



Price rises in fixed term contracts

Decision to issue Guidance on General Condition 9.6

Non-confidential version
Redactions are indicated by [X]

Statement

Publication date: 23 October 2013

Contents

Section		Page
1	Summary	2
2	Introduction	8
3	Legal Framework	14
4	Consultation responses: unfairness, consumer harm and key issues	20
5	Consultation responses: regulatory options	35
6	Ofcom's decision to issue guidance on GC9.6	43
7	Other issues	70

Annex		Page
1	Guidance on "material detriment" under GC9.6 in relation to price rises and notification of contract variations	79
2	List of respondents	86
3	Price rises since September 2011	92
4	Complaints analysis	94

Section 1

Summary

1.1 This statement sets out the Office of Communications' ("Ofcom") decision to issue guidance on General Condition 9.6 ("GC9.6").¹ The guidance will secure fairness for consumers and small business customers in respect of price rises to the core subscription price² during the fixed term of contracts for telecommunications services.

1.2 The guidance sets out that:

- we are likely to regard as materially detrimental (or likely to be materially detrimental), for the purposes of GC9.6, any increase³ during the fixed term of the contract to the core subscription price charged to consumers and small business customers⁴ by Communications Providers ("CPs") to whom GC9.6 applies; and
- in respect of such price rises CPs should give consumers and small business customers notice of the price rise and the right to terminate their contract without penalty in accordance with GC9.6.

This position reflects that the core subscription price is likely to be the most important aspect of one of the key terms of the contract (the price).

1.3 The guidance does not apply to any increase to non-subscription prices⁵, which will continue to be subject to the current regulatory protection provided by GC9.6 (but not the guidance) and relevant consumer legislation (which applies to all price increases).

¹ Of the General Conditions of Entitlement, <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf>

² For the purposes of this decision statement and the relevant guidance, the core subscription price is the recurring (usually monthly) charge that the customer is contractually obliged to pay for a core package of inclusive services (such as call minutes to certain numbers, text messages and data allowances for mobile customers) for a pre-determined period of time (of no more than two years for consumers).

For fixed line services, we note that it is common practice for customers to be offered a monthly subscription deal that includes, for example, line rental and unlimited weekend calls but all other calls are billed incrementally. For the time being, charges for these other calls – even where relating to important aspects of what is provided under the contract, for example, some charges for local and national calls to geographic numbers – fall outside our definition of the core subscription price and this guidance does not apply to them. Ofcom will monitor the position in respect of increases to such prices and may take further action if we consider CPs are acting unfairly in respect of them.

³ With the limited exceptions of the kinds set out in this statement and our guidance, for example, as to price rises passing on increases in VAT.

⁴ As defined in GC9.3(b)(v).

⁵ For present purposes, these are the prices for services that fall outside of the relevant core monthly subscription, and which are billed incrementally when such services are used by the customer. For example, for mobile customers they typically include: charges incurred when they exceed their monthly inclusive allowance, charges for premium rate services, non-geographic calls ("NGCs"), directory enquiries, making calls and sending texts internationally and roaming services.

- 1.4 The guidance also does not apply to any non-price variations⁶. However, if CPs respond to our guidance by making variations to non-price terms, for example by reducing call allowances (and/or text and/or data allowances where relevant) included in a consumer's monthly subscription price, we would consider such a change effectively to constitute an increase in the unit price paid by the consumer. Ofcom would regard this as a price rise to which the guidance would apply.
- 1.5 We have made a decision that we consider, as a matter of our regulatory policy judgment, secures fairness in relation to mid-contract increases to key aspects of the price in telecommunications contracts. We have done so in particular in light of the sector-specific provisions of the Universal Services Directive⁷ (the "USD") and applying the principle of proportionality.
- 1.6 The principles of fairness and proportionality have caused us, in light of the consultation responses to which we have given careful consideration, to modify and re-focus our consultation proposal. We recognise that the proposal was broad and we have re-assessed its scope.
- 1.7 In particular, the judgment we have now made is that:
- it is appropriate to focus on the likely most important aspects of price and price increases; and
 - the position we have decided to set out in guidance secures fairness in a proportionate way.

In reaching this judgment we have had regard to, amongst other things, the protection provided by existing regulatory rules and the fundamental importance of price and price terms, particularly as to core subscription prices, to telecommunications consumers and small business customers.

Background

- 1.8 Amongst other things, Article 20(2) of the USD sets out, in relation to the provision of telecommunications services, that subscribers (including consumers and small business customers) to such services have a right to withdraw from their contract without penalty where providers modify the contractual conditions. In the UK, this is reflected in GC 9.6.
- 1.9 In acknowledgment of the general legal principle of proportionality, and the need for regulators to act proportionately, Ofcom has included in GC9.6 a proviso that the rights for which the condition provides apply in respect of modifications of contractual conditions that are likely to cause "material detriment" to the subscriber. Ofcom has, however, re-considered the position following price rises by most major mobile CPs over the last 18 months or so. This statement sets out the judgments we have made and the action we have decided to take.

⁶ Although what we say in the guidance about notifying subscribers under GC9.6 is relevant to all contract modifications.

⁷ DIRECTIVE 2002/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended by Directive 2009/136/EC.

- 1.10 Our work on mid-contract price rises is identified in Ofcom's Annual Plan as a priority under our strategic objective to protect consumers from harm⁸. In January, we published a consultation on addressing consumer harm from price rises in fixed term contracts ("the consultation").⁹ This followed a review of the current rules¹⁰ in light of a significant rise in complaints to Ofcom due to the core subscription price increases by most of the major mobile CPs since the end of 2011 (Annex 3). Which? also asked Ofcom to stop mobile providers making in-contract price rises.¹¹ We also received a smaller number of complaints from customers of fixed line CPs.
- 1.11 In our consultation, we proposed four key principles relevant to meeting the basic aims of fairness that we considered the applicable regulatory rules seek to, and should, pursue. We used these principles as a framework to assess whether those rules were providing adequate consumer protection (fairness) and to assess any consumer harm from price rises in fixed term contracts. We also used them to consider the options for addressing any unfairness or harm. The principles were:
- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
 - **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
 - **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and
 - **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the USD).
- 1.12 In light of these principles, we identified causes of unfairness and consumer harm including:
- a lack of transparency in some CPs' terms and conditions and/or practices in relation to price variations;
 - CPs' inconsistent application of the "material detriment" test in GC 9.6 and uncertainty under the Unfair Terms in Consumer Contract Regulations 1999 (the "UTCCRs"); and
 - CPs' ability to raise prices in fixed term contracts without a reciprocal right to withdraw from a contract without penalty on the part of consumers.
- 1.13 We sought stakeholder views on the following options, proposing option 4 as our preferred course of action:
- **Option 1:** no change to the current regulatory framework;

⁸ <http://www.ofcom.org.uk/files/2013/03/annplan1314.pdf>

⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/gc9/summary/condoc.pdf>

¹⁰ The current rules are explained in section 3.

¹¹ <http://www.which.co.uk/campaigns/mobile-phone-price-rises/>

- **Option 2:** require greater transparency of CPs' price variation terms and publish Ofcom guidance on the application of GC9.6 and the UTCCRs to price rises and relevant contract terms;
- **Option 3:** modify GC9.6 so that consumers have to expressly opt-in to any variable price contract offered by a CP; and
- **Option 4:** modify GC9.6 so that consumers can withdraw from a contract without penalty for any increase in the price for services applicable at the time the contract is entered into by the consumer (including changes to the level of service provided which effectively constitute a (unit) price increase).

1.14 Having given careful consideration to all the responses received, we have decided to adopt a variation of consultation option 2, rather than option 4.

Consultation responses

- 1.15 Across both CPs' and consumers' responses there were areas of agreement or consistency with aspects of the consultation. These included that price is an important consideration for consumers in contracts for telecommunications services, and that it is correspondingly important that terms relating to price and price variation are transparent. There was also some broad agreement that there are shortcomings in respect of this transparency.
- 1.16 There was similarly broad agreement or consistency on the points that the current regulatory framework¹² provides some level of protection for consumers and other subscribers, but the current rules nonetheless contain elements of uncertainty. In particular, there is a need for clarity about what amounts to material detriment for the purposes of GC9.6.
- 1.17 Both consumers and CPs generally agreed that Ofcom should take action to address shortcomings in the transparency of price variation terms and uncertainty in the application of GC9.6's material detriment requirement.
- 1.18 There were also areas of disagreement with aspects of our consultation and we have had due regard to these. In particular, CPs challenged the extent, and Ofcom's assessment, of the evidence of relevant consumer harm. They also challenged our proposals as to the proper allocation of the risks of increased costs, the need for telecommunications sector-specific regulatory intervention, our assessment of the likely impact of option 4 and the basis for our intervention applying to fixed line services. Each of these points, in our assessment, challenges the proportionality of what we proposed.

Decision to issue guidance on the application of GC9.6 to core subscription price rises

- 1.19 Having carefully considered the consultation responses, our assessment is that the key principles of fairness we proposed are appropriate. In particular, most responses were generally consistent with the principles that:

¹² the UTCCRs, the Consumer Protection from Unfair Trading Regulations 2008 (the "CPRs") and the General Conditions (the "GCs"))

- consumers should have information enabling them to make informed transactional decisions;
 - consumer should be protected against terms and practices that surprise them and impose on them unfair burdens and risks;
 - consumers should be able to take steps to avoid those unfair effects, and
 - the relevant rules should be clear, certain and effective in practice.
- 1.20 Accordingly, we have decided to adopt measures to give effect to these principles. Our consideration of the responses, however, has led us to re-consider the options proposed. Having done so, our policy judgment is that, at this time, the appropriate and proportionate action is to issue Ofcom guidance as to the application of GC9.6 to core subscription price rises.
- 1.21 In making this decision we have had regard to, amongst other things, the importance to telecommunications consumers (and other subscribers) of price and price variation terms. Our judgment also reflects the consultation responses as to the need for, and shortcomings in, the transparency as to contract terms and CPs' practices as to price rises, and the need for certainty as to the application of the relevant rules.
- 1.22 We have taken due account, in making our assessment, of both the existing protections under general consumer law and sector specific requirements arising out of the Universal Services Directive. We agree that existing provisions give consumers some protection with regard to both the transparency, and the substantive effects, of mid-contract price rises. We do not consider, however, for the reasons set out in section 6 of this statement, either that:
- additional transparency measures alone are, in all the relevant circumstances, sufficient to secure fair outcomes; or
 - the existing regulatory protection secures that fairness effectively.
- 1.23 We have had particular regard to the requirements of the Universal Services Directive. These deal specifically with changes to contracts for telecommunications services, including changes to core subscription prices. They provide a basis for sector-specific rules protecting telecommunications consumers and small business customers that are different and additional to those derived from general consumer law (unfair contract terms legislation, most particularly). We have viewed the evidence of the importance of price terms to consumers and the uncertainty in the way the current rules apply, in particular, in the light of those sector-specific provisions.
- 1.24 In our judgment, the guidance we are issuing is an appropriate and proportionate means of securing fairness in relation to core subscription price rises during the fixed term of telecommunications contracts between CPs and consumers and small business customers. It specifically addresses the harmful effects of shortcomings in transparency and the uncertainties in current rules and practices in respect of the likely most important aspects of prices and price rises. It does so by addressing the uncertainty about the material detriment requirement in a manner consistent with the Universal Services Directive and, in Ofcom's overall assessment, with likely limited costs.

- 1.25 The guidance will be part of a regulatory scheme¹³ that will help to ensure that consumers and small business customers:
- have information enabling them to make informed transactional decisions; and
 - benefit from clear and certain rules that are effective in enabling them to avoid the effects of terms and practices that surprise and impose on them unfair burdens and risks.

These are, in our judgment, key aspects of fairness that the regulatory rules for telecommunications should seek to secure.

Price increases to non-subscription services

- 1.26 For the reasons we set out, we consider it appropriate and proportionate to limit the scope of our guidance to increases to core subscription prices for the time being. As with any price variations, increases to non-subscription prices, and the contract terms providing for them, will remain subject to the UTCCRs and to the GCs, including GC9.6. The guidance, however, will not apply to them.
- 1.27 We will continue to assess the application of GC9.6 to non-subscription prices on a case by case basis. We will also monitor complaints about any increases to such prices and may review our position if new evidence comes to light of consumer harm arising from them.

Implementation

- 1.28 Ofcom will adopt the approach set out in the guidance three months after the date of publication of this statement. It will apply in relation to any new contracts entered into on or after that adoption date.
- 1.29 We consider that three months should be sufficient for CPs to make any adjustments they identify as necessary in light of our guidance whilst ensuring that protection for consumers entering into new contracts takes effect as early as reasonably possible.
- 1.30 For existing contracts, GC9.6 will continue to apply as it does now. Any question regarding whether a price increase meets the material detriment requirement will be considered on a case by case basis.
- 1.31 In all cases, we will monitor compliance with GC9.6 and consider taking enforcement action where necessary.

¹³ Including the CPRs, the UTCCRs and the GCs, which continue to apply to all price increases and relevant contract terms.

Section 2

Introduction

Ofcom's role in protecting consumers

- 2.1 Ofcom is the regulator for the communications sector. Under section 3(1) of the Communications Act 2003¹⁴ ("the Act"), Ofcom's principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.2 Section 3(3) of the Act sets out that, in performing our duties under section 3(1), Ofcom must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to any other principles appearing to us to represent the best regulatory practice. We must also, where relevant, have regard in performing those duties to matters including the desirability of promoting competition in relevant markets (section 3(4)(b)). Section 3(5), meanwhile, says that, in performing our duty of furthering the interests of consumers, Ofcom must have regard, in particular, to the interests of those consumers in respect of matters including price.
- 2.3 Pursuant to section 4(1)(a) of the same Act, in carrying out our functions in relation to electronic networks and services, Ofcom is also under a duty to act in accordance with the six Community Requirements.
- 2.4 The six Community Requirements give effect, amongst other things, to the requirements of Article 8 of the Framework Directive (2009/140/EC which amended Directive 2002/21/EC). These include, in particular, the requirement to promote competition in relation to the provision of electronic communications networks and services by ensuring that users derive maximum benefit in terms of choice, price and quality (Art 8(2)(a)), and the requirement to promote the interests of citizens by ensuring a high level of protection for consumers in their dealings with suppliers (Art 8(2)(b)) and by promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services (Art 8(2)(d)).
- 2.5 We are constantly working to achieve the best outcomes for citizens and consumers within our day-to-day responsibilities. We want to make sure that consumers get the best choice and value for money from their communications services and are protected from unfair terms and practices, while allowing competition to thrive. We intervene if things are not working as well as they should.

General Condition 9: monitoring and enforcement programme¹⁵

- 2.6 In January 2012, we launched a monitoring and enforcement programme into Communication Providers' (CPs) compliance with General Condition 9 ("GC9") of the consolidated version of the GCs which sets out the requirement to offer contracts with minimum terms ("the Programme")¹⁶. The purpose of the programme was to

¹⁴ <http://www.legislation.gov.uk/ukpga/2003/21/contents>

¹⁵ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01082/

¹⁶ <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/>

monitor compliance following changes made to GC9 to implement the revised EU electronic communications framework in May 2011, and Ofcom's decision in September 2011 to prohibit automatically renewable contracts ("ARCs"). As the Programme relates to contract terms, we also consider the fairness of relevant contract terms under the Unfair Terms in Consumer Contract Regulations 1999 ("the UTCCRs")¹⁷ in accordance with our powers under those regulations and as a designated enforcer under Part 8 of the Enterprise Act 2002¹⁸.

Unfairness and consumer harm from mid-contract price rises

2.7 Following price rises announced by a number of CPs in late 2011 and during 2012¹⁹, we became aware of issues regarding the interpretation of the term "material detriment" in the part of the condition (GC9.6) relating to CPs' obligation to notify subscribers of certain modifications made to the contract and their ability to cancel the contract without penalty²⁰.

2.8 We noted a significant increase in complaints to our Consumer Contact Team (CCT) from consumers affected by price rises. Ofcom examined 1644 consumer complaints about changes to terms and conditions in the period from September 2011 to May 2012 and identified the following key reasons for the complaints²¹:

- 25% of consumers complained about the principle of price rises in fixed term contracts. They considered the practice to be "unfair" and did not think it acceptable that providers can raise prices when they have agreed to a fixed term contract. They appeared to consider that price variation terms alter the balance of the contract in favour of the CP and harm results as the consumer has little choice but to pay the higher price because they cannot withdraw from the contract without paying an early termination charge ("ETC"). These consumers did not mention concerns with the transparency of price variation terms.
- 24% of consumers specifically raised concerns in relation to harm arising from a lack of transparency of variation terms. These consumers complained about the price rise because they had assumed that the price was "fixed" for the duration of the contract term. They complained that they were not made aware at point of sale that the price might change nor were they made aware of the price variation term in the terms and conditions. Therefore, subsequent price rises came as an unpleasant surprise to them.
- 16% of consumers complained specifically about the harm arising from the amount of the price rise and how it could result in material detriment and/or financial hardship. Some said that the increase was too much and would be unaffordable for them but their CP considered that the increase did not constitute material detriment. They had originally taken the contract out because it was

¹⁷ Under the Programme, we assessed the terms and conditions of CPs against the provisions in GC9 and, where relevant, the UTCCRs.

¹⁸ As a designated enforcer, Ofcom is empowered to take action in respect of infringements of certain consumer protection legislation. Specifically, Ofcom can seek undertakings from CPs and can apply for Enforcement Orders to prevent infringements which harm the collective interests of UK consumers.

¹⁹ See Annex 3 which lists the price rises by the major fixed line, broadband and mobile providers since September 2011.

²⁰ See legal framework in section 3.

²¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/gc9/summary/update2.pdf>

within their budget but the price rise over the remainder of the minimum contract period would mean it was no longer affordable.

- 2.9 In addition to the above consumer complaints, we received evidence from Which? as part of its “Fixed means Fixed” campaign which asks Ofcom to take action to stop mobile providers making in-contract price rises. Which?’s research found that over 60% of mobile contract customers said that they expected monthly bills and inclusive allowances to remain the same in fixed term contracts. The research also found a lack of awareness amongst consumers that providers can raise prices during fixed term contracts²². In addition, a mystery shopping exercise found that many consumers were not being told at point of sale that the price might increase during the minimum contract term. In some cases sales staff categorically and incorrectly stated that prices were fixed for the term of the contract²³.
- 2.10 In the consultation we proposed four key principles for the provision of adequate consumer protection (fairness) in a competitive market in relation to mid-contract price rises:
- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
 - **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
 - **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and
 - **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).
- 2.11 In light of those principles, and our review of the evidence, including that above, we identified three main areas of unfairness and consumer harm:
- a lack of transparency in some CPs’ terms and conditions and/or practices in relation to price variations;
 - CPs’ inconsistent application of the “material detriment” test in GC 9.6 and uncertainty under the Unfair Terms in Consumer Contract Regulations 1999 (the “UTCCRs”); and
 - CPs’ ability to raise prices in fixed term contracts without a reciprocal right to withdraw from a contract without penalty on the part of consumers.
- 2.12 Our provisional conclusion was that the current rules are not effectively securing fairness and protecting consumers from the harm identified. They are not giving adequate effect to the four principles identified.

²² <http://www.which.co.uk/documents/pdf/the-marketing-of-mobile-phone-fixed-term-offers-which-complaint-290997.pdf>

²³ <http://conversation.which.co.uk/consumer-rights/mobile-phone-shop-investigation-price-rises-fixed-means-fixed/>

Our consultation proposals

- 2.13 Our consultation was published on 3 January 2013 and the consultation period lasted ten weeks.
- 2.14 We sought stakeholder views on the following options and proposed option 4 as our preferred course of action:
- **Option 1:** make no changes to the current regulatory framework;
 - **Option 2:** require greater transparency of price variation terms by CPs and publish Ofcom guidance on the application of GC9.6 and the UTCCRs to price rises and relevant contract terms;
 - **Option 3:** modify GC9.6 so that consumers have to expressly opt-in to any variable price contract offered by a provider; and
 - **Option 4:** modify GC9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services applicable at the time the contract is entered into by the consumer (including changes to the level of service provided which effectively constitutes a (unit) price increase).
- 2.15 We acknowledged that most of the evidence from consumer complaints and from Which? related to mobile subscription price increases. However, we considered that the importance of price terms and the need for rules that are clear, certain and effective in securing a fair position for consumers should apply in respect of any regulated communications service. We also considered that CPs are better able to forecast their costs in an unbiased way and should, as a result, bear the risk that their costs may rise (rather than passing it on to consumers). Therefore, all price elements (i.e. subscription and non-subscription charges) for mobile, fixed line and broadband services were included in option 4 on the basis that the same principles and rules should apply to all prices payable for services in a contract.

Consultation responses

- 2.16 In total, we received 333 responses to our consultation:
- 14 from CPs: BT, KCOM, Sky, SSE, TalkTalk, Universal Utilities Ltd²⁴, Virgin Media, EE (Orange and TMobile), Three, Telefonica (O2), Vodafone, Vonage, The Number UK Ltd (TNUK), and one provider [X] who wished to have its name withheld.
 - 16 from other organisations: the Federation of Communication Services (FCS), the Mobile Broadband Group (MBG), the UK Competitive Telecommunications Association (UKCTA), Which?, Consumer Forum for Communications (CFC), Communications Consumer Panel (CCP), uSwitch.com, National Consumer Federation (NCF), Citizens Advice, Ombudsman Services (OS), Culanu, Clinic of Spinal Therapy and four organisations who wished to have their names withheld.
 - 303 from individual consumers.

²⁴ For the purpose of its response, Universal Utilities Ltd referred to both Universal Utilities Ltd and Titan Telecom Ltd.

- 2.17 A full list of non-confidential respondents can be found at Annex 2 and these responses are published on our website²⁵. We have carefully considered the responses. We set out in sections 4, 5 and 7 of this statement a summary of key points to which we have had particular regard in making our decision.

General impact assessment

- 2.18 The analysis presented in this document is intended to build on and complement the analysis contained in the consultation. Together, that analysis represents an impact assessment, as defined in section 7 of the Act.
- 2.19 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the 2003 Act, which means that generally Ofcom has to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of its policy decisions. For further information about Ofcom's approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment²⁶.
- 2.20 Specifically, pursuant to section 7, an impact assessment must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act – see paragraphs 2.1 - 2.2 above) is secured or furthered by, in relation to what we propose.

Equality impact assessment

- 2.21 Ofcom is also required to assess the potential impact of all our functions, policies, projects and practices on the equality of individuals to whom those policies will apply²⁷. Equality impact assessments (EIAs) assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity. We have given careful consideration to whether or not our decision to issue guidance on GC9.6 would have a particular impact on race, age, disability, gender²⁸, pregnancy and maternity, religion or sex equality²⁹. We do not, however, envisage that the decisions contained in this statement will have a detrimental impact on any particular group of people.
- 2.22 Nor do we envisage any need to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because the guidance will affect all stakeholders equally and will not have a differential impact in relation to people of different gender or ethnicity, on consumers in Northern Ireland or on disabled consumers compared to consumers in general. Similarly, we are not making a distinction between consumers in different parts of the UK or between consumers according to income. Again, we believe that our guidance will not have a particular effect on one group of consumers over another. We do not envisage that the decisions contained in this statement will have a detrimental impact on any particular group of people.

²⁵ <http://stakeholders.ofcom.org.uk/consultations/price-rises-fixed-contracts/?showResponses=true>

²⁶ http://stakeholders.ofcom.org.uk/binaries/consultations/ia_guidelines/summary/condoc.pdf

²⁷ Equality Act 2010

²⁸ including gender reassignment

²⁹ including sex orientation

Structure of this document

2.23 The structure of this statement is as follows:

- Section 3 sets out the legal framework and explains the current rules protecting consumers in relation to contract variations and point of sale information.
- Section 4 summarises responses in relation to the unfairness and consumer harm identified as arising from mid-contract price rises and other key issues.
- Section 5 summarises the responses to the regulatory options proposed in our consultation.
- Section 6 sets out Ofcom's conclusions and decision to issue guidance for GC9.6 following consideration of the consultation responses and other relevant supporting information.
- Section 7 summarises other issues raised by respondents (including any new/additional issues raised that were not discussed in the consultation) and how we have considered them.
- Annex 1 sets out our guidance on material detriment for GC9.6 in relation to price rises and for notification of contract variations.
- Annex 2 lists the non-confidential responses to the consultation.
- Annex 3 lists price rises of most of the major CPs since September 2011.
- Annex 4 sets out our analysis of complaints to Ofcom about mid-contract price rises from 1 June 2012 – 31 August 2013.

Section 3

Legal Framework

Introduction

- 3.1 This section sets out the legal framework relevant to the issues we were consulting on. It explains the current rules protecting consumers in relation to contract variations and point of sale information.

General Condition 9

- 3.2 Ofcom has powers under sections 45 – 48C of the Act to set (and to modify) General Conditions (GCs) for the purposes of governing the way in which CPs conduct their operations in the UK. Such conditions include those which Ofcom considers are appropriate for protecting the interest of end users of public electronic communications services (section 51(1)(a)).

- 3.3 GC9 sets out the requirement on providers to offer contracts with minimum terms. The condition includes requirements relating to the provision of information, the length of contracts and the conditions for termination.

- 3.4 GC9.6 (of the consolidated version of the GCs as at the date of this statement) states that:

“The Communications Provider shall:

- (a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;
- (b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and
- (c) at the same time as giving the notice in condition 9.6(a) above, shall inform the Subscriber of its ability to terminate the contract if the proposed modification is not acceptable to the Subscriber.”³⁰

- 3.5 GC9.6 is included pursuant to section 51(1)(a) of the Act and is intended to give effect to Article 20(2) of the Universal Services Directive (“USD”) (Directive 2002/22/EC, as amended by Directive 2009/136/EC)³¹ which requires that:

“Member states shall ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications networks and/or services. Subscribers shall be given adequate notice, not shorter than one month, of any such modification, and shall be informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions. Member States

³⁰ <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf>

³¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF>

shall ensure that national regulatory authorities are able to specify the format of such notifications.”

- 3.6 The USD does not refer to a requirement for likely material detriment to the subscriber of any proposed modification before that subscriber can terminate the contract. Nonetheless, Ofcom and, before us, OFTEL has included a material detriment requirement in the relevant part of GC9. Our intention was to reflect our general duties and principles of good administration and proportionality in particular. We sought, in light of these, not to rule out contract variations altogether. For example, those beneficial to, or having a neutral impact on, a subscriber.
- 3.7 Ofcom has, however, for the reasons set out in the consultation and in this statement, re-considered the position in the context of price variations. Such variations had not previously been the focus of consideration in our transposition of the USD and the drafting of GC9.6 (which applies to all modifications of any contract terms). In this connection we note that, of the 13 Member States who provided us with information about their national provisions implementing Article 20 of the USD, most said subscribers are given the right to exit the contract without penalty if the price is increased by any amount³².

The Unfair Terms in Consumer Contract Regulations 1999 (“the UTCCRs”)³³

- 3.8 Ofcom is a “designated enforcer” under Part 8 of the Enterprise Act 2002, meaning that we are empowered to take action to enforce certain specified consumer protection legislation, including the UTCCRs. Ofcom also has the power to enforce the UTCCRs directly (as a “Qualifying Body” under the UTCCRs). It is important to note that the UTCCRs only apply to consumer (i.e. residential customers) contracts whereas GC9.6 applies to all subscribers (i.e. residential and business customers).
- 3.9 A term in a consumer contract allowing the CP to make unilateral changes to that contract may be unfair under the UTCCRs if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer. The requirement of good faith embodies a general principle of fair and open dealing. It means that terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer should be given appropriate prominence. Terms which do not meet the fairness requirements are unenforceable.
- 3.10 This requirement for fairness is designed to protect the consumer as the presumptively weaker party when contracting with a trader (here, a CP) on the latter’s standard terms. It is designed to ensure that an imbalance in the parties’ bargaining power is not reflected in an imbalance in the contractual terms.
- 3.11 Amongst other things, the need for fairness is meant to ensure that the consumer’s legitimate interests are protected and the contract terms do not contain any unfair surprises. The contract terms should not be inconsistent with the idea of consumers being aware of the bargain they are striking, making informed purchasing decisions and being able to rely on the terms of that bargain.
- 3.12 The indicative and non-exhaustive list of terms which may be regarded as unfair in Schedule 2 of the Regulations includes a reference to any term which enables the

³² See Annex 6 in the consultation.

³³ <http://www.legislation.gov.uk/uksi/1999/2083/contents/made>

seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract (paragraph 1(j)). Also included on the list of terms which may be regarded as unfair are terms allowing a supplier of services to increase their price without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded (paragraph 1(l)). These examples are stated to be without hindrance to price indexation clauses, provided that the method by which prices vary is explicitly described. The right to vary prices is also potentially unfair if there is no indication as to the level and timing of any price rises.

3.13 The OFT has published guidance on the UTCCRs which discusses suppliers' rights to vary terms generally and price variation clauses³⁴. We note that the OFT's discussion on the potential unfairness of variation terms is consistent with key consumer concerns highlighted by recent price rises in the telecommunications market. The guidance considers how variation terms could tilt the balance of the contract unfairly in favour of the supplier but it also notes how an element of balance can be restored so that such terms are more likely to be found fair.

3.14 On the issue of price variation clauses, OFT's guidance states that:

“12.1 ...A clause allowing the supplier to increase the price – varying the most important of all of the consumer's contractual obligations – has clear potential for unfairness.

12.2 Any purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable.....It also applies to rights to increase payments under continuing contracts where consumers are “captive” – that is, they have no penalty-free right to cancel.

12.3 A price variation clause is not necessarily fair just because it is not discretionary.....Suppliers are much better able to anticipate and control changes in their own costs than consumers can possibly be. In any case, such a clause is particularly open to abuse, because consumers can have no reasonable certainty that the increases imposed on them actually match net cost increases.”

3.15 The guidance then goes on to explain that a degree of flexibility in pricing may be achieved fairly in a number of ways such as by specifying the level and timing of any price rise (within narrow limits if not precisely), by linking terms permitting price rises to a relevant published price index such as RPI or by allowing consumers to end the contract and not experience any financial loss as a result of cancellation.

3.16 It is important to note that the UTCCRs and GC9.6 are not the same. The UTCCRs set out the basis on which a contractual term may be considered unfair. GC9.6, meanwhile, sets out a requirement which protects subscribers by placing a positive obligation on CPs to notify and give subscribers the right to withdraw from their contract without penalty in the event of any modification likely to be of material detriment. It should be seen in light of the relevant requirements of the USD. Providers are required to ensure compliance with the UTCCRs and GC9.6 separately.

³⁴ http://www.ofg.gov.uk/shared_ofg/reports/unfair_contract_terms/ofg311.pdf

- 3.17 Both sets of rules can, however, be seen as working towards similar goals. As described above, standard form contracts between consumers and, in this context, CPs, should be balanced and not contain unfair surprises. One aspect of this is that consumers should receive the contractual bargain they signed up to and legitimately expect. They should have protection against not doing so. Ofcom does not see how there can be any reasonable objection to rules that seek to achieve that position.
- 3.18 The UTCCRs' provisions relating to contract terms allowing for price variations, for example, seek to ensure that consumers get what they bargained for and expect in respect of one of the key terms: the price. A term allowing price increases without giving the consumer the right to cancel without penalty, especially where the price rise could be above some objective measure like RPI, is liable to be unfair (though there may also be circumstances in which these kinds of terms are fair). In other words, the law reflects a basic requirement of fairness: that the price agreed should generally be fixed (and variable, if at all, only in very limited circumstances). GC9.6 seeks to give consumers similar protection against the effects of price rises (amongst other things).
- 3.19 Ofcom notes that the Law Commission has issued a report on the amendment of the UTCCRs.³⁵ The Government has subsequently published a draft Consumer Rights Bill,³⁶ proposing to replace the UTCCRs with provisions substantially giving effect to the Law Commission's report.
- 3.20 Neither the Law Commission's report, nor the draft Bill, has (yet) changed the law. Whether the Bill will do so, and in what way, is a matter for Parliament. However, Ofcom's understanding of the current provisions of the Bill is that they are to similar effect, and they pursue similar goals, to the provisions of the UTCCRs (and GC9.6 and the Universal Services Directive).
- 3.21 In this review, Ofcom has considered whether the rules described achieve the legitimate aims of fairness described above in clear and certain ways (in line with the general legal principle that rules should be clear, certain and genuinely effective).

The Consumer Protection from Unfair Trading Regulations 2008 ("the CPRs")³⁷

- 3.22 Ofcom is also a designated enforcer of the CPRs under Part 8 of the Enterprise Act 2002. Amongst other things, the CPRs prohibit unfair commercial practices (including sales and marketing activity)³⁸ that involve misleading omissions by traders (CPs) which affect or are likely to affect the average consumer's "transactional decisions."

³⁵ Unfair Terms in Consumer Contracts: Advice to BIS,

http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf

³⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf

³⁷ <http://www.legislation.gov.uk/uksi/2008/1277/contents/made>

³⁸ Regulation 2 of the CPRs defines a "commercial practice" as:

"..... any act, omission, course of conduct, representation or commercial communication (including advertising and marketing), by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during, or after a commercial transaction (if any) in relation to a product."

- 3.23 Under Regulation 6(1), a misleading omission includes any commercial practice which, in its factual context, and taking account of certain matters:³⁹
- omits material information;
 - hides material information; or
 - provides material information in a manner which is unclear, unintelligible, ambiguous or untimely; and
 - as a result causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
- 3.24 “Material information” is defined in Regulations 6(3) and 6(4). Under the former, material information includes “.... the information which the average consumer needs, according to the context, to take an informed transactional decision....”
- 3.25 A transactional decision is defined in Regulation 2 as: “... any decision taken by a consumer, whether it is to act or to refrain from acting, concerning - (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or (b) whether, how and on what terms to exercise a contractual right in relation to a product.”

General Conditions 23 & 24

- 3.26 GC23 and GC24 set out the obligations on CPs in respect of the sales and marketing of mobile and fixed-line telecommunications services respectively. There are obligations under GC23.5(c)(ii) and GC24.6(c)(ii) for providers to make the consumer aware of specific information at point of sale, including: a description of the service; the key charges (including minimum contract charges and any early termination charges, if applicable); payment terms; the existence of any termination right, including termination procedures; the likely date the service will be provided, in case the provision of the service is not immediate; and any minimum period of contract. Ofcom has published guidance for GC23⁴⁰ and GC24⁴¹.

Stakeholder responses on the legal framework

- 3.27 Although we did not ask specific questions regarding the legal framework relevant to price rises in fixed term contracts, some stakeholders commented in their responses. These are summarised below.
- 3.28 Sky said that Article 20(2) of the USD is clearly directed at “modifications to the contractual conditions” and not “modifications to the price”. Therefore, when interpreting the USD in this respect, Sky considered that a distinction should be made between a modification of a contractual condition and a variable term in a contract. It said that in order to modify the terms of a contract, the CP must change

³⁹ all the features and circumstances of the commercial practice; the limitations of the medium used to communicate the practice (including limitations of space and time); and where the relevant medium of communication imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means (CPRs Regulation 6(2)).

⁴⁰ Annex 7 (pg 140 – 147):

<http://stakeholders.ofcom.org.uk/binaries/consultations/mobmisselling/statement/statement.pdf>

⁴¹ <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/statement.pdf>

the terms and not merely give effect to terms that expressly provide for variable circumstances, such as increases in price.

- 3.29 Similarly, Telefonica said that Ofcom has not considered whether price variation terms result in “modifications to the contractual conditions”. It said that in practice, contractual conditions have not been modified but that price variation terms already included in contracts have simply been exercised.
- 3.30 Sky agreed with Ofcom’s proposition that prohibiting price rises would not be consistent with Article 20(2) of the USD or the UTCCRs. In contrast, the CFC and Citizens Advice considered that Ofcom’s interpretation of Article 20(2) in that respect is self-evidently not correct and said that it does not require regulators to allow CPs to vary terms during the fixed period.

Our response

- 3.31 We note Sky and Telefonica’s question as to whether a price increase in accordance with a price variation term can be considered to be a “modification to the contractual conditions” covered by Article 20(2). We consider that a price increase constitutes a change to the price agreed at the time the contract was concluded and is therefore a “modification to the contractual conditions”. The price variation term merely enables (or purports to enable) that change to occur.
- 3.32 In response to CFC and Citizens Advice point, we maintain our view that prohibiting price increases would not be consistent with Article 20(2). We consider it would be disproportionate to limit the commercial freedom of CPs to make contractual modifications and that the purpose of the Article is simply to ensure that there are rules in place to protect consumers should CPs exercise their commercial freedom to make contract changes which could be unfair to consumers.

Section 4

Consultation responses: unfairness, consumer harm and key issues

Introduction

- 4.1 We have published on our website (where non-confidential) and carefully considered the responses to the consultation. This section of the statement summarises the responses in relation to the consumer harm identified from price rises in fixed term contracts (discussed in section 4 of the consultation) and key issues raised. It sets out, in particular, a summary of key points to which we have had particular regard in making our decision as explained in section 6.
- 4.2 In section 4 of the consultation, we identified and sought stakeholder views on the following proposed key causes of unfairness and consumer harm from price rises in fixed term contracts:
- a lack of transparency in some CPs' terms and conditions and/or practices in relation to price variations;
 - CPs' inconsistent application of the "material detriment" test in GC 9.6 and uncertainty under the Unfair Terms in Consumer Contract Regulations 1999 (the "UTCCRs"); and
 - CPs' ability to raise prices in fixed term contracts without a reciprocal right to withdraw from a contract without penalty on the part of consumers.
- 4.3 We primarily identified likely unfairness and consumer harm and their causes from:
- complaints to Ofcom's Consumer Contact Team (CCT) (see section 2);
 - our review of variation terms in CPs' terms and conditions; and
 - information provided by stakeholders such as Which? as part of our review of contractual terms and conditions and also specifically on the issue of price rises in fixed term contracts.
- 4.4 We used the following key principles (which take account of our regulatory duties under the legal framework) to assess the (proposed) unfairness and consumer harm and the options for addressing it:
- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
 - **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
 - **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and

- **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).

Overview of responses

- 4.5 There was general agreement amongst consumers and CPs that unfairness and harm has arisen from both the lack of transparency of price variation terms and the lack of clarity in relation to the application of the “material detriment” test in GC9.6. They agreed that, at the very least, Ofcom should address these issues.
- 4.6 However, consumers and CPs differed on what they considered to be the most appropriate and proportionate course of action to address the unfairness and harm identified. In general, consumer groups and individual consumers were supportive of option 4. In contrast, the most CPs opposed option 4 and instead favoured option 2 (to improve the transparency of price variation terms and/or provide guidance on the application of GC9.6 in relation to mid-contract price rises).
- 4.7 Most CPs said that non-subscription services should not be included in any action Ofcom may take⁴². They argued that there was very little (if any) evidence of unfairness or harm arising from price increases to non-subscription services as consumers are only contractually obliged to pay the core subscription price⁴³. CPs said that some costs associated with non-subscription service’ costs are outside of their control.
- 4.8 Most CPs argued that our evidence base for unfairness and consumer harm was limited and that the volume of complaints to Ofcom about mid-contract price rises was relatively low compared to the total customer base. They also submitted that the evidence showed that customers were dissatisfied with the “surprise” of price rises rather than experiencing any unfairness or harm from the amount of the price rises. Most CPs criticised the qualitative nature of the impact assessment in the consultation and said that Ofcom should undertake more detailed quantitative analysis of the costs and benefits of intervention before regulatory intervention could be justified.
- 4.9 We set out in this, and the following, section of this statement a summary of consultation responses. Our assessment, and the decision we have decided to make in light of our careful consideration of the responses, is in section 6.

⁴² For present purposes **non-subscription services** typically include premium rate or NGCs (though see following footnote), directory enquiries, making calls and sending texts internationally and roaming services. Non-subscription charges are the prices for services that fall outside of the inclusive core monthly tariff, and are billed incrementally when such services are used by the customer.

⁴³ In the context of this decision statement, the **core subscription price** is the recurring (usually monthly) charge that the customer is contractually obliged to pay a CP for an inclusive core package of services (such as line rental, minutes for calls to certain numbers and/or at certain times, texts, data etc.) for a pre-determined period of time (of no more than two years for consumers). Although often outside, some CPs may include some NGCs within the inclusive core package. Where a CP chooses to do so, in principle the core subscription price covers such NGCs and we treat them accordingly in this statement and the guidance we have decided to issue (see section 6 and Annex 1).

Evidence of unfairness and consumer harm

- 4.10 Most CPs questioned the robustness of the evidence base used by Ofcom to identify unfairness and consumer harm from mid-contract price rises. In addition, most fixed line/broadband CPs questioned the extent to which harm was arising in relation to price increases in that sector and suggested that the evidence demonstrated harm principally in the mobile sector.
- 4.11 EE, Telefonica, Vodafone, Sky and United Utilities Ltd put forward various arguments as to why they did not consider that the unfairness or harm arising from mid-contract price rises was as widespread as Ofcom had suggested. They criticised Ofcom for not presenting complaints data in context and, in particular, mentioned one or more of the following:
- the volume of complaints to Ofcom about mid-contract price rises is relatively low compared to other issues (such as silent calls, mis-selling and slamming) and as a proportion of total customers on mobile/fixed line/broadband contracts;⁴⁴
 - the majority of complaints to Ofcom could be attributed to three CPs, which suggests that the practices of those providers were responsible for the increase in complaints and does not demonstrate widespread unfairness or harm in the market;
 - complaints data is inherently biased⁴⁵ as it comes from a self-selecting group of respondents; and
 - CPs offer their deals in a competitive market where consumers have choice but are mainly opting for pay monthly contracts and where Ofcom's Consumer Experience survey suggests that consumer satisfaction (with mobile contracts) is generally high⁴⁶.
- 4.12 Telefonica and Vodafone also questioned the robustness of Which?'s survey which Ofcom used as supporting information for our proposals⁴⁷ and noted Which?'s

⁴⁴ EE said that complaints to Ofcom about price increases represented 0.002% of total telecoms subscribers in the UK. This was worked out using Ofcom's CMR 2012 which reported 81.6m mobile users and 33.2m fixed line (including broadband) connections in the UK and Ofcom's reported number of 1644 complaints about price rises in the period from Sept 2011-May 2012 which would amount to 2192 complaints in a yearly basis. Taking into account that all mobile operators and fixed line/broadband operators increased their tariff, EE estimated that around 110m customers would have been subject to a price increase of some sort in 2012-13. (See page 12 of EE's response.)

⁴⁵ Assessing views on 'unfairness' of contracts from a population of complainants is biased as this group is self-selecting. It ignores those who have not expressed a view of unfairness/fairness.

⁴⁶ Section 7.4, http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-12/Consumer_Experience_Research1.pdf

⁴⁷ Pg 34 of Vodafone's response set out its key concerns: (a) Vodafone questioned whether it was a representative sample as only 77% of those asked were on post-pay contracts – which is significantly different to Ofcom's own stats on the proportion of post-pay contracts (47%), (b) there was no assessment of the use of online research or the nature of questions put to respondents, (c) the Pay TV appeals case shows that Ofcom had previously expressed reservations about online research, (d) it considered that Which?'s questions clearly related to the core component only. At most the survey results suggest that some consumers are not aware that mid contract price rises are possible and are not expecting mid-contract price rises to CPs' core terms. In summary, Vodafone interpreted the results from the two questions in Which?'s survey as suggesting that a lack of awareness of the possibility leads to a lack of expectation of a price change. It suggests some of the lack of awareness must come from the fact in mobile, unlike for fixed-line services, there have not been many past price increases to core terms.

campaigning activities had been in relation to subscription price increases rather than non-core services. Given the limitations in the use of consumer complaints data and the Which? survey, Vodafone said Ofcom should conduct a survey across a robust weighted sample of the UK population. Telefonica noted, in general, that the Which? “Fixed means fixed” campaign was too simplistic as it failed to account for customers who benefit from price variation clauses.

- 4.13 Telefonica and Vodafone considered that perhaps it was the unexpected nature of mobile price increases that had generated recent complaints and that any harm from the “surprise” of price increases was now reduced as a greater number of consumers now know that they can occur. Vodafone said one of the main reasons for the recent consumer dissatisfaction over mobile price increases was that consumers have become accustomed to mobile prices decreasing and therefore recent increases have been unexpected. Vodafone noted that a Which? omnibus survey undertaken in July 2012 showed 30% of consumers were aware prices could increase mid-term. Vodafone said that it would be interesting to see the result if a similar question was asked now.
- 4.14 Telefonica and EE commented about a lack of quantified impact assessment on the scale of harm. Telefonica submitted that Ofcom had made no attempt to conduct even a rudimentary analysis of the scale of harm – in particular whether an RPI increase had caused material detriment or financial hardship (and if so the pence per individual). This was notwithstanding that only 16% of consumers complained to Ofcom specifically about harm arising from the amount of a price rise⁴⁸. Telefonica submitted that Ofcom could therefore only say that harm “could” be caused, which does not provide a robust basis for intervention and therefore considered that our analysis would not withstand “profound and rigorous scrutiny.”
- 4.15 Vodafone, Telefonica and EE also noted that the potential costs should be set against the potential benefits. EE argued that any assessment of harm would need to take into account the impacts of operators not being able to effectively recover efficiently incurred costs from consumers in contract (or raise overall prices to cover the risk of this over the contract)⁴⁹. This would need to be shown against the possible benefits.
- 4.16 In contrast, consumers and some consumer groups (Which?, NCF, CCP and the CFC) agreed that consumer harm arises from mid-contract price rises as identified by Ofcom. Which? said that the current balance of power (of the contract) is stacked in favour of CPs and it is this which it and the consumers that have supported its “Fixed means fixed” campaign consider to be “unfair”⁵⁰.

⁴⁸ From our assessment of 1644 consumer complaints about price increases in September 2011 - May 2012.

⁴⁹ EE suggested that one approach would be to compare the impact on customers on mid-term price increases compared with the impact on customers on fixed price contracts. EE’s submitted that its “fix your monthly” plan option illustrates the forward pricing and fixed price premium impact on total cost of ownership. EE calculated that based on a particular monthly subscription charge, the premium of £1.50 per month would add £36 to the cost of the contract over two years. It compared this to the cost of a mid-term price increase. If RPI price increase occurred 10 months into a two year contract this would result in a £12 increase over the life of the ‘variable’ deal. EE calculated that the consumer that had signed a fixed deal would be £24 worse off.

⁵⁰ Which?’s campaign has attracted nearly 59,000 pledges of support from members of the public (correct as of 18/10/13), <http://www.which.co.uk/campaigns/technology/fixed-means-fixed/pledge-your-support/>

- 4.17 The majority of consumers objected to the very principle of raising prices when contracts had been entered into a “fixed term” basis. Some consumers pointed out that price rise clauses were inserted in all mobile contracts and it was therefore impossible to avoid these terms – i.e. they had no choice but to accept them.

Lack of transparency of price variation terms

- 4.18 A number of respondents acknowledged that consumer harm could arise from the lack of transparency of price variation terms and that action should be taken to address this:
- Telefonica said that being clear and upfront with customers to avoid surprises is important in treating customers fairly and admitted that it knew from mystery shopping “that we have more to do in this respect.” Nevertheless, it questioned the extent to which mobile consumers are now “surprised” by price rises given the media attention to this issue and the ASA’s recent rulings which has resulted in greater transparency (that prices may vary) in CPs’ advertising. It therefore considered that consumers are probably now more familiar with the concept of mid-contract price rises. Telefonica argued that we should test the available complaints data to see whether the majority of complaints related to the first price rise announcements.
 - Sky accepted the potential for consumer harm to arise where the expectations and understanding of the consumer are not aligned with the reality of their contractual position regarding the potential for price rises in fixed term contracts. Sky noted that complaints mainly related to mobile operators who present offerings at different price points for different minimum contract lengths (e.g. £14.99 for 12 months, £10.99 for 24 months). This is likely to have influenced consumer expectations that prices would remain fixed for the duration of the contract.
 - SSE agreed that the evidence showed consumers generally have an expectation of fixed monthly charges for the duration of a fixed term contract and are likely to be subject to harm if CPs seek to increase charges during that period.
 - BT agreed that lack of transparency in price variation clauses can lead to consumer harm. For example, it said that 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.
 - Citizens Advice said that since April 2012, it had received 87 enquiries about CPs raising prices during the term of the contract. In the majority of cases, consumers said that price increases ran counter to their understanding of the contract they agreed to as they had believed that all terms were “fixed”. It 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.
 - Ombudsman Services (OS) said that, in its experience, consumers seem to have an expectation that the initial cost of the contract will remain until the contract expires and therefore price increases are unexpected and come as a shock to them, resulting in dissatisfaction. uSwitch agreed that with household expenses rising and many consumers on a tight budget, unexpected price increases to a

cost that consumers expect to be constant⁵¹ can cause harm and therefore considered that the possibility of price variance should be made clear at point of sale (“POS”).

- 4.19 The NCF agreed that the present price increase terms lack transparency and that consumers would not be aware of them until they are used. It considered that even if the terms were drawn to consumers’ attention they would still have difficulty in assessing their impact. The CCP believes that offering services where fixed contract terms allowing price increases are not highlighted to consumers is misleading and that if a price increase is possible then this must be communicated clearly to consumers at point of sale and certainly before they enter into the contract.
- 4.20 Citizens Advice and OS said that even where a consumer is aware of the possibility of a price increase they will have no way of anticipating when that rise may occur or how much it could be. Citizens Advice said that its 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 is paid to what are sometimes seen by consumers as incidental or contingent prices and contractual terms. It also said that Ofcom should consider whether existing contracts where price variation was not transparent breached the CPRs. OS said that the original sale price could be considered irrelevant as it might be subject to change and make any comparison with another CP impossible.
- 4.21 The CFC considered that the principal harm is caused not so much by lack of transparency of price variation terms but by the fact that they exist in the first place. It said that even if consumers are provided with adequate information at POS they may not recall the information when it becomes relevant. It added that the problem is not merely a lack of transparency but of misleading information being provided to consumers and a lack of understanding by POS staff.

Current regulatory framework

- 4.22 Some CPs (EE, BT, Sky, Telefonica, Vodafone and Universal Utilities Ltd) considered that the current regulatory framework already protects consumers from the “surprise” of price increases since a right to terminate a contract on the basis of material detriment is required under GC9.6. In addition, they noted that a price variation clause that is drafted in plain intelligible language to allow the CP to increase prices within clearly defined parameters but which does not provide a customer with a corresponding right to exit the contract without penalty can, in the right circumstances, be fair under the UTCCRs. Therefore, they argued that the potential for unfairness or consumer harm is already limited.
- 4.23 Vodafone said that an RPI measure of price inflation already provides an upper limit for line rental⁵² increases and that Ofcom could confirm this within a revised GC. It said that Ofcom had not put forward a case for why increases based on RPI are fair in other industries but somehow unfair in telecoms and said our proposed option 4 is likely to create additional complexity without a corresponding consumer benefit. It

⁵¹ It stated that its own research found that 61% of consumers believe that a fixed term contract means a fixed price.

⁵² We understand “line rental” to mean the monthly subscription charge in this case. We note that Vodafone’s contract allows customers to withdraw from the contract without penalty if line rental is increased by more than RPI and/or if the customer’s total bill increases by more than 10% as a result of a price increase to any service that forms part of that bill.

considered there was nothing inherently unfair about index linking to take account of inflation and said that this is widely accepted in other sectors, and by Ofcom for charge controls.

- 4.24 Similarly, Telefonica noted that Ofcom had not assessed whether an RPI increase causes “material detriment” and therefore cannot conclude that GC9.6 needs to be modified because it does not adequately protect consumers from harm. It also noted Ofcom’s role in respect of the UTCCRs and said that we had not explained whether we had considered taking enforcement action in light of the consumer complaints about mid-contract price rises. It also noted that the material detriment test has been in place for several years and was subject to a review in 2011 when Ofcom concluded that it had implemented the relevant articles of the USD correctly via GC9.6. Therefore, it failed to see how removal of material detriment can be objectively justifiable when Ofcom’s conclusion in 2011 was that its inclusion was justified.
- 4.25 Three said that if there is unfairness or potential consumer harm due to the UTCCRs being too complex, uncertain and/or difficult to enforce, then this is a policy issue which should be addressed by the Government, as opposed to sector specific regulation. Vodafone and Telefonica noted that the Law Commission had recently reviewed the UTCCRs and said that Ofcom should consider the outcome of that review to see if our concerns about the effectiveness and/or uncertainty of those regulations will be addressed before creating sector-specific changes.
- 4.26 In contrast, the CCP said that the existence of price variation terms without the consumer having the right to cancel without penalty places the consumer at a disadvantage and considered such a situation to also be a de facto restriction on consumer choice. It considered vulnerable consumers to be at particular risk and in some cases even a small unexpected price increase could have a disproportionate impact on vulnerable customers. OS said the current regulations leave consumers exposed to unfair surprises and unfair effects. It agreed that price is one of the principal reasons a consumer enters into a contract.

“Material detriment” test in GC9.6

- 4.27 BT, Sky, Virgin Media, KCOM, Universal Utilities Ltd and TNUK agreed that there is potential for consumer confusion, and therefore harm, as a result of the uncertainty surrounding the interpretation of the material detriment concept and CPs’ inconsistent approaches to this when implementing price rises. TNUK said that the vagueness of the material detriment test is the key cause of consumer harm which must be addressed. However, Sky and BT considered that harm only arises where CPs have an unfettered unilateral right to increase monthly subscription charges. Virgin Media said that harm is not necessarily related to the inconsistent application of the term but rather the high threshold that some CPs have set for what constitutes material detriment.
- 4.28 UKCTA agreed that GC9.6 as it stands may not be achieving its intended objective and that some changes may be necessary. It agreed that “material detriment” is subject to a risk of inconsistent interpretation across providers but also noted that Ofcom has not issued any interpretative guidelines that could have assisted in achieving more uniform application over time.
- 4.29 The NCF said that consumers will be confused by the variety of definitions of material detriment that could trigger the ability of consumers to cancel without penalty, even supposing that the individual terms passed the fairness test under the UTCCRs. The

NCF said that a uniform trigger would be desirable. Citizens Advice said that it is unacceptable to allow CPs to apply different interpretations of an important part of consumer protection. It also noted that the word “material” does not appear in the Universal Service Directive. Ombudsman Services said that in its experience, consumers do not understand the term “material detriment”, it is often perceived as a legal term and complainants often argue that any change to the costs to them of their price plan gives rise to a right to cancel.

Requests for Ofcom guidance on GC9.6

- 4.30 In terms of clarity for customers and industry, EE said that Ofcom should consult with industry on an approach to developing a definition of material detriment. It said that guidance as to what constitutes material detriment would give clarity to consumers as to when they would be able to terminate their contract without paying ETCs. Guidance on the frequency with which prices can be changed would add further transparency. However, it noted that since material detriment is a subjective concept, guidance should allow for a certain level of flexibility and considered that developing a set of principles as to what guidance should look like would enable operators to produce their own guidance for their customers.
- 4.31 BT said that in the absence of a definition or guidance, the application of the concept of “material detriment” has not been straightforward. BT said that consumers and CPs alike would benefit from the imposition of a common standard or threshold for material detriment but it considered that guidance alone would not provide sufficient clarity or certainty. BT considered 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. It acknowledged that wherever the threshold is set, it needs to be not only fair and reasonable, but also transparent and measurable. It therefore suggested defining the threshold in simple percentage terms based, for example, on the previous year’s RPI to ensure transparency for customers.
- 4.32 Virgin Media considered that guidance would only be useful if it set a cap on the level of an increase, above which would constitute material detriment but said that such an approach is unlikely to benefit consumers as it would still allow mid-contract price rises up to a certain level before consumers could withdraw without penalty.
- 4.33 SSE said that guidance would be useful if it could set limits on the range of acceptable practices by CPs. It also considered that guidance on the acceptable interpretation of material detriment and how consumers could make reasonable representations to CPs if they consider a price increase constitutes material detriment in their particular case, would allow dispute resolution schemes to resolve consumer complaints.
- 4.34 KCOM said that publishing guidance could remedy the potential consumer harm and would be an appropriate remedy as a first instance response. It considered that guidance could offer greater certainty around “material detriment” in relation to monthly subscription, linking it to the provisions in the UTCCRs. It recognised that guidance is not legally binding but would help in any enforcement action taken under GC9.6. Guidance would also set consumer expectations around when they are able to withdraw from a contract without penalty.
- 4.35 Universal Utilities Ltd said that guidance on the meaning of “material detriment” would be beneficial in the absence of a definition of that term in the GCs. It considered that the term remains unclear even where the UTCCRs are referred to. However, it said that Ofcom should consider taking enforcement action against the

CPs with the highest volume of complaints about this issue and that the outcome of such action could serve as guidance for the rest of the industry. The FCS also considered that enforcement action under GC9 may be the most appropriate response. It said that effective enforcement would require more detailed guidance on what constitutes “material detriment” and that it would welcome such guidance as the current lack of clarity has been a source of uncertainty and concern for many FCS members. It further added that such clarification should specifically exclude price increases where the relevant contract contains a clause which permits (within bounds) such increases.

- 4.36 Which? said that the concept of material detriment is different for each individual customer and therefore using a broad “rule of thumb” to determine what constitutes material detriment is inappropriate. Consumers have told Which? that they want to decide for themselves whether or not they leave a contract when they face price increases or other changes, therefore, guidance on material detriment would be irrelevant as the consumer should ultimately be responsible for making the decision whether to accept the changes or walk away.
- 4.37 Citizens Advice said that guidance on what constitutes material detriment would do nothing to address the shock and confusion arising from price rises nor would it protect consumers from the impact of price rises they cannot avoid. OS said guidance could still lead to differing interpretations and inconsistencies amongst CPs and therefore considered that changes should be made to the General Conditions so that they can be applied equally across the sector and can be enforced. It said that clarity as to what constitutes material detriment would not solve the problem of complainants being unaware of CPs’ ability to increase the cost of contracts.
- 4.38 uSwitch agreed that guidance alone would not suffice as it considered that consumers must be able to respond to price rises so that they can avoid them, or at least minimise the effects. The CFC also said that guidance alone would not be an adequate remedy and considered that it would be too complex to define and apply and would likely absorb considerable regulatory time and resources in implementation and enforcement.

Scope of unfairness and consumer harm

Fixed line and broadband

- 4.39 In general, fixed line and home broadband providers questioned whether there was sufficient evidence of consumer harm arising from mid-contract price rises for their services.
- 4.40 Sky was concerned about the data used, and analysis conducted, by Ofcom in assessing the scope and potential scale of the actual harm arising, particularly in relation to the fixed line and home broadband sector. It noted that complaints were mainly in reaction to mobile subscription price increases after a prolonged period of time during which such prices were maintained at the same level for existing customers. It also argued that the potential harm in the fixed sector was reduced in light of more customers being outside of their minimum contract term and of the shorter contract durations.
- 4.41 TalkTalk, KCOM and Universal Utilities Ltd went further and said that Ofcom had not presented any evidence to show significant consumer harm in the fixed line sector for mid-contract price rises and therefore they considered that any regulatory intervention should not be extended to that sector. UKCTA agreed with the principle

that the monthly price agreed between a consumer and CP should generally be fixed during the fixed term. However, it said that the potential for consumer harm is much less in the fixed line market and that this is evidenced by fewer complaints about fixed line price increases even though they do take place quite regularly (in relation to line rental price). KCOM argued that there is greater consumer awareness of the potential for price increases in the fixed market, particularly in relation to line rental and said that Ofcom should demonstrate any harm in the fixed market through research.

- 4.42 In contrast, Virgin Media agreed that consumers may suffer harm as a result of a material increase in the monthly price which they are contractually bound to pay, where they are not able to withdraw from the contract without penalty. It said that its own terms allow consumers to withdraw from the contract for any price increase (except for its mobile contract which allows RPI increases) and therefore the harm did not extend to its customers.
- 4.43 Citizens Advice supported regulatory intervention across all communications sectors as consumers who contacted it about mid-contract price rises included fixed voice and broadband customers.

Business customers

- 4.44 KCOM, Universal Utilities Ltd, the FCS and a confidential respondent [redacted] did not consider that there was sufficient evidence to show that the harm from price rises in fixed term contracts extends to small businesses.
- 4.45 BT, Vodafone and EE said that small business customers on standard and/or consumer contracts could be included in any regulatory intervention because of the similarity with consumers in respect of their bargaining power. EE said that larger businesses tend to have considerably more bargaining power and are therefore less comparable with small businesses and consumers. SSE said that larger businesses are well able to understand and negotiate on the terms of price variations in contracts. KCOM said it is absolutely essential that larger businesses are not captured by any proposed change.
- 4.46 The CFC and Ombudsman Services agreed with Ofcom's view that small businesses require the same protection from mid-contract price rises as consumers because they are unlikely to have the knowledge and/or bargaining power when entering contractual arrangements with their provider.

Other key issues raised

The difference between subscription and non-subscription services

- 4.47 Most CPs (BT, KCOM, TalkTalk, Sky, SSE, Virgin Media, Vonage, Three, Telefonica and Vodafone), TNUK and UKCTA distinguished between price rises to monthly recurring/subscription/core charges and non-monthly recurring/non-subscription/non-core/usage based charges in order to achieve a more proportionate and targeted outcome. They considered that there is more of a case for Ofcom intervention in relation to increases to regular monthly charges such as package price and line rental.
- 4.48 Many CPs noted that all customers who subscribe to a monthly package are contractually obliged to pay a monthly/recurring charge which gives them an inclusive bundle of services (e.g. minutes, texts and data in a typical pay monthly mobile

contract) to use on a monthly basis for the minimum term, but that all other charges are incurred at the discretion of the customer depending on their usage. Therefore, they considered that consumers only expect subscription charges to remain the same. They argued that a significant proportion of customers will have alternatives available for services that are not in the monthly recurring/subscription charge. They considered that those who do use non-subscription services have sufficient protection from price increases to those services under the current material detriment test in GC9.6.

- 4.49 Virgin Media said that CPs benefit considerably more from a subscription price increase which a customer cannot avoid (unless they pay an ETC) compared with a non-subscription price increase which a customer is able to avoid by not using that service. This is because an increase in the monthly charge is not subject to competitive forces due to ETCs compared with non-subscription charges which it considers are subject to competitive forces (Vodafone also mentioned the latter point). It added that the recurring monthly charge for TV/content services should be subject to the same rules as telephony and broadband services.
- 4.50 Sky, BT, SSE, TalkTalk, Telefonica, Three, Vodafone, UKCTA noted that there has been little, if any, evidence that variations to non-monthly recurring charges are causing actual consumer harm. They noted that there are some services where some cost elements are controlled by third parties e.g. international calls and service charges for non-geographic calls (“NGCs”). Three, Vodafone and Telefonica noted that a variety of services that usually fall outside of the subscription charge e.g. international roaming, NGCs, premium rate services are already subject to specific regulation to protect consumers from harm. Telefonica also said that Ofcom has already assessed and dealt with any harm in respect of “additional charges”.
- 4.51 Three, TNUK and the MBG said that the inclusion of all charges, including those where a CP has no control or ability to foresee some relevant input costs (as is the case with many out of bundle charges) is not supported by consumer expectation and is not a proportionate response. Three and TNUK said that whilst CPs are able to anticipate some future direct costs, there are other charges, such as premium rate, non-geographic numbers and roaming charges, which can vary significantly and this is generally why such charges are “out of bundle” i.e. not included within inclusive allowance of tariffs. Three considered that the proposed inclusion of all charges risks market distortion, particularly in relation to additional charges (such as non-direct debit payment processing fees that may be subject to change by the banks) and call charges for out of bundle services where the originating CP has no control over termination charges.
- 4.52 TalkTalk said that the inclusion of all out of bundle charges would force CPs to set their charges above a level reflective of cost (i.e. wholesale cost plus efficient retail cost) to protect against the risk that wholesale costs may suddenly increase at short notice. This would ultimately harm all consumers as they would all have to pay higher retail prices overall regardless of whether they used certain non-subscription charges or not. Vodafone and Telefonica said that where CPs are faced with escalating third party wholesale charges, a possible course of action may be to remove those services affected from a bundle or to close access to them – both outcomes which would be to the detriment of the consumer.
- 4.53 The CFC agreed in principle that intervention should protect consumers in respect of any price increases but identified some of the concerns expressed by CPs above e.g. that some consumers may use out of bundle services sporadically and that some

NGCs charges may be subject to significant changes outside the CP's control (such as PRS, international and roaming charges).

- 4.54 In contrast, consumers and some consumer groups (Which?, NCF, Citizens Advice and uSwitch) agreed that any regulatory intervention should apply to all charges. Which? said that consumers can find tariffs complex and face high costs associated with out of plan charges and therefore it is important to make things as clear as possible by ensuring that costs outside the monthly subscription price are included. It also considered that out of bundle items may well be a feature that consumers consider when choosing CP if they know they will make frequent use of such services. Citizens Advice said that 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. It said that any increase in prices to out of bundle services could cause detriment to consumers and as such it would not support any proposals to exclude any services from our preferred regulatory intervention. OS and uSwitch said that intervention should relate to all services including increases to the service charge for NGCs.

Who should bear the risk of CPs' costs increasing?

- 4.55 Many CPs (BT, Sky, SSE, EE, KCOM and Universal Utilities Ltd) said that they are able to anticipate and bear some risks of increasing costs over the life of a fixed term contract but not all of them. Most CPs said that wholesale price changes for non-geographic, directory enquiries, PRS and international calls are outside of their control. They argued that where there are increases in charges for those calls, they should be allowed to pass them on to customers without having to let them withdraw from the contract without penalty. They believed that this would avoid CPs incorporating significant risk premiums into tariffs from the outset.
- 4.56 EE agreed that operators are able to forecast a number of cost categories related to their own network and operations reasonably accurately. However, it said CPs are also subject to price increases and, in particular, energy costs, costs of sites, rent for its retail shops and commercial rates have all gone up significantly over the past year (and some of these costs had risen faster than RPI). EE said that operators should be able to pass on to customers any costs or revenues that they are unable to accurately plan e.g. regulatory decrease of certain revenue streams such as wholesale mobile termination rates. In any case, it said consumers are protected by the UTCCRs, which makes provision for RPI-linked price increases and, therefore, the risk to consumers is limited anyway. Vodafone also made the latter point that CPs currently bear the risks of unexpected cost increases to a very significant extent due to consumer protection laws limiting the extent of any price increases.
- 4.57 Sky considered that a balanced contract, as envisaged by the USD and UTCCRs, should allocate risk between the contracting parties albeit with the significant burden being placed with the CP. Sky was concerned if Ofcom's proposals meant that CPs were not allowed to pass on cost increases which, for example, were driven by changes in guidance or best practice directed by a regulator (such as Ofcom or the ASA), or regulatory directions (such as to re-designate a number range).
- 4.58 BT saw no reason why a CP could not legitimately increase its prices in line with inflation. KCOM expressed concern that the effect of CPs having to absorb all cost increases is that some consumers will end up paying for services consumed by others, particularly out of bundle usage of non-geographic premium rate services.

- 4.59 Vodafone highlighted that the core services offered in a contract have expanded over time due to more cost certainty and competition. However, it said it is rare for NGCs to be included within core packages because many NGCs contain a revenue share element that is unregulated and termination rates can change at short notice. It said CPs have no control over the wholesale price set by wholly independent third parties and therefore it is essential that OCPs can react by changing their own non-core charges. Vodafone submitted a number of points in relation to the role of RPI⁵³.
- 4.60 In contrast, consumers and consumer-related organisations considered that CPs should bear the risk of costs increasing on the basis that they are better able to forecast their own costs and take steps to mitigate any increases.
- 4.61 Citizens Advice said inflation is reasonably predictable and a next to unavoidable fact of doing business. It recognised that there are potential cost increases faced by CPs other than inflation but that CPs are in a far better position to forecast them than consumers. Which? considered that if a CP has to bear a change in cost which is completely unforeseeable, they have ways to reflect the changes in their operating costs such as charging higher prices for new contracts. The CFC said that CPs' incentive to become more efficient is reduced if they are not required to bear the risks of increasing costs.
- 4.62 OS said that CPs are best placed to assess the risk of any price fluctuations and should bear the risk of any price increase. uSwitch said that CPs are best placed to predict costs over the life of a contract and therefore should take a bigger share of the risk. However, both expressed concerns that headline prices may rise if regulatory intervention restricted CPs' ability to increase prices mid-contract: if CPs start to charge a premium to cover possible cost increases not predicted at the outset of the contract. However, both also considered that competition may mitigate across the board price increases.
- 4.63 The CFC recognised that in a competitive market, any increases in costs must eventually be borne by consumers but its view is that any increases should not fall upon existing consumers who have already entered into a bargain. However, it noted that it may not be reasonable to expect the CP either to be prevented from passing on increases in costs to roaming and some calls to international numbers: where the country's international operator charges exceptionally high termination rates and where such costs may, to a significant degree, be outside the CP's control. However, where they are allowed to make such increases without triggering their obligations then they should also pass on any cost decreases.
- 4.64 An individual respondent, Andrew Dyson, submitted that no CP has provided any evidence for the bare assertion that their decision to increase prices results from a corresponding increase in their costs. Mr Dyson questioned whether RPI bears any resemblance to CPs' actual increase in costs. He noted that RPI records the price of a basket of consumer goods, taken from a range of industries which have very different costs structures from the telecommunications industry and submitted that the measure has no necessary connection with costs incurred by CPs. He also noted that most of the price increases implemented by CPs were only applied to individual consumers and not to business customers and submitted that if the basis for price rises were really an increase in CPs' costs, then the increases should have applied to everyone. He therefore considered it far more likely that CPs' decision to increase prices were not wholly, or even mainly, driven by increasing costs but instead were

⁵³ Pg 42-46 of Vodafone's response.

either: (a) attempting to make up for a shortfall in revenue or (b) simply an opportunistic attempt to increase profits.

Price increases attributable to VAT

4.65 EE, Sky, BT, Vodafone, Virgin Media, SSE, KCOM, the FCS, Which?, OS, uSwitch, Citizens Advice and the CFC agreed that price rises due to an increase in the rate of VAT (or the imposition of a new tax or the extension of an existing tax that has not previously applied) should not trigger the obligations under GC9.6 for subscribers to cancel without penalty. They agreed that those reasons are genuinely outside the control of CPs, would automatically apply to all CPs and therefore can be passed on to subscribers. The CFC said that the converse should also apply i.e. that prices will be reduced if the VAT rate falls. Which? said only changes in tax should be permitted to be passed on. It was concerned that allowing other exceptions could result in CPs trying to pass off costs under the guise of a “regulatory” change in order to avoid its obligation to let consumers withdraw without penalty for a relevant price increase.

Price rises to one or more services in a bundle

4.66 Most substantive responses to this issue related to how rules should apply to Pay TV services where they are included in a bundle with fixed line and broadband services. uSwitch asked whether consumers would be able to leave the whole bundle if one element increased in price and questioned whether CPs would be put off implementing price rises because of the hassle consumers would face in breaking up a bundle.

4.67 BT, Virgin Media and Three said that our proposals should ensure that consumers are protected from price increases to Pay TV services in the same way as communications services. They said that different rules on price increases for different services will confuse consumers especially as Ofcom’s research shows that consumers are increasingly purchasing ECSs in bundles with Pay TV services and therefore, they want the same rules to apply to all services.

4.68 They considered that consumer harm from price rises will continue if Pay TV services are excluded from Ofcom’s proposals as:

- providers would be able to attribute price rises to Pay TV services where such a service is provided in a bundle with ECSs without giving the consumer the ability to withdraw from the contract without penalty, or
- providers that charge separately for telephony, broadband and Pay TV services will increase the price of the services not covered by GC9.

4.69 BT said that Ofcom should seek to align the rules for price rises to ECSs and Pay TV/content services by allowing all providers to be able to increase prices for those services by up to RPI without the obligation to give consumers the ability to withdraw from the contract without penalty. Alternatively, it suggested that Ofcom could ask CPs to sign up to a voluntary code of conduct covering price increases in contracts for Pay/TV content services which would mirror exactly the requirements on CPs for price increases to ECSs in GC9.6.

4.70 Virgin Media said that in the absence of an interpretation of law which would permit Ofcom to regulate content (Pay TV) services or a change to legislation if that is necessary, we should issue guidance in respect of how the UTCCRs apply to price increases to Pay TV/content services. Telefonica also noted that, in a

communications market where consumers purchase bundles of services (where some are regulated by the GCs and some regulated under the UTCCRs), any inconsistency of rules is unhelpful for consumers, providers and regulators alike.

- 4.71 In contrast, Sky said that given the Universal Service Directive and General Conditions do not extend to the provision of Pay TV, Ofcom cannot and should not seek to extend its proposals in respect of the treatment of bundled services to any Pay TV element of that bundle directly or indirectly. It considers that the Pay TV elements of any bundle should be expressly carved out of any guidance, direction or decision issued by Ofcom under the consultation.
- 4.72 SSE said that it would be useful for Ofcom to define more clearly what constitutes a “bundle” because it considers there is a distinction to be made between situations where multiple products are sold together as one offering with one set of terms and conditions and those where products are offered separately.

Section 5

Consultation responses: regulatory options

Introduction

5.1 Section 6 of the consultation set out and sought responses to the following options to address the possible unfairness and consumer harm arising from mid-contract price rises:

- **Option 1:** make no changes to the current regulatory framework (maintain the status quo).
- **Option 2:** require greater transparency of price variation terms by CPs and publish Ofcom guidance on the application of GC9.6 and the UTCCRs to price rises and relevant contract terms.
- **Option 3:** modify GC9.6 so that consumers have to expressly opt-in to any variable price contract offered.
- **Option 4:** modify GC9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services applicable at the time the contract is entered into by the consumer (including changes to the level of service provided which effectively constitute a (unit) price increase).

5.2 This section summarises the responses to each of those options, focussing on key aspects in particular. The following section (section 6) sets out Ofcom's decision to issue guidance on the application of GC9.6 following our careful assessment of the responses to our consultation and relevant supporting information.

Responses to proposed options

Option 1: make no changes to the current regulatory framework

5.3 The majority of respondents agreed that “do nothing” was not a suitable option. For example:

- OS said that the current framework leaves consumers open to unfair surprises which can undermine their confidence in the sector. uSwitch said its own research shows that consumers are confused by CPs' pricing, harmed by these price rises and that the market lacks transparency.
- EE said Ofcom should at least review the information requirements on CPs as it believes that customers are currently faced with too much information. It also considered that this option would not address the different ways in which operators have interpreted GC9.6's material detriment requirement and implemented that concept in their processes and terms and conditions (although it pointed out that mobile CPs have been consistent in using RPI as the threshold for material detriment).

- Sky acknowledged that this option would not address concerns regarding the current drafting of GC9.6 and the concept of material detriment both in terms of the potential for its inconsistent application by CPs, and the potential to cause confusion among consumers who, without further clarification to its interpretation, may be unsure as to when they have a right to cancel their contract without penalty in the event of a price increase.
- Vodafone said that it did not entirely agree with Ofcom's views on consumer harm and therefore did not consider that the case for change is quite as pressing as Ofcom had suggested. However, it saw the case for some refinement of current regulation providing that the intervention is proportionate.
- Virgin Media said that the conduct of certain CPs and their interpretation of General Condition 9.6 is resulting in that obligation not providing the protection that it was intended to provide. Based on that, the option of making no change to the regulatory framework is unlikely to remedy any consumer harm being caused by that conduct. TNUK considered that the current wording of GC9.6 is confusing and therefore clarification of the regulation is required.

5.4 In contrast, Telefonica said that a more balanced solution given Ofcom's duties would be option 1 in light of the Law Commission's review of the UTCCRs which could address any harm caused by the uncertainty of those regulations and that many consumers may no longer be "surprised" by mid-contract price rises due to the coverage of the issue and recent ASA rulings. It was not convinced that the current rules create uncertainty given OFT guidance on price variation terms. However, despite its view that option 1 may be appropriate, it also saw the merits of option 2 if there is robust evidence.

5.5 Universal Utilities Ltd said that option 1 is the most suitable option. However, it clarified that this does not mean that Ofcom should take no action but instead should consider taking enforcement action using existing regulations.

Option 2: require greater transparency of price variation terms by Communications Providers and publish Ofcom guidance on application of GC9.6 and the UTCCRs to price rises and relevant contract terms

5.6 In light of their views on the transparency of price variation terms and the uncertainty of the material detriment test as summarised in section 4 above, most CPs considered this option to be the most proportionate response to the consumer harm identified. They agreed the evidence suggests that consumers are not aware of the potential for price increases when they enter into the contract and, therefore, they considered that the unfairness and harm caused by the "surprise" of a price increase could be addressed by greater transparency. Most considered that the benefits of greater transparency should be considered further rather than the proposal to amend GC9.6 in option 4.

5.7 EE said that a revised approach to consumer information combined with guidance on what constitutes material detriment and possibly frequency of price increases (in combination with giving consumers the choice to "fix" their subscription charge) would be the most appropriate intervention. It said that if information about price changes is clear, transparent and easy to find in marketing material and terms and conditions then consumers will be well informed and able to make a transactional decision. It said this should give the customer clear information regarding the different price plans and price variation terms and a choice as to whether they want a fixed price deal. However, in order for this to be effective it said the current approach

in respect of providing information to consumers needs to be reviewed to avoid duplication and to ensure consumers are given information that is relevant to them.

- 5.8 Sky said there are sufficient legal and regulatory protections in place to adequately address concerns about “unfair surprise” and therefore it did not agree that Ofcom has to make any regulatory changes. Instead, it suggested that Ofcom should work with other regulators such as the ASA to address specific concerns and to prioritise this work in the mobile sector which has generated the vast majority of complaints in relation to mid-contract price rises.
- 5.9 Telefonica considered that promoting greater transparency under option 2 to be the most balanced and appropriate solution. It said Ofcom already has the tools to do this (under GC23 and the UTCCRs) and was not convinced by Ofcom’s conclusion that remedies under this option would take time to develop. For example, the ASA had already ruled in respect of advertising. However, it asked why Ofcom had not considered enforcement of current rules if they are not being sufficiently adhered to. Universal Utilities Ltd said that no further transparency requirements are necessary as there are already rules in place which Ofcom should enforce to address any unfairness or harm from the “surprise” of price rises.
- 5.10 Vodafone noted that the ASA had contacted CPs confirming their ruling that the potential for monthly prices to increase within a fixed term contract must be made clear to consumers. This means that the term (allowing price increases) must be stated explicitly in the advertisement, in a footnote or equivalent. Vodafone considered that any potential harm or surprise from price increases is significantly mitigated by this action. It also said Vodafone modifying GC9.6 to clarify that RPI increases are allowed would contribute to greater transparency and consistency in the application of that rule.
- 5.11 SSE said there is significant merit in seeking to address the consumer harm identified through less intrusive remedies as set out under this option. It said guidance for GC23 and GC24 should be updated to mention that “payment terms” should include an explanation of the variability of prices within contract. It also said new guidance should be issued on expectations around the relevant matters in the existing wording of GC9.6 e.g. the types of change that constitute material detriment.
- 5.12 KCOM supported option 2 and considered that requiring CPs to make clear the potential for price increases at point of sale and guidance on the level of a price increase likely to constitute material detriment would address the consumer harm identified. It said that CPs uncomfortable with having to make a point of sale statement about the potential for price increases could offer fixed contracts if they wished to. It considered that competitive forces would ensure any demand for such contracts would be met with this small change in the transparency requirements.
- 5.13 Three said Ofcom should take action to ensure that all CPs price their recurring monthly charges in an open way to provide clarity for consumers so they can make an informed choice when they make a contract commitment. It also supported option 4 if only applied to subscription price increases (see below).
- 5.14 Virgin Media and consumer groups considered that transparency measures alone are unlikely to be adequate. Virgin Media agreed that even where a consumer is told about a price variation term which indicates the amount by which their bill may be increased, the complexity of comparing different offers with so many variables would be very challenging for even the most informed consumers.

- 5.15 Which? said that improving transparency in the marketing of telecoms services is a necessary first step so that consumers are fully aware of the deal they are signing up to. However, it considered that this alone would not solve the problem because even if CPs are clear about the fact that prices can rise, it does not change the fact that consumers have little alternative to the contracts on offer in an industry where all major mobile CPs have announced price rises. Even if consumers were made aware of price variation clauses, they would still be in a position where the balance of power is weighted towards the CP.
- 5.16 The CCP said it is vital that consumers are made fully aware of the terms of any contract into which they are entering and that the potential for price rises is communicated clearly. However, it also considered that if there are any price increases during the contract period then consumers should be able to withdraw from the contract without penalty. Citizens Advice said that even if consumers were aware of the potential for price increases, there would remain an asymmetry in the contract skewed towards the CP's advantage as consumers would still not know when price rises may occur or by how much.
- 5.17 OS agreed that the current rules in place to ensure transparency are not operating effectively and therefore there is a need for clear and certain rules which are uniformly applied by CPs. The CFC considered that an improvement in transparency might be an appropriate remedy if customers were able to take action to avoid potential price increases during the course of a contract by using an alternative supplier, but there is little or no evidence that they could do this.

Option 3: Modify GC9.6 so that consumers have to expressly opt-in to any variable price contract offered

- 5.18 There was a general lack of support for this option. Virgin Media, SSE, TNUK, OS, NCF and uSwitch agreed with Ofcom's analysis of the limitations of this option. TNUK said that this option would simply create a greater number of tariffs but that greater choice is not necessarily in the best interests of consumers as it does not believe that most consumers would welcome the additional choice/confusion. The NCF said that under this option, it would be open to CPs to market contracts with indexed prices by giving due prominence to the relevant terms and to obtain explicit opt-in but in practice, consumers will continue to base their decisions on headline prices alone.
- 5.19 uSwitch said this option would clearly define fixed price and fixed term contracts and therefore remove questions about clarity of price variation. However, it was concerned that a two-tiered pricing system could add complexity and create less engaged consumers and noted that in the energy market, restrictions on the number of tariffs each supplier can offer are about to be brought in by the regulator to reduce complexity and customer confusion. It expressed further concerns that an automatic opt-in to a fixed contract could mean that consumers pay the higher prices expected from such contracts even though they may be prepared to take a gamble for a lower monthly bill. It also said that Ofcom would have to work with stakeholders to educate consumers.
- 5.20 The CFC said that even under this option, consumers would still be unable to evaluate the relative costs of opting in or opting out without better information about the level or frequency of price variations. It also said that the problem of enforcement and interpretation of GC9.6 and the UTCCRs still exists under this option. However, it noted that if consumer harm is measured simply in terms of surprises, then the ability

of consumers to opt out of price increases would reduce it (although they may face other harm in the form of higher prices for fixed price contracts).

- 5.21 SSE noted that although fixed and variable price contracts are common in the energy sector and mortgages, those markets are very different to telecoms in that they have a smaller number of individual charges and therefore energy suppliers would find it easier to “fix” those charges. In contrast, there are many more charges in the telephony market, for example, different call rates to different numbers that are outside of the subscription charge, and therefore “fixing” all of these costs is not as straightforward and would impose significant costs. Vodafone also noted that mobile CPs have many more price points compared with the energy industry where prices are set for units of gas and electricity with only a handful of variants such as peak/off peak pricing.
- 5.22 EE considered that customers should not be required to expressly opt-in to a variable price contract (as did Vodafone). However, it said that giving customers the choice to “fix” their contract (along with a revised approach to consumer information and guidance on material detriment as described under option 2) is the most appropriate intervention. It believes that if both types of plan (variable price and fixed price) are presented in a clear and transparent manner, customers can make an informed decision as to which to choose. It mentioned that it already provides its customers with a choice to fix the price of their monthly plan but is unable to fix the amount of “out of bundle” tariffs. It disagreed that fixed price plans will be unattractive and pointed to the utility sector where there is customer demand for them.

Option 4: Modify GC9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services applicable at the time the contract is entered into by the consumer (including changes to the level of service provided which effectively constitutes a (unit) price increase)

- 5.23 All CPs rejected this option and argued that, at the very least, non-subscription services should be excluded from such an intervention.
- 5.24 Under option 4, mobile CPs (EE, Three, Vodafone and Telefonica) and the MBG considered that operators may be forced to change the current handset subsidy model to the detriment of consumers and/or take other action in order to mitigate the risk of not being able to recover those costs – for example, operators could reduce handset subsidies, split contracts into handset and airtime payments or increase prices for pay-as-you-go customers instead. EE submitted that a decline in handset subsidies would reduce access to smartphones, including, in particular, for vulnerable customers. It noted Ofcom’s duties to have regard to the needs of vulnerable consumers and accessibility to communications services.
- 5.25 Vodafone said this option was tantamount to prohibiting such price changes as mobile CPs in particular would not want to lose customers who would be able to walk away with expensive handsets under the current handset subsidy model. It said that mobile CPs are not in the same position as Pay TV providers who may also have an equipment subsidy model as most phones will work on other networks (usually after they have been “unlocked”) whilst Pay TV set top boxes do not operate in the same way.
- 5.26 Telefonica said that option 4 would just replace the possibility of fair price variation clauses being exercised in the future with the likelihood that risk premiums will be reflected in (headline) prices going forward. Cost increases will need to be incurred

by consumers in some form (price, quality, choice or value). It considered that option 4 is taking away the choice for consumers with no evidence to back up the conclusion that consumers prefer to pay the risk premium for certain rather than contract on the possibility that prices may go up during a fixed term contract. It submitted that we had not presented any evidence (consumer research) to suggest that fixed contracts are preferable to the current position.

- 5.27 Virgin Media, Three and UKCTA supported option 4 subject to it applying to monthly recurring/subscription charges only and the same rules applying to Pay TV/content services. UKCTA said that this would target regulation in the area where specific consumer harm had been identified. Virgin Media and Three agreed that mid-contract subscription price increases have resulted in consumers not knowing when and by how much a price increase will occur and therefore has made it harder for consumers to make an informed choice when comparing the monthly recurring charge and inclusive allowance for fixed term contracts.
- 5.28 TNUK partially supported this option. It said that it should apply to non-revenue share services until NGCs unbundling (when services charges will be separated entirely from any charges levied by the operator). It said that the ability to cancel the contract without penalty should rightly be applied in respect of increases in any charges set by the operators themselves and that would include the access charge after NGCS unbundling.
- 5.29 Sky considered that Ofcom should distinguish between the treatment of increases in monthly recurring charges, and increases in non-monthly recurring/usage based charges. It supported removing the material detriment threshold from GC9.6 where CPs have an unfettered unilateral right to increase monthly subscription charges. However, it considered that CPs should be able to include price variation clauses with clearly defined parameters within which prices may be increased and which provide customers with a corresponding right to exit without penalty in line with the UTCCRs.
- 5.30 BT supported this option subject to it applying to subscription charges only, the material detriment threshold being set at RPI and the rules for Pay TV services being aligned with ECSs. Vodafone had similar views in that it considered that GC9.6 should be modified to allow RPI increases to core subscription charges before a subscriber has the right to withdraw without penalty. It considered that under option 4, a prudent CP, in the face of high and unpredicted inflation, would factor in a very considerable initial increase to the monthly subscription price in order to avoid an inflationary deficit. It considered that this would be more detrimental to consumers than an increase based on actual RPI during the fixed term.
- 5.31 TalkTalk and Universal Utilities Ltd said that intervention was not required in the fixed line sector due to the lack of evidence of significant consumer harm from mid-contract price rises in that sector. However, TalkTalk said that even if fixed line services are included in option 4, then it should only apply to price rises to subscription charges. It considered that the current material detriment test in GC9.6 provides adequate protection for consumers for increases to out of bundle charges. SSE and KCOM also noted that complaints appear to be driven by recent mobile subscription charges and considered that there is more justification to intervene for those charges. However, overall, they considered that option 2 would be more proportionate in addressing any unfairness and consumer harm.
- 5.32 SSE was concerned that applying Option 4 to all services would limit innovation and tariff differentiation (e.g. the ability to offer discounted introductory deals). [3<]

- 5.33 Vonage said that for fixed term contracts that are longer than 12 months, CPs should be allowed to make an annual one off price increase that is less than or equal to RPI. However, it also recognised that the primary reason for customers choosing an “inclusive bundle” is because of the certainty of the cost of making calls within the bundle. Therefore, it considered that price increases to inclusive bundles could trigger a right of termination without penalty and should be the focus of Ofcom’s proposals.
- 5.34 The majority of consumers, some consumer groups (Which?, CCP, NCF), uSwitch and OS supported this option and agreed that CPs should allow consumers to withdraw from a contract without penalty for any proposed price increase⁵⁴. Which? said that it agreed with Ofcom’s analysis of the four options and that only option 4 would sufficiently address the problem of mid-contract price rises as it would help to re-balance the power between consumer and CP⁵⁵. Which? acknowledged that there may be a variety of reactions from the industry but agreed that the benefits of rebalancing power would outweigh them and that any changes to the current business model would be subject to competitive pressure.
- 5.35 The CCP said option 4 is not an extension of consumer rights but a correction to ensure a basic principle of fairness and considered that option 4 will provide a clear, simple and effective remedy to an unfair situation that has caused consumer harm. uSwitch noted that Tesco Mobile had already committed to not making mid-contract price rises and therefore considered that this supported its view that CPs are well positioned to predict the cost of a contract for its life and that it is possible for other providers to do the same. However, the CFC and Citizens Advice suggested an alternative approach of prohibiting increases to subscription/core prices and applying option 4 to non-subscription services as the best solution. The CFC’s concern with option 4 is that consumers may not benefit if all CPs raise prices and that it would only create extra churn, the costs of which will ultimately fall on consumers generally.
- 5.36 uSwitch expressed concerns that option 4 could result in consumers being put on to more expensive plans as soon as their minimum term has expired and that many consumers will not switch because they are unaware that their contract has expired⁵⁶. It therefore suggested that Ofcom should ensure that CPs issue a letter to consumers before the end of their contract, stating the price of the deal that they would be moved onto. It was also concerned that this option could lead to the withdrawal of equipment subsidies which would penalise consumers who cannot afford upfront costs.

Implementation

- 5.37 All CP respondents to this question said that they would require more than 3 months if our preferred option 4 was implemented. BT, Virgin Media, KCOM and Universal Utilities Ltd said that they would require at least 6 months whilst others suggested longer timescales. Sky and SSE said they would need 12 months if we went ahead with our preferred option 4 and EE said it would require 24 months as it would need a

⁵⁴ Of the 179 out of 303 individual (consumer) respondents to this option, the majority (90%) agreed with Ofcom’s assessment that option 4 is the most suitable option to address the consumer harm from price rises in fixed terms contracts. Overall, there was a sense that no price changes should be allowed at all. Only 1% of consumers disagreed with Ofcom’s assessment of option 4.

⁵⁵ It conducted a survey asking visitors to its website which option they would prefer and from over 5,000 votes received, 91% were in favour of option 4.

⁵⁶ uSwitch noted that this is a bigger problem in the broadband market where a third of consumers have not switched for 3 years, and half have never switched.

new billing system to cope with customers being on different call rates depending on when they entered into a contract. In contrast, individual respondents and consumer groups said that implementation should take no longer than 3 months.

- 5.38 Sky and Vodafone said that they would require 6 months for implementation even if non-subscription charges were removed from option 4. Vodafone said that distributors of mobile airtime would need to give effect to a modified GC9.6 and will require time to accommodate and adapt existing systems. It also said that Ofcom should not underestimate the logistical complexity of rolling out new contracts. Therefore, they considered that a longer implementation period would be more realistic and appropriate. Universal Utilities Ltd said that many smaller CPs are unlikely to have the resources to carry out the required amendments within three months and that Ofcom had not taken into account that CPs may be required to carry out wholly new cost projections and analyses. Similarly, the FCS said that CPs will need more time to assess the impact on their businesses and to calculate the commercial changes necessary as well as the legally required re-drafting of the contract.
- 5.39 The majority of individual respondents, consumer groups (Which?, National Consumer Federation, Citizens Advice and CFC) and OS said that if option 4 is implemented then CPs should be required to amend all existing contracts so that all customers are given the ability to cancel without penalty for any price increase.
- 5.40 In comparison, most industry stakeholders (EE, BT, Sky, SSE, KCOM, Telefonica, Vodafone, Universal Utilities Ltd and the FCS) agreed that any new regulatory intervention should apply to new contracts only (Virgin Media was the exception in that it said that option 4 should apply to new and existing contracts and that a six month implementation period would give CPs time to make those changes). Most CPs considered that intervention should only be forward looking in order to enable them to react and re-balance their prices.

Section 6

Ofcom's decision to issue guidance on GC9.6

Introduction

- 6.1 Having carefully considered the consultation responses, Ofcom has decided not to adopt option 4 as proposed. Instead, we have decided to adopt a variation of consultation option 2.
- 6.2 In particular, we have decided, for the reasons set out in this section, to issue guidance as to the meaning of “material detriment” for the purposes of GC9.6. That guidance is to the effect that we are likely⁵⁷ to regard an increase to the core subscription price as giving rise to material detriment (or likely to be materially detrimental) entitling consumers and small business customers to receive notice of the change and the right to terminate their contracts without penalty in accordance with GC9.6. This reflects our regulatory policy judgment as to fairness in respect of mid-contract price rises, and as to the securing of that fairness in a proportionate way. It focuses on the likely most important aspect (the core subscription price) of one of the most important contract terms (the price).
- 6.3 For the purposes of this decision statement and the relevant guidance, the core subscription price is the recurring (typically monthly) charge that the customer is contractually obliged to pay a CP for a core package of inclusive services for a pre-determined period of time (of no more than two years for consumers). This package might include line rental, call minutes to certain numbers and/or at certain times,⁵⁸ text messages and data allowances, depending on whether the contract is for mobile or fixed voice or broadband services.⁵⁹

⁵⁷ With the limited exceptions of the kinds set out in this statement and our guidance, for example, as to price rises passing on increases in VAT.

⁵⁸ Although often excluded, some CPs may make calls to certain NGCs part of the inclusive package of voice services. Where a CP chooses to do so, in principle the core subscription price covers those NGCs and, where the CP seeks to increase the price relating to those NGCs, our guidance applies. We are aware that, in the context of our review *Simplifying non-geographic numbers*, stakeholders have raised concerns about the inclusion of NGCs in inclusive bundles. We have addressed these elsewhere in this statement and our updated guidance, as well as in our statement on NGCs at <http://stakeholders.ofcom.org.uk/binaries/consultations/simplifying-non-geo-no/statement/final-statement.pdf>.

⁵⁹ Non-subscription charges, by contrast, are the prices for services that fall outside of the core monthly subscription for the inclusive package, and which are billed incrementally when such services are used by the customer.

For mobile customers, non-subscription services typically include premium rate or NGCs, directory enquiries, making calls and sending texts internationally and roaming services. For some services, we note that some charges relating to important aspects of what is provided under the contract may fall outside our definition of the core subscription price. For example, charges for local and national calls to geographic numbers may fall outside the core package, as we have defined it, under a contract for fixed voice services. Ofcom will monitor the position in respect of increases to such prices and may take further action if we consider CPs are acting unfairly in respect of them.

Overview

- 6.4 As set out in the consultation document, our analysis started from the proposition that the price subscribers have to pay for the telecommunications services provided by a CP is one of the most important contractual terms. The current rules in both the Unfair Terms in Consumer Contracts Regulations (the “UTCCRs”) and GC9.6 seek to reflect this.
- 6.5 In particular, contract terms should be balanced and not contain unfair surprises. Subscribers should receive the contractual bargain they thought they had signed up to and legitimately expect, and should be protected against not doing so. Terms allowing price increases without giving consumers the right to cancel without penalty are therefore liable to be unfair.
- 6.6 We put forward the view that the rules are intended to reflect a clear and straightforward general principle, and a basic requirement of fairness: the price agreed in respect of fixed or minimum term contracts should generally be fixed (and variable, if at all, only in limited circumstances). Where prices rise, consumers should generally have the option to avoid their effects. GC9.6 seeks to give subscribers similar protection against those effects.
- 6.7 Our analysis continued that, in line with general legal principles, the protection provided by the relevant rules should be clear, certain and genuinely effective. The basis on which we consulted is that there can be no reasonable objection to rules that seek effectively to achieve the basic aims of fairness described.
- 6.8 Again as set out in the consultation, and elsewhere in this statement, Ofcom proposed four key principles, in light of our regulatory duties, relevant to meeting the basic aims of fairness identified. We used these principles as a framework to assess possible unfairness and consumer harm from price rises in fixed term contracts and the options for addressing any such effects.
- 6.9 To re-iterate, the principles were:
- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
 - **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
 - **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and
 - **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).⁶⁰
- 6.10 The causes of unfairness and harm we identified in light of these principles included:

⁶⁰ DIRECTIVE 2002/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended by Directive 2009/136/EC.

- a lack of transparency in some CPs' terms and conditions and/or practices in relation to price variations;
 - CPs' inconsistent application of the "material detriment" test in GC 9.6 and uncertainty under the UTCCRs; and
 - CPs' ability to raise prices in fixed term contracts without a reciprocal right to withdraw from a contract without penalty on the part of consumers.
- 6.11 In our provisional assessment, we said unfairness and harm to consumers could arise not just in terms of the "surprise" to consumers arising from price rises, as some CPs have argued. It can also derive from the point that the consumer might have made a different transactional decision had the price been different at the time they entered the contract, and from financial loss (the consumer cannot avoid the price increase) and a sense of injustice (the balance of the contract being weighted in favour of the CP).
- 6.12 We have considered our proposed aims as to fairness, and the principles identified, in light of the consultation responses. We note that, in those responses as summarised in the preceding sections of this statement, there were a number of areas of agreement, or consistency, with aspects of the principles we identified and of the options for regulatory change we put forward.
- 6.13 In particular, across both CPs' and consumers' responses there were areas of agreement or consistency with these aspects of what we said in the consultation:
- price is an important consideration in contracts for communications services;
 - certain costs at least, recovered in the prices charged to customers, are within CPs' control or ability to forecast (or within that control or ability to a greater extent than others);
 - it is important that terms relating to price and price variation are transparent (and some CPs, in addition to consumers and consumer groups, agreed there are shortcomings in the transparency of price variation terms);
 - that the current regulatory framework (the UTCCRs, the CPRs and the GCs) provides some level of protection for consumers and other subscribers;
 - the current rules nonetheless contain elements of uncertainty, when they should be certain;
 - especially, there is a need for clarity about what amounts to material detriment for the purposes of GC9.6; and
 - this uncertainty has resulted in inconsistent application of the rules as far as some CPs and some customers are concerned.
- 6.14 There were also, we note and take due account of, a number of areas of disagreement and inconsistency with aspects of our consultation. In particular, as set out in more detail in preceding sections, CPs challenged:
- the extent, and Ofcom's assessment, of the evidence of consumer harm arising out of mid-contract price rises;

- Ofcom's proposals as to the proper allocation of the uncertainty relating to increased costs, especially costs said to be outside CPs' control;
 - our provisional view as to the need for a (further) sector-specific regulatory intervention, as opposed to the application of general consumer law;
 - Ofcom's position as to the costs to customers of adopting proposed option 4 and our assessment of the likely impact of its adoption; and
 - as far as CPs outside the mobile sector were concerned, the basis for applying any regulatory measure to other communications sectors.
- 6.15 In general, CPs considered that, at most, there was some basis for Ofcom to adopt option 2 of the consultation options, whereas consumers and consumer groups agreed with the proposed adoption of option 4. That is, CPs generally said that there may be a need to improve the transparency of price variation terms and/or for Ofcom guidance on the application of GC9.6 to mid-contract price rises.
- 6.16 After considering carefully these responses, Ofcom has, as a matter of our regulatory policy judgment, decided that the following are appropriate:
- the aim of securing fairness in respect of mid-contract price rises;
 - the key principles we proposed, which go to securing fairness; and
 - some form of regulatory intervention, consistent with those principles, to secure that fairness.
- 6.17 In particular, the areas of agreement and/or consistency are in line with our view as to the importance of price and price terms in telecommunications contracts. Some of them also recognise the scope for sector specific rules in light of the requirements of the USD. They are in line with the principles that consumers should have information enabling them to make informed transactional decisions, should be protected against terms and practices that surprise them and impose on them unfair burdens and risks, and should be able to take steps to avoid those unfair effects. Likewise, with the fourth principle that the relevant rules should be clear, certain and effective in practice. In other words, they are in line with these key aspects of fairness.
- 6.18 We have accordingly decided that it is appropriate to adopt measures that are consistent with these principles and which will address aspects of the harm we identified and secure an appropriate level of fairness in respect of mid-contract price increases.
- 6.19 Our consideration of all the responses, however, has led us to re-consider the form of those measures. Most particularly, we do not consider, on the grounds of the assessable evidence currently available to us, that a formal regulatory intervention as proposed under option 4 would be appropriate.
- 6.20 We recognise the limitations of that evidence and that the action we proposed in our consultation option 4 was broad in scope. Whilst we make the policy judgment that an intervention designed to secure fairness is appropriate, an important aspect of this is that our intervention should be modified so as to meet the requirement of proportionality.

- 6.21 Our decision, therefore, is that, for the time being, it is appropriate, to secure fairness for consumers and small business customers in a proportionate way, for Ofcom to issue guidance as to the application of GC9.6. That guidance should address concerns as to the substantive effects of price rises and transparency.
- 6.22 In particular, we consider guidance is needed as to price rises which we are likely to regard as materially detrimental (or likely to be materially detrimental) and invoking the requirements of GC9.6. Such price rises are likely to include any increase to core subscription prices.
- 6.23 We make this judgment on fairness in reflection of the following, in particular:
- the importance of price (and price variation terms) to telecommunications consumers, and especially that the core subscription price is the likely most important aspect of the price;
 - the need for transparency as to the relevant terms and for certainty as to their application; and
 - the sector specific requirements arising out of the USD, as well as the existing protections under general consumer law.

In more detail, the considerations informing our judgment are as follows.

Ofcom analysis

Evidence of unfairness and harm

- 6.24 We have given careful consideration to CPs' submissions on Ofcom's evidence and analysis of unfairness and consumer harm caused by mid-contract price rises. The consultation set out a methodology for assessing the magnitude of the harm from in-contract price rises.⁶¹ But, it also went on to discuss the difficulties of quantification, and we acknowledge the limitations of the quantitative evidence on the magnitude of the relevant harm. We have taken full account of those limitations in our assessment of the proportionate intervention and, accordingly, have modified our approach.
- 6.25 A number of other points are also relevant, however:
- Ofcom does not take regulatory action on the basis of complaints alone;
 - there is other evidence as to the importance of price terms and certainty as to agreed contractual prices, as key aspects of consumer choice;
 - the evidence from consumer complaints and other sources such as Which?, notwithstanding its limitations, does demonstrate some ongoing uncertainty as far as price terms, price variations and the application of the rules as to the latter are concerned; and
 - the fact that there are differences in CPs' terms and practices as to price increases are indicative of variations, if not inconsistency, as to the application of the current rules and are likely to feed into uncertainty as to that application.

⁶¹ Paragraphs 4.13-4.26 in the consultation

In making our judgment as to fairness, in the context of the important provisions of the USD and related European framework legislation, we have given due consideration to each of these points.

Volume of complaints

- 6.26 As to the first of the bulleted points above, Ofcom acknowledges that complaint volumes for other issues such as silent and nuisance calls are greater than those relating to mid-contract price rises. However, in many cases, consumer complaints (and/or market research data) simply alert Ofcom to potential problems that may require intervention. Such information is helpful, but not always a necessary (nor, we agree, necessarily sufficient) ground for intervention. Rather, we consider this type of evidence alongside other factors before determining whether action by Ofcom would be consistent with our statutory duties and regulatory principles.
- 6.27 In relation to mid-contract price rises, our proposals were based, amongst other things, on Ofcom's assessment of the importance of price terms and price variations, the reasons for consumer complaints, a review of the current regulatory framework and an over-arching aim of securing fair outcomes for consumers and small business customers.

Other evidence

- 6.28 As to the second bullet in paragraph 6.25 above, we have considered again the limitations of the quantitative evidence of consumer harm in the context of other evidence as to the importance of price terms and price rises to telecommunications consumers and other subscribers. Having done so, our conclusion is that the assessment we have made of the evidence in support of our policy judgment as to fairness, as set out below, is appropriate in these circumstances.
- 6.29 That assessment supports the view that there is unfairness and consumer harm. Furthermore, our assessment of the action we are proposing to take suggests that it will be effective in reducing those effects on telecommunications consumers and other relevant subscribers, while at the same time resulting in likely limited costs on operators.
- 6.30 In particular, each of the other sources of evidence we have considered supports our hypothesis as to the central importance of price in the transactional decisions consumers make and the bargains they enter into. They tend to support our assessments that, given that importance:
- telecommunications consumers and other subscribers need accurate and transparent price information; and
 - that changes to agreed headline core subscription prices in telecommunications contracts are liable materially to harm consumers and are unfair.
- 6.31 In this connection we note again the provisions of the OFT's unfair contract terms guidance⁶² which state that (our *emphasis*):

⁶² "Unfair contract terms guidance" at http://www.ofcom.gov.uk/shared_ofcom/reports/unfair_contract_terms/ofcom311.pdf

“12.1 ...A clause allowing the supplier to increase the price – *varying the most important of all of the consumer’s contractual obligations* – has clear potential for unfairness.

12.2 Any purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable.....It also applies to rights to increase payments under continuing contracts where consumers are “captive” – that is, they have no penalty-free right to cancel.....”.

This guidance reflects the operative provisions of the UTCCRs, and of the underlying Unfair Contract Terms Directive, and to which we referred in the consultation.

6.32 We also note the findings of the OFT market study, “Consumer contracts,”⁶³ which examined when, how and why contracts may cause difficulties for consumers. Amongst other things, its findings revealed that:

- searching for the lowest price was the main reason that consumers shopped around when choosing a contract;
- relatively few consumers shop around to compare terms and conditions as opposed to the price on which goods and services are offered; and
- many consumers, do not read contracts in full, and instead focus on headline elements such as the price.⁶⁴

6.33 As set out in the OFT’s report,⁶⁵ these findings are consistent with other evidence that consumers focus on a limited number of variables in making purchasing decisions. They also again reflect the importance consumers attach to the (headline) price terms of a contract.

6.34 These OFT findings are supported by two research studies commissioned by Ofcom into specific aspects of the telecommunications sector. The first of these studied the factors which consumers take into account in considering whether to switch providers of services.⁶⁶ The second studied the factors which consumers take into account when choosing their mobile broadband provider.⁶⁷ Both found that price is the main factor, or amongst the main factors, that consumers consider when choosing providers of services in a range of contexts.

6.35 For example, the former research study looked at the service and device elements that drive decisions to switch providers and made these findings:

- Cost, package and reliability/functionality are more important than interoperability and portability when choosing a provider. Cost alone accounts for around half of overall importance when choosing a new provider, regardless of service area (see paragraph 1.3.1.1).

⁶³ <http://www.ofcom.gov.uk/OFTwork/markets-work/consumer-contracts>

⁶⁴ See para 3.14 <http://www.ofcom.gov.uk/OFTwork/markets-work/consumer-contracts>

⁶⁵ See para 2.44 and section 3 <http://www.ofcom.gov.uk/OFTwork/markets-work/consumer-contracts>

⁶⁶ See “Customer Retention and Interoperability Research”

http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/customer-retention/CRI_Report_Final.pdf

⁶⁷ “Ofcom UHF Strategy Research” figures 19 and 20 in relation to mobile broadband http://stakeholders.ofcom.org.uk/binaries/research/spectrum-research/UHF-strategy-research/research_report.pdf

- “Finding a better deal/price with other provider” is one of the key reasons for a consumer to review their current service provision (see Figures 17 and 18).
- “Among pay-monthly Mobile users, the desire to get a new handset is the factor most likely to be claimed by Switchers as triggering them to first think about switching (cited by 42%). The desire to reduce cost is also a common trigger: 35% claim they were prompted by a better deal/price with an alternative communications provider, 23% spotted a specific deal or tariff from an alternative communications provider and 20% claim they were dissatisfied with the high prices charged by their current communications provider.” (see page 27).
- “In the Dual Play⁶⁸ market, the top three factors that Switchers claim prompted them to review their service at the time were spotting a better deal/price (cited by 41%), dissatisfaction with current charges (cited by 34%) and product/service issues (cited by 29%).”

6.36 All of these findings are consistent with the judgment that price is of critical importance to telecommunications consumers and other subscribers, and that they are likely to focus on price as an important aspect of their transactional decisions. As a result, differences in price are liable to have a material impact on those decisions. Subsequent changes in price, after transactional decisions have been made, are, accordingly, liable to give rise to unfairness.

6.37 We are also aware of evidence in relation to behavioural economics studies, suggesting that consumers’ limited attention and cognitive resources mean they tend to focus on only a few aspects of a transactional decision. We acknowledge that this forms part of an extensive body of such literature, the findings of which cover a very broad range and much of which is context-specific. Nevertheless, we note that the OFT’s paper, “What does behavioural economics mean for competition policy,”⁶⁹ does suggest that behavioural biases can create or exacerbate consumers’ difficulties in assessing the best deals.

6.38 The OFT’s work considered that, for consumers to make informed choices, to drive competition and for markets to work well requires, amongst other things, engaged consumers to be able to:

- access information about the various offers in the market;
- assess these offers in a well-reasoned way; and
- act on the information and analysis by purchasing the good or service that offers the best value.

It went on to argue that, where any of these elements is not present, consumers (and competition) are harmed. Consumers (and the market generally as a result of fair and open competition) are not able to benefit from consumers making the informed decisions that maximise welfare.

6.39 Ofcom has taken the OFT’s approach into account in building on our assessment of telecommunications consumers’ focus on, and the importance of, price, and in our judgment as to the consequent requirements of fairness in respect of price rises. That is, given that focus and importance, it also follows, in our assessment, that

⁶⁸ Where the customer purchases fixed voice and broadband services in a bundle from the same CP.

⁶⁹ http://www.ofcom.gov.uk/shared_ofcom/economic_research/ofcom1224.pdf

those consumers need transparent and accurate price information. This includes information as to the liability of prices to change. Those consumers need this in order to put them in a better position to evaluate the bargains offered to them and to make informed transactional decisions. They risk exposure to unfairness if prices later change.

Quantitative evidence in context

- 6.40 In Ofcom's view, it is appropriate, notwithstanding their limitations, to put the complaints numbers in the context of the above, more qualitative, evidence. We note again that Ofcom received 1,644 consumer complaints to our Consumer Contact Team during the period from September 2011 to May 2012 about changes to terms and conditions of consumer contracts. These mainly concerned price rises in fixed term contracts for mobile services.
- 6.41 A quarter of the complainants alleged that they were not aware of the potential for price rises in what they believed to be "fixed" contracts. Their expectation was that the contract price was fixed for the contract's length and they complained that CPs should not be able to impose price rises during the fixed term. If the provider sought to do so, the consumer should be able to exit the contract without penalty.
- 6.42 A further 16% of consumers complained specifically about the amount of the price rise and its adverse financial impact on them. Some complained that they are placed in an unfair position as the balance of the contract is weighted in favour of the Communications Provider and the consumer has little choice but to accept the price rise or pay an early termination charge to exit the contract.⁷⁰
- 6.43 We have also had regard to evidence submitted by Which? as part of its "Fixed means Fixed" campaign. In doing so we take due account of the criticisms made of it by CPs and acknowledge that, by itself, there are limits as to its reliability. Nonetheless, it is at least broadly indicative of relevant consumer concerns.
- 6.44 Which?'s campaign focuses on price rises in fixed term contracts for mobile consumers⁷¹. As of the date of this statement it had attracted nearly 59,000 pledges of support from members of the public for the proposition that "mobile providers shouldn't increase prices during a fixed contract". This has increased from 37,000 pledges at the time our consultation was published in January, which is consistent with the view that mid-contract price rises remain an issue of concern for consumers.
- 6.45 Moreover, Ofcom has continued to receive similar types of complaints from consumers since publication of our consultation (in response to CPs' price rises announced and implemented since then). An analysis of complaints to Ofcom about mid-contract price rises in the period from 1 June 2012 to 31 August 2013 is in Annex 4. This indicates a level of continued surprise as to mid-contract price rises and, at best, uncertainty in the proper application of the rules relating to such rises.
- 6.46 We recognise that this evidence has limitations. It is also the case that, on its own, it does not provide a basis for formal regulatory intervention. It is, nevertheless, a body of evidence consistent with the qualitative assessment as to the importance of price terms and the contention that the current rules relating to price and price variations

⁷⁰ We also note that 25% of complainants complained about the unfairness in principle of mid-contract price rises. They appeared to contend that the ability to vary an agreed price tilted the balance of the contract towards the CP and gave rise to harm.

⁷¹ <http://www.which.co.uk/campaigns/mobile-phone-price-rises/>

are not operating effectively to meet the legitimate aims of fairness. In particular, as to consumers' legitimate expectations as to price and their exposure to, and inability to avoid, unfair surprise and/or unfair effects. It is consistent with conclusions that there is, or is a significant risk of, shortfalls in transparency as to price variations and certainty in the application of the rules meant to protect consumers. Likewise, with our judgment as to the need for a proportionate intervention to secure fairness in these regards.

CPs' terms and practices

- 6.47 We have also considered again, in the context of the qualitative and (limited) quantitative evidence described, the differences in CPs' terms and practices as to price increases. As we noted in the consultation, different providers have different contractual terms and practices as to price variation.
- 6.48 Some terms purport to allow providers to raise their prices up to a certain amount (e.g. by up to RPI and/or capped by a specified percentage) and/or a certain frequency (e.g. once every 12 months) before triggering consumers' right to terminate their contracts without penalty. Others state that the provider will determine whether material detriment is likely to result from such changes. A minority, meanwhile, allow subscribers to withdraw from contracts without penalty for any price rise.
- 6.49 There is, therefore, a degree of variation in relevant providers' contract terms. Our view, with which the limited complaints evidence, as well as the qualitative evidence described above, is consistent, is that these variations, if not inconsistencies, as to the proper application of the current rules feed into uncertainty as to how those rules should apply. This, in turn, contributes to unfairness that affects both CPs and consumers.
- 6.50 In that context, we take account of the fact Ofcom has not issued any guidance as to the meaning of "material detriment" for the purposes of GC9.6. We note that, in their consultation responses, a number of CPs and consumer organisations generally contended that Ofcom should issue guidance on the application of GC9.6 to mid-contract price rises.
- 6.51 We have considered carefully that some CPs said Ofcom should take this step before considering more intrusive measures such as amending the GCs. They considered that the lack of any such guidance has led to uncertainty for consumers and CPs. Ofcom agrees that, to the extent there is uncertainty as to what amounts to a materially detrimental price rise for the purposes of GC9.6, issuing guidance would be one means of addressing that uncertainty.

Ofcom's assessment

- 6.52 Each of the above points is consistent with the assessment that the present rules are not, or may not be, operating so as to give sufficient effect to the four principles we have identified. They may not, as a result, be achieving the legitimate aims of fairness that should be pursued.
- 6.53 Those points are consistent in particular with the conclusions that:
- **principle 1:** consumers should, but do not necessarily, have information that enables them to know what bargain they are striking, so they can make informed

transactional decisions: that they are striking bargains the price of which may increase;

- **principle 2:** consumers should be, but in some case at least may not be, adequately protected against terms and practices – price increases – that take them by surprise and which, or may (at least), impose on them burdens and risks they should not fairly bear;
- **principle 3:** where potentially unfair terms and/or practices operate, those consumers should be, but in some cases at least do not appear to be, able to take steps to avoid their effects; and
- **principle 4:** the rules that give effect to these principles should be, but are not operating so as to be, clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).

6.54 In making those aspects of our judgment, we have considered the important provisions of Article 20(2) of the Universal Services Directive. Again, it states that:

“Member States shall ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications networks and/or services. Subscribers shall be given adequate notice, not shorter than one month, of any such modification, and shall be informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions. Member States shall ensure that national regulatory authorities are able to specify the format of such notifications.”

6.55 Likewise, the provisions of Recital 27 of the amending Directive to the Universal Services Directive,⁷² which says:

“The right of subscribers to withdraw from their contracts without penalty refers to modifications in contractual conditions which are imposed by the providers of electronic communications networks and/or services.”

6.56 In other words, these provisions are a basis for sector-specific regulation or measures relating to the modification of contractual terms, including price terms, in respect of fixed term contracts for telecommunications services between CPs and consumers and small business customers. Noting this, and in light of the above conclusions, we make the policy judgment that some level of regulatory action is appropriate. Doing nothing is not a viable option.

⁷² DIRECTIVE 2009/136/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

Forms of action: existing law and transparency

- 6.57 Those conclusions lead us then to consider what form that regulatory action should take. We have considered in particular whether the problem to be addressed in order to secure fairness is wholly or mainly one of transparency and, in any event, whether the provisions of general consumer law and the existing GC9.6 are adequate to address any problems. We have done so in the context of consultation responses, principally from CPs, that such existing provisions suffice, and giving careful consideration as to what level of intervention would be proportionate.
- 6.58 We have noted and agree in general terms with much of what CPs, in particular, have said about the effects of the UTCCRs, the Consumer Protection from Unfair Trading Regulations 2008 (the “CPRs”) (and the rulings of the ASA on misleading advertising) and the existing GCs. We agree that, properly complied with, these provisions offer consumers protection both in terms of transparency and substantive effects as far as price increases are concerned.
- 6.59 In particular, the CPRs prohibit both misleading actions and misleading omissions in the provision of information in advertising and marketing material. We are aware that, in enforcing the Committee of Advertising Practice rules that, broadly, reflect the CPRs, the Advertising Standards Authority (the “ASA”) has found two mobile CPs’ advertisements to breach the relevant rules on account of their failure to state that prices could be increased during the fixed term of the contracts.⁷³
- 6.60 Similarly, the provisions of GCs 9, 23 and 24 all require CPs to provide information to consumers and other subscribers before or at the time contracts are made. Ofcom has issued guidance about the requirements in GCs 23 and 24⁷⁴. In our consultation on mid-contract price rises, we have also made clear our view that the requirements of GCs 23 and 24 for information about “payment terms” include price variation terms⁷⁵.
- 6.61 In addition, we agree that, properly complied with, the UTCCRs also provide consumers with protection both as to transparency and in respect of the substantive effects of price rises in fixed term contracts. In particular, all standard terms are required to be in plain, intelligible language. The UTCCRs’ requirement of good faith means CPs must deal fairly and openly with consumers. It means that terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer should be given appropriate prominence (and, where they are liable to operate surprisingly, be drawn to the consumer’s specific attention).
- 6.62 As far as terms providing for price variations are concerned, we agree that the effects of the UTCCRs’ fairness requirements and of the indicative terms set out in Schedule 2 of the Regulations (paragraphs 1(j) and 2(d), in particular) is to limit the amount by which standard terms in consumer contracts may provide for price increases. Relevant case law has stressed the importance in assessing the fairness of such terms of considerations such as whether the terms:
- specify the reasons for or method of price variations;

⁷³ http://www.asa.org.uk/Rulings/Adjudications/2013/2/Vodafone-Ltd/SHP_ADJ_210326.aspx

⁷⁴ <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/general-conditions-guidelines/background/>

⁷⁵ Paragraph 4.65

- provide for clear and intelligible criteria on the basis of which the consumer can foresee price increases; and
- provide contract termination rights.

6.63 We also agree that, whatever its uncertainty, GC9.6 also places some constraint on CPs' abilities to increase prices, and so also some limit on the surprise effect of such increases. We have taken all of these provisions into account in making our assessment about whether, and what, intervention would be proportionate to secure fairness.

Transparency

6.64 We have considered carefully, in light of the above, all the consultation responses that go to the question of the transparency of terms and practices relating to price increases. We agree that:

- transparency as to those terms and practices is of key importance, reflected in, amongst other places, what we have defined as **principle 1** in this statement;
- the evidence, considered in light of relevant consultation responses, suggests some consumers are not sufficiently aware of the potential for prices to rise in respect of what they believed to be fixed term and price contracts; and
- the provisions described above require amongst other things, transparency, and should provide consumers with protection in that regard.

6.65 Questions to which those conclusions in turn give rise include whether:

- regulatory actions or measures going beyond ensuring transparency are required or would be disproportionate; and
- the existing provisions described provide such further substantive protection as is required in respect of telecommunications services and whether any further intervention would be disproportionate.

Our judgment, having regard to our consultation proposals and the responses, is that, for the following reasons, sector-specific measures going beyond transparency and to supplement existing legislative and regulatory provisions are necessary to secure our aims as to fairness. Such a measure or measures would give effect to the principles which provide the framework for our assessment. The measures we have decided to adopt, which are a focused modification of our consultation proposals, would secure those aims in a proportionate way.

6.66 In reaching that view, we have regard to the CAP rules and ASA rulings that require indications in advertising material where contract prices are not fixed over the contract period. Ofcom, of course, welcomes and endorses that position. Our judgment, however, is that, in light of the evidence of consumers' focus on price and the way in which communications services are advertised, CPs remain likely typically to market their services on the basis of the following principal elements:

- a core/inclusive package of services - such as an allowance of minutes, texts and data for a mobile contract;
- a minimum contract period – typically 12, 18 or 24 months; and

- a recurring (usually monthly) subscription price for the core/inclusive package of services for a minimum contract period.

The likely effect, in our judgment, in light of both the qualitative and quantitative evidence described above, and of the following, is that many telecommunications consumers remain liable to consider contract prices, core subscription prices in particular, to be fixed for the fixed term of their contracts, and to make transactional decisions on that basis (or at least on a basis that does not enable them adequately to evaluate and compare prices over the fixed-term of contracts).

6.67 In making that judgment, we take account in particular of some CPs' submissions that consumer complaints in 2011-12 about price rises:

- were due to "surprise" at those rises; and
- that any harm from this surprise would now be reduced as many consumers will have experienced mid-contract price rises and will be aware they can happen.

As part of our consideration, we note the following two points (in addition to the point reflected in this statement generally that harm from mid-contract price rises is not limited to surprise alone).

6.68 First, as we note above, Ofcom and Which? have continued to receive complaints from consumers following price rises in 2013. This is despite many consumers having already experienced price increases in 2011-12 and notwithstanding the significant publicity associated with the price increases arising, for example, from Which?'s "fixed means fixed" campaign.

6.69 Second, since the publication of our consultation, we have been made aware of further mystery shopping exercises undertaken by Which? and BBC Watchdog in relation to mid-contract price rises. These reported findings that some mobile retailers were still not telling consumers of the potential for price increases during contract periods.⁷⁶

6.70 We have also considered again the likely efficacy, or otherwise, of limiting our concerns and actions to matters of transparency. The findings of the OFT consumer contracts market study described above also support the assessment that, even where terms are brought to a consumer's attention, they may still not fully understand or be able effectively to assess their implications. For example, a consumer may understand the existence of a charge but may not be able to assess its implications for the overall cost of the contract. This is particularly likely if the term requires complex calculations or if the level of a charge requires estimates of future usage.⁷⁷

6.71 We also note the results of a recent Which? survey carried out online by Populus on 2078 UK adults between 9 and 11 August 2013.⁷⁸ It found that nearly half (45%) of mobile phone customers do not know what the Retail Prices Index (RPI) is and around eight in 10 (84%) do not know the current level of RPI. This is consistent with

⁷⁶ http://conversation.which.co.uk/consumer-rights/mobile-phone-shop-investigation-price-rises-fixed-means-fixed/?utm_campaign=W0713_convo_fmfindercover&utm_medium=print&utm_source=magazine_which&cmp=W0713_convo_fmfindercover

⁷⁷ See para 2.31, 2.32, and 5.28 – 5.30 http://www.ofcom.gov.uk/shared_ofcom/market-studies/consumercontracts/oft1312.pdf

⁷⁸ <http://press.which.co.uk/whichpressreleases/ofcom-must-protect-consumers-from-fixed-mobile-phone-hikes/>

the view that, even where consumers are made aware of price variation terms and of the mechanism by which they operate, they are still unlikely fully to understand the potential impact of any index-linked price increases.

- 6.72 Each of these matters and points is in turn consistent with our judgment that the rules providing for transparency are unlikely alone to be sufficient in these circumstances to give effect to the four principles which provide the framework for our fairness assessment. They are similarly consistent with the view that, accordingly, there is a need for actions or measures which address the substantive effects of unfair price rises. We consider in the following part of our analysis whether existing rules address those effects sufficiently.

Existing provisions

- 6.73 As we note above, we agree that, properly complied with, the UTCCRs and GC9.6 place a significant constraint on CPs' abilities to increase prices mid-contract and give consumers a measure of protection against the effects of such increases. We have examined further the adequacy of this constraint and protection. For the reasons that follow, we consider there is a basis for the judgment that some further, sector-specific, action or measure is required. Again, we have close regard, in reaching that view, to the provisions of the USD.
- 6.74 A first point to make, however, is that, having carefully considered CPs' submissions as to the existing level of protection provided by the UTCCRs and GC9.6, we agree they go to the point that an intervention as comprehensive as our proposed option 4 is not appropriate or proportionate for the time being. We reflect that general point in the decision we have made, which refines the focus of our intervention to secure fair outcomes in a proportionate way.
- 6.75 Nevertheless, we remain of the view that the existing rules give rise to uncertainties that mean, in the telecommunications sector, they do not sufficiently reflect principles 2 – 4 of our framework for assessment and do not secure the appropriate fairness. In particular, they are not sufficiently clear, certain and effective in practice in protecting consumers against terms and practices in respect of price increases that take them by surprise and/or impose unfair burdens. We make that judgment in light of the following.
- 6.76 First, we set out in the consultation document our provisional view that uncertainty may arise out of the current rules because there is too much scope for their inconsistent application and/or because of their complexity. We suggested this inconsistency and uncertainty arises in relation to GC9.6 because of the considerable scope it gives CPs to determine, in the first instance, whether a price rise is likely to give rise to material detriment for the purposes of that condition. In respect of the UTCCRs, we suggested that their complexity, and the consequent difficulty for consumers in practice to identify and challenge relevant contract terms as unfair and unenforceable, was problematic.
- 6.77 Second, we have further considered that view in the context of the following, as set out in this statement,⁷⁹ the first two in particular:
- the importance of price in consumers' transactional decisions in relation to telecommunications contracts;

⁷⁹ and, previously, in the consultation document.

- the specific provisions of the USD (and amending Directive) about modifications to contractual conditions;
- consumer complaints about the surprise and effects of mid-contract price rises;
- the variations in CPs' terms in respect of, and approaches to, such price rises; and
- CPs' consultation responses indicating their desire for Ofcom guidance about the meaning of the material detriment requirement in GC9.6.

6.78 These factors are consistent with our assessment that it is appropriate, in pursuit of fairness, to take some form of regulatory action to address the uncertainty and complexity in the current rules and the shortfall in the protection they provide for telecommunications consumers and other subscribers. Again, we acknowledge that the protection provided by existing rules (the UTCCRs in particular) means that an intervention as comprehensive as the option 4 we proposed would not be proportionate (for the time being, at least). However, each of the foregoing points takes us to the conclusions that there is scope:

- for sector-specific action, in addition to the protection provided by general consumer law; and
- for such action to focus on the material detriment requirement in GC9.6.

6.79 In that regard again we take particular account of recital 27 of the amending Directive to the Universal Services Directive and Article 20(2) of the latter Directive. These confer sector specific protection on telecommunications subscribers in respect of modifications to contractual conditions (which, it seems to us, notwithstanding the submissions to the contrary, include conditions as to price modified on the basis of terms allowing the price to be changed). Such protection is different and additional to that afforded by unfair contract terms legislation.

6.80 In light of that sector-specific protection, and of our view as to the importance of price (and so price changes) in telecommunications consumers' transactional decisions, our judgment is that, pursuant to our twin goals of fairness and proportionality, we should adopt a view of material detriment (or likely material detriment) that further constrains CPs' ability to increase relevant prices. In particular, that the appropriate position to adopt in guidance is that we would be likely to regard any relevant mid-contract core subscription price rises as materially detrimental (or likely to be materially detrimental). Such rises should, in our view, give rise to all the rights provided for by GC9.6.

6.81 This position would be in addition to compliance with the requirements of the CPRs, GCs 9, 23 and 24 and the requirements of the UTCCRs. The requirements of fairness under the latter, for example, mean the relevant contract terms should provide in plain, intelligible language that:

- the price may be variable during the initial commitment period;
- any increase is linked to a relevant published price index such as the RPI, and limited to an amount no greater than the rate set out in that index; and
- the frequency and timing of any such increase is limited to no more than once every twelve months during the initial commitment period of the contract.

Those terms should be drawn specifically to the consumer's attention and information reflecting them should be provided transparently in marketing material and at point of sale (in accordance with the GCs, 9, 23 and 24 in particular).

- 6.82 The effect would be that transparent contract terms may in plain, intelligible language provide for mid-contract price rises once every 12 months limited to RPI that Ofcom would likely regard as fair contract terms for the purposes of the UTCCRs. But, where a CP proposes any price rise to which our GC9.6 guidance applies, we would be likely to regard it as giving rise on the consumer's part to rights to give notice and to terminate the contract in accordance with that condition.
- 6.83 That position would, we conclude in light of all the factors in this statement, achieve our aim of fairness, giving effect (as part of an overall regulatory scheme)⁸⁰ to the four principles comprising our framework for assessment. It would address the effects of surprise and uncertainty arising out of relevant price rises and be consistent with the Universal Services Directive.
- 6.84 We turn next to consider the precise scope of the price rises we say would likely meet the material detriment requirement and why we consider the guidance we have decided to issue is a proportionate regulatory action.

Scope

- 6.85 We have considered the scope of our action in respect of mid-contract price rises, taking due account of the consultation responses. We have done so in four respects in particular:
- the price rises which should be covered by it;
 - the providers to whom any such action should apply;
 - the application of the guidance to bundled services; and
 - the subscribers to whom it should apply.
- 6.86 Our decision is that our guidance on GC9.6 should be to the effect that we are likely to regard as materially detrimental (or likely to be materially detrimental) any increase by any provider to whom the GC applies to the core subscription price charged to any consumer or small business customer.
- 6.87 The guidance does not apply to any non-price variations. However, if CPs respond to our guidance by making variations to non-price terms, for example by reducing call allowance (and/or text and/or data allowance where relevant) included in a consumer's monthly subscription price, we would consider such a change effectively to constitute an increase in the unit price paid by the consumer. We would regard this as a price rise subject to the guidance.

Price rises covered

- 6.88 Two particular issues are relevant here:
- whether our guidance on the material detriment requirement should apply to non-core subscription price rises, as well as those to core subscription prices; and

⁸⁰ Including the CPRs, the UTCCRs and the GCs.

- the position in relation to VAT and regulatory cost increases.

Non-subscription services

- 6.89 As to the first, non-subscription charges for present purposes are the prices for services that fall outside of the relevant core monthly subscription for the inclusive package of services, and which are billed incrementally when such services are used by the customer. For mobile customers, for example, they typically include charges for services used when they exceed their monthly inclusive allowance, premium rate services, NGCs,⁸¹ directory enquiries, making calls and sending texts internationally and roaming services.
- 6.90 For fixed line services, we note that it is common practice for customers to be offered a monthly subscription deal that includes, for example, line rental and unlimited weekend calls but all “other calls” are billed incrementally. For the time being, charges for these other calls – even where relating to important aspects of what is provided under the contract, for example, some charges for local and national calls to geographic numbers – fall outside our definition of the core subscription price. Ofcom will monitor the position in respect of increases to such prices and may take further action if we consider CPs are acting unfairly in respect of them.
- 6.91 In making our decision, we have taken careful note of CPs’ objections to Ofcom taking any action on price increases to non-subscription services. They considered there was a lack of evidence of unfairness or consumer harm arising from price rises to those services. We acknowledge that the significant increase in complaints to Ofcom’s Consumer Contact Team (CCT) about price rises resulted from increases to monthly core subscription charges. Moreover, we agree that, from the perspective of consumers and other subscribers:
- it is a fair assumption⁸² that they generally enter contracts principally on the basis of a recurring (usually monthly) subscription price (for a core package of services/inclusive allowance) rather than the prices for non-subscription services; and
 - they generally do not have to use non-subscription services and therefore have greater control of their level of usage (they may, for example, have alternative sources of provision to which they can switch following a price rise to a non-subscription service).
- 6.92 We also note that CPs have argued that there are some cost elements of non-subscription charges that are outside their control (and difficult to forecast). Ofcom has undertaken extensive work in relation to simplifying NGCs⁸³ and we recognise that the termination rates for calls to non-geographic numbers are largely unregulated (in the case of 118 directory enquires, entirely so). The same applies to termination rates for international calls to non-EU countries. We acknowledge therefore that it may be more difficult for CPs to assess and/or mitigate the impact of

⁸¹ Although, as we note elsewhere in this statement, some CPs may make some NGCs part of the inclusive core package. Where a CP chooses to do so, those NGCs are in principle covered by the core subscription price and price increases relating to them are subject to our guidance (save where otherwise indicated therein).

⁸² This is supported by Ofcom research mentioned in paragraph 6.35 above. Likewise by our work on non-geographic calls referred to in this statement, and including that in our Non-Geographic Call Services Review of October 2010, <http://stakeholders.ofcom.org.uk/binaries/consultations/simplifying-non-geo-numbers/annexes/nts.pdf>.

⁸³ <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/?a=0>

any increases in those termination rates (though we note also that some CPs may choose to include as part of inclusive packages certain NGCs).

- 6.93 In addition, we take account of the point that, in contrast to core subscription services (such as bundled calls and data allowances) likely to be used by most if not all subscribers, the numbers of subscribers using non-subscription services, and the extent to which they are using them, is variable. We also acknowledge the point some CPs made that, were any intervention to cover price increases for non-subscription services, this could result in price increases for all subscribers. In other words, they could impose a risk premium which would be applied to all subscribers, including those who make little or no use of such services.
- 6.94 Accordingly, for the time being at least, we consider it appropriate and proportionate, as part of our policy judgment as to fairness in respect of price rises, to limit our action to increases to core subscription prices.⁸⁴ That is, to limit our guidance such that it provides that we are likely to regard any increase to the core subscription price as materially detrimental (or likely to be materially detrimental). This is on the basis that this is the likely most important aspect of the price (price itself being one of the most important contract terms) and a key factor in telecommunications consumers' transactional decisions. Changes to this core price are most liable to give rise to unfairness to consumers (and small business customers).
- 6.95 We will not necessarily take the same view in respect of other price rises. They will, however, remain subject to GC9.6 and its material detriment proviso, as well as other relevant provisions of the GCs and general consumer law provisions such as the UTCCRs (though see Ofcom's statement on NGCs [here](#) in respect of price rises for calls to unbundled tariff numbers not within inclusive bundles: where such rises are attributable to the level of the service charge selected for that number Ofcom is unlikely to regard these as modifications of material detriment to consumers).
- 6.96 CPs must also, therefore, continue to consider the application of the UTCCRs and GC9.6 to non-subscription price increases and the contract terms providing for them. Ofcom will continue to assess the application of those provisions, GC9.6 in particular, to non-subscription prices on a case by case basis. We will also monitor complaints about any increases to such prices and may review our position if new evidence comes to light of consumer harm arising from them.

VAT

- 6.97 As to VAT, we agree that any increase (or decrease) in the relevant rate would be outside CPs' control and its application would be mandatory.⁸⁵ Our guidance will, therefore, make clear that we would not regard as materially detrimental price increases passing on to consumers increases in VAT (or any other directly and specifically applicable taxation or regulatory levy, payment of which is compulsory).⁸⁶
- 6.98 The same would not apply, however, to price rises attributable, or purportedly attributable, to increases in costs resulting, or purportedly resulting, from general

⁸⁴ That will, in principle, cover any NGCs a CP chooses to make part of the inclusive package of core services (save where otherwise indicated in the guidance).

⁸⁵ We also acknowledge OFT's guidance on the UTCCRs which considers that a right to pass on VAT increases does not attract fairness concerns, since such changes are (a) outside the supplier's control, (b) publicly known and verifiable and (c) universally applicable, so that the consumer would not be any better off with a right to cancel.

⁸⁶ Were the rate of VAT decreased and a CP did not pass this on to customers, we would likely regard the effect as a materially detrimental price rise to which our guidance applies.

regulatory policy decisions or increases in the general costs of regulation (which do not levy specific, directly applicable and compulsory charges on CPs).

Sectors

- 6.99 Some fixed line and broadband providers challenged the evidence of consumer harm arising from price rises in those sectors, contending that it is limited mainly to rises by some mobile providers. We agree that, in respect of the quantitative evidence, that is largely correct.
- 6.100 However, our judgment is that price is an important consideration in consumers' transactional decisions in respect of telecommunications services generally. In making this judgement, we have considered the more qualitative evidence described in this statement. There is no particular reason of which we are aware that a different assessment should apply for different services.
- 6.101 In this connection, we note that it is common for fixed voice and broadband providers' standard terms and conditions to provide for mid-contract price increases. We also note that our 2012 switching tracker telephone survey (July-August 2012) found that around 40% of fixed voice, and 44% of fixed broadband consumers are subject to contracts with fixed minimum terms and are, therefore, liable to the effects of mid-contract price increases⁸⁷.
- 6.102 Accordingly, we do not judge it disproportionate to maintain the scope of the services covered by our decision. That is, to issue guidance on the application of GC9.6 to core subscription price rises in contracts for all telecommunications services to which GC9.6 applies.

Bundled services

- 6.103 We note that:
- BT, VM and Three raised concerns about the exclusion of increases in prices for Pay TV services from our proposals;
 - BT and VM suggested that Ofcom seek voluntary agreement from providers of Pay TV services that they be treated the same as the services covered by GC9.6; and
 - VM said Ofcom should issue guidance on how the UTCCRs would apply to price increases for Pay TV services.
- 6.104 In response, we note three points. First, we re-iterate a point explained in our consultation. Ofcom does not have the power to apply GC9.6 to content/Pay TV services that are not electronic communications services. To the extent a price increase is a modification to a contract for such a service, GC9.6, and our guidance on it, does not apply (although, equally, GC9.6 does not prevent providers from applying the same rules to other services).
- 6.105 Second, such services are often marketed and sold to subscribers together with other services as part of a bundle. Such a bundle may comprise some services

⁸⁷ Please see Ofcom Switching Tracker 17 July – 20 August 2012: for fixed line see table 13 and for fixed broadband see table 96, (<http://stakeholders.ofcom.org.uk/binaries/research/statistics/switching-tracker.pdf>)

subject to GC9.6 and some not. It will be a question of fact and proper contractual construction as to whether all the services comprised in any such bundle are:

- governed by one set of terms and conditions that comprise a single contract;
- purportedly subject to separate terms and conditions for each service but which in reality comprise a single contract (as may be the case where, for example, the subscriber is required to pay a single price for the bundle as a whole); or
- subject to separate terms and conditions for each service such that each service can properly be said to be subject to separate contracts.

In the first two circumstances, Ofcom will treat GC9.6 as applying to the whole contract even if there are elements within that contract which, on their own, are not subject to GC9.6. We would be likely to apply our guidance – that we are likely to regard any mid-contract increase in the price of core subscription services in such a contract to be materially detrimental (or likely to be materially detrimental) – to any such contract.

6.106 Third, we see little merit in seeking Pay TV service providers' voluntary submission to GC9.6. Likewise, with regard to issuing guidance as to the application of the UTCCRs specifically to Pay TV services. In respect of the former, such providers would have no legal obligation to comply, nor would Ofcom be able to take enforcement action should they fail to do so. In respect of the latter, it is not clear to us what Ofcom guidance could add to the OFT's existing UTCCRs guidance.

6.107 A further important point, relevant to both bundled services and more generally, is that the protection provided by GC9.6 must be real and effective in practice. Where a materially detrimental price rise occurs, subscribers must be made properly aware by CPs of their rights and be able to exercise them. In that regard, GC9.3 is also relevant⁸⁸.

6.108 Terms and/or practices which frustrate the practical effect of GC9.6 are liable to attract suspicion of non-compliance with the relevant GCs. These may include allowing subscribers less than 30 days to exercise any termination rights or imposing financial, administrative or contractual requirements that have the aim or effect of deterring or disincentivising a subscriber's termination of the contract.

Business customers

6.109 In the consultation, we proposed that our intervention should apply also to small business customers (those falling within the definition in GC 9.3(b)(v)).⁸⁹ Some CPs contended that our action should not extend to cover such customers. Others, however, agreed with our assessment⁹⁰ that small businesses are generally likely to

⁸⁸ GC9.3 states, "Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider".

⁸⁹ GC9.3(b)(v) says, "'Small Business Customer', in relation to a public communications provider, means a customer of that provider who is neither himself a communications provider, nor a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise)."

⁹⁰ Which mirrors the assessment we made in respect of small business customer in respect of automatically renewable contracts under GC9.3 – see

http://stakeholders.ofcom.org.uk/binaries/consultations/arcs/statement/ARCs_statement.pdf

be in a similar position to consumers, having little or no bargaining power and dealing with CPs on the latter's standard terms and conditions.

6.110 In this connection we take account of Recital 47 of the Universal Services Directive. It provides that:

“This Directive should provide for elements of consumer protection, including clear contract terms and dispute resolution, and tariff transparency for consumers. It should also encourage the extension of such benefits to other categories of end-users, in particular small and medium-sized enterprises.”

6.111 Given these points, we confirm our provisional view that small businesses contracting with CPs on their standard terms and conditions are likely to consider price to be similarly important as consumers do, and are liable to be affected by price rises in a similar way. Accordingly, we have decided that our guidance on GC9.6 should also apply to price rises in respect of such customers.

6.112 By contrast, we consider it more likely that larger businesses may have stronger bargaining power in relation to CPs and may be able to negotiate terms with them. That being so, they are less likely to suffer material detriment in the event of price increases, especially if the terms (including price variation terms) have been negotiated in bespoke contracts.

6.113 In such cases, our application of the rules in GC9.6 is likely to differ. We will take into account the circumstances in which a larger business has entered into a contract and the nature of the contract. This is consistent with our policy position in our May 2011 decision on implementing the revised EU framework.⁹¹

Proportionality

6.114 A key consideration in our decision-making is to ensure that our decisions are proportionate. An important aspect of this, in the present case, is the assessment we have made, as part of our overall regulatory policy judgment, of likely costs and benefits of our action.

6.115 There are a number of relevant parts to this proportionality assessment. We have already set out above elements of our judgment that are relevant in this regard. We have, for example, acknowledged the breadth of our proposed consultation option 4, the limitations of the relevant quantitative evidence and the consequent need to refine our intervention in pursuit of our aim of fairness.

6.116 We have similarly explained our assessment of the importance of price, price terms and price rises to telecommunications consumers and small business customers. Likewise, the focus we judge to be appropriate on the key aspects of price and price rises – the recurring core-subscription price – and the sector specific requirements of the USD. Each of these go to our judgment as to the securing, by proportionate means, of fairness in respect of price rises.

⁹¹ In paragraph 7.36, we said “.....we do agree that in certain cases where there is an agreed change mechanism, such as in the case of business contracts, that changes captured by this mechanism are unlikely to be materially detrimental as they are likely to have been envisaged by the parties at the time the contract was agreed.” <http://stakeholders.ofcom.org.uk/binaries/consultations/gc-usc/statement/Statement.pdf>

6.117 The relevant provisions of the USD are a central part of this assessment (as well as being material in other respects). As we note elsewhere,⁹² these do not refer to a requirement for likely material detriment before a subscriber may terminate a contract in response to its proposed modification. Ofcom nonetheless retained such a requirement in GC9.6 light of our general duties and of the principle of proportionality. We sought to retain a fair balance in the rights of CPs and subscribers to telecommunications contracts, imposing rules no more intrusive than necessary to achieve this balance.

6.118 Those remain our aims. However, as we also say elsewhere,⁹³ GC9.6 applies to modifications to all contract terms. It does not relate specifically to price rises and these were not the subject of specific consideration either when GC9.6 was made or later modified.

6.119 We have, therefore, re-considered the position in the context of price rises. Our judgment, in light in particular of our assessment of the importance of price, especially the core subscription price, to telecommunications consumers and small business customers, the protection already provided by existing rules and the sector-specific protection the USD provides, is to these effects:

- it is appropriate generally to retain GC9.6's material detriment requirement, including in relation to price variations;
- a fair and proportionate interpretation of that requirement, however, is that increases in core-subscription prices are, or are likely to give rise to such detriment and to engage the rights to notice and termination for which the condition provides; and
- a fair and proportionate policy intervention is to issue guidance that that is the view we are likely to take in the application of GC9.6 to such price rises.

That broad policy conclusion is also supported by the following specific parts of our analysis.

6.120 In particular, we set out in our consultation that existing rules, such as those under the UTCCRs, seek to ensure that the allocation of risks and burdens as to costs and price rises is fairly provided for in contract terms. We also set out our provisional view that CPs were generally better placed to forecast costs and bear risks as to increases than consumers, and that the rules relating to price rises should reflect that. That is, CPs should generally bear the risks of cost increases during the lifetime of fixed term contracts. The consultation presented a qualitative assessment of the potential costs and benefits of our proposals.

6.121 We have carefully considered those issues again in light of the consultation responses. In particular, those responses which discussed increases in costs outside CPs' control and the CPs' difficulties in forecasting and controlling those costs, together with the potential for price increases for relevant subscribers as a result of CPs adding on a "risk premium" to their charges were we to adopt our consultation option 4.

6.122 We acknowledge these issues (and the potential impact on subscribers) if we were to adopt our proposed option 4 or to regard all price increases, including in respect of

⁹² in section 3 above, for example.

⁹³ in section 3.

non-subscription services, as materially detrimental for the purposes of GC9.6. This is an additional consideration in our judgment that we should limit the scope of our guidance to core subscription prices.

- 6.123 We consider that such guidance will seek to allocate risks as to price increases where they should fairly lie, and that the costs incurred by CPs and consumers are likely to be limited when compared to the benefit to consumers and other relevant subscribers of addressing the harm we have identified. This is discussed in more detail below.
- 6.124 We start by discussing the arguments in relation to the benefits consumers might derive from price variation clauses in contracts. We go on to discuss the arguments in relation to cost increases and the potential for prices to increase as a result of CPs applying a 'risk premium' to their prices.
- 6.125 As we set out in our consultation, we accept that in principle some benefits may accrue to consumers from rules allowing CPs to increase prices in fixed term contracts. First, such increases may allow a CP to preserve service quality and/or service availability in the face of unanticipated cost increases. Second, if CPs are able to pass on cost increases in higher prices this removes the need for CPs to incorporate a 'risk premium' to reflect the cost uncertainty.
- 6.126 We accept that our guidance will constrain the ability of CPs to pass on increased costs through increases in the core subscription price. Accordingly, there is a risk in principle that this could impose costs on consumers in the form of a loss of the type of benefits discussed in the previous paragraph.
- 6.127 We do not consider that we can quantify the potential cost to consumers that could result from CPs' responses to our proposed guidance. However, our judgment is that, in practice, any such costs are likely to be limited, given the policy approach we have decided to take.
- 6.128 In particular, our guidance only applies to core subscription charges, and not to those non-core services such as international calls or NGCs⁹⁴ for which CPs identified that it was particularly difficult to forecast and control costs. In addition, we note that our guidance recognises that certain, mandatory increases in core subscription charges may not be considered to cause material detriment (for example if VAT or other taxes are increased – see paragraph 6.97).
- 6.129 Additionally, as part of this assessment we take account that CPs' tariff offers are based on a range of cost and revenue considerations. We note that in their responses many CPs accepted that they were able to anticipate and bear some of the risks associated with increasing costs over the life of a fixed term contract (see for example paragraph 4.55 above).
- 6.130 This is consistent with the assessment that given their expertise and experience CPs are in a better position than consumers to bear some of the relevant risks. As a matter of regulatory policy, we consider this is an appropriate view to take. We note again in this regard the OFT's UTCCRs' guidance which, in respect of terms providing for price rises, says (again, Ofcom's *emphasis*):

⁹⁴ Other than those the CP has chosen to make part of the inclusive core package of services covered by the core subscription price, to which the guidance applies as indicated therein.

“12.3 A price variation clause is not necessarily fair just because it is not discretionary – for example, a right to increase prices to cover increased costs experienced by the supplier. *Suppliers are much better able to anticipate and control changes in their own costs than consumers can possibly be.* In any case, such a clause is particularly open to abuse, because consumers can have no reasonable certainty that the increases imposed on them actually match net cost increases.”

- 6.131 To demonstrate this point, in its response EE accepted that operators were able to forecast a number of cost categories related to their own network and operations reasonably accurately (although it did also argue that CPs should be able to pass on any costs that they were unable accurately to plan). EE also accepted that it was in a position to take steps to forecast cost increases and reflect them in its tariff pricing structure⁹⁵.
- 6.132 We also note that the period of time over which CPs would have to forecast cost changes would be relatively limited (i.e. up to two years). As a result of points such as these, we would expect CPs already to be well placed to factor potential changes in input costs into their tariff planning.
- 6.133 We also note that other costs associated with services usually included in the core subscription price are likely to be fixed or falling. An example of this would be the cost of the handset.
- 6.134 These are all factors consistent with the view that the value of price flexibility and the costs of its reduction are likely limited. At the same time, we do accept, as most CPs contended in their consultation responses, that wholesale price charges for NGCs⁹⁶ directory enquiries, PRS and international calls are outside their control. We acknowledge that CPs’ abilities to forecast and control changes in these charges are accordingly limited. We have taken due account of this in our decision, making clear that our guidance on GC9.6 does not apply to increases in non-subscription prices.
- 6.135 There are also grounds, as follows, for the view that the need for CPs to incorporate a “risk premium” into their charges as a result of the guidance we have decided to issue, will be limited, too. In taking that view, we have considered carefully what respondents said about such risk premia in their consultation responses.
- 6.136 Most CPs talked about the potential need to factor a risk premium into their monthly prices in relation to our proposed consultation option 4. That is, in the event that the proposals included calls over which CPs did not have control and their ability to forecast price changes was limited. As set out above, our guidance does not extend to such services.
- 6.137 EE’s was the only response to discuss the potential risk premium issue more generally. It pointed out that it offered a “Fix Your Monthly Plan” option that allowed consumers to fix their price over the duration of their contract. The charge EE makes for this option varies between 50p and £2 per month depending on the customer’s monthly tariff.

⁹⁵ See page 16 of EE response.

⁹⁶ We accept this point in respect of cases where the CP has not chosen to make NGCs part of the inclusive core package of services. The guidance sets out the way it applies where the CP has included NGCs in an inclusive package.

- 6.138 The fact that an operator is offering such an option seems to us to be a recognition that some consumers do value certainty as to the subscription price they expect to pay over the length of their contract. The EE tariffs could be taken as to be a potential indicator of, or proxy for, the risk premia that an operator might consider imposing in response to our decision (although we acknowledge that, without understanding the assumptions which underlie this tariff, it is not necessarily clear to us how accurate a measure it is).
- 6.139 At the same time, we also note that Tesco Mobile has promised not to increase its core monthly tariffs mid-contract.⁹⁷ This indicates that Tesco considers it can compete on the basis of fixed prices, rather than seeking to increase prices to customers, and that a guarantee of a fixed price over the term of the contract may give it a competitive advantage over other CPs.
- 6.140 We recognise that the commercial offerings described in the preceding paragraphs are both relatively recent developments. They are consistent, nonetheless, with the view that price increases are not an automatic or inevitable response to the guidance we have decided to issue. Likewise with the view that, even if some CPs sought to include a risk premium in response, competitive pressures from other operators will mitigate the extent of any such premium. These points support our judgment that any risk premium CPs might put on prices, in light of the proportionate approach we have decided to take in our guidance on GC9.6, is likely to be limited.
- 6.141 Accordingly, it is our overall assessment that any benefits of price flexibility are likely to be limited. Any “cost” arising from the loss of this potential benefit would have corresponding limits. We also consider that the costs of implementing our decision will be restricted. That is, the guidance we are issuing only applies to new contracts. Furthermore, there is a three month implementation period (as to which see further below) which will enable CPs to factor these changes into their business as usual processes rather than have to make immediate changes.
- 6.142 We set these likely limited costs against our judgment as to the importance to consumers and other subscribers of subscription prices and having certainty about the changes to that price. We take full account of that importance. Likewise of the consequential benefits to consumers of transparency and of constraining CPs’ ability to raise certain prices in a clear and certain way (providing certainty about the effect of GC9.6 and over the cost of contracts and the ability to compare them), especially in light of the relevant provisions of the Universal Services Directive.
- 6.143 Having done so, our judgment is as follows:
- First, a qualitative impact assessment, with which the limited quantitative evidence is consistent, is appropriate.
 - Second, in that assessment, the likely benefits of the more limited and proportionate action we have decided to take, as set out in this statement, are broadly commensurate with the (limited) costs to which that action may give rise.
 - Third, accordingly, our fairness aims and principles are appropriate, and the decision we have made gives due and proportionate effect to them.

⁹⁷ See “Tesco Mobile Tariff Promise” press release, <http://phone-shop.tesco.com/tesco-mobile/about-us/press-releases.aspx>

Implementation

- 6.144 We have had careful regard to the consultation responses about the implementation of our decision. We note that they contended for a range of implementation periods were Ofcom to adopt option 4 as proposed.
- 6.145 In light of the more focussed and proportionate decision we have made, a number of the points made by CPs, in particular, about a longer implementation period have more limited application. We do not foresee the guidance we have decided to adopt requiring as extensive an implementation period as CPs contended in respect of option 4. It is not clear to us, for example, that, as was contended in respect of option 4, the guidance will require CPs to implement new billing systems.
- 6.146 We therefore consider that a three-month implementation period is appropriate. Our guidance will apply to all new contracts entered into three months from the date of this statement. That period will enable CPs to make any changes they consider appropriate to their terms and practices.

Conclusion

- 6.147 For all the above reasons, Ofcom has decided to issue guidance as to those price rises which we are likely to regard as giving rise to material detriment (or likely to be materially detrimental) for the purposes of GC9.6 and giving consumers the rights provided for by that condition. In particular, guidance to the effect that we are likely to regard as materially detrimental (or likely to be materially detrimental) any increase to core subscription prices (as defined).
- 6.148 In our judgment, such guidance represents an appropriate and proportionate action, in light of the consultation responses. In particular, it gives effect to principles that reflect the importance of price, core subscription price in particular, and price variation terms, to telecommunications consumers and other subscribers, the need for transparency as to those terms and the need to address the substantive effects of price rises in clear and certain rules. It takes account of the existing protections under general consumer law and sector specific requirements in the Universal Services Directive, to address a principal shortcoming in the existing rules: the meaning of GC9.6's material detriment requirement in the context of price rises. It does so, to the protection of consumers and other subscribers, in a way which provides that benefit at likely limited cost.

Section 7

Other issues

Introduction

- 7.1 In this section we summarise and consider other issues raised by respondents (including new/additional issues not discussed in the consultation) and how we have considered them in light of our decision in section 6.
- 7.2 We discuss each of the following issues in turn:
- non-price variations;
 - how CPs notify consumers of contract variations;
 - timescales set by CPs for consumers to cancel their contract without penalty for contract variations; and
 - additional issues: Early Termination Charges (ETCs) and Distance Selling Regulations (DSRs).

Non-price variations

- 7.3 In the consultation, we noted that variation terms in contracts also allow CPs to make non-price variations to the contract. However, we had not identified any concerns in relation to how the current rules have been applied to any non-price variations made to the contract. Therefore, our provisional view was that the material detriment test would remain in GC9.6 for any non-price variations and CPs would have to take this into account when making variations to any other terms in the contract.
- 7.4 This would mean that, as now, providers would need to assess and decide how to comply with GC9 in respect of any non-price variations made and Ofcom would also continue to assess such variations on a case-by-case basis as and when required e.g. following consumer complaints. We did not propose to issue any guidance on how this would apply to non-price variations as we had not identified any current consumer concerns regarding such changes. We sought respondents' views on the material detriment test in GC9.6 still applying to any non-price variations in the contract.

Stakeholder responses

- 7.5 A small number of respondents expressed some concerns over retaining the material detriment test in GC9.6 for non-price variations. EE said that this would still raise the question as to the meaning of material detriment, and it considers that guidance from Ofcom is required as other non-price elements of the contract are still important to customers.
- 7.6 One private respondent said that Ofcom's intervention could result in CPs making more non-price variations and therefore it would be important for Ofcom to issue guidance on "material detriment" both for non-price variations and price variations that would still be possible in existing contracts. The National Consumer Federation also said that CPs could side-step any changes to GC9.6 by degrading the service

(offering less minutes etc.) as an alternative to raising headline prices. However, it considered that retaining the material detriment test for non-price variations would address this issue adequately.

- 7.7 Citizens Advice said it recognised that demonstrating material detriment for non-price variations is theoretically easier but it was not convinced that such a test was necessary and removing it altogether would make redrafting GC9.6 far more straightforward.
- 7.8 The CFC said that there may be some justification for retaining the definition of detriment as “material” if there were no robust or objective way of measuring the detriment, for example in straightforward financial terms for non-price variations. However, it was concerned that it would be hard to measure whether changes such as quality of service or a reduction in call allowance are of material detriment to a consumer.
- 7.9 In contrast, BT, Sky, Virgin Media, KCOM, SSE, Universal Utilities Ltd, Vodafone, Telefonica, FCS and OS said the material detriment test in GC9.6 should apply to all variations that are not specifically caught by our intervention, including increases to non-subscription charges.
- 7.10 Sky said that there should be high level guidance on the factors to consider when determining whether consumers have suffered material detriment and therefore have a right to cancel their contract without penalty in respect of non-subscription price increases. However, it advised against specifying percentage thresholds for material detriment in light of increases that are outside of CPs’ control.
- 7.11 Of the total of 303 consumer responses, 101 responded to this question. Of those:
- 46% thought that the material detriment test should still apply to non-price rises;
 - 41% did not think so; and
 - some consumers commented that “material detriment” should be defined as it is not easy to test.

Our response

- 7.12 We consider that the role of guidance would likely be limited in the above circumstances. The variety of non-price changes that may be made to the contract is potentially very wide. Any such variation would be subject to a qualitative assessment linked to the particular variation and the attendant circumstances. In addition, as we acknowledge elsewhere in this statement, there are some cost elements of non-subscription services (such as termination rates for NGCs and calls to non-EU destinations) that are outside CPs’ control. In all these circumstances, it is not easy to see how useful guidance could be set out.
- 7.13 More particularly, whether a non-price variation or increase to a non-subscription charge is likely to constitute material detriment to a subscriber would depend on a number of factors, including whether the subscriber used the service in question. As now, a CP would need to decide how to comply with GC9.6 in respect of any non-price variations and price increases to non-subscription charges. We would continue to assess such variations on a case-by-case basis as and when required e.g. following consumer complaints (though see Ofcom’s statement on NGS [here](#) in respect of price rises for calls to unbundled tariff numbers not included as part of

inclusive bundles: where such rises are attributable to the level of the service charge selected for that number Ofcom is unlikely to regard these as modifications of material detriment to consumers). If evidence came to light of consumer harm from such variations then we would review our position and consider whether guidance and/or changes to GC9.6 are necessary to address the harm.

- 7.14 Although the guidance does not apply to any non-price variations, CPs may respond to our guidance by making variations to non-price terms, for example, by reducing call allowances (and/or text and/or data allowances where relevant) included in a consumer's monthly subscription price. In such circumstances, we are likely to consider such a change effectively to constitute an increase in the unit price paid by the consumer and to which the guidance we have decided to issue would apply.

How Communications Providers notify consumers of contract variations

- 7.15 In the consultation, we explained that Ofcom received a small number of complaints from consumers about the prominence and/or clarity of price rise notifications following a number of price rises in 2012. In light of this, Ofcom reviewed some of the recent notifications, met with providers to discuss their notification processes and made suggestions as to how the notifications could be improved.
- 7.16 We considered that we did not need to take formal regulatory action to specify the form of contract variation notifications at this time. We maintained the position that industry is best placed to decide how it communicates this information with its consumers. It is, nonetheless, important that the rights provided by GC9.6 are given clear and certain effect. They must be real and capable of effective exercise in practice. We said we would continue to monitor this issue and, where appropriate, we will continue our approach of speaking with providers and making suggestions for better practice where we identify that their notifications could be improved.
- 7.17 We reminded industry of our expectations and the high level guidance as set out in our discussion on GC9 issues in Ofcom's 2011 consultation and decision documents to implement the revised EU framework above.
- 7.18 In addition, following our review of some recent notifications, we identified how the relevant rights should be given effect, as set out below:
- Hard copy price notifications should be clearly marked as such in a prominent manner e.g. on the front of the envelope/communication material/the subscriber's bill, and possibly in more than one place in order to attract the subscriber's attention.
 - Providers should consider issuing the variation notification on a separate piece of paper from any marketing material. This could help to ensure that the notification does not get lost in other communications that the subscriber receives from the provider but may not necessarily read.
 - Email notifications of contract variations should be clearly marked as such in the subject line of the email.
 - Information about the subscriber's termination rights should be made clear upfront. For example, on the front page of a hard copy notification, in the main

email message rather than via a link in the message or on the actual webpage of the variation notification rather than via a link to another page.

- Where the subscriber does have the ability to terminate, this should be made clear in the main body of the notification rather than in a footnote or a reference to the relevant clause of the terms and conditions.

7.19 We asked respondents if they agreed that CPs are best placed to decide how they can communicate contract variations effectively with its consumers. We also asked if they agreed with our proposal to liaise with providers informally at this stage, where appropriate, with suggestions for better practice where we identify that notifications could be improved. We also sought respondents' views on our additional suggestions for best practice in relation to the notification of contractual variations.

Stakeholder responses

7.20 EE, BT, SSE, Virgin Media, KCOM, Vodafone, Telefonica and the CFC agreed with Ofcom's approach in relation to notification of contract variations. Sky also agreed but urged Ofcom to take specific enforcement action where it considers particular notifications are inadequate.

7.21 Citizens Advice said that it would be keen to see a uniform approach to notifications across the sector and would expect consumer organisations and consumers themselves to be consulted. OS said that Ofcom should provide minimum standards that all CP should be expected to meet and that if a CP wanted to exceed the minimum requirement set by Ofcom then they should be free to do so.

7.22 The main concerns raised in relation to the notification of price changes to customers were due to the inclusion of "non-core" services in our proposed option 4. CPs argued that if they are required to inform their customers of every price increase to every service provided (including the "non-core" and "discretionary" elements that are not usually included in a customer's monthly core subscription charge) then there would be information overload on consumers and it would also impose additional costs on CPs for having to send out so many notifications.

7.23 In particular, Vodafone said that our proposed option would result in CPs having to "spam" customers as they would have to notify every customer of every price change to every price point even if the customer did not use the relevant services. Sky said that the information overload could result in consumers overlooking a material notification and that the costs of the additional notification will inevitably be passed onto end-users. TalkTalk said that the consultation did not consider the cost to CPs of providing notification or the confusion it could cause to customers.

7.24 In relation to Ofcom's views on best practice for notifications as set out in previous documents and the additional best practice suggestions in the consultation, the majority of CP respondents supported them and also supported the approach that CPs are best placed to decide the format of such notifications.

7.25 EE noted the best practice examples and considered that it already followed them. BT was supportive of the best practice suggestions and said that guidance would be useful to understand Ofcom's expectations in this area and for CPs to understand what may be acceptable. Virgin Media said that the suggestions are reasonable and agreed that the right to terminate should be clear from the main body of the notification but the process for termination can, in its view, reasonably be set out in a footnote or by link to a web page. KCOM noted that best practice for a core

subscription price increase is not necessarily the same as it would be for a change to an out of bundle call charge. It was concerned that giving out of bundle price changes as much prominence would result in consumers becoming desensitised to formal notifications.

- 7.26 Consumer groups (Which?, Communications Consumer Panel, National Consumer Federation) stressed the importance of notifications being clear to consumers as to the nature of the contractual change, the implications for them and their termination rights, rather than just referring the customer to read their terms and conditions and/or other background information. Citizens Advice said that the notification should also include information on the switching process where the right to cancel without penalty has been triggered.
- 7.27 Citizens Advice and uSwitch said that consumers should be able to choose the communication methods used for notifying them of contractual changes. uSwitch considered that notifications should be based on a template that Ofcom should draw up to ensure uniformity and clarity and should also include a reminder to the customer of when the minimum term of their contract is up. The response from the Consumer Forum for Communications (CFC) noted that people with sensory impairments had difficulty in assessing information and therefore CPs need to demonstrate that they communicate contract changes and termination rights in an appropriate format to those customers. OS said that whatever method is used, it is important for CPs to use plain language and make it available in different languages and formats.
- 7.28 Universal Utilities Ltd said that Ofcom should set out notification requirements so there is certainty and incentive for CPs to adhere to best practice. Otherwise, any new regulations could be ineffective if CPs can find a way of not giving sufficient notification and of ability to cancel. A private respondent said that guidance is appropriate as long as CPs adhere to best practice and that if CPs do not follow guidance then Ofcom should look at more intrusive measures proposed in other industries.

Our response

- 7.29 As explained above, Ofcom's guidance explains that we are likely to take the view that consumer and small business subscribers should be given the rights provided for by GC9.6 in the event of mid-contract core-subscription price rises. This does not prevent CPs from being able to make such price increases or other price or non-price variations. Where CPs choose to make such contract variations, it is important for them to comply with GC9.6 which includes notifying subscribers accordingly.
- 7.30 We maintain our view that CPs are best placed to decide how to notify their customers of contract variations. In the absence of significant concerns about the current notification process, we do not propose to take any formal action in relation to this issue. However, it is fundamentally important that the rights provided for by GC9.6 are clear, certain and capable of real and effective exercise in practice. We have, therefore, consolidated our pieces of guidance from previous documents and the consultation so that this information can be found in one place in our guidance on GC9.6.
- 7.31 We consider that our guidance sets out the minimum standards for notifications for contract variations that are likely to constitute material detriment to subscribers. This does not prevent CPs taking additional steps in their notification to consumers as

long as the core message of the contract change and ability to withdraw from the contract remains clear and is not lost in any additional information provided.

- 7.32 With regard to the CFC's comment on CPs communicating with customers with sensory impairments in an appropriate format, we consider that there are already relevant existing obligations under GC15 which requires that bills and correspondence pertaining to bills are provided by CPs in accessible formats such as large print and Braille on request and free of charge which would protect those consumers.
- 7.33 We note that subscribers outside of their minimum contract period ("initial commitment period" as defined in GC9.4) are able to withdraw from the contract without penalty at any time anyway. However, we would stress that the obligations under GC9.6 apply to all subscribers regardless of whether they are within or outside the minimum contract period. Those outside of their minimum contract period still need to be notified of changes that are likely to constitute material detriment to them so that they can make a decision as to whether to remain in that contract or exercise their already penalty-free right to exit.

Timescales set by Communications Providers for consumers to cancel their contract without penalty for contract variations

Summary of consultation

- 7.34 In the consultation, we said that following a review of price variation terms as part of the GC9 programme, we found that providers set various timescales for consumers to be able to withdraw from the contract without penalty if they do not wish to accept the price rise (subject to whatever threshold set by the provider for material detriment). The timescales ranged from seven to 30 days for the consumer to notify their intention to cancel (without penalty) following notification of the proposed price rise.
- 7.35 We were concerned about the shorter timeframes set, such as seven, ten or 14 days to cancel without penalty once notified of changes. We questioned whether such short periods of time were reasonable and/or sufficient for enabling consumers to consider the impact of the change, shop around for better deals and make the decision whether to switch after notification of a price rise that triggers a right to cancel without penalty.
- 7.36 Under GC9.6 CPs have to give subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment. We set out our initial view that providers should also give consumers the ability to cancel the contract at any time before the price rise takes effect, in other words not less than one month. We considered that this would give consumers the appropriate time to review their options and take action to avoid the price rise. We invited stakeholder views on this issue and whether the timescale that consumers should be given to cancel without penalty should be set out in guidance.
- 7.37 We asked, in particular, for respondents' views on the length of time that consumers should be given to cancel a contract without penalty in order to avoid a price rise. We questioned whether, for consistency, there should be a set timescale applying to all Communications Providers. We also asked 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.

Stakeholder responses

- 7.38 Most respondents stressed the need for consistency amongst CPs on the timescales they give to customers to withdraw from the contract without penalty for relevant contractual changes and therefore urged Ofcom to set a specific timescale by way of guidance.
- 7.39 Sky asked whether the timescale would apply to all contract variations requiring notification or only price variations. Sky did not consider it necessary or desirable for Ofcom to prescribe a set length of time that consumers should be given to cancel a contract without penalty or issue guidance in this respect.
- 7.40 The timescales suggested by respondents ranged from 28 days from notification to one month after the change takes effect⁹⁸. However, the majority of respondents suggested timescales of around one month (28-30 days) from notification would be reasonable.
- 7.41 BT and Sky said that Ofcom should not require providers to let customers withdraw from the contract without penalty at any time between the notification and price rise as this would disincentivise providers from notifying customers of changes early. However, the CFC said that customers should be able to terminate the contract at any time up to the date the contract variation comes into effect and that some customers may gain some advantage from having a longer notice period but this is likely to be minor.
- 7.42 Vonage said that retail CPs are subject to wholesale ETCs (especially where there are WLR arrangements) and therefore requiring end users to give not shorter than 30 days' notice of cancellation would allow CPs to time to serve notice on wholesale providers and avoid or help to mitigate any ETCs.

Our response

- 7.43 We note that for recent price rises, some CPs have given their customers more than one month's notice of the proposed changes. To clarify, we do not wish to deter CPs from notifying relevant subscribers as early as possible of any change to the contract that is likely to be materially detrimental. Our aim is to ensure that consumers are given a reasonable period to read and understand the implications of the proposed modification, consider their options and make the decision to stay or cancel their contract with their provider. In other words, to ensure full and real practical effect is given to the rights provided for in GC9.6. To this extent, we consider that 30 days is a reasonable length of time for CPs to give consumers to cancel their contract where a variation is likely to constitute material detriment.
- 7.44 Our guidance for notification of contractual modifications will set out our expectation that CPs should give subscribers at least 30 calendar days in which they can notify their provider that they wish to withdraw from the contract for any proposed modification that is likely to constitute material detriment to the subscriber. CPs should make clear in their notifications when that 30 days starts and ends and when

⁹⁸ EE said a 30-day period and accompanying Ofcom guidance would be useful. Virgin Media said that there should be a set timescale and that one month would be reasonable. SSE suggested a 28-day notice period with accompanying Ofcom guidance. KCOM said it would be comfortable with guidance which suggested that CPs should allow customers one month either side of a potentially materially detrimental price rise to exercise a right to exit without penalty. uSwitch said that a month is a suitable window for consumers to act within which is the same window energy customers have to notify their supplier that they are leaving.

the cancellation will take effect (e.g. immediately, within x days of being notified by the subscriber, on the date the contract modification takes effect etc.) Where CPs do not do this, they are liable to suspicion of breaching the requirements of GC9.6.

Additional issues

7.45 Below we summarise and consider new/additional issues raised by stakeholders but which were not discussed in the consultation.

Early termination charges (ETCs)

Stakeholder responses

7.46 Sky noted that Ofcom had undertaken a review of ETCs levied by fixed line and broadband providers but had yet to do the same in the mobile sector. It suggested that Ofcom should prioritise a similar review of mobile ETCs as it considers that the imposition of ETCs is currently a key factor in consumers deciding not to cancel a contract even when they are subject to mid-contract price increases. In addition, it noted that ETCs are generally considerably higher and more rigorously enforced in the mobile sector. Therefore, it considered that a review of mobile ETCs would significantly help to address some of the potential and actual instances of consumer harm highlighted in the consultation.

Our response

7.47 We note Sky's comments above in relation to mobile ETCs. Ofcom currently has a monitoring and enforcement programme⁹⁹ open for considering the fairness of additional charges such as ETCs under the UTCCRs and in light of our published guidance on such charges¹⁰⁰. As part of the programme, we monitor consumer complaints in relation to ETCs in all communications sectors and, along with consideration of other issues and developments in those sectors, this helps us to identify what our priorities should be under the Programme. The action we may take under this programme is subject to ongoing consideration. In addition, where we identify concerns with mobile ETCs, we will consider the case for further action against specific providers in accordance with our administrative priorities as set out in our published enforcement guidelines¹⁰¹.

Distance Selling Regulations (DSRs)¹⁰²

Stakeholder responses

7.48 SSE raised concerns about the length of time that consumers should have to consider the extension or renewal of an existing contract. There are various pieces of consumer protection legislation in place to ensure that a consumer benefits from a 'cooling off' period of several working days' duration when they have decided to purchase goods or services by phone, online or the like. SSE is concerned that some CPs are proposing renewal of fixed term contracts by telephone as a consumer approaches the end of their current term and then, if the consumer agrees to this on

⁹⁹ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01019/

¹⁰⁰ <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Guidance.pdf>

¹⁰¹ http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf

¹⁰² Consumer Protection (Distance Selling) Regulations 2000

the call, tying the customer in without allowing a cooling off period. It considered that this practice appears contrary to the spirit, if not the letter, of consumer protection legislation and asked Ofcom to investigate or set out its views on this topic in the context of GC9, where automatically renewable contracts for consumers have already been prohibited.

Our response

- 7.49 We note SSE's concerns above in relation to "cooling off" periods, which is a requirement under the DSRs¹⁰³. This issue is outside of the scope of our consultation on price rises in fixed term contracts but we would happy to discuss this separately with stakeholders.
- 7.50 Speaking generally, and as explained in our Enforcement Guidelines, Ofcom is a "designated enforcer" under Part 8 of the Enterprise Act, meaning that we are empowered to take action to enforce certain consumer protection legislation, including the Distance Selling Regulations. Ofcom will consider complaints alleging a breach of one or more pieces of relevant legislation, and will investigate where we believe the evidence demonstrates a business practice that infringes the legislation and which Ofcom considers may be harming the collective interests of consumers.
- 7.51 As to the DSRs more specifically, are the rules that apply when consumers buy products or services from suppliers without face-to-face contact, and where the consumer has not had an opportunity to examine the goods before buying or discuss the service in person. Examples of distance selling include selling via: the internet, text message, phone call, fax and interactive TV or mail order.
- 7.52 The regulations say, amongst other things, that consumers:
- must be given clear information about the goods or services before they buy;
 - must receive written information after they have bought the goods or services; and
 - have a right to cancel their order within a seven day cooling-off period.

¹⁰³ <http://www.legislation.gov.uk/ukssi/2000/2334/contents/made>

Annex 1

Guidance on “material detriment” under GC9.6 in relation to price rises and notification of contract modifications

Introduction and summary

- A1.1 This is Ofcom’s guidance on how we are likely to apply General Condition 9.6 in relation to certain price increases. In particular, on what Ofcom are likely to regard as price increases meeting the “material detriment” requirement and giving rise to the rights to notice and to terminate the relevant contract without penalty. The principles reflected in this guidance are transparency, comparability and certainty.
- A1.2 General Condition (“GC”) 9.6 says:
- “The Communications Provider shall:
- a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;
 - b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and
 - c) at the same time as giving the notice in condition 9.6 (a) above, shall inform the Subscriber of its ability to terminate the contract without penalty if the proposed modification is not acceptable to the Subscriber.”
- A1.3 It is essential that the core subscription price in a telecommunications contract (described in paragraph A1.7 below) is made clear to the subscriber at the point of sale and before the subscriber enters into the contract. Ofcom is likely to treat any increase to the agreed core subscription price during the fixed term of such a contract as a modification that is of, or is likely to be of, material detriment to consumer and small business subscribers¹⁰⁴ for the purposes of GC9.6.
- A1.4 Ofcom sets out below a series of examples, for illustrative purposes, of modifications to the agreed core subscription price likely to meet the material detriment requirement (example 1) and of agreed core subscription prices that do not involve contract modifications (examples 2 and 3). The position in examples 2 and 3 depends on the relevant price terms being sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant prices.

Background

- A1.5 Contracts for telecommunications services (fixed and mobile voice services and broadband) are commonly marketed and sold to subscribers on a basis where the most prominent terms are those relating to:

¹⁰⁴ For the purposes of this guidance, a small business subscriber is a subscriber of a CP who is a “Small Business Customer” within the definition set out in GC9.3(b)(v).

- a) the fixed term length of the contract (the “initial commitment period” as defined in GC9.4);
- b) the inclusive package of services or features provided to the subscriber; and
- c) the price payable by the subscriber for the inclusive package, usually on a recurring, periodic basis (typically, monthly).

A1.6 The inclusive package of services or features may vary between different Communication Providers (“CPs”) and contracts for different products and services. In a fixed voice contract, it will often be for line rental and an inclusive call package to certain numbers and/or at certain times, but may be for other features. In a contract for mobile services, it may be for a number of minutes of calls to certain numbers, a number of text messages and a data allowance for internet use.¹⁰⁵ For broadband services, it may be for a certain amount of data consumption.

A1.7 The inclusive package may be marketed on the basis of a single inclusive figure or separate figures for separate elements of the inclusive package. Either way, this price will usually be an amount or amounts which the subscriber agrees and is bound to pay each month (or other recurring period) for services the CP is bound to provide. It might be thought of in terms of the “core subscription price,” and that is how we describe it in this guidance.¹⁰⁶

A1.8 These contracts are typically subject to the CP’s standard form terms and conditions. These often include a term to the effect that the CP may increase the agreed price payable by the subscriber (including the core subscription price) during the initial commitment period of the contract (or at any time). These terms are, however, usually significantly less prominent than the headline terms of the kind described in paragraph A1.5 and may not be adequately drawn to the subscriber’s attention.

A1.9 There is a significant possibility that subscribers:

- a) make their purchasing decisions on the basis of, or principally on the basis of, the most prominent terms described in paragraph A1.5; and
- b) regard the recurring, usually monthly, price agreed for the inclusive package (the core subscription price) as being fixed along with the fixed term length of the contract (the initial commitment period).

¹⁰⁵ Although often excluded, some CPs may make calls to certain non-geographic numbers (“NGCs”) part of the inclusive package of voice services. Where a CP chooses to do so, the core subscription price, as defined in paragraph A1.7, covers those NGCs (in principle) (though see further below).

¹⁰⁶ This differs from the non-subscription price(s): for services that fall outside of the relevant inclusive package or core subscription, and which are billed incrementally when such services are used by the customer. For example, for mobile customers they typically (though not necessarily) include charges: incurred when they exceed their monthly inclusive allowance of services, and for premium rate services, NGCs, directory enquiries, making calls and sending texts internationally and roaming services.

For fixed line services, we note that it is common practice for customers to be offered a monthly subscription deal that includes, for example, line rental and unlimited weekend calls but all other calls are billed incrementally. For the time being, charges for these other calls – even where relating to important aspects of what is provided under the contract, for example, some charges for local and national calls to geographic numbers – fall outside our definition of the core subscription price and this guidance does not apply to them. Ofcom will monitor the position in respect of increases to such prices and may take further action if we consider CPs are acting unfairly in respect of them.

Material detriment

- A1.10 Ofcom is likely to treat any price increase¹⁰⁷ to the agreed core subscription price (however constructed and described in the contract terms)¹⁰⁸ during the fixed term of a telecommunications contract as a modification that is of, or is likely to be of, material detriment to consumer and small business subscribers for the purposes of GC9.6.¹⁰⁹ ¹¹⁰ The core subscription price is one of the most important factors in the subscriber's choice of contract. It is likely to be the most important aspect of one of the key terms of the contract. There is likely to be a significant possibility that the subscriber would not have entered into that contract had they been bound to pay a different price to that they agreed.
- A1.11 Accordingly, in the event of any such increase to the agreed core subscription price, Ofcom is likely to take the view that the relevant subscribers should be given the rights provided for by GC9.6. That is:
- a) to be given at least one month's notice of the price increase and of their ability to terminate the contract without penalty if the proposed increase is unacceptable; and
 - b) to be allowed to withdraw from their contract without penalty if they choose to exercise that right.

¹⁰⁷ Other than increases which are limited to the CP passing on to subscribers an amount equal to any increase in VAT or any other directly and specifically applicable taxation charge or regulatory levy, imposed by changes in mandatory provisions laid down by Government or regulatory authorities, payment of which is compulsory.

¹⁰⁸ Including, in principle, a change in the price relating to NGCs that a CP has chosen to make part of the inclusive package of services and which are covered by the core subscription price. One exception to this is in respect of price rises at the time of the implementation of the unbundled tariff for calls to NGCs where calls to such numbers were, immediately prior to the implementation date, within an inclusive package. Where the price rise is attributable to a decision by the originating CP to charge separately the service charge element of the price for calls to the relevant NGC, Ofcom's view is that this should not be treated as falling within this guidance. GC9.6 will, however, still apply depending on the particular facts of each case. More detail is in Ofcom's statement on NGCs at <http://stakeholders.ofcom.org.uk/binaries/consultations/simplifying-non-geo-no/statement/final-statement.pdf>.

This also includes changes to the level of the service provided in the inclusive bundle of services or features and which effectively constitutes a (unit) price increase. We would also be likely to regard as a price rise meeting GC9.6's material detriment requirement any failure by a CP to pass on to consumers a decrease in the rate of VAT (or other relevant tax or charge) applicable to the core subscription price.

¹⁰⁹ Without prejudice to those matters to which it does apply, this guidance does not apply to any increase to non-subscription prices, which will continue to be subject to the current regulatory protection provided by GC9.6 (but not the guidance) and relevant consumer legislation (which applies to all price increases). Ofcom will monitor the position in respect of increases to such prices and may take further action if we consider CPs are acting unfairly in respect of them.

¹¹⁰ Again without prejudice to those matters to which it does apply, this guidance also does not apply to contracts in which no minimum contract or initial commitment period applies. However, a customer in receipt of services from a CP outside such a contract period will still be a party to a contract with that provider and will, therefore, be a subscriber for the purposes of the General Conditions. The subscriber's rights, and the CP's obligations, under GC9.6 will, accordingly, continue to apply, as will all relevant consumer legislation. Again, Ofcom will monitor the position and may take further action if we consider CPs are acting unfairly.

Application to bundles

A1.12 In some circumstances, telecommunications services (fixed and mobile voice services and broadband) may be marketed and sold to subscribers together as part of a bundle. Such a bundle may include some services subject to GC9.6 and some not. It will be a question of fact and proper contractual construction as to whether all the services comprised in any such bundle are:

- a) governed by one set of terms and conditions that comprise a single contract;
- b) purportedly subject to separate terms and conditions for each service but which in reality comprise a single contract (as may be the case where, for example, the subscriber is required to pay a single price for the bundle as a whole); or
- c) subject to separate terms and conditions for each service such that each service can properly be said to be subject to separate contracts.

In the first two circumstances, Ofcom is likely to treat GC9.6 as applying to the whole contract even if there are elements within it which, on their own, are not subject to that condition. We would be likely to apply our guidance – that we are likely to regard any mid-contract increase in the agreed core-subscription price to be materially detrimental (or likely to be materially detrimental) for the purposes of GC9.6 – to any such contract.

Examples

A1.13 The importance of the core subscription price in the subscriber's choice of contract means it should be clear to the subscriber before entering into any contract what the price offered and agreed is. The subscriber should be able to compare offers, make informed decisions and rely on the price agreed. An increase at the CP's discretion, changing it to a price the consumer might not otherwise have chosen to pay over other offers on the market is, or is likely to be, materially detrimental.

A1.14 These examples of the application of this guidance are for illustrative purposes:

- **Example 1: discretionary price increases**

The subscriber agrees and enters into a 24-month contract for services on terms that the core subscription price will be £10 per month. The contract also contains a term to the effect that the CP may increase the agreed core subscription price¹¹¹ by up to a certain amount, percentage or index-linked level (such as RPI).¹¹² Ofcom is likely to treat any exercise of the discretion to increase this agreed price during the fixed minimum term of the contract as a modification meeting GC9.6's material detriment requirement.

Ofcom's concern is with the application of price and price variation terms which give the CP discretion as to, for example, the possibility, amount and/or timing of a price increase. We are likely to take a similar approach to that above to the application of contract terms that reserve such discretion and/or are to the same or similar effects as those in example 1.

¹¹¹ Whether during the initial commitment period of the contract, on a fixed date or at any time

¹¹² The Retail Price Index

- **Example 2: agreed prices**

The subscriber agrees and enters into a 24-month contract on terms that the core subscription price will be £X per month for the first 12-months (or some other period) and £X + £Y (or £X + Y%) for the second 12-months (or some other period). On the basis that the relevant price terms are sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant tiered price(s), Ofcom would not regard the application of the agreed price in the second period as a modification of the contract capable of meeting GC9.6's material detriment requirement.

- **Example 3: agreed prices**

The subscriber agrees and enters into a 24-month contract on terms that the agreed core subscription price will be £X per month for the first 12-months (or some other period) and £X + RPI¹¹³ for the second 12-months (or some other period). On the basis that the relevant price terms are sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant tiered price(s), Ofcom would not regard the application of the agreed price in the second period as a modification of the contract capable of meeting GC9.6's material detriment requirement.

- A1.15 As set out above, the position in examples 2 and 3 depends on the relevant price terms being sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant tiered price(s). Where that is so, the application of the agreed price(s) at the relevant time(s) would not be a modification of the amount he or she has agreed and is bound to pay. Most clearly, this proviso as to prominence and transparency could be met where CPs market offers, and enter into contract terms, in a way that sets out with equal prominence that the contract price is £X in period 1 and £Y in period 2 (or some other periods).¹¹⁴

Notification of contract modifications

- A1.16 In this part of the guidance we have collated the following, including from previous Ofcom publications, to set out our expectations on how CPs should notify subscribers of contract modifications.
- A1.17 We expect CPs actively to communicate to their subscribers any proposed contractual modifications. CPs need to ensure that subscribers know how such changes will be communicated to them. For example, the terms and conditions should state the method(s) used to communicate contractual modifications and timescales for doing so.

Notification methods

- A1.18 Notifications should be set out with due prominence in order to attract the subscriber's attention. They should be in a form which subscribers can reasonably

¹¹³ or some other price index well known to consumers, like the Consumer Price Index

¹¹⁴ These time periods must be sufficiently specified that the subscriber knows what the (overall) contract price will be. Without that certainty, where the provider reserves to itself the discretion to determine when a higher price applies, it is the provider who is determining at some later point the (overall) contract price, rather than merely applying the price agreed at the point of sale.

be expected to read. Letters and emails (if that is the means of communication chosen by the subscriber) are the most obvious examples of notifications.

- Hard copy notifications should be clearly marked as such in a prominent manner e.g. on the front of the envelope/communication material/the subscriber's bill, and possibly in more than one place in order to attract the subscriber's attention.
- Providers should consider issuing the modification notification on a separate piece of paper from any marketing material. This could help to ensure that the notification does not get lost in other communications that the subscriber receives from the provider but may not necessarily read.
- Other printed material, such as pamphlets or magazines, may be used but whether this would be deemed sufficient will depend on how transparent it is made to the subscriber upfront that such publications may contain important information. Not all customers read pamphlets and magazines sent by their CP.
- Email notifications of contract modifications should be clearly marked as such in the subject line of the email.
- We do not consider that asking subscribers regularly to check their CP's website for possible changes to their contract is acceptable.

Content of notification

- A1.19 The notification must be clear and easy to understand. For example, it should make the subscriber aware of the nature of the contract modification, the likely impact on him/her, and, where relevant, set out clearly what action the subscriber can take to avoid the impact, should he/she wish to.
- A1.20 Information about the subscriber's termination rights should be made clear upfront. For example, on the front page of a hard copy notification, in the main email message rather than via a link in the message or on the actual webpage of the modification notification rather than via a link to another page.

Notification of termination rights

- A1.21 Where it arises, a subscriber's right to terminate their contract must be real and capable of effective exercise in practice.
- A1.22 To that end, where the subscriber does have the ability to terminate, this should be made clear in the main body of the notification rather than in a footnote or a reference to the relevant clause of the terms and conditions.
- A1.23 The minimum timescale that CPs should give subscribers the ability to exit the contract for any relevant changes is 30 days. This is to enable subscribers to consider the proposed contractual modification and give them time to research their options.
- When this 30 day period for termination starts and ends should be made clear to the subscriber in the notification they receive from the CP of the proposed changes.
 - When the cancellation of the services actually takes effect following a subscriber's request to terminate should also be made clear.

- CPs may give their customers a period of more than 30 days in which to withdraw from the contract if they wish to do so.
- A1.24 The terms and conditions or other practices CPs apply (whether in contracts for bundled services or other contracts relating to that in respect of which a relevant price rise occurs) in respect of contract termination are also important considerations. Terms and/or practices which frustrate the practical effect of GC9.6 are liable to attract suspicion of non-compliance with the relevant rules.¹¹⁵
- A1.25 CPs should also keep in mind the need to comply with all their obligations under the General Conditions, including as to switching processes. This is particularly relevant where the rules provide for a gaining provider-led process under which a subscriber is able to switch providers by contacting a new provider and without needing to contact their existing one.
- A1.26 Neither GC9.6 itself nor this guidance requires that a subscriber must exercise their rights under that condition by contacting their existing provider. One way the CP making contract modifications could meet its obligations in a relevant case is by telling the subscriber that the GC9.6 termination rights may be exercised by contacting a new provider.

¹¹⁵ In this regard, GC9.3 is also relevant. It says, “Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider....”.

Annex 2

List of respondents

A2.1 In total, we received 333 responses to our consultation. A full list of non-confidential respondents can be found below. All non-confidential responses are published on our website¹¹⁶.

Communications Providers

A2.2 We received 14 responses from CPs, with one CP wishing to remain anonymous. The non-confidential respondents were:

- BT
- EE (Orange and T-Mobile)
- KCOM
- Telefonica O2
- Sky
- SSE
- TalkTalk Group
- The Number UK Ltd (118 118)
- Three
- Universal Utilities Ltd
- Virgin Media
- Vodafone
- Vonage Ltd

Other Organisations

A2.3 We received 16 responses from other organisations with four of these wishing to remain anonymous. The non-confidential respondents were:

- Citizens Advice Bureau
- Clinic of Spinal Therapy
- Communications Consumer Panel (CCP)
- Consumer Forum for Communications (CFC)

¹¹⁶ <http://stakeholders.ofcom.org.uk/consultations/price-rises-fixed-contracts/?showResponses=true>

- Culanu
- Federation of Communications Services (FCS)
- Mobile Broadband Group (MBG)
- National Consumer Federation (NCF)
- Ombudsman Services (OS)
- UK Competitive Telecommunications Association (UKCTA)
- uSwitch
- Which?

Individual respondents

A2.4 We received 303 responses from individual respondents. The non-confidential respondents were:

- Adam Lang
- Alan Hall
- Alan Morris
- Aleksander Boyd
- Amy Daniel
- Andrew Dyson
- Andrew Forth
- Andrew Northrop
- Andrew Ryland
- Andrew Walker
- Andrew Yeomans
- Anne Way
- Anthony Peake
- Banks
- Begum
- Brian McGonagle
- Brian Murray

- Cailen Hanna
- Carl Abbott
- Christos Demetriou Deeble
- Clare Pearson
- Clive Gregory
- Daemon Wade
- Daniel Howard
- Daniel Sweeting
- Darryl Boulton
- David Bower
- David Cruickshank
- David Harland
- David Skidmore
- David Thomas
- Derek Buttivant
- Dr John Knox
- Duncan Sutcliffe
- Edward Jackson
- Edward Miller
- Ellis Romero
- Gareth Jeanne
- Geoff Whitlow
- Greg Smith
- Guy Gibson
- Hannah Goaten
- Iain Macpherson
- Ian Griffiths

- James Ford
- Joanna Morley
- John Hardman
- John Holmes
- John Thorburn
- Jon Fitzmaurice
- Julian Moore
- Julie Wiggs
- Kaushal Trivedi
- Kevin Mckenna
- Kirsty Lockwood
- Lydia Majic
- Maria Distefano
- Mark Thompson
- Mark Whalley
- Mark Wilson
- Mark Woodman
- Mark Woodman
- Martyn Chadderton
- Mary Copsey
- Matthew Searle
- Michael Corley
- Michael Felton
- Michael Quinn
- Michal Lesiewicz
- Michele Thackray
- Mr G Samy

- Mr Parke
- Mrs Audrey Capel
- Ms Rachel Allen
- Ms Tina Jaffray
- Nicola Attwell
- Nigel Ashton
- Nigel Lorriman
- Nina Stockford
- Olasimbo Bammeke
- Paul Campbell
- Paul Turner
- Peter Edwards
- Peter Hicking
- Peter Mills
- Reginald Edmonds
- Richard Anderson
- Rob Hadley
- Robert Ashby
- Robert Yates
- Roberto Tironi
- Rochelle Byles
- Ronald Faulkner
- Ronald Tonkin
- Ronnie Frame
- Roy Latham
- Ruth Hostler
- S Hughes

- Sam Wardill
- Samantha Leadbetter
- Samantha Tonge
- Simon Ayling
- Stephen Hudson
- Stephen Jack
- Stephen Locke
- Stephen O'Brien
- Steve Clark
- Steve James
- Sumunta Barua
- Terry Harvey
- Terry Reed
- Tracey Hawes
- Vivek Gupta
- Wendy Headon.

Annex 3

Price rises since September 2011

Provider	Price rise announced	What were the price changes?	Date changes came into effect
Vodafone (1)	Sept 2011	Standard line rental increased to nearest 50p for pay monthly customers. Out of bundle rates for calls were matched with out of bundle rates that Vodafone charged its customers as of May 2011. Various changes to out of bundle services.	11/10/2011
BT (1)	Sept 2011	Standard monthly line rental increased by 70p (5%) from £13.90 to £14.60. Various call charges increased by up to 5%. Various increases to broadband services.	3/12/11
Orange	Nov 2011	Pay monthly plans increased by 4.34%.	8/1/12
Virgin Media (1)	Feb 2012	Various increases to call charges (up to 12%), broadband services and bundles. Also moved back daytime call period from 6pm to 7pm.	1/4/12
T-Mobile	Mar 2012	Pay monthly plans increased by 3.7% (based on RPI figure of 3.7% in February 2012).	9/5/12
TalkTalk (1)	April 2012	Monthly line rental increased by 70p (5.1%) from £13.80 to £14.50.	1/5/12
Three	May 2012	Pay monthly plans increased by 3.6% (based on RPI figure of 3.6% for March 2012).	16/07/12
Sky	July 2012	Increase to Sky Talk UK landline call rates during chargeable periods from 7.6p to 7.95p per min. Line rental increased from £12.15 to £14.50 from 1/12/12.	1/09/12 1/12/12 for line rental
Vodafone (2)	Sept 2012	Increase in pay monthly line rental by up to 2.4% for existing customers, increase to PRS and Vodafone Passport replaced with Euro Traveller.	1/11/12
BT (2)	Sept 2012	Standard line rental will increase by 5.8% from £14.60 to £15.45. Various increases to voice, broadband services. Voice and broadband increases 5.9% or below.	5/1/13
TalkTalk (2)	Oct 2012	Monthly line rental increased by 45p (3.1%) from £14.50 to £14.95. Various packages increased by £1. Increase to various call rates.	1/1/13
Virgin Media (2)	Nov 2012	Standard line rental will increase from £13.90 to £14.99. Various increases to broadband standalone services and bundles.	1/2/13
Telefonica (O2)	Dec 2012	Line rental in monthly subscription charge increased by up to 3.2%.	28/2/13
Everything Everywhere (Orange and T-Mobile) (2)	March 2013	Pay monthly mobile plans for Orange and T-Mobile customers increased by up to 3.3%.	Orange: 10/4/13 T-mobile: 9/5/13
Virgin Media (Mobile only)	June 2013	Monthly subscription charge for mobile subscribers increased by up to 2.9%.	15/7/13
BT (3)	Sept 2013	Standard line rental will increase 3.5% from £15.45 to £15.99 a month. Various increases	Will come into effect on 4/1/14

		to call rates and broadband services.	
Sky (2)	Oct 2013	Standard line rental increased by 6.2% from £14.50 to £15.40. Various increases to call rates.	Will come into effect on 1/12/13

Annex 4

Complaints analysis

A4.1 The table below provides a breakdown of 1063 complaints examined by Ofcom about mid-contract price rises from 1 June 2012 to 31 August 2013.

CP	Total	Main reason for complaint					
		General	Amount	Transparency	Unfair	Interpretation of T&Cs	More than one issue
[X]	177	56	9	21	55	3	33
[X]	104	31	12	10	27	2	22
[X]	181	36	9	16	45	35	40
[X]	42	23	1	7	6	1	4
[X]	64	27	6	15	12	0	4
[X]	78	39	4	13	15	0	7
[X]	128	54	13	12	37	1	11
[X]	138	48	5	24	42	9	10
[X]	15	3	0	3	5	0	4
[X]	27	13	1	3	7	0	3
Other CPs	109	51	10	23	16	3	6
TOTAL	1063	381	70	147	267	54	144 ¹¹⁷
% of Total	100%	36%	7%	14%	25%	5%	13%

A4.2 We categorised the complaints as follows:

- **General:** consumers expressing general dissatisfaction about a price rise.
- **Amount:** consumers complaining specifically about the amount of the price rise and how it could result in material detriment and/or financial hardship for them.
- **Transparency:** consumers complaining specifically about the lack of transparency of variation terms. These consumers complained about the price rise because they had assumed that the price was “fixed” for the duration of the contract term.
- **Unfair:** consumers complaining specifically about the principle of price rises in fixed term contracts and how they consider it “unfair” that providers can raise prices when they have already agreed to a fixed term contract. This also includes complaints from consumers complaining about the application of an early termination charge (ETC) and/or amount of the ETC quoted when they have asked to cancel their contract to avoid the price rise with their provider.
- **Interpretation of T&Cs:** consumers complaining specifically that the terms and conditions have not been applied correctly in relation to the price rise.
- **More than one issue:** consumers complaining about two or more of the above issues.

¹¹⁷ in 93 of these cases the “unfairness” of the price rise was described by the consumer.