

*Representing the Communication Services Industry*



Price rises in fixed term contracts  
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## Introduction

The [Federation of Communication Services](#) represents over 300 businesses delivering products and services via wireless, copper and fibre technology. Over 50% of FCS members provide services in the fixed markets and many of these are smaller CPs or new entrants. These FCS members deliver telephony services into both the residential and business markets, but most specialise in serving business customers, a sector which is continuing to grow. This response has been prepared on behalf of the Fixed Service Providers Group within the Federation.

## Overview

We welcome the opportunity of responding to this consultation (which proposes to make a further change to General Condition 9 (GC9), allowing Consumers and Small Business Customers to withdraw from fixed term contracts without penalty in response to price rises) as we believe that the approach proposed by Ofcom is flawed in a number of areas.

Firstly, we are surprised that Ofcom is considering such intrusive regulation without seeking to address the problem via more rigorous enforcement of the existing provisions of GC9, specifically the right of Subscribers set out in GC9.6 to withdraw from contracts without penalty following modifications "likely to be of material detriment". We are not aware that there has been a specific investigation into this aspect of GC9, where Ofcom considers that the requirement has been breached by a particular CP or group of CPs.

We recognise that effective enforcement as suggested above would require more detailed Ofcom guidance on what constitutes "material detriment" and indeed would welcome this as the current lack of clarity has been a source of uncertainty and concern for many of our members. We also strongly believe that such clarification should specifically exclude price increases where the relevant contract contains a clause which permits (within bounds) such increases. It may be that an amendment to General Conditions 23 and 24, requiring explicit disclosure of such a provision at the point of sale would be a better route to tackling the problems which are of concern to Ofcom.

We are, therefore, opposed in principle to the introduction of the proposed changes which, following a number of recent changes to GC9, will lead to further uncertainty and disruption for communications providers.

We would also like Ofcom to recognise that there is a clear distinction between the impact of these changes on network providers or wholesale CPs who are in control of the pricing of their own networks and the underlying costs of provision, and reseller CPs who are subject to increases entirely beyond their control.

We note Ofcom's view at paragraph 4.23 of the consultation that many of the costs of supplying a service have been sunk at the point the contract is signed, in particular the cost of any network that a communications provider owns, together with the cost of any equipment provided to the customer. Clearly, this principle cannot be applied to resellers who are simply buying a product or service from a carrier or operator at the prevailing wholesale price and selling it with margin added.

In contrast, it is unrealistic to think that any reseller can negotiate contracts with wholesalers under which it has its own pricing fixed by that wholesaler during any period where it has agreed a fixed term with its Small Business Customers. We further note that at paragraphs 4.24 and 4.25 in the consultation, Ofcom believe communications providers can mitigate the effects of increasing supply costs and underlying costs. We also note that Ofcom does not further develop this point (in terms of how that mitigation can be achieved, particularly by reseller CPs).

We have been provided by our members with a number of examples of specific areas where increases have been made by wholesale providers. These include international call charges (fixed to international and international mobile) which vary in price regularly. As these are set by the international networks and can be affected by exchange rate fluctuations it is impossible for carriers to provide fixed pricing over a long term contract. However, while carriers can pass on these increases without risk to their reseller customers, under the current proposals, resellers would not be able to pass these increases on to their Small Business Customers. Calls to non geographic numbers have also been cited as an area where wholesale costs can move on a regular basis.

The issue is not limited to price increases in the fixed telephony sector. One member has advised that, since November last year, its two main mobile providers have increased wholesale charges for each of international calls, roaming, directory enquiries and premium rate charges as well as increase to a major business tariff.

In a final illustration, there have been at least 6 instances in the last 2 years in which fixed carriers have increased the charges for calls to directory enquiries:

Charge Code	Fixed Fee	Peak	Off Peak	Weekend	Date of change
dq106 (118 500)	112.1	191.069	190.988	190.973	effective 1-12-2012
dq133 (118 500)	126.2	158.419	158.419	158.419	effective 18-6-2012
dq140 (118 500)	112.1	191.069	190.988	190.973	effective 1-12-2012
dq126 (118 118)	154.200	108.500	108.500	108.500	effective 1/9/2011
dq131 (118 118)	176.700	133.500	133.500	133.500	effective 1-3-2012
dq143 (118 118)	227.5	150.167	150.167	150.167	effective 1-2-2013

We trust that the above serves as a clear illustration of the complexity and volatility of the wholesale market which resellers need to manage but cannot control.

Ofcom should also be aware of an unintended consequence of implementation of this type of requirement; namely that in order to protect the viability of its business, a reseller CP may anticipate and factor in possible price rises from wholesalers to future contracts with its customers, resulting in higher prices for end user customers for the duration of the contract, which may not ultimately be necessary.

It seems clear that the main motivation for the proposed changes is the number of consumer complaints that Ofcom has received which arise from increases in pricing in fixed term mobile contracts. By extending the scope of the proposed change to Small Business Customers across fixed and mobile services, Ofcom are attempting to address an issue that doesn't exist for Small Business Customers (and in the process will arguably cause harm and limit the choices available to Small Business customers).

Specifically, we are concerned about the problems which are likely to arise in connection with longer term contracts offered by CPs to Small Business Customers. These longer contracts are mutually beneficial as it enables the end-user business customer to spread upfront costs associated with the installation and purchase of equipment over a longer period, making more sophisticated technology and solutions accessible to smaller companies.

Finally, we feel that a 3 month implementation period for implementation of the proposed changes is too short. If these proposals are progressed, CPs will need more time to assess the impact on their businesses and to calculate the commercial changes which will be necessary as well as the legally required re-drafting of contract wording (which may have knock on effects throughout the whole contract).

### **Consultation Questions**

We have limited our responses to those questions which are most relevant to the interests of our members and to the points raised in the overview above.

### **Section 4**

***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?***

We do not agree with Ofcom's analysis of the ability of CPs to mitigate the risk of price increases as it applies to reseller CPs and we believe that it is legitimate on this basis for customers to share this risk.

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

We understand Ofcom's concerns about inconsistency in CPs' interpretation of what constitutes material detriment. However, we believe that CPs would better be able to interpret this accurately if suitable guidance is provided by Ofcom.

***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?***

See response above.

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

We believe in general that transparency will provide adequate protection for consumers and do not consider that a price rise which has been highlighted at the point of sale and appropriately recorded in the customer's contract constitutes "harm".

## Section 5

***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 disagree.

***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?***

We strongly disagree. As noted above, Small Business Customers benefit from longer contracts offered by CPs and we are concerned about the problems which are likely to arise in connection with these longer term contracts should these proposals go ahead.

Longer contracts are mutually beneficial as it enables the end-user business customer to spread upfront costs associated with the installation and purchase of equipment over a longer period, making more sophisticated technology and solutions accessible to smaller companies.

***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?***

We have some reservations generally about the current definition of Small Business Customers within the Communications Act and the rationale for providing them with equivalent protection to Consumers. However, we do not believe it would be appropriate to develop a separate definition of small business customers for the purpose of these proposals.

***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?***

We believe it would be wholly inappropriate to allow customers to withdraw from a contract without penalty where a communications provider has merely passed on increases in VAT or other tax.

## Section 6

***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 strongly disagree that this is the most suitable option to address the relevant consumer harm. We believe that the proposals under option 4 are disproportionate and intrusive and will have negative impacts for Consumers and especially Small Business Customers.

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

We are happy that a general material detriment test should be retained and, as noted above, believe that with suitable guidance on how it applies to price increases is adequate to protect customers from harm in this area.

***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 disagree that three months is an adequate implementation period. CPs will need more time to assess the wider impact on their businesses and to calculate the commercial changes necessary as well as the legally required re-drafting of contract wording (which may have knock on effects throughout the whole contract).

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

We believe that it would be problematic and disproportionately difficult to apply any new regulation in this area to existing contracts.

We hope that the above feedback is helpful and would be happy to discuss any of the issues raised in the FCS response in more detail with the Ofcom team.