

Annex A

Ofcom's Statement published 23 October 2013.

Summary

1.1 This statement sets out the Office of Communications' ("Ofcom") decision to issue guidance on General Condition 9.6 ("GC9.6"). The guidance will secure fairness for consumers and small business customers in respect of price rises to the core subscription price during the fixed term of contracts for telecommunications services.

1.2 The guidance sets out that:

- we are likely to regard as materially detrimental (or likely to be materially detrimental), for the purposes of GC9.6, any increase during the fixed term of the contract to the core subscription price charged to consumers and small business customers by Communications Providers ("CPs") to whom GC9.6 applies; and
- in respect of such price rises CPs should give consumers and small business customers notice of the price rise and the right to terminate their contract without penalty in accordance with GC9.6.

This position reflects that the core subscription price is likely to be the most important aspect of one of the key terms of the contract (the price).

1.3 The guidance does not apply to any increase to non-subscription prices, which will continue to be subject to the current regulatory protection provided by GC9.6 (but not the guidance) and relevant consumer legislation (which applies to all price increases).

1.4 The guidance also does not apply to any non-price variations. However, if CPs respond to our guidance by making variations to non-price terms, for example by reducing call allowances (and/or text and/or data allowances where relevant) included in a consumer's monthly subscription price, we would consider such a change effectively to constitute an increase in the unit price paid by the consumer. Ofcom would regard this as a price rise to which the guidance would apply.

1.5 We have made a decision that we consider, as a matter of our regulatory policy judgment, secures fairness in relation to mid-contract increases to key aspects of the price in telecommunications contracts. We have done so in particular in light of the sector-specific provisions of the Universal Services Directive (the "USD") and applying the principle of proportionality.

1.6 The principles of fairness and proportionality have caused us, in light of the consultation responses to which we have given careful consideration, to modify and re-focus our consultation proposal. We recognise that the proposal was broad and we have re-assessed its scope.

1.7 In particular, the judgment we have now made is that:

- it is appropriate to focus on the likely most important aspects of price and price increases; and
- the position we have decided to set out in guidance secures fairness in a proportionate way.

In reaching this judgment we have had regard to, amongst other things, the protection provided by existing regulatory rules and the fundamental importance of price and price terms, particularly as to core subscription prices, to telecommunications consumers and small business customers.

Background

1.8 Amongst other things, Article 20(2) of the USD sets out, in relation to the provision of telecommunications services, that subscribers (including consumers and small business customers) to such services have a right to withdraw from their contract without penalty where providers modify the contractual conditions. In the UK, this is reflected in GC 9.6.

1.9 In acknowledgment of the general legal principle of proportionality, and the need for regulators to act proportionately, Ofcom has included in GC9.6 a proviso that the rights for which the condition provides apply in respect of modifications of contractual conditions that are likely to cause "material detriment" to the subscriber. Ofcom has, however, re-considered the position following price rises by most major mobile CPs over the last 18 months or so. This statement sets out the judgments we have made and the action we have decided to take.

1.10 Our work on mid-contract price rises is identified in Ofcom's Annual Plan as a priority under our strategic objective to protect consumers from harm . In January, we published a consultation on addressing consumer harm from price rises in fixed term contracts ("the consultation"). This followed a review of the current rules in light of a significant rise in complaints to Ofcom due to the core subscription price increases by most of the major mobile CPs since the end of 2011 (Annex 3). Which? also asked Ofcom to stop mobile providers making in-contract price rises. We also received a smaller number of complaints from customers of fixed line CPs.

1.11 In our consultation, we proposed four key principles relevant to meeting the basic aims of fairness that we considered the applicable regulatory rules seek to, and should, pursue. We used these principles as a framework to assess whether those rules were providing adequate consumer protection (fairness) and to assess any consumer harm from price rises in fixed term contracts. We also used them to consider the options for addressing any unfairness or harm. The principles were:

- **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 USD).

1.12 In light of these principles, we identified causes of unfairness and consumer harm including:

- a lack of transparency in some CPs' terms and conditions and/or practices in relation to price variations;
- CPs' inconsistent application of the "material detriment" test in GC 9.6 and uncertainty under the Unfair Terms in Consumer Contract Regulations 1999 (the "UTCCRs"); and
- CPs' ability to raise prices in fixed term contracts without a reciprocal right to withdraw from a contract without penalty on the part of consumers.

1.13 We sought stakeholder views on the following options, proposing option 4 as our preferred course of action:

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

1.14 Having given careful consideration to all the responses received, we have decided to adopt a variation of consultation option 2, rather than option 4.

Consultation responses

1.15 Across both CPs' and consumers' responses there were areas of agreement or consistency with aspects of the consultation. These included that price is an important consideration for consumers in contracts for telecommunications services, and that it is correspondingly important that terms relating to price and price variation are transparent. There was also some broad agreement that there are shortcomings in respect of this transparency.

1.16 There was similarly broad agreement or consistency on the points that the current regulatory framework provides some level of protection for consumers and other subscribers, but the current rules nonetheless contain elements of uncertainty. In particular, there is a need for clarity about what amounts to material detriment for the purposes of GC9.6.

1.17 Both consumers and CPs generally agreed that Ofcom should take action to address shortcomings in the transparency of price variation terms and uncertainty in the application of GC9.6's material detriment requirement.

1.18 There were also areas of disagreement with aspects of our consultation and we have had due regard to these. In particular, CPs challenged the extent, and Ofcom's assessment, of the evidence of relevant consumer harm. They also challenged our proposals as to the proper allocation of the risks of increased costs, the need for telecommunications sector-specific

regulatory intervention, our assessment of the likely impact of option 4 and the basis for our intervention applying to fixed line services. Each of these points, in our assessment, challenges the proportionality of what we proposed.

Decision to issue guidance on the application of GC9.6 to core subscription price rises

1.19 Having carefully considered the consultation responses, our assessment is that the key principles of fairness we proposed are appropriate. In particular, most responses were generally consistent with the principles that:

- consumers should have information enabling them to make informed transactional decisions;
- consumer should be protected against terms and practices that surprise them and impose on them unfair burdens and risks;
- consumers should be able to take steps to avoid those unfair effects, and
- the relevant rules should be clear, certain and effective in practice.

1.20 Accordingly, we have decided to adopt measures to give effect to these principles. Our consideration of the responses, however, has led us to re-consider the options proposed. Having done so, our policy judgment is that, at this time, the appropriate and proportionate action is to issue Ofcom guidance as to the application of GC9.6 to core subscription price rises.

1.21 In making this decision we have had regard to, amongst other things, the importance to telecommunications consumers (and other subscribers) of price and price variation terms. Our judgment also reflects the consultation responses as to the need for, and shortcomings in, the transparency as to contract terms and CPs' practices as to price rises, and the need for certainty as to the application of the relevant rules.

1.22 We have taken due account, in making our assessment, of both the existing protections under general consumer law and sector specific requirements arising out of the Universal Services Directive. We agree that existing provisions give consumers some protection with regard to both the transparency, and the substantive effects, of mid-contract price rises. We do not consider, however, for the reasons set out in section 6 of this statement, either that:

- additional transparency measures alone are, in all the relevant circumstances, sufficient to secure fair outcomes; or
- the existing regulatory protection secures that fairness effectively.

1.23 We have had particular regard to the requirements of the Universal Services Directive. These deal specifically with changes to contracts for telecommunications services, including changes to core subscription prices. They provide a basis for sector-specific rules protecting telecommunications consumers and small business customers that are different and additional to those derived from general consumer law (unfair contract terms legislation, most particularly). We have viewed the evidence of the importance of price terms to consumers and the uncertainty in the way the current rules apply, in particular, in the light of those sector-specific provisions.

1.24 In our judgment, the guidance we are issuing is an appropriate and proportionate means of securing fairness in relation to core subscription price rises during the fixed term of telecommunications contracts between CPs and consumers and small business customers. It specifically addresses the harmful effects of shortcomings in transparency and the uncertainties in current rules and practices in respect of the likely most important aspects of prices and price rises. It does so by addressing the uncertainty about the material detriment requirement in a manner consistent with the Universal Services Directive and, in Ofcom's overall assessment, with likely limited costs.

1.25 The guidance will be part of a regulatory scheme that will help to ensure that consumers and small business customers:

- have information enabling them to make informed transactional decisions; and
- benefit from clear and certain rules that are effective in enabling them to avoid the effects of terms and practices that surprise and impose on them unfair burdens and risks.

These are, in our judgment, key aspects of fairness that the regulatory rules for telecommunications should seek to secure. Price increases to non-subscription services

1.26 For the reasons we set out, we consider it appropriate and proportionate to limit the scope of our guidance to increases to core subscription prices for the time being. As with any price variations, increases to non-subscription prices, and the contract terms providing for them, will remain subject to the UTCCRs and to the GCs, including GC9.6. The guidance, however, will not apply to them.

1.27 We will continue to assess the application of GC9.6 to non-subscription prices on a case by case basis. We will also monitor complaints about any increases to such prices and may review our position if new evidence comes to light of consumer harm arising from them.

Implementation

1.28 Ofcom will adopt the approach set out in the guidance three months after the date of publication of this statement. It will apply in relation to any new contracts entered into on or after that adoption date.

1.29 We consider that three months should be sufficient for CPs to make any adjustments they identify as necessary in light of our guidance whilst ensuring that protection for consumers entering into new contracts takes effect as early as reasonably possible.

1.30 For existing contracts, GC9.6 will continue to apply as it does now. Any question regarding whether a price increase meets the material detriment requirement will be considered on a case by case basis.

1.31 In all cases, we will monitor compliance with GC9.6 and consider taking enforcement action where necessary.