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Dear Karen and Peter

### **FCA withdrawal of unfair contract terms guidance**

Thank you for your letter dated 22 April 2015, in which you set out your concerns that we withdrew some unfair contract terms material from our website without providing "any real" explanation or substitute guidance. I address the key concerns you raised in your letter in turn below.

1. **It is unreasonable for firms to second guess why the guidance the FCA withdrew is deficient**

We have stated on our website why we have withdrawn some unfair contract terms material. Given that the material no longer reflected the FCA's views on unfair contract terms, we felt that it was important to communicate that fact externally even though we were (and still are) considering how best to update the materials.

2. **It seems surprising that some firms should remain legally bound by undertakings**

As you note, the firms who gave the undertakings we have withdrawn from our website are still legally bound by them. We have had correspondence with those firms affected regarding their undertakings and will continue to correspond with them regarding anything that might affect their undertakings.

3. **It is not helpful to suggest that firms should seek legal advice and not provide explanations on the Court of Justice of the European Union (CJEU) judgments**

It seems to us not unreasonable to suggest that firms may wish to take legal advice on the legal effect of, for example, CJEU case law on their specific contract terms.

In relation to the CJEU judgments, we explain that one of the developments that led us to withdraw material from our website was CJEU case law. We did not provide an

explanation of these judgments as we were of the view that it was more prudent to remove material from our website once we had decided that it no longer reflected our views on unfair contract terms. Whether or not to provide explanations of CJEU case law is a matter we are considering, however, the effect of that case law cannot be altered by any explanations we might provide and we would expect firms to read and consider the case law even where we might have provided an explanation. As our website indicates, the application of CJEU cases will be specific to each firm and its contracts.

4. The FCA is expected to be transparent and it is not clear what considerations led to the removal of guidance

As you identify, we did not have an obligation to consult when we withdrew the guidance relating to unfair contract terms. The considerations that led to the removal of the guidance and other materials are those we put on the website, namely that the material no longer reflected the FCA's views on unfair contract terms, and as we said at the time, we are considering how the material should be updated in light of the Consumer Rights Act 2015, the draft CMA guidance and CJEU case law.

5. You would like us to release another statement stating how firms should respond to the removal of guidance in the interim and which particular aspects of the guidance no longer represent good practice

We make it clear that we are considering whether to issue guidance in this area. Any guidance we issue will be in line with relevant CJEU judgments and any final guidance issued by the CMA, taking account of our strategic and operational objectives. At this stage we are unable to make any further commitments beyond this.

Finally, we do not agree that firms have been left in regulatory limbo. The material still on our website makes it clear that (as has always been the case) we can only give a view on the fairness of a term and not approve terms for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). It is for firms to ensure their contracts are clear and not unfair under the UTCCRs in the context of the product or service in question. We do not have a duty to produce guidance; however we have chosen to do so in the past. Whilst we have withdrawn some material from our website, the website still contains some information which firms might find useful. They can also have regard to:

- Relevant CJEU case law (the most recent being C-96/14 Van Hove)
- Draft CMA guidance which refers to relevant CJEU case law
- OFT guidance on unfair contract terms (OFT 311)<sup>1</sup>

As we have stated before, a firm may also wish to consider seeking legal advice in this area.

Yours sincerely



p.p Claudine Hilton  
Manager  
Consumer Contracts Team

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<sup>1</sup> The CMA board adopted the OFT unfair contract terms guidance (OFT 311). This will be replaced by the new CMA guidance on unfair contract terms once it is finalised.