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To whom it may concern,

Domestic heating oil suppliers: Use of fair terms and conditions

The Competition and Markets Authority (CMA) has a wide range of legal powers which it may use to examine and address problems found in markets. These include specific powers to enforce consumer protection law, both directly and through the courts.

The CMA's main consumer enforcement powers are also shared with other bodies, such as local authority Trading Standards Services. Further information about the CMA's consumer powers and functions can be found in Consumer protection: enforcement guidance (CMA58).

CMA action in relation to domestic heating oil

The CMA has recently intervened over concerns that some domestic heating suppliers cancelled orders when heating oil prices, and demand, surged following the conflict in the Middle East. The CMA has secured voluntary compensation from suppliers after finding that hundreds of customers who ordered through an intermediary site were affected.

Suppliers' contracts may already contain clauses which seek to limit their liability where they fail to perform their contractual obligations on time or at all, for example because of disruption in the market. Alternatively, suppliers may be planning to redraft their standard terms and conditions to include specific provisions relating to such disruptions in new contracts.

The CMA is therefore publishing this open letter to suppliers of domestic heating oil to remind them of the requirement that the terms and conditions in their contracts with consumers must be fair and transparent.

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Terms and conditions in consumer contracts must be fair and transparent

The Consumer Rights Act 2015 (the Act) sets out consumer rights when purchasing goods. Part 2 of the Act contains provisions which protect consumers from unfair contract terms and notices used between businesses and consumers.

The unfair contract terms provisions in the Act apply to any terms, written or not, contained in contracts used by suppliers with consumers, whether those terms are individually negotiated or in standard form. They also apply to the wording of any written or verbal announcements or other communications, namely 'notices', intended to be seen or heard by a consumer.

Unfair terms and notices are not binding on consumers, which means suppliers cannot rely on those terms, and may have to repay money paid by consumers under such terms. Suppliers remain otherwise bound by their contracts.

The CMA and other authorities can also take enforcement action to stop the use of unfair terms or notices. This could lead to financial penalties for businesses who breach the requirements of the Act.

The CMA has produced unfair contract terms guidance to help businesses make sure their contract terms and notices are fair and transparent to consumers.

Transparency

A written consumer contract term or written consumer notice must be transparent.

Terms and notices must be expressed in plain and intelligible language, and if in writing, be legible. However, while important, legibility and clarity of language are not enough to ensure compliance. The transparency test requires that terms are presented and explained in a way that enables the average consumer to understand their rights and obligations, assess how the contract will operate in practice, and make informed choices about whether to enter into the contract.

Suppliers are more likely to achieve transparency if they take as their starting point that consumers must be able to understand their rights and obligations and the practical scope and consequences of terms before entering into a contract.

This might include:

- using everyday words in their normal sense
- not using vague or ambiguous wording which might mislead consumers or obscure the meaning of a term – avoiding legal jargon

- organising terms logically, grouped under clear and descriptive headings, and written in short, simple sentences
- giving appropriate emphasis to important, onerous, or unusual terms[1]

Exclusions and limitations of liability

In light of the concerns which the CMA has identified about cancelled orders, the CMA is drawing suppliers' attention to its guidance on exclusion and limitation terms (also referred to as disclaimers or exemption clauses) which seek to remove or reduce a supplier's liability to consumers, including where the supplier fails to perform its contractual obligations or there is a delay.[2]

For example, terms which exclude or limit liability are **less likely to be fair** if they:

- simply exclude all liability, for example where suppliers fail to perform their contractual obligations or there is a delay, whether the supplier is at fault or not
- give suppliers a choice about whether to do anything under a contract while the consumer continues to be bound by the contract, in particular where the supplier can choose not to provide a significant benefit under the contract unless strictly necessary (for example to deal with technical problems or other circumstances outside its control, or protect the interests of other innocent third parties)

Such terms are **more likely to be fair** if:

- they are qualified in a way that consumers will know when and how they are likely to be affected; for example, this could be done by specifying exactly the circumstances in which they can be used – but fairness is unlikely to be achieved where the circumstances in question are effectively under the control of the trader
- the circumstances in which they apply are genuinely outside the supplier's control (and the control of any agents they use, such as a delivery company), not situations which can be the fault of the supplier
- they do not use legal jargon such as 'force majeure' without a clear explanation of what is meant

[1] For more information see the section on the transparency test in the CMA's unfair contract terms guidance.
[2] See, for example, the section in the CMA's unfair contract terms guidance relating to 'Exclusion and limitation of rights and duties'.

- they do not enable the supplier to refuse compensation where it is at fault, for example in not taking reasonable steps to prevent or minimise the effects of the stated circumstances

- there is a duty on the supplier to give notice of any proposal to rely on the term, and a right for the consumer to cancel before being affected by it, without the imposition of a financial sanction or otherwise being worse off for having entered the contract

Domestic heating oil suppliers should review their terms and conditions, in particular any which seek to exclude or limit liability to consumers, to ensure that they are fair.