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Which? response to Ofcom's consultation on 'Prohibiting inflation-linked price rises'

Summary

Unpredictable, inflation-linked price rises are harmful to consumers. Ample evidence shows that these contract terms create unfair complexity, making it harder for consumers to compare prices, undermining competition. Which? therefore welcomes Ofcom's proposal to ban inflation-linked price rises so that consumers can have price certainty in their telecoms contracts.

We are supportive of Ofcom's proposals for providers to be required to set out any price changes during the contract period up-front in pounds and pence. However, we are concerned that the effectiveness of the intervention could be reduced if Ofcom does not take further steps to enhance and strengthen it. In particular we are concerned that:

- The ability of consumers to effectively compare prices will be undermined by the absence of total contract costs. To support Ofcom's intended outcome, it should work towards ensuring providers **list total costs up-front**, alongside monthly costs under the proposed "pounds and pence" (£/p) requirement.

- Providers may frustrate the intent of the remedy by moving to **unspecified discretionary price increases**. We believe that new rules should be applied to restrict the use of these terms. However, recognising that such a change would take time, we recommend Ofcom:
    1. Announce a regulatory review of unspecified discretionary price rises
    2. Strengthen existing obligations on providers when using 'prices may vary' clauses, by requiring them to give customers more frequent notifications of the price change, more information about alternative offers, or more time to take action
    3. Push harder to reduce switching costs for consumers, including through robust enforcement of One Touch Switch

- Ofcom has not proposed to help the **millions of consumers** who will be in contracts with inflation-linked price variation terms after the new rules take effect and potentially through to 2026. These consumers will continue to experience the harm from unpredictable price rises and we believe it would be proportionate for Ofcom to take action on this. At the very least, Ofcom must implement its proposals as quickly as possible, to reduce the long tail of consumer harm.

Alongside its proposals, Ofcom must put sustained pressure on providers to act in the best interests of consumers during this transitional period. Voluntary action from providers, to help in contract customers move to fairer terms, and allow others to effectively compare the deals available to them will ensure that consumers experience the maximum benefit from this important change.

The Consumer Harm (Q3)

Which? agrees with Ofcom's assessment of the significant consumer harm arising from inflation-linked in-contract price rises. The inability for consumers to calculate their monthly bills has knock-on effects for the entire telecoms market, dampening competition. There is a strong consumer preference for price certainty which the market is failing to provide.[1]

Price is a key piece of information when consumers are seeking to make a decision about their telecoms contract. They should be able to rely on the pricing information they receive at the point of comparing, and signing up to a contract. Without this information, they are unable to properly compare deals, make an informed decision, or have a clear understanding of what they can expect to pay throughout their contract.

Inflation-linked in-contract price rises require consumers to read and comprehend their terms and conditions to understand how their contract price will change. They must then obtain forecasts and undertake calculations to predict the price that they will pay in the future. As Ofcom itself notes, the steps consumers must take are complex. This is highlighted by Which? research, which found that just 1 in 20 consumers (5.2%) are able to successfully complete the required steps to estimate their future contract price.[2]

Consistent with Ofcom's own research, our evidence found that only half (51%) of broadband customers know that CPI and RPI measure the rate of inflation.[3] Among those that did identify these as inflation indices, less than a quarter (23%) were then able to provide a reasonable estimate of January 2024's CPI inflation. When given the inflation rate and asked to calculate their monthly price, only a quarter (25%) of all respondents were able to do so correctly. We agree with Ofcom that the consumer harm is likely to be greater for some consumer groups, who are more likely to find inflation-linked price increases difficult to understand.

The consumer harm is also exacerbated by the fact that inflation-linked price rises tend to apply to all customers, even those who have recently taken out a new contract. Consumers suffer harm, as they will have spent time researching the best deal for their needs, only to find that their price goes up (potentially within weeks of taking out a contract) forcing them to pay more than they expected.

We support Ofcom's assessment that these pricing practices also dampen competition and limit consumer engagement, given that consumers are less able to effectively compare deals as the headline price is less informative. They also impact on providers' incentives to offer lower prices overall, although they retain incentives to offer lower initial headline prices.

[1] Which (2023) The benefit of certainty
[2] Which (2023) Customer knowledge and understanding of mid-contract price rises
[3] ibid

We agree that the scale of this consumer harm is large. Our research suggests that at an economy-wide scale, the value consumers place on price certainty for their broadband contracts alone is as much as £710 million, of which £514 million relates to inflation-linked in-contract price rises.[4] Because of this, regulatory intervention from Ofcom is an appropriate and proportionate step, as the benefits to consumers will be significant.

Ofcom's proposed remedy (Q5-9)

Which? supports Ofcom's proposed interventions. Banning inflation and percentage linked price variation terms, and requiring prices be set out clearly in pounds and pence will help to address the consumer harm. The proposals will:

- Remove the significant degree of price uncertainty often faced by consumers
- Remove the requirement for complex predictions and calculations
- Help to address the distortion of price competition that results from these practices

Consumers must be able to effectively compare connectivity packages to manage their personal household budget. Current price variation terms require consumers to make laborious calculations to compare deals.[5] This adds complexity to the process of shopping around, making it harder for consumers to find the right deal for their needs. In turn, impacting the effectiveness of competition.

Ofcom's current proposals will still require consumers to make a number of price-related comparisons to establish the best deal for their needs, including comparing:

- Fixed price deals against those with price changes
- Different price levels, including magnitude of price changes
- Different contract lengths and the impact of different price change dates and durations

To overcome this need for calculations and detailed comparisons, Which? believes that alongside the £/p requirement, consumers would benefit from providers prominently listing total costs, as shown in Figure 1. This would further support Ofcom's intended outcome of enabling consumers to easily compare packages when shopping around. It would also mitigate any risk that consumers continue to be led by initial headline prices in their comparisons, which would limit the remedy's impact on the current distortion of price competition.

Figure 1: Displaying total costs

Fixed price example (illustrative)
Broadband at 36mbps, £30 per month
(Total £720 over 24 month contract)

Price changes example (illustrative)
Broadband at 500mbps
£40pm until 31st March 2025
Increasing to £42pm on 1st April 2025.
(Total £964 over 24 month contract)

[4] Which (2023) The benefit of certainty
[5] Ofcom (2023) Prohibiting inflation-linked price rises, p.4

Including total costs alongside monthly pricing would also help those consumers who might struggle to make comparisons between different pricing structures, as in the example below.

<u>**Example - comparing a fixed price deal to a deal with price changes**</u> A consumer may be comparing a 24 month contract that is **£30 in the first 12 months and £33 for the remainder**, to a similar 24 month contract that is **fixed at £32** for its duration. Without calculation, given the differing pricing models, it is not immediately clear which is the cheaper deal overall. However, if the total cost was prominently displayed, consumers would see that the former is **£756 in total**, and the latter **£768 in total.**

In Ofcom's consumer research participants specifically suggested that a 'total contract cost' is something they would find useful for the purpose of comparing deals.[6] Providing a total cost over the life of the contract is not dissimilar to information that consumers paying monthly are provided and value in other essential markets, such as insurance.

Due to the presence of different types of bundled contracts in the market, in particular those which include services that Ofcom does not have powers over, we understand it may be difficult for Ofcom to require that total costs be drawn prominently to the consumer's attention. Linked contracts with different agreement lengths also add complexity. It is important that any remedy not give consumers a misleading picture of the costs they will incur, or negatively influence consumer behaviour.

Despite this, we would like to see Ofcom work with industry and consumer groups towards ensuring that reliable total costs are present at the point of comparison and signing up. Providers are able to set out how much they intend to charge for each aspect of an agreement. This is especially true in the case of the financing agreements often present in split-linked mobile contracts, where the total cost of the handset is known and should be made clear and prominent, as in Figure 2 below.

Figure 2: Total costs in a split-linked mobile contract

<u>**Split-linked mobile contract (illustrative)**</u> Handset at £27.75 per month (Handset total £999 over 36 monthly repayments)	Ofcom may not be able to require the handset total cost, but providers should list it
Airtime agreement at £20 per month until 31st March 2025 Increasing to £22 pm on 1st April 2025. 50% airtime discount for first 6 months at £10 per month (Airtime total £444 over 24 months)	Ofcom could require that the airtime total be prominently drawn to the consumer's attention

Ofcom should explore how best this can be delivered, whether through best practice guidance, a voluntary industry code, or another vehicle. The effectiveness of any proposals should be tested with consumers.

[6] Ofcom (2023) Qualitative Research Report - Inflation-linked in-contract price rises, p.27

Risks arising from Ofcom's proposals (Q4)

Unspecified discretionary price rises

It is a shortcoming of Ofcom's proposals that it has failed to fully assess the risk of providers moving to unspecified discretionary price rises as a result of its proposals. Ofcom must consider mitigations now, rather than waiting for this unintended consequence to play out. Ofcom itself acknowledges that more frequent unspecified discretionary price rises could "*have the unintended consequence of undermining our objective*".[7] Concerningly, there has been no detailed examination of the potential consumer harm that could occur as a result. 'Prices may vary' clauses are unpredictable and unclear for consumers in much the same way as inflation linked terms.

Unspecified discretionary price rises were widely and frequently used prior to the introduction of inflation-linked variation terms, and continue to be used by some providers like Sky.[8] While consumers must be given notice of a price change, and the right to a penalty free exit within 30 days of notification in such circumstances, many face barriers to taking action.[9] Ofcom's consumer research also found that participants did not find exit remedies appealing, largely due to concerns about difficulties in exiting a contract, and service downtime.[10] As such, it is highly questionable the extent to which consumers will take advantage of the opportunity to switch following notification of a discretionary price rise - reducing the risk to the provider of customer churn.

Which? also believes that, in their current form, the contractual terms that enable unspecified discretionary price rises can risk breaching consumer protection law. Section 62 of the Consumer Rights Act requires that consumer contracts and notices are fair, and deems any unfair terms or notices not to be binding on the consumer. Additionally, Competition and Markets Authority (CMA) guidance on unfair terms notes that:

"*Any purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable.*"[11]

We are of the view that provisions enabling providers unlimited discretion to increase in contract charges at any time, by any amount, are likely to result in a significant imbalance of power to the detriment of consumers and may therefore risk breaching the law. Giving consumers the right to exit lessens this imbalance, but is not necessarily sufficient to dismiss the risk that the term remains unfair, including in the light of the period allowed to exercise exit rights in a particular case (usually only 30 days). Whether consumers realistically can or would exercise this right is particularly relevant, and our evidence calls this into question.

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[7] Ofcom (2023) Prohibiting inflation-linked price rises, p.44
[8] See the below coverage: The Guardian (2014) BT to put prices up for home phone and broadband customers by 6.49%; The Guardian (2015) TalkTalk raises prices again; The Guardian (2015) BT announces 7% price rise for landline and broadband services; The Guardian (2016) BT customers face summer price rises | Internet, phones & broadband ; Which? (2023) Virgin Media hikes prices for broadband, TV and mobile customers
[9] Which? (2019) Consumer Engagement with Broadband Market.
[10] Ofcom (2023) Qualitative Research Report - Inflation-linked in-contract price rises, p.36
[11] Competition and Markets Authority (2015) Unfair contract terms: CMA37

This is a concern that we raised to Ofcom in August 2023, including highlighting where providers have included both inflation-linked variation terms, and ‘prices may vary’ clauses simultaneously, something Ofcom expressed concern about in its consultation.[12] We are disappointed that despite the information we provided on this issue, the legality of these practices has not been given thorough consideration in the consultation. Ofcom must undertake a full legal analysis of these terms against its obligations to enforce the Consumer Rights Act, and the Consumer Protection from Unfair Trading Regulations.

Whilst Ofcom has committed to monitoring pricing practices going forward, it is crucial that Ofcom take action against this form of unpredictable price variation clause. Which? recommends that it introduce new rules such that the only permissible reason for providers to apply a discretionary price increase, during a customer’s minimum term, is for changes imposed by law (e.g. changes in VAT). This would replicate the current standard for other contractual modifications and ensure that all consumers have clear and predictable prices for their contract duration by removing the option for providers to use this pricing practice.

While we note that reaching such a conclusion would require Ofcom to undertake further work, there are steps that Ofcom could take in the interim to robustly deter providers from instead relying on unspecified discretionary price rises. Which? recommends that Ofcom consider:

1. **Announcing a regulatory review of unspecified discretionary price rises**

Ofcom should set out its plans to review this practice as a priority. The review should include a consideration of these terms against general consumer law. This would send a strong signal that Ofcom is concerned about ‘prices may vary’ terms and may disincentivise providers from reverting to using them.

2. **Strengthening the existing obligations on providers when using ‘prices may vary’ clauses**

Given the barriers that consumers face to capitalising on their ‘right to exit’, Ofcom could consider how it can reduce these by strengthening the existing obligations on providers. For example, Ofcom could consider whether consumers would benefit from: more frequent notifications of the price change; more information about alternative offers; more time to take action - through extending or removing the 30 day restriction that consumers face to cancel a contract following notification of a price rise.

3. **Taking steps to further reduce switching costs for consumers**

Ofcom should also take steps to make switching itself easier and less burdensome, specifically through robust enforcement of One Touch Switch, which providers have so far failed to deliver despite regulatory deadlines. We note that switching rates in broadband are particularly low, with Ofcom’s own tracker survey indicating that only 10% of customers have switched providers in each of 2022 and 2023. This compares to 15% for mobile, while other data shows that switching rates for electricity and gas have also tended to be considerably higher.[13]

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[12] Which? (2023) Which? asks Ofcom to investigate Virgin Media contracts over fears they could break the law

[13] In 2020, the last full year before the energy crisis and for which there was price competition between providers, the switching rate was 20% for electricity and 18% for gas. Department for Energy Security and Net Zero (2023) Quarterly domestic energy switching statistics

The ongoing consumer harm from inflation-linked terms

We are disappointed that Ofcom has decided to use its powers to impose or change General Conditions under the Communications Act 2003 **only** with respect to new contracts. Millions of consumers will remain in contracts which include inflation-linked price variation terms, and continue to face unavoidable and unpredictable inflation-linked price rises for up to two years post-implementation because of this.[14] Given Ofcom's conclusion, that these terms "*create substantial consumer harm*", we are concerned that little consideration has been given to this enduring impact.[15] It would be proportionate and in the public interest to take action on existing longer contracts as well.

Ofcom must quickly consider what action it can take to bring clear and certain pricing to these consumers. It should work with providers to ensure that these consumers are given appropriate options that remove harmful price variation terms from their agreements.

Impact assessment

Which? believes that Ofcom's proposals are appropriate and proportionate, but that our additional recommendations must be acted upon if the overarching policy objective is to be fully met. It is critical that the interests of consumers are fully protected, given the scale of consumer harm arising from inflation-linked pricing practices. Our research supports Ofcom's assessment that this intervention is proportionate because the likely benefits to consumers are significant.[16]

We agree that Ofcom's proposed remedy is the only available intervention that can adequately address the harms that arise from inflation-linked pricing. Which? has considered alternative approaches and found that none would address the fundamental consumer harm as comprehensively as a prohibition of the practice, and rules to ensure consumers are given price certainty at the point of comparison and signing up to a contract.[17]

Implementation (Q10)

The changes proposed by Ofcom must be implemented as quickly as possible, particularly given the consumer harm this practice is causing. We welcome Ofcom's proposed implementation period for new contracts. In our view, Ofcom's review of this practice was long overdue given providers' use of it since 2020. It is beyond time to remedy this harm.

We are concerned about two groups of consumers that Ofcom's proposals will not benefit. First, these proposals come too late to help consumers facing price hikes this April, the combined

[14] Ofcom (2023) Prohibiting inflation-linked price rises. Ofcom reports that as of April 2023, at least 11 million broadband customers and 36 million mobile customers were on contracts subject to inflation-linked in-contract price increases. As more providers have now adopted these terms, Ofcom predicts these numbers will grow in 2023/2024 to 6 in 10 consumers in both markets.
[15] ibid
[16] Which (2023) The benefit of certainty
[17] Which? (2023) The Right to Connect: Ensuring the price you see is the price you pay

impact of which could leave them paying upwards of £60 more per year.[18] Second, consumers who are already in contracts, or take out contracts between now and when the changes come into effect, will continue to face unavoidable and unpredictable inflation-linked in-contract price rises for up to two years. Quick implementation by Ofcom will help to reduce the long tail of consumer harm from this practice.

These groups of consumers need their provider to act to protect them. Through our campaign, The Right to Connect, Which? is calling on providers to cancel these planned increases and to immediately reform their pricing practices.[19] Over 90,000 consumers have signed our petition on this issue. We reiterate that there is nothing to stop providers from moving to the clearer and fairer pricing practices that customers are demanding, prior to Ofcom's final decision.

The evidence presented by Ofcom does not suggest that a lengthy implementation timeline is justified. In our view, the proposed requirements appear to be fundamentally simple, and Ofcom should reject any arguments to delay the implementation.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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[18] Which? (2024) 'Outrageous' price rises could trap telecoms customers between £60 price hikes and £500 exit fees
[19] The Right to Connect | Which? Campaigns