

Terms & conditions and consumer protection fining powers: Call for evidence

Response from the Simplification Centre, 25 April 2016 to the Department of Business Innovation and Skills call for evidence¹ on ways to make terms and conditions more accessible.

The Simplification Centre is a registered charity which exists to challenge inequalities that arise from difficult information. We have a network of volunteers, mostly professional information writers and designers (and students in relevant subjects), who give their time to develop better ways of communicating complex information for the public benefit (many of whom have contributed to this response).

We welcome the current efforts of BIS to address the problems of unclear Terms and Conditions. In responding to your Call for Evidence we have focused particularly on your appeal for specific views on four practical measures described in your Executive Summary (p5).

- Building on the requirements of the Consumer Rights Act (CRA) for price and subject matter terms to be prominent and transparent so that it is easier to make comparisons between the T&Cs offered by different suppliers.
- Putting key facts together bold and up front (e.g. on two pages)
- Making T&Cs more navigable, by grouping certain terms under clear headings. More specifically, creating themes in T&Cs so that the material that is required by law or regulators is distinguishable from terms that are at the discretion of the parties, or where T&Cs go beyond minimum requirements.
- Encouraging business to enable and support consumers to actively engage with T&Cs. For example, working to reduce the length and complexity of T&Cs to make it more likely that T&Cs have been read and understood by consumers, boosting the confidence of both parties in the agreement.

We found it difficult to use the form provided to express our feedback, partly because neither the business nor the consumer version worked for an organisation such as ours. So we are instead responding in the form of a short report. We first react specifically to these four issues, then we move on to some more general remarks about design processes and solutions which we hope will contribute usefully to the discussion.

Making comparisons easier

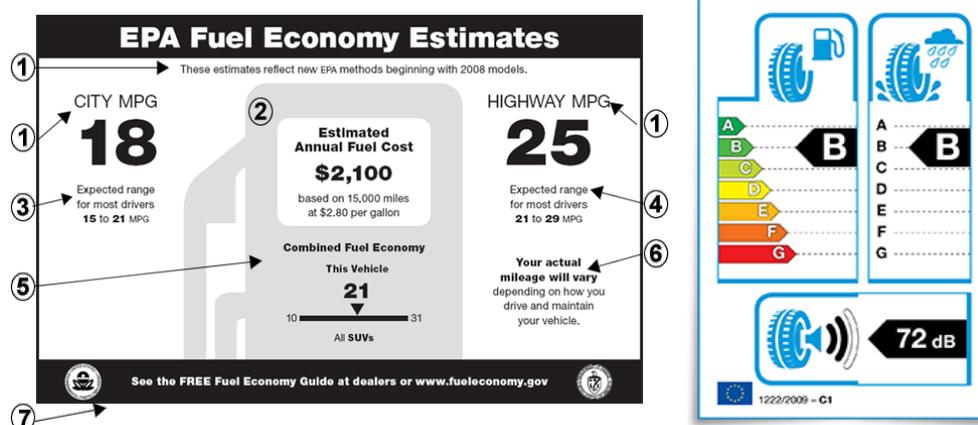
- *Building on the requirements of the Consumer Rights Act (CRA) for price and subject matter terms to be prominent and transparent so that it is easier to make comparisons between the T&Cs offered by different suppliers.*

We broadly support this aim, but point out that prominence and transparency alone do not make comparison easy. For example, the Summary Box provided under the

¹ <https://www.gov.uk/government/consultations/improving-terms-and-conditions>

Consumer Credit Act is designed to make comparison easy, but it fails in this aim because of inconsistent and often poor execution. Inconsistency is perhaps inevitable because each brand uses a different font and layout, and the boxes are also very text heavy. By contrast, nutrition labelling and energy efficiency labelling are both standardised and succinct, and so easier to compare. Below are two examples: the US Environmental Protection Agency fuel efficiency label for cars and the EU tyre label.

Information for quick comparison would, we believe, have to be at this level of consistency and simplicity.



Key facts in bold

- *Putting key facts together bold and up front (e.g. on two pages)*

We support the sentiment behind this idea – to make it easy for consumers to read the most important information. However, we would not recommend that such a specific single solution is insisted upon.

Instead we suggest that you specify desirable outcomes (and ways of assessing if they have been achieved) but leave the methods more open to innovative and creative solutions.

Better navigation

- *Making T&Cs more navigable, by grouping certain terms under clear headings. More specifically, creating themes in T&Cs so that the material that is required by law or regulators is distinguishable from terms that are at the discretion of the parties, or where T&Cs go beyond minimum requirements.*

We strongly support your call for better navigation, which is key to strategic reading – that is, reading purposefully to answer questions, compare information, and explore scenarios.

We also support making distinctions between regulated content (presumably identical in effect if not wording) and discretionary content (which is where service offerings potentially compete on their business terms).

Encouraging active engagement

- *Encouraging business to enable and support consumers to actively engage with T&Cs. For example, working to reduce the length and complexity of T&Cs to make it*

more likely that T&Cs have been read and understood by consumers, boosting the confidence of both parties in the agreement.

We also support this concept. In practice we believe it means making a distinction between T&Cs which consumers genuinely need to understand, and others of a legal and technical nature which will have little likely impact on them. Forcing them to consider the more obscure terms just imposes extra cognitive load. Below we raise the idea of risk assessment to arrive at such a distinction.

Clarifying the implications of the Consumer Rights Act 2015 (CRA) on T&Cs

Moving on to our more general comments, we believe it would be helpful to clarify in a practical way how the CRA's concepts of transparency and prominence should be interpreted.

Section 68 of the CRA states that

“(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent. (2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.”

Plain and intelligible language

The cause of plain language has been well argued for over the last few decades by a number of agencies and campaigning groups. They have met with considerable success although vigilance is still needed, particularly in the case of more specialist products and small suppliers (and in the case of digital products which are often purchased from US suppliers.)²

While the fight for plain English continues, we see the battleground moving increasingly to the issues of legibility and design – and this is reflected in the focus of your Call for Evidence.

Legibility

Personal experiences reported by our team show that however clear the language, many organisations continue to supply T&Cs in barely legible print. Supplying illegible print amounts to not supplying it at all. We suggest that more definitive guidance is given about minimum legibility requirements.

The most thorough recent review of typographic research and practice³ concludes that a 1.4 mm x-height⁴ should be regarded as a minimum (roughly equivalent to 8pt in a font such as Arial). Information that is smaller than that should be regarded as inadequately legible and the content therefore regarded as unsaid – unavailable to consumers and uncommunicated.

² UK consumers find themselves 'agreeing' to T&Cs under US law for much of the software they buy. One of our group, Nick Parker, has published an Open Letter to Apple which addresses this point. *Small print is broken: an open letter to Apple*, accessible at www.nickparker.co.uk.

³ Legge, G. E., & Bigelow, C. A. (2011). Does print size matter for reading? A review of findings from vision science and typography. *Journal of Vision*, 11(5), 1–22.

⁴ x-height refers to the height of a lower-case x.

The RNIB's *See It Right* guidelines call for considerably larger type (11pt Arial), and this raises the issue of how the Equality Act should be applied to the small print. Some of the most vulnerable sections of society (the elderly, and those with poor literacy) generally require larger type sizes.

Duty of Care

The CRA speaks of the 'average consumer', meaning "a consumer who is reasonably well-informed, observant and circumspect." But as your Call for Evidence points out, our standards of observance and circumspection are easily affected by stress and cognitive biases. Moreover, functional literacy is a significant problem in our society – that is, the ability to use complex documents and to cope with quantitative information. And many people also have poor financial literacy.

So we were interested to note in the Competition and Markets Authority (CMA) guidance⁵ on the CRA that:

"To meet the section 68 requirement of transparency ... obligations and rights should be set out fully, and in a way that is not only comprehensible but puts the consumer into a position where he or she can understand their practical significance." (p19).

This view from the CMA implies a duty of care to provide much fuller explanations than is traditional in T&Cs – for example, explanations, exemplars, flowcharts and other aids to comprehension. A number of financial services companies do provide financial education materials (including videos) but we have not found one directly related to the terms and conditions of products.

Risk assessment

We would like to see the concept of duty of care more formally recognised, rather than just implied. One effective way to help companies manage such a duty would be a formal risk assessment process for T&Cs, similar to the health and safety risk assessments which all organisations are familiar with.

A health and safety risk assessment searches out physical risks, assesses their probable frequency and seriousness and recommends mitigating measures that should be taken. Steep steps, for example, might acquire warning signs, handrails, hi-viz edges and non-slip coatings.

A risk assessment of T&Cs would similarly search out potential 'cognitive accidents', and distinguish between

- Information that is also covered by general law or consumer protection legislation, so does not need to be restated.
- a low risk/low impact event (an example might be a change of address, or company reorganisation that results in the transfer of a consumer's otherwise unchanged contract).
- A high risk/high impact event such as a major service failure, or an unexpected exit fee.

⁵ Consumer & Markets Authority (2015) Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015. CMA 37.

The risk level would then be flagged up to consumers, or used to identify something as a key fact (indeed, this term itself implies some kind of assessment). The need to mitigate risks would demand higher standards of presentation for consumer information. We look forward to a time when where professional copywriters and usability specialists are as influential as lawyers in the process of drafting T&Cs.

Information design processes

As a response to your Call for Evidence, risk assessment is a process measure rather than a simple design solution (such as, for example, bold type). Professional information designers and user experience (UX) designers use a range of well-documented processes to arrive at their solutions. These include:

- *Use cases*: identifying typical users and uses of products in order to design appropriate routes through information.
- *User journeys*: these analyse the changing information needs experienced at different stages.
- *Thematic analysis*: information architecture (the overall structure) may reflect major themes as well as user types and their journeys. Thematic analysis is mentioned in your executive summary (p5 of the Call for Evidence) and we welcome this.
- *Risk assessment*: already described – information is prioritised according to a formal risk assessment that acknowledges the risks of misunderstanding, and seeks to mitigate it.
- *Co-designing*: the processes mentioned above can be carried out in cooperation with users themselves, who then also contribute to the co-designing of solutions. Online T&Cs could be linked to consumer comments and questions, which might feed into future versions.
- *Testing*: there is a long tradition of the testing both to refine ideas, and to demonstrate that typical consumers can successfully use and understand the information. This is already built into regulations for medicines labelling and a recent report for the FCA includes a thorough review of alternative testing methodologies.⁶

Companies who can demonstrate the use of best-practice processes would reduce their risk of providing poor or uncompliant T&Cs.

Design patterns and principles

Earlier we remarked that while we support the motive for your bold type solution, a wider range of design options should be considered. We list some of them below:

- *Progressive disclosure*: don't overwhelm people with information, but lead them through it by establishing their full engagement, and sense of relevance before

⁶ Oxera Consulting LLP (2014) *Review of literature on product disclosure*. Financial Conduct Authority.

revealing further levels of detail as needed. This also establishes mental schemas within which new information can more easily be handled. Marketing promises and product descriptions are effectively the first stage of a progressive disclosure, and are in fact subject to regulators' scrutiny as much as the T&Cs.

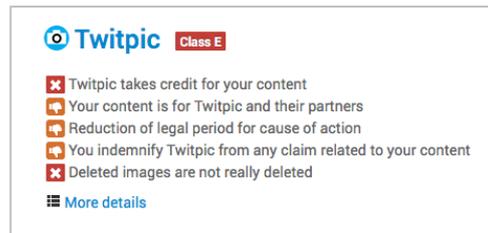
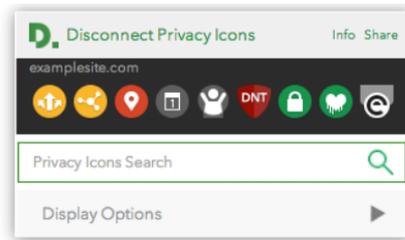
- *Forgiveness*: this is an important concept in interaction design (as in 'Save file before you quit?'). The cooling off period for some products is also a forgiveness feature. For important financial decisions it means checks on misunderstandings and ways to recover.
- *Speed calming*: slow people down if they genuinely need to read something.
- *Decision support*: offer help for complex decisions (eg, where competing products have different T&Cs). Decision support can take the form of flow charts or interactive displays where figures can be entered and scenarios played out.
- *Norms and exceptions*: your concept of separating standard and unique terms is an example of this. By allowing consumers to assume certain normalities, they can focus their effort on exceptions.
- *Product lifecycle*: the product lifecycle can as provide a thematic organisation. This acknowledges different information needs at decision time, start-up, business-as-usual, troubleshooting, and exit.
- *Icons*: it would be possible to direct attention to consistent topics within T&Cs through standardised icons. There are already published proposals such as the EU's 'Model for the display of consumer information about online digital products' (below),⁷ the disconnect.me privacy icons developed by Mozilla (bottom left below),⁸ and 'Terms of Service: Didn't Read' (TSDR) (bottom right below).⁹



⁷ DG Justice Guidance Document concerning Directive 2011/83/EU, June 2014, page 69.

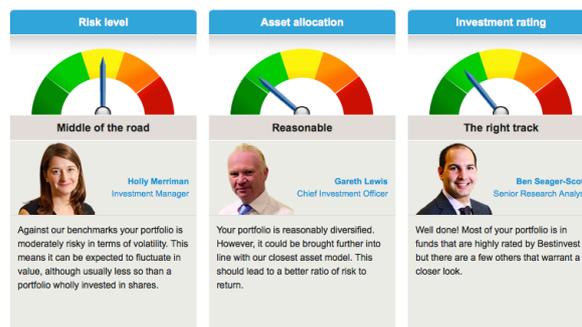
⁸ <https://disconnect.me/icons>

⁹ <https://tosdr.org/>



Icons need to be thoroughly tested and used consistently, as their meanings are rarely as transparent as their creators think. Compare the disconnect.me icons (above left) with the TSDR ones which are amplified by captions.

- *Colour-coded risk warnings*: the energy efficiency labels shown earlier use colour-coding to warn of high energy use. Colour is also commonly used in financial services information to indicate the level or risk (see below, from Bestinvest)



- *Layered text*: layered texts use multi-column layouts to present information at different levels of complexity in parallel. They might, for example, offer a heading layer for skim-reading, an explanation layer, and a legal language layer. Layering can prioritise the consumer-friendly explanations, while still referring to legal concepts when necessary.
- *Swim-lane layout*: Swim lanes show the respective responsibilities of different parties to a contract, and can be effective in demonstrating imbalances in power relations.
- *Data-driven personalisation*: many transactional documents (eg, financial statements, energy bills) and websites present information in a personalised way to prioritise each customer's needs. Some T&Cs have done this also – for example, to avoid presenting terms that relate to products or options the customer does not have.
- *Visualisations*: there is a growing movement of people interested in making legal concepts clear through visualisations such as flow charts, time-lines or even comic book formats.¹⁰
- *Explanations*: encourage direct links to consumer education sources.
- *Reasonable declarations*: 'I have read and understood...' is obviously impossible to declare completely honestly, because we cannot tell if we have fully understood the T&Cs, or their impact on us. Separate stepped declarations

¹⁰ A collection of legal visualisation projects can be found at <http://www.openlawlab.com>

could slow consumers down and make them think about key issues – for example: ‘I understand that there is an exit fee payable if I end my contract early’.

Enforcement

We do believe that innovative and effective solutions should be encouraged by regulators. We have no evidence on which to come to a view on your question about enforcement through fines, but we do have a concern that this might encourage a defensive and legalistic response.

In addition to testing, discussed above, some ideas we considered are:

- *Published ratings for clarity and fairness.* This would be similar to the ‘scores on doors’ approach to restaurant hygiene. However, this would involve an inspection regime which would be unwieldy and inflexible.
- *Minimum readability levels.* Readability formulas (such as are built into the Microsoft Word spell checker) are crude measures but are quite widely used to specify the readability of textbooks, newspapers and technical manuals, particularly in the USA. They focus on word and sentence length, and some also measure the proportion of common words (thus penalising legalese). The Texas Plain Language law mandates that auto finance contracts be written at an 11th-grade reading level by 2017.¹¹
- *Incident reporting:* following common practice in safety management, major misunderstandings might be treated as accidents to be recorded. Companies would log all incidents of complaints, and actions taken to prevent them (this links to risk assessment). Regulators would be able to inspect such logs, and the resulting actions.

Our next steps

We are developing design prototypes to demonstrate some of the concepts listed here, and we will be publishing these under Creative Commons license for free use over the coming months. They will be available on our website: www.simplificationcentre.org.uk.

¹¹ <http://generalcounselnews.com/hudson-here-come-the-readability-police/>