

Response from the Consumer Forum for Communications to Ofcom's consultation dated 3 January 2013 – "Price rises in fixed term contracts"

Executive Summary

We welcome the opportunity to comment on Ofcom's proposals on how to deal with price rises in fixed term contracts.

The response is submitted on behalf of members of the Consumer Forum for Communications ("the CFC"). All non-Ofcom members, as well as Ofcom members associated with the Communications Consumer Panel, were sent a copy, and have had the opportunity to comment, and nine have done so. Those comments are summarised after this Executive Summary. Other members of the CFC have raised no objections.

In December 2008, Ofcom published a statement following its review of additional charges, and how it would consider them under the Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCCRs"). In that statement Ofcom concluded that certain contractual terms, as long as they were sufficiently prominent and transparent, were exempt from the test of fairness under the UTCCRs. Although the statement did not consider headline prices for services, it is clear that as long as that price is sufficiently clear it is not subject to the test of fairness.

Our view is that there are certain contractual terms which consumers are entitled to rely upon when entering into a contract for telecom services, and these include the headline package price, the service allowances in the headline package, and any minimum contract period ("MCP"). These would be core terms under the UTCCRs, and which enable consumers to know precisely what it is that they are committing to. We consider that consumers have a right to expect that these will not change within any minimum contract period.

Ofcom recognises the potential for consumer harm when a Communications Provider ("CP") changes any contractual terms during the MCP. The current rules for terminating a contract without penalty are unclear and variable. Ofcom is proposing that in future consumers should be allowed to terminate a contract without penalty during the MCP if the CP makes any detrimental changes to the contract. One of its main reasons for doing this, rather than prohibiting CPs from making any detrimental changes in the first place, is based on its interpretation of Article 20(2) of the Universal Service Directive ("USD"), which requires Member States to ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions, if they do not accept the new conditions. Ofcom concludes that this means that CPs may modify any contractual terms (including the headline package price) as long as they allow consumers to terminate the contract without penalty if those changes are detrimental to the consumer.

Ofcom's view is that the imposition of such a requirement may deter CPs from making contractual changes. If this is the case, then it would have the same effect as prohibiting detrimental contractual modifications in the first place. However, we consider that inertia will be likely to be a dominant factor in consumer behaviour following a price increase, particularly if the increase is small, and that most customers will not terminate their contracts, and will pay the increased charges.

We do not consider that it is clear that USD Article 20(2) does in effect require a regulator to allow CPs to make detrimental modifications to contracts, but that the Article permits the regulator to allow such changes to be made. Up to now Ofcom has interpreted Article 20(2) as requiring a regulator to allow consumers to exit contracts only if there is a materially detrimental change, even though the USD does not refer to materiality.

While the ability to terminate a contract without penalty would enable a consumer to avoid price increases for that contract, it does not mean that the consumer would be able to avoid paying higher prices, if CPs were generally increasing prices. Consumers would also have to bear switching costs, as well as creating more customer churn, the price of which is ultimately borne by consumers. There are other difficulties with terminating contracts during the MCP, such as who owns any equipment provided as part of the contract (in particular mobile handsets), and what would happen to that equipment on termination.

Of the four options which Ofcom has proposed, we support Option 4 above all of the others, i.e. allowing consumers to terminate their contracts if there are any detrimental contract variations.

As Ofcom has pointed out, CPs are better able than consumers to predict and deal with risk and uncertainties, and to anticipate changes. In a competitive market any increases in costs must eventually be borne by consumers, but our view is that any increases in costs should not fall upon existing customers who have already entered into a bargain and which they can reasonably expect to be honoured.

Our view is that Ofcom should consider whether to prohibit such changes for the core package during the MCP, while still allowing changes for ancillary or additional services. For a mobile service the core package would be the call, text and data allowance. Additional services would be those included in the package but where the allowance has been exceeded, as well services which are generally outside the package such as calls to premium rate, non-geographic and overseas numbers, and roaming charges. Most of these would also apply to a fixed line service, with the exception of roaming and text charges.

If Ofcom adopted such a hybrid approach then it would still in effect be recognising an interpretation of the USD as allowing CPs to make contract changes, while at the same time ensuring that for the core package consumers would know exactly what they would be paying for the duration of the MCP.

A prohibition on detrimental contract variations for the core package could lead to a change in behaviour by CPs, such as promoting shorter contract durations. While this might be seen as providing opportunities for more frequent price increases, it might at the same time stimulate competition as fixed term contracts come up for renewal more often, to the potential benefit of consumers.

We agree with Ofcom that certain elements of the price, in particular VAT, can be passed on to consumers without triggering penalty-free termination rights. By extension, it would be acceptable for a CP to increase its charge for the core package if the rate of VAT were to increase (as long as the converse applies that prices will be reduced if the VAT rate falls).

We agree that any changes should be implemented within three months of Ofcom issuing its final statement, but are not aware of any reason why any changes should not apply to existing contracts.

We refer below to Quality of Service, which is a non-price aspect of contracts, but arguably at least as important as price. We would be concerned if CPs were to allow service quality to degrade without allowing consumers to terminate contracts, and we ask Ofcom to give this aspect further consideration.

Our answers to the specific questions in the consultation document are set out below, after the summary of comments from those who commented on this response.

Comments from members of the CFC

Organisations which have stated that they support the response

- **Citizens Advice** fully supported the hybrid approach.
- **The International Longevity Centre** agreed with the proposals.
- **Consumer Focus** agreed with the proposals.
- **Sense** agreed with the approach. It added that while UKCoD and Sense had not considered the matter in detail, but pointed out that many people with sensory impairments had difficulty in accessing information. Sense considered that CPs needed to be able to demonstrate they had communicated changes, and individuals' rights to termination, in an appropriate format. If information is sent, but was not accessible to the receiver, it was as if it had not been sent.
- **The Fair Telecoms Campaign** fully supported the response.

Organisations which will be sending their own responses

- **The National Consumer Federation** is submitting its own response.
- **Ombudsman Services** is submitting its own response.
- **The Communications Consumer Panel** is submitting its own response.
- **Which?** could not support the hybrid approach and is submitting its own response.

Responses to Ofcom questions

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?

Our view is that the current situation leads to consumer harm. In a truly competitive market, with efficient suppliers, supra-normal profits would in theory be competed away and the suppliers would become as efficient as they could. This might arguably lead to the conclusion that any in-contract price rises will not, in the long term, lead to overall consumer detriment even if they led to certain groups of consumers suffering detriment in the short term. However, as Ofcom has pointed out in paragraph 4.21 of the condoc, the ability of suppliers to raise prices might enable suppliers to pass on the costs of inaccurate forecasts. This could reduce the incentive on CPs to improve their forecasting.

We agree with Ofcom's view that CPs are in a good position to forecast their costs when setting prices. We would add that CPs also have a large portfolio of customers at different stages of their fixed or minimum period contracts, and are able to offset the impact of cost shocks by passing them onto new customers and spreading their costs over longer time periods. Consumers tend to have only a very small number of contracts at any one time, perhaps one mobile and one landline contract, and are not in a good position to absorb price increases. Once consumers have reached the end of their fixed term contracts they may face price increases, but at that point they can reconsider what level of service they wish to have if the cost of continuing with the same service is unaffordable or unacceptable.

We consider that CPs should themselves bear the risk of increasing costs for existing contracts, not only for the reasons set out above but because we are concerned that if they are not required to do so it may reduce their incentive to become more efficient or to control their costs.

We are unaware of any instances, during the period a few years ago when prices were falling and/or service allowances were increasing, of CPs reducing the price of their services during the course of fixed term contracts. There is no clear reason why CPs should expect to be able to increase prices for existing customers when costs are rising.

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?

Oftel, and subsequently Ofcom, has over the past few years examined the terms and conditions of many CPs, often as a result of consumer complaints, particularly under the UTCCRs. The result is that there is a wide variety of “allowable” price increases, as Ofcom has noted. Some CPs allow penalty-free termination where price rises exceed RPI, others at a different level, perhaps 10%. This leads to several sources of consumer harm, particularly when considering that the GC9.6 material detriment test also applies. There is no clear consistency between the test under the UTCCRs and the test under GC9.6, and even if consumers were aware that their contracts potentially allowed them to terminate a contract without penalty, they may understandably be confused about whether they could do so in practice. Some may not request termination even where they would prefer it and the terms and conditions would allow it, because they are not confident about their rights.

Ofcom has referred in paragraph 4.33 to the variability between different CPs’ thresholds for contract termination, and has also noted in the next paragraph a distinction between the central and non-central elements of the CPs’ services. We do not consider that CPs should automatically be permitted to distinguish between different parts of their services. Neither the UTCCRs nor GC9.6 do so, referring mainly to prices, contractual terms or modifications.

Under the UTCCRs terms are regarded as “core” or “non-core”. Core terms are those, such as price or contract term, which are regarded as not being subject to the test of fairness as long as they are sufficiently transparent and prominent. However, while the package or bundle price may be regarded as the headline price, and therefore a core term, the same rule does not appear to apply to out of bundle charges, even though consumers may regard them as a key part of the overall service. The most obvious examples are prices for services where the consumer has exceeded the package allowance, roaming charges, and charges for services such as calls to other countries. Many consumers consider these to be an important part of the service, especially if they are regular users of services which are not generally found in the packages or in bolt-ons.

CPs have a different approach to such charges, and whether they can be taken into account when calculating any increases in charges for the purposes of deciding whether consumers can terminate under the service terms and conditions, the UTCCRs or GC9.6. Even if CPs may in their terms and conditions allow contract termination for increases above a certain level, they do not always accept that certain out-of-bundle charges should be taken into account when making such calculations.

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 do not consider that further guidance on the application of the UTCCRs or GC9.6 would provide an adequate remedy. The fact that Ofcom is undertaking this consultation suggests that the guidance that does exist is not clear for either CPs or their customers, and leads to confusion and potential, if not actual, consumer detriment. Our view is that any guidance which adequately addressed the concerns which already exist would be too complex both to define and to apply, and would be unlikely to lead to a significant improvement in the current situation. It would also be likely to absorb considerable regulatory time and resources in implementation and enforcement.

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?

In paragraph 4.61 Ofcom referred to the results of a Which? survey in which 92% of shop assistants in mobile phone shops did not refer to the possibility of prices increases during the fixed contract term, and further that 80% also stated, when prompted, that the price would not rise during the term. The problem is therefore not merely a lack of transparency but of misleading information being provided to consumers were they to enquire of whether prices may rise. Even if that information is provided inadvertently it shows a lack of understanding by point of sale staff.

Even if consumers are provided with adequate information at the point of sale this does not necessarily enable them to reduce the potential harm because there is little that they can do about it. Also, it would be an exceptional consumer who would recall this information at the moment when it becomes relevant. The information needs to specify not only in what circumstances penalty-free cancellation is allowed, but also how long this right lasts (this is discussed below) and how to invoke it. There is a strong argument that true transparency requires all this to be repeated, prominently, at the same time that the consumer is informed about the price changes in question.

Few (if any) CPs currently offer an unconditional right to penalty-free termination in the event of price rises, so consumers faced with the knowledge that one CP may raise its prices during the contract term have little or no opportunity to avoid that risk by going to another CP. There have also been cases where consumers have tried to invoke their penalty-free termination clauses but have been told, for example, that such a clause does not apply to the contractual change in question.

Our view is that the principal harm is caused not so much by lack of transparency of price variation terms, but by the fact that they exist in the first place. There may be potential for such harm to be reduced by consumers having a clear idea of when they may be able to terminate their contracts, but such clarity and understanding does not appear to be

widespread. Our view is that an improvement may be helpful, but is unlikely to significantly reduce consumer detriment.

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?

We are not clear on the distinction between these two questions, but assume that what Ofcom means by the first question is whether there should be a blanket intervention regardless of type of service, and by the second question whether it would be acceptable to have a carve-out for certain services, where any increase in regulatory intervention would not apply.

We agree in principle that regulatory intervention should protect consumers in respect of any price increases. However, we anticipate that such a step would be much more complex in practice than might be anticipated in respect of out of bundle services. Some consumers may use such services only sporadically, such as calls to international numbers or overseas roaming, and at the time of an increase may not have previously used a service but intend to do so later. We question how Ofcom would treat such cases where a price increase came to light only months after it had been introduced.

Many non-geographic prices, such as calls to 0845 numbers, may be relatively easy for CPs to forecast with a reasonable degree of accuracy, but other charges may be subject to significant changes outside the CP's control, in particular premium rate services, calls to overseas numbers, and roaming charges.

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?

We agree that the harm from price rises also applies to small business customers. As Ofcom has pointed out, many small businesses do not negotiate contracts with CPs and are subject to terms and conditions which are broadly similar to those which apply to residential customers. They are not in a position to negotiate, and do not have specialist buying departments which are able to manage telecoms contracts.

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?

Yes, for the reasons stated above.

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?

Yes, for the reasons stated above.

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?

Paragraphs 5.28 and 5.29 refer to price rises which CPs say are outside of their control, including 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.

We consider that elements of price such as VAT are not so much costs that CPs consider in the charges that they set, as pass-through costs. Unless there were intervention in other regulated markets on such matters it may be difficult to justify treating the telecoms market differently. (If a CP decides to absorb an increase in, say, VAT, that would be its own decision.)

If CPs are permitted to pass on costs such as VAT, we expect that the converse would apply, that if VAT is reduced the reduction should be passed onto customers.

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?

We have already referred above to roaming and calls to international numbers. We are aware that calls to some overseas numbers (for example Afghanistan and Cuba) are very much more expensive than others, perhaps because the country's international operator charges exceptionally high termination rates. Such costs may to a significant degree be outside the CP's control.

Our view is that it may not be reasonable to expect the CP either to be prevented from passing on increases in those costs, or to be required to allow consumers to terminate the contract without penalty. However, we are concerned that if such exceptions are allowed, it may discourage CPs from attempting to control those costs where they can. As with our response to the question about whether CPs should be permitted to pass on price increases

resulting from the reasons set out in paragraph 5.29, we would expect them to pass on such decreases in costs.

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?

Subject to the provision of guidance in line with Ofcom's additional suggestions as to the prominence and availability of information, we accept that CPs are best placed to decide how to communicate contract variations. We also agree with Ofcom's proposed approach to informal liaison.

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?

Our view is that the minimum period of notice before a price rise or other contract variation comes into effect should be one month, as set out in Article 20(2) of the USD, which requires Member States to:

"ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions [...]. 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. [...]"

Given that different CPs notify customers in different ways we would expect that some customers would receive notifications significantly earlier, such as those with landlines who receive only paper bills on a quarterly billing cycle.

We consider that customers should be able to terminate the contract at any time up to the date that the contract variation comes into effect. We do not think that customers should have a certain period from the date of notification in which to terminate the service. While

some customers may have more than one month from the date of the notification to the date of the contract variation, it is likely to be too complicated to apply a system in which the clock started at the point of notification. Customers may gain some advantage from having a longer notice period, but this is likely to be minor.

Section 6

Option 1

“make no changes to the current regulatory framework (maintain the status quo)”

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?

The current system does not appear to be working effectively and we agree that Option 1 is not suitable.

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”

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

Our view is that it is not a lack of transparency of price variation terms, but confusing regulatory and legislative requirements, which is the source of many of the problems with the current framework, with inconsistent messages being delivered about the interpretation of the UTCCRs and GC9.6.

An improvement in transparency might be an appropriate remedy if customers were able to take action to avoid potential price increases during the course of a contract by using an alternative supplier, but there is little or no evidence that they could do this.

Option 3

“modify GC9.6 so that consumers have to expressly opt-in to any variable price contract offered by a provider”

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

Although, as Ofcom has pointed out, consumers would be making a more informed choice as to the bargain they were making, we are not persuaded that consumers will have any meaningful information about the level and frequency of price variations. Without better information about potential price rises consumers would still be unable to evaluate the relative costs of opting-in or opting-out. Although they might in theory be protected by the

UTCCRs and GC9.6 were they to opt in, the problem of enforcement and interpretation still exists.

If consumer harm is measured simply in terms of surprises, then the ability of consumers to opt out of price increases would reduce it. However, if consumer harm (or consumer detriment) is measured by the prices that consumers pay, then the price premium which CPs would be expected to apply to provide certainty to consumers for the duration of the fixed contract term may well lead to more consumer harm than not having an opt-in facility.

This option also retains the disadvantages of Options 1 and 2, of the difficulties and complications of enforcement.

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)”

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?

As a matter of principle, our view reflects that of Which?, i.e. that a fixed contract means that all contractual terms should be fixed, but of the options that Ofcom has presented, this is the one which we favour. Ofcom has already noted that the modification of GC9.6 may in most cases deter CPs from making contract variations, or may make them only in certain circumstances, such as in particularly large cost increases or where cost increases affect all providers.

There are, however, potential difficulties in enforcement. We have noted above that certain charges may be only sporadically incurred, such as roaming charges or charges for calling overseas numbers. The tariffs of CPs are often so detailed and lengthy as to make it all but impossible for most consumers to understand whether price rises may affect them. An increase in a certain charge may not affect a consumer until several months after the change has been made, by which time it may in practice be too late to invoke the contractual termination clause.

GC9.6 as currently worded (and indeed in Ofcom’s proposed rewording) refers to any change as being “likely” to be of material detriment. As Ofcom has noted, CPs vary in their interpretation of this wording, for example deciding on the basis of the previous month’s bill how far a change is likely to affect a particular customer. Consumers’ use of telecoms services may be variable or seasonal. The former would include month to month variations

in broadband download volumes, while the latter would include people using mobile phones on holiday or overseas.

It may be very difficult for consumers to assess, or even know, what any likely increases may be, but in practice the increases may represent a substantial proportion of the normal billing level. Our view (which applies also to the current regulatory regime) is that some consumers may be disadvantaged where there is a contract variation which they cannot reasonably be expected to know about until after the deadline for contract termination without penalty has expired.

The difficulty for the CP (as well others such as an independent dispute resolution service) is that they may be unable to make a reasonable assessment of whether any particular consumer would be likely to be affected by a contractual variation. We consider that Ofcom should examine what additional protections can be put in place for such consumers.

We are not sure why Ofcom proposes to retain the qualification of detriment in GC9.6 as being “material”, if the clear intention is that any increase at all in prices (or variation of equivalent effect) would trigger the consumer’s ability to terminate the contract without penalty.

Ofcom has referred to the issue of equipment provided with contracts. The main examples are mobile phone contracts where a handset is provided, but landline broadband contracts also often include modems/routers which have a significant value. The value of mobile handsets is often substantial, and may well represent around half of the entire charges for the fixed period of the contract.

If consumers are allowed to keep equipment when contract termination is triggered, this may represent a significant benefit to them, and may potentially encourage them to seek termination even if the likely increases in costs for the remainder of the contract are very low. Handsets costs may be so substantial that if this happens on anything but a very small scale the CPs may attempt to recover the costs from those consumers who are unable, or choose not, to terminate their contracts. Conversely, where the CPs seek the return of the equipment, consumers may be deprived of something that would have a non-negligible value at the end of the normal fixed period. One possible option would be to allow CPs to charge a residual value for consumers to retain equipment where they choose to terminate the contract.

If such an approach were adopted we do not consider that it should be left entirely to the CPs to decide what any residual value might be, but should be subject to high-level guidance from Ofcom. One approach might be to assume a straight line depreciation to zero by the end of the fixed period, but we recognise that even this approach might not be straightforward because of the way in which costs are allocated to each part of the contract, and because there may be some debate about the initial cost or value of the equipment.

However, such an approach would be better than either requiring the customer to return the equipment with no compensation for residual value, or allowing the customer to retain an item of high value but without providing the CP with any compensation.

One of our concerns, which Ofcom has noted, is about the situation where all CPs are increasing prices. In this case the ability of consumers to terminate their contracts without penalty may be nugatory, since they will have to pay the higher prices wherever they go. The effect may therefore simply be to create extra churn, the costs of which will ultimately fall on consumers generally. Where there are price rises across the market there is a reasonable argument that Ofcom and/or consumer organisations should publicise what is happening so that consumers do not engage in needless and useless switching. This could encourage some CPs to raise prices, and is another reason for our proposal that at least for the core service, price rises within the MCP should be prohibited.

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?

Of the options proposed by Ofcom, we agree that Option 4 is the most suitable but, as we have stated above, our view is that in principle there should be no contract variations (except those outside the CPs' control) during a fixed contract period. If, as Ofcom has suggested, the adoption of Option 4 were to deter CPs from introducing detrimental contract variations, then our concerns would be reduced. However, if this were the case, we see no reason why Ofcom should not prohibit such variations in the first place since it would have the same or a similar effect.

Ofcom's principal objection to banning detrimental contract variations appears to be the wording of USD Article 20(2). In paragraph 6.2 of the condoc Ofcom concludes that this specifically provides for CPs to have the ability to modify contractual terms. However, we question whether this is indeed the case. Article 20(2) would certainly give consumers the ability to terminate contracts if CPs were to raise prices, but we are not persuaded that it leads to the automatic conclusion that CPs must be given the ability to modify fixed term contracts.

As we have noted above, some costs are largely or entirely outside the CPs' control. Ofcom has proposed, and we agree, that certain charges such as VAT should be outside of the proposed changes, and would not trigger the right of penalty-free termination.

Charges are generally split into two key components: the basic package charge; and any other charges for services used in excess of the package allowances plus services which are excluded from the package, such as premium rate and non-geographic calls, and roaming charges.

We do not consider that CPs should be absolutely prevented from raising prices, but our view is that there is scope for a regulatory regime within which CPs would not be able to change core package prices or terms during the fixed contract period, but would be able to do so for services outside the core package as long as consumers had the ability to terminate those contracts without penalty. This would, in our view, satisfy any implicit requirements in Article 20(2) that CPs be allowed to modify contracts.

While we consider that such a solution would better address consumer concerns, it does not entirely resolve the problems with implementation. To the extent that the solution applies to the core package it would mean that consumers could be sure that they were protected from detrimental contract changes for the duration of the MCP. It would also remove any difficulties associated with the communication of contract variations to consumers.

The problems would still remain for the non-core elements of the services, but many consumers do have greater control over their use of such services. They may be better able to control their costs if they do not wish to terminate their contracts. Ofcom noted in paragraph 5.15 of the condoc that charges for mobile services in addition to the monthly contract fee were on average £6 to £10 per month, or a quarter of the average bill. The scale of the problem is therefore less for out of bundle charges than for the core bundle. This, together with the additional control that consumers have on out of bundle services, means that the potential for detriment is reduced.

We do still have a concern that the pattern of usage, particularly for mobile phones, may mean that some consumers do not become aware of an increase in charges until after they see their bills. It may be too complicated (and may also be open to potential misuse) to allow such customers to terminate their contracts penalty-free months after the change has been made. However, the provision by CPs of clearer information about the potential for out of bundle charges (in particular related to seasonal or holiday use) to increase would be likely to reduce the potential for consumer detriment.

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

As stated above, we question why the wording retains the test of any detriment as being "material" if Ofcom's intentions are that any level of price increase would trigger contract termination.

The proposed modification does not specify a time limit by which consumers must give notice that they wish to terminate their contracts. It would seem reasonable, if a month's notice of any increase is given, for consumers to be required to terminate a contract (if they wish) before the change comes into effect. Without such a condition, consumers may assume that they can terminate the contract at any time. It does not seem that Ofcom

intends this to be the case, and a lack of clarity could lead to disputes if CPs seek to impose termination deadlines.

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

We consider that the difference between price increases and non-price contract variations is a qualitative difference, and that no distinction should be drawn between them if a change would be likely to lead to a consumer being charged more for using the same level of service that they had previously used, or would reduce or impair the quality of a service (for example by not making improvements to infrastructure in line with demand). To this extent, there may be some justification for retaining the definition of detriment as “material” if there were no robust or objective way of measuring the detriment, for example in straightforward financial terms.

Quality of Service reductions are much harder to evaluate and deal with than price changes. Quality of Service fluctuates, and is rarely recorded, or at least if it is, consumers are provided with very little information about it. This means that it is a non-transparent measure. At the moment it is very difficult for consumers (and indeed dispute resolution services) to prove that service quality has degraded, despite consumers’ detailed descriptions of their experiences. We would be concerned if CPs were to allow service quality to degrade without allowing consumers to terminate contracts, and we ask Ofcom to give this aspect further consideration.

We do have some concerns about how some non-price variations would be interpreted. If, for example, the call allowance were to be reduced, it may affect only a certain proportion of customers who had regularly reached, or got close to, the allowance. We question whether Ofcom would regard a reduction in a call allowance as triggering the right for all customers to terminate a contract, even if they never got close to the allowance. A ban on detrimental contract variations to the basic package would mean that this difficulty could be avoided.

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?

We recognise that it would take some time for CPs to implement any necessary changes, and consider that three months is a reasonable period which recognises this fact, while limiting the potential for continuing consumer harm to an acceptably short period.

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

We do not see why any new regulatory requirement should apply only to new contracts. Between now and the implementation of the new regime several million consumers will have entered into new fixed term contracts for fixed and mobile services. It does not seem

to us that it would be particularly onerous for CPs to be required to apply any new rules to existing contracts.

END