NATIONAL CONSUMER FEDERATION

Response to Ofcom consultation on:

Price rises in fixed term contracts

Options to address consumer harm

Summary

In principle the general consumer law ought to be sufficient to prevent the scope for price increase terms being obscured in ostensibly fixed price contracts. Ofcom has considered the issue by reference to licensing conditions, UTCCRs and the CPRs. Ofcom's view is that while the existing regs should be sufficient, in practice consumers would have difficulty in seeking to have a particular price escalation term declared unenforceable under UTCCRs. In addition there is uncertainty of how the law might be interpreted by the courts - as illustrated by the banks test case. We therefore support the proposal for an amended licence condition as providing greater regulatory certainty for consumers.

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

We agree with the assessment of harm to consumers, following the four key principles as set out in para 4.4. It would be open to Communications Providers to market contracts with indexed prices by giving due prominence to the relevant terms. However Ofcom's analysis of the terms across the contacts in place indicates that consumers would have difficulty in assessing their possible impact or in comparing them across contacts. In practice consumers will continue to base their decisions on headline prices alone.

key principles ... 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).

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

Communications Providers are best placed to assess their costs when setting prices and to put in place appropriate management of the risks they can identify. These risks should not be passed on to consumers as part of a fixed period contract.

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

We agree that consumers will be confused by the variety of definitions of the 'material detriment' that could trigger the ability of consumers to cancel without penalty, even supposing that the terms individually passed the UTCCR fairness test. We consider that a uniform trigger would be desirable. In relation to the UTCCRs, we agree that the existing precedents relating to price increase terms do not create sufficient certainty. We note the experience regarding interpretation by the courts as illustrated by the banks test case.

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

We agree that Ofcom should provide guidance.

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

We doubt if guidance alone would be adequate to address the issues for consumers.

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

The present price increase terms lack transparency. Until they were used, most consumers would not have been aware of them. Even if the terms were drawn to consumers' attention we agree that they would have difficulty in assessing their impact.

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

See previous question.

Section 5

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

See 9.

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

Any regulatory intervention should apply to ALL charges.

Small business questions 10 - 12

We agree that the harm identified applies to small business customers and that any regulatory intervention should apply to both residential and small business customers. The proposals should apply to small businesses as presently defined.

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

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

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

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

Increases deemed to be outside the provider's control should be limited as proposed. All other risks should be capable of being managed by providers.

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

Communicating contract variations to consumers

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

We consider that the informal guidance as proposed by Ofcom is proportionate. Communications should be clearly separate from marketing. The implications of any changes should be clear the consumer without the consumer having to refer to the contract itself or other background material. For example, it would not be sufficient merely to state that prices were being increased in line with RPI as provided by the contract without also stating amount of the increase.

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

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

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

We agree that 14 days is too short a period for consumers to be able to cancel without penalty. We consider that one month would be adequate and that guidance to that effect should be given.

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

See 18.

Section 6

As a general comment on this section, we approve of the way you have used the four principles set out in para 4.4 in analysing the various options.

Option 1

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

We agree that taking no action is not a suitable option to address the harm identified.

Option 2

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

We agree with your analysis of option 2

Option 3

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

We agree with your analysis of option 3. It would be very easy for providers to obtain an explicit opt-in, just sign (or tick boxes) here, here … and here.

Option 4

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

We agree with your analysis of option 4. Providers must inform consumers of the option to withdraw from the contact at the time they are informed of any proposed increase.

Other

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

We agree with your analysis of option 4.

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

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

As an alternative to raising headline prices, providers have the option to degrade the service (offering less minutes etc) in order to side-step the price increase provisions. Your formulation appears to address this issue adequately.

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

Three months is a reasonable time. We would be concerned if it were any longer.

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

Here we have misgivings about your proposed approach. Will consumers be clear when they have a new contract and if so what are the new terms? Consider the situation where a consumer's contract comes to an end after, say, 24 months. If that contract continues without any specific action on the part of either the consumer or the provider, will the contract going forward be a 'new' contract and incorporate the new terms? If the consumer obtains an upgraded handset but on the same headline terms, will the consumer know if is there a new contract in place and its terms? Specifically will any terms in the previous contract have been clearly amended? The new regulatory requirement should apply to all existing contracts.