



Variations to fixed-term telecommunications contracts

Consultation

Channel Islands Competition and Regulatory Authorities

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1. Introduction

Many consumers opt for fixed-term¹ telecommunications contracts to provide certainty about the product they will receive and the associated monthly outgoings. However, there appears to be a growing trend among, in particular, mobile phone operators in the United Kingdom (**UK**) to increase prices for customers during the term of fixed-term contracts. In the provision of mobile services, Orange, T-Mobile and Vodafone and Three have all done this, and in the face of customer complaints, adopted the position that it is within their contractual rights to do so because their terms and conditions include the right to raise prices. Reportedly, mobile phone operators have stated that “it is only the length of the contract that is ever really fixed.”² Three’s announcement in early 2012 of an increase in prices for fixed-term contracts led to more than 1000 complaints to Which?, the consumer advocacy association, and consequently the latter submitted a formal complaint to Ofcom and launched a campaign ‘Fixed means Fixed,’³ to eliminate this practice.

In the Channel Islands, one local operator’s decision to vary a product offering during a fixed-term contract in January 2012 also negatively impacted on consumers. The Jersey Competition Regulatory Authority (**JCRA**) received numerous customer complaints regarding JT (Jersey) Limited’s (**JT**) decision to remove a 100MB monthly allocation of free data, which 9000 fixed-term pay monthly mobile customers had been receiving as part of the MyMobile, SIM Only and JT Complete plans. In addition, the data download charge was increased from 1p per MB (which had applied to data used over the 100MB allowance) to 5p per MB⁴ for all such contracts. Importantly, the changes affected customers who had entered into a 12-month or 24-month fixed-term contract with JT.

JT stated, in mitigation, that “55% of the customer base never used the data allowance and were unaffected by the change but 100% of the base benefitted from the addition of 25 extra minutes.”⁵

CICRA (the Channel Island Competition and Regulatory Authorities) regulates the telecommunications sector in the Channel Islands. CICRA comprises the JCRA and the Guernsey Competition and Regulatory Authority (**GCRA**), and all references in this document to CICRA should therefore be read as references to each of the JCRA and the GCRA, unless the context otherwise requires.

The constituent authorities of CICRA are responsible for the issuance of telecommunications licences and the terms and conditions of those licences. In light of the harm caused to Jersey consumers by the incident detailed in the paragraphs above, and having regard to the regulatory action being considered by Ofcom in the United Kingdom (**UK**) (detailed in Section 3 below), CICRA believes that it should consider intervening in order to prevent any future consumer harm arising from price rises and product changes in fixed-term contracts.

¹ Known in the industry as post paid contracts.

² *Which?* Magazine, August 2012, page 6

³ *Ibid*

⁴ Note that the JCRA understands that a minimum 5p charge is levied in respect of every data connection made by the customer, even if less than 1MB of data is used as part of that connection.

⁵ Letter dated 22 February 2012 from JT to the JCRA. An extra 25 call minutes were given for free to all new and existing customers.

CICRA has no objection to JT, or any other operator, introducing a price increase, or creating an offer or package with new terms and conditions, provided that this is done for new contracts only and the terms comply with the operator's licence and regulatory decisions made by CICRA (e.g. price controls). However, as a general principle, CICRA considers that consumers have a right to expect, and do expect, that the terms of a contract entered into for a fixed-term will remain unchanged for that term, whether for fixed-line telephony, mobile or broadband services. It should also be noted that, unlike in the UK, such conduct on the part of operators is not subject to any consumer protection legislation in Jersey or Guernsey.⁶

Therefore, in order to achieve consistency across the telecoms industry on this topic, and to prevent customers from being adversely affected in the future by similar practices, CICRA has decided to issue a consultation on proposed changes which would be implemented on a pan-Channel Island, industry-wide basis for fixed-line telephony, mobile and broadband services. The options are outlined in section 5 below. However, in summary, option 1 would involve the JCRA and GCRA issuing directions to operators under their existing licences, requiring certain changes to their standard terms and conditions, while option 2 would involve the introduction of a new condition into the licence of relevant operators, in terms similar to those of General Condition 9.6 (**GC 9.6**) enforced by Ofcom, to ensure the fairness of certain contract terms. CICRA's provisional view is that option 2 would provide more regulatory certainty; however, it wishes to hear the views of stakeholders as to the relative merits of the proposed options.

⁶ The *Unfair Terms in Consumer Contracts Regulations* 1999 protect UK consumers from terms that reduce their statutory or common law rights or terms that seek to impose unfair burdens on the consumer over and above the obligations of ordinary rules of law. Equivalent legislation does not yet exist in the Channel Islands.

2. Legal Background & Regulatory Framework

2.1 Legal Background

The *Competition Regulatory Authority (Jersey) Law 2001*, and *The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001* together with *The Guernsey Competition and Regulatory Authority Ordinance, 2012*,⁷ set out the legal framework for regulation. In addition, there is scope for the States of Guernsey and States of Jersey to give directions to the GCRA and the JCRA respectively.

In Guernsey, *The Telecommunications (Bailiwick of Guernsey) Law, 2001* (**Guernsey Law**) determines the GCRA's duties and the operators' obligations under their licences. In Jersey, the JCRA's duties in the telecommunications sector are defined in Article 7 of the *Telecommunications (Jersey) Law 2002* (**Jersey Law**).

Article 16 of the Jersey Law and Section 8 of the Guernsey Law provides that the JCRA and GCRA respectively may include in licences such conditions as they consider necessary for a licensee to carry out its functions. In addition, Article 16(1)(c) of the Jersey Law specifically provides that the JCRA can include conditions in telecoms licences which regulate terms and conditions, or require that specified terms and conditions be included, in any contract between the licensee and a user within Jersey.

2.2 Regulatory framework

Each of the telecoms licences issued by the JCRA and GCRA contains a condition which entitles the regulator to direct the licensee to change its standard terms and conditions. For example, Condition 18.2 of JT's licence provides as follows:

“The JCRA may direct the Licensee to change the Licensee's standard terms and conditions from time to time.”

One way of addressing this issue would be for CICRA to invoke its powers under this licence condition, and to issue a direction requiring the inclusion of a general clause in each operator's terms and conditions, setting out the basis on which those terms and conditions can be varied during a fixed contractual term. However, an alternative option would be to introduce a new condition into the licence of relevant operators, similar to GC 9.6 enforced by Ofcom. These options are explored in more detail below.

⁷ This Ordinance provided for the GCRA to be established as a successor to the Office of Utility Regulation, which was established in 2001.

3. Ofcom's review

Unlike in the Channel Islands, UK telecoms operators do not hold individual telecoms licences. Instead, Ofcom, the UK communications regulator, provides a general authorisation for parties to supply telecoms services, subject to general conditions of entitlement (that is, conditions which apply to all operators) and specific conditions (that is, conditions which apply to individual operators in particular positions). The general conditions of entitlement include a number of provisions dealing with the manner in which telecoms customers are treated by operators.

GC 9.6 states that:⁸

“The Communications Provider shall:

- a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;*
- b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and*
- c) at the same time as giving the notice in condition 9.6 (a) above, shall inform the Subscriber of its ability to terminate the contract without penalty if the proposed modification is not acceptable to the Subscriber.”*

In January 2012, Ofcom announced a review of operators' compliance with the General Conditions.⁹ The review related to contracts between operators and consumers, and considered the fairness of certain contract terms for fixed-line telephony, mobile and broadband services. Ofcom was concerned that the current rules were not achieving their aims of ensuring fairness and protecting consumers, and the terms of reference included giving consideration to price variation clauses within contracts. In July 2012, Ofcom announced that the review was to be extended for a further six months given the numerous complaints received. In January 2013, Ofcom provisionally concluded that it was necessary to modify GC 9.6, in particular to remove the “material detriment” threshold, and issued a consultation on various options that it considers will protect consumers from unexpected prices rises within fixed contracts for fixed-line telephony, broadband and mobile services (the **Consultation**).¹⁰

Ofcom's view is that the price the consumer has to pay for the services provided by a Communications Provider (**CP**) is one of the most important contractual terms. The current rules in both the *Unfair Terms in Consumer Contract Regulations* and GC 9.6 seek to reflect this, and Ofcom has considered whether the current rules are achieving these aims. Its provisional view, based on an assessment of the evidence, is that they are

⁸ Ofcom, *Consolidated version of general conditions as at 13 September 2011*, Section 48(1) of the Communications Act 2003.

⁹ *Ibid*

¹⁰ Ofcom, *Price rises in fixed term contracts – options to address consumer harm*.
<http://stakeholders.ofcom.org.uk/binaries/consultations/gc9/summary/condoc.pdf>

not and that harm to consumers is being caused. Ofcom has therefore put forward proposals to amend GC 9.6 to secure the appropriate fairness and address the harm.¹¹

The Consultation has identified, among others, the following key causes of consumer harm from price rises in fixed-term contracts and the options for addressing them:

- a) *CP's ability to raise prices in fixed-term contracts without an automatic right to terminate without penalty on the part of consumers* – Ofcom notes that the rules are not operating to meet consumers' legitimate expectations as to the price and that it, like other important obligations the contract places on the consumer (like its length), is and should be fixed;
- b) the rules are not giving consumers sufficient ability to avoid surprises and unfair effects (by ending contracts without penalty);
- c) *Different price elements in a contract* – Ofcom's view is that any regulatory intervention should protect consumers in respect of any increase in the prices for services provided under a contract applicable at the time the contract is entered into by the consumer;
- d) *Allowing CPs to increase prices for reasons outside of their control, e.g. changes in tax* - CPs should be able to rely on a term which specifies that consumers are not allowed to exit the contract without penalty where such increases are passed through to them in the form of price variations;
- e) *How CPs notify consumers of contract variations* - Ofcom has given high level guidance on this issue but does not consider that at this time it needs to take formal regulatory intervention to specify the form of contract variation notification;
- f) *Timescales set by CPs* – Under GC 9.6, CPs have to give subscribers a minimum of one month's notice of any modifications likely to be of material detriment. Ofcom's initial view is that CPs should also give consumers the ability to cancel the contract at any time before the price rise takes effect. Ofcom is seeking views on whether the timescale that consumers should be given to cancel without penalty should be set out in the guidance.

Ofcom has assessed four regulatory options on what intervention, if any, is necessary and appropriate to negate consumer harm. It considers that the most appropriate option is to modify GC 9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services. The 'material detriment' threshold for price modifications would also be removed. Ofcom considers that the ability to avoid the effects of price rises would mean that the risks of cost increases would lie, appropriately, with CPs and would address the inconsistent and uncertain application of the current rules.¹²

¹¹ Ibid, para 1.6.

¹² Ibid, para 1.18

4. Discussion

CICRA's decision to consult on this issue has stemmed both from the concerns expressed by Ofcom as they relate to GC 9.6 (discussed in Section 3 above), and from the concerns raised by Jersey consumers in connection with a commercial decision that JT took in January 2012 to make changes to a mobile telephony offer during the fixed-term of the relevant contracts.

JT removed a 100MB monthly allocation of free data that 9000 existing fixed-term pay monthly mobile customers had been receiving as part of the MyMobile, SIM Only and JT Complete plans. In addition, the data download charge was also increased from 1p per MB (which had applied to data used over the 100MB allowance) to 5p per MB¹³ for both new and existing contracts. When asked about the rationale for the change, JT stated that it had misjudged the degree to which the data allowance might be used, and that the cost of providing the service had exceeded its initial estimates.

JT considered that it was entitled to make these variations under its Mobile Telephone Service Terms and Conditions. Clauses 3.1 and 3.2 of these terms and conditions provide as follows:

3.1 JT may from time to time vary the Conditions and Product Description applicable to the Service and will as soon as practicable and in any event not less than one calendar month before any such variation is to take effect give notice of such variation on-line and / or at JT's office(s) in Jersey and/or Guernsey as applicable.

3.2 Notwithstanding the above, JT may vary all or any of the Service Charges by publishing any such variation in a schedule of tariffs to be displayed and / or available at JT's office(s) in Jersey and/or Guernsey as applicable and / or On-line such variation to have immediate effect unless stipulated otherwise.

Clause 14.2 of JT's mobile contract sets out certain rights of customers when JT invokes its rights to vary the contract. In the current version of the mobile terms and conditions, the clause provides as follows:

14.2. The Contract may be terminated by the Customer if:

14.2.1. JT unreasonably exercises its rights of variation or suspension under the Contract, by the Customer giving written notice to JT within 14 days of the notice of variation or suspension;

14.2.2. JT exercises its rights of variation of the technical specification of a Service such that performance of the same is materially degraded, such termination to be on 14 days' written notice without further obligation...

¹³ Note that the JCRA understands that a minimum 5p charge is levied in respect of every data connection made by the customer, even if less than 1MB of data is used as part of that connection.

Upon questioning by the JCRA, JT was firmly of the view that the decision it took to vary the terms of a mobile offer was entirely standard in the telecoms industry, and cited a response by Ofcom on 22 March 2012 to an announcement by Orange that it was increasing its monthly plan prices that were tied to an existing contract. However, CICRA considers this example does not support JT's claim, as the reason that Ofcom did not act and/or issue a direction was because the price increase was equal to or less than RPI and Orange's terms and conditions explicitly allowed for this.

In CICRA's view, JT's conduct in January 2012 raised two significant concerns:

- Firstly, if JT's interpretation of its terms and conditions was correct, JT could use its right to vary the terms and conditions of the contract under clause 3.1 to introduce very significant modifications to the services that customers have purchased from JT, and clause 14.2 provided customers with little or no effective protection; and
- Secondly, the process outlined in clause 3.2 of the mobile contract for advising customers when variations were being made to the contract did not provide sufficient transparency for consumers.

On the first issue, JT disadvantaged a significant number of customers by removing an element of the package provided under existing fixed-term mobile contracts. In CICRA's view, these customers could reasonably have expected to receive the offer set at the time they entered into a contract with JT, for the duration of that contract.

On the second issue, CICRA is concerned that the requirement in clause 3.2 to publicise any such contract variation "online and/or at JT's office" does not offer consumers sufficient protection, since consumers are unlikely to check JT's website or to visit JT's office on a regular basis. CICRA does not consider that customers should be expected to regularly visit an operator's retail store or its website in order to be kept informed of fundamental changes that will affect the product they receive and/or their final bill. Given that operators have address details or mobile phone numbers for all of their customers, CICRA would expect, at the very least, direct communication with all customers where contract variations were proposed.

Both Airtel Jersey Limited (**Airtel**) and Cable & Wireless (Jersey) Limited (**CWJ**) have similar clauses in their terms and conditions to clauses 3.1 and 3.2 of JT's mobile contract. Airtel and CWJ have informed CICRA that they do not consider it appropriate to implement price changes or product changes for existing customers on fixed-term contracts until the contract ends. CICRA is not aware of any evidence of either operator invoking the equivalent of clause 3 to change a material component of the tariff for a fixed-term contract. Notwithstanding this, CICRA's provisional view is that there would be a benefit to consumers and the industry from ensuring consistency as to the right of operators to seek variations to fixed-term contracts, and in the manner in which variations should be notified to customers.

5. Potential options under consideration

This section describes two options that CICRA is considering, to address its concerns about product or price changes being introduced during fixed term telecommunications contracts.

In preparing these proposals, CICRA has endeavoured to strike a balance between preserving the commercial freedom of operators on the one hand, and its concerns regarding the scope of operators' power to vary fixed-term contracts and the manner in which customers are contacted to advise them of these variations. CICRA has also given consideration to the options proposed by Ofcom in the Consultation, although acknowledging that the Consultation only focused on price rises and not material non-price changes.

At present, CICRA's provisional view is that in the interests of regulatory certainty, the preferred option would be option 2 (i.e. the introduction of a new licence condition). However, CICRA seeks views from stakeholders and other interested parties as to the relative merits of these options.

5.1 Option 1: Changes to Terms & Conditions

CICRA considers that in order to offer consumers a level of protection that is otherwise absent in Jersey and Guernsey, one option would be for it to issue a direction under the consumer protection conditions of each operator's licence, requiring the operator to amend the variation clauses (or equivalents) in its terms and conditions, to the extent that the clauses are inconsistent with the proposed direction outlined in the paragraph below. CICRA believes that it would be desirable for there to be consistency across the industry in both islands on this topic; as such, the proposed direction would cover the terms and conditions for fixed-line, mobile and broadband services. However, it is proposed that the direction would only apply to residential and domestic customers, since business customers are in a better position to protect themselves by negotiating on contract terms.

It is proposed that the direction would be based on the following principles:

- a) Where an operator proposes to vary the terms and conditions of a contract, or to change the price payable by the customer, or to remove or alter a component of the product/package being supplied, affected customers would need to be contacted directly, at least one calendar month in advance, and provided with an explanation of the proposed change. Customers could be contacted by letter, e-mail or SMS, depending on the particular customer contact details held by the operator; and
- b) If the operator seeks to change the price payable by the customer, or to remove or alter a component of the product/package being supplied (regardless of whether the operator is entitled to do this under the existing terms and conditions), or where a variation to the terms and conditions of the contract is likely to be of material detriment to the customer, then at the same time as giving the notice in a) above, the licensee would be required to inform the customer of his/her right to terminate the contract by giving verbal notice to

the operator within one calendar month of receiving the notice of variation or suspension. Termination would be without penalty, although where a pay monthly mobile contract included a handset subsidy, customers would be obliged to make a payment to the operator in respect of the remaining handset subsidy (and the same principle could be applied where subsidised equipment is supplied under a broadband contract). The details of the calculation of the handset/equipment subsidy during the term would need to be explained to the customer before the contract was entered into.

5.2 Option 2: Introduction of a new Licence Condition

CICRA observes that an alternative option would be to introduce a new condition into the licence of relevant operators, in terms equivalent to those of GC 9.6 enforced by Ofcom, to ensure the fairness of certain contract terms for fixed-line telephony, mobile and broadband services.

GC 9.6 states that:¹⁴

“The Communications Provider shall:

- a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;*
- b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and*
- c) at the same time as giving the notice in condition 9.6 (a) above, shall inform the Subscriber of its ability to terminate the contract without penalty if the proposed modification is not acceptable to the Subscriber.”*

If CICRA did consider making changes to the conditions of an operator’s licence, GC 9.6 might provide a template for any such amendments, modified to take account of the principles outlined in paragraphs (a) and (b) of option 1 above. We observe that Ofcom is currently considering whether the wording of GC 9.6 provides adequate protection for consumers. If CICRA were to decide to introduce a new condition into the licences of relevant operators, in all likelihood, we would take account of what Ofcom recommends as a result of its review.

¹⁴ Ofcom, *Consolidated version of general conditions as at 13 September 2011*, Section 48(1) of the Communications Act 2003.

6. Next steps

Interested parties are invited to submit comments on the general issue of variations to fixed-term telecommunications contracts.

Views are also sought specifically on the two options for regulatory action outlined in section 5 above; namely, 1) a direction to operators under the existing licence conditions requiring changes to their standard terms and conditions to address the issue of variations to fixed-term telecommunications contracts; or 2) the introduction of a new licence condition regulating the manner in which operators can make variations to fixed-term telecommunications contracts.

Comments should be submitted in writing or by email to one of the following addresses.

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GY1 2NH
Email: info@bicra.gg

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All submissions should be clearly marked “Variations to fixed-term telecommunications contracts - Consultation” and should arrive before **10am on 10 June 2013**.

In line with CICRA’s consultation policy, responses to the consultation will be made available on the CICRA website. Any material that is confidential should be put in a separate annex and clearly marked as such.