



Ofcom consultation on price rises in fixed term contracts

March 2013

About Citizens Advice

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

The service aims:

- to provide the advice people need for the problems they face
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of nearly 400 independent advice centres that provide free, impartial advice from more than 3,500 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups. In 2011/12 the Citizens Advice service in England and Wales advised 2.03 million people on 6.9 million problems.

Since April 2012 we have also operated the Citizens Advice Consumer Service, formerly run as Consumer Direct by the OFT. This telephone helpline covers Great Britain and provides free, confidential and impartial advice on all consumer issues.

Responses to consultation questions

Questions on section 4

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?

Ofcom's analysis of the consumer detriment caused by CP's ability to raise prices in fixed term contracts without the right to terminate without penalty tallies with the experiences of consumers contacting the Citizens Advice Consumer Service. Since taking over the Service from the OFT in April 2012, we have received 87 enquiries about CPs raising prices during the term of a contract. In the majority of cases, consumers contacted us to find out if CPs were allowed to raise prices during a fixed term contract as it ran counter to their understanding of the contract they had agreed to.

Comments by consumers included feeling shocked that their CP was allowed to raise prices during what they believed to be a contract in which all terms were fixed, disempowered by their inability to cancel the contract without penalty and dismay at the increased costs.

We also received complaints from a small number of consumers who had taken out a contract after a price rise had been announced to existing customers but before it had taken effect, without the impending price rise being made clear to them.

Several consumers reported having extracted explicit guarantees from sales staff that the price would remain fixed throughout the period of the contract, only to find that this was not the case.

In addition, some consumers who contacted us complained that, in their view, they had received insufficient notice of the price rises.

Some illustrative examples are below.

A consumer who contacted the Consumer Service complained that he had taken out a 12 month fixed contract with a mobile CP but was not informed that price rises had already been announced but not implemented. Upon discovering this one month into the contract, the consumer returned to the store he had made the purchase from where he witnessed three other consumers take out contracts without being told of the impending increase.

Another consumer found the price of their fixed mobile contract increasing after one month. Their CP refused their request to allow them to cancel without penalty. The consumer was particularly irritated as the rate of inflation which was used to justify the increase was publicly known some time before the contract had begun. The consumer had taken his complaint to the Ombudsman but was told it could not rule on unfair terms. Instead he was planning to take the case to the small claims court.

A consumer who had the monthly price of their telephone and broadband package increased mid-way through an 18 month contract was very surprised when she was told that there was a price variation term in her contract. She had not been made aware of this term at the outset and had upon investigation discovered she had not even been sent a copy of the contract in the first place.

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?

In our view CPs are in the best place to assess the risks of their costs rising and take steps to mitigate them. Assuming a consumer is even aware that there is a possibility their tariff may increase in price, they will have no way of anticipating when that rise may occur or how much it could be. Given that inflation is reasonably predictable and a next to unavoidable fact of doing business, the idea that it is not possible to mitigate it when setting the price for consumer contracts is untenable. While there are other potential price increases faced by CPs beyond inflation, CPs are in a far better position to forecast them than consumers. In any case, allowing CPs to pass on the costs of inaccurate forecasts may also reduce their incentives for efficiency and accurate forecasts, thus harming competition in the long-run.

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?

Yes, the inconsistent application of the "material detriment" test is a problem and should not be allowed to persist. Putting to one side the fact that the word "material" does not appear in the Universal Service Directive, it is unacceptable to allow CPs to apply different interpretations of what is an important part of consumer protection, thus leading to an inconsistent level of protection for consumers depending on which CP they have chosen to contract with.

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?

We feel that neither Ofcom guidance on what constitutes "material detriment" nor allowing CPs to determine it would be sufficient remedy for the consumer harm identified. Consumers understand a fixed contract to be just that. Guidance on what constitutes material detriment would do nothing to address the shock and confusion that comes from price rises nor would it protect consumers from the impact of price rises they cannot avoid.

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

Yes, our evidence bears out the harm identified by Ofcom. The majority of consumers who contacted us were astonished to discover that there was a price variation term in their contracts and that it was legal in the first place.

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 transparency alone is not enough. While it may make more consumers aware of the possibility that their price may increase during the fixed period of the contract, it does nothing to improve their awareness of when the price rise may occur or by how much it may increase. There would remain an asymmetry in the contract skewed towards the CP's advantage.

In addition, our experience in other sectors suggests that many consumers would not pay much attention to the more transparent price variation terms as there tends to be a bias towards the headline price and less attention paid to what are sometimes seen by consumers as incidental or contingent prices and contractual terms.

Questions on section 5

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?

Yes.

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?

We agree that any regulatory intervention should apply to price increases in relation to all services. Those consumers who are not concerned about a price increase in a service they do not use would be at liberty to ignore it and carry on with the contract, whereas consumers who have specifically taken out a contract because of the price it offers for international calls, for example, should not be denied the right to cancel without penalty if the cost of such calls is increased during the contract.

Ofcom notes that many consumers regularly incur charges above and beyond the monthly price of their contract by using, for example, text messages or data beyond their monthly allowance. Any increase in these prices could quite clearly cause detriment to consumers and as such we could not support any proposal to exclude them or indeed any services from the requirement to notify consumers of price variations or to not allow consumers to cancel their contract without penalty as a result.

We are however supportive of the proposal in the Consumer Forum for Communications (CFC) response for a hybrid between the approach proposed by Ofcom and the approach that Which? campaigned for in their 'fixed means fixed' campaign. This proposal would see CPs prohibited from varying the core terms of a contract during the fixed term (i.e. the elements covered in the 'bundle' paid for via the monthly tariff: number of minutes of free calls and texts, data allowances etc) but permitted to vary other terms if they allow consumers to cancel their contract without penalty in that event.

We agree with the CFC response that Ofcom's interpretation of Article 20(2) of the USD is not self-evidently correct. It does not follow that a provision for penalty free exit from a contract in response to a detrimental contractual change therefore requires regulators to allow CPs to vary terms during the fixed period. The above proposal takes this into account but would still allow CPs to vary non-core terms.

We consider that this approach would deliver greater protection to consumers for two key reasons: there is a natural inertia against switching providers at the best of times and the potential hassle of switching will see many consumers just put up with it, and as the CFC response points out, the costs created by the additional churn of those who do switch will eventually be borne by consumers in any case.

We also welcome the proposal for any regulatory intervention to apply to all communications sectors, rather than mobile phones alone. Consumers who contacted us

about price rises during fixed term contracts included fixed voice and broadband customers.

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?

Yes, we agree with these exceptions as where they would apply across the industry as a whole there would be no benefit or avoided detriment for a consumer in switching to another provider. One potential problem may arise if one or some CPs choose to absorb such costs and not pass them on to consumers, at which point a consumer would arguably be experiencing detriment by being prevented from switching.

There may also be costs imposed on CPs by regulatory intervention, for example, which create varying degrees of burden and hence see different CPs raise their prices by different amounts even though they are passing all of the additional cost on to consumers.

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

We are keen that the approach should be uniform across the sector rather than concerned about who decides the best way to communicate contract variations. Whether it is Ofcom or CPs who make this decision, we would expect consumer organisations and consumers themselves to be consulted. In general, consumers should also be able to choose the communication method used, for example whether they prefer a letter or an email.

We are not convinced by the argument that any requirements from Ofcom on how CPs communicate contract variations with consumers would stifle innovation and therefore should not be permitted. While there may be a case for innovative channels by which consumers are notified, generally speaking we do not consider notifying consumers of variations under the contractual terms to which they are subject is an area where innovation should be sought.

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?

An important aspect of best practice in this area is the provision of information to customers about how to switch. As the switching process varies across different communications sectors it is important to provide this information to consumers at the point when the right to cancel without penalty is triggered.

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?

We believe that consistency is important and would wish to see the same timescale apply to all CPs. It should be sufficient for consumers to switch, allowing time to look for the best deal from another provider.

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?

We believe there should be guidance and that the length of time that CPs allow consumers to exit the contract without penalty should be set by Ofcom.

Questions on section 6

Option 1

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 agree this option is not suitable in light of the consumer harm identified.

Option 2

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

Yes.

Option 3

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

Yes.

Option 4

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?

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?

We believe that option 4 is the best approach put forward by Ofcom but we believe the approach detailed above as proposed in the CFC response would be the best solution.

Other questions

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

While we can see a logic in retaining the material detriment test for non-price variations in that it is theoretically easier to demonstrate material detriment in non-price variations, we are not convinced that it is necessary. Removing it would also make redrafting GC9.6 far more straightforward.

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

We accept that CPs will be opposed to the idea of any new regulatory requirement applying to existing contracts but considering the extent to which consumer detriment has been caused by the lack of transparency of price variation terms and evidence from consumers who have contacted us suggests that in some cases the prospect of a price rise has been actively concealed, there is a strong case for the new requirement applying to existing contracts as well as new ones.

Ofcom should also consider whether existing contracts where price variation was not transparent breached the Consumer Protection from Unfair Trading Regulations (CPRs) 2008. Under the CPRs, misinforming consumers about the possibility of a price variation would appear to us to constitute a misleading action under Article 5(2)(a), specifically in relation to(4)(g): 'the price or the manner in which the price is calculated'. If Ofcom agree that CPs have breached the CPRs we would expect these businesses to be required by Ofcom to refund any additional payments that consumers have paid when they were misinformed that the price was fixed.