

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

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Introduction and summary

- A1.1 This is Ofcom’s guidance on how we are likely to apply General Condition 9.6 in relation to certain price increases. In particular, on what Ofcom are likely to regard as price increases meeting the “material detriment” requirement and giving rise to the rights to notice and to terminate the relevant contract without penalty. The principles reflected in this guidance are transparency, comparability and certainty.
- A1.2 General Condition (“GC”) 9.6 says:
- “The Communications Provider shall:
- a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;
 - b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and
 - c) at the same time as giving the notice in condition 9.6 (a) above, shall inform the Subscriber of its ability to terminate the contract without penalty if the proposed modification is not acceptable to the Subscriber.”
- A1.3 It is essential that the core subscription price in a telecommunications contract (described in paragraph A1.7 below) is made clear to the subscriber at the point of sale and before the subscriber enters into the contract. Ofcom is likely to treat any increase to the agreed core subscription price during the fixed term of such a contract as a modification that is of, or is likely to be of, material detriment to consumer and small business subscribers¹ for the purposes of GC9.6.
- A1.4 Ofcom sets out below a series of examples, for illustrative purposes, of modifications to the agreed core subscription price likely to meet the material detriment requirement (example 1) and of agreed core subscription prices that do not involve contract modifications (examples 2 and 3). The position in examples 2 and 3 depends on the relevant price terms being sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant prices.

Background

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

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

A1.6 The inclusive package of services or features may vary between different Communication Providers (“CPs”) and contracts for different products and services. In a fixed voice contract, it will often be for line rental and an inclusive call package to certain numbers and/or at certain times, but may be for other features. In a contract for mobile services, it may be for a number of minutes of calls to certain numbers, a number of text messages and a data allowance for internet use.² For broadband services, it may be for a certain amount of data consumption.

A1.7 The inclusive package may be marketed on the basis of a single inclusive figure or separate figures for separate elements of the inclusive package. Either way, this price will usually be an amount or amounts which the subscriber agrees and is bound to pay each month (or other recurring period) for services the CP is bound to provide. It might be thought of in terms of the “core subscription price,” and that is how we describe it in this guidance.³

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

A1.9 There is a significant possibility that subscribers:

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

Material detriment

A1.10 Ofcom is likely to treat any price increase⁴ to the agreed core subscription price (however constructed and described in the contract terms)⁵ during the fixed term of a telecommunications contract as a modification that is of, or is likely to be of, material detriment to consumer and small business subscribers for the purposes of GC9.6.^{6 7} The core subscription price is one of the most important factors in the subscriber’s choice of contract. It is likely to be the most important aspect of one of the key terms of the contract. There is likely to be a significant possibility that the subscriber would not have entered into that contract had they been bound to pay a different price to that they agreed.

A1.11 Accordingly, in the event of any such increase to the agreed core subscription price, Ofcom is likely to take the view that the relevant subscribers should be given the rights provided for by GC9.6. That is:

- a) to be given at least one month's notice of the price increase and of their ability to terminate the contract without penalty if the proposed increase is unacceptable; and
- b) to be allowed to withdraw from their contract without penalty if they choose to exercise that right.

Application to bundles

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

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

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

Examples

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

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

- **Example 1: discretionary price increases**

The subscriber agrees and enters into a 24-month contract for services on terms that the core subscription price will be £10 per month. The contract also contains a term to the effect that the CP may increase the agreed core subscription price⁸ by up to a certain amount, percentage or index-linked level (such as RPI).⁹ Ofcom is likely to treat any exercise of the discretion to increase this agreed price during the fixed minimum term of the contract as a modification meeting GC9.6's material detriment requirement.

Ofcom's concern is with the application of price and price variation terms which give the CP discretion as to, for example, the possibility, amount and/or timing of a price

increase. We are likely to take a similar approach to that above to the application of contract terms that reserve such discretion and/or are to the same or similar effects as those in example 1.

- **Example 2: agreed prices**

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

- **Example 3: agreed prices**

The subscriber agrees and enters into a 24-month contract on terms that the agreed core subscription price will be £X per month for the first 12-months (or some other period) and £X + RPI¹⁰ for the second 12-months (or some other period). On the basis that the relevant price terms are sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant tiered price(s), Ofcom would not regard the application of the agreed price in the second period as a modification of the contract capable of meeting GC9.6's material detriment requirement.

A1.15 As set out above, the position in examples 2 and 3 depends on the relevant price terms being sufficiently prominent and transparent that the subscriber can properly be said to have agreed on an informed basis, at the point of sale, to the relevant tiered price(s). Where that is so, the application of the agreed price(s) at the relevant time(s) would not be a modification of the amount he or she has agreed and is bound to pay. Most clearly, this proviso as to prominence and transparency could be met where CPs market offers, and enter into contract terms, in a way that sets out with equal prominence that the contract price is £X in period 1 and £Y in period 2 (or some other periods).¹¹

Notification of contract modifications

A1.16 In this part of the guidance we have collated the following, including from previous Ofcom publications, to set out our expectations on how CPs should notify subscribers of contract modifications.

A1.17 We expect CPs actively to communicate to their subscribers any proposed contractual modifications. CPs need to ensure that subscribers know how such changes will be communicated to them. For example, the terms and conditions should state the method(s) used to communicate contractual modifications and timescales for doing so.

Notification methods

A1.18 Notifications should be set out with due prominence in order to attract the subscriber's attention. They should be in a form which subscribers can reasonably be expected to read. Letters and emails (if that is the means of communication chosen by the subscriber) are the most obvious examples of notifications.

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

Content of notification

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

Notification of termination rights

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

- A1.24 The terms and conditions or other practices CPs apply (whether in contracts for bundled services or other contracts relating to that in respect of which a relevant price rise occurs) in respect of contract termination are also important considerations. Terms and/or practices which frustrate the practical effect of GC9.6 are liable to attract suspicion of non-compliance with the relevant rules.¹²
- A1.25 CPs should also keep in mind the need to comply with all their obligations under the General Conditions, including as to switching processes. This is particularly relevant where the rules provide for a gaining provider-led process under which a subscriber is able to switch providers by contacting a new provider and without needing to contact their existing one.
- A1.26 Neither GC9.6 itself nor this guidance requires that a subscriber must exercise their rights under that condition by contacting their existing provider. One way the CP making contract modifications could meet its obligations in a relevant case is by telling the subscriber that the GC9.6 termination rights may be exercised by contacting a new provider.

¹ For the purposes of this guidance, a small business subscriber is a subscriber of a CP who is a “Small Business Customer” within the definition set out in GC9.3(b)(v).

² Although often excluded, some CPs may make calls to certain non-geographic numbers (“NGCs”) part of the inclusive package of voice services. Where a CP chooses to do so, the core subscription price, as defined in paragraph A1.7, covers those NGCs (in principle) (though see further below).

³ This differs from the non-subscription price(s): for services that fall outside of the relevant inclusive package or core subscription, and which are billed incrementally when such services are used by the customer. For example, for mobile customers they typically (though not necessarily) include charges: incurred when they exceed their monthly inclusive allowance of services, and for premium rate services, NGCs, directory enquiries, making calls and sending texts internationally and roaming services.

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

⁴ Other than increases which are limited to the CP passing on to subscribers an amount equal to any increase in VAT or any other directly and specifically applicable taxation charge or regulatory levy, imposed by changes in mandatory provisions laid down by Government or regulatory authorities, payment of which is compulsory.

⁵ Including, in principle, a change in the price relating to NGCs that a CP has chosen to make part of the inclusive package of services and which are covered by the core subscription price. One exception to this is in respect of price rises at the time of the implementation of the unbundled tariff for calls to NGCs where calls to such numbers were, immediately prior to the implementation date, within an inclusive package. Where the price rise is attributable to a decision by the originating CP to charge separately the service charge element of the price for calls to the relevant NGC, Ofcom’s view is that this should not be treated as falling within this guidance. GC9.6 will, however, still apply depending on the particular facts of each case. More detail is in Ofcom’s statement on NGCs at <http://stakeholders.ofcom.org.uk/binaries/consultations/simplifying-non-geo-no/statement/final-statement.pdf>.

This also includes changes to the level of the service provided in the inclusive bundle of services or features and which effectively constitutes a (unit) price increase.

We would also be likely to regard as a price rise meeting GC9.6’s material detriment requirement any failure by a CP to pass on to consumers a decrease in the rate of VAT (or other relevant tax or charge) applicable to the core subscription price.

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

⁷ Again without prejudice to those matters to which it does apply, this guidance also does not apply to contracts in which no minimum contract or initial commitment period applies. However, a customer in receipt of services from a CP outside such a contract period will still be a party to a contract with that provider and will, therefore, be a subscriber for the purposes of the General Conditions. The subscriber's rights, and the CP's obligations, under GC9.6 will, accordingly, continue to apply, as will all relevant consumer legislation. Again, Ofcom will monitor the position and may take further action if we consider CPs are acting unfairly.

⁸ Whether during the initial commitment period of the contract, on a fixed date or at any time

⁹ The Retail Price Index

¹⁰ or some other price index well known to consumers, like the Consumer Price Index

¹¹ These time periods must be sufficiently specified that the subscriber knows what the (overall) contract price will be. Without that certainty, where the provider reserves to itself the discretion to determine when a higher price applies, it is the provider who is determining at some later point the (overall) contract price, rather than merely applying the price agreed at the point of sale.

¹² In this regard, GC9.3 is also relevant. It says, "Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider....".