



BT's response to Ofcom consultation
document

"Price Rises in Fixed Term Contracts"

14 March 2013

Executive Summary

We welcome the opportunity to comment on this consultation on Price Rises in Fixed Term Contracts. We support the adoption of Option 4 subject to the following:

- (i) **Exclusion of Pay TV:** Ofcom seeks to align the position on content services (i.e. Pay TV) and on Electronic Communications Service (ECS) as far as possible. This could be achieved by Ofcom issuing guidance on acceptable price variation thresholds for content services for the purposes of the Unfair Terms in Consumer Contracts Regulations (UTCCRs) or by asking Communication Providers (CPs) to sign up to a voluntary code [on price variations in fixed term contract for content services];
- (ii) **Material Detriment Definition for ECS:** the threshold for material detriment is not set at zero, but is set at something objectively justifiable and measureable (for example RPI, or a figure derived from RPI);
- (iii) **Prices in Scope:** the prices in scope are limited only to the core elements of the contract; and
- (iv) **Notice Periods:** all CPs are obligated to give customers no longer than a 30 day exit window in which to leave a contract without penalty (from the date upon which the customer receives a notification of the relevant price rise).

Our proposed approach will give customers greater clarity and certainty when they are contracting with CPs for services. It will also help facilitate greater alignment between telephony (PSTN), broadband (BB) and content which will allow CPs to compete with each other fairly on the markets for these products and services, ultimately to the benefit of customers.

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Key Points

1. We support the need for change in the context of improving transparency and certainty for consumers when they enter into contracts with CPs. BT has adopted a range of different approaches in recent years to the “material detriment” issue, and whilst we have received very few complaints in this context, we agree that it is in consumers’ best interests for Ofcom to prescribe a common approach that all CPs must follow. However, we have the following significant concerns with Ofcom’s proposed approach:

Exclusion of Pay TV Creates Confusion for Customers

2. We consider that the Ofcom consultation document fails to recognise the reality of consumer behaviours and the converged market that now operates in the provision of PSTN, BB and Content services. For this reason, we would support creating a regime that would facilitate greater alignment between the treatment of ECS and of content services. We believe that the introduction of a “zero threshold” for ECS would unfortunately militate against alignment and that would not be a good outcome for consumers.

3. If Ofcom does not seek to address the issue of content services, those CPs who provide them will still be able to rely upon unilateral price variation clauses in their contracts. Whilst such clauses may be subject to challenge under the UTCCRs, this would have the unfortunate effect of defeating the very goal that Ofcom is seeking to achieve through the adoption of Option 4.

4. There is now a growing converged market for PSTN, BB and Pay TV services. Market research indicates that a very significant proportion of households are now bundling these services together and choosing to take them from the same provider. Currently many of the major CPs are marketing their services as PSTN, BB and Pay TV bundles and Ofcom’s Communications Market Report of 2012 shows that 19% of UK households buy triple play bundles. Many of the other major players in this market have identified the same issue. We believe that their submissions will also argue for a consistent approach to cover these services. A consistent approach would also make it simpler for consumers to understand.

5. Moreover, if Ofcom do not address the issue of content services, it is unclear how the proposed regime would apply in cases where CPs offer triple-play bundles for a single, aggregated price. CPs would have the ability to increase the price of bundled service by saying that the price rise attaches solely to the Pay TV element. This would not be a sensible outcome or a desirable one for the consumer, who may not understand that changes could apply to some services but not all, due to inconsistent regulation.

6. Ofcom has the ability to introduce Guidance under the UTCCRs to bring the regime for content into closer alignment with the conditions for ECS under a modified

GC9.6. Unlike the GC, any such guidance would of course not be legally binding, but it would be open to Ofcom to indicate (as it did in the context of its Guidance on “*additional charges*”¹) that non-compliance might lead to enforcement action being taken. We would submit that any such Guidance should insist upon clarity and transparency in the operation of unilateral variation clauses in contracts for content services. Furthermore, the Guidance should set the parameters for price increases (and other changes) that Ofcom consider to be “unfair” under the UTCCRs. Most CPs would be content to operate within the confines of such a regime if it created certainty and a level playing field between all CPs, and this would also create greater certainty for consumers.

7. Alternatively, we consider that Ofcom could request CPs sign up to a voluntary code of conduct governing price increases (and other changes) in contracts for content services. This could be based on guidance produced for UTCCRs, but would not have to be. This approach would allow for the introduction of a regime (albeit one without formal enforcement powers) that mirrors *exactly* the relevant requirements of the revised GC 9.6. BT considers that this would represent the optimum solution for consumers, offering both certainty and consistency across the full range of services offered by CPs and (subject to the other points raised in paragraphs 2 to 6 above) would be prepared to sign up to such a code.

Material Detriment Definition for ECS

8. The second discrete caveat to BT’s support for Ofcom’s Option 4 relates to the recommended “zero threshold” for price increases to ECS (or, put another way, the proposal that the right to terminate without penalty should be triggered by any price increase).

9. The Consultation Document [at paragraph 1.4] states that “*consumers should receive the contractual bargain they signed up to and legitimately expect, and should be protected against not doing so.*” BT agrees entirely with this statement. However, the Consultation Document then goes on to say that “*terms allowing price increases without giving the consumer the right to cancel without penalty are therefore liable to be unfair*”. We do not agree with this statement, and do not think that it follows from the first extract for the reasons set out below.

10. We accept that CPs should not have complete discretion to use unilateral variation clauses to raise prices (or to introduce other contractual changes) which, by significantly altering the contractual bargain originally made, would have a material adverse impact on consumers. When such changes are made, those consumers who are still within minimum term should be allowed to terminate without penalty.

¹ Ofcom’s guidance on unfair terms in contracts for communication services published November 2010

11. We do not consider, however, that every price increase should trigger the right to terminate. We see no reason, in the case of a contract for services provided on a continuing basis, why a CP (or indeed any other provider) cannot legitimately increase its prices in line with inflation. The majority of contracts between consumers and CPs contain minimum term provisions, with GC9 permitting terms of up to 2 years. However, it is rarely, if ever, a part of the contractual bargain that the price will remain fixed for the duration of the minimum term and in principle we see no reason why consumers have a legitimate expectation that they will be protected from any such increase.

12. We therefore consider that the threshold for detriment (i.e. the point at which the right to terminate is triggered) should be set at RPI, or should at least be RPI-related. We acknowledge that wherever the threshold is set, it needs to be not only fair and reasonable, but also transparent and measurable. It may be sensible, then, to define the threshold in simple percentage terms based, for example, on the previous year's RPI to ensure transparency for customers.

13. We consider that this approach would be fair to both customers and CPs alike. We also believe that contract terms allowing for such increases, when properly framed, are unlikely to fall foul of the UTCCRs, and the Consultation Document also acknowledges that such terms may not be considered "unfair" as a matter of general consumer law. In the light of this, we do not see any justification for Ofcom to apply what would be essentially a higher standard of "fairness" for ECS under the auspices of the Communications Act than is likely to be imposed by the general law in respect of all other services.

14. Finally, in relation to the zero threshold that is being proposed, it is worth noting that this will drive certain behaviours within CPs that may not be to the consumer's benefit. A zero threshold will significantly increase the costs of notifying price rises as all CPs will have to notify on a more frequent basis. As a result it is likely that CPs will make bigger price rises to offset the likely churn rates. If all CPs adopt this approach then it is difficult to see how the customer would benefit.

Prices in Scope

15. The third caveat to BT's support for Option 4 relates to the prices to which the revised GC9.6 would apply. We do not agree that an increase in price for any "applicable service" should trigger the right to leave without penalty. We believe that a fairer and more practical approach would be to restrict the scope of the revised GC (in the context of price increases) to the core elements of the service for which the consumer contracts, and for which there is a recurring charge.

16. The core or most significant elements of ECS are likely to be rental and calling package elements and the charges for these are "unavoidable" for consumers. However, the service for which the consumer contracts is invariably broader in

scope, covering a range of non-package calls and ancillary services. In most cases, it is unlikely that the precise nature and cost of these is in the contemplation of the consumer when making the contract. Once the contract is made, however, the consumer may elect to make additional calls or take ancillary services and to incur additional one-off charges, but of course is under no contractual obligation to do so.

17. All CPs will have to make price rises to the above services that they provide which will not have a material impact, if any at all, on the price the customer pays for the services they have subscribed to. So, for example, if we increase the prices of any of the services offered in the examples cited below then under Option 4, we would have to notify all customers of their right to leave without paying a penalty, when in fact only a very small proportion of those customers would actually be impacted. Examples could include:

- Price increases for international pence per minute rates to remote locations
- Movement of certain numbers into and out of different calling packages (0845 etc.)
- Increasing the price of 118500
- Increasing the price of the speaking clock

18. We therefore believe it is a disproportionate response by Ofcom in relation to the consumer harm that has been identified to suggest that any price rise in any applicable service should give consumers the right to leave without paying penalty charges.

Notice Periods

19. Under the current proposal for Option 4, Ofcom is suggesting that customers are given the right to leave without penalty at any point in time from the notification of the price rise to the point in time when the price rise actually takes effect. This will discourage CPs from providing notice periods greater than 30 days, which is not in the consumers' interest. This is particularly relevant when price changes are planned for after a special trial offer. For example, a customer may receive a service at a special offer rate for, say, three months, with a higher rate in effect at the end of the offer. If a CP knows there is a price increase planned – and internal processes often require at least three months' notice – then it is preferable to let the customer know the new post-offer rate as soon as possible. However, if this notification means that the customer could then exit the contract without penalty for the next three months, the CP will be discouraged from making such a notification.

20. We suggest that a proportionate response would be to modify GC9 so that consumers have 30 days from receiving their notification of any price rise to leave their contract without penalty.

Responses to Consultation Questions

Section 4 – Consumer harm

Do you agree with the consumer harm identified from Communications Providers' ability to raise prices in fixed term contracts without the automatic right to terminate without penalty on the part of consumers?

Should consumers share the risk of Communications Providers' costs increasing or should Communications Providers bear that risk because they are better placed to assess the risks and take steps to mitigate them?

We agree that there would be potential for significant consumer harm if CPs had unfettered rights to use their unilateral variation rights to introduce price increases. However, in the context of ECS, the exercise of those rights is already constrained both by the general law and by the “material detriment” provisions of GC9.

The potential for harm is therefore already limited, but we believe it could be further reduced by imposing common standards on all CPs under GC9 and by seeking to align, as far as possible, the protections afforded under that GC and under general law.

We consider that in most cases, it is appropriate for CPs to bear the risk of their own costs increasing. However, for contracts of no fixed duration, we believe that it is reasonable to expect consumers to bear the cost of price increases that simply reflect the rate of inflation.

Material detriment

Do you agree with the consumer harm identified from Communications Providers' inconsistent application of the “material detriment” test in GC9.6 and the uncertainties associated with the UTCCRs?

Should Communications Providers be allowed (in the first instance) to unilaterally determine what constitutes material detriment or should Ofcom provide guidance?

What are your views on whether guidance would provide an adequate remedy for the consumer harm identified? Do you have a view as to how guidance could remedy the harm?

In the absence of a definition or guidance, the application of the concept of “material detriment” has not been straightforward. We have adopted a number of different approaches in good faith. We have, for example either simply replicated the “material detriment” wording in our contracts or we have sought to define the threshold for it. There are advantages and disadvantages with each approach.

However, whilst we have received few customer complaints relating to this issue, we believe that consumers and CPs alike would benefit from the imposition of a common standard or threshold. We do not believe that guidance alone would provide sufficient clarity or certainty.

Lack of transparency

Do you agree with the consumer harm identified from the lack of transparency of price variation terms?

Do you agree that transparency alone would not provide adequate protection for consumers against the harm caused by price rises in fixed term contracts?

We agree that lack of transparency in price variation clauses can lead to consumer harm. For example, the concept of “material detriment”, without accompanying clarification, does not provide sufficient information to enable consumers to determine in what circumstances they may terminate without penalty.

We also agree that transparency alone does not provide adequate protection.

Section 5 – Price rises other issues

Different price elements in a contract

Do you agree that any regulatory intervention should protect consumers in respect of any increase in the price for services provided under a contract applicable at the time that contract is entered into by the consumer?

Do you agree that any regulatory intervention should apply to price increases in relation to all services or do you think that there are particular services which should be treated differently, for example, increases to the service charge for calls to non-geographical numbers?

Please refer to paragraphs 15-18 above.

Business customers

Do you agree that the harm identified from price rises in fixed term contracts applies to small business customers (as well as residential customers) but not larger businesses?

Do you agree that any regulatory intervention that we may take to protect customers from price rises in fixed term contracts should apply to residential and small business customers alike?

Do you agree that our definition of small business customers in the context of this consultation and any subsequent regulatory intervention should be consistent with the definition in section 52(6) of the Communications Act and in other parts of the General Conditions?

We agree that large business customers and bespoke contracts should be out of scope.

We understand why Ofcom is using the small business definition as it has been used before but it is not a threshold that we use in practice when we enter into contracts with our business customers. We do not believe it is helpful when looking at a large legacy customer

base. The definition relating to number of employees was used for a specific scenario (automatically renewing contracts), and does not easily translate for use on a wider basis where business customers can order a variety of products and services and via a number of different channels. An alternative approach could be to consider the number of lines as a way to identify small business customers.

Price increases outside CPs control

Do you agree that price rises due to the reasons referred to in paragraph 5.29 are outside a Communications Provider's control or ability to manage and therefore they should not be required to let consumers withdraw from the contract without penalty where price rises are as a result of one of these factors?

Except for the reasons referred to in paragraph 5.29, are there any other reasons for price increases that you would consider to be fully outside the control of Communications Providers or their ability to manage and therefore should not trigger the obligation on providers to allow consumers to exit the contract without penalty?

We agree that price rises for VAT increases, imposition of a new tax and extensions of an existing tax are outside CPs' control and should not trigger the right to terminate the contract without penalty. Similarly, we consider that the right should not be triggered by de minimis increases introduced for rounding purposes following VAT increases or other tax changes.

We also consider that there may be other price increases that are fully outside the control of CPs, but does not believe that it is appropriate or necessary for Ofcom to seek or specify particular examples. This is an issue that is best dealt with contractually. CPs should be free to make it clear in their terms and conditions that where an increase results from circumstances beyond their control, the right to terminate will not arise. The extent to which CPs can rely on such terms would then turn on the facts of each case.

Notifications

Do you agree that Communications Providers are best placed to decide how they can communicate contract variations effectively with its consumers?

Do you agree with Ofcom's approach to liaise with providers informally at this stage, where appropriate, with suggestions for better practice where we identify that notifications could be improved?

What are your views on Ofcom's additional suggestions for best practice in relation to the notification of contractual variations as set out above? Do you have any further suggestions for best practice in relation to contract variation notifications to consumers?

We agree with Ofcom's view that CPs are in the best position to decide how to contact their own customers and advise of contract changes. We welcome the fact that Ofcom is having constructive dialogue with industry in this area and that they do not see a need for further regulation.

Guidance is useful to understand Ofcom's expectations in this area and allows CPs to understand what may be acceptable. We are supportive of the best practice suggestions set out in paragraph 5.46 and endeavour to follow that practice in the way that we communicate with our Consumer customers.

Timescales for cancellation

What are your views on the length of time that consumers should be given to cancel a contract without penalty in order to avoid a price rise? For consistency, should there be a set timescale to apply to all Communications Providers?

What are your views on whether there should be guidance which sets out the length of time that Communications Providers should allow consumers to exit the contract without penalty to avoid a price rise?

Please see paragraphs 19-20 above.

Section 6 – Options

Option 1 – no change to the current framework

Do you agree that this option to make no changes to the current regulatory framework is not a suitable option in light of the consumer harm identified in section 4 above?

We support many of the principles cited by Ofcom in this consultation and support the position that making no change is not a sensible option. We would like to see a consistent approach across the industry to promote customer confidence in CPs.

Option 2 – greater transparency of terms and publish Ofcom guidance on GC9.6 & UTCCR

Do you agree with Ofcom's analysis of option 2? If not, please explain your reasons.

We are supportive of Option 4 provided that a reasonable threshold for material detriment is proposed (not zero) and Guidance issued on it and that Ofcom issue Guidance under the UTCCRs to ensure that Content services are covered by the same regime.

Option 3 – modify GC9.6 so that customers have to expressly opt-in to any contract variation

Do you agree with Ofcom's analysis of option 3? If not, please explain your reasons.

We agree that Option 3 should not be pursued.

Option 4 – modify GC9.6 so that customers are able to withdraw from a contract without penalty for any increase in the price

What are your views on option 4 to modify the General Condition to require Communications Providers to notify consumers of their ability to withdraw from the contract without penalty for any price increases?

BT agrees that Option 4 represents the best solution, subject to the caveats set out in the main body of our response.

Other

Amendment of GC9.6

Do you agree with Ofcom's assessment that option 4 is the most suitable option to address the consumer harm from price rises in fixed term contracts?

Do you agree that Ofcom's proposed modifications of GC9.6 would give the intended effect to option 4?

We support Option 4 on the basis set out above. Accordingly we have not commented on your proposed modification to GC9.6 which would need to be modified further to reflect those changes.

Non-price variations

What are your views on the material detriment test in GC9.6 still applying to any non-price variations in the contract?

We agree that the material detriment test is still relevant for non-price changes.

Implementation

For our preferred option 4, do you agree that a three month implementation period for Communications Providers would be appropriate to comply with any new arrangements?

What are your views on any new regulatory requirement only applying to new contracts?

Since this would entail significant changes for the bigger CPs, we believe that there should be a six-month implementation period.

We agree that any new regulatory requirement should only apply to new contracts.