the other priorities for grieving relatives. In practical terms it is most likely that the request will be made verbally. This leads to uncertainty as what was agreed and will be reliant on each party's recollection or the care home's written record.

2.52 Many respondents raised concerns about all the examples in respect of the wording included about the storage and disposal of possessions. These concerns centred on one or more of the following:

- (a) The examples do not acknowledge the differences in care homes and the type of personal possessions held, for example:
- some homes do not store items due to a lack of space;
 - some homes will store items for free or will charge a fee;
 - some residents bring in valuable and/or large items,²¹ whilst others bring in very little that is of no or minimal monetary value;
 - some residents have no one for the care home to contact about their possessions; and
 - some items are not wanted and the estate refuses to collect them.
- (b) The examples fail to recognise that charges for storage would differ. For example, there are regional differences in storage charges and charges, if any, would depend on the type of possessions. For example, a third party may be needed to collect and store large items;
- (c) The examples do not consider the additional costs of insuring any valuables, the risk of transporting possessions to external storage facilities and the increase in complaints relating to the removal of possessions;
- (d) Contrary to the examples, uncollected items should not be sold;
- (e) There should not be any responsibility on care homes to store possessions and take any further action beyond 28 days - subject to contracts having clearly set out what would happen after this period; and/or
- (f) A month, as the example terms suggest, is not long enough as the final stop date for representatives to retrieve uncollected possessions.²²

CMA response

2.53 After careful consideration of all comments on the example terms, the final advice does not include examples of terms which the CMA considers are less likely to be unfair. We consider that such examples will not add to the clarity of

²¹ Which may require contractors to remove items

²² Three months was suggested as an alternative.

the final advice, which clearly explains the types of terms which we are unlikely to object to.

2.54 In reaching this decision, we have also taken into account how respondents understood the example terms' purpose. The purpose in giving these examples, as explained in paragraph 2.32 of the draft advice, was to provide a practical illustration of the CMA's approach and thereby assist with responding to the consultation. In addition, as explained in footnote 16 of the draft consultation document the fairness assessment takes into account a number of factors including for instance the other terms of the contract. Therefore, the CMA was not, as some respondents appear to have thought, advocating that these terms should be copied by care homes. It was not, for example, our intention to suggest that it would be appropriate, regardless of whether it reflected the costs reasonably incurred by care homes, to charge £20 per day for stored items nor was it our intention to state that storing uncollected items for 28 days, regardless of other terms in the contract and so forth, was fair.

Question 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 ten 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.

2.55 Whilst, the majority of respondents favoured the period of payment of fees following a resident's death to be a fixed period, some respondents either considered that linking the payment period to the removal of possessions (by representatives) was the fairest approach or, at least, noted the benefits and workability of such an approach. Those respondents who rejected the option proposed in Question 4.5 altogether, emphasised the following:

(a) The lack of certainty it provided for care homes over both the period of time for which fees would be received and when the room would be

returned to the care home, thereby leading to delays in new admissions or voids in occupancy;

(b) The failure to provide residents' representatives with certainty and simplicity, at a difficult time; and

(c) The fact that this approach would be difficult or impossible to administer.

2.56 Nonetheless, other respondents, including some care homes favoured linking the payment period with the removal of possessions, noting for instance that:

(a) it was workable in practice; and/or

(b) it incentivised resident's representatives to remove possessions as soon as possible without pressure, whilst accommodating representatives' preferences and circumstances (including the need to remove large amounts of furniture).

2.57 Views from respondents on the duration of the backstop period were mixed, albeit several respondents considered the payment period should be from when possessions were removed or up to seven days, whichever was earlier, whilst a couple of respondents considered that a backstop of up to ten days would be reasonable for this type of provision. Further, a couple of other respondents said that fees should be paid for a fixed period of three or five days, after possessions had been removed.

CMA response

2.58 The CMA has set out some options in its final compliance advice, that it considers to be fair to both parties, for the period for which fees can usually continue to be charged following a resident's death. One of these options will 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 "backstop period") of up to ten days after death. This gives a flexible option to those care homes who prefer not to use terms which oblige possessions to be removed within a short, fixed period and gives control to representatives to limit the extent to which fees are paid subject to room clearance. It also incentivises representatives to move possessions as soon as possible, thereby allowing homes to prepare for the next resident.

2.59 The final advice refers to the fact that the CMA is unlikely to object to a backstop period of ten days or less. The draft advice referred to a back stop of seven or ten days. After considering the consultation responses, the final advice provides for the possibility of the longer period. This approach takes

into account that many respondents emphasised that the circumstances/wishes of representatives are varied. We consider that a backstop period of up to ten days should accommodate, within the bounds of fairness, the potential for this type of variation.

- 2.60 Moreover, the ten days period takes into account the overall effect of the term of putting the resident's representatives in a position of control, being able to determine themselves how long they are prepared to pay fees following the resident's death.
- 2.61 Therefore, the backstop period serves a different purpose to the fixed, short period. In addition to providing an element of certainty for the care home, as to when the room will be handed back to them, it recognises that a point of time will be reached when it is reasonable for the care home to remove the resident's possessions themselves. Such positive action is reasonably to be expected, after an appropriate lapse in time following the resident's death, as it enables the home to get on with the process of preparing the room for the next resident, thereby reducing any potential losses arising from the loss of a resident in this way.

Question 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?

- 2.62 Several respondents provided examples of circumstances where it would be impossible or disproportionate to store or attempt to sell items that have not been collected. The examples included:
- (a) the lack of storage space, especially at smaller care homes, to store anything, or a lack of storage space for large items such as furniture, and so uncollected possessions may need to be stored off site by a third party;
 - (b) some care homes, especially in rural areas, not having easy access to external storage facilities;
 - (c) some low value, poor condition and/or unwanted items not being worth storing or selling; and
 - (d) attempting to store and/or sell items being disproportionate, as staff time will be taken away from more important things in order to arrange external or on-site storage or the items' sale, deal with the storage costs or sales

proceeds and potentially deal with any disputes which may arise about the sale values obtained with the deceased's estate.

- 2.63 A number of respondents pointed out that there are other options to storing and selling unwanted items such as donating the items, or proceeds, to charities or to the care home or where the items are of low value or damaged, disposing of them.
- 2.64 A few care home respondents advised that they did not want to be obliged to have to store and/or sell possessions. In their view, the responsibility for dealing with the possessions rests with the deceased's estate and offering such services may result in families expecting it rather than taking on the responsibility themselves. One respondent advised they would be willing to provide the family with a list of local storage firms.
- 2.65 A number of respondents advised that family members at times refuse to collect the deceased's items or cannot be contacted and the care homes are left with unwanted possessions and have to deal with their clearance, but not through choice.
- 2.66 One respondent pointed out the impracticability of storing or selling certain items such as pets, important legal papers (share certificates) and the ashes of a deceased spouse.

CMA response

- 2.67 The CMA recognises that contract terms and/or practices concerning the storage of possessions are more varied than the draft advice indicated. The CMA has therefore revised and expanded the relevant content in the final advice. For example, the final advice recognises that in some circumstances it may be proportionate to dispose of possessions. Also, the final advice has not included example terms given the risk that they may be misconstrued as appropriate across homes, when a single approach is not necessarily tenable.
- 2.68 Given that a number of the points made on the handling of uncollected possessions were fairly fact specific, we have not dealt with them all in the final advice. This approach is in line with our objective to keep the final advice focussed on broad principles that can be easily applied across care homes. In relation to the handling and disposal of uncollected possessions it is important that care homes act consistently with the obligations imposed upon them by the general law or specific statutes such as the Torts (Inference with Goods) Act 1977. It is this type of approach which guided the CMA's final advice on these issues.

Question 4.7

Do you have any other comments about this draft advice or the supporting Appendix B attached to this consultation document?

2.69 The comments received included the following:

Third party top-up payments

2.70 Some respondents commented on the contributions that third parties sometimes make towards the fees of LA funded residents, namely top-up payments,²³ and what happens to such payments after the death of a resident. Details are as follows:

- (a) A few respondents advised that some care homes make clear that the contractual arrangements with any third party will be, or need to be, consistent with the terms of the agreement between the care home and the relevant LA.²⁴ This means that third party top-up payments would cease at the same time as LA funding for the deceased stops;
- (b) One respondent advised that in the minority of cases, where they contract directly with the third party for the top-up fee, they will charge the third party for a longer period, consistent with their self-funded contract; and
- (c) A couple of respondents put forward the view that it is not unlawful for a care home to charge top-up fees for a period after death that is longer than a LA will pay and is consistent with the period, which the care home requires self-funders to pay.

Application of consumer law to terms which determine the length of the payment following the death of a resident

2.71 In addition to the points raised above, a couple of respondents raised detailed legal points on the CMA's interpretation of the law and its applicability to terms

²³ 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 they would like to secure a better room in the same care home, then their family or friends (ie a 'third party') can pay a 'top-up fee' to make up the difference between what the LA will pay and the fee required by the care home for the additional requirements of the resident.

²⁴ Under the statutory guidance to the Care Act in England, where an LA is meeting someone's needs by arranging a care home, it is responsible for contracting with the care home and for paying the full amount, including where a third party 'top-up' fee is being paid. Although the guidance says that where all parties are agreed the LA may choose to allow the third party to pay the care home directly for the 'top-up', it does not recommend this and makes clear that LAs should deter such arrangements because 'multiple contracts risk confusion' and the LA may be unable to assure itself that it is meeting its responsibilities.

which permit the charging of fees after a long-term, self-funded resident's death. These included one or more of the following:

- (a) Terms which permit the charging of fees after death are not subject to the fairness assessment in Part 2 of the Consumer Rights Act 2015 (CRA). Such terms benefit from the exemption in the legislation relating to price terms.²⁵ Accordingly, the CMA's assessment is excluded by this part of the exemption, given that it is essentially assessing the appropriateness of the price against the services provided;
- (b) The CMA has erred in law as it has elided the fairness test under section 62 of the CRA with the common law test for the implications of contractual terms. These tests are very different; and
- (c) The CMA would err in law if it were to find that the fairness test under section 62 of the CRA requires an assumption that the supplier and consumer have equal bargaining power. Rather for a term to be unfair the term must be objectively unreasonable ie outside the range of the contractual terms that a reasonable supplier and consumer (in the particular circumstances in question) would have agreed in individual negotiation.

CMA response

Third party top-up payers

- 2.72 We respond to the above points in the order that they are summarised above, dealing first with third party top-ups²⁶ and then the more general points regarding the CMA's interpretation and application of the CRA, Part 2.
- 2.73 The CMA's view remains that any third parties paying top-up fees should not be required to pay fees after a resident has died for a longer period than the associated LA agreement. The terms of any third-party agreement must be provided on the LA's terms.²⁷
- 2.74 The CMA's view is that obligations and rights in an agreement between a third-party top-up fee payer and a care home, in order to ensure compliance with

²⁵ Section 64(1)(b) of the CRA.

²⁶ We note that in some limited circumstances the person receiving care can pay a top-up.

²⁷ See for instance, for England, the Care and Support and After-care (Choice of Accommodation) Regulations 2014, Regulation 3(1) specify the conditions which must apply in order for the local authority to be required to meet the adult's preference for accommodation. Regulation 3 (1)(e) provides "where the preferred accommodation is not provided by the local authority, the care home of the accommodation agrees to provide the accommodation to the adult on the local authority's terms."

consumer law, should be consistent with the agreement between home and the LA. The latter, for example, 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.

- 2.75 Requiring a third party to pay for a longer period after death than the LA does – merely because it has been agreed between all the parties that the top-up should be paid directly to the care home rather than via the LA – is problematic under consumer law. It is likely to be a breach of the professional diligence provisions of the CPRs and the obligation to pay for longer is likely to be an unfair term, as it is contrary to specific sectoral regulation and contrary to the requirement of good faith.

Applicability of the CRA

- 2.76 Consistent with the reasoning set out in its draft advice, it is the CMA's view that its assessment of fairness is not subject to either of the exclusions provided for in section 64 (1) of the CRA, including the part of the exemption which limits the fairness assessment of price setting terms ('the second part of the exemption'). The type of assessment which is excluded by the second part of the exemption is limited to an assessment of the appropriateness of the price against the services provided in exchange.²⁸ The CMA's assessment does not challenge the relevant terms on this basis. The CMA is not challenging, for example, the level at which the weekly residential fees are set during a period following the resident's death nor is it challenging the nature of the services provided under the care home contract in exchange for those fees, either before or after the resident's death. Rather the CMA challenges the fairness of terms to the extent that they oblige fees to be paid beyond the point in time when the contract has stopped being of any benefit at all to the resident or their representatives.
- 2.77 The CMA has not elided or in any way confused the tests as to whether a term would be implied at common law with the fairness test. The CMA's assessment begins with a comparison of the contractual terms in issue with those that would be implied by the common law absent the term. This approach to assessing fairness is consistent with case law on the interpretation of the significant imbalance element of the fairness test.²⁹ Moreover, our analysis takes full account of the fact that the assessment of

²⁸ The law has been considerably clarified by *the Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6, by the European case law [see for example the CJEU case of C-20/13 *Aprad Kasler and Hajnalka Kasleme Rabai v OPT Jelzalogbank Ztr* at paragraphs 54 to 58 and C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank Romania SA* at paragraphs 55, 70 and 71] and the CRA, Part 2.

²⁹ C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* at paragraph 68

fairness does not stop there. The significant imbalance must be contrary to the requirement of good faith (See Appendix B, paragraph B29 onwards of the CMA's consultation document in particular).

- 2.78 The CMA does not consider that it has erred in law when concluding in the consultation document that “We do not think that a resident, 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 estate” (see paragraph B30 of the consultation document). Our approach is in line with the leading and relevant CJEU case of *Aziz*³⁰ and is consistent with a key purpose of the Unfair Terms Directive, which is to protect consumers, who are assumed under the Directive to be in a weaker position, in terms of bargaining power and level of knowledge, vis a vis the trader. Moreover, unfair terms are non-binding on consumers, reflecting the Directive's aim to re-establish equality between the trader and the consumer.

³⁰ See the CJEU case C-415/11 *Aziz*, as above, at paragraphs 44, 45 and 69. The key word that the respondent's analysis seems to have missed from, for instance, paragraph 69 of the *Aziz* Judgment are as follows in bold “the national court must assess for those purposes whether the seller or supplier, **dealing fairly and equitably** with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contractual negotiations”.

Appendix A: List of respondents

Consultation responses were received from the following:

1. Akari Care
2. Avery Healthcare
3. Balhousie Care Group
4. Barchester Healthcare
5. Brighterkind
6. BUPA UK
7. Care England
8. Care Forum Wales
9. Care UK Community Partnerships Limited
10. Four Seasons Health Care Ltd
11. Hallmark Care Homes
12. London Trading Standards
13. Melrose Care Ltd
14. MHA
15. Ourris Properties Ltd and Ourris Residential Homes Ltd
16. Sanctuary Group
17. Scottish Care
18. Solicitors for the Elderly
19. Somerset Care
20. Sunrise Senior Living Limited
21. The Convention of Scottish Local Authorities
22. The Fremantle Trust
23. The Local Government and Social Care Ombudsman
24. The Society of Chief Officers of Trading Standards in Scotland
25. Which?

3 Individuals