



Date: 14 March 2013

### **Price rises in fixed term contracts**

SSE is pleased to provide a response to the recent consultation on the above subject. We are very concerned about the option that Ofcom proposes to address the relatively recent issues that have arisen for consumers and advocate a less intrusive approach.

We have set out our points in detail in annex 1, which contains our response to the consultation questions, and have provided further detail of SSE's business and the likely costs it would face if Ofcom goes ahead with its favoured option in confidential annex 2. As this annex contains commercially sensitive information about SSE's business processes and costs, we request that it be kept confidential to Ofcom. Below, we summarise the main points from our response to the consultation questions and then cover some other points arising from the consultation.

#### Summary of main points in response to consultation questions

- SSE agrees that the evidence suggests that in recent times, some Communications Providers (CPs) have pushed the boundary of what is acceptable in terms of both increasing prices for fixed term customers and refusing to allow any affected customer to exit their contract without penalty.
- We believe that Ofcom's proposed 'option 4' – of requiring CPs to allow fixed term contract customers to exit their contracts without penalty if there is an increase in price for any element of their service – is disproportionate, intrusive and onerous, particularly for telephony services where many hundreds of individual prices are entailed in the product. We have provided some evidence for this in confidential annex 2 of our response. There is a greater rationale for a proposal that recurring monthly charges should be made fixed for the term of a contract but even here, some room for suppliers to differentiate their offerings is likely to lead to a more efficient market outcome.
- We consider that Ofcom should make use of less intrusive options to deal with the consumer issues that have arisen. These would entail guidance on the acceptable approaches to the material detriment test in General Condition (GC) 9.6 and an increased emphasis on requirements for transparency for consumers on which price elements of a fixed term contract package are fixed and which are variable.



- Guidance on the acceptable interpretation of the ‘material detriment’ test would also allow dispute resolution schemes to resolve consumer complaints according to the regulatory guidance, thus providing support for individual consumer complaints on how they have been treated by CPs.
- Against a background of greater clarity in the market that fixed term packages offer a combination of some fixed and some variable prices, with CPs obliged to be clear on the matter in their product and contractual information, we believe that market forces should be able to operate and allow customers to select the products that best suit them.

### Other Points

#### **Treatment of bundles**

Paragraphs 5.34 to 5.39 of the consultation discuss the treatment of bundled services. SSE is a company that can consider providing innovative offerings to customers across a range of regulated communications products, regulated energy products and other services. We are concerned that the operation of Ofcom’s proposals on price rises, when allied with its view of what constitutes a bundle, could act to reduce innovation that benefits customers in product offerings by companies such as SSE – for example, wider ‘loyalty discounts’ ranging over several products. The risk would be reduced if Ofcom pulled back from implementing ‘option 4’, which we argue is an onerous and disproportionate response to the consumer harm identified. However, it would still be useful for Ofcom to define more clearly what constitutes a ‘bundle’ in this context; in our view, 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.

#### **Practices on contract renewal**

One of the questions in the consultation addresses the matter of how long a time period consumers should have to cancel a contract without penalty in the event that a CP increases a price. We would like to raise a related point 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. It has come to our attention 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 the call, tying the customer in without allowing a cooling off period. This practice appears contrary to the spirit, if not the letter, of consumer protection legislation and we consider that it would be worth Ofcom investigating or setting out its views on this topic in the context of GC9, where automatically renewable contracts have already been ruled out.

We hope that the information, evidence and views provided in this response are helpful to Ofcom in deciding on the appropriate course of action to take on this matter. We would be happy to discuss any point further.



Yours sincerely

**Regulation Manager**

## Response to Consultation Questions

### Section 4

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

**We accept that consumers are unhappy and suffer some detriment if prices that they considered to have been 'fixed' when they entered a fixed term contract are increased by their supplier, who then refuses to allow them to exit without penalty when they make representations of concern. There appear to be two main issues here in terms of the customer experience: firstly, what customers are told about the variability of charges when entering into fixed term contracts; and secondly, the behaviour of suppliers when customers make representations. We believe that much of the detriment identified could be remedied by appropriate transparency around variability of charges at point of sale, coupled with appropriate complaint handling procedures and policy. If suppliers and, as back-up, the independent dispute resolution schemes took the attitude that, if an individual customer makes a reasonable representation about the level of increase that he faces as a result of the proposed price change, the material detriment test is satisfied and the customer should be released from the contract without penalty, then consumer harm would fall significantly.**

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

**We believe that CPs can bear some risks of increasing costs over the life of a fixed term contract but not all of them e.g. CPs should not have to bear risks on the charges that providers of services on non-geographic numbers make for their services on directory enquiry and premium rate numbers. We therefore do not agree that CPs should take all the risk and we think, instead, that they should be able to pass certain call charge price rises on to consumers without, in the general case, triggering an ability for a fixed term customer to exit their contract without penalty. It is also the case that the consumer has some choice about making calls to these types of number.**

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

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

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

**Ofcom has rightly identified that the law in this area is complex and its effect uncertain. Against this background, CPs take different views on how to interpret the position and some will 'push the envelope' much further than others in terms of the price rises that they seek to impose without allowing consumers to leave a fixed term contract without penalty. Customers of those particular CPs will potentially be**

**subject to greater consumer harm from in-period price rises than customers of other CPs.**

**It does appear to us that guidance from Ofcom – particularly on the transparency around what a consumer must be told at the point of sale and in contractual documentation about the potential for price rises – has the potential to remedy consumer harm in this area. If CPs were required to provide an explanation of their policy on the variability of different types of contractual charge during the life of the fixed term contract, this would do much to make consumers more aware of the potential for changes in contract prices. The forces of market competition could then act to favour CPs who provided customers with the best combination of initial price and ongoing certainty of price for their needs.**

**It would also be useful for Ofcom to give guidance on what constitutes material detriment and we believe that some CPs have sought guidance from Ofcom on this matter before. This could perhaps set limits on the range of acceptable practices by CPs on this matter. Coupled with the price transparency requirements, we believe this approach would narrow the range of interpretations that are currently taken by CPs, while still allowing them some freedom to innovate and offer different types of ‘fixed price’ deals to customers, who were fully informed of the differences and could choose amongst CPs for the offering that suited them best.**

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

**We agree that the evidence shows that consumers generally have an expectation of fixed monthly charges for the duration of a fixed term contract and thus, where they have a contract with CPs that in fact seeks to increase those charges in that time period, are likely to be subject to harm.**

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

**No – as discussed in our response to an earlier question, we believe that guidance and clearer rules on transparency would go a long way towards informing and protecting customers. We therefore believe that Ofcom should pursue this less intrusive option in preference to the more burdensome options being considered.**

## **Section 5**

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

**No – we are of the view that this is too onerous a regulatory intervention and goes beyond what is needed to address the identified issues. We discuss this point further in confidential annex 2.**

*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?*

**As above, we do not consider that there should be a regulatory intervention applying to price increases in relation to all services. There is more of a case for Ofcom to require that ‘headline’ regular monthly charges such as package price and line rental are not increased during the period of the contract. Even here, a greater emphasis on transparency of information to customers could allow customers to understand the differences between fixed term contracts and select those that suit them best, thus solving the issue without such intrusive regulation. We do particularly consider that service charges for calls to non geographic numbers are beyond retail CPs’ control and would be onerous to ‘fix’ as well as representing a systematic commercial risk to these CPs if they were put in the position of having to fix the equivalent retail price while absorbing increased wholesale prices.**

*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?*  
**Yes. We consider that larger business customers are well able to understand and negotiate on the terms of price variation in contracts.**

*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.**

*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 – there is a benefit in consistency of definition in this area.**

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

**Yes – this is welcome clarification that price rises for the following reasons:**

- **An increase in the rate of VAT;**
- **The imposition of a new tax; or**
- **The extension of an existing tax that has not previously applied**

**would not lead to an expectation that customers on fixed term contracts would be able to leave these contracts without penalty. We would expect these factors, together with the further discussion in paragraph 5.32 on increases in cost imposed directly by changes in mandatory provisions laid down by Government or regulators would be listed in any guidance that Ofcom issued on the implementation of the relevant requirements in General Condition 9.6.**

*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?*

**Yes. We have already referred above to the reasons discussed in paragraph 5.32. We also consider that wholesale price changes in areas such as non geographic services and international calls are outside the ability of retail CPs to control or manage.**

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

**Yes**

*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?*

**Yes**

*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?*

**While Ofcom's suggestions for best practice are a helpful note of expectations in this area, we believe that suppliers, knowing their customers best, should have flexibility on their implementation. We do not have any further suggestions for best practice in this area.**

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

**We agree with Ofcom that consumers should be given adequate time to consider any notice of contract variation and respond to it if they wish to take steps to terminate the contract – often the only thing they have to do in this case is to contact another supplier to arrange a new contract. We believe it would be beneficial for CP processes if a fixed number of days is specified and so would avoid using the phrase 'one month'. In our view, 28 days would be an adequate period approximating to one month and we would have no objection if Ofcom wished to specify the period of days that all CPs should use in this respect.**

*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?*

**If Ofcom feels strongly that all CPs should use the same time period (or minimum time period) in their terms and conditions on this matter then it would seem appropriate to set this out as a rule in any guidance that Ofcom proposes.**

## **Section 6**

### Option 1

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

**We agree that option 1 is not suitable but believe that the harm identified is capable of being addressed through a combination of guidance and transparency.**

Option 2

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

**No. We believe there is significant merit in Ofcom taking a precautionary, incremental approach to the consumer harm identified by seeking to address it through less intrusive remedies relating to information and guidance provision than the option that Ofcom currently favours (option 4).**

Ofcom refers, in the discussion under Principle 4 for this option, to Article 20(2) of the Universal Services Directive (USD). Earlier in the consultation, in paragraphs 3.7-9, the regulatory view on the requirements of the USD prevailing in 2003 and again at the time of implementing the revised EU framework in 2011 is explained. We support the arguments set out there for the proportionality of allowing some minor amendments to contractual terms (including price) for fixed-term contracts, consistent with other aspects of UK law. Given that the harm that Ofcom has identified has only arisen since 2011, we believe that a proportionate regulatory approach would seek to use the approach of guidance and increased transparency before the extremely intrusive option of limiting the form of fixed-term contracts that can be offered in the market.

Ofcom acknowledges in its discussion that there are risks of greater intervention in the market and we agree with this. Ofcom has issued guidance on GC23 and GC24 but has not amended this since the conditions were put in place in 2009. At that time, the application of GC9.6 did not cause significant concern as it appears from the Introduction to the consultation that it is only in the last year or so that the behaviour of certain – mainly mobile CPs – with respect to price rises in fixed term contracts has led to consumer complaints and Ofcom's current concern. One of the advantages of formal regulatory guidance is that it can be changed more readily and with less regulatory intrusion than the text of GCs in order to react to changing circumstances and practices.

In 2009, the meaning of the phrase 'payment terms' was not amplified in the guidance on GC23 and GC24, as Ofcom acknowledges in paragraph 4.65, while other aspects of the text in the conditions were addressed. At that time, it could readily have been expected to cover items such as the types of payment method and frequency of billing rather than, additionally, the variability of prices within the contract, which has only recently become an issue. Therefore, we advocate that Ofcom amend existing guidance for GC23 and GC24 as well as issuing new guidance on expectations around the relevant matters in the existing wording of GC9.6. We believe that most CPs will seek to ensure that they meet the spirit and clear intentions of amended guidance, without Ofcom needing to move straight to additional GC obligations.

We are puzzled by Ofcom's apparently ambivalent attitude to the effectiveness of guidance. The discussion under Principle 4 in paragraph 6.20 suggests that Ofcom considers that guidance cannot impose obligations. This contrasts with the statement in paragraph 5.49 that a precise timescale that CPs should give to consumers to cancel without penalty can be set out in guidance, thus presumably becoming an 'obligation'. Similarly, the whole approach by Ofcom to the structuring of GC23 and GC24 was to have relatively high level description of obligations in the

**GC text, with the guidance adding more detail around the regulatory expectation on what types of measures and behaviours would be judged to meet – or, as the case may be, not to meet – the obligations. This approach also allows a degree of flexibility to CPs that avoids the costs of onerous prescription. We agree with this overall approach and consider that GC9.6 would benefit from similar types of guidance to that accompanying GC23 and GC24, which could also be amended as necessary to remain consistent with the new guidance.**

**We are not aware of any views expressed by Ofcom to suggest that the approach introduced by GC23 and GC24 has not been successful, as a package of GC and accompanying guidance, in setting out clear regulatory expectations on CPs. Where circumstances change and Ofcom identifies new sources of harm, we believe that issuing appropriate guidance is very likely to be helpful and improve the situation and that it is an option that Ofcom should consider in preference to prescriptive and more interventionist measures. The guidance could be structured so that some text is more clearly articulating Ofcom’s expectation about what will meet the terms of the overall intention of the GC and some is more along the lines of best practice guidance. By way of comparison, paragraph A6.10 in Ofcom’s guidance on GC24 falls into the former category while A6.15 shows aspects of the latter type of guidance.**

**We also have some comments on how CPs could provide information to customers on the variability of their prices. We consider that there are a number of ways of doing this – and that one of the most helpful for customers would be for CPs to explain clearly to customers considering signing up for a fixed term contract what types of charge are fixed for the duration of the fixed term. As this is clearly an attribute of these contracts that customers are interested in, we believe that such information provided up front would allow consumers to discriminate between different retail offerings. To the extent that customers value products with more reassurance on fixing charges, CPs that are willing to fix a greater number of types of charge in a fixed-term contract will gain market share and the practice is likely to spread naturally, rather than through the burden of regulation. We provide further comments on this matter in confidential annex 2.**

**Finally, we believe there is a further tool that Ofcom could consider using to remedy the identified harm in a non-intrusive manner. That is to structure the industry’s expectations on how the independent dispute resolution bodies would rule on individual complaints from consumers about a material price rise imposed on them during a fixed term contract, where the CP concerned refused to allow them to leave the contract without penalty. Such complaints could be escalated to ‘deadlock’ status very rapidly as the point at issue is a matter of CP policy – effectively an interpretation of ‘material detriment’. If Ofcom issued guidance on the types of change that constituted material detriment, the dispute resolution bodies would follow this. Against a background of suitable publicity for the policy, we believe that CPs who are inclined to ‘push the envelope’ would quickly be incentivised to follow the guidelines and avoid individual customers being able to successfully pursue a complaint through dispute resolution as this would increase their case fee costs.**

### Option 3

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

**Option 3 is not an attractive option and in this respect, we agree with Ofcom's analysis. It illustrates the detailed prescription that is often involved in market interventions – for example, the discussion in paragraph 6.29 about how the 'fixed price contract' product that CPs would be required to offer would have to be described. However, we do not agree with Ofcom's conclusions on the extent to which guidance can be effective in changing CP behaviour and our thoughts on this are set out in our response to the previous question.**

**We would also comment on Ofcom's statement that a choice between fixed and variable price contracts is common in energy contracts and mortgages (paragraph 6.23). In these markets, the number of individual charges entailed in providing the service is very small compared to a telephone service. This means that it is relatively simple to offer fixed price contracts in these markets. The same is not the case in the telephony market where the customer can be charged for hundreds of different 'non-included' call types. Fixing these is not a straightforward matter and imposes significant costs, which illustrates the intrusiveness of this option and also, in effect, option 4 in requiring CPs to provide contracts on this basis. We discuss this further in confidential annex 2.**

### Option 4

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

**SSE does not agree with option 4 and considers it to represent an intrusive, disproportionate and unnecessary imposition of further regulatory rules in this area. It effectively requires CPs to fix all the prices that could possibly be entailed in their fixed term telephony contracts as few would be in a position to take on the cost and risk of writing to all affected customers with a price variation notice that allows the customers to exit the contract without penalty for every minor call price change. As we discuss in confidential annex 2, there is a significant systems cost in 'fixing' prices for fixed term contracts in this way. Unlike the energy contracts discussed under option 3 that have a handful of individual prices (e.g. standing charge, unit rate #1, unit rate #2), it is not a simple matter for CPs to offer 'all prices fixed' fixed term contracts for telephony, in particular.**

**There are other less onerous options to address how CPs interpret the material detriment test, how they inform customers of the status of the package of prices they are considering signing up to in a fixed-term contract and how they treat individual customers concerned about a price change. These entail regulatory guidance and have been discussed in our comments under option 2 above. We would query Ofcom's comment at paragraph 6.45 that some CPs already allow consumers to exit a contract without penalty for any price rise – does this apply to a telephony service where a change in any non-geographic or international call price is drawn to a customer's attention? We doubt this due to the points made above but we do accept that some CPs may fix some telephony charges in a fixed-term contract and advocate that this trend be built upon by requiring that CPs make clear to customers what is fixed for the contact term.**

Consumer complaints in this area appear to be driven by the recent policy of mobile telephony providers rather than fixed line telephony providers. Furthermore, the concerns expressed seem to relate to the fixed recurring charges in the contract – predominantly the monthly package charge. There may therefore be some justification for Ofcom to require this type of charge to be effectively fixed (i.e. allowing consumers to exit their contracts without penalty if these charges change). However, we do not consider that Ofcom has justified the much wider and more intrusive measure of requiring all prices forming part of a telephony package to be effectively fixed in this way.

Other

*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?*

**No. See comments in response to previous questions.**

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

**We have one comment about a clarification in the text or guidance around General Condition 9.6 that would be helpful. This relates to customers who are not on fixed term contracts and can already terminate their contract at any time without penalty. At the time of a price increase affecting these customers, the wording of the existing version of GC9.6 suggests that they should also be told, under the 'material detriment' test, that they can leave their contract without penalty, which could cause confusion and is not actually necessary since their form of contract does not contain any penalties for leaving. Since the protections in GC9.6 are aimed at those customers in the initial period of a fixed term contract, it would be helpful if any amended wording or guidance on GC9.6 resulting from the current consultation could clarify that these are the customers to whom the provisions apply.**

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

**This is reasonable.**

*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?*

**No. Option 4 will push retail CPs towards setting up systems to 'fix' all prices associated with fixed term contracts rather than bearing the costs and commercial risks of writing to customers on these contracts with the necessary notice when price increases occur. Such systems would involve IT work and would require a minimum period of a year to be specified and implemented.**

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

**This is fair and is consistent with the principle of no retrospective regulation.**