



Date 21 March 2013

Sky Response

1. This is the response by British Sky Broadcasting Group Plc ("**Sky**") to Ofcom's consultation on "price rises in fixed term contracts: options to address consumer harm" (the "**Consultation**").
2. Sky is the UK's fastest growing broadband and telephony provider. Since 2006, Sky has offered various home broadband services (Sky Broadband) and fixed telephony services (Sky Talk). As at 31 December 2012, Sky had 4.2 million Sky Broadband customers and 4 million Sky Talk customers in the UK. Sky has also recently launched Sky Broadband and Sky Talk in the Republic of Ireland.
3. Our customers are critical to Sky's success. We look at every aspect of a customer's relationship with us to identify ways of improving their experience and satisfaction. Sky considers that if customers are certain of the bargain they have entered into and the rights and remedies available to them, they are more likely to try new goods and services and that will lead to a positive outcome for our industry and economic growth generally. Sky also considers it important that a customer's relationship with us is as flexible as possible and able to adapt to the changing economic and regulatory environment in which we operate.
4. Our response to the Consultation is divided into the following sections:
 - Part 1 - Executive Summary;
 - Part 2 - Legal Framework;
 - Part 3 - Consumer Harm; and
 - Part 4 - Ofcom's Proposals.

Part 1 - Executive Summary

1. Sky welcomes the opportunity to comment on the Consultation. Sky agrees with Ofcom that price is one of the most important elements of the contract and agrees with the principle that there must be a high level of transparency in respect of prices, price terms and any variability in those prices (as set out at paragraph 1.15 of the Consultation).
2. We accept, as evidenced by the Ofcom complaints data, the support for the Which? “Fixed means Fixed” campaign¹ and the supporting analysis of both organisations, that the ability of Communications Providers to unilaterally vary their prices in fixed term contracts is an area which should be reviewed in order to ensure that there is an appropriate balance between the rights of suppliers and the corresponding rights of consumers.
3. We also accept that there is the potential for consumer confusion, and therefore harm, as a result of the uncertainty surrounding the interpretation of the “material detriment” concept, and its inconsistent application by Communications Providers. For these reasons, we agree with Ofcom that in certain respects, consumers may need some additional protection from the potential effects of price rises occurring within the minimum term of their contract.
4. However, we do not consider that Option 2 (greater transparency and new guidance alone) nor Option 3 (requiring express opt-in to variable price contracts) would adequately address the harms Ofcom has identified.
5. Consequently, Sky supports Ofcom’s proposals to remove the “material detriment” threshold from General Condition 9.6 where suppliers have an unfettered unilateral right to increase monthly subscription charges during a customer’s minimum term.
6. However, Sky considers that Ofcom’s preferred Option 4 approach of removing “material detriment” in respect of any increase in any price (including monthly recurring and non-monthly recurring/usage based charges²) is disproportionate to the harms identified by Ofcom, not objectively justifiable and could have potentially far-reaching unintended consequences, particularly when considered in the context of telephony calling rates.
7. As an alternative approach, Sky proposes that Ofcom distinguishes between the treatment of increases in monthly recurring charges, and increases in non-monthly recurring/usage based charges. In respect of the latter, Sky proposes that Ofcom retains the consumer protection and flexibility provided by the “material detriment” concept, and supplements this with high level guidance for consumers on the factors to consider when determining whether they have suffered “material detriment” and therefore have a right to cancel their contract without financial penalty.

¹ <http://www.which.co.uk/documents/pdf/the-marketing-of-mobile-phone-fixed-term-offers-which-complaint-290997.pdf>

² By “monthly recurring charges”, we mean charges which apply irrespective of the customers’ usage of a particular service and which the customer has a contractual obligation to pay throughout the length of their fixed term contract, such as the monthly subscription price, line rental charge or other recurring administrative charges (e.g. itemised billing charges).

By “non-monthly recurring charges” we mean charges which:

- are incurred on a usage or per use basis;
- are not included in the customer’s bill by default every month irrespective of usage; and
- the customer has no contractual commitment or obligation to incur,

such as telephony calling rates, one-off costs, charges for optional features/additional services without a minimum term or data usage charges above an “inclusive” element. This distinction supports Ofcom’s analysis at paragraph 5.3 of the Consultation.

8. Not only will this approach enhance protection in respect of monthly-recurring charges but it would continue to provide protection to those customers who are affected by price increases to particular call charges, and will not have the disproportionate effect of providing *all* customers with a right to cancel their contract free of charge irrespective of whether or not the price increase has any actual or material effect on them as a result of their call usage.
9. In addition, Sky considers that where a price variation clause has been drafted in plain and intelligible language to allow a supplier to increase prices within clearly defined parameters, and that clause has been brought clearly to the attention of the customer before entering into a contract, this clause forms part of the bargain to which the customer has agreed, and should therefore be permitted even where the customer is not provided with a corresponding right to end the contract without charge.
10. Finally, given the adequacy of the regime already in place to ensure significant terms are transparently drawn to a customers' attention (which is illustrated by a number of recent examples we have highlighted at paragraph 51), Sky does not consider that there is a need for Ofcom to make further regulatory changes in respect of transparency in marketing or at point of sale. Instead, Sky would encourage Ofcom, working together where appropriate with other regulatory bodies such as the ASA, to exercise their existing powers to continue to target those who are not compliant, particularly the mobile telephony sector which has generated the vast majority of the complaints Ofcom references in the Consultation, and which was also the subject of the Which? Fixed means Fixed campaign.

Part 2 - Legal Framework

11. As Ofcom has set out in the Consultation, the primary legislation governing price variation clauses in telecommunications contracts with consumers is: (i) the Universal Services Directive³ ("**USD**"); and (ii) the Unfair Terms in Consumer Contracts Regulations 1999 ("**UTCCRs**"), both of which envisage and permit contract terms which grant a supplier with the right to vary the price, the service, or other terms of the contract, subject to appropriate protections for the consumer.
12. The USD, implemented in the UK by the General Conditions of Entitlement ("**GCs**"), seeks to protect consumers by stipulating that where the supplier varies the contractual conditions, customers must be given a corresponding right to exit their contract free of charge.⁴
13. However, it is important to note that Article 20(2) USD is clearly directed at "modifications to the contractual conditions" and not "modifications to the price". The latter, whilst relevant, was not the sole concern of the European legislature in drafting this legislation. Therefore, when interpreting the USD in this respect, Sky considers that a distinction should be made between a modification of a contractual condition and a variable term in a contract. In order to modify the terms of a contract, the supplier must change the terms and not merely give effect to terms that expressly provide for variable circumstances, such as increases in the price.

³ Directive 93/13/EEC, 5 April 1993, on unfair terms in consumer contracts.

⁴ Article 20(2) USD.

14. Furthermore, as set out in Recital 30 and Article 4(1) of the USD, the USD should be read in conjunction with the UTCCRs.⁵ We further agree with Ofcom's statement at paragraph 3.21 of the Consultation that the USD and UTCCRs are not the same and compliance with the UTCCRs does not necessarily equate to compliance with the USD. However, it is important for Ofcom to also bear in mind when considering its options under the Consultation that a term giving a supplier the right to vary the price without giving the consumer a corresponding right to exit the contract is not *necessarily* unfair under the UTCCRs and may be drafted in such a way as to not trigger a right to leave under USD.
15. As Ofcom is aware, Schedule 2 of the UTCCRs sets out an "indicative and non-exhaustive list" of the types of terms which *may be* held to be unfair, which includes: (i) terms which enable the seller to alter the terms of the contract unilaterally without a valid reason which is specified in the contract (Schd. 2, para 1(j)); and (ii) terms providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases 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 (Schd. 2, para 1(l)).
16. However, these types of variation clauses will not *always* be unfair and, as Ofcom recognises, the OFT sets out in its guidance on the UTCCRs various ways in which price variation clauses can be drafted to satisfy the test of fairness set out in Regulation 5 of the UTCCRs. These include: (i) where the level and timing of any price increases are specified (within narrow limits if not precisely) in which case the OFT notes they effectively form part of the agreed price; or (ii) where the term permits increases linked to a relevant published price index such as the RPI.⁶ The OFT also states that any type of variation clause, including a price variation clause, may in principle be fair if consumers are free to escape its effects by exiting the contract without experiencing financial loss, such as the payment of early termination charges.⁷
17. Ofcom has focussed primarily in the Consultation on the right of a customer to exit a contract without penalty as being the only means by which a price variation clause can be made fair, not only in respect of the USD but also in respect of the UTCCRs.⁸ Furthermore, Ofcom uses this assumption as the basis of the third of its key principles used to assess the adequacy of each of its proposed options set out in the Consultation.⁹ However, it is important to note that including a right of termination is not the only means by which the OFT envisages a price variation clause can be drafted to satisfy the test of fairness under the UTCCRs – an approach which was recently supported by the European Courts.¹⁰

⁵ Recital 30 of the USD states "In addition to the provisions of this Directive, the requirements of existing Community consumer protection legislation relating to contracts, in particular Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts(8) and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts(9), apply to consumer transactions relating to electronic networks and services." Article 4(1) of the USD states "The provisions of this Directive concerning end-users' rights shall apply without prejudice to Community rules on consumer protection, in particular Directives 93/13/EEC [unfair contract terms directive] and 97/7/EC [distance selling directive], and national rules in conformity with Community law."

⁶ At paragraph 12.4 OFT guidance on UTCCRs (http://www.of.gov.uk/shared_of/reports/unfair_contract_terms/oft311.pdf)

⁷ *ibid.*

⁸ See para's 1.20 and 4.40 "where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their affects" and "many, if not most, terms providing for price rises are unfair where they do not give consumers a corresponding right to cancel the contract without penalty ..."

⁹ See the 3rd key principle in relation to providing adequate consumer protection in a competitive market, set out at paragraph's 1.20 and 6.3 of the Consultation.

¹⁰ Case C-472/10: Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt. at paragraph's 21 - 28

18. In Sky's view, a price variation clause that is drafted in plain intelligible language, to allow the supplier to increase prices within clearly defined parameters (e.g. an increase of up to 5% once in a 12 month period) but which does not provide a customer with a corresponding right to exit the contract without financial penalty, can, in the right circumstances, be fair under the UTCCRs. This interpretation is consistent with Ofcom's analysis in respect of the UTCCRs in Section 3.¹¹
19. In addition, in accordance with the reasoning set out at paragraph's 13 and 14 above, Sky also considers that the same clause is compliant with the USD as an increase in the price in accordance with the provisions of such a clause is merely the giving of effect to the variable price clause, and not a modification of the conditions or terms of the contract.
20. To reach this conclusion, the prominence with which the clause in question is brought to the attention of the customer prior to the customer entering into the contract is of fundamental importance, particularly to an assessment of "fairness" under the UTCCRs. This is acknowledged by Ofcom at paragraph 4.63 of the Consultation and confirmed by European case law.¹²
21. Furthermore, Regulation 7 of the UTCCRs imposes an obligation on traders to draft their contract terms in plain and intelligible language and Regulation 6 UTCCRs requires account to be taken of all the circumstances surrounding the conclusion of the contract when assessing the fairness of a particular contract term.
22. Sky therefore acknowledges that both to address the requirements of the "fairness" test under the UTCCRs, and to address the concerns raised by Ofcom of consumers being "unfairly surprised" by price variation clauses (and price variations), these terms must be brought clearly to the attention of consumers before entering into a contract.
23. Moreover, Ofcom will note that GC9.2 includes a requirement on providers to set out in their contract in "a clear, comprehensible and easily accessible form" details of prices and the tariffs, which Sky considers includes information about payment terms.
24. As Ofcom is aware, it is designated as an enforcer of the UTCCRs and of the Consumer Protection from Unfair Trading Regulations 2008 (the "**CPRs**") which set out specific requirements for material information which may affect a consumer's transactional decision, and which is to be provided to a consumer at the appropriate points during the sales process, together with the ASA which is responsible for the enforcement of the B/CAP Codes.
25. The CPRs are also reflected both in the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing and The UK Code of Broadcast Advertising (together the "**B/CAP Codes**")
26. Sky considers that the GCs, CPRs, UTCCRs, and the B/CAP Codes provide more than adequate means to enforce increased transparency in marketing, during the sales process and in contracts. To the extent that Ofcom considers that further action is required, we would therefore strongly encourage Ofcom to utilise the powers which it already has under existing legislation rather than create additional regulation in the form of new or revised GCs which may have the effect of not only creating a double layer

¹¹ See in particular para's 3.17, 3.18, 3.20 and 4.45 of the Consultation

¹² Case C-472/10: Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt at paragraph's 27 and 28.

of regulation but also provide more confusion for consumers seeking to understand which regulatory body they should turn to to raise complaints, or to which guidance they should refer.

Part 3 – Consumer Harm

27. Sky understands that the crux of Ofcom’s concerns in the Consultation is that consumers may be subjected to unacceptable harm where they are exposed to a price increase during their minimum contract term and not given a corresponding right to exit their contract free of charge.
28. In addition, Ofcom is also concerned with: (i) the uncertainty and confusion that consumers face when selecting telecommunications products without the knowledge that the price they are agreeing to may change; and (ii) the element of “unfair surprise” consumers experience when the prices they have agreed to are increased during their minimum contract term.
29. In light of the evidence provided by the Ofcom complaints data, the support for the Which? “Fixed means Fixed” campaign and the analysis set out in the Consultation, Sky accepts, to a certain degree, some of these potential harms.
30. We therefore acknowledge that the ability to unilaterally vary the prices in fixed term telecommunications contracts and the inconsistent application of the “material detriment” concept is an area that requires review.
31. However, we have some concerns over the data and analysis conducted by Ofcom in assessing the scope and potential scale of the actual harm arising (and in Ofcom’s view, increasing), particularly in relation to the fixed line and home broadband sector, which are set out below.
32. First, as Ofcom has acknowledged in the Consultation, the focus of the vast majority of consumer evidence is the mobile telephony sector, and in relation to the Which? Campaign, the sole focus.¹³ There is little evidence of similar levels of complaints being made in relation to fixed line or home broadband services despite mid-term price rises being more common in those sectors, which suggests this could be a compliance issue rather than a failure of the regulatory framework as a whole.
33. Second, Sky considers it is very likely that the significant increase in customer complaints identified by Ofcom in its data was due to the decision of a small number of mobile telephony companies to increase prices for customers within their minimum term after a prolonged period of time during which monthly subscription prices were maintained at the same level for existing customers. This practice, together with the ways in which mobile telephony providers promote their services as having different price points depending on the length of the minimum contract period (e.g. £14.99 a month for 12 months, or £10.99 a month for 24 months), is likely to have influenced consumer expectations that prices for telecommunications services would remain fixed for the duration of their minimum contract period and even beyond.
34. Third, over 80% of the 1,644 complaints Ofcom cites as evidence of widespread “harm” have been made about one single provider;¹⁴ nearly 90% relate to the top two most

¹³ See paragraph’s 1.10 and 1.12 of the Consultation

¹⁴ Based on breakdown of complaints by provider provided by Ofcom on 24 January 2013

complained about providers; and 93% the top three. Given that Ofcom has stated that the vast majority of the complaints relate to the mobile telephony sector, this suggests that the practices of one or two mobile telephony providers are responsible for the significant increase in complaints, and does not therefore support a finding of widespread harm in the wider market which includes fixed line and home broadband services.

35. Fourth, Ofcom has based its figures for the potential scale of consumer harm on the total number of fixed residential telephony, broadband and mobile subscriptions in the UK.¹⁵ This figure will include a significant number, if not a majority, of customers who are outside a minimum term particularly in the fixed line telephony and broadband sectors where the practice of re-contracting customers after the expiry of one minimum term is much less prevalent than in the mobile telephony sector, particularly since the prohibition on automatically renewable contracts in the fixed line and broadband sectors which was introduced in December 2011. As the majority of customers who are outside of a minimum term will have a right to cancel their contract on notice, or, in the case of the fixed line sector, on notification to their new provider in accordance with the regulated switching process, this figure will incorporate a large number of customers who already have an avenue to avoid mid-contract price rises, and therefore potentially exaggerates the potential harm.¹⁶
36. Fifth, Ofcom assumes there have been increases in: (i) the number of customers tied in to fixed term contracts; (ii) the average length of such contracts; and (iii) the average number of months remaining on such contracts, and consequently has concluded that potential for harm and loss to consumers as a result of mid-contract price increases has risen. However, the only evidence Ofcom has provided in support of these assumptions again relates to the mobile sector where there is a greater incentive for customers to agree to new and potentially longer contract terms in order to receive updated mobile phones.¹⁷ Ofcom has provided no evidence to suggest that a similar position exists in relation to the fixed line and home broadband sectors. In fact, in Sky's case, it has retained a 12 month minimum contract term for its fixed line and home broadband services since their introduction in 2006.
37. Sky is concerned that the weaknesses in this data, analysis and assumptions result in an over-estimation of the potential scale of the harm which arises, or could arise, as a result of mid-contract price increases and therefore there is not sufficient evidence to support implementation of Ofcom's Option 4 unamended as an "evidence based", "objectively justifiable" and "proportionate" decision.
38. Whilst we acknowledge Ofcom's view that price variation clauses have the potential for harm across all telecommunications products and its desire to implement consistent regulation across the sector, we would remind Ofcom of its statutory obligation to

(<http://stakeholders.ofcom.org.uk/binaries/consultations/gc9/summary/update2.pdf>) We have a strong suspicion that this was caused by poor practices on the part of one mobile provider in handling their price rises (and related notifications) – including refusing to adequately deal with its customers who raised concerns about the increase and unfairly holding them to their contractual obligations.

¹⁵ See paragraph 4.14 of the Consultation

¹⁶ If a right to cancel on notice is not set out in a providers' contract for customers who are outside their minimum term, Sky submits that Ofcom already has sufficient powers under UTCCRs to take appropriate enforcement action. In respect of Sky's products on this point, Ofcom will note that:

- Sky's broadband contract allows customers outside their minimum contract term to exit free of charge on notice (<http://www.sky.com/shop/terms-conditions/broadband/>); and
- Sky's telephony contract allows customers outside their minimum contract term to exit free of charge on 10 days' notice (<http://www.sky.com/shop/terms-conditions/talk/>)

¹⁷ See data supplied by Ofcom at paragraph's 4.14 and 4.15 of the Consultation.

implement decisions based on these three principles when seeking to introduce or amend the GCs.¹⁸

39. We also have a separate concern regarding Ofcom's priorities for its enforcement programme following its consultation and subsequent statement on Additional Charges. As Ofcom is aware, it conducted an extensive review into the early termination charges levied by fixed line telephony and home broadband providers in 2008 which resulted in a significant reduction in those charges across the sector.¹⁹ However, a similar investigation was not conducted into early termination charges levied by mobile telephony providers. Given that the imposition of early termination charges is currently a key factor in consumers deciding not to cancel a contract on the occurrence of a mid-contract price rise,²⁰ and that the level of early termination charges is generally considerably higher and more rigorously enforced in the mobile sector than the fixed line telephony and home broadband sectors, Sky suggests that Ofcom may now wish to prioritise the implementation of a similar review of early termination charges in the mobile sector as this would, in Sky's view, significantly help to address some of the potential and actual instances of consumer harm highlighted in the Consultation.²¹

Part 4 - Ofcom's Proposals

40. Sky agrees with Ofcom's analysis at paragraphs 4.9, 6.54 and 6.55 of the Consultation that the material detriment test in GC9.6 should still apply to any non-price variations in the contract.

41. Sky also agrees with Ofcom's analysis at paragraph 6.59 that any new regulatory requirements regarding price variations during fixed term contracts should only apply to new contracts. In addition to Ofcom's analysis, Sky would encourage Ofcom to consider carefully the consequences of taking an alternative approach and requiring any new regulatory requirements to apply to existing contracts. To do so may have significant and far-reaching unintended consequences. For example, implementing such a change would itself be a change to the contract of existing customers for the purposes of the current GC9.6 where the existing terms may not allow for such a variation. Ofcom will note that Sky's existing broadband and talk contracts expressly prohibit us from making changes to our price variation clause, or the customers' right to leave following a price variation, in order to ensure the "fairness" of such provisions by protecting the customer against Sky's right to vary the contract being used to vary these clauses to their detriment.

Option 1 - maintain the status quo

42. Notwithstanding the concerns we have set out in Parts 2 and 3 of this response, Sky agrees with Ofcom that price rises occurring during a customer's fixed term contract have the potential to unfairly affect the consumers concerned, particularly where a customer is contractually obliged to continue paying an increased price they did not expect for the remainder of their minimum term, such as monthly subscription charges.

¹⁸ As required by section 47(2) Communications Act 2003 and Governments' principles of Better Regulation.

¹⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/summary/addcharges.pdf> and <http://stakeholders.ofcom.org.uk/consultations/addcharges/statement/>

²⁰ As evidenced by the fact that early termination charges made up 10% of the complaints data used by Ofcom in support of the Consultation - see FN 14.

²¹ Sky notes that in the last update note to the Additional Charges Enforcement Programme in the Competition & Consumer Bulletin Ofcom states that, in parallel to monitoring GC9, it will be monitoring early termination charges in relation to all communications products, and Sky would urge Ofcom to focus its attention in this respect on the mobile sector in particular (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01019/).

43. We also acknowledge Ofcom's 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 providers, and the potential to cause confusion among consumers who, without further clarification on its interpretation, may be unsure as to when they have a right to cancel their contract without financial penalty as a result of an increase in the price.
44. We therefore agree with Ofcom that maintenance of the status quo would not appropriately address the actual or potential consumer harm which has been identified in the Consultation.

Option 2 – greater transparency of price variation terms

45. Sky agrees with Ofcom's key principle 1 that consumers should be provided with the information that enables them to know what bargain they are striking so that they can make an informed transactional decision when purchasing telecommunications services. Sky also agrees with Ofcom that the price is one of the most important elements of a customer contract and prices, price terms and any variability in those prices is material information that the "average consumer" would need to know in order to make this informed transactional decision.
46. However, we do not agree with Ofcom that, in order to address its concerns, there is a need for Ofcom to make regulatory changes. As Ofcom acknowledges at paragraph 1.25, there is already an existing regime of protection in place which includes the UTCCRs, the CPRs, the provisions of GCs 9.2, 23 and 24, and the B/CAP Codes. The CPRs in particular, are directed exactly at the harms Ofcom has identified in the Consultation, and make it an offence to fail to provide the material information consumers require to make an informed transactional decision, or to provide this in a manner which is "unclear, unintelligible, ambiguous or untimely". The CPRs also set out in detail what "material information" will constitute, and this includes "the price" and the "manner in which the price is calculated".
47. The B/CAP Codes mirror the requirements of the CPRs but also impose detailed requirements around misleading advertising, including the need to state clearly and prominently in advertising significant information or qualifications that the customer needs to know to understand the claim being made.
48. As we have already highlighted, the UTCCRs require terms to be drafted in "plain and intelligible language" and the OFT guidance on the UTCCRs and a significant body of case law clearly establish that the extent to which a term is brought prominently to the attention of a consumer is fundamental to an assessment of its fairness.²² It is for these reasons that Sky has, for many years, included a "Key Fact" at the beginning of the customer contract booklet setting out the variability of our prices and the rights of the customer in respect thereof.
49. In addition, GCs 9.2, 23 and 24 set out sector-specific obligations on providers to make the consumer aware of specific information in marketing, at point of sale and in their contracts, which includes information about "payment terms".²³

²² See Introduction to OFT Guidance on UTCCRs (pgs 9 and 10) and at paragraphs 19.2 and 19.10, *OFT v. Abbey National plc & Others* [2008] EWHC 875 and *Case C-472/10: Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, at para's. 24 and 28.

²³ See GC9.2(i), GC23.5(c)(ii) and GC24.6(c)(ii)

50. It is therefore clear that there is a significant body of existing regulation which is directed specifically at ensuring that consumers are provided with the information they need at various stages during the sales process (including in relation to the price and payment terms) in order to make an informed choice, including in advertising, at point of sale and in further correspondence.
51. Whilst acknowledging the extent of existing regulation, Ofcom has stated that these rules have not operated effectively to date.²⁴ However, there is significant evidence to suggest that this is not the case. For example, the Advertising Standards Authority, which adjudicates on complaints brought under the B/CAP Codes, has recently up-held two complaints made about mobile telephony providers' advertising which did not adequately qualify the price points stated by reference to the fact that those prices may change in the future.²⁵ As a result of these adjudications, Sky has introduced in any print advertising which includes a price point, a statement that its prices may increase during the customers' minimum contract term and we are reviewing this across our sales process more generally. Other telecommunications providers are taking a similar approach and including wording in their advertising to address this concern.
52. A further recent case illustrates the effectiveness of the CPRs in addressing issues of transparency.²⁶ In this case, the court found that data roaming charges were not enforceable against a consumer as the data roaming capability and the costs associated with it, were not sufficiently brought to the attention of the consumer by the salesperson at the point of sale.
53. Furthermore, Sky notes that Ofcom has previously taken enforcement action under the UTCCRs and CPRs in respect of prominence and transparency concerns regarding international calling cards.²⁷
54. As previously stated, Sky accepts the potential for consumer harm to arise (in the form of confusion, surprise and uncertainty) where the expectations and understanding of the consumer are not aligned with the reality of their contractual position regarding the potential for price rises during fixed term contracts. This harm is even more acute where the consumer has been subjected to misleading commercial practices at the point of sale²⁸ or has become accustomed to what they perceive to be fixed price contracts over many years.
55. However, for the reasons set out above, Sky considers that sufficient legal and regulatory protections are already in place with regard to marketing and point of sale activities to adequately address Ofcom's concerns about "unfair surprise". As an enforcer both under the CPRs and the UTCCRs, and the sole enforcement authority for

²⁴ At paragraph's 4.66 and 4.67.

²⁵ See the Hutchinson 3G ASA adjudication in which the ASA states "because the monthly price of the contract was likely to be of significant importance to consumers when deciding on a mobile phone contract, the potential for the monthly tariff to be increased within the term of the contract amounted to a significant term, which should have been made clear" and Vodafone ASA adjudication in which the ASA states "We considered that the monthly price of a contract was likely to be of importance to consumers when deciding on a mobile phone contract and that the potential for it to increase, within the term of the contract, was a significant condition that needed to be stated clearly in the ad, without readers needing to click through to further web pages"

²⁶ <http://www.telegraph.co.uk/finance/personalfinance/consumertips/household-bills/9815527/T-Mobile-loses-test-case-on-holiday-data-charges.html>

²⁷ See Lycatel Distribution UK Ltd investigation (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01045/) and Nowtel Management Limited investigation (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01069/)

²⁸ Such as those identified by Which? where customers were expressly told at the point of sale that their prices were fixed for the duration of their contract when this was not the case (referred to at paragraph 2.9 of the Consultation).

the GCs, we therefore consider that Ofcom should, in conjunction with other regulators such as the ASA and B/CAP, use the extensive powers already at its disposal under these various regulations to address the specific areas of concern it has identified. In doing so, we would strongly urge Ofcom to prioritise the mobile telephony sector which has generated the vast majority of the complaints identified by Ofcom in this Consultation and seem to be the cause of much of the actual harm occurring, and in particular those one or two providers who have generated between 80% and 90% of the complaints made.

56. To introduce further regulation in respect of transparency and prominence requirements would be at risk of unnecessary “double-regulation” which could itself result in inconsistency and confusion both for suppliers and consumers, and costs to business. We would also remind Ofcom that the Unfair Commercial Practices Directive (which is the source EU legislation for the CPRs) is a maximum harmonisation measure and therefore prohibits the introduction of regulatory guidance which imposes greater restrictions than those set out in the CPRs.

Option 3 – modify GC9.6 so customers expressly opt-in to variable price contracts

57. We agree with Ofcom’s conclusion at paragraph 1.19 of the Consultation that prohibiting price rises in fixed term contracts in order to address the consumer harm identified would not be consistent with Article 20(2) of the USD nor would it be a proportionate regulatory intervention. As set out in Part 2 above, we also consider that such a step would be inconsistent with the UTCCRs, which allow for the inclusion of price variation clauses in customer contracts provided that they satisfy the test of “fairness” set out within those Regulations.

Option 4 – the removal of the “material detriment threshold

58. As set out at paragraph 42, Sky acknowledges that without adequate protections in place price variation clauses have the potential to unfairly affect consumers, and that the concept of “material detriment” is a confusing one both for them and their suppliers. Sky therefore supports Ofcom’s proposed Option 4 to amend GC9.6 to remove the “material detriment” threshold from applying to price rises, subject to the below.

Changes as a result of legislation, regulation and guidance

59. Whilst Sky agrees with Ofcom’s analysis at paragraphs 5.28 – 5.32 regarding the ability of providers to pass on cost increases which arise as a result of changes in mandatory provisions laid down by Government or regulations, and that where such price variations occur, customers should not be given the right to exit their contract free of charge, Sky notes that Ofcom’s proposals only include changes “*imposed directly and specifically by changes in legal or regulatory requirements compliance with which by the Communications Provider is compulsory*”. Sky is concerned that this does not go far enough as it does not allow providers to pass on cost increases which, for example, are 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), or even a change in the rate of VAT, without also providing a right to exit without charge – this is a particular concern where the regulator has the ability to take enforcement action for non-compliance with such guidance. We consider it unlikely that this was Ofcom’s intention.

60. Ofcom will note that the examples given in the OFT guidance on the UTCCRs referred to at paragraph 5.32 of the Consultation include “allowing variations to reflect changes in law, to meet regulatory requirements or to reflect new industry guidance and codes of practice which are likely to raise standards of consumer protection”. This is a much more flexible and pragmatic approach than that proposed by Ofcom in the new definition of “Price Modification” and does not include any reference to a requirement of “compulsion” on the part of the contracting party to pass on a charge which has been imposed on it. Sky would urge Ofcom to follow this in its drafting.

Non-monthly recurring/usage based charges

61. Sky does not support Ofcom’s proposal to remove the “material detriment” threshold in respect of any increase in any price (including monthly recurring and non-monthly recurring/usage based charges, such as call rates). Instead, Sky considers it necessary to distinguish between price rises to monthly recurring and non-monthly recurring/usage based charges in order to achieve a more proportionate and targeted outcome as set out below.

Proportionality

62. First, the application of Ofcom’s proposal to all charges, including call rates, would lead to consumers having, and being notified of, a right to exit their contract without financial penalty for any increase in the price of a call rate or optional service that that customer may have never used, and has no intention of using. This is particularly the case in relation to international call rates where an increase in, for example, the roaming call rates between two countries would give all consumers the right to cancel and to be notified, irrespective of the fact that the vast majority of customers have never visited or called either destination.

63. Second, the significance of a particular call rate change will be different for each consumer depending on their individual usage. For example, a customer who has relatives in Australia may be particularly affected by a call rate increase to weekend calls to fixed lines in Australia. However, this increase will have no impact on a customer who has no friends or family in Australia and has never visited that country. Equally, even for customers who have friends and family in Australia, the impact may differ as some customers may call on weekdays in the morning to a mobile number whilst others may restrict their calls to fixed line numbers on the weekend.

64. Third, although the vast majority of fixed line and mobile telephony providers offer customers packages which have a certain amount of inclusive calls and/or data usage, we are not aware of any provider that also *requires* their customers to incur any charges over and above those included in their package. Additional charges (such as call charges) are therefore incurred at the discretion of the customer based on their individual needs and usage and they can therefore assess and control the amount they wish to incur on a case by case basis. Conversely, all customers who subscribe to a monthly calls or broadband package or line rental are contractually obliged to pay that monthly charge for the entire duration of their minimum contract term.

65. Fourth, a significant proportion of customers will have alternatives available to them to make calls other than via their fixed lines or mobiles (as the case may be). For example: fixed line customers may be able to use their mobile telephone network which may have

more favourable rates for certain destinations or services (and conversely mobile customers could use a fixed line); customers with access to the internet could use VOIP services, such as Skype, Facetime or Blackberry Messenger; customers could purchase international calling cards for cheaper calling rates to international destinations; premium rate services often offer “toll free” routes (e.g. public services and banks offer alternative geographic numbers to 0845 numbers, or television voting has on-line alternatives); and there are a variety of directory enquiry services to choose from which actively compete on price. Even within individual number ranges, such as 118, there is price competition that allows customers to choose between highly substitutable services to select the most appropriate for them (whether based on price or another factor).

66. Fifth, there is already sector-specific regulation in place in respect of some call rates, such as PhonePayPlus, which regulates premium rate numbers and which protects against potential consumer harm from these call charges (including in respect of transparency).
67. Sixth, there has been little, if any, evidence provided by Ofcom or Which? that variations to non-monthly recurring charges (such as calling rates) are causing actual consumer harm. The complaints data Ofcom has discussed in the Consultation relates primarily to price increases to the core monthly pricing, and much of the harm Ofcom has identified arises from those increases.²⁹
68. It is for all the reasons set out above that Sky therefore considers Ofcom’s proposed approach, which makes no distinction between the treatment of price rises to monthly recurring and non-monthly recurring or usage based charges, to be a disproportionate one which does not sufficiently target the cause of the harms currently arising and does not take into account alternative ways these can be mitigated.

Information overload

69. Sky is also concerned about the impact of Ofcom’s proposed Option 4 in requiring Communications Providers to notify customers of *every* price increase (i.e. every call rate change), particularly where for a vast majority of customers the increase may be of no relevance as it may relate to call rates the customer has never used, and has no intention of using. This is a particular concern in the light of Ofcom’s high-level guidance that individual letter or email notifications are the most suitable method of delivering this information.
70. Furthermore, given the volatility of many calling rates, this would result in a supplier providing multiple notifications to its customers every year. Such regular notifications would give rise to significant risk of “information overload” for customers and are likely to significantly increase the risk of customers overlooking a material notification, such as an increase in monthly subscription charges, having become accustomed to receiving weekly notifications of minor changes to call rates, the vast majority of which are not relevant to their usage. Ofcom itself acknowledges, in its recently published paper “A Review of Information Remedies”³⁰, that a large volume of information can be confusing for consumers. Ofcom references the Better Regulation Executive Department for Business Enterprise & Regulatory Reform and National Consumer Council’s 2007 paper “Warning: Too Much Information Can Harm”³¹ which concluded that too much information can be a bad thing for consumers, can fail to help

²⁹ Which is accepted by Ofcom at paragraph 5.7.

³⁰ At paragraph 2.17 (<http://stakeholders.ofcom.org.uk/binaries/research/research-publications/information-remedies.pdf>).

³¹ <http://www.berr.gov.uk/files/file44588.pdf>

consumers make choices and that there has been a lack of firm evidence that consumer information is achieving its goals. Ofcom also acknowledges, in paragraph 5.17 of its Information Remedies Review, that “too much information can be as problematic as too little”.

71. This significantly increased volume and frequency of price change notifications would be a significant step change to the current practice in the fixed line and broadband sectors where providers typically send white mail notifications to customers approximately only once or twice a year as a result of “materially detrimental” changes. These are clearly distinguishable from other correspondence the customer may receive (e.g. they are in different envelopes with a notice such as “important information inside”) and set out clearly for our customers any changes in the price of their monthly subscriptions, and their rights to cancel the contract if they are affected by this.
72. In addition, there would be a significant cost to businesses in sending written notifications about every price change, including call rate changes, to all customers. It costs Sky a significant amount every time we send our subscriber base a white mail notification plus associated internal costs. It would be highly disproportionate to require this level of expenditure for every price increase, particularly for call rates changes which could occur on a weekly basis and given that for the vast majority of customers the price increase would be irrelevant. In light of this information, Sky has some concerns as to whether Ofcom has conducted a sufficient Impact Assessment in respect of such a change. Furthermore, such a cost would almost inevitably be reallocated within the overall pricing structure and lead to increased prices for consumer for a notification that for many of them we are concerned has no value.
73. In relation to the form of notifications, Sky supports Ofcom’s analysis at paragraph’s 5.40 – 5.45 of the Consultation that industry is best placed to decide how it communicates contract and price variations effectively with consumers and there is no need for Ofcom to take formal regulatory interventions at this stage to specify the form, or format, of contract or price variation notifications. Whilst Sky also supports Ofcom’s approach to liaise with providers informally, where necessary, with suggestions for better practice where it identifies that notifications could be improved, Sky would urge Ofcom to take specific enforcement action where it considers particular notifications are inadequate.
74. Sky also supports Ofcom’s additional suggestions for best practice in relation to the notification of contract variations at paragraph 5.46 on the assumption that Ofcom adopts our alternative proposals regarding the treatment of monthly recurring and non-monthly recurring charges set out in this response. However, if Ofcom implements the more restrictive rule regarding price variations as proposed in Option 4 Sky would consider that Ofcom’s existing guidance and new best practice examples should be revisited and amended. In this circumstance, Sky would urge Ofcom to seek to achieve a more balanced approach to notifications. It would be overly onerous on telecommunications operators to implement a strict rule that *all* price variations trigger a notification obligation *and* maintain the guidance that individual letter and email notifications are the most appropriate form (especially in light of our points above regarding call rate variations). Balance could be achieved by relaxing the guidance regarding the form notifications should take for different types of change.³²

³² Sky notes that Greece detailed in its response to Ofcom that contract change notifications are required to be “through the press or via email” (see Annex 6). Similarly, whilst ComReg (the Commission for Communications Regulation in Ireland) has now issued its Decision in respect of its consultation on contract variation notifications Ofcom will note that ComReg has expressly chosen not to

Allocation of risk

75. Sky also has concerns regarding Ofcom's conclusion that Communications Providers are best placed to bear all of the risk of all cost variations (whether related to monthly recurring charges or not), which we do not consider reflects the balanced outcome intended by the UTCCRs and USD, as they can forecast, control and mitigate underlying costs. In coming to this conclusion, Ofcom has not taken into account the limitations on Communications Providers forecasting certain cost fluctuations and the complexities of the cost structure of some call charges, such as international call charges which may be made up of a connection charge, access charge, CLI levies, discounts, transit fees, termination rates and service rates, etc.³³
76. Whilst Sky accepts that forecasting and financial planning is a fundamental part of our business and agrees with Ofcom that many cost fluctuations can be forecast, controlled or mitigated by Communications Providers,³⁴ we are not able to forecast, control and mitigate every single cost which feeds into our business model and Sky is concerned that Ofcom has given insufficient consideration in its analysis to this fact.³⁵
77. This is particularly true for call rates, many of which are volatile and are controlled by third parties and as such are entirely beyond our reasonable ability to control or foresee (for example, changes to unregulated wholesale and third-party call charges, such as the service charge for directory enquiry services). For example, we note from the UKCTA response that the wholesale pence per minute rate for calls to the 118500 DQ service has been increased 9 times in the last 5 years and in total by over 500% in that period. [On an indicative basis only, Sky has been required to make approximately 158 changes to directory enquiry call rates between 2009 - 2013 as a result of changes to the underlying service charge imposed by third parties].³⁶
78. Sky does not therefore agree with Ofcom's conclusion that all costs are within a Communications Providers' control and as such it is a proportionate outcome that the risk of all fluctuations should fairly rest solely with them. Instead, Sky considers that a balanced contract, as envisaged by the UTCCRs and recognised by Ofcom as a desirable outcome, should allocate risk between the contracting parties, albeit with the significant burden being placed with the Communications Provider. We believe that this can be achieved in a more proportionate way than requiring providers to notify all of their customers of a right to leave their contract without charge every time any price is changed by any amount.

Fixing of call rates

79. Finally, Sky is concerned that Ofcom has not considered the practical implications of operating under a regime where all prices are fixed so that different call rates apply to different categories of customer depending on when that customer joined the Communications Provider and depending on whether or not they remain within a minimum term. The practical implications of ascertaining which call rates applied to each

specify the form or medium of such notifications. (<http://www.comreg.ie/fileupload/publications/ComReg12128.pdf>)

³³ Further details of how BT calculate their wholesale call rates are set out in their NTS calculator.

³⁴ Either through commercial negotiation to fix costs on an on-going basis or, where such costs are regulated, because they are subject to a rolling "price control period".

³⁵ At para. 5.33 Ofcom states "Where possible, providers should be able to make well-informed and unbiased forecasts of their wholesale costs..." - accepting only in passing that there may be instances where such forecasting is simply impossible.

³⁶ Wording amended in non-confidential version.

customer for the purposes of billing would be hugely complex and would require significant investment in system changes for the production of customer bills. Similarly, when it comes to notifying an increase in call rates, the Communications Provider would need to send out multiple variations of their notification depending on when a customer joined, what call rate they “fixed” at (which dictates the level of change) and whether or not they were in a minimum term. Again, this would impose significant administrative and operational costs on the Communications Provider which may well end up being reallocated within their overall business model to the detriment to the consumer.

Alternative proposal to retain “material detriment” threshold for non-monthly recurring charges

80. However, as Sky recognises the potential consumer harms which Ofcom has identified, Sky does not consider that variations to non-monthly recurring/usage based charges (such as call rates) should be unprotected. Sky therefore proposes that an amended GC9.6 retains the flexibility provided by the “material detriment” concept in respect of variations to these charges only.
81. This approach provides protection to customers who are adversely affected by a price increase but acknowledges the distinction between monthly and non-monthly recurring charges, and the significant difference in the scale and scope of the potential consumer harm arising from increases in these.
82. In considering the retention of the concept of “material detriment” in this respect, Sky would encourage Ofcom to revert to Oftel’s/Ofcom’s previous analysis completed when implementing Article 20(2) of the USD and subsequently when considering the Citizens Rights Directive in 2011.³⁷ Ultimately, Sky considers that the principles of “proportionality” and Ofcom’s legislative constraints when amending a GC³⁸ support this approach.
83. Sky also acknowledges that Ofcom could enhance current protection in this regard by issuing some high-level guidance for consumers about the factors they should consider when determining whether or not the increase to a non-monthly recurring charge is to their “material detriment”.³⁹ However, we would caution Ofcom against going as far as specifying percentage thresholds for price variations as this would not take into account the factors set out in paragraphs 74 to 77 above regarding the extent to which some of the factors involved in determining price increases sit outside of the Communications Providers’ control. If Ofcom were to proceed with this proposal for guidance, we would welcome the opportunity to participate in and contribute to its development.
84. Finally, as set out in paragraphs 18 and 19 above, Communications Providers should be able to continue to include in their contracts price variation clauses drafted with clearly defined parameters within which prices may be increased and which do not provide customers with a corresponding right to exit their contract without charge. As we have identified, the “fairness” of such clauses will be dependent on whether they are drafted in “plain intelligible language” and the prominence with which they

³⁷ See paragraphs 3.7 - 3.9 of the Consultation and related Oftel/Ofcom analysis.

³⁸ As set out in s.47 Communications Act 2003.

³⁹ Such as providing that Communications Providers should base their decisions on a customers’ past usage over a relatively recent period of time, or setting out how providers should conduct the assessment in relation to variation to the price for different call types (e.g. a change to the price for dialling a “core” number over and above inclusive usage compared to a change to the calling rate for a DQ/118 number).

are presented to the customer prior to them entering into the contract; but provided that that test can be satisfied, these clauses are both permitted and envisaged by both the UTCCRs and the USD.

Bundles

85. In respect of Ofcom's proposals regarding the treatment of customers where they have purchased their telecommunications services as part of a bundle,⁴⁰ Sky notes that Ofcom acknowledges⁴¹ that its proposals can only relate to the telecommunications services included within a bundle, and not to other services such as the provision of pay TV, or other, services which are not covered by the GCs.
86. Given the USD and the GCs do not extend to the provision of TV or other non-telecommunications services, 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 (or take enforcement action in this respect) directly or indirectly. As such, the pay TV, or other, elements of any bundle should be expressly carved out of any guidance, direction or decision issued by Ofcom under the Consultation.

Cancellation Periods

87. Sky supports Ofcom's concerns regarding Communications Providers giving consumers short periods of time following the notification of a right to exit their contract free of charge to exercise this right (especially where this is as short as 7 or 10 days).⁴²
88. However, Sky notes that many Communications Providers, including Sky, do not take this approach. Some providers notify their customers significantly in advance of a price variation taking effect, giving significantly more than the *minimum* one month notice required by the USD,⁴³ but ask that customers give a shorter period of notice during this time if they wish to exit their contract. This approach is compliant with the requirements of both the USD and GCs. For example, a provider may legitimately give one months' notice of a price variation but request that its customers give it 7 days' notice if they wish to exit (note, this approach does not require the customer to exercise their decision within 7 days of the notification, just that they give at least 7 days' notice to exit following receipt of the notification).
89. It is unclear to Sky whether Ofcom's proposal in the Consultation of setting a timescale to apply to all Communications Providers applies to all contract variations requiring notification (price or otherwise) or only price variations.
90. Irrespective of Ofcom's position in this regard, given the complexity of each contract variation (price or otherwise) and the particular factors to be taken into account by Communications Providers each time this arises, and the fact that Ofcom have accepted that providers are best placed to decide how to notify their customers of such changes, Sky does 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 in order to avoid a price rise or issue guidance in this respect, in the absence of any apparent consumer harm in this regard.

⁴⁰ At paragraphs 5.34 – 5.39 of the Consultation.

⁴¹ At paragraph 5.38 of the Consultation.

⁴² As set out at paragraph's 5.47 – 5.49 of the Consultation.

⁴³ As identified by Ofcom in Annex 7. For example, BT notified of a price rise in Sept 2012 which didn't take effect until 05 January 2013.

91. Furthermore, Sky does not accept Ofcom's proposal that customers should be allowed to exit their contract from any time between receipt of the notification and the price rise taking effect.⁴⁴ As mentioned above at paragraph 87, Communications Providers may choose to provide customers with a longer notice period than that set out in the GCs (and often do), particularly when they wish to ensure that their existing customers are individually notified before they are required to include details of forthcoming price rises in marketing. However, requiring Communication Providers to give customers the right to cancel their contract from the point of notification until the effective date of the price increase will discourage Communications Providers from providing longer notice periods than the minimum required, which Sky considers will be to the detriment of the customer. Providing customers have at least one month's notice of the price rise and time within that period to end their contract if they wish to so, customers will be protected.
92. Instead of implementing further regulation, Sky would therefore urge Ofcom to take appropriate enforcement action against specific Communications Providers where it identifies areas of concern.

Implementation Timescales

93. If Ofcom retains the "material detriment" concept in respect of non-monthly recurring/usage based charges as Sky has proposed at paragraphs 57 to 83 above, we consider that a six month implementation period would be appropriate. Whilst Sky agrees with Ofcom's analysis at paragraphs 6.56 - 6.58, we consider that the work streams required (namely adjusting business models, ensuring any new contract offered from a certain date has a clause which allows the consumer to exit the contract without penalty for any increase to monthly recurring charges and a clause which sets out the treatment of variations to non-monthly recurring/usage based charges, as well as training staff and changing policies) would take longer than the three months Ofcom have proposed.
94. However, should Ofcom implement its preferred Option 4 unamended (so that customers are given the right to exit their contract free of charge on any increase to any price) Sky considers a three month implementation period to be wholly inappropriate given the commercial implications and the complexity of systems changes required. On this basis, Sky would consider a 12 month implementation period to be the minimum period appropriate for such a wide-reaching regulatory change.

⁴⁴ As set out at paragraph 5.49.