



# Price rises in fixed term contracts

Options to address consumer harm

Consultation

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## Section 1

# Summary

- 1.1 On 18 October 2012, Ofcom announced our intention to consult on whether consumers need additional protection from price rises in fixed term contracts<sup>1</sup> for landline, broadband and mobile services<sup>2 3</sup>. This followed a review launched in January 2012 into the fairness of Communications Providers' contract terms ("the review")<sup>4</sup>.
- 1.2 Ofcom's review identified a number of issues with the effectiveness of the current rules - General Condition 9.6 ("GC9.6") and the Unfair Terms in Consumer Contract Regulations ("the UTCCRs") - with which Communications Providers have to comply when making contractual modifications. In particular, we identified issues in relation to consumer harm arising from price rises during fixed term contracts. These issues were further highlighted by price rises announced by several Communications Providers in late 2011 and during 2012.
- 1.3 The price the consumer has to pay for the services provided by a Communications Provider is one of the most important contractual terms. The current rules in both the UTCCRs and GC9.6 seek to reflect this.
- 1.4 In particular, contract terms should be balanced and not contain unfair surprises. Consumers should receive the contractual bargain they signed up to and legitimately expect, and should be protected against not doing so. Terms allowing price increases without giving the consumer the right to cancel without penalty are therefore liable to be unfair.
- 1.5 The rules are intended to reflect a clear and straightforward general principle, and a basic requirement of fairness: the price agreed should generally be fixed (and variable, if at all, only in limited circumstances). Where prices rise, consumers should be able to avoid their effects. GC9.6 seeks to give consumers similar protection against those effects. In line with the general legal principle, the protection provided by the rules should be clear, certain and genuinely effective.
- 1.6 Ofcom's view is that there can be no reasonable objection to rules that seek to achieve these basic aims of fairness. We have considered whether the current rules are achieving these aims. Our provisional view, based on our assessment of the evidence, is that they are not and that harm to consumers is being caused. We are, therefore, making proposals to amend the rules in GC9.6 to secure the appropriate fairness and address the harm.

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<sup>1</sup> By "fixed term contracts" we mean contracts that are "fixed" for a minimum contract period (usually 12, 18 or 24 months) and the consumer is tied into that contract unless they pay an early termination charge ("ETC") to leave before the end of the minimum contract period. Such contracts may include clauses allowing the provider to make variations (price and non-price) to the contract.

<sup>2</sup> <http://consumers.ofcom.org.uk/2012/10/addressing-consumer-concerns-over-mid-contract-price-rises/>

<sup>3</sup> Content services were not included in the review nor are they covered in this consultation as the retail of a content package is not the provision of an Electronic Communications Service (ECS) and, therefore, is not in itself covered by the General Conditions ("GCs") but the retail of a content package is, nevertheless, subject to consumer protection law.

<sup>4</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01082/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01082/)

- 1.7 In particular, during the course of the review, Ofcom examined 1,644 consumer complaints made to our Consumer Contact Team during the period from September 2011 to May 2012 about changes to terms and conditions of consumer contracts. These principally concerned price rises in fixed term contracts for mobile services.
- 1.8 Our analysis shows that a quarter of consumers complained that they were not made aware of the potential for price rises in what they believed to be “fixed” contracts. Their expectation was that the contract price was fixed for the contract’s length. They complained that Communications Providers should not be able to impose price rises during the fixed term of the contract. If the provider sought to do so, the consumer should be able to exit the contract without penalty.
- 1.9 A further 16% of consumers complained specifically about the amount of the price rise and its adverse financial impact on them. Some complained that they are placed in an unfair position as the balance of the contract is weighted in favour of the Communications Provider and the consumer has little choice but to accept the price rise or pay an early termination charge to exit the contract.
- 1.10 We have also considered evidence submitted by Which? as part of its “Fixed means Fixed” campaign. This campaign focuses on price rises in fixed term contracts for mobile consumers<sup>5</sup>. It has so far attracted over 37,000 pledges of support from members of the public for the proposition that “mobile providers shouldn’t increase prices during a fixed contract”.
- 1.11 The volume and nature of the evidence suggests, in Ofcom’s provisional view, that the current rules are not operating effectively to meet their aims. In particular:
- the rules are not operating so as to meet consumers’ legitimate expectations as to the price - one of the most important terms of the contract – that it, like other important obligations the contract places on the consumer (such as its length), is and should be fixed;
  - instead, those rules are leaving consumers exposed to unfair surprise and/or unfair effects; and
  - the rules are not giving consumers sufficient ability to avoid these surprises and effects (by ending contracts without penalty).

Consumer harm is arising in each of these respects. We have therefore considered the potential for the existing rules to address this harm and options for further intervention.

- 1.12 In making this assessment, we have taken into account that most of the evidence from consumer complaints and from Which? relates to consumer contracts for mobile services. We do not see, however, why different principles should apply to the price for one set of services but not another. The importance of price terms and the need for rules that are clear, certain and effective in securing a fair position for consumers should apply in respect of any regulated communications service.
- 1.13 Amongst the matters we have considered is whether the harm is arising only as a result of a lack of transparency. That is, a lack of transparency about the possibility Communications Providers may seek to increase prices in fixed term contracts. We have also considered whether, in general, providers are in a position to forecast their

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<sup>5</sup> <http://www.which.co.uk/campaigns/technology/fixed-means-fixed/>

costs in an unbiased way and should, as a result, bear the risk those costs may rise (rather than passing it on to consumers).

- 1.14 We have similarly looked at whether the current rules give rise to too much uncertainty and, in practice, leave consumers with insufficient ability to avoid the effect of relevant price rises. This uncertainty may arise, for example, because there is too much scope for inconsistent application of the current rules. It may also arise because of the complexity of some of those rules. The result may be that those rules do not achieve the intended fairness in respect of price terms and price variations. We have also considered the need for the rules to be consistent with the relevant provisions of the Universal Services Directive<sup>6</sup>, in addition to securing the fairness aims of the UTCCRs and GC9.6.
- 1.15 Our view is that, given their central importance to consumers, there must be a high level of transparency of prices, price terms and any variability in those prices. This is necessary so that consumers can evaluate the bargain they are striking, make informed transactional decisions and avoid exposure to unfair surprises, all of which are aspects of well-functioning markets.
- 1.16 But, transparency, while necessary, would not alone be sufficient. The rules must give certain, genuinely effective practical effect to the straightforward general principles that price terms in fixed contracts are of key importance; the price should be certain, variable only in limited circumstances, at most; and consumers should generally be able to avoid the effects of price rises. They must also allocate risks and burdens where they most fairly fall and be consistent with the European legal framework.
- 1.17 Ofcom has, therefore, assessed four regulatory options against four key principles for the provision of adequate consumer protection in a competitive market, in order to take a provisional view on what intervention, if any, is necessary and appropriate to address the consumer harm we have identified. In doing so, we have set out our assessment of the impact of each option on Communications Providers and on Consumers. That assessment is essentially qualitative (and we invite stakeholder views on the impacts identified and, where appropriate, to submit information, if necessary on a confidential basis, to inform our decision).
- 1.18 The options we have considered are:
- **option 1:** make no changes to the current regulatory framework (maintain the status quo);
  - **option 2:** require greater transparency of price variation terms by Communications Providers and publish Ofcom guidance on the application of GC9.6 and the UTCCRs to price rises and relevant contract terms;
  - **option 3:** modify GC9.6 so that consumers have to expressly opt-in to any variable price contract offered by a provider; and
  - **option 4:** modify GC9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services applicable at the time the

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<sup>6</sup> Article 20(2) provides for Communications Providers to have the ability to modify contract terms, including as to price, provided subscribers have the right to withdraw from the contract without penalty.

contract is entered into by the consumer (including changes to the level of service provided which effectively constitutes a (unit) price increase).

1.19 Ofcom has also considered whether prohibiting price increases in fixed term contracts in order to address the consumer harm identified, and as suggested by Which?, would be an option. Our view is that this would not be consistent with Article 20(2) of the Universal Service Directive nor, taking that provision into account, a proportionate regulatory intervention.

1.20 We have assessed the options against the following four principles which take account of our regulatory duties under the legal framework:

- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
- **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
- **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and
- **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).

1.21 Having done so, our provisional view is that options 1, 2 and 3 would not adequately and appropriately address the relevant consumer harm. Our further provisional view is that adopting option 4 would be the appropriate and necessary measure to address that harm. The reasons, in summary, are as follows.

1.22 As to **option 1**, the evidence indicates that the current rules are not operating effectively to secure the intended fairness as to price and price rises. They provide neither sufficient transparency nor sufficiently clear and certain application as to enable consumers to avoid unfair price rises.

1.23 This uncertainty arises in relation to GC9.6 because of the potential for its inconsistent application by providers. In particular, because of the considerable scope it gives them to determine, in the first instance, whether a price rise is likely to give rise to material detriment for the purposes of that condition and whether, as a result, they will allow consumers in practice to withdraw from contracts without penalty when prices rise. It arises in respect of the UTCCRs because of their complexity and the consequent difficulty for consumers in practice to identify and challenge relevant contract terms as unfair and unenforceable.

1.24 As to **option 2**, greater transparency would increase consumers' ability to know and evaluate the bargain they are striking and to make informed transactional decisions. The potential for unfair surprise from price rises would, accordingly, be reduced. Ofcom guidance on the application of GC9.6 and the UTCCRs to price rises and relevant contract terms could also help to limit the inconsistent and uncertain application of those rules.

1.25 Our assessment, however, is that there are already a number of rules imposing transparency requirements. The evidence suggests these have not operated effectively. Moreover, we take account of the importance of price terms to consumers

and the UTCCRs' indication that fundamental fairness requires that such terms may only be varied (and prices increased) in very limited circumstances (if at all). Likewise, the large numbers of consumer complaints, which suggest the current rules are not securing the required fairness. Each of these, in our assessment, point to a need, absent any countervailing benefit for consumers arising out of price variation terms, for clearer and certain rules applied uniformly by Communications Providers for the protection of consumers generally.

- 1.26 Our assessment of **option 3** is broadly similar to that of option 2. If Communications Providers were required to secure that consumers could only be subject to price rises where they expressly opt-in to variable price contracts, the extent to which consumers would be aware of the bargain they are striking, and their ability to make informed transactional decisions, would be increased. The potential for unfair surprise from, and the inability to avoid, price rises would, accordingly, be reduced.
- 1.27 This option would, therefore, have the potential to address a number of the aspects of harm we have identified. In those respects, it could protect consumers in line with the fundamental requirements of fairness that the current rules seek, but appear to be failing, to secure.
- 1.28 Our concern, nonetheless, is that this option would not provide the certain protection necessary to secure such fairness in respect of the price where consumers opt into variable price contracts. An opt-in mechanism for variable price contracts would not, in itself, secure sufficient protection for consumers against unfair price rises in those contracts. There would remain a need for amended rules to secure fairness in practice in respect of those contracts.
- 1.29 We also have concerns this option would add further complexity to the already complex choices consumers have to make in the markets for communications services. It is also vulnerable to the risk of providers offering only unattractive fixed price contracts, leaving variable price contracts unaffected and the harm relating to them unaddressed.
- 1.30 As to **option 4**, our assessment is that modifying GC9.6 as proposed would be the appropriate and necessary measure to address harm identified. The existing requirements as to transparency would continue to apply. To the extent they do not enable consumers to evaluate bargains and make informed transactional decisions, consumers would be protected against unfair surprise by the ability to withdraw from a contract without penalty should the Communications Provider increase the price. This ability to avoid the effects of price rises would also mean that the risks of costs increases would lie where we consider most appropriate, with providers.
- 1.31 Moreover, the ability to avoid price rises would be in line with the straightforward principles of fundamental fairness applicable to all providers, and which the UTCCRs and the provisions of GC9.6 seek to reflect but are not being met. This option would provide for clear and certain rules in this regard. This would address the inconsistent and uncertain application of the current rules, and enhance the prospects of consumers in practice being able to avoid unfair price rises. Modifying GC9.6 as proposed under this option would also be consistent with the express requirements of the Universal Services Directive.
- 1.32 Ofcom accordingly proposes to modify GC9.6 in line with this option, as set out in the Notification at Annex 8 to this document. We propose that those modifications should apply in respect of all aspects of the price payable in exchange for services under a

contract and for the benefit of small business customers as well as consumers. We explain why in the following sections.

- 1.33 Interested parties are requested to submit responses to this consultation to us by 14 March 2013. Following consideration of responses and any other relevant information, we intend to publish a statement setting out our decisions. This will include notification of any modifications to GC9.6. Our present intention, if we decide to modify GC9.6 as proposed, is that any such modification would come into effect three months from the date of our statement.

## Section 2

# Introduction

## Ofcom's role in protecting consumers

- 2.1 Ofcom is the regulator for the communications sector. Under section 3(1) of the Communications Act 2003, Ofcom's principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.2 Section 3(3) of the Act sets out that, in performing our duties under section 3(1), Ofcom must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to any other principles appearing to us to represent the best regulatory practice. We must also, where relevant, have regard in performing those duties to matters including the desirability of promoting competition in relevant markets (section 3(4)(b)). Section 3(5), meanwhile, says that, in performing our duty of furthering the interests of consumers, Ofcom must have regard, in particular, to the interests of those consumers in respect of matters including price.
- 2.3 Pursuant to section 4(1)(a) of the same Act, in carrying out our functions in relation to electronic networks and services, Ofcom is also under a duty to act in accordance with the six Community Requirements.
- 2.4 The six Community Requirements give effect, amongst other things, to the requirements of Article 8 of the Framework Directive (2009/140/EC which amended Directive 2002/21/EC). These include, in particular, the requirement to promote competition in relation to the provision of electronic communications networks and services by ensuring that users derive maximum benefit in terms of choice, price and quality (Art 8(2)(a)), and the requirement to promote the interests of citizens by ensuring a high level of protection for consumers in their dealings with suppliers (Art 8(2)(b)) and by promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services (Art 8(2)(d)).
- 2.5 We are constantly working to achieve the best outcomes for citizens and consumers within our day-to-day responsibilities. We want to make sure that consumers get the best choice and value for money from their communications services and are protected from unfair terms and practices, while allowing competition to thrive. We need to be prepared to intervene if things aren't working as well as they should.

## General Condition 9: monitoring and enforcement programme<sup>7</sup>

- 2.6 In January 2012, we launched a monitoring and enforcement programme into Communications Providers' compliance with General Condition 9 ("GC9") of the consolidated version of the General Conditions of entitlement which sets out the requirement to offer contracts with minimum terms ("the Programme")<sup>8</sup>. The purpose of the programme was to monitor compliance following changes made to GC9 to

<sup>7</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01082/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01082/)

<sup>8</sup> <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/>

implement the revised EU electronic communications framework in May 2011, and Ofcom's decision in September 2011 to prohibit automatically renewable contracts ("ARCs"). As the Programme relates to contract terms, we also consider the fairness of relevant contract terms under the Unfair Terms in Consumer Contract Regulations 1999 ("the UTCCRs")<sup>9</sup> in accordance with our powers under those regulations and as a designated enforcer under Part 8 of the Enterprise Act 2002<sup>10</sup>.

- 2.7 Following price rises announced by a number of Communications Providers in late 2011 and during 2012<sup>11</sup>, we became aware of issues regarding the interpretation of the term "material detriment" in the part of the condition (GC9.6) relating to Communications Providers' obligation to notify subscribers of certain modifications made to the contract and their ability to cancel the contract without penalty<sup>12</sup>.
- 2.8 We also noted a significant increase in complaints to our Consumer Contact Team (CCT) from consumers affected by price rises. Ofcom examined 1644 consumer complaints about changes to terms and conditions in the period from September 2011 to May 2012 and identified the following key reasons for the complaints:
- 25% of consumers complained about the principle of price rises in fixed term contracts. They considered the practice to be "unfair" and did not think it acceptable that providers can raise prices when they have already agreed to a fixed term contract. They considered that price variation terms alter the balance of the contract in favour of the Communications Provider and harm results as the consumer has little choice but to pay the higher price because they cannot withdraw from the contract without paying an early termination charge ("ETC"). These consumers did not mention concerns with the transparency of price variation terms.
  - 24% of consumers specifically raised concerns in relation to harm arising from a lack of transparency of variation terms. These consumers complained about the price rise because they had assumed that the price was "fixed" for the duration of the contract term. They complained that they were not made aware at point of sale that the price might change nor were they made aware of the price variation term in the terms and conditions. Therefore, subsequent price rises came as an "unpleasant surprise" to them.
  - 16% of consumers complained specifically about the harm arising from the amount of the price rise and how it could result in material detriment and/or financial hardship. Some said that the increase was too much and would be unaffordable for them but their Communications Provider considered that the

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<sup>9</sup> Under the Programme, we assessed the terms and conditions of Communications Providers against the provisions in GC9 and the UTCCRs. We have identified some potential compliance concerns. Our intention is to contact Communications Providers individually to raise our concerns in due course and take action in accordance with our published enforcement guidelines as appropriate.

<sup>10</sup> As a designated enforcer, Ofcom is empowered to take action in respect of infringements of certain consumer protection legislation. Specifically, Ofcom can seek undertakings from Communications Providers and can apply for Enforcement Orders to prevent infringements which harm the collective interests of UK consumers.

<sup>11</sup> See Annex 7 which lists the price rises by the major fixed line, broadband and mobile providers since September 2011.

<sup>12</sup> GC9.6 states that: "The Communications Provider shall: (a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber; (b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and (c) at the same time as giving the notice in condition 9.6(a) above, shall inform the Subscriber of its ability to terminate the contract if the proposed modification is not acceptable to the Subscriber."

increase did not constitute material detriment. They had originally taken the contract out because it was within their budget but the price rise over the remainder of the minimum contract period would mean it was no longer affordable.

- 2.9 We also received evidence from Which? as part of its “Fixed means Fixed” campaign which asks Ofcom to take action to stop mobile providers making in-contract price rises. Which?’s research found that over 60% of mobile contract customers said that they expected monthly bills and inclusive allowances to remain the same in fixed term contracts. The research also found a lack of awareness amongst consumers that providers can raise prices during fixed term contracts<sup>13</sup>. In addition, a mystery shopping exercise found that many consumers were not being told at point of sale that the price might increase during the minimum contract term. In some cases sales staff categorically and incorrectly stated that prices were fixed for the term of the contract<sup>14</sup>.
- 2.10 In light of the factors above, we have re-assessed the views we took when transposing the requirements of Article 20(2) of the Universal Services Directive (see section 3 below). In particular, about whether the current UK rules leave consumers exposed to unfair surprise that prices are not fixed for contractual fixed-term periods and do not provide enough certainty and protection for consumers to avoid the effect of relevant price rises. This consultation considers the consumer harm we have identified from price rises in fixed term contracts and invites stakeholder views on the options to address that harm.

### “Fixed term” contracts

- 2.11 For the purpose of this consultation, “fixed term contracts” means contracts that have a “fixed” initial/minimum term. Many Communications Providers offer fixed term contracts that require consumers to commit to paying for a service for a minimum contract period (MCP). The consumer is tied to those terms and would have to pay an ETC in order to exit the contract before the end of the MCP.
- 2.12 Fixed term contracts may include a provision which allows the provider to make variations (price and non-price) to the contract at any time. Consumers are protected to some degree from the impact of such variations by GC9.6 and general consumer protection law.
- 2.13 Ofcom’s Communications Market Report 2012 notes that the average length of new mobile contracts has increased in recent years, and in Q1 2012 more than two-thirds of new contracts had a minimum term of two years, compared to five years previously when this was the case for just 1% of contracts and 80% had a minimum term of 18 months. Similarly, in Q1 2012 31% of new mobile post-pay contracts had a minimum term of 18 months or less, compared to 99% five years previously<sup>15</sup>.
- 2.14 These longer minimum contract periods may be a factor influencing consumer concerns about price rises during fixed term mobile contracts, especially where a price rise is implemented when the consumer still has many months remaining on their contract. Where providers are not allowing consumers to withdraw from the

<sup>13</sup> <http://www.which.co.uk/documents/pdf/the-marketing-of-mobile-phone-fixed-term-offers-which-complaint-290997.pdf>

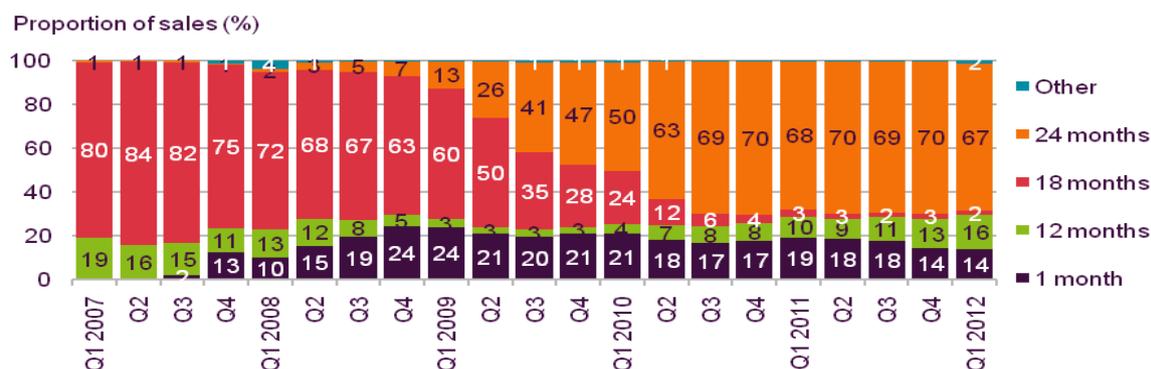
<sup>14</sup> <http://www.which.co.uk/campaigns/technology/fixed-means-fixed/mystery-shopping-fixed-contracts/>

<sup>15</sup> <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr12/>

contract without penalty, the consumer is subjected to having to pay the increased price over a longer period of time and possibly up to 24 months before they are able to switch. Whilst a price rise is usually expressed as an increase on a pay monthly price by the Communications Provider, the cumulative effect of the price rise varies depending on how long the consumer has left on their MCP.

### Graph 1: Tracking post-pay mobile contract lengths 2007-2012

#### Contract lengths for new post-pay mobile connections



Source: GfK Retail and Technology UK Ltd, Contract Length Sales of new Mobile Connections, Q1 2007 to Q1 2012.

Notes: England, Scotland and Wales only (excludes Northern Ireland); based on GfK's coverage of 94% of the consumer market; based on new post-pay connections; excludes contract renewals; only represents sales through consumer channels (i.e. most business connections are excluded).

## Purpose of this document

2.15 The purpose of this document is to:

- Summarise the findings of our review of Communications Providers' price variation terms and the consumer concerns and the harm we have identified.
- Describe the current situation and rules regarding Communications Providers' ability to make price and other variations in a fixed term contract.
- Set out potential options to address any consumer harm we consider may arise out of price rises in fixed term contracts.
- Invite views from stakeholders on the effectiveness of current consumer protection mechanisms, the options for improved consumer protection and the impacts of the options.
- Make proposals to amend GC9.6 which, in our provisional view, would address the relevant consumer harm.

## Structure of this document

2.16 This document is structured as follows:

- Section 3 sets out the legal framework and explains the current rules protecting consumers in relation to contract variations.

- Section 4 identifies the consumer harm from price rises in fixed term contracts and discusses the causes of that harm.
- Section 5 discusses other issues identified in relation to price rises in fixed term contracts which we have taken into account in our consideration of the options to address consumer harm.
- Section 6 sets out the options to address the consumer harm arising from price rises in fixed term contracts and considers the impacts of each option. It also contains our proposals to amend GC9.6.

## General impact assessment

- 2.17 The analysis presented in this document represents an impact assessment, as defined in section 7 of the Communications Act 2003 (“the Act”).
- 2.18 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the 2003 Act, which means that generally Ofcom has to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom’s activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of its policy decisions. For further information about Ofcom’s approach to impact assessments, see our guidelines<sup>16</sup>.
- 2.19 Specifically, pursuant to section 7, an impact assessment must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act) is secured or furthered by, in relation to what we propose.

## Equality Impact Assessment

- 2.20 In carrying out our functions, we are also under a general duty under the Equality Act 2010<sup>17</sup> to have due regard to the need to:
- eliminate unlawful discrimination, harassment and victimisation;
  - advance equality of opportunity between different groups; and
  - foster good relations between different groups,
- in relation to the following protected characteristics: age; disability; gender re-assignment; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
- 2.21 Such equality impact assessments (“EIAs”) also assist us in making sure that we are meeting our principal duty under section 3 of the 2003 Act discussed above.

<sup>16</sup> *Better Policy Making* – Ofcom’s approach to Impact Assessment, Ofcom, 21 July 2005, <http://stakeholders.ofcom.org.uk/consultations/better-policy-making/>

<sup>17</sup> Ofcom conducts equality impact assessments in order to fulfil its duties under section 149 of the Equality Act 2010.

- 2.22 We have therefore considered what (if any) impact the options in this consultation may have on equality. We do not consider the impact of the options in this consultation to impact on any particular group within society.
- 2.23 We have therefore not carried out separate EIAs in relation to race or gender equality, or equality schemes under the Northern Ireland and Disability Equality Schemes.

## **Our consultation process**

- 2.24 This consultation and the responses received forms an important part of our assessment of what, if any, remedies are required to address the consumer harm in relation to price rises in a fixed term contract.
- 2.25 Ofcom has published general guidelines on its consultation process<sup>18</sup>. In accordance with our guidelines, we consider that this document falls within “Category 1: consultations which contain major policy initiatives and/or of interest to a wide range of stakeholders” and will be consulting for 10 weeks.
- 2.26 Our consultation questions are listed in Annex 4. We invite responses and any supporting information by 14 March 2013.
- 2.27 Following the consultation, once we have considered responses, we will publish a statement setting out our conclusions on whether consumers need additional protection from price rises within fixed term contracts, including any notification of modifications to General Conditions that are needed to implement our conclusions. We will aim to publish our statement by June 2013.

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<sup>18</sup> <http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>

## Section 3

# Legal framework

## Introduction

3.1 We have already referred in section 2 to Ofcom's role in protecting consumers and our duties under sections 3 and 4 of the Act. In this section we consider the background to General Condition 9 ("GC9"), Ofcom's consumer protection powers in relation to setting conditions under the General Authorisation regime and consumer protection law more generally.

## General Condition 9

3.2 Ofcom has the power under section 45 of the Communications Act 2003 ("the Act") to impose various types of conditions on Communications Providers. These include General Conditions ("GCs") which apply to all providers, although not every GC is relevant to every provider or to every type of consumer or service provided. A GC is a condition authorised or required by one or more of sections 51, 52, 57, 58 or 64 of the Act. In particular, under section 51(a) Ofcom may set conditions making such provisions as Ofcom considers appropriate for protecting the interests of the end-users of public electronic communications services. Accordingly, the GCs include, for example, rules on the requirement to offer contracts with minimum terms and rules on sales and marketing to domestic and small business customers.

3.3 In order to create or modify a GC, Ofcom must be satisfied that such a condition or modification is:

- objectively justified,<sup>19</sup>
- not unduly discriminatory,
- proportionate, and
- transparent in relation to what it is intended to achieve.<sup>20</sup>

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

3.5 GC9.6 (of the consolidated version of the General Conditions of entitlement as at 22 November 2012) states that:

"The Communications Provider shall:

- (a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;

<sup>19</sup> This is an express requirement where we modify a GC. It is also relevant where we set a GC, given the need for the condition to meet a proportionality requirement.

<sup>20</sup> Section 47 of the Communications Act 2003.

- (b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and
- (c) at the same time as giving the notice in condition 9.6(a) above, shall inform the Subscriber of its ability to terminate the contract if the proposed modification is not acceptable to the Subscriber.”<sup>21</sup>

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

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

- 3.7 The USD does not refer to a requirement for likely material detriment to the subscriber of any proposed modification before that subscriber can terminate the contract. Nonetheless, when it first introduced this obligation in 2003 through making GC9, Oftel read into the then Article 20(4) of the USD the words ‘materially detrimental’. (In that any modifications to the contract had likely to be of material detriment to the Consumer before s/he could withdraw from that contract as a consequence of the modification.) As Oftel explained at the time, this reflected the test the OFT used in Unfair Terms in Consumer Contracts Regulation 1999 (‘UTCCRs’) cases to decide whether contractual terms were fair or not.
- 3.8 When Ofcom consulted on GC9 in February 2011 in relation to implementing the revised EU framework, we said that we considered the material detriment threshold was still relevant and likely generally to reflect current consumer protection in this area (in particular the UTCCRs which provide that contract terms are unfair if, amongst other things, they create a “significant imbalance” in the consumer’s (subscriber’s) and supplier’s (CP’s) rights and obligations under the contract)<sup>22</sup>. Our position, therefore, was that retaining a “material detriment” requirement would generally reflect the “significant imbalance” requirement used to determine the unfairness of relevant contract terms.
- 3.9 We also stated that we believed this approach was in line with the requirement for Framework obligations to be exercised in a proportionate manner; whereby, in this case, any proposed contract modifications must materially affect the subscriber before that subscriber can choose to exit from the contract. Our intention was not to rule out contract variations altogether. For example, we did not want to prevent Communications Providers from making variations that are beneficial or have a neutral impact on a subscriber. However, we did want to prevent subscribers from being tied into a contract where a variation has a materially detrimental effect. We did not specifically discuss the issue of price rises as opposed to any other contract

<sup>21</sup> <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf>

<sup>22</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/gc-usc/summary/gc-usc.pdf>

variations<sup>23</sup>. At that time, it was still the case that mobile providers generally had not sought to impose price rises on consumers in fixed term contracts and therefore consumers of mobile services had little to no experience of price variation terms, how providers applied the material detriment test and the effect on consumers. As we set out in section 2 above and 4 below, the complaints we have received from consumers and via Which? have caused us to re-consider this view.

### **How other Member States have transposed Article 20(2) of the Universal Service Directive**

- 3.10 In August 2012, Ofcom sent out a survey to other BEREC (Body of European Regulators for Electronic Communications) members to ask how they had transposed Article 20(2) of the USD.
- 3.11 We received responses from 13 EU Member States: Austria, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Malta, Poland, Portugal, Slovakia, Slovenia and 3 other BEREC members: Croatia (acceding country to the EU), Switzerland (not in the EU) and Turkey (EU candidate country). The detailed responses can be found in Annex 6.
- 3.12 It is interesting to note that most respondents indicated that subscribers have the right to exit the contract without penalty if the price is increased by any amount. Typically, non-price contract variations are allowed insofar as the subscriber is not compromised e.g. the subscriber can only exit the contract without penalty where the change is “not in favour to the customer”, “less favourable”, “to the detriment of the subscriber”, “to their disadvantage” etc. However, the contractual changes that would be considered to compromise the subscriber and the circumstances that would fall within these tests are not defined.

### **The Unfair Terms in Consumer Contract Regulations 1999 (“the UTCCRs”)<sup>24</sup>**

- 3.13 Ofcom is a “designated enforcer” under Part 8 of the Enterprise Act 2002, meaning that we are empowered to take action to enforce certain specified consumer protection legislation, including the UTCCRs. Ofcom also has the power to enforce the UTCCRs directly (as a “Qualifying Body” under the UTCCRs). It is important to note that the UTCCRs only apply to consumer (i.e. residential customers) contracts whereas GC9.6 applies to all subscribers (i.e. residential and business customers).
- 3.14 A term in a consumer contract allowing the Communications Provider to make unilateral changes to that contract may be unfair under the UTCCRs if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer. The requirement of good faith embodies a general principle of fair and open dealing. It means that terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer should be given appropriate prominence. Terms which do not meet the fairness requirements are unenforceable.
- 3.15 This requirement for fairness is designed to protect the consumer as the presumptively weaker party when contracting with a trader (here, a Communications Provider) on the latter’s standard terms. It is designed to ensure that an imbalance in

<sup>23</sup> See Annex 5 for extracts on the discussion in relation GC9.6 taken from Ofcom’s consultation and statement on implementing changes to the revised EU framework in 2011.

<sup>24</sup> <http://www.legislation.gov.uk/ukSI/1999/2083/contents/made>

the parties' bargaining power is not reflected in an imbalance in the contractual terms.

- 3.16 Amongst other things, the need for fairness is meant to ensure that the consumer's legitimate interests are protected and the contract terms do not contain any unfair surprises. The contract terms should not be inconsistent with the idea of consumers being aware of the bargain they are striking, making informed purchasing decisions and being able to rely on the terms of that bargain.
- 3.17 The indicative and non-exhaustive list of terms which may be regarded as unfair in Schedule 2 of the Regulations, includes a reference to any term which enables the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract (para 1(j)). Also included on the list of terms which may be regarded as unfair are terms allowing a supplier of services to increase their price without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded (para 1(l)). These examples are stated to be without hindrance to price indexation clauses, provided that the method by which prices vary is explicitly described. The right to vary prices is also potentially unfair if there is no indication as to the level and timing of any price rises.
- 3.18 The OFT has published guidance on the UTCCRs which discusses suppliers' rights to vary terms generally and price variation clauses<sup>25</sup>. We note that the OFT's discussion on the potential unfairness of variation terms is consistent with key consumer concerns highlighted by recent price rises in the telecommunications market. The guidance considers how variation terms could tilt the balance of the contract unfairly in favour of the supplier but it also notes how an element of balance can be restored so that such terms are more likely to be found fair.
- 3.19 On the issue of price variation clauses, OFT's guidance states that:
- “12.1 ...A clause allowing the supplier to increase the price – varying the most important of all of the consumer's contractual obligations – has clear potential for unfairness.
  - 12.2 Any purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable.....It also applies to rights to increase payments under continuing contracts where consumers are “captive” – that is, they have no penalty-free right to cancel.
  - 12.3 A price variation clause is not necessarily fair just because it is not discretionary.....Suppliers are much better able to anticipate and control charges in their own costs than consumers can possibly be. In any case, such a clause is particularly open to abuse, because consumers can have no reasonable certainty that the increases imposed on them actually match net cost increases.”
- 3.20 The guidance then goes on to explain that a degree of flexibility in pricing may be achieved fairly in a number of ways such as by specifying the level and timing of any price rise (within narrow limits if not precisely), by linking terms permitting price rises

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<sup>25</sup> [http://www.of.gov.uk/shared\\_of/reports/unfair\\_contract\\_terms/oft311.pdf](http://www.of.gov.uk/shared_of/reports/unfair_contract_terms/oft311.pdf)

to a relevant published price index such as RPI or by allowing consumers to end the contract and not experience any financial loss as a result of cancellation.

- 3.21 It is important to note that the UTCCRs and GC9.6 are not the same. The UTCCRs set out the basis on which a contractual term may be considered unfair whilst GC9.6 sets out a requirement which protects subscribers by placing a positive obligation on Communications Providers to notify and give subscribers the right to withdraw from their contract without penalty in the event of any modification likely to be of material detriment. Therefore, providers are required to ensure compliance with the UTCCRs and GC9.6 separately.
- 3.22 Both sets of rules can, however, be seen as working towards similar goals. As described above, standard form contracts between consumers and, in this context, Communications Providers, should be balanced and not contain unfair surprises. One aspect of this is that consumers should receive the contractual bargain they signed up to and legitimately expect. They should have protection against not doing so. Ofcom does not see how there can be any reasonable objection to rules that seek to achieve that position.
- 3.23 The UTCCRs' provisions relating to contract terms allowing for price variations, for example, seek to ensure that consumers get what they bargained for and expect in respect of one of the key terms: the price. A term allowing price increases without giving the consumer the right to cancel without penalty, especially where the price rise could be above some objective measure like RPI, is liable to be unfair (though there may also be circumstances in which these kinds of terms are fair). In other words, the law reflects a basic requirement of fairness: that the price agreed should generally be fixed (and variable, if at all, only in very limited circumstances). GC9.6 seeks to give consumers similar protection against the effects of price rises (amongst other things).
- 3.24 In this review, Ofcom has considered whether these rules achieve these legitimate aims in clear, fair and certain ways (in line with the general legal principle that rules should be clear, certain and genuinely effective).

## The Consumer Protection from Unfair Trading Regulations 2008 (“the CPRs”)<sup>26</sup>

- 3.25 Also potentially relevant here are the CPRs. Ofcom is also a designated enforcer of these under Part 8 of the Enterprise Act 2002. Amongst other things, the CPRs prohibit unfair commercial practices (including sales and marketing activity)<sup>27</sup> that involve misleading omissions by traders (Communications Providers) which affect or are likely to affect the average consumer’s “*transactional decisions*.”
- 3.26 Under Regulation 6(1), a misleading omission includes any commercial practice which, in its factual context, and taking account of certain matters:<sup>28</sup>

<sup>26</sup> <http://www.legislation.gov.uk/ukxi/2008/1277/contents/made>

<sup>27</sup> Regulation 2 of the CPRs defines a “commercial practice” as:

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

<sup>28</sup> all the features and circumstances of the commercial practice; the limitations of the medium used to communicate the practice (including limitations of space and time); and where the relevant medium of

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

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communication imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means (CPRs Regulation 6(2)).

## Section 4

# Price rises in fixed term contracts: consumer harm

## Introduction

- 4.1 In this section we discuss the impacts of price rises in fixed term contracts. We consider both positive and negative impacts in relation to Communications Providers' ability to increase prices and the consumer harm arising from this.
- 4.2 We consider the key cause of consumer harm to be Communications Providers' ability to unilaterally raise prices in fixed term contracts in the absence of an automatic right to terminate without penalty on the part of consumers. The other, related, causes of harm are Communications Providers' inconsistent application of the "material detriment" test in GC9.6, the uncertain application of the UTCCRs in this context, and a lack of transparency of price variation terms at point of sale and in contractual information given to consumers by Communications Providers.
- 4.3 We have primarily identified consumer harm and the causes of the harm from:
- Complaints to Ofcom's Consumer Contact Team (CCT) (see section 2).
  - Our review of variation terms in Communications Providers' terms and conditions.
  - Information provided by stakeholders such as Which? as part of our review of contractual terms and conditions and also specifically on the issue of price rises in fixed term contracts.
- 4.4 We consider that the following key principles which take account of our regulatory duties under the legal framework are vital to providing adequate consumer protection in a competitive market:
- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
  - **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
  - **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and
  - **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).

We use these principles as a framework to assess the consumer harm from price rises in fixed term contracts and the options in section 6 for addressing that harm.

## Key causes of harm

### Communications Providers' ability to raise prices in fixed term contracts without an automatic right to terminate without penalty on the part of consumers

- 4.5 We have identified from consumer complaints (made directly to Ofcom and via Which?) harm resulting from price rises imposed as a result of Communications Providers' ability to increase prices when the consumer is tied into a fixed term contract. Our CCT data shows that a quarter of consumers (407 of 1644 consumers contacting us from September 2011 to May 2012) complaining about price rises did so because they consider it "unfair" that the price can change when they are tied into a fixed term and cannot afford to exit the contract if they are unhappy with the change because they would have to pay an early termination charge. It seems to Ofcom a fair assumption that most, if not all, of these consumers made this complaint to us because they had been notified of the price increase while not also being given notice that they had the ability to withdraw from the contract without penalty.
- 4.6 Consumers appear to consider that they are placed in an unfair position because the balance of the contract is weighted in favour of the Communications Provider. The consumer has little choice but to accept the price rise or pay an early termination charge if they want to exit the contract. Some consumers suggested that Communications Providers should raise revenues to cover their increasing costs by charging new consumers more rather than existing consumers.
- 4.7 Where providers consider that they have to raise prices in a fixed term contract, some consumers take the view that a fair balance would exist if they were able to withdraw from the contract without penalty if they do not want to accept the price rise.
- 4.8 Which?'s "Fixed means fixed" campaign generally supports the views of consumers discussed above. Which? submitted a complaint to Ofcom in July 2012 asking Ofcom to intervene as it believes price and all other aspects of fixed deals should remain the same for the contract period when consumers are also tied in<sup>29</sup>. Which? considers that if a mobile operator sells a contract as fixed, it should not just be a fixed length contract, with an early termination charge if consumers try to cancel, but other key terms such as service offerings (i.e. the number of minutes, texts and data you get) and price should be fixed too.
- 4.9 Whilst it has been price rises that has brought the issue of contractual variations to the fore, GC9.6 also allows Communications Providers to make non-price variations during a fixed term contract. However, we have not identified any widespread consumer harm in relation to how the current rules have been used for any non-price variations. For this reason, our consultation and the options set out are targeted at the currently identified harm in relation to price rises during a fixed term contract.
- 4.10 We are aware that if restrictions are imposed on price increases in fixed term contracts, then providers may respond by making variations to other terms. For example, by reducing call allowance (and/or text and/or data allowance where relevant) included in a consumer's monthly subscription price. However, we would consider such a change to effectively constitute an increase in the unit price paid by the consumer and this would therefore be considered to be a price rise and subject to the same restrictions.

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<sup>29</sup> <http://www.which.co.uk/documents/pdf/the-marketing-of-mobile-phone-fixed-term-offers-which-complaint-290997.pdf>

- 4.11 Which? also submits that if contracts are permitted to allow for price rises during the fixed term then operators must ensure that this is made clear to consumers in their advertising and at point of sale and that they should allow consumers to switch providers without penalty. Which?'s campaign has attracted over 37,000 pledges of support from members of the public so far on the issue that "mobile providers shouldn't increase prices during a fixed contract"<sup>30</sup>.
- 4.12 What this evidence from consumers and Which? suggests, in Ofcom's provisional view, is that the current rules designed to balance the rights and obligations of Communications Providers and consumers, and to protect the latter, are not operating effectively in certain respects. In particular:
- the rules are not operating so as to meet consumers' legitimate expectations as to the price - one of the most important terms of the contract – that it, like other important obligations the contract places on the consumer (like its length), is and should be fixed;
  - instead, those rules are leaving consumers exposed to unfair surprise and/or unfair effects; and
  - the rules are not giving consumers sufficient ability to avoid these surprises and effects (by ending contracts without penalty).

We have considered the current rules and the options for regulatory intervention in light of this harm.

### Assessment of the scale of consumer harm

- 4.13 The magnitude of consumer harm from price rises in fixed term contracts will depend on a number of factors. The consumers potentially affected are those still within their minimum contract period. The aggregate size of any increased payments will depend on the exact number of tariff plans affected and the number of consumers on each, the size of future price increases and their frequency, the average remaining number of months on a consumer's contract and whether providers choose to volunteer to waive any early termination charges and/or strike a bargain with the consumer following a complaint.
- 4.14 There are currently 24 million fixed residential connections and 81.7 million mobile subscriptions<sup>31</sup>. Data is not available for either sector on the number of fixed contract consumers who are still within their minimum contract period. However, there has been an increase in the numbers of fixed contract consumers in recent years in the mobile sector. Correspondingly, there has been a steady decline in pre-pay contracts, which do not typically feature fixed terms. Currently, 51.1% of subscriptions are post-pay. Therefore, the number of consumers potentially affected by price rises in a fixed term contract has increased.
- 4.15 Similarly, we do not have data for consumers' average number of months remaining on their contract. In the mobile sector, the average length of new contracts has increased with the increased take-up of smartphones and in 2011 68% of new

<sup>30</sup> Correct as of 2 January 2013, <http://www.which.co.uk/campaigns/technology/fixed-means-fixed/pledge-your-support/>

<sup>31</sup> Data is for Q2 2012. See Section 1 Table 7, and Section 3 Table 3: [http://stakeholders.ofcom.org.uk/binaries/research/cmr/telecoms/Q2\\_2012\\_telecoms\\_data\\_tables.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/telecoms/Q2_2012_telecoms_data_tables.pdf)

contracts were two years in length<sup>32</sup>. This trend means that the potential loss for consumers from price rises in fixed term contracts has risen.

- 4.16 With regards to the size and frequency of price rises in fixed term contracts, we consider there is a risk of these becoming a standard and regular practice in the communications sector. We note that some providers have increased prices more than once since 2011. Since most providers set a threshold (usually by up to RPI) before they allow consumers to exit without penalty the incentive to raise prices once consumers have signed up to them will be large and any reputational damage to a provider will be diffused because competitors have pursued similar policies in the past.
- 4.17 The size of any future price increases is likely to depend on the rate of increase in the Retail Price Index (RPI), since this is currently a standard benchmark used by some Communications Providers in defining 'material detriment'. The Bank of England's inflation target of 2% is linked to the increase in the Consumer Price Index (CPI), which is typically below that for RPI<sup>33</sup>. As a conservative estimate, then, we can assume future price increases might be around 2% per year. Where inflation exceeds its long run target (as it has done so recently<sup>34</sup>) or where RPI is above CPI, increases could be more than this. It could also be more where a Communications Provider adopts a different benchmark for defining 'material detriment'.
- 4.18 Arguably, if price rises in fixed term contracts become a standard practice that Communications Providers anticipate when setting contract terms, any excess revenues from future price increases will be reflected in lower initial headline prices. This 'waterbed effect', whereby competition ensures that additional revenues are simply offset via a lower (initial) headline (monthly subscription) price, requires that consumers place a significant weight on the headline price when comparing offers. But since future price increases mean the headline price is less informative, consumers may become less responsive to it, dampening price competition among Communications Providers. This reduced price transparency means we do not believe a waterbed effect will fully compensate consumers for any harm from price rises in a fixed term contract.
- 4.19 Furthermore, uncertainty about future prices could make new customers wary about signing up for new contracts with minimum contract periods, opting instead for pay-as-you-go offers or contracts without minimum contract periods.

### Ofcom's view

- 4.20 Ofcom considers that the setting of prices should be a function of a competitive market. In order to run a successful business in a competitive market, a provider has to be able to forecast accurately to some degree its likely costs and revenues. Therefore, a provider should be able to anticipate how they might rise or fall over the life of the contracts it enters into with its customers and what return it needs to make over that period, far better than a consumer can.
- 4.21 Current rules give providers some discretion over price rises before they allow consumers to exit the contract without penalty. It could, therefore, be argued that

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<sup>32</sup> See Figure 21 in Ofcom's Consumer Experience Report 2011, [http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-11/research\\_report\\_of511a.pdf](http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-11/research_report_of511a.pdf).

<sup>33</sup> See Figure F, [http://www.ons.gov.uk/ons/dcp171778\\_286398.pdf](http://www.ons.gov.uk/ons/dcp171778_286398.pdf)

<sup>34</sup> See Figure A, [http://www.ons.gov.uk/ons/dcp171778\\_286398.pdf](http://www.ons.gov.uk/ons/dcp171778_286398.pdf)

providers are able to use the current rules to pass on some if not all of the costs of any inaccurate forecasts on to their consumers. For this reason, the current rules may not be adequate in protecting consumers from risks that the Communications Provider ought to bear, resulting in harm to the consumers' financial position instead of the provider. However, some providers consider that the current rules are appropriate as they give them some commercial flexibility and that it is appropriate for risk to be shared with consumers who are, in any case, protected to some degree from the potential impact of price rises by the UTCCRs and GC9.6.

- 4.22 We accept that there may be benefits for consumers from contract terms that allow price increases. There are two potential sources of these benefits, both stemming from unexpected cost increases that the Communications Provider may face over the duration of the contract. First, price increases may allow the Communications Provider to preserve service quality in the face of 'cost shocks' and second, the initial offer may be more attractive since the Communications Provider does not have to incorporate a 'risk premium' to reflect the cost uncertainty.
- 4.23 These benefits are difficult to quantify. However, for a number of reasons, our current view is that the benefits to consumers are likely to be small. First, many of the costs of supplying a service will have already been sunk at the point the contract is signed, in particular the cost of building any network the Communications Provider owns. The cost of any equipment provided to the consumer will also have been incurred once the contract has started.
- 4.24 Second, even where underlying costs are subject to change Communications Providers will, for many cost categories, have options available to mitigate the effects. Even where a provider faces some uncertainty it is able to take steps to manage the potential impact of increasing costs.
- 4.25 Finally, given their expertise and experience, Communications Providers are in a good position to forecast their costs when setting their prices. From this we would expect that their cost forecasts are unbiased, meaning actual costs are as likely to fall below as above the predicted costs<sup>35</sup>. Even though Communications Providers will lose when costs are unexpectedly high they are equally likely to gain from costs being unexpectedly low. We would expect suppliers to regard these scenarios as cancelling each other out (i.e. they will be broadly 'risk neutral'<sup>36</sup>) and it is common practice across all industries for contracts to provide for relevant tax increases such as VAT to be passed through.
- 4.26 Ofcom's view, in light of the foregoing analysis, is that Communications Providers should generally bear the risks of cost increases during the lifetime of fixed term contracts.

*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?*

*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?*

<sup>35</sup> To be strict, if the distribution of cost 'shocks' is asymmetric they may be more likely to be positive than negative. However, when weighted by value they will still be equal.

<sup>36</sup> A risk neutral decision maker is one that only cares about the expected (i.e. weighted average) outcomes.

## **Communications Providers' inconsistent application of the "material detriment" test in GC9.6**

- 4.27 We have considered whether the current rules protect consumers against the harm identified above and in light of our provisional view that providers should bear the risk of increases in their costs. We look first at GC9.6, then at the UTCCRs.
- 4.28 The background to GC9.6 and the "material detriment" test is explained in section 3. Whilst Communications Providers can include price variation terms in contracts providing that the term is not considered to be unfair under the UTCCRs, GC9.6 places a positive obligation on providers to notify and give subscribers the right to withdraw from their contract without penalty in the event of any modification likely to be of material detriment.
- 4.29 Ofcom has not issued any guidance on what is likely to constitute material detriment, leaving it for Communications Providers to consider the matter on a case by case basis. This has resulted in different interpretations of what constitutes material detriment by providers and when the notification obligations under GC9.6 are triggered.
- 4.30 As described in section 2, Ofcom examined 1644 consumer complaints about changes to terms and conditions in the period from September 2011 to May 2012. Of these, 16% complained specifically about the amount of the price rise and how it could result in material detriment to them and/or would result in financial hardship. Some said that the increase was too much and would be unaffordable for them – they had originally taken the contract out because it was within their budget but the price rise over the remainder of the minimum contract term would work out as a lot of money overall. This suggests recent price rises have resulted in material harm for some consumers even where the price rise was less than RPI and/or whatever other threshold or criteria the provider has applied to identify material detriment.
- 4.31 Different providers have different price variation terms in their contracts which allow them to raise their prices up to a certain amount (e.g. by RPI and/or capped by a specified percentage) or a certain frequency (e.g. once every 12 months) before it triggers consumers' right to terminate without penalty. Some providers state that they will determine whether material detriment is likely to result from such changes. However, a minority of providers allow subscribers to withdraw from their contract without penalty for any price rise, regardless of whether they consider the price rise to constitute material detriment.
- 4.32 We also found that some Communications Providers set different thresholds for when the subscriber can leave without penalty for different pricing elements of the service.
- 4.33 For example:
- One provider's pay monthly contract allows subscribers to leave without penalty if:
    - their monthly subscription charge (defined as the fixed amount paid on a monthly basis which does not include any out of bundle costs) is increased by more than RPI or,

- they increase any of their charges (apart from Additional Services) in such a way that would have increased the subscriber's total bill for the immediately previous month by more than 10%.
  - Another provider's pay monthly contract allows subscribers to leave without penalty if:
    - line rental charges are increased by more than RPI or,
    - if an increase in charges results in the subscriber's bill (based on usage in the previous month) increasing by more than 10%.
- 4.34 We note from those terms that the providers have separated out price rises for what may be considered the "central" elements of the service, e.g. the line rental/monthly subscription charge with inclusive allowance, from what may be considered "non-central" elements of the service e.g. all other charges not included in monthly subscription charge and any inclusive allowance. Consumers therefore have different levels of protection depending on which aspect of the service and what charges the price rise is applied to.
- 4.35 We found that the most common thresholds set by Communications Providers before subscribers have the right to withdraw from their contract without penalty were price rises up to RPI or up to 10%. We understand that these thresholds are commonly used because price indexation clauses are less likely to be considered unfair under the UTCCRs.
- 4.36 Some Communications Providers have set 10% as the threshold for material detriment because of an OFT case in 1998 relating to a clause in Sky's Pay TV terms and conditions which gave it an unlimited right to increase the subscription charge at any time, by any amount, as often as it wished<sup>37</sup>. The OFT withdrew its objections when the clause was amended to permit annual price rises of up to 10% or RPI (whichever was greater).
- 4.37 Our initial view is to advise caution when using this case as a precedent. We note that in Sky's original contract, it had an unlimited right to increase the subscription charge at any time, by any amount, as often as it wished. Under the revised terms, Sky could raise the charge once during the first 12 months of subscription and it stated that any such increase would not exceed 10% (or the rise in RPI if that should be more) and that a consumer could terminate the contract at any time – even during the initial 12 month minimum period – should the company alter the conditions they signed up to.
- 4.38 Ofcom considers that the Sky case demonstrates the importance ascribed by OFT to the principle of transparency in terms and conditions (in relation to any thresholds for price rises and the circumstances allowing consumers to terminate the contract) and that a purportedly unlimited ability to increase prices is objectionable, rather than the significance (material or not) of the 10% level of the price rise itself. There are other OFT cases that could also be relevant when looking at precedent in relation to terms allowing price rises<sup>38</sup>.

<sup>37</sup> [http://www.ofcom.gov.uk/shared\\_ofcom/reports/unfair\\_contract\\_terms/ofcom246.pdf](http://www.ofcom.gov.uk/shared_ofcom/reports/unfair_contract_terms/ofcom246.pdf)

<sup>38</sup> For example, see other cases on page 96-97 of the same OFT bulletin [http://www.ofcom.gov.uk/shared\\_ofcom/reports/unfair\\_contract\\_terms/ofcom246.pdf](http://www.ofcom.gov.uk/shared_ofcom/reports/unfair_contract_terms/ofcom246.pdf) and other Unfair Contract Terms bulletins. For example, pg 34 of Dec 2001 bulletin [http://www.ofcom.gov.uk/shared\\_ofcom/reports/unfair\\_contract\\_terms/ofcom369.pdf](http://www.ofcom.gov.uk/shared_ofcom/reports/unfair_contract_terms/ofcom369.pdf) , pg 33 of Dec 2003 bulletin

## Uncertainty under the UTCCRs

- 4.39 Similar potential for inconsistency and uncertainty arises under the UTCCRs. As indicated in section 3, paragraph 1(l) of Schedule 2 says terms allowing a supplier of services to increase their price, without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded, may be regarded as unfair.
- 4.40 To re-iterate, this reflects that the price is one of the most important terms for consumers and the importance of certainty in the bargain struck. As the OFT's guidance notes, any right for the supplier (Communications Provider) unilaterally to vary the price is liable to be unfair. The effect is that 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.
- 4.41 The position is, however, complicated, and made significantly less certain, by two points.
- 4.42 First, paragraph 1(l) refers to the consumer's corresponding right to cancel the contract *if the final price is too high in relation to the price agreed when the contract was concluded*. This suggests some latitude for contract terms to provide for price rises limited to lower levels.
- 4.43 Second, and again as indicated above, paragraph 2(d) of Schedule 2 to the UTCCRs provides that, "*Paragraph 1(1) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.*"
- 4.44 This latter provision does not mean that terms providing for price rises using price indexation clauses *are necessarily fair*. They must still meet the fairness requirement in regulation 5(1) of the UTCCRs. But, they do not fall within paragraph 1(l) and so are not subject to the same presumption of unfairness as terms that do fall therein. The implication is that terms using price indexation clauses are more likely fair.
- 4.45 In other words, both these points indicate that, whilst most terms providing for price rises are likely to be unfair where they do not provide consumers with a corresponding right to withdraw from the contract without penalty, some such terms may be fair.

### Ofcom's view

- 4.46 Ofcom's provisional analysis is that the rules in GC9.6 and the UTCCRs do not, in light of the above, provide consumers with sufficient clear and certain protection to enable them to avoid price rises that are unexpected and/or unfair.
- 4.47 As far as GC9.6 is concerned, it leaves consumers exposed to the following risks:
- it effectively gives Communications Providers too much latitude to decide (in the first instance) whether a price rise is likely to cause material detriment and whether, as a result, to give consumers notice of the price rise and the right to end the contract without penalty;

- Communications Providers may, and do, take different approaches to the question of what amounts to material detriment (setting their own thresholds for raising prices and only letting consumers exit contracts without penalty in certain circumstances as determined by the Provider and specified in the contract); and
  - where consumers seek to avoid price rises, Communications Providers may, and the evidence from complaints shows often do, disagree that price rises are likely to cause material detriment.
- 4.48 These risks give rise to inconsistencies and, at the very least, considerable uncertainty as to consumers' ability fairly to protect themselves against price increases by means of GC9.6. Communications Providers' different interpretations of the notion of "material detriment" may also inhibit choice as consumers are likely to experience difficulty in effectively comparing prices between different providers over the life of a contract.
- 4.49 As far as the UTCCRs are concerned, the following points appear to Ofcom to be relevant.
- 4.50 First, the general intention of the law seems clear enough. Consumers should be required to pay the contract price they agreed, but should not be exposed to the risk that price will rise. That the price may only be changed in limited circumstances and where consumers have appropriate ability to protect themselves.
- 4.51 Second, the law is, nonetheless, in a more specific sense, complex and its effect uncertain. That is, it will not necessarily be clear in every (or any) particular case whether a contract term providing for price rises is unfair. A consumer, and perhaps even a Communications Provider, will not necessarily be able to predict whether a term satisfies the fairness requirement. It will be particularly difficult for a consumer seeking to resist the effect of a price rise to challenge the relevant contract term as unfair and unenforceable given the complex relationship between the provisions described above.
- 4.52 Third, there would be a similar uncertainty in Ofcom's ability to enforce the UTCCRs on behalf of consumers generally. Such action would, at least, be likely to occupy considerable time and resources (for both Ofcom and relevant Communications Providers) and be subject to the uncertainty of outcome that accompanies action involving complex questions of law.
- 4.53 We have considered all these risks and uncertainties alongside:
- the large numbers of complaints we have received directly and via Which? demonstrating consumers' surprise that prices in fixed term contracts are not fixed and about consumers' inability to avoid price rises;
  - the clear and straightforward general principles reflected in the UTCCRs;
  - the requirements of Article 20(2) of the Universal Services Directive to provide subscribers with a right to withdraw from the contract without penalty on notice of changes to contractual conditions; and
  - our initial view that Communications Providers are better placed to assess and bear the risks of increases in their costs.

This leads us to the provisional view that the risks and uncertainties in the operation of GC9.6 and the UTCCRs mean consumers are not being protected effectively. Our further provisional view is that there is a need for clear and certain provisions to prevent the harm demonstrated by the complaints, to reflect the clear principles in the relevant law and our view of where the relevant risk should lie.

- 4.54 These provisional views in turn give rise to a number of possibilities and options for regulatory intervention (to which we consider in more detail in section 6 below). Amongst them, is whether it is appropriate for the material detriment test in GC9.6 to apply to price rises and whether it is appropriate for “material detriment” to remain undefined in this context. This raises the further question of whether the consumer harm identified can be prevented by Ofcom providing more clarity in the form of guidance (setting out high level principles regarding how a price rise could constitute material detriment and on our view of the fairness of relevant contract terms).
- 4.55 We seek stakeholder views on the issues discussed above and in particular, we seek responses to the questions below.

*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?*

### **Lack of transparency of price variation terms**

- 4.56 Again as we have already noted, the price the consumer is required to pay for the services provided by a Communications Provider is one of the most important contractual terms. This is particularly true when the consumer has obligations to pay the monthly price for the duration of the minimum contract period. In this context we note a recent ruling by the ASA in relation to pricing information contained in a Communication Provider’s marketing leaflet. Although the leaflet did not make any explicit claims that monthly tariffs would remain fixed, the ASA considered that, 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 concluded that the advertisement was misleading<sup>39</sup>.
- 4.57 As we have also noted, recent price rises have resulted in consumers complaining to Ofcom about price variations and a quarter of those complaints were on the grounds the consumer was not specifically made aware of any price variation clauses during the sales process. The relevant consumers said they understood they had contracted to a “fixed” monthly price. Some consumers consider it poor business practice for variation terms to be included in the “small print”. This small print contrasts with the headline terms Communications Providers make highly visible when signing up to a

<sup>39</sup> [http://www.asa.org.uk/Rulings/Adjudications/2012/12/Hutchison-3G-UK-Ltd/SHP\\_ADJ\\_202838.aspx](http://www.asa.org.uk/Rulings/Adjudications/2012/12/Hutchison-3G-UK-Ltd/SHP_ADJ_202838.aspx)

contract: the monthly subscription price and the minimum contract period in particular.

- 4.58 Harm to consumers arises if the advertising, marketing and selling practices of Communications Providers create the erroneous expectation that prices and other elements of the service they signed up to on entering the contract are “fixed” for the duration of the contract when this is not the case. Effectively, the consumer has made a different bargain with the provider than they intended to.
- 4.59 Amongst our other concerns, we consider that the lack of transparency of price variation terms may affect consumers’ confidence in the communications market. In particular, at point of sale, consumers may have made their purchasing decision based on a belief that they are signing up to a competitively priced contract. However, they can then be subsequently “surprised” by a price rise which could increase the price to a level which the consumer had not anticipated and may not consider as competitive.
- 4.60 In other words, the price rise has the effect of changing the bargain that the consumer thought they had entered into at point of sale especially in relation to the competitiveness of the offer at the time of entering into the contract compared to the other offers available and as a result may undermine the benefits of effective competition. The harm is increased as the consumer may not be able to switch because of the thresholds the provider applies before it will allow the consumer to leave the contract without penalty. The consumer is tied in and is “forced” to accept the price rise and cannot take advantage of other offers in the competitive market until the end of their contract term.
- 4.61 The concerns about the transparency of price variation terms are backed up, to some extent, by research conducted by Which? as part of its “Fixed means fixed” campaign:
- A mystery shopping exercise was conducted on 30 July 2012 where mystery shoppers entered into 39 mobile phone shops across different regions in the UK to find out what shop assistants tell customers about price at point of sale<sup>40</sup>. The main findings were:
    - 92% of the mobile phone shop assistants did not mention that the contract is only “fixed” for the term but not the price.
    - 82% of shop assistants said that the price would stay the same throughout the contract when prompted.
  - An omnibus survey of 2035 adults (with 1567 (77%) in a mobile phone contract) to determine expectations of whether prices or other services could change during a minimum fixed term<sup>41</sup>. The main findings were:
    - Over 60% of contract customers said that they expected monthly bills and the number of calls/texts allowance to remain unchanged during a minimum term fixed contract with a mobile phone company.

<sup>40</sup> <http://www.which.co.uk/campaigns/technology/fixed-means-fixed/mystery-shopping-fixed-contracts/>

<sup>41</sup> <http://www.which.co.uk/documents/pdf/the-marketing-of-mobile-phone-fixed-term-offers-which-complaint-290997.pdf>

- Over 60% of all contract customers were not aware that providers could increase monthly payments during a minimum fixed-term contract.
- 4.62 The findings from the above research and consumer complaints about transparency of price variation terms suggest that there are deficiencies at point of sale meaning that consumers are not clear as to what may be considered key aspects of some of the central terms of the contract they are entering into. This evidence suggests that consumers are not being given information that enables them to know what bargain they are striking in order to make an informed transactional decision. There appears to be a lack of awareness amongst consumers that their provider is able to make changes to price and other variations to the contract during the minimum contract term. This lack of awareness meant that most recent prices were “unexpected” because the consumer did not know that their provider had the ability to increase prices during the contract term. In this context, some consumers think that price rises are unfair because they are “surprised” that providers are able to do this.
- 4.63 The OFT guidance on the UTCCRs states that “...terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer should be given appropriate prominence...”. In addition, in the examples provided on how a degree of flexibility may be achieved fairly in relation to price variation terms, the guidance states that some terms may be acceptable “provided the details are clearly and adequately drawn to the consumer’s attention”. Communications Providers should note the importance of the transparency of variation terms for the purpose of ensuring compliance with the UTCCRs.
- 4.64 The CPRs also seek to protect consumers in this area. In particular, they require Communications Providers not to omit from commercial practices (which includes sales and marketing activity) material information consumers require to make informed transactional decisions.
- 4.65 In addition, there are already existing consumer protection mechanisms in place in the form of GC23 and GC24 which set out the obligations on Communications Providers in respect of the sales and marketing of mobile and fixed-line telecommunications services respectively. There are obligations under GC23.5(c)(ii) and GC24.6(c)(ii) for providers to make the consumer aware of specific information at point of sale. We consider that the requirement in those conditions for information about “payment terms” to be provided at point of sale includes any price variation terms. Therefore, we would expect providers to mention price variation terms at point of sale to comply with their obligations under GC23 and GC24 (although we acknowledge that existing guidance on GC23 and GC24 does not explicitly refer to this).

#### Ofcom’s view

- 4.66 Ofcom considers in light of the above that, despite the existence of rules that seek to do so, consumers are not being provided with information about price variations that enables them to make informed purchasing decisions and protects them against the unfair surprise of unexpected price increases. Neither, in our provisional view, does it appear appropriate to continue to rely only on those rules, nor solely on an approach that would increase the transparency, and consumer awareness, of the possibility of price variations. There are a number of reasons for this.
- 4.67 First, the large amount of evidence we have received directly from consumers and from Which? suggests the rules on transparency have not been effective. They have

not operated to prevent the creation of erroneous consumer expectations that prices are fixed, nor eliminated the potential for unfair surprise when price rises occur.

- 4.68 Second, reliance on rules designed to ensure transparency alone would be subject to uncertainty. In particular, the uncertainty derived from the need to establish in any particular case that consumers were not provided with the relevant information. The central importance of price terms, the liability to unfairness of contract terms providing for price rises and the potential for unfairness where prices do rise, all, in our provisional view, point to the need for a more uniform and certain solution applying to consumers generally.
- 4.69 Third, even where consumers are made aware that prices may rise, this does not appear to resolve all the harm that may arise out of price variations.
- 4.70 One aspect of this is that consumers may still not be able to make a fully informed purchasing decision even if they are told at point of sale that the price may change, unless the provider also tells them how much the price could increase by, how often the price may increase and what their termination rights are in respect of any such changes. Such uncertainty may render the headline price effectively meaningless making it very hard for consumers to compare the deals on offer. With consumers unable to select the best deals, competition itself may be undermined, generating further harm.
- 4.71 Another aspect is that knowing a price may rise does not, by itself, enable a consumer to avoid the effects of any increase. The possession of such knowledge does not appear to Ofcom to address all the reasons why, in our preliminary view, there is a need for clear and certain rules enabling consumers to avoid those effects.

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

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

## Section 5

# Price rises in fixed term contracts: other issues

## Summary

- 5.1 In addition to the consumer harm identified in Section 4 regarding price rises in fixed term contracts, we have identified the following related issues which we have taken into account in our consideration of the options on which we seek stakeholder views:
- The different price elements in a contract.
  - Protecting business customers from price rises in fixed term contracts.
  - Allowing Communications Providers to increase prices for reasons outside of their control.
  - Price rises to one or more services in a bundle.
  - How Communications Providers notify consumers of contract variations.
  - Timescales set by Communications Providers for consumers to cancel their contract without penalty for contract variations.
- 5.2 This section explains each of these issues in turn, sets out Ofcom's initial views on each issue and seeks stakeholder views.

## The different price elements in a contract

- 5.3 We note that a consumer's monthly bill could consist of many elements of price. For example:
- The "monthly subscription price" which is often the advertised headline price. The consumer would pay the monthly subscription price over the term of the contract for the "package" they signed up to which, depending on whether the service was fixed-line, broadband or mobile, would usually include elements such as line rental, call allowances (sometimes based on time of call), texts and data allowance; usually on a UK-wide basis but sometimes including international services<sup>42</sup>.
  - Other charges for services typically not included in the monthly subscription price, such as charges for calls/texts/data when the consumer has exceeded their inclusive allowance for the monthly subscription price and/or services typically not included in inclusive allowances such as calls to mobiles from landlines, and calls to non-geographical numbers<sup>43</sup> etc.

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<sup>42</sup> More details of the numbers that are usually included in call packages and the indicative call charges for all numbers can be found in Ofcom's numbering guide [here](#).

<sup>43</sup> These include 03, 080, 0845, 0870, 083/4, 0871/2/3, 09 and 118 numbers.

- “Additional services” – where consumers choose to purchase extra services from their Communications Provider on top of their monthly package/regular monthly payment.
  - Other administrative charges e.g. itemised billing, non-direct debit payment charge, late payment charge etc.
- 5.4 When a consumer enters into a contract, he/she would be aware of the monthly subscription price (a regular monthly payment for the package he/she opted for) and in most cases would have made his/her purchasing decision principally on the basis of that price. Typically, consumers would also be given a list and/or a web link to other charges for services that fall outside their pay monthly package.
- 5.5 Whilst an increase to the monthly subscription price will always affect the consumer, price rises to services not included in the monthly subscription price may have no effect on the consumer if the consumer does not use those other services. One provider told us that consumers only need to be protected from price rises to the “package” that they are on and for which they agreed to pay a regular monthly price. The provider said that they are more able to control the costs of the basic package compared to the costs for the elements usually outside of the package, such as calls to non-geographical numbers e.g. premium rate services, directory enquiries etc.
- 5.6 Another provider told us that it would be disproportionate to require Communications Providers to notify consumers of all price variations. The provider considers that notifying consumers of an increase to its monthly subscription price is important but said that notifying consumers of each and every price rise to services not included in the monthly subscription price would mean that consumers would be subject to information overload as they would be receiving such notification on a regular basis for services that they may not even use.
- 5.7 Ofcom acknowledges that there may be a number of charges that comprise aspects of the price the consumer pays under a contract for communications services. We similarly acknowledge that most of the complaints made to us and via Which? appear to relate to monthly subscription charges. Neither of these points, however, appear to Ofcom to be a reason to treat these other aspects of the price differently to the monthly subscription charge.
- 5.8 Rather, it seems to us that the same principles and rules should apply to all aspects of the price payable for services under a (i.e. any particular) contract. For example, the part of the price comprised in the monthly subscription charge and that in the charges for out of bundle calls and data services provided under the contract.
- 5.9 In taking this view, we return to the point that the price is a key term of the contract, and consumers must know, and be able to evaluate and rely upon, the bargain they are striking. That means the total cost to them of the services they are contracting for. Any increase is liable to be unfair (at least absent a right to withdraw from the contract without penalty). It does not appear to Ofcom to make any material difference how a provider has chosen to divide up the price between monthly subscription charges and other elements. We also note and rely on the following points.
- 5.10 First, it would defeat the key principles we are pursuing - about unfair surprise and the ability to avoid price rises during fixed term contracts - if Communications Providers could evade them by reducing monthly subscription prices and/or

exploiting the ability instead to raise other aspects of the price. The adverse effect on consumers would be the same.

- 5.11 Second, the same should also apply to other, less direct, increases to prices. In particular, we acknowledge that providers might respond to rules relating to their ability to increase prices by means such as reducing call, text and/or data allowances (where relevant) included in a consumer's monthly subscription price. Such changes would effectively constitute an increase in the unit price paid by the consumer, so similar rules should also apply in this regard.
- 5.12 Third, as we have described above, Communications Providers are better able to assess and bear the risks of increases in their costs than consumers. Again, this appears to Ofcom to apply to costs relating to all services not just those covered by monthly subscription charges.
- 5.13 It is not clear to us why, for example, any different position should apply to costs such as those relating to non-geographical numbers, for example. Providers are able to, and do, make an unbiased forecast of these costs like any other costs and set prices for them periodically. They are able to make a commercial decision as to the frequency of price increases and notification to consumers. If it is of commercial importance to the Communications Provider to increase a price or prices contained in a contract with a consumer then the provider will have to notify the consumer and bear the risk that the consumer will choose not to accept the proposed increase.
- 5.14 Fourth, this is not merely an abstract application of the principles described in this document. By no means all fixed voice, mobile and data services are covered by inclusive, monthly subscription packages. There is evidence to show that many consumers do incur charges in addition to their monthly subscription price for using out of bundle services and/or where they exceed their allowances included in the monthly subscription price.
- 5.15 For example, our Communications Market Report 2011<sup>44</sup> reported that data collected by price comparison service, Billmonitor, based on between 3,000 and 10,000 bills submitted by mobile customers every month in the period from July 2010 to June 2011, indicates that, on average, mobile users were billed between about £6 and £10 a month in addition to their contractual monthly fee. These out-of-allowance charges represent on average about 20-30% of average mobile bills. In addition, omnibus surveys undertaken for Ofcom earlier this year found that for users who check their monthly bills:
- 40% of fixed line consumers incurred charges in addition to their set monthly price;
  - 26% of mobile consumers incurred charges in addition to their set monthly price; and
  - 13% of fixed broadband consumers always incur charges for using more data than included in their monthly data allowance<sup>45</sup>.

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<sup>44</sup> [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK\\_CMV\\_2011\\_FINAL.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK_CMV_2011_FINAL.pdf) (pg 318)

<sup>45</sup> [http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/Misselling\\_Billshock\\_W3\\_071.pdf](http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/Misselling_Billshock_W3_071.pdf)

## Initial views

- 5.16 Our initial view, therefore, is that any regulatory intervention should protect consumers in respect of any increase in the prices for services provided under a contract applicable at the time the contract is entered into by the consumer.

### Additional services

- 5.17 Our further initial view is that a similar principle should also apply in respect of the prices payable for additional services provided under contracts that can properly be characterised as separate to the consumer's main contract for services. For example, where, at some point during a fixed term contract for network services, the consumer enters into a further contract for a 'bolt-on' service such as international calls.
- 5.18 That is, the consumer should be able to evaluate and rely upon the price agreed at the time that separate contract is entered into. The consumer should have adequate protection from an increase in that price during the period of the "bolt-on". That would not mean the consumer should also be able to withdraw without penalty from the main contract for services, but should be able to do so in respect of the separate contract where the provider seeks to increase the price payable thereunder.

### Other administrative charges

- 5.19 It also appears to Ofcom that the same position should apply, for similar reasons, to other charges that can, in light of the Supreme Court's decision in the *OFT Bank Charges* case,<sup>46</sup> properly be characterised, in the context of contracts for the supply of services to consumers, as parts of the price payable in exchange for those services. These aspects of the price would include charges for receiving itemised bills and for making payments by means other than non-direct debit. They would not include charges in respect of matters such as late payments and early contract termination. The latter are charges payable as compensation for defaults or quasi-defaults under the contract, rather than in exchange for services. Consumers are protected in respect of their amounts by the UTCCRs,<sup>47</sup>

*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?*

*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?*

## Protecting business customers from price rises in fixed term contracts

- 5.20 In May 2011, Ofcom modified GC9.6 to apply to all subscribers – both residential and business customers - to reflect Article 20(2) of the revised USD which sets out that

<sup>46</sup> See *The Office of Fair Trading v Abbey National plc & others* [2010] 1 All ER 667

<sup>47</sup> Ofcom's view as to the application of which is set out in our Additional Charges guidance at <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Guidance.pdf>

“subscribers” should be able to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by their Communications Provider. Previously, only residential consumers had this right under GC9.6. The reference to subscribers meant that the right was extended to other subscribers, including businesses.

- 5.21 When we consulted on modifying GC9.6 to include business customers, some respondents raised concerns with extending this right to all customers and considered that it should only apply to residential customers and SMEs on standard contracts. Respondents were concerned that extending GC9.6 to all business customers meant that businesses or organisations with bespoke contracts, where specific changes to pricing or other terms by the Communications Provider are allowed, would be able to rely on the provisions in GC9.6 to exit the contract without penalty, should they consider that any proposed changes would cause them material detriment.
- 5.22 We acknowledged the concerns raised in relation to bespoke contracts and material detriment for subscribers who may have bargaining power. We said that establishing whether a change is materially detrimental would ultimately depend on an assessment of the facts in such cases. However, we agreed that in certain cases where there is an agreed change mechanism, such as in the case of business contracts, that changes captured by this mechanism are unlikely to be materially detrimental as they are likely to have been envisaged by the parties at the time the contract was agreed.
- 5.23 The majority of complaints to Ofcom about recent price rises were from residential customers. However, we did receive a small number of complaints from small business customers who considered that they were adversely affected by price rises<sup>48</sup>. They expressed the same concerns as residential customers i.e. they were not aware that prices could change and they opposed the principle that providers could increase the price and still tie them in to the contract unless they pay an early termination charge to exit.
- 5.24 We consider that these customers would be in the same position of having little to no bargaining power. Our knowledge and experience of the industry show that small business customers are as likely as residential customers to enter into contracts with standard terms. We therefore consider that the harm and concerns identified from unexpected price rises during a fixed term contract would apply to small business customers as well as residential customers. In contrast, large businesses are more likely to be in a better bargaining position and would enter into bespoke contracts where some of the terms, including any price or other variation terms, are negotiated and agreed.
- 5.25 For the purpose of this consultation, we have grouped residential and small business customers together as having the same interests and requiring the same level of protection. Our initial view is that any regulatory intervention that we may take to protect customers from unexpected price rises during a fixed term contract should apply to residential and small business customers alike.
- 5.26 We note that in other General Conditions (e.g. the prohibition of automatically renewable contracts in GC9.3 and the codes of practice in GC14) some of our regulations are restricted to residential and small business customers. The GCs

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<sup>48</sup> 20 out of 1644 complaints about changes to terms and conditions were from small business customers.

already define “small business customer” as “a person of that provider who is neither himself a communications provider, nor a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise)” which is consistent with the meaning of “domestic and small business customer” in section 52(6) of the Communications Act 2003.

- 5.27 For the purpose of any regulatory intervention we may take following this consultation, we would propose to adopt the same definition for small business customers.

*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?*

*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?*

*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?*

## Allowing Communications Providers to increase prices for reasons outside of their control

- 5.28 We note that in most terms and conditions, providers include a clause which provides for variations (to price and other terms) for reasons that are “outside of their control”. Where a change is made under these circumstances, consumers are not allowed to exit the contract without penalty regardless.
- 5.29 Such clauses typically include the following examples as reasons for price changes that would be outside of the provider’s control:
- 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.
- 5.30 Ofcom’s initial view is that any cost increases imposed by Government for the reasons above would be outside of the control of providers. As such, we consider that providers should be able to rely on a term which specified that consumers are not allowed to exit the contract without penalty where such increases are passed through to consumers in the form of price variations. Any amendments we make to GC9.6 would be subject to this caveat.
- 5.31 We are also aware that many providers’ contracts are not so specific. They may simply state that any price or non-price variation made due to new legislation, statutory instrument, government regulation, other regulatory changes, financial requirements etc. would be outside of their control and therefore would not trigger the ability for the consumer to cancel without penalty.

- 5.32 We note that OFT's guidance on the UTCCR's states that a variation term is more likely to be found fair:

“if it is narrowed in effect, so that it cannot be used to change the balance of advantage under the contract – for example, allowing variations to reflect changes in the law, to meet regulatory requirements or to reflect new industry guidance and codes of practice which are likely to raise standards of consumer protection .”

We are concerned to ensure that such terms should only apply for reasons that are genuinely outside the control of providers, and not used simply to tilt the balance of advantage under the contract towards the provider and away from the consumer. But, we agree that GC9.6 should allow providers to pass on to consumers increases in costs imposed directly and specifically by changes in mandatory provisions laid down by Government or regulators, compliance with which by the provider is compulsory. Any changes to GC9.6 would also reflect this.

- 5.33 Communications Providers have said that wholesale price changes are outside of their control. However, Ofcom's view is that Communications Providers are able to take steps to mitigate that risk. For example, there may be increasing costs from exogenous factors that providers are able to hedge against. We recognise that some wholesale inputs would be more within providers' control than others. For example, providers have certainty in relation to the wholesale price of the regulated product during a price control period. However, if a contract transcends the period between price controls then there may be some uncertainty over the wholesale price over the duration of that contract. Where possible, providers should be able to make well-informed and unbiased forecasts of their wholesale costs and factor these in when setting their retail prices.

*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 these factors?*

*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?*

## **Price rises to one or more services in a bundle**

- 5.34 Bundling is where a supplier offers several products for sale as one combined product.

- 5.35 From our Communications Market Report 2012, we are aware that purchasing communications services in a bundle continues to increase in popularity across the UK:

- One in five UK households purchase fixed voice, broadband and multichannel TV in a bundle.
- 57% of UK households purchase communications services in a bundle – i.e. more than one service from the same provider. This has grown steadily since 2008.

- The most popular type of bundle remains a dual fixed voice and broadband package, purchased by 27% of UK households in Q1 2012.
  - Taking a triple play bundle of fixed voice, broadband and multichannel TV accounted for 19% of UK homes, up by three percentage points on the same period last year<sup>49</sup>.
- 5.36 Whilst the bundles above include content services with telecommunications services, we are also aware that some suppliers may bundle telecommunications services with other services such as gas and electricity.
- 5.37 Given the increasing trend in purchasing services in a bundle, some stakeholders told us that it is important for Ofcom to be clear about how the current rules and any potential modifications to the rules in relation to price variations may or may not apply to services provided in a bundle.
- 5.38 GC9.6 can only apply to the services which are subject to the general authorisation regime for electronic communications networks and services (ECN/ECS). Where services regulated by the GCs are bundled with services not regulated by the GCs, the current rules would still apply to the services covered by the GCs. For example, the retail of a content package is not the provision of an ECS and, therefore, is not in itself covered by the GC. But where other services which are ECSs (such as a fixed line, broadband and mobile services) are provided in a bundle together with the content service, the provision of the content service will not mean that those other services will fall outside the scope of GC9. In other words, GC9 would still apply to the other services in the bundle even if the bundle includes services not caught by GC9. In this context it is important to ensure that consumers who choose to exercise their right to withdraw from the contract in relation to one element of the bundle in response to a proposed price rise are not disadvantaged as a result of the bundle reducing in scope of services provided, i.e. consumers should not lose the benefit of any discounts or other benefits associated with the original bundle because of the provider's decision to increase the price of one or more of the regulated services in the bundle.
- 5.39 Given the above, it is critically important that Communications Providers make clear upfront to consumers how the terms and conditions apply to the bundle. For example, it should be made clear to consumers that their right to withdraw from the contract in the event of price rises continues. This would enable consumers to know what their termination rights are in relation to a price rise to one or more regulated elements of the bundle and to be able to make an informed choice as to the package they want.

## How Communications Providers notify consumers of contract variations

- 5.40 Ofcom considers that it is important for a Communications Provider's notice of contractual variations to consumers to be clear and easy to understand. It should attract the consumer's attention, make him/her aware of the nature of the contract change(s) and the likely impact on him/her and, where relevant, set out clearly what action the consumer can take to avoid the impact, should he/she wish to do so.
- 5.41 Article 20 of the Universal Service Directive provides for national regulatory authorities to have the power to specify the form in which contract notifications are to

<sup>49</sup> [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR\\_UK\\_2012.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf)

be made. In Ofcom's 2011 consultation and decision documents to implement the revised EU framework, we considered that industry should decide in the first instance how best such notifications should be made.

5.42 However, we did set out some high level guidance regarding such notifications. For example, we considered that:

- Notifications will have at least to be in a form which subscribers can reasonably be expected to read and we expect CPs to actively communicate any proposed modifications to their consumers.
- Notifications should be expressed in plain, intelligible language and be set out with due prominence.
- Letters and emails are the most obvious examples of notifications. Other printed material, such as pamphlets or magazines, may be used, but whether this is deemed sufficient will depend on how transparent it is made to the subscriber upfront that such publications may contain important information.
- We did not consider that a notification which asks subscribers to regularly check their Communication Provider's website for possible changes to their contract is acceptable.

5.43 Following recent price rises, Ofcom received a small number of complaints from consumers about the prominence and/or clarity of price rise notifications<sup>50</sup>. In light of this, Ofcom has reviewed some of the recent notifications, met with providers to discuss their notification processes and made suggestions on how the notifications could be improved.

5.44 We note that there is considerable variation in the approaches (and media) being used by providers when notifying consumers of contractual variations. We also note that regulators in other sectors are considering prescribing the format and/or content of price rise and/or contract variation notifications to ensure a consistent approach across industry in their particular sectors so that clearer information is provided to consumers to help them engage more effectively in relevant markets. For example:

- Ofgem's retail market review consultation makes a number of proposals to improve the quality of information that suppliers give consumers<sup>51</sup>. One of their proposals is to specify elements of the information contained in price rise notifications. This follows research undertaken with consumers to test how information can be presented more effectively to them.
- ComReg (the Commission for Communications Regulation in Ireland) has recently consulted on contract variation notifications which considered the notification medium and the format and content of such notifications<sup>52</sup>.

5.45 Although we received a small number of consumer complaints about this issue, we do not consider that we need to take formal regulatory interventions to specify the

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<sup>50</sup> There were 10 complaints about this issue.

<sup>51</sup> Ofgem, Retail Market Review – updated domestic proposals consultation, 26 October 2012, <http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/The%20Retail%20Market%20Review%20-%20Updated%20domestic%20proposals.pdf>

<sup>52</sup> ComReg, Consultation: contract change notifications, 1 August 2012, [http://www.comreg.ie/publications/consultation\\_contract\\_change\\_notifications.583.104175.p.html](http://www.comreg.ie/publications/consultation_contract_change_notifications.583.104175.p.html)

form of contract variation notifications at this time. We maintain the position that industry is best placed to decide how it communicates this information with its consumers. We will however continue to monitor this issue and, where appropriate, we will continue our approach of speaking with providers and making suggestions for better practice where we identify that their notifications could be improved.

5.46 We would remind industry of our expectations and the high level guidance set out above. In addition, we have identified some further examples of best practice following our review of some recent 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 consumer's bill, and possibly in more than one place in order to attract the consumer's attention.
- Providers should consider issuing the variation notification on a separate piece of paper from any marketing material. This could help to ensure that the notification does not get lost in other communications that the consumer receives from the provider but may not necessarily read.
- Email notifications of contract variations should be clearly marked as such in the subject line of the email.
- Information about the consumer's termination rights should be made clear upfront. For example, on the front page of a hard copy notification, in the main email message rather than via a link in the message or on the actual webpage of the variation notification rather than via a link to another page.
- Where the consumer 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.

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

*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?*

*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?*

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

5.47 From a review of price variation terms as part of the GC9 programme, we found that providers set various timescales for consumers to be able to withdraw from the contract without penalty if they do not wish to accept the price rise (subject to whatever threshold set by the provider for material detriment). The timescales range from seven to 30 days for the consumer to notify their intention to cancel (without penalty) following notification of the proposed price rise.

- 5.48 We have concerns with the shorter timeframes set, such as seven, ten or 14 days to cancel without penalty once notified of changes. We question whether such short periods of time are reasonable and/or sufficient in enabling consumers to consider the impact of the change, shop around for better deals and make the decision whether to switch after notification of a price rise that triggers a right to cancel without penalty.
- 5.49 Under GC9.6 Communications Providers have to give subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment. Our initial view is that providers should also give consumers the ability to cancel the contract at any time before the price rise takes effect, in other words not less than one month. We consider that this will give consumers the maximum time to review their options and take action to avoid the price rise. We invite stakeholder views on this issue and whether the timescale that consumers should be given to cancel without penalty should be set out in guidance.

*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?*

*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?*

## Section 6

# Options for addressing consumer harm from price rises in fixed term contracts

## Introduction

- 6.1 In section 4 above, we have identified the consumer harm from price rises in fixed term contracts. This section sets out the options we have considered for addressing the consumer harm identified. We set out the merits and limitations of each option, provide an assessment of the potential impacts of each option and invite responses from stakeholders.
- 6.2 We have also considered whether it would be appropriate to prohibit price increases in fixed term contracts in order to address the consumer harm identified. However, we do not believe this would be consistent with Article 20(2) of the Universal Service Directive which specifically provides for Communications Providers to have the ability to modify contract terms including price, subject to subscribers having the right to withdraw from the contract without penalty. Taking Article 20(2) into account, we also consider that it would be disproportionate to limit the commercial freedom of providers in this way.
- 6.3 In section 4, we identified the following key principles in relation to providing adequate consumer protection in a competitive market:
- **principle 1:** consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions;
  - **principle 2:** consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear;
  - **principle 3:** where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects; and
  - **principle 4:** the rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).

We use these principles as a framework in which to assess the options considered below.

- 6.4 When reviewing the options, stakeholders are asked to have regard to the following issues where appropriate and consider them in any response:
- **Price rises to monthly subscription prices and to services not included in the monthly subscription price.** The majority of consumer complaints received by Ofcom about recent price rises were from consumers in relation to their mobile monthly subscription price. However, for the reasons set out in section 5 above, we propose that the same principles and rules should apply to all aspects of the price payable for services under any particular contract.

- **Residential and small business customers should be protected from price variations in fixed term contracts.** Again as set out in section 5, our initial view is that the harm identified in relation to price rises in fixed term contracts is likely to apply to both residential and small business customers (but not to larger businesses). As we say, our view is that these customers have little or no bargaining power and enter into standard contracts unlike larger businesses/organisations which are more likely to be able to negotiate the price and other terms of bespoke contracts. For the purpose of this consultation and the options considered, we have grouped residential and small business customers together as “consumers” who have the same or similar interests and require the same level of protection. We do not consider that larger businesses are likely to require any further protection.
- **Application to all communications services covered by GC9.** The majority of complaints to Ofcom were from mobile customers and the recent price rises prompted the consumer organisation Which? to launch its “Fixed means fixed” campaign which asks Ofcom to take action to stop mobile providers making in-contract price rises. However, for the reasons described in this document, our preliminary view is that the relevant consumer harm also arises in relation to other communications services.
- **Non-price variations in fixed term contracts.** Currently, we have not identified widespread consumer harm arising from how the current rules have been applied to any non-price variations made to the contract. Therefore, the options set out are targeted at the currently identified consumer harm in relation to price variations in fixed term contracts.

## Options

6.5 The options we are consulting on are:

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

### Option 1: make no changes to the current regulatory framework

6.6 Under this option, we would not make any changes to the status quo. We would continue our practice of assessing price rises against the current rules on a case-by-case basis as and when required, for example following consumer complaints.

6.7 Communications Providers would be allowed to make price rises (and other variations) in fixed term contracts provided that their terms and conditions included a

variation term which meets the fairness requirement under the UTCCRs<sup>53</sup>. They would also retain the significant discretion to determine (in the first instance) whether the price variation (or other variation) is likely to cause “material detriment” to their subscribers and therefore whether the GC9.6 rules would apply.

6.8 Our assessment of this option against the key principles in relation to providing adequate consumer protection in a competitive market is as follows.

- **Principle 1: Consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions.** We currently have significant evidence to show that consumers are not aware of what bargain they are striking in relation to mobile phone contracts. They may have been inhibited from making informed transactional decisions as a result of being unaware that prices may be increased (and that any variations may be made to the contract) during the minimum contract term. The evidence therefore suggests the current rules are not operating effectively in line with this principle.
- **Principle 2: Consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear.** Consumers’ complaints that they were not made aware of price variation terms at point of sale indicate that the current rules in relation to the information that consumers should be given at point of sale (the CPRs, GCs 23 and 24 and the UTCCRs) are either not operating effectively or being sufficiently adhered to to protect consumers. Our review of price variation terms, meanwhile, suggests some do not make clear the level and frequency of any price rise nor the circumstances in which the consumer can withdraw from the contract. In addition, our provisional analysis of where the risks of cost increases should lie, suggests they are more appropriately borne by providers, rather than passed through to consumers in the form of price rises.
- **Principle 3: Where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects.** Currently, Communications Providers have significant power to decide (in the first instance) whether a price rise is likely to cause material detriment and whether a consumer should, accordingly, be allowed to withdraw from the contract without penalty. A consumer is unable, in practice, to withdraw from the contract unless the provider agrees on this point and/or that a price variation term is unfair under the UTCCRs and unenforceable as a result. This has resulted in large numbers of consumers complaining that providers limit their ability to take steps to avoid a price increase, and that this results in a harmful imbalance in the contractual relationship between provider and consumer. This evidence suggests that the fundamental requirements of fairness in relation to price, and of an appropriate balance in the rights and obligations of the parties, which the UTCCRs and GC9.6 seek to reflect, are not being met.
- **Principle 4: The rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).** Further, or alternatively, maintaining the status quo would not address the uncertainty arising out of providers’ inconsistent application of GC9.6 and/or the uncertainty of the application of the UTCCRs in any particular case, as set out in

<sup>53</sup> Such terms would be subject to the fairness test in the UTCCRs.

section 4 above. A change to the status quo would also be more consistent with the express requirements of Article 20(2) of the Universal Services Directive.

- 6.9 Based on the analysis presented in the sections above and our assessment of this option against the key principles in relation to protecting consumers in a competitive market, our current view is that it would not be sufficient to make no changes to the current regulatory framework and maintain the status quo. It would fail to address the issues raised and the consumer harm that we have identified from consumer complaints, our own review of price variation terms in contracts and requests for regulatory intervention from stakeholders on the application of the “material detriment” test in GC9.6 to price rises. There is no evidence to suggest that the problem is likely to be of a short term nature or that providers are likely to change their current practices to remove the consumer harm we have identified.

*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?*

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

- 6.10 Under this option we would require Communications Providers to provide consumers with more information at point of sale, and at renewal, about price variation terms, where a contract contains such a term. This could address some of the consumer harm from price rises in fixed term contracts since, as long as consumers are able to pay adequate attention to the information and to understand it, they would have greater awareness of the bargain they are striking and would understand that they are entering into a variable price contract. However, it does not take into account that consumers may already find the amount of information available to them in the form of advertisements and terms and conditions to be difficult to understand and/or assess in order to compare offers.
- 6.11 As already noted, existing consumer protection mechanisms under GC23 and GC24 in respect of the sales and marketing of mobile and fixed-line telecommunications services respectively do not appear to be operating effectively or to be sufficiently adhered to to make consumers aware of price variation terms at point of sale. One possibility would be to amend these GCs to include express reference to the requirement for information about price variation terms to be provided at point of sale.
- 6.12 Ofcom could adopt a similarly interventionist approach by, for example, introducing a new requirement on Communications Providers to provide a short document at the point of sale, similar to the FSA’s “Key Facts,”<sup>54</sup> <sup>55</sup> in which providers would include some or all of the information required under GC23.5(c)(ii) and GC24.6(c)(ii) (information at point of sale for mobile and fixed line services). That is, a description of the service; the key charges (including minimum contract charges and any early termination charges, if applicable); payment terms; the existence of any termination right, including termination procedures; the likely date the service will be provided, in case the provision of the service is not immediate; and any minimum period of contract. This document could also set out any variation terms (price or otherwise)

<sup>54</sup> <http://www.fsa.gov.uk/pubs/other/keyfacts2.pdf>

<sup>55</sup> [http://www.fsa.gov.uk/pubs/other/key\\_features.pdf](http://www.fsa.gov.uk/pubs/other/key_features.pdf)

and how this affects the right to terminate and any associated early termination charges.

- 6.13 Ofcom has already published guidance on GC23 and GC24<sup>56</sup> <sup>57</sup>. Another possibility, therefore, would be to update this guidance to set out our view that the requirement to provide information about “payment terms” includes information about price variation terms. Some consumers who complained to Ofcom about the (lack of) transparency of price variation terms also mentioned that they were unhappy that the contract/price variation clauses were “hidden” in the terms and conditions. We could issue further guidance for Communications Providers about making contract and price variation terms more prominent in the contract. For example, by putting this information upfront as one of the first items on the first page of the agreement or, include this information in the summary of terms where there is a summary provided already.
- 6.14 Any guidance could, and would, also set out that where providers include a term in their contract allowing variations, including price, it is important that they make this clear to consumers to ensure fairness under the UTCCRs. Providers should ensure that consumers properly understand at point of sale that terms, including price terms, may change and they must be in no doubt about the circumstances in which they may have the right to exit the contract without penalty. This would ensure that consumers are given information that would enable them to know what bargain they are striking in relation to the price that they would be expected to pay and how this might change over the fixed term.
- 6.15 This option - requiring greater transparency by one means or another - would allow Communications Providers, subject to competitive pressures in the market, to retain the commercial freedom to increase prices in fixed term contracts, while reducing the harm from consumers’ lack of awareness that the price, and other terms, may change during a fixed term contract. Also, as long as the requirements for greater transparency were not overly burdensome and were introduced with a reasonable deadline, the implementation costs for providers should not be significant.
- 6.16 Where effective, remedies that promote greater awareness would empower consumers to shop around and compare offers on the basis of the terms that permit price increases. This would subject these terms to competitive constraints, meaning that we would only expect the terms to remain a common feature of the market if there is a corresponding benefit for the consumer. Communications Providers that insisted on including them without corresponding benefits would, over time, lose market share as consumers switch to rival offers. We might also see greater choice, with some tariffs offering fixed prices (perhaps in return for a price premium) and others maintaining the possibility of increases.
- 6.17 However, the effectiveness of greater transparency of price increase terms is uncertain given the complexity of contracts for communications services and the large quantity of information a consumer needs to process. Although the potential for price increases is one element determining the value of the contract for a consumer, it will only be one factor for the consumer to weigh up and maybe considered less of a priority than terms such as the contract length, the bundled call minutes or data usage and the size of any handset subsidy. Consequently, there is a risk that consumers ignore additional information that is presented to them or even that it distracts them from other important elements of the contract.

<sup>56</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/mobmisselling/statement/statement.pdf>

<sup>57</sup> <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/statement.pdf>

- 6.18 Furthermore, even where a contract term permitting price increases is presented clearly the consumer still faces uncertainty about whether the supplier will actually use it. By the open-ended nature of the terms, the value of the contract to the consumer remains uncertain. It is currently the case that not all Communications Providers set limits as to the level and/or frequency of any price increase, therefore, even if consumers are told at point of sale about the possibility of a price rise during a fixed term contract they may still not have sufficient, if any, certainty as to the likelihood and/or frequency of a price rise or the likely amount.
- 6.19 Some of these concerns about the effectiveness of measures designed to ensure transparency could be addressed by, for example, the fairness requirements of the UTCCRs and by Ofcom setting out our view of the way they should be applied by providers. We could, for instance, set out our view that, to ensure fairness, providers should be making clear to consumers that the circumstances in which prices can be fairly changed is closely limited in terms of:
- the amounts and frequency by which the price may be varied;
  - the right consumers have to withdraw from the contract without penalty; and
  - the procedure for notifying consumers of the change (e.g. not shorter than one months' notice).
- 6.20 Our provisional view, however, is that this option relying on increased transparency would not adequately address the consumer harm we have identified. Our assessment of this option against the key principles in relation to providing adequate consumer protection in a competitive market is set out below. Our concerns relate especially to the third and fourth principles.
- **Principle 1: Consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions.** Under this option, consumers would be told at point of sale that the price is variable, which could enable them to make a more informed transactional decision than now. There is also the possibility they would have more information about the level and frequency of potential price rises and the circumstances in which they are able to withdraw from the contract without penalty. This option accordingly increases the potential for consumers to know and evaluate the bargain they are striking and to make informed transactional decisions.
  - **Principle 2: Consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear.** Consumers would no longer be “surprised” by the possibility of a price rise in a fixed term contract if this is effectively made clear to them at point of sale. They would also be told about the level and frequency of any price rise and the circumstances in which they can withdraw from the contract without penalty. The potential for “surprise” should, accordingly, be reduced by measures designed to increase transparency. Such increased transparency would not, however, by itself address any unfair allocation of the risk of cost increases. That a consumer knows such costs may be passed on does not, by itself, make that passage fair.
  - **Principle 3: Where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects.** An increase in transparency has the potential to limit some of the harm arising out of price

rises, particularly where this includes Ofcom guidance on the application of GC9.6 and the UTCCRs.

Our provisional view, however, is that, by themselves, measures designed to increase transparency would not provide consumers with sufficient ability to avoid the effects of unfair terms or practices. We set out reasons in section 4 above. For example, there are already a number of rules requiring transparency. The large numbers of consumer complaints suggest those rules may not be providing effective protection for consumers. Similarly, knowledge of the possibility of price variations does not on its own provide the means by which a consumer can fairly escape their effect. We also have concerns that such measures would not provide a sufficiently certain means of protecting consumers (see immediately below).

- **Principle 4: The rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).** One possibility that may enhance consumers' ability to avoid the effects of relevant price rises would be for Ofcom to issue guidance on our view of the meaning of the material detriment proviso in GC9.6 and of the application of the UTCCRs to price variation terms. Such guidance has the potential to reduce the inconsistencies and uncertainties in their application. Our assessment, however, is that there are a number of reasons why it would not adequately do so.

In particular, any guidance would not itself impose obligations on providers. It would remain the case that consumers would in practice only be likely to be able to withdraw from the contract without penalty, or otherwise avoid price increases, where (1) the provider unilaterally considers, or at least agrees, the price increase to be likely to cause material detriment; and/or (2) the UTCCRs mean the relevant contract terms are unfair and unenforceable. As to the latter, there is already OFT guidance on the point. It is not clear what Ofcom could add to that, nor that any Ofcom guidance would necessarily, given the complexity of the UTCCRs' provisions, make the position sufficiently clear and certain in any particular case. The importance of the price terms to consumers, the UTCCRs' indication that fundamental fairness requires that such terms may only be varied (and prices increased) in very limited circumstances (if at all), and the large numbers of consumer complaints, which suggest the current rules are not securing the required fairness, all point to a need, absent any countervailing benefit for consumers arising out of price variation terms, for clearer and certain rules applied uniformly by Communications Providers for the protection of consumers generally. Again, we also note that changes to rules relating to transparency would not increase the consistency of GC9.6 with the express requirements of Article 20(2) of the Universal Services Directive.

- 6.21 Accordingly, we agree transparency is, clearly, an important issue. This is evidenced by Which?'s research and consumers complaining to Ofcom about not being made aware of price variation terms when entering into the contract. We agree measures relating to transparency would address some aspects of the harm we have identified as arising out of price variation terms and price rises. However, our analysis of this option leads us to the provisional conclusion that measures relating to transparency are unlikely on their own to be sufficient to address that harm.
- 6.22 We acknowledge that, given the risks of greater intervention in the market, the case for adopting a transparency remedy would be strong if there were some ambiguity about whether price rises in fixed term contracts can create countervailing benefits

for the consumer. This option has the benefit that, if price increase terms offer benefits for the consumer, they can be preserved. But, as we have explained above, our current view is that there are few, if any, corresponding benefits to consumers from contract terms providing for price increases. Accordingly, given the uncertainty about whether transparency remedies will be sufficient, and in light of the analysis above, we think it is appropriate to look for a more certain, comprehensive and likely effective solution.

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

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

- 6.23 Under this option, a Communications Provider would be required to offer a fixed price contract to a consumer unless the consumer expressly opts-in to a variable contract. This would ensure that the consumer makes a conscious decision to enter into a variable price contract and would be aware that the price may change during the contract term. We are not aware of any Communications Provider that currently offers the choice between fixed and variable price contracts although it is a common choice for energy contracts and mortgages.
- 6.24 Were we to adopt this option, we would not propose other changes to GC9.6. So, where a consumer opts-in to a variable price contract, the UTCCRs and the "material detriment" test in the condition would still apply. In order to ensure that Communications Providers do not include variation terms which would be unfair under the UTCCRs, we would require any variable price contract to have terms that are clear, transparent and fair as follows:
- the level and frequency by which the price may be varied (which must be very strictly limited);
  - there must be a procedure for notifying consumers of the price variation no less than one month in advance; and
  - the consumer's right to withdraw from the contract without penalty must be clearly and prominently stated.
- 6.25 Consumers choosing to enter into a variable price contract would, therefore, still have protection from the material detriment test in GC9.6 (in addition to the UTCCRs). However, this would not necessarily address the consumer harm arising from Communications Providers' different interpretations of when and how GC9.6 applies. This again raises the question of whether there is a need for Ofcom to provide more clarity by way of guidance on those issues. We return to this below, in our assessment of this option against the key principles.
- 6.26 Under this option it is possible that more consumers may opt in to variable price contracts than fixed price contracts as the initial headline prices of those contracts could be expected to start off lower than contemporary fixed price contracts. This is because the latter may need to charge a premium to reflect any costs to the Communications Provider of providing certainty. By opting in to a variable price contract, consumers would be signing up to some element of risk that the price may go up during the minimum contract period and they may not have the ability to withdraw from the contract without penalty.

6.27 Our assessment of this option against the key principles in relation to providing adequate consumer protection in a competitive market is as follows:

- **Principle 1: Consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions.** Similarly to option 2, under this option, consumers would be told at point of sale where the price is variable. They would be making a more informed choice as to the bargain they are striking: a decision as to whether they want the certainty of a fixed price for the minimum contract period or to accept the risk that the price may increase if they opt-in to a variable price contract. This option, like option 2, also offers the possibility that, where consumers expressly opt-in to a variable price contract, they will have more information about the level and frequency of any price variations and the circumstances under which they are able to withdraw from the contract without penalty.

This option accordingly increases the potential for consumers to know and evaluate the bargain they are striking and to make informed transactional decisions.

- **Principle 2: Consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear.** A similar analysis applies in respect of this principle as applies under principle 1 above and in relation to option 2. In particular, this option would remove the possibility of “surprise” on the part of consumer at the fact of a price rise in a variable price fixed term contract.
- **Principle 3: Where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects.** This option would, clearly, increase consumers’ ability to avoid the effects of price rises: they could choose a fixed price contract at the point of sale. This ability to avoid these effects could be enhanced by Ofcom guidance on the application of GC9.6 and the UTCCRs to variable price contracts (as to which see immediately below).
- **Principle 4: The rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).** This option also offers the possibility of greater clarity and certainty for consumers, both in the choice they would make between fixed and variable price contracts at the point of sale and, were Ofcom to issue relevant guidance, in their ability to avoid the effects of price rises in variable price contracts. As we have indicated elsewhere, such guidance has the potential to reduce the inconsistencies and uncertainties in the application of GC9.6 and the UTCCRs in respect of such contracts. A similar assessment as to why we do not consider it would adequately do so applies here, however, as in respect of option 2. Once more, we also note that this option would not increase the consistency of GC9.6 with the express requirements of Article 20(2) of the Universal Services Directive.

6.28 Accordingly, our provisional view is that this option would have the potential to address a number of the aspects of harm we have identified and to protect consumers in line with the fundamental requirements of fairness that the current rules seek to reflect but are not being met. However, we are concerned that it is liable to similar weaknesses as other options designed to secure increased transparency (see section 4 and our assessment of option 2 above). Likewise, we consider that this option would not provide the certainty that appears necessary to secure the required fundamental fairness in respect of the price in variable contracts. We also identify

what appear to us to be two further potential problems which suggest the effectiveness of this option may be limited.

- 6.29 First, were providers required to offer consumers an explicit choice between fixed and variable price contracts, it may well be necessary to set out in great detail the relevant process and information requirements for providers to follow to ensure the rules have the intended effect. For example, Ofcom might have to set out exactly how the options are presented, including the precise language used, or the timeframe for a decision to be made.
- 6.30 Accordingly, there is a risk that, in practice, the opt-in is subsumed amongst a variety of choices a customer needs to make with regard to the services he/she is purchasing. Consumers already have a large number of different provider and product options to consider. Presenting further pricing options at the point of sale is likely to add further complexity to the process for consumers.
- 6.31 Second, were we to adopt this option, Communications Providers could use pricing/marketing strategies to make fixed price contracts unattractive and unrealistic alternatives to the variable price contracts. This would render their potential to reduce consumer harm more apparent than real.

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

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

- 6.32 Under this option, we would modify GC9.6 to remove price rises from the “material detriment” test so that Communications Providers would be required to notify consumers for any price increase under a contract, and to allow them to withdraw from that contract without penalty regardless of the level of the price rise. Our provisional view is that adopting this option is necessary and appropriate to secure the fundamental fairness in respect of price (and the ability to avoid price variations in fixed term contracts) that the current rules seek to reflect. The volume of consumer complaints about such price rises, to Ofcom and via Which?, suggests these rules are not operating as effectively in this regard as they should.
- 6.33 In particular, as set out in sections 3 and 4 above, both the UTCCRs and GC9.6 seek to reflect that the price is one of the most important terms in (standard form) consumer contracts. Those contracts should be balanced and not contain unfair surprises: consumers should receive the contractual bargain they signed up to and legitimately expect, and should be protected against not doing so. Terms allowing price increases without giving the consumer the right to cancel without penalty, especially where the price rise could be above some objective measure like RPI, are therefore liable to be unfair (though there may also be limited circumstances in which these kinds of terms are fair).
- 6.34 In other words, the law reflects a clear and straightforward general principle, and a basic requirement of fairness, that the price agreed should generally be fixed (and variable, if at all, only in limited circumstances). Where prices rise, consumers should be able to avoid their effects. GC9.6 seeks to give consumers similar protection

against those effects. In line with the general legal principles, those protections should be clear, certain and genuinely effective.

- 6.35 Our evidence and Which?'s research indicate that consumers object to the principle that their Communications Provider has the discretion to increase prices at all when the consumer has already entered into the contract. They consider that this puts them in an unfair position. The balance of the contract is weighted in favour of the Communications Provider since the consumer has little choice but to accept the change (or pay an early termination charge if they want to exit the contract). They consider the practice to be "unfair" on existing consumers tied into fixed term contracts.
- 6.36 Put in terms of general principle, the volume and nature of the evidence from consumers and Which? suggests, in Ofcom's provisional view, that the current rules are not operating effectively to meet their aims. In particular:
- the rules are not operating to so as to meet consumers' legitimate expectations as to the price - one of the most important terms of the contract – that it, like other important obligations the contract places on the consumer (such as its length), is and should be fixed;
  - instead, those rules are leaving consumers exposed to unfair surprise and/or unfair effects; and
  - the rules are not giving consumers sufficient ability to avoid these surprises and effects (by ending contracts without penalty).
- 6.37 Adopting this option would, therefore, address fairness concerns relating to each of transparency, the restoration of balance in the contract and certainty. Consumers would have the clear and certain choice to accept the price rise or withdraw from the contract without penalty if they did not want to accept it, including where it came as a surprise. It would also place the risk of cost increases on the party with whom, in our assessment, they most appropriately lie: the communications provider. In these respects this option would address aspects of the consumer harm identified that the other options discussed would not.
- 6.38 This option would also be consistent with how the majority of other EU Member States have transposed and interpreted the requirements of Article 20(2) of the Universal Service Directive. As mentioned in section 3, we surveyed BEREC members in August 2012 and found that most respondents had rules which required Communications Providers to allow consumers to withdraw from the contract without penalty for any price rise regardless of the level of the increase.
- 6.39 We note that some mobile providers have expressed concerns to us that a requirement on them to allow consumers to exit the contract without penalty for any price rise would mean that consumers would be able to keep heavily subsidised handsets. They consider that consumers with expensive devices, such as smart phones, would find cancellation beneficial whilst there would be a disproportionate risk to the operator subsidising the device. They consider that this option, in practice, would have the effect of preventing them from making price rises during the contract because of the handset subsidy.
- 6.40 Currently, when consumers sign up to a post-pay mobile phone contract they either get the handset for "free" upfront as the cost of the handset is included in the pay monthly price and is paid off over the minimum term of the contract or they may pay

a small fee upfront for the handset and pay the remainder over the minimum term. Some providers have said that they are likely to review the way they currently subsidise handsets in order to reduce the risk to them if they have to let consumers exit the contract without penalty for any price rise.

- 6.41 For example, it may be that consumers would have to pay more upfront for the handset so that the provider recovers more of this cost upfront. Further, or alternatively, providers may start offering split contracts, so that consumers enter into separate contracts for airtime and the handset and would still have to pay for the handset even if they could cancel the airtime contract without penalty for any price rise.
- 6.42 We have considered these points. Our provisional view is that any disadvantages arising from changes in the way in that handsets are obtained by consumers would be outweighed by the protection offered by this option. This is on the basis in particular that handset manufacturers and handset/communications services retailers will continue to have a strong incentive to ensure that consumers are offered competitive and attractive deals for handsets.
- 6.43 We accept that the requirement to allow a customer to exit the contract without penalty may act as a deterrent to price rises in fixed term contracts in many circumstances. In practice, Communications Providers may be willing to increase prices only in cases where an unexpected cost increase is quite large or where customers have only a few months left on the contract. A Communications Provider might also be willing to change prices in fixed term contracts where a cost increase affects all providers, so that prices across the market will change and consumers are less likely to respond by withdrawing from the contract and switching to another supplier. Communications Providers may also choose to increase the price of their fixed term contracts generally in order to better protect themselves from risks associated with increases in their own costs. We note, however, that any changes Communications Providers make to their offers would be subject to competitive pressure, since the value of any new offers should be clear to the consumer.
- 6.44 We also accept there is a possibility that providers may respond by altering service quality during the contract. For example, by cutting resources devoted to customer service. However, since this consultation is focused on the behaviour we have observed in the market it would be disproportionate to introduce further regulation to tackle this possibility. We will respond as appropriate to any future developments in the relevant markets. We discuss below other non-price variations that may be made to the contract.
- 6.45 We also note that some Communications Providers already allow consumers to exit the contract without penalty for any price rise. This demonstrates that there is a business model that exists which takes into account the risks of allowing consumers to exit the contract without penalty if price rises have to be made during fixed term contracts. For example, some providers provide equipment (e.g. set-top boxes for TV services) to the consumer as part of the deal to enter into a minimum contract term. Where price rises are made and the consumer chooses to withdraw from the contract without penalty, the consumer is then required to return the equipment to the Communications Provider on cancellation of the contract.
- 6.46 Our assessment of this option against the key principles in relation to providing adequate consumer protection in a competitive market is accordingly as follows:

- **Principle 1: Consumers should have information that enables them to know what bargain they are striking, so they can make informed transactional decisions.** Under this option, none of the existing requirements for providers to give consumers information about prices and price variation terms (such as guidance to GCs 23 and 24, the CPRs and requirements derived from the UTCCRs) would change. These will continue to provide the current level of protection for consumers in relation to their ability to make informed transactional decisions. However, this option would offer them protection to the extent that, as the evidence suggests, those rules do not operate sufficiently effectively.

That is, regardless of whether the consumer is told at point of sale, and/or recalls that they were told about possible price rises, this option protects consumers as they would be able to withdraw from the contract without penalty should the Communications Provider increase the price. This should give providers the appropriate incentive to ensure that they are transparent about the possibility of price variations, to avoid aggrieving consumers unduly when they do occur.

- **Principle 2: Consumers should be protected against terms and practices that take them by surprise and which impose on them burdens and risks they should not fairly bear.** In the absence of improved transparency by Communications Providers at point of sale, surprises may still occur in relation to the level and frequency of any price rise. However, adopting this option would mean consumers are protected from the unfairness of such surprise. They would have the ability to withdraw from the contract without penalty, both where it could be characterised as a “surprise” and where it could not. This ability to avoid the effects of price rises would also mean that the risks of costs increases would lie where we consider most appropriate, with providers.
- **Principle 3: Where potentially unfair terms and/or practices operate, consumers should be able to take steps to avoid their effects.** Consumers would have the ability to avoid the impact of any price increase imposed on them (by withdrawing from the contract without penalty). This would be in line with the straightforward principles of fundamental fairness applicable to all providers, and which the UTCCRs and the provisions of GC9.6 seek to secure (albeit currently less than successfully as the evidence suggests).
- **Principle 4: The rules that give effect to these principles should be clear, certain and effective in practice, and consistent with the general law (including the relevant provisions of the Universal Services Directive).** As we have set out elsewhere in this document, and in sections 3 and 4 in particular, the rules designed to ensure the necessary fairness in relation to price and price variations must be clear, certain and genuinely effective. The evidence indicates that the current rules do not operate in a way that meets these requirements so as to secure the appropriate fairness and protection for consumers. Neither, necessarily, would the supplementation of those rules with further Ofcom guidance. That would not necessarily address the inconsistent and uncertain application of those rules in ways which undermine the position of consumers and give rise to harm.

In particular, without clear and certain rules it would remain the case that consumers would in practice only be likely to be able to withdraw from contracts without penalty in the event of price rises, or otherwise avoid those rises, where (1) the provider unilaterally considers, or at least agrees, the price increase to be likely to cause material detriment; and/or (2) the UTCCRs mean the relevant contract terms are unfair and unenforceable. Given the scope that this would, in

practice, give providers to prevent consumers withdrawing from contracts, and the complexity of the UTCCRs' provisions, this would not make the position sufficiently clear and certain in any particular case. That, in turn, creates significant risk that consumers' rights are not upheld and they are left in the unfair position of having insufficient ability to avoid price rises. The volume and nature of consumer complaints, and other evidence, shows that this risk is being realised and is resulting in consumer harm. That, in Ofcom's provisional view, is unsatisfactory.

In those circumstances, the importance of price terms to consumers, the UTCCRs' indication that fundamental fairness requires that such terms may only be varied (and prices increased) in very limited circumstances (if at all), and the large numbers of consumer complaints, all point to the adoption of this option as both appropriate and necessary to address the consumer harm. It would provide for clearer and certain rules applied uniformly by Communications Providers for the protection of consumers generally. Such rules would be consistent with the express requirements of Article 20(2) of the Universal Services Directive, as well as with the use of terms that are likely to be fair under the UTCCRs.

- 6.47 In terms of the impact on Communications Providers, where this option deters price rises in fixed term contracts this will remove one source of revenue. However, as long as this revenue is needed to cover costs (i.e. does not represent excess profits) competitive forces will allow it to be recovered from initial headline prices. As we have already noted we believe Communications Providers have the expertise and information to forecast and manage costs, and can set initial prices appropriately. Therefore, any loss of future revenues can be anticipated and built into initial prices (although as noted, our current view is that any 'waterbed effect' will be small). Any administrative costs of implementing this option, for example rewriting terms and conditions, can be mitigated through an appropriate implementation timeline for the GC.
- 6.48 In terms of enforcement and compliance costs, the removal of the 'material detriment' requirement would mean that a case-by-case assessment of the impacts on consumers is not needed. It should be very clear when contract changes breach the revised GC and compliance by the Communications Provider and enforcement by Ofcom should be less costly as a result.
- 6.49 We consider that this option provides more flexibility for consumers and Communications Providers compared to option 3 and also provides more protection for consumers than options 1, 2 and 3. Communications Providers would retain commercial freedom to make price rises during a fixed term contract whilst a consumer would be able to escape the effects of any price increases if they do not wish to accept the change. This option would address consumer concerns regarding the contract being "unfair" because providers are currently able to make price increases yet still tie the customer in because they would have to pay an ETC to exit the contract.
- 6.50 In section 5 above, our initial view is that any regulatory intervention would apply to residential and small business consumers alike because we consider that they have similar interests and require similar levels of protection against price rises in fixed term contracts. Therefore, under this option, residential and small business consumers would be given the ability to cancel without penalty for any price rise. Communications Providers would still be able to use the material detriment test for any price rises affecting other businesses.

*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?*

### **Proposed amendment of GC9.6**

- 6.51 In light of the analysis above, our provisional view is that the most suitable option to address the consumer harm identified is:
- Option 4: Modify GC9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services applicable at the time the contract is entered into by the consumer (including changes to the level of service provided which effectively constitute a (unit) price increase).
- 6.52 Accordingly, we propose to modify GC9.6 to give effect to this option. The specific modifications we propose to make are set out in Annex 8 to this document. In order to make those modifications Ofcom must be satisfied they are:
- objectively justifiable;
  - not such as to discriminate unduly against particular persons or against a particular description of persons;
  - proportionate to what they are intended to achieve; and
  - in relation to what they are intended to achieve, transparent.
- 6.53 Ofcom's provisional view is that those requirements would be met by the proposed modifications. For the reasons set out in this document, there is consumer harm that is not being addressed by the combination of existing general consumer protection laws and the current requirements of GC9.6. On that basis, the modification would be objectively justified. The modified condition would apply to all Communications Providers as defined in GC9.6. It would not therefore discriminate unduly against particular persons or against a particular description of persons. It would be proportionate to what it is intended to achieve in that, for the reasons given and as explained in this document, other options Ofcom has considered would, in Ofcom's view, fall short of what is necessary to address the relevant consumer harm. The proposed modification would, by contrast, and again for the reasons set out, be necessary to address that harm and meet our legitimate aims, but impose no greater regulatory burden than necessary to do so. This document sets out clearly what the modifications would be intended to achieve, such as to meet the requirement for transparency.

*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?*

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

### **Non-price variations**

- 6.54 Variation terms in contracts also allow Communications Providers to make non-price variations to the contract. Currently, we have not identified any concerns in relation to how the current rules have been applied to any non-price variations made to the

contract. Therefore, our initial view is that the material detriment test would remain in GC9.6 for any non-price variations and Communications Providers would have to take this into account when making variations to any other terms in the contract.

- 6.55 As now, providers would need to assess and decide how to comply with GC9 in respect of any non-price variations made and Ofcom would also continue to assess such variations on a case-by-case basis as and when required e.g. following consumer complaints. We would not propose at this stage to issue any guidance on how this would apply to non-price variations as we have not identified any current consumer concerns regarding such changes.

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

### **Implementation of any new regulatory interventions**

- 6.56 We recognise that Communications Providers have offered their current deals on the basis of the current rules and would require time to ensure compliance with any new regulatory interventions. Therefore, it is important to consider an appropriate timescale in which it would be acceptable for them to comply with any new arrangements which Ofcom may introduce.
- 6.57 Our initial view is that options 2 and 3 would take some time to develop, finalise and implement with detailed discussions and input required from industry and stakeholders on the greater transparency requirements in option 2. We would also require time to develop the guidance for industry to follow in relation to the high level principles in assessing whether a price rise constitutes material detriment for options 2 and 3.
- 6.58 However, we consider that option 4 would have shorter implementation timescales as it would require Communications Providers to ensure that any new contract offered from a certain date to have a clause which allows the consumer to withdraw from the contract without penalty for any price increases. For our preferred option 4, we consider that a three month implementation period from the time we issue a statement should be sufficient to enable Communications Providers to make the necessary changes to their planned advertising/marketing and contractual documentation as well as staff training.
- 6.59 Our initial view is that any new regulatory requirement should only apply to any new contracts rather than require Communications Providers to make changes to existing contracts. In particular, we note that Communications Providers will have planned on the basis of existing contracts being capable of price variation. We are aware that this would mean that consumers currently tied into a fixed term contract would not benefit from any additional protection until their current contract comes to an end. This would also mean that consumers who enter into fixed term contracts in the period before any new regulatory intervention takes effect would also not be protected for up to a maximum of two years. We believe, in this context, that the role of consumer education will be important to ensure that consumers currently in fixed term contracts and those intending to enter into new contracts prior to any regulatory changes coming into force, are aware of both the current and the potential scenarios. The existing rules in all of GC9.6 (in its current form), the CPRs, GCs 23 and 24 and the UTCCRs would continue to apply to all existing sales and marketing activity and to all existing contracts. The CPRs, GCs 23 and 24 and the UTCCRs would also, of course, continue to apply to all sales and marketing activity and to all contracts once

any modifications to GC9.6 came into force (and in addition to that modified condition).

*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?*

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

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 14 March 2013**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://stakeholders.ofcom.org.uk/consultations/price-rises-fixed-contracts/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [pricerises.consultation@ofcom.org.uk](mailto:pricerises.consultation@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation:
- Carmen To  
Ofcom  
Floor 2: Consumer Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7981 3333
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Carmen To on 020 7981 3538.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all

responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement by June 2013.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 020 7981 3601

Email: [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 4

# Consultation questions

A4.1 We invite stakeholders to respond to any of the questions set out in this consultation as listed below and, where relevant, provide evidence to support your views.

### 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?*

*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?*

*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?*

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

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

### 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?*

*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?*

*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?*

*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?*

*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?*

*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?*

*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?*

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

*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?*

*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?*

*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?*

*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?*

## **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?*

### **Option 2**

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

### **Option 3**

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

#### 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?*

#### 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?*

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

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

*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?*

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

## Annex 5

# Extracts relevant to GC9.6 from Ofcom consultation and statement on implementing changes to the revised EU framework

## Introduction

A5.1 This annex contains extracts in relation to General Condition 9.6 taken from Ofcom's consultation and statement on implementing changes to the revised EU framework in 2011.

## Extract from February 2011 consultation<sup>58</sup>

### **Subscribers can withdraw from contracts penalty-free following a notice of contract modifications**

#### **Inclusion of all subscribers**

7.10 Article 20(2) of the USD sets out that subscribers should be able to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by their CP. Previously, only residential consumers had this right under GC9. The inclusion of subscribers means that the right has been extended to other subscribers, including businesses.

7.11 We propose to amend GC9 to apply this provision to subscribers more generally and the revised text can be found at Annex 7.

7.12 For the avoidance of doubt, we do not consider that the proposed changes we set out in this Section to the information that needs to be provided to end-users, where applicable, will constitute a material change to end-users' terms and conditions such that they would be able to exit penalty free from their contract with the CP under proposed GC9.6.

7.13 In addition to notifying consumers of proposed modifications to contracts, CPs will now also have to notify these other subscribers. This change will provide a 'flexibility' benefit for business customers (who will be able to withdraw penalty free from contracts following a notice of modification). It may also involve some costs for CPs, in relation to those business customers who choose to exercise this new right.

#### **Notifications of modification**

7.14 Article 20 also requires that Ofcom has the power to specify the form in which such notifications are to be made. Ofcom considers that it already has the power to be able to do this via modifying GC9 if needed. At present, we consider that industry should decide in the first instance how best such notifications should be made. That said, we consider that notifications will have to at least be in a form which subscribers can reasonably be expected

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<sup>58</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/gc-usc/summary/gc-usc.pdf>

to read and expect CPs to actively communicate any proposed modifications to their customers. Notifications should furthermore be expressed in plain, intelligible language and be set out with due prominence.

7.15 Letters and emails (if that is the means of communication chosen by the subscriber) are the most obvious examples of notifications. Other printed material, such as pamphlets or magazines, may be used, but whether this is 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 or magazines sent by their CP. In addition, we do not consider that a notification which asks subscribers to regularly check their CP's website for possible changes to their contract is acceptable.

### **Material Detriment**

7.16 The USD does not refer to a requirement for likely material detriment to the subscriber of any proposed modification before that subscriber can terminate the contract. Nonetheless, when it first introduced this obligation through making GC9, Oftel read into the then Article 20 (4) USD the words 'materially detrimental'. (In that any modifications to the contract had likely to be of material detriment to the Consumer before s/he could withdraw from that contract as a consequence of the modification.) As Oftel explained at the time, this reflected the test Oftel used in Unfair Terms in Consumer Contracts Regulation 1999 ('UTCCRs') cases to decide whether contractual terms were fair or not.

7.17 Ofcom considers that such a threshold is still relevant and likely generally to reflect current consumer protection in this area. That is, under the UTCCRs contract terms are unfair if, amongst other things, they create a "significant imbalance" in the consumer's (subscriber's) and supplier's (CP's) rights and obligations under the contract. Contract terms which could allow a supplier to change the contract in a significant way could well unbalance the contract and are under strong suspicion of unfairness. This is reflected in the provisions of paragraphs 1 (j), (k) and (l) of Schedule 2 of the UTCCRs, which say that various terms providing for contractual variation may be unfair. Retaining a "material detriment" requirement would therefore generally reflect the "significant imbalance" requirement used to determine the unfairness of relevant contract terms.

7.18 We note that the UTCCRs apply to residential consumer contracts only. That said, we consider it appropriate to read in the material detriment wording in relation to wider subscriber contracts as well. If this were not the case, we would end up with a stricter test for residential consumers than for businesses which would not be appropriate.

7.19 This approach is also in line with the requirement for Framework obligations to be exercised in a proportionate manner; whereby, in this case, any proposed contract modifications must materially affect the subscriber before that subscriber can choose to exit from the contract.

### **Extract from May 2011 statement<sup>59</sup>**

#### **Subscribers to be able to withdraw from contracts penalty-free following a notice of contract modifications**

7.33 Six respondents – BT, Vodafone, Sky, Ombudsman Services, EE and a confidential respondent commented on this proposal. Ombudsman Services noted that this provision has now been extended to cover Subscribers (which includes both residential and all business customers) who are in a contract with a provider of PECS and they welcomed this extension.

<sup>59</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/gc-usc/statement/Statement.pdf>

While the other respondents did not indicate opposition to our proposal, they did seek clarifications on the application.

7.34 A confidential respondent was concerned that a Subscriber who has bargaining power, such as a business or government department who agreed to a bespoke contract, where specific changes to pricing or other terms by the CP are allowed, would be able to rely on this provision to exit the contract at no cost, should they consider that any proposed changes would cause them material detriment. BT also commented that the provision was drafted too wide, and that it should only capture consumers and businesses on standard contracts. BT's view was that GC9 should only apply to consumers, SMEs and micro businesses.

7.35 We do not agree with BT that GC9 should only apply to consumers, SMEs and micro businesses. We are transposing the revised Framework requirements via GC9 and the Directives make it clear that new provisions like exiting penalty free following notice of contract modifications are now relevant for both consumers and businesses.

7.36 However, we note the points made in relation to bespoke contracts and material detriment for subscribers who may have bargaining power. Establishing whether a change is materially detrimental will ultimately depend on an assessment of the facts in such cases. Having said that, we do agree that in certain cases where there is an agreed change mechanism, such as in the case of business contracts, that changes captured by this mechanism are unlikely to be materially detrimental as they are likely to have been envisaged by the parties at the time the contract was agreed.

7.37 EE noted that Ofcom should not provide guidance on the format by which notices of changes are to be given. It considered that the CP was best placed to decide this and that Ofcom should avoid issuing guidance which can stifle innovation. It further suggested that Ofcom should either delete the proposed guidance provided in the consultation or that it should broaden it to include alternative and new forms of communication.

7.38 While we agree that CPs are well placed to decide on how to communicate with customers, we also consider that some guidance is necessary to ensure that customers are well informed. For example, we maintain that, notifications which require customers to regularly check CPs' websites for possible changes will not be sufficient. Our view is that CPs need to ensure that customers know how such changes will be communicated from the outset. This can include for example, letters, emails or other acceptable forms of communication.

### **Conclusions on penalty free withdrawal following a notice of contract modifications**

7.39 Having considered all the responses in relation to this issue, our modifications remain unchanged from those set out in the consultation:

- subscribers – including now businesses – will be able to withdraw from contracts penalty-free following a notice of contract modifications; and
- that we will maintain the words “material detriment” in 9.6(a) to make clear that notices must be provided in those cases where modifications are likely to be of *material detriment* to the Subscriber.

7.40 We continue to believe that the impacts of this change will be limited only to CP's business customers, who now gain the right to exit from a contract penalty free following a notice of modification which is likely to be materially detrimental to them. CPs will not be

impacted further in terms of their residential customer base given consumers already had this right under the existing GC9.

## Annex 6

# Findings from BEREC survey

A6.1 In August 2012, we sent out a survey to BEREC (Body of European Regulators for Electronic Communications) to ask what rules there are in other countries in relation to when Communications Providers make price rises in fixed term contracts and other variations to fixed term contracts.

A6.2 We received answers from 13 EU Member States: Austria, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Malta, Poland, Portugal, Slovakia, Slovenia and 3 other BEREC members: Croatia (acceding country to the EU), Switzerland (not in the EU) and Turkey (EU candidate country).

A6.3 The detailed responses are as follows:

<b>Question: Are Communications Providers required to allow customers to exit their contract without penalty if the provider increases its prices by any amount during the minimum contract term?</b>	
Austria	If the customer does not agree to the new terms and conditions (there is no distinction if the changes refer only to terms and/or prices) the customer has the right to terminate the agreement without penalty.
Croatia	Yes, except in cases where the amendments to the price list are: 1. a consequence of regulatory obligations arising from Electronic Communication Act, 2. a consequence of changes of value added tax, 3. a consequence of changes in wholesale prices to which the operator of public communications services has no influence.
Finland	Yes.
France	Yes, minimum contract terms have no consequences on the obligation of allowing subscribers to exit contract in case of modification.
Germany	The new section 43a of the German Telecommunications Act (TKG) summarizes all the information the telecommunications provider has to give to the end-user in its contract (sec. 43a para. 1 and 2 TKG), for example the prices, the duration of the contract, the data about the product, how to terminate the contract, the offered minimum data rate of broadband internet accesses, etc. The Federal Network Agency (BNetzA) is allowed to specify this information which has to be given to the consumer in its contract in a special regulation which will be published in the official gazette of the BNetzA. In the case the BNetzA intends to make such a regulation the BNetzA has ensure the participation of the associations and companies concerned (sec. 43a para. 3 sent. 1 TKG). Furthermore the BNetzA is allowed to determine in this regulation which information has to be given to the consumers concerning their right of withdrawal. In this regulation the BNetzA can determine the conditions under which the consumer has the right to withdraw the contract with the provider. For example which modifications to the contractual conditions trigger the right to withdraw without penalty, if the consumer will not accept the new conditions of the provider. Until the BNetzA will make such a regulation with the called provisions the right to withdraw from a contract is regulated in the German Civil Code (BGB) and depends on the fulfilment of certain conditions. The BNetzA is not the competent

	authority to interpret these conditions according to civil law and the general terms and conditions between the providers and their customers.
Greece	<p>Yes the Communications Providers are required to allow customers to exit their contract without penalty if they increase their prices by any amount during the minimum contract term.</p> <p>According to the regulation on General Authorizations (<a href="http://www.eett.gr/opencms/export/sites/default/EETT_EN/Electronic_Communications/Telecoms/Licensing/Licensing_Docs/Decision_390_3_2006.pdf">http://www.eett.gr/opencms/export/sites/default/EETT_EN/Electronic_Communications/Telecoms/Licensing/Licensing_Docs/Decision_390_3_2006.pdf</a>) and specifically section 2.1.14. "Contracts":</p> <p>"g) If a person that provides Public Electronic Communication Networks or/and Services to the public amends the contractual terms unilaterally, then subscribers shall be entitled to terminate the contract at no cost within one (1) month after the relevant notification. The provider is under obligation to inform subscribers, through the press or via e-mail, on the amendments and the right to terminate the contract at least one (1) month prior to their effective date.</p> <p>h) Without prejudice to the provisions on competition and the principles of good faith and transactional ethics and the law on consumer protection, a retrospective increase of tariffs is prohibited without the prior consent of the other contracting party."</p>
Hungary	<p>In the case of contract for an indefinite term, the subscriber has the right to terminate the contract at any time for any reason with a notice of eight days.</p> <p>In case of contracts for a fixed term, the subscriber has the right to exit the contract within 15 days after receiving the notification from the service provider if the unilateral modification of the contract is to their disadvantage. A price increase would likely fall into this category. However, if the fixed term contract contains benefits for the subscriber (e.g. a price reduction) then the subscriber can only exit the contract without penalty if the unilateral modification also affects the benefit(s) in question.</p>
Latvia	<p>According to Electronic Communications Law customers have rights to exit their contract without penalty if the provider changes its prices by any amount during the minimum contract term. It has to be noted, that changes in VAT are not the reason to withdraw the contract.</p>
Malta	Yes.
Poland	<p>Yes, the customer is allowed to exit the contract if the provider increases its prices. In the event of exercising the right to terminate an agreement the provider of publicly available telecommunications services shall not be entitled to compensation and to the recovery of an allowance referred to in Article 57 (6).</p>
Portugal	<p>Yes, but according to article 48, paragraph 7, withdrawing motivated by the increase of prices does not exclude compensatory measures laid down in case of early termination by subscribers of contracts including minimum contractual periods.</p>
Slovakia	<p>In general, yes. However in the case of dispute the appraisal whether the particular price change is considered "substantial modification" would be in the jurisdiction of general courts.</p>
Slovenia	<p>Yes, resulting from the 85th Article of Electronic Communications Act. But in practice Agency cannot solve disputes (when end users terminate the contract and do not want to pay penalties – full price for terminal or equipment, etc.) because of decision of the Administrative Court of the Republic Slovenia. The Court considers that in such cases disputes are relating to the amendment of the contract and that disputes in such cases are not in relation to services.</p>

Switzerland	No.
<b>Question: Are Communications Providers required to allow customers to exit their contract without penalty if the provider makes any changes (not just price changes) to the contract? Or can the customer only cancel without penalty for specific changes?</b>	
Austria	The changes must be “not only in favour to the customer”
Croatia	Yes, but only changes that are less favourable for the customers compared to signed contract.
Finland	The user has always a right to terminate the contract if the changes made to the contract are to the detriment of the user.
France	Any changes in the contract (price or other) allow the subscriber to exit the contract.
Germany	See answer above.
Greece	The Communications Providers are required to allow customers to exit their contract without penalty if the provider makes any changes (not just price changes) to the contract.
Hungary	In the case of contract for an indefinite term, the subscriber has the right to terminate the contract at any time for any reason with a notice of eight days. In case of contracts for a fixed term, the subscriber has the right to exit the contract within 15 days after receiving the notification from the service provider if the unilateral modification of the contract is to their disadvantage. A price increase would likely fall into this category. However, if the fixed term contract contains benefits for the subscriber (e.g. a price reduction) then the subscriber can only exit the contract without penalty if the unilateral modification also affects the benefit(s) in question. Also applies to changes to terms other than price.
Latvia	If the Communications Providers want to make any changes in contract except price changes the customer has rights to disagree with these changes. If after negotiations between both sides changes in the contract are not accepted the contract may be continued without changes or the customer may withdraw the contract without penalty.

Malta	<p>In 2011, the Malta Communications Authority ('MCA') published a decision which specifies that when an undertaking considers that modifications to contract terms and conditions which it intends to introduce will positively affect all impacted subscribers, that undertaking may notify the MCA regarding the proposed modifications to terms and conditions of subscriber contracts and seek a waiver from the MCA from the obligation to provide subscribers with the option to terminate the contract without penalty in accordance with Article 23 of the ECRA referred to in response (1) above.</p> <p>This decision specifies the process to be followed by the undertaking should the waiver be sought by the said undertaking.</p> <p>In any of the following instances, the undertaking must inform subscribers of any changes to his/her terms and conditions, at least 30 days prior to the implementation of the said changes and provide the possibility to subscribers to terminate their contract without incurring any penalties:</p> <ul style="list-style-type: none"> <li>i. the Authority decides that the modifications do not necessarily impact, in a manifestly positive manner, some or all of the concerned subscribers (following the process required to be pursued by the undertaking as referred in the first paragraph of response above); or</li> <li>ii. undertakings have already determined that the modifications to the subscribers' contract are not positively affecting impacted subscribers; or</li> <li>iii. the undertaking decides, for any other reason, not to seek the Authority's ruling.</li> </ul>
Poland	<p>Yes, the customers are allowed to exit the contract without penalty if the provider makes any changes to the contract. According to the Article 60a(2) in the event of exercising the right to terminate an agreement referred to in paragraph 1, the provider of publicly available telecommunications services shall not be entitled to compensation and to the recovery of an allowance referred to in Article 57 (6), of which the subscriber should be also informed.</p> <p>According to the Article 60a(3) the provision of paragraph 2 shall not apply if the necessity to make modifications referred to in paragraph 1 results directly from changes to the provisions of law, also including elimination of forbidden contractual clauses.</p>
Portugal	<p>According to article 48, paragraph 6 of Electronic Communications Law, when the undertaking decides to amend any of the contractual conditions referred to in paragraph 1, the subscribers have the right to terminate, without penalty.</p> <p>Paragraph 7 of article 48 stipulates that the provision in the preceding paragraph shall not apply to contractual amendments where an objective advantage for the subscriber can be identified, nor does it exclude compensatory measures laid down in case of early termination by subscribers of contracts including minimum contractual periods.</p>
Slovakia	<p>There is no list of changes in the Act that would imply right to cancel the contract without any penalty. In the case of dispute, the general court would decide whether the certain modification is significant enough to be considered substantial. Small insignificant changes would not give customer the right to exit contract without penalty. Some providers define the "substantial modification of the contractual conditions" as any change that increase the price of provided service or objectively limit the rights of subscriber or widen the obligations above the range in the original contract.</p>

Price rises in fixed term contracts

Slovenia	Yes, resulting from the 85th Article of Electronic Communications Act. But in practice Agency cannot solve disputes (when end users terminate the contract and do not want to pay penalties – full price for terminal or equipment, etc.) because of decision of the Administrative Court of the Republic Slovenia. The Court considers that in such cases disputes are relating to the amendment of the contract and that disputes in such cases are not in relation to services. The Electronic Communications Act does not specify the changes on which end user is entitled to terminate the contract early. 85th Article in our Act is written in general about changes of the terms set out in the subscription agreement.
Switzerland	n/a.

## Annex 7

## Price rises since September 2011

Provider	Price rise announced	What were the price changes?	Date changes came/come into effect
Vodafone (1)	Sept 2011	Standard line rental increased to nearest 50p for pay monthly customers. Out of bundle rates for calls were matched with out of bundle rates that Vodafone charged its customers as of May 2011. Various changes to out of bundle services.	11/10/2011
BT (1)	Sept 2011	Standard monthly line rental increased by 70p (5%) from £13.90 to £14.60. Various call charges increased by up to 5%. Various increases to broadband services.	3/12/11
Orange	Nov 2011	Pay monthly plans increased by 4.34%.	8/1/12
Virgin Media (1)	Feb 2012	Various increases to call charges (up to 12%), broadband services and bundles. Also moved back daytime call period from 6pm to 7pm.	1/4/12
T-Mobile <sup>60</sup>	Mar 2012	Pay monthly plans increased by 3.7% (based on RPI figure of 3.7% in February 2012).	9/5/12
TalkTalk (1)	April 2012	Monthly line rental increased by 70p (5.1%) from £13.80 to £14.50.	1/5/12
Three	May 2012	Pay monthly plans increased by 3.6% (based on RPI figure of 3.6% for March 2012).	16/07/12
Sky	July 2012	Increase to Sky Talk UK landline call rates during chargeable periods from 7.6p to 7.95p per min.  Line rental increased from £12.15 to £14.50 from 1/12/12.	1/09/12  1/12/12 for line rental
Vodafone (2)	Sept 2012	Increase in pay monthly line rental by up to 2.4% for existing customers, increase to PRS and Vodafone Passport replaced with Euro Traveller.	1/11/12
BT (2)	Sept 2012	Standard line rental will increase by 5.8% from £14.60 to £15.45. Various increases to voice, broadband services <sup>61</sup> . Voice and broadband increases 5.9% or below.	Will take effect on 5/1/13
TalkTalk (2)	Oct 2012	Monthly line rental increased by 45p (3.1%) from £14.50 to £14.95. Various packages increased by £1. Increase to various call rates. <sup>62</sup>	Will take effect on 1/1/13
Virgin Media (2)	Nov 2012	Standard line rental will increase from £13.90 to £14.99. Various increases to broadband standalone services and bundles.	Will take effect on 1/2/13
O2	Dec 2012	Line rental in monthly subscription charge increased by up to 3.2%.	Will take effect on 28/2/13

<sup>60</sup> [http://support.t-mobile.co.uk/help-and-support/index?page=home&cat=NEW\\_PRICES](http://support.t-mobile.co.uk/help-and-support/index?page=home&cat=NEW_PRICES)

<sup>61</sup> [http://bt.custhelp.com/app/answers/detail/a\\_id/35832/~/-/price-changes-from-5-january-2013](http://bt.custhelp.com/app/answers/detail/a_id/35832/~/-/price-changes-from-5-january-2013)

<sup>62</sup> <https://sales.talktalk.co.uk/pricing/info/pricing-notification>

## Annex 8

# Notification of proposed modification to General Condition 9.6

## PROPOSAL FOR A MODIFICATION OF CONDITION 9.6 OF PART 2 OF THE GENERAL CONDITIONS UNDER SECTION 48A OF THE COMMUNICATIONS ACT 2003

### BACKGROUND

- A. The Director General of Telecommunications published on 22 July 2003 a notification setting general conditions under section 45 of the Communications Act 2003 (the “Act”) which took effect on 25 July 2003. Since July 2003, the general conditions so set have been modified on several occasions and new general conditions have been set by Ofcom (collectively, the “General Conditions”).
- B. General Condition 9.6 sets out requirements with which Communications Providers must comply where they propose to make certain modifications to the contracts under which they provide services to Subscribers.
- C. Ofcom has considered the ways in which General Condition 9.6 might be modified so as to provide the appropriate protection for the interests of end-users of public electronic communications services, including in light of the provisions of Article 20(2) of the Universal Services Directive.
- D. Ofcom is setting out in this Notification proposals to modify General Condition 9.6.

### PROPOSAL

- 1. In accordance with section 48A of the Act, Ofcom sets out its proposals for modifications to General Condition 9.6.
- 2. The proposed modifications are set out in the Schedule to this Notification.
- 3. The effect of, and Ofcom’s reasons for making, the proposed modifications are set out in the accompanying consultation document.
- 4. Ofcom is satisfied that the proposed modifications satisfy the requirements of section 47(2) of the Act.
- 5. In making the proposals set out in this Notification, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
- 6. If implemented, the modifications of General Condition 9.6 would come into effect three months from the date of the publication of Ofcom’s statement setting out our decision to make the modifications.
- 7. In this Notification:
  - (i) “Act” means the Communications Act 2003;

- (ii) "General Conditions" have the meaning ascribed in recital A above;
  - (iii) "Ofcom" means the Office of Communications; and
  - (iv) "Universal Services Directive" means Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (as amended by Directive 2009/136/EC).
8. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act or, in appropriate cases, the General Conditions.
9. For the purpose of interpreting this Notification:
- (i) headings and titles shall be disregarded; and
  - (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
10. The Schedule to this Notification shall form part of this Notification.

Signed by **Lynn Parker**

A handwritten signature in dark ink, appearing to be 'Lynn Parker', written in a cursive style.

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

**3 January 2013**

## SCHEDULE

### ***Proposed Modification to General Condition 9.6 of Part 2 of the General Conditions***

1. General Condition 9.6 will be modified with effect from the date three months after the date on which Ofcom publishes a statement setting out our decision to make the modifications.

2. The modified condition will read as follows:

“9.6 The Communications Provider shall:

- (a) give adequate notice not shorter than one month:
  - (i) to every Subscriber in relation to whom any modification of a contract is likely to be of material detriment; and
  - (ii) to every Consumer and Small Business Customer of any Price Modification;
- (b) allow its Subscribers, Consumers and Small Business Customers, as the case may be, to withdraw from the contract to which the modification, or Price Modification, as the case may be, in Condition 9.6 (a) above relates without penalty upon such notice; and
- (c) at the same time as giving the notice in Condition 9.6 (a) above:
  - (i) in the case of a modification falling only within Condition 9.6 (a) (i) above, inform the Subscriber of his/her ability to terminate the contract without penalty if the modification is not acceptable to the Subscriber; or
  - (ii) in the case of a Price Modification, inform the Consumer or Small Business Customer of their ability to terminate the contract without penalty.
- (d) For the purposes of Condition 9.6:
  - (i) “Price Modification” means an increase in the price payable in exchange for any Electronic Communications Service which the Communications Provider has agreed to provide to the Subscriber under a contract, including any modification which has the effect of increasing the unit price of any such service from the price agreed at the time the contract was entered into, but excluding any increase comprising only an amount equal to any charge imposed directly and specifically by changes in legal or regulatory requirements compliance with which by the Communications Provider is compulsory; and
  - (ii) “Small Business Customer” has the same meaning as in Condition 9.3(a).”