Ofcom Consultation on Price Rises in Fixed Term Contracts
Response by Andrew Dyson, 4th January 2013

Preliminary Notes

My interest in this consultation arises primarily from my employment as a College Lecturer in Contract Law at Corpus Christi College Oxford, and as a Tutor in Commercial Remedies at the University of Oxford. However, the views expressed in this response are my own personal views and are not intended to represent the views of the University of Oxford.

I was also, until recently, a consumer with a fixed term contract for mobile phone services with H3G. Following Three's decision to increase its prices in May 2012, I brought a legal claim against H3G which was publicised by an article in The Independent on 7th June 2012. The claim was settled out of court in November 2012 on terms which are confidential.

In this response, all references to paragraph numbers are references to paragraphs in the consultation document, unless stated otherwise. 'Communications Providers' is abbreviated as 'CPs'.

Section 4

Q1. 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?

I strongly agree with Ofcom's identification of this consumer harm and have nothing to add to Ofcom's reasoning.

Q2. 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?

I strongly agree that CPs should bear the risk of costs increasing, for the reasons identified in paragraphs 4.24-4.25.

However, I disagree with the premise of the question, which appears to concede that price increases are in fact connected with costs increases. As far as I am aware, no CP has provided any evidence for the bare assertion that their decision to increase prices results from a corresponding increase in their costs.

Ofcom correctly identifies (in paragraph 4.23) that a significant proportion of CPs' costs are sunk at the point when the contract is signed, for instance, the costs of building network infrastructure. The on-going costs of service provision are likely to be constituted mainly by labour costs, and it is well-known that labour costs (i.e. wages) are currently stagnant.

Most CPs have increased their prices in line with RPI. However, it would be a remarkable coincidence if this figure bore any resemblance to CPs' actual increase in costs. RPI records the price of a basket of consumer goods, taken from a range of industries which have very different

costs structures from the telecommunications industry. The measure has no necessary connection with the costs incurred by CPs.

Furthermore, most of the price increases implemented by CPs were only applied to individual consumers and not to business customers. If the basis for price rises were really an increase in CPs' costs, there would surely be no basis for distinguishing between these two groups since the cost base for each group is almost identical.

Consequently, and contrary to the CPs' assertions, it seems far more likely that CPs' decisions to increase prices were not in fact wholly or even mainly driven by increasing costs. Instead, it seems more likely that CPs were either: (a) attempting to make up for a shortfall in revenue; (b) simply being opportunistic, in an attempt to increase profits.

It is unfortunate that these highly dubious assertions of the 'need' to increase prices 'to reflect increases in costs' have been uncritically accepted by the media and even by leading consumer groups such as Which? Ofcom should make it clear whether it accepts these assertions. I suggest that further investigation is required before CPs' claims can be assumed as fact.

Q3. 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?

Although I agree with the general sentiment expressed by Ofcom in this section, I disagree that consumer harm results (mainly) from inconsistent application of the 'material detriment' test in GC9.6. Instead, I think that the main consumer harm results from the narrow interpretation of 'material detriment', which features in most consumer contracts with CPs.

The phrase 'material detriment', which is adopted in GC9.6, is often replicated in CPs' terms and conditions. However, it does not follow from this that the meaning of 'material detriment' in a consumer's contract must be the same as the meaning of 'material detriment' in the General Conditions, even if the latter could be defined with certainty (which currently it cannot).

This is because the meaning of 'material detriment' in a consumer's contract must be determined by ordinary rules of contractual interpretation. These rules require that a term has the 'meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties' (*ICS v West Bromwich*) (emphasis added). It is very doubtful that the General Conditions would constitute relevant background knowledge in most cases, unless one makes the fanciful assumption that consumers are aware (or even reasonably could be aware) of the General Conditions at the time of contracting.

In other words, there is no necessary connection between the meaning of 'material detriment' in GC9.6 and its meaning in consumers' contracts. Of course, if the contracts made explicit reference to the General Conditions, expressing that the contractual term was intended to adopt the same meaning as in GC9.6, then such a connection would exist. However, as far as I am aware, none of the CPs' terms and conditions currently does this.

The correct understanding of consumers' current legal position (when faced with a price increase) is therefore as follows:

(1) If a consumer's contract allows them to terminate without penalty for a price rise which is likely to be of 'material detriment' to them, then the meaning of 'material detriment' must be determined according to the ordinary rules of contractual interpretation.
(2) It is very doubtful (for the reason just explained), whether the meaning of the phrase 'material detriment' in Ofcom's general conditions, is of any relevance to this process.
(3) The General Conditions function as a backstop; in other words, they constitute a minimum standard (by regulating CPs' conduct) in cases where, on the correct interpretation of the relevant term, a consumer's contract would not otherwise give them a right to terminate for the price increase.

The relevance of GC9.6 to the meaning of consumers' contracts has been widely misunderstood, and has been exploited by CPs. Several CPs have claimed, misleadingly, that because Ofcom has previously indicated that price rises in line with RPI do not constitute 'material detriment' for the purposes of the General Conditions, then their own contractual terms (where they share the phrase 'material detriment') must similarly not apply. This simply does not follow, for the reasons explained above.

Unfortunately, the General Conditions consequently appear to have had the perverse and wholly unintended effect of stifling potentially valid consumer complaints, by leading consumers to believe that their contractual rights are narrower than may actually be the case.

To answer the first part of the question directly, the main consumer harm is not the inconsistent application of 'material detriment' in GC9.6. More often, the harm concerns the CPs' narrow interpretation of 'material detriment' in their contracts with consumers. Differences between CPs on the latter issue are entirely to be expected since the wording of CPs' contracts differ, and the context of the relevant terms (within the contractual document as a whole) also differ.

This so-called 'inconsistency' (which is not really an inconsistency, just an inevitable consequence of the contextual nature of contractual interpretation) cannot be resolved by Ofcom guidance over the meaning of GC9.6 (see answer to Q5).

With regard to the uncertainties associated with the UTCCRs, I strongly agree that these present a significant risk of consumer harm. In particular, the risk arises because CPs will inevitably resolve any uncertainties in their own favour. The cost of obtaining a legal decision (even on the small claims track) is prohibitive for most consumers, and the sums at stake for any one individual are small in comparison with the cost of legal proceedings, so it is highly unlikely that a legal decision would ever be obtained (unless initiated by Ofcom) to clarify the uncertainties.

Q4. Should Communications Providers be allowed (in the first instance) to unilaterally determine what constitutes material detriment or should Ofcom provide guidance?

In order to answer this question, it is essential clearly to distinguish between two different contexts in which the phrase 'material detriment' may be relevant:

(1) Where the consumer's dispute concerns the meaning and application of 'material detriment' in GC9.6.

CPs must not be allowed 'unilaterally' to determine what constitutes material detriment. Such an approach would, as has forcefully been noted in another context, effectively allow CPs to 'mark their own homework'. Additionally, for the reasons identified by Ofcom in paragraph 4.48, inconsistency between CPs is highly undesirable. However, inconsistency is inevitable if individual CPs are allowed separately to determine the application of the General Conditions.

CPs must not even be allowed to determine what constitutes material detriment in the first instance. If given this opportunity CPs will inevitably adopt a narrow application since this furthers their interest in limiting terminations. If consumers fail at this first hurdle, most will be put off further complaints. From personal experience, it takes significant persistence to escalate matters further once a large business contests a claim. The vast majority of consumers that give up would effectively be left unprotected by the General Conditions.

(2) Where the consumer's dispute concerns the meaning and application of 'material detriment' in their contract with the CP.

It is axiomatic as a matter of contract law that CPs cannot unilaterally determine what 'material detriment' means in their contract with consumers. As explained in answer to Q3, the meaning (and hence the application) of a contractual term must be determined by ordinary principles of contractual interpretation.

It is absolutely essential that consumers are made aware that the meaning of contractual terms can never be 'unilaterally determined' by the business with whom they are contracting. The proper interpretation of a contractual term can only ever be determined in legal proceedings. Any assertions made by CPs are just arguments about what they think the term *probably* means; they cannot be definitive.

One need only glance through the comments on Which? Conversations (for instance, regarding the price increase notified by Three in May 2012) to see that this misunderstanding is widespread, even amongst those with the initial inclination to complain or seek further information.

Furthermore, my personal experience indicates that CPs exploit this misunderstanding by propagating the impression that their definition of a term is conclusive. Customer services departments are currently free to make claims along the lines that 'unfortunately Clause X means you cannot terminate'. Indeed, in relation to the price increase notified by Three in May 2012, Three even posted a statement to this effect on its website, obviously with the intention of supressing potential complaints.

It is therefore essential that, as well as transparency in the existence and meaning of individual contractual terms, there must also be transparency in the process by which the meaning of these terms is ascertained. CPs must not be allowed to mislead consumers into thinking that the CP has the final say on the content of the rights which the contract gives to the consumer. This point is too often missed when considering the need for transparency.

Q5. 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?

Guidance on the meaning of 'material detriment' in GC9.6 is fundamentally unsuited to resolving the consumer harm that results from CPs' narrow interpretation of 'material detriment' in consumer contracts, for the reasons given in answer to question 3. Guidance may assist in making the backstop of the General Conditions more robust, but it would do nothing to alleviate the problem insofar as it concerns contractual interpretation rather than regulatory control.

Q6. Do you agree with the consumer harm identified from the lack of transparency of price variation terms?

I strongly agree with Ofcom's identification of the consumer harm from lack of transparency and have nothing to add to Ofcom's reasoning.

Q7. Do you agree that transparency alone would not provide adequate protection for consumers against the harm caused by price rises in fixed term contracts?

I strongly agree with Ofcom's analysis that transparency alone would not provide adequate protection for consumers, particularly for the reasons given in paragraphs 4.70-4.71.

Section 5

Q8. 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?

I agree, for the reasons given by Ofcom, that regulatory intervention should protect consumers in respect of any increase in the price paid for services provided under a contract, whether or not that price constitutes the headline monthly subscription.

However, the headline monthly subscription will in most cases comprise the largest component of the price paid by the consumer (even if other charges may also be substantial, as explained in paragraph 5.15). Consequently, I regard regulatory intervention in relation to the headline monthly subscription as the most essential object of reform. In other words, I would not wish to support an 'all or nothing' approach if 'nothing' is even remotely on the table.

Q9. 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?

My preference, for the reasons given by Ofcom, would be for regulatory intervention to apply in relation to all services.

However, if it necessary to concede that some services should be treated differently (i.e. excluded from the absolute right to terminate without penalty), then I would recommend that:

(1) The 'material detriment' test in GC9.6 is expressly applied to these services, AND;
(2) Ofcom issues clear guidance on the meaning and application of 'material detriment' in GC9.6, AND;
(3) Ofcom should define 'material detriment' broadly, and should seek to prevent CPs from attempting to impose any burden on consumers to provide intrusive evidence of their individual circumstances.

Q10. 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?

I agree that the harm identified from price rises in fixed term contracts applies to small business customers, in particular due to their typical lack of bargaining power as identified in paragraph 5.24. Small businesses are similarly likely to suffer from the anti-competitive effects that may result from mistrust of the headline price of fixed term contracts.

I am ambivalent as to whether the harm identified from price rises in fixed term contracts applies to larger businesses. As noted in answer to question 2, most price rises implemented by CPs were not applied to customers on business contracts. I also share the concern identified in paragraph 5.22 in relation to bespoke contracts between parties of equal (or similar) bargaining power.

Q11. 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?

I agree, for the reasons given in answer to question 10, that regulatory intervention should preferably apply to residential and small business customers alike. However, the harm caused by lack of information (in particular, information concerning the legal rights of consumers) is likely to affect residential customers more severely. Consequently, if necessary then residential customers should form the priority for regulatory intervention.

Q12. 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?

I agree, and have nothing to add to Ofcom's reasoning.

Q13. 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?

I agree that the reasons referred to in paragraph 5.29, namely changes in tax, are outside a CP's control. I lack the requisite industry expertise to determine whether they are also outside a CP's ability to manage.

However, I strongly disagree that it automatically follows from this that, where a reason is outside a CP's control, the CP should not be required to let customers withdraw from the contract without penalty.

First, for the reasons explained in answer to question 2, it is highly doubtful (or at least currently unsubstantiated) whether recent price rises were in fact due to increases in CPs' costs at all, as opposed to reductions in revenue or attempts to supplement profits. In practice it would be very difficult for Ofcom (or any other body) to assess whether the purported reasons given for a price rise are genuine, let alone whether those reasons (if genuine) are outside the CP's control. Consequently an exception based on reasons 'outside a CP's control' would be impossible to police.

Second, and more fundamentally, it is not at all clear why the fact that a reason is outside the CP's control should be relevant in the first place. It is no defence for a customer to say that they can no longer afford to pay for their contract because of a reason which is outside their control (for instance, redundancy). Judging from comments on Which? Conversations, the greatest sense of unfairness felt by consumers derives from the fact that CPs expect to be able to rely upon justifications that do not apply equally to consumers on the other side of the bargain.

The relevant issue is instead whether the CP should be expected to factor the risk of a reason occurring into its initial pricing of the contract, whether that reason is outside the CP's control or not. For the reasons identified in paragraph 4.25, CPs will almost always be in a better position to assess these risks than consumers. Furthermore, the types of reason which are outside a CP's control (for instance, changes in tax) are just as likely to be risk neutral as any other type of reason.

It is also to be noted that when CP's costs decrease due to reasons outside its control (such as reductions in the rate of VAT), these costs savings never passed on to existing customers in the form of a price reduction (though they may indirectly be passed on to new customers). Again, this lack of symmetry is rightly regarded as a source of unfairness by consumers.

Despite the foregoing general arguments concerning the undesirability of an exception based on reasons outside a CP's control, I accept that there may be good reasons for making a special isolated exception for changes in tax. For instance, the effectiveness of fiscal policy depends upon prices being sensitive to changes in tax. On balance, I regard these types of argument as insufficiently strong to justify an exception to Option 4. Nevertheless, if an exception is thought necessary, it should only be developed for clearly specified policy reasons, and not because of any general principle concerning reasons outside a CP's control.

Q14. 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?

As explained in answer to question 13, it would be highly problematic for Ofcom (or any other body) to attempt to assess the reasons given by a CP for increasing prices. CPs are likely to have very complicated pricing structures, making it difficult if not impossible for Ofcom to investigate

whether: (1) the price increase is genuinely due to an increase in costs (as opposed to a decrease in revenue or an attempt to supplement profit); (2) the increase in costs is genuinely attributable to the reason given by the CP as outside its control.

For these practical reasons I regard the proposal to include an exception based on the type of reason as totally unworkable. I also regard an exception based on reasons 'outside a CP's control' as objectionable in principle, for the reasons given in answer to question 13. However, if it was thought necessary to include an exception for price increases due to certain types of reason, the exception should be clearly and strictly limited to the direct effect of changes in tax.

Any broader definition of the exception would almost inevitably be uncertain and would be liable to be exploited by CPs as a way of introducing price rises that were shielded from termination by consumers. Paragraph 5.33 provides evidence that CPs have already engaged in this kind of practice. As Ofcom correctly concludes, the best solution is for CPs to make well-informed and unbiased forecasts which they can use when setting their initial retail prices.

Q15. Do you agree that Communications Providers are best placed to decide how they can communicate contract variations effectively with its consumers?

Provided that CPs follow Ofcom's high level guidance as indicated in paragraph 5.42 (and proposed in paragraph 5.46), I agree that CPs should be allowed to decide how they communicate contract variations effectively with their customers. However, I disagree that they are 'best placed' to do so, because they suffer from the obvious conflict of interest that (for PR and competitive purposes) it is in their interest to minimise awareness of any contract variations which the consumer may regard as detrimental to them.

Q16. 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?

I agree that at the present time Ofcom's approach is appropriate. However, the situation should be kept under review and if it is shown that CPs are not following the high level guidance provided by Ofcom, then the measures proposed in other industries (as outlined in paragraph 5.44) should be considered.

Q17. 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?

Ofcom's additional suggestions for best practice in relation to the notification of contractual variations are very welcome. Adherence to these practices is essential in order to ensure that consumers derive practical benefit from the protection proposed by Ofcom in Option 4.

One minor comment regarding the proposals in paragraph 6.46 is that the second suggestion (concerning notification on separate paper) should be mandatory, rather than merely open for consideration by CPs. It is well-known that the vast majority of mail that looks like marketing is immediately discarded without reading. It is therefore essential that notifications of contractual variations are clearly and physically separated from marketing materials.

A more fundamental concern regarding notifications of contractual variations relates to the fifth and sixth suggestions in paragraph 6.46 (concerning information about the consumer's termination rights). From personal experience, I am aware that some CPs are currently engaging in egregious bad practice in their explanation of consumers' rights to terminate.

In May 2012, I received an email from Three (as provider of a fixed term contract for mobile network services) notifying me that my monthly bill would be increased by 3.6%. In the email, Three provided a link to its website which read: 'Our terms and conditions (http://www.three.co.uk/terms) allow us to raise prices in line with inflation so that we can cover our business costs. This means that you won't be able to leave your contract early as a result of this change.'

I have two main objections to this statement:

(1) The only terms and conditions available at www.three.co.uk/terms were those applicable to Three's most recent new customers.

Three did not provide any archive of the terms and conditions applicable at the time when earlier customers had entered into their contracts. As it happened this was highly significant, because at some undisclosed date in the past Three had changed its terms and conditions for new customers such that the relevant termination clause read 'likely to be of material detriment' whereas it had previously read 'likely to be of detriment…'. The latter clause obviously gave customers a more expansive right to terminate. Three's practice made it impossible for customers to ascertain which contractual terms applied to them, unless they undertook the onerous task of making a specific demand to Three's Head Office to obtain a copy of the terms and conditions that applied on the date they entered their contract.

Consequently, I suggest that Ofcom's best practice guidelines should include a requirement that CPs maintain a clearly dated archive of previous terms and conditions, easily accessible by consumers.

(2) Three stated with absolute certainty that 'you won't be able to leave your contract early as a result of this change'

As a contract lawyer, I regard this statement as at best misleading, and at worst (given the consumer context) as an example of cynical malpractice. The statement was obviously calculated to dissuade consumers from bringing any legal claim or complaint. It relies upon the misunderstanding, identified in answer to question 4, that CPs are able unilaterally to determine the meaning of contractual provisions.

In this case, it was at the very least arguable that consumers did in fact have a good legal claim to leave their contract early (without penalty), as a result of an express termination clause in their contract. Whether or not such a claim would have succeeded, Three's practice in attempting to stifle legitimate legal challenges from the outset should not be permitted. Such practices have a severe chilling effect on consumers' perceived rights of redress.

Of course, I do not go so far as to suggest that in cases where the meaning of a contractual term is uncertain, CPs should shoot themselves in the foot by making a statement which resolves the

uncertainty in consumers' favour. However, neither should they be allowed make clear and confident assertions which ignore the existence of legitimate cause for uncertainty in contractual interpretation.

Consequently, I suggest that Ofcom's best practice guidelines should prevent CP's from making any statement which seeks to conclude a consumer's legal position before Ofcom or other consumer protection organisations have had the opportunity to consider whether consumers may have any legitimate right of redress.

Q18. 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?

I strongly agree that consumers should be given at least one month (from the date of notification) in which to cancel their contract without penalty.

For the reasons given in paragraph 5.48, any shorter timescale is inadequate to allow consumers time to consider the impact of the change and to shop around for better deals.

Furthermore, I note that action and publicity by consumer groups such as Which? takes time to organise. The debates that took place on Which? Conversations concerning price increases lasted well over a month from the date of the initial notification. Accordingly, at least one month is required in order for consumers to make a properly informed decision based on media reporting and subsequent discussion.

It would be preferable if a fixed timescale applied to all CPs, so that this standard became well-known to consumers within the telecommunications industry. Nevertheless, it may be possible to achieve this aim by setting a universal minimum standard, since CPs are unlikely to grant a longer notice period than required.

Q19. 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?

I prefer that CPs should be regulated by a universal standard timescale (either an absolute timescale or a minimum timescale) rather than merely guidelines as to timescale. I can see no benefit to consumers from allowing divergence in the length of timescale, and no need for CPs to possess the freedom to select different timescales. Insofar as CPs may claim to require administrative flexibility, I regard this concern as substantially outweighed by the negative effect that it would have on consumers.

Section 6

Q20. 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?

I very strongly agree that Option 1 is not a suitable option. It is essential that Ofcom intervenes with a solution to the consumer harm that exists in the status quo.

I fully agree with the arguments made in paragraph 6.8 and have little to add. I additionally note that the current consumer harm is likely to get worse if it is not addressed by Ofcom, because the practice of imposing price increases is becoming steadily more widespread throughout the telecommunications industry, meaning that consumers' ability to avoid the practice (principle 3) is becoming progressively reduced.

Q21. Do you agree with Ofcom's analysis of option 2? If not, please explain your reasons.

I strongly agree with Ofcom's analysis of Option 2 and have little to add to the reasoning in paragraph 6.20. I also wish to draw particular attention to two further points in support of the argument that Option 2 is unsuitable.

First, as explained in answer to question 3, the introduction of guidelines for GC9.6 would do nothing to remedy the consumer harm that derives from CPs' narrow interpretation of consumers' contractual rights to terminate (as opposed to the regulatory requirement imposed in the General Conditions). The only way of remedying this type of consumer harm is to implement Option 4.

Second, regulatory intervention which merely imposes new information requirements would be impossible to police. The mystery shopping exercise undertaken by Which? indicates that CPs routinely mislead customers at the point of sale; this is unsurprising given the unaccountability of individual staff members.

Q22. Do you agree with Ofcom's analysis of option 3? If not, please explain your reasons.

I agree with Ofcom's analysis of Option 3, but am even more resolute in my conclusion that Option 3 is unsuitable.

In particular, I consider that the problems identified in paragraphs 6.29 and 6.31 would be fatal to the success of Option 3 in practice. Additionally, Option 3 leaves Ofcom open to the (entirely self-serving) claim by CPs that regulatory intervention will introduce added complexity to the market.

Option 4 is conceptually preferable and also far simpler and easier to implement than Options 2 or 3.

Q23. 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?

I very strongly support Option 4. I regard this option as the best and only effective method of addressing the consumer harm identified by Ofcom. Option 4 is vastly preferable to the other

options put forward for consultation. I also agree with Ofcom that Option 4 is preferable to the solution put forward by Which?, for the reasons identified in paragraph 6.2.

With regard to the potential objections to Option 4 raised by mobile providers in paragraph 6.39, there is a very simple solution to these concerns: mobile providers should price their fixed term contracts more carefully so that mid-term price increases are not required.

It is true that Option 4 may result in slightly higher headline prices as CPs impose a 'risk premium' to guard against uncertainty in costs forecasts. However, it is preferable to incorporate this risk premium as part of the headline price (rather than as part of the small print), because consumers are then more easily able to compare between providers. I anticipate that within a short time the risk premium would reduce to a fair and sustainable level due to competitive pressures.

Q24. 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?

I very strongly agree with Ofcom's assessment, for reasons explained in answer to question 23, and for the other reasons expressed in my response to the consultation.

Q25. Do you agree that Ofcom's proposed modifications of GC9.6 would give the intended effect to option 4?

I agree that Ofcom's proposed modifications of GC9.6 would give the intended effect to Option 4. Overall I strongly welcome the proposed modifications.

However, for the reasons given in answer to questions 13 and 14, I remain concerned by the proposal to exclude from the definition of 'Price Modification' (in s2(d)(i) of the schedule to Annex 8), 'any increase comprising only an amount equal to any charge imposed directly and specifically by changes in legal or regulatory requirements…'.

Whilst I welcome use of the phrase 'directly and specifically' to limit the scope of the exclusion as far as possible, some uncertainties are likely to remain. For instance, would a legal or regulatory requirement that imposed additional costs relating to the new 4G network fall within this exclusion?

CPs would no doubt be inclined to argue that the foregoing example meets the criteria of directness and specificity, with the consequence that Ofcom would be required to deliver further guidance on the meaning of those criteria, in order to avoid CPs from undermining the effectiveness of the regulatory intervention.

Consequently, I suggest that the exclusion should instead be limited simply to the direct and specific effect of changes in tax. This wording would be entirely consistent with the types of exclusion that Ofcom expressly envisage in paragraph 5.29. It would be more certain and less open to abuse.

Q26. What are your views on the material detriment test in GC9.6 still applying to any non-price variations in the contract?

I strongly agree that the material detriment test in GC9.6 should still apply to any non-price variations in the contract. However, I disagree that guidance as to the meaning of 'material detriment' is not required at this stage.

First, clear guidance is essential to reduce to the greatest extent possible the likelihood of inconsistency in CPs application of GC9.6. The introduction of Option 4 would make it more likely that CPs would attempt to make non-price variations, meaning that the need for guidance is likely to increase as a result of the present proposals.

Second, guidance is required as an interim measure to protect consumers whilst the full effect of Option 4 comes into force. As Ofcom identifies in paragraph 6.59, some consumers (who start a new fixed term contract just before the implementation date) will have to wait up to two years before receiving the protection of Option 4.

Ofcom's guidance on the meaning of 'material detriment' should:

(1) Define 'material detriment' broadly. Whilst such a definition may be difficult to draft, there must be other existing regulations that can be relied upon to provide an initial template.
(2) Expressly prevent CPs from attempting to impose any burden on consumers to provide intrusive evidence of their individual circumstances, before they are allowed to rely on the provision.

Ofcom must also be prepared to assess, and correct if necessary, CPs application of the 'material detriment' provision.

Finally, Ofcom must make it clear that GC9.6 only sets a minimum standard of conduct for CPs. It does not exclude the possibility that a consumer may have additional or broader rights as a result of the contractual terms specifically agreed with their provider (or indeed, as a result of any other relevant legislation such as UTCCR 1999).

Q27. 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?

I do not have the requisite industry expertise to determine whether a three month implementation period would be appropriate. However, as a lay person this seems to be a reasonable timescale and I am confident that Ofcom is best placed to make this assessment.

With regard to the longer time for implementation of Options 2 or 3 (noted in paragraph 6.57), I regard this as an additional strong argument in favour of Option 4. It is clear that the consumer harm is immediate and that regulatory intervention should be implemented as soon as possible.

Q28. What are your views on any new regulatory requirement only applying to new contracts?

I agree that the amendments to GC9.6 proposed in Option 4 should only apply to new contracts. Although there will be a delay in the protection available to some consumers (as identified in paragraph 6.59), this is unfortunately unavoidable since it would be unfair on CPs if Ofcom were able effectively to rewrite contracts that have already been concluded.

However, the lack of protection identified in paragraph 6.59 could be addressed by interim measures to improve transparency along the lines suggested in Option 2. In particular, I regard it as important that Ofcom produces guidance on the meaning of 'material detriment' in GC9.6 (explained in answer to question 26).

Despite the weaknesses in interim protection provided by Option 4, I am strongly of the opinion that in the long-term this option is vastly preferable to the other options presented for consultation.

General Remarks

I strongly welcome this consultation. Ofcom's analysis of the problem and suggestions for intervention appear to me to be very thoroughly researched and clearly expressed. This seems to me to be exactly the type of project that an effective regulator should be engaging in.

With regard to potential objections, I note that some CPs have already powered up the doomsday machine to predict 'significant confusion' and increasing costs 'for millions of people' (see comments by Vodafone quoted in the Daily Telegraph 03/01/12). Nevertheless, I have complete confidence that Ofcom will not be dissuaded from reform by unsubstantiated claims that the world will end, put forward by obviously self-interested parties.

In particular, I note that several CPs have previously pointed out (when it suited them) that their price rises were infrequent, carefully guarded against, and minimal. If this is so then we can confidently predict that the disruption to their business models will be similarly slight once Ofcom's proposals are introduced.

Andrew Dyson
4th January 2013