Which?

Which? works for you

March 2013

Which? response to Ofcom consultation on price rises in fixed term contracts

FIXED
MEANS **FIXED**

In July 2012 Which? started the Fixed Means Fixed campaign as a direct response to the comments and concerns of thousands of consumers. They were angry about surprise price rises for their so-called 'fixed' mobile phone contracts.

We found that over 70% of people did not know that companies could increase prices in what they thought were fixed contracts. The mobile phone companies are not up front about the clause permitting these unfair price rises, often it is buried deep within the small print of the contract, so it's not surprising that there has been a lot of concern from consumers.

In August 2012 we carried out a mystery shopping exercise of mobile phone retailers. Our field workers found that 92% of shop assistants failed to draw attention to the clause permitting price rises. Even when we asked if the contract was for a fixed price, 82% of shop assistants still maintained that contracts were fixed and prices would not rise for the length of the contract.

Our research suggests that since the major mobile operators' price rises to fixed term contracts came into effect an extra £100m has been collected by these companies, affecting more than 15 million people.

The thousands of people who have contacted us on our community website Which? Conversation believe that these companies are not playing fair.[1] Many have said they are angry that providers are not being upfront about potential price increases at the beginning of the contract and that they are taking money from a customer by surprise.

Which? is pleased that Ofcom has recognised that there is a problem in this market and has made a serious commitment to fixing this issue. The following document sets out the position of Which? and the many thousands of consumers who have contacted us.

Which? submitted a formal complaint to Ofcom last year and began collecting online support for our campaign. So far, more than 42,000 consumers have backed our Fixed Means Fixed campaign.

1. A selection of comments from consumers who have contacted us are included in this document. A comprehensive list can be found here: www.whichconversation.co.uk/tag/fixed-means-fixed/

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?

Which? agrees with the consumer harm identified by Ofcom arising from Communications Providers' ability to raise prices in fixed term contracts.

In our opinion the current balance of power is stacked in favour of Communications Providers at the expense of consumers. Consumers are forced to absorb price increases on lengthy contracts. If consumers disagree with the price change and choose to end their contract they are subject to significant exit fees.

Exit fees for mobile contracts are usually the sum of the monthly subscription charges for each month remaining on the contract. Some providers offer a small discount but this is often negligible. The result is that the consumer has little option than to accept the price rise since exiting the contract would mean the consumer would still pay a similar amount per month but would forego the mobile service.

Which? and the 42,000 consumers who signed our pledge believe that this is unfair. These contracts were advertised as being 'fixed' in terms of price and duration when the consumer signed up to these deals and we want fixed to mean fixed. The price and all other features of a contract (minutes, data etc.) should stay fixed from the day it's agreed until the end of that agreement. If providers don't want to keep their end of the bargain and prices do change, consumers should be able to legally leave without having to pay an exit penalty. This right should also be made very clear to consumers before they sign up.

OK, fixed should mean fixed and if that's not the case then how can you market as such?

Mission Impossible, Which? Conversation

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 should bear the risk of their costs increasing just as any business bears the risk of a change in its operating costs.

Firstly, they are in a better position of forecasting their costs and should bear the risk of costs increasing themselves, just as they would not pass on a sudden decrease in costs.

Secondly, if a Communications Provider has to bear a change in cost which is completely unforeseeable, they have ways to reflect the changes in their operating costs. One way would be to charge higher prices for new contracts rather than forcing increased costs onto existing customers who believed their contract was 'fixed'. When energy companies offer fixed contracts to their consumers they take account of wholesale costs at the outset and do not vary prices mid-contract. Similarly, banks would not change the interest rate on a fixed-rate mortgage during the minimum period.

How can this be so one sided? Ofcom needs to intervene. It's not about the money, I personally can afford it, for me it's about the principle.

Andrew, Which? Conversation

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

The idea of material detriment refers to the degree of harm consumers may experience, in this case due to an unforeseen rise in their monthly subscription price. We believe the concept of material detriment is specific to each individual consumer. In our view, using a broad 'rule of thumb' to determine what constitutes material detriment is inappropriate.

While Which? disagrees with any price rise at all during a fixed-term contract, it is up to the customer to judge whether or not a price increase would have a significant negative impact on them. Which? believes that the customer should be given the right to withdraw from any fixed contract when terms or prices change, as is the case with energy providers.

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?

Consumers have told Which? that they want to decide for themselves whether or not they leave a contract when they face price increases or other changes. Therefore, guidance on material detriment would be irrelevant as the consumer should ultimately be responsible for making the decision of whether to accept the changes or walk away.

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

Price increases on these phone contracts may not appear to be a large amount of money. However, hundreds of consumers complained to us about the principle of changing a contract that, they felt, was misleadingly advertised as 'fixed'. Consumers who contacted Which? used terms such as 'sneaky' to describe the way companies had increased the cost of their 'fixed' mobile phone contract.

Which? carried out a mystery shopping exercise of mobile phone retailers in August 2012. We found that 92% of shop assistants failed to draw attention to the clause permitting price rises. Even when we asked if the contract was for a fixed price, 82% of shop assistants still maintained that the prices were fixed for the contract term.

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

2,800

comments made on Which? Conversation

Which? CASE STUDY

Sasha

"When I was sold my mobile phone contract I was told a certain price. I would have expected that price to remain the same throughout what I thought was a fixed contract. I was extremely disappointed that this price was then increased half way through the contract, and there seemed to be nothing I could do about it! I want to see changes made that will allow consumers to get out of their contract without having to pay a penalty if this happens in the future."

Greater transparency in the marketing of telecoms services is necessary. When Which? first launched its complaint on mid-contract price rises we noted that the form and nature of mobile phone operators' marketing gave a clear impression that all terms of the mobile phone contract were 'fixed' for the minimum contract period, including price. We also noted that the contract terms relating to price changes were insufficiently clear. Both these elements need to be clearly communicated to consumers so that they are fully aware of the deal they are signing up to. Improving transparency is a necessary first step.

However, this alone would not solve the problem of consumers facing mid-contract price rises. If companies are clear about the fact that prices can rise, it does not change the fact that consumers have little alternative to the contracts on offer in an industry where all five major mobile network operators announced price rises to fixed-term contracts since Which? first launched its complaint. Thus, if consumers were made aware of the price-variation clauses, they would still be in a position where the balance of power is weighted towards the Communications Provider.

I am so angry about this. It isn't about the amount, a couple of quid a month, it is the bare faced inequality. I should be able to leave and go somewhere else.

Craig,
Which? Conversation

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 nongeographical numbers?

Which? agrees with Ofcom that any regulation changes must protect consumers in the event of any price increase to any service provided by the Communications Provider. In 2012, Bill Monitor's Mobile Report[2] shows eight million mobile phone subscribers are on plans that are inadequate for them and collectively spend an extra £1.66bn on out-of-plan charges that could be avoided. While this highlights a different problem, it is an indication that customers can find tariffs complex and face high costs associated with out of plan charges. Therefore it is important to make things as clear and simple as possible by ensuring that costs that lie outside the monthly subscription charge also remain fixed.

Even if consumers always chose tariffs that were adequate for their needs, there would be some charges that would not be covered under the monthly charge, such as non-geographic numbers. Which? found that charges for non-geographic numbers vary widely among providers. For example, Vodafone charges its customers 14p per minute for calls to 0870 numbers while this rises to 40p per minute for T-Mobile and Orange customers. Given that there is a significant difference in pricing, the price of out-of-bundle items may well be a feature that consumers consider when choosing which provider to sign up with.

Furthermore, some consumers who know they will make frequent use of certain features may consider the price of that element in addition to the monthly subscription charge when choosing between Communication Providers. For example a consumer who must travel frequently may choose a higher priced monthly plan based on the fact that the roaming charges are better than with the alternative provider.

If a contract is advertised as 'fixed price' no change to any costs or prices related to the contract or the phone to which it applies should be allowed.

Robert,
Which? Conversation

42,000

Fixed Means Fixed pledges

2. Bill Monitor is an independent service analysing mobile phone bills.

Consultation questions formal responses

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?

Which? agrees that price rises which are the result of a new tax, an extension of a previous tax or an increase in the rate of VAT should be the sole valid reasons for which consumers should not be able to withdraw from their contracts penalty free.

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?

Which? agrees that Communications Providers are best placed to decide how to inform customers of changes to their contracts. However we would want to see an obligation for Communications Providers to directly notify consumers of contractual changes rather than posting changes on their websites or sending new terms and conditions without highlighting the specific changes.

We welcome Ofcom's intention to make suggestions on how communications could be improved and carry out informal discussions with Communications Providers regarding this. We encourage Ofcom to issue further guidance or requirements if contract changes continue to be unclear 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?

For consistent and equal protection for all consumers we suggest that there is a set timescale applicable to all Communications Providers to cover how long a consumer has to exercise their right to withdraw from a contract. A set timescale would also help avoid confusion over consumer rights. Which? does not have specific views as to what the set timescale should be, but agrees that, at a minimum consumers should be given one month to cancel.

Which? CASE STUDY

Adele

"My mobile phone provider sent me a text telling me that they were going to put the price up under what I thought was a "fixed" contract. It is very unfair to do this to people, I should have been told about this before signing up to the contract. I was really surprised when I got the text saying my bill would go up, I didn't even know they were allowed to do this. I hope Ofcom takes action to stop the companies from imposing these price rises on people."

It's safe to say my contract can't end quick enough now. I don't begrudge a little extra but I am not happy with the sneaky way its been done.

Billy, Which? Conversation

In addition to providing consumers with more time to shop around and consider the impact of the change, this longer timescale would be beneficial if consumers are unable to act immediately. There may be periods when consumers are unable to access their emails or open their post, giving them reduced time to react to the notice.

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?

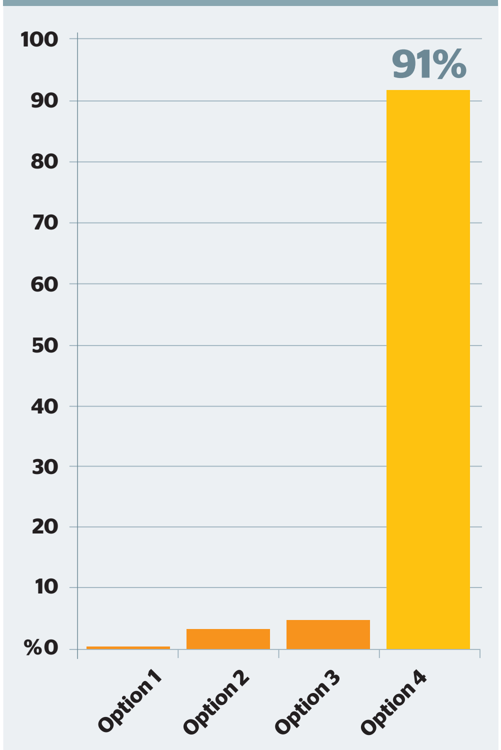
Which? agrees with Ofcom's analysis of the four options it has presented and agrees that the only option which would sufficiently address the problem of mid-contract price rises is option four: allowing consumers to exit their contracts without penalty for any price increase to services applicable at the time the contract was entered into.[3] We conducted a survey (right) asking visitors to our website which of Ofcom's four options they preferred. The response from the more than 5,000 votes received was overwhelmingly (91%) in favour of option four. This would help to re-balance the power between consumer and Communications Providers.

Currently consumers have little option in the face of a mid-contract price rise than to accept it and pay more per month. However, if Ofcom implements option 4 consumers would have greater power and freedom to exercise consumer choice and vote with their feet if they do not wish to accept the price rise. It would restore confidence as consumers could trust that the price they agreed to when they signed up will not increase, and if it does they have the choice to stay or reject the price rise and switch providers or plans. Option 4 would address the issue of "fairness" that many consumers have cited and should lead to an environment where consumers get what they signed up for.

As Ofcom rightly points out, there may be a variety of reactions industry could take in response to introducing option four, but we agree that the benefits of rebalancing power would outweigh them. Any changes to the current business model would be subject to competitive pressure and therein lies an incentive to offer attractive deals. Which? agrees that the added protection and certainty that option four would provide would outweigh the effects of industry's potential response. Furthermore, given the relatively small magnitude of the price rises observed across the mobile industry, we would expect the industry response to be proportionate. We would also expect more incentives for Communications Providers to maintain the advertised price throughout the minimum term to avoid losing customers, and instead reflect increasing costs in higher prices for new customers.

Which? welcomes Ofcom's commitment to monitor indirect or unintended consequences which may arise in response to implementing option four.

Which option would you most like Ofcom to implement?



5,073

poll votes

3. The four options presented by Ofcom were as follows: 1. Make no changes, 2. Require greater transparency of price variation terms, 3. Consumers have to expressly opt in to price rise contracts and 4. Allow consumers to exit contracts without penalty.

Consultation questions formal responses

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

Which? is concerned that the modifications to GC 9.6 may be open to too much interpretation by Communications Providers.[4] General Condition 9.6 sets out requirements for Communications Providers regarding notifying consumers of changes to contract terms and their right to withdraw.

Ofcom is proposing that Communications Providers would be exempt from allowing consumers a penalty-free exit in the cases of price rises due to legal and regulatory requirements. Which? is concerned that Communications Providers may be able to pass on costs under the guise of a 'regulatory' change. For example, if a new piece of regulation stipulated that every consumer must be offered access to an online account through which to control their services, a Communications Provider could claim that in addition to basic programming costs, a massive computer system upgrade was necessary to meet the new obligation. The cost of the infrastructure upgrade could then be passed on directly to existing consumers.

Which? recommends removing the word "regulatory" so that only changes in tax are permitted to being passed on, as Ofcom suggests in the document. If Ofcom insists on allowing pass-through of costs associated with regulatory changes, Which? recommends the draft language be made more explicit. One possible distinction to consider would be whether the cost is necessary to conform to regulation or whether it is discretionary. Another distinction that may be useful would be to differentiate between a new imposition on Communication Providers rather than a clarification of existing regulation.

A safer route might be to include the words "subject to Ofcom's approval" so that Ofcom has the final word on which changes affecting industry's costs are permitted to be passed-through to consumers. We would expect these to be limited to legislative changes, and perhaps the odd regulatory change that significantly affects industry operations.

You enter into a contract at a given price. There should be no change in that price until the contract ends. Changes to the contract should mean you can terminate without a penalty.

Robert, Which? Conversation

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

Which? would like any new regulatory requirements to apply to new as well as existing contracts. Given the high prevalence of long-term (12-24 month) contracts on the market, we note that a considerable number of consumers may be in an existing contract and would not be protected from new price rises until they sign a new contract.

We think applying the regulation in this way is fair since consumers who would be in an existing contract when the regulations come into force entered that contract under false pretences, believing the price as well as the term to be fixed.

Furthermore, given that maximum contract lengths are of 24 months duration, there are likely to be few existing contracts on the market by the time the regulation comes into force that were signed before July 2012, the time when Which? began engaging with Ofcom and Communications Providers. Therefore many Communications Providers would have already been aware that their practices were misleading and had the opportunity to improve their marketing practises and/or change their strategy.

4. Specifically we are concerned with the wording in paragraph d(i) in the Schedule proposing modified language.