

Response to Ofcom's consultation on price rises in fixed term contracts

14 March 2013

Price rises in fixed term contracts

Ombudsman Services' consultation response

1 Summary

1.1 About Ombudsman Services

The Ombudsman Service Ltd is a company limited by guarantee that provides ombudsman services for the energy, telecommunications, property and copyright licensing sectors, by appointment or approval from the relevant regulators. We provide dispute resolution and redress to domestic consumers and micro-businesses. We were recently appointed by the secretary of state for energy and climate change as the ombudsman and investigation service for the Green Deal. Established in 2002, Ombudsman Services now has over 8,900 participating companies and last year we resolved over 18,000 complaints. The company employs around 170 people and has a turnover of just under £8 million.

Ombudsman Services complaints resolution service is free to consumers and costs the public purse nothing; it is paid for by the participating companies under our jurisdiction by a combination of subscription and case fee. The participating companies do not and should not exercise financial control over the company. Ombudsman Services' governance ensures that we are independent from the companies that fall under our jurisdiction. The more complaints there are about a company, the more the company pays, ensuring an incentive for the company to improve their customer service.

To help level the playing field between consumers and companies, we have a contact centre which provides information and helps those who have difficulty in making a complaint. We achieve proportionality by providing alternative dispute resolution through different processes, from early resolution to Ombudsman Services decision.

2 Specific response to the questions

2.1 Ombudsman Services' response

Ombudsman Services welcomes the opportunity to comment on Ofcom's consultation on price rises in fixed term contracts. Our response to the specific questions the consultation raises is below.

Last year Ombudsman Services e had 618 communications companies under its jurisdiction. We had 121,000 contacts, an increase of 16% on the previous year (104,000) and dealt with over 11,000 complaints. Customer service accounted for nearly 40% of the complaints we received, while disputed charges and service accounted for 19% and 17% respectively.

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

Yes. Ombudsman Services believes that the current conditions do leave the consumer exposed to unfair surprises and unfair effects as the result of communications providers being able to increase the price in a fixed term contract. The price is one of the principle reasons a consumer enters into a phone contract and is one of the bench marks the companies use to sell their product. Indeed, the experience Ombudsman Services has is that many consumers do have the impression that when they agree a mobile phone contract, the price will not change during the contract period, and any price rise does come as a shock. Such price increases are very unpopular with customers because they are so unexpected. Consumers seem to have an expectation that the initial cost of the contract will remain until the contract expires, and this seems to be driver of dissatisfaction.

On the other hand, the cost of mobile contracts is often relatively small and therefore the price rises are often fairly minor. It appears that some consumers may be using price rises as an excuse to try to break contracts and sign up for new handsets when they don't have grounds for taking such action. Restricting a service provider's ability to increase the price of contracts mid-term is in Ombudsman Services' view likely to reduce complaint numbers.

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

As communications providers are best placed to assess the risk of any price fluctuations, they should bear the risk of any price increase.

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

Yes. If communication providers consistently applied the "material detriment" test in General condition 9.6 then there may be an argument that consumers should know what the standard practice was. However, given there is an inconsistent approach to the application of the test then consumers may be disadvantaged in respect of the price terms or price variation. In our experience, consumers do not understand the term "material detriment" – it is often perceived as a legal term – and complainants will often argue that any change to the cost of their price plan gives rise to a right to cancel. The term does leave room for interpretation and therefore will generate complaints.

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

In order to provide consistency between communications providers and allow Ombudsman Services to provide remedies that are comparable, we believe that Ofcom should provide guidance on the matter.

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

No. Ombudsman Services believes that merely issuing guidance on how to treat consumers who enter into a fixed price contract will not address the harm; our view is that it will inevitably lead to differing interpretations and application of the rules by service providers which in turn will lead to inconsistency and confusion in the mind of the consumer. It is our view that any changes should be conditions of the licence so they can be applied equally across the sector and

can be enforced. Furthermore, providing more guidance about the definition of material detriment would not solve the problem of complainants being unaware of a company's ability to increase the cost of contracts.

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

Yes. Despite there being rules on transparency, the evidence provided in the consultation appears to show that they have been ineffective. This is because they do not seem to have prevented the creation of erroneous expectations in the consumers' minds that the prices are fixed, or because they illuminate the potential for an unfair surprise when a price rise does occur.

Ombudsman Services' experience is that service providers tell us that if they were prevented from changing the price of contracts mid-term, this may have the effect of increasing the cost of the contract at outset. It may be that any prohibition on price rises may have some unintended consequences. However, on the other hand, competition among providers may mitigate across the board price increases.

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

Ombudsman Services believes that transparency alone would not provide adequate protection for the consumer against the harm caused by price rises in fixed term contracts. Even if the consumer were told at the point of sale that the contract might allow the price to be altered, the communications provider would not be able to tell the consumer how much the new price would be, how often the price might change or what rights the consumer would have to terminate the contract. This being the case, the original sale price could be considered irrelevant as it might be subject to change and make any comparison with another provider impossible.

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

While regulatory intervention should in general protect the consumer from any unfair and unexpected price increases, it should not prevent changes being made to the contract. This being the case, consumers should be given the choice to exit a contract if changes are being made to it.

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

The regulatory intervention in our view should relate to all services including such things as increases to the service charge for calls to non-geographical numbers?

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

Unlike small businesses, larger businesses are often better placed to negotiate contracts with communications providers. Small businesses, however, are similar to residential consumers as they often do not have the time, resources and knowledge to deal with the contractual arrangements of a communications provider. This being the case, it is our view that the harm identified from price rises in fixed term contracts should apply to small businesses and not large businesses.

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

Yes; small businesses like residential consumers often have limited knowledge of the market when entering into a contract and as such they should be covered by any regulatory intervention.

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

Yes. Ombudsman Services' jurisdiction is limited to domestic and micro businesses and we believe that the definition used in section 52(6) of the Communications Act and in other parts of the General Conditions should be the basis of the definition of a small business.

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

Ombudsman Services understands that there may be circumstances where price rises occur beyond the control of communications providers including increases in VAT and other new taxes. We would agree that in such cases the communications providers should not be required to let consumers withdraw from the contract without penalty. The reasons, however, should genuinely be beyond their control, be specified in the regulations and apply equally to all the communications providers.

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

Ombudsman Services is not aware of any other price increase outside the control of communications providers that should not trigger the obligation on providers to allow consumers to exit the contract without penalty.

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

While communications providers may be best placed to decide how they can communicate contract variations effectively with their consumers, it is Ombudsman Services' view that Ofcom should provide minimum standards that all providers should be expected to meet. If a provider wants to exceed the minimum requirement set by Ofcom they should be free to do so.

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

It is important that any consultation process is open and transparent.

Ombudsman Services recognises, however, that there may be circumstances when there is a need for informal discussions to take place. This being the case, and in the interests of transparency and openness, Ofcom should provide clear reasons why this course of action is being taken and once the informal discussions have concluded a full, reasoned explanation should be published as to why a decision has been made.

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

Ombudsman Services supports the ways highlighted Ofcom's consultation proposes to expect communications providers to inform their consumers of a change in their telephone contract. Whatever method is used, Ombudsman Services believe it is important that communications providers use plain language and make it available in different languages and formats.

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

Ombudsman Services considers that for consistency the regulations should set a prescribed timescale that would apply to all communications providers. The timescale should balance the interest of both the consumer and the communications provider. It should not be too short so as to prevent consumers from cancelling, nor too long that it might penalise the communications provider. This being the case Ombudsman Services considers that companies should give consumers one month's notice in order to allow them to cancel their contract without penalty.

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

See Ombudsman Services response to Question 18

Option 1

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

It is Ombudsman Services' view that the current regulatory framework which allows a contract to be amended and a price increase introduced is unacceptable. We believe that the current framework leaves consumers exposed to unfair surprises which can undermine the consumer's confidence in the sector.

Option 2

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

Ombudsman Services agrees with Ofcom's assessment that although there are already a range of rules in place to ensure transparency, they are not operating effectively. There is therefore a need for clear and certain rules to be applied which are uniformly applied by communications providers for the protection of consumers generally.

Option 3

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

Although this option would have the potential to address a number of aspects of harm that Ofcom has identified, this option would not in our view provide protection needed to secure fairness in respect of the price where consumers opt into variable price contracts. We also share Ofcom's view that this option

would add further complexity to the already complex choices that consumers have to make.

Option 4

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

Ombudsman Services believes that this is the most appropriate option. It appears to balance the needs of the companies to increase the cost of a tariff while protecting the rights of the consumer and providing them with an opportunity to withdraw from the contract without penalty if there is an increase.

Other

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

See Ombudsman Services response to Question 23.

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

Yes. Ombudsman Services agrees that the proposed modifications to GC9.6 which apply in respect of all aspects of the price payable in exchange for services under a contract will give the intended effect to option 4.

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

Ombudsman Services believes that the material detriment test should remain in GC9.6 for any non-price variations and that communications providers should have to take this into account when making variations to any other terms in the contract.

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

Yes, we accept that there is a need for an implementation period and believe that three months is reasonable.

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

Ombudsman Services considers that the regulations to provide a requirement to notify consumers of changes to a telephone contract and allow them to leave the contract without penalty should apply to both existing and new contracts. In our view it is difficult to justify the need for additional protection in effect for new consumers whilst leaving existing consumers unprotected

Chief Ombudsman

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