

## **CMA response to Committee of Advertising Practice ('CAP') and Broadcast Committee of Advertising Practice ('BCAP') consultation on new guidance on how to present information about mid-contract price rises in ads for broadband and mobile services ('the consultation')**

1. The CMA welcomes the opportunity to comment on the consultation and considers it important that guidance published by the Committees is consistent with the requirements of UK consumer protection law. The CMA has therefore had regard to relevant provisions in the Consumer Rights Act 2015 ('the Act') which deal with unfair contract terms and notices; Schedule 2 to the Act which lists consumer contract terms that may be unfair in some circumstances; the Consumer Protection from Unfair Trading Regulations 2008 ('the CPRs'); and relevant case law.<sup>1 2</sup> CMA also provides comment on the price index used, in particular raising concerns about RPI as a relevant measure, building on comments by others including the UK Statistics Authority.
2. Transparency is essential to fairness, so the more transparent a consumer notice (including an advertisement) is, the more likely it is to be fair in law. The CMA is aware that the telecoms industry offers a range of retail contracts to consumers, including 'lengthy' ones (i.e. those exceeding a 12-month commitment) and those in which price rises feature during the contractual fixed term. In very general terms, the CMA considers that the longer the minimum term of a contract in which prices rises are a feature, the greater the potential disadvantage (or risk of being disadvantaged) to a consumer. It is important that the industry takes particular care in such circumstances to ensure that their contracts' terms and notices are transparent and fair in law; and that those contracts are marketed and concluded transparently and fairly. In particular any indication of how the price will vary must be specific enough so that the consumer can understand the likely economic impact on them when it happens. Further, the contract must require the consumer to be given sufficient notice of the price rise and contain provisions giving the consumer a genuine right to exit without any penalty before the price rise occurs.<sup>3</sup>
3. Though transparency is necessary for fairness, both in relation to the unfair contract terms provisions in the *Consumer Rights Act 2015* and also in the *Consumer Protection*

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<sup>1</sup> CJEU case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* ('RWE').

<sup>2</sup> CJEU case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.* ('Kasler').

<sup>3</sup> Key considerations as to whether the consumer has a genuine right to exit include 'whether the market concerned is competitive, the possible cost to the consumer of terminating the contract, the time between the notification and the coming into force of the new tariffs, the information provided at the time of the notification, and the cost to be borne and the time taken to change supplier,' CJEU case C-92/11 *RWE Vertrieb AG v VBZ Nordrhein-Westfalen* at para 54; the right must not be 'illusory,' *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch) at para 57. See also CMA 37 Guidance on Unfair Contract Terms paragraphs 5.21.1 to 5.21.13.

from *Unfair Trading Regulations 2008*, it is not sufficient alone. To meet the legal requirements of these cross-cutting consumer laws, there must also be substantive fairness. The Act requires that terms must be fair and the CPRs require that practices must be fair as well. Partitioned and in particular variable pricing in fixed term contracts risk being unfair under the CRA and/or CPRs for several reasons. Firstly, they may obstruct effective upfront price competition by making it harder for consumers to find the lowest priced offer (which of course relates to the transparency arguments above).<sup>4</sup> The CMA's predecessor body, the OFT, produced some detailed analysis and research into the impact of drip and partitioned pricing on consumer behaviour which further explains the adverse effects of such impaired price transparency.<sup>5</sup> It is difficult for there to be effective competition on price where consumers cannot calculate the 'go-to' price that will be charged part way through a fixed term deal, nor can consumers calculate their liability. This is particularly the case in relation to RPI + % increases. Secondly, price increases may not track actual cost increases and so have limited objective justification. Thirdly, there is no benefit to the consumers under the contract in this approach to structuring price, only to providers -for whom the term provides protection from increases to their own costs, while they do not have to provide any increased level of service to consumers in exchange for the price rise. Fourthly, where there is no possibility of prices falling under such an approach to pricing, there is an inherent imbalance in the contractual rights which exclusively benefits providers.

4. These legal considerations, which we are happy to discuss in more detail with both ASA and Ofcom, are supported by three other contextual factors. Firstly, that consumers will not expect the 10% or more price increases supported by some of the more variable deals. Secondly, that ordinary consumer expectations are likely to be that a 'fixed' deal means 'fixed' prices. Thirdly, that the current levels of inflation may mean severe hardship for many consumers as a result of these anti-consumer approaches to pricing. Overall, it seems difficult to justify RPI+ or CPI+ contracts in consumer deals, partly as there is unlikely to be a direct connection between RPI or CPI and telecoms providers' actual costs (see more below). We would suggest CAP and Ofcom reconsider the approach, to the extent of considering a straightforward requirement that fixed term deals have fixed, unitary prices (for example £20 per year for 2 years).
5. The CMA notes that the consultation focusses on tiered and variable contracts as defined on page 9. Whilst examples of tiered contracts are provided, the CMA considers that other types of telecoms contracts where price increases (whether inflation/percentage based or not) feature at any point during their term (including but not limited to an annual increase) ought also to fall within the scope of the consultation (e.g. a contract featuring an initial price for the first 6 months, increasing thereafter).

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<sup>4</sup> This is more likely given the commonplace reliance of consumers on price comparison websites to find the best deal, which logically cannot calculate and therefore display the more complex pricing arrangements. This creates strong incentives on firms to more strongly 'drip' the price and

<sup>5</sup> [\[ARCHIVED CONTENT\] Advertising of prices - The Office of Fair Trading \(nationalarchives.gov.uk\)](#)

## Do you agree with the guidance principles set out above?

6. The CMA understands “the guidance principles” to refer to the points set out on page 17 of the consultation and has commented on each in turn:

***a. Information indicating the presence or possibility of a price rise is either part of the price claim, or placed immediately adjacent to it.***

Section 68 of the Act requires that a written consumer contract term or consumer notice be transparent - the so-called transparency test. The case law on this concept has clarified that this also means the term or notice should be prominent, particularly where it could have a disadvantageous effect (e.g. a price rise) on a consumer. The concept of ‘good faith’ in the Act also requires a term or notice to be “*expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously’ to the consumer.*”<sup>6</sup>

The CMA therefore considers that principle (a) should make clear that the price claim and the presence or possibility of price rise should be **equally** prominent. The industry should not interpret “*immediately adjacent*” as representing any lesser degree of prominence.

***b. If known, information about the nature of the price rise is featured prominently within the main copy of the ad.***

The CMA agrees that information about the nature of the price rise should feature prominently in any consumer notice, including advertisements. For the avoidance of doubt, the CMA considers this information should be as prominent as any headline price notice so that consumers can assess their likely financial liability.

***i. In static-format ads, no lower than one ‘step’ below the initial price claim and linked by an asterisk to the main price claim.***

The CMA does not consider this gives sufficient clarity to the industry about the need for the information to be prominent. In particular, the CMA assumes that the ‘step’ concept referred to relates to the ‘qualifying ladder’ set out on page 11 of the consultation. If that is the case, the guidance suggests that the information in question could be presented less prominently in some circumstances, including in footnotes. This is exemplified in some of the examples included in the Appendix to the consultation where the CMA does not consider that information about the nature of the price rise has been presented sufficiently prominently. It may not meet

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<sup>6</sup> Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank plc* 2001.

other elements of legal tests such as the broader requirements of fairness under the Act or the provisions on misleading actions and omissions in the CPRs.

- c. Descriptions of future price rises and terminology used are clear and simple to understand, and initialisms like RPI are written out in full the first time they are used in an ad, and appended with ‘rate of inflation’ to aid understanding.***

The CMA agrees that abbreviations should be written in full at the point they appear and explained at the same point in a consumer notice rather than the explanation being simply “*appended*”. This is because section 68 of the Act requires a consumer notice to be written in plain and intelligible language - **in addition to** being prominent – so that consumers can make an informed choice without undue further investigation.

The CJEU, in *RWE* and *Kasler*, has explained that the Act’s requirement of plainness and intelligibility means that a term or notice should not only make grammatical sense to the average consumer, but must also put him in the position of being able to “*evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [the term or notice]*”. The CMA considers that this requires consumers to be able to easily understand what the go-to price will be, with clear examples set out to show what the price will be after the variation. This is particularly important in fixed term contracts, where consumers are likely to choose a fixed term in exchange for price certainty. In this regard the CMA has concerns that consumers may struggle to understand RPI or other index linked price increases in the context of fixed term contracts. Consequently they may not be fair. A term is more likely to achieve fairness if the stepped price is set out prominently in monetary terms, specifying the dates each increase will take place. If potentially disadvantageous terms or notices are in any way concealed (e.g. by being appended in a manner that makes it easy for a consumer to overlook them), they may become a trap for consumers and represent a significant future obligation. This is particularly relevant for inflation-based pricing terms and notices in the present climate of relatively high inflation.

- d. Advertisers take care to distinguish the full contractual price ahead of the tiered increase from any other introductory discounts that may apply.***

The CMA considers the law requires that all mandatory elements of a pricing notice should be given equal prominence. The CMA would be concerned if guidance suggested or could be interpreted as suggesting that some such elements could be less prominent. Obviously a unitary price would make such transparency far easier to achieve in practice.

With regard to “*the full contractual price*”, the CMA notes that in some of the examples given in the Appendix to the consultation, small print in the advertisement

refers to i) an additional connection charge for consumers without a compatible landline; and ii) the landline itself not being included in the headline broadband price. The CMA considers that given very few consumers with landline-based broadband purchase the broadband and landline services separately (i.e. from different providers),<sup>7</sup> both of these small print qualifications should be more prominent as one or both elements of these landline charges would essentially be mandatory for the vast majority of consumers.

- e. Advertisers are mindful of the time of year the ad is being published, relative to the timing of any compulsory or potential annual inflation-linked increase (usually April) to avoid misleading consumers.***

We take this to mean that where a fixed term contract is being advertised within a short time before the price rise is due to take effect, the advertised price may be misleading. We agree that this is a risk. We consider that traders would be more likely to comply with the law if they advertise the go-to price as the price during this period. However, this also illustrates a fundamental problem with the business practice of increasing prices during a fixed term period, which is that the average consumer is likely to expect the price to be as advertised for the whole period, and a term which permits the price to be varied during this period may be unfair.

Aside from this we would observe that relevant provisions of UK consumer protection law, including the prohibition in the CPRs of misleading commercial practices, apply at all times to all consumer terms and notices, including advertisements. Whilst guidance principle (e) is sensible and the CMA understands the reason for its inclusion, industry should not interpret it as suggesting less care could be taken to comply with the law at other times. It may be helpful, therefore, to explain to the industry more explicitly what type of additional measures the CAP considers advertisers should take with advertisements closer to the time of a contractual price increase.

- f. Where a product listing is included on a webpage with multiple other listings, then it may be sufficient to link each price statement to one or more qualifications providing further information, lower down the page – provided the qualification is sufficiently prominent.***

A headline price statement must not mislead consumers in any way. Information about a potential or actual price increase at any point during a fixed term contract must be **as** prominent as the headline price. Including that information in a qualification statement lower down on a webpage or anywhere else that is arguably less prominent, is less likely to comply with the Act's fairness and transparency

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<sup>7</sup> Although now dated, a 2017 [Ofcom report](#) indicated that 'split-purchaser' customers who buy standalone landline and a separate package including broadband, usually with different suppliers, made up c.5% of landline homes in 2016. This is likely to have further decreased to date.

requirements and could also constitute a breach of Regulation 6 of the CPRs. Including a link to the qualification may not alleviate the potential deception.

**Do you agree with taking the same approach to ads for both tiered and variable contracts, in terms of the level of prominence expected for information about mid-contract price increases?**

7. Subject to our comments above, yes.

**Do you have any comments on the use of terms used to describe rates of inflation such as CPI and RPI, and the level of understanding consumers have of these terms (including when they are referred to using an initialism only)?**

8. The CMA concurs with the UK Statistics Authority's [statement](#) concerning the use of the RPI as a measure of inflation. In 2019 the Chair of the UK Statistics Authority wrote "We have been clear that the RPI is not a good measure, at times significantly overestimating inflation and at other times underestimating it, and have consistently urged all – in Government and the private sector – to stop using it."<sup>8</sup> In particular, the CMA notes that the RPI was replaced by the CPI in 2003 as the Bank of England's inflation target measure and ceased being an official statistic in March 2013. Consequently, the CMA sees no reason for any contracts in which prices rises are a feature to refer to the RPI. In particular it may have the effect of increasing the amount the trader is charging above inflation, and even where the trader has not incurred increased costs, which undermines or removes completely what we presume is the justification for it. This may make the contract term unfair, since the consumer is being required to pay proportionately more for the same product.
9. If written in full and explained explicitly and prominently as the monthly or annual rate of inflation together with worked examples to help consumers understand how to calculate an inflation-linked price increase, the CMA considers the 'average consumer'<sup>9</sup> (defined in the Act as "*a consumer who is reasonably well informed, observant and circumspect*") can be expected to understand what the CPI is, however it does not follow that the average consumer would be able to understand how the application of this index would change the advertised price. In particular, the CMA considers that at the very least a trader who wishes to use this practice should set out some illustrative examples of how the monthly price might change in circumstances where the CPI is at a range of percentages. This will of course not allow consumers to know what the % increase actually will be, and therefore in the context of fixed term contracts, the CMA considers that traders are more likely to achieve compliance by deciding before they advertise the deal what the % increase will be (and therefore they will be able to

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<sup>8</sup> <https://uksa.statisticsauthority.gov.uk/news/uk-statistics-authority-statement-on-the-future-of-the-rpi/>

<sup>9</sup> The 'average consumer' is an objective standard developed for certain purposes in European and UK case law. This includes for the purpose of assessing transparency and whether a consumer notice is prominent.

advertise what the go-to price will be). Given that fixed term contracts are generally no longer than 2 years, this should be easy for traders to achieve.

**Do you agree with the mitigating factors listed as having the potential to cause an advertiser to take additional action in order to ensure material information relating to in-contract price increases is sufficiently clear?**

10. The CMA understands the factors listed in the consultation to be aggravating factors that have the scope to mislead consumers and increase the likelihood of consumer notices not being transparent as required by the Act. The question is therefore not one of “*additional action*” being necessary: the law requires important information such as contractual price rises to be transparent and prominent in and of itself.

**Do you agree that in instances where multiple offers/products appear on one page (for example, on a telecoms provider’s own website), it may be sufficient for prices to link or refer to a suitably-prominent single piece of information about mid-contract price increases, rather than including this information within each individual product listing?**

11. See paragraph 6(f).

**Do you have any other comments or suggestions in relation to the proposals?**

12. Paragraph 25 of Schedule 2 to the Act indicates that where mid-contract price increases include terms based on price-indexation clauses, the method by which the price will vary should be “*explicitly described*”. The CMA considered this is also a requirement of good faith under the Act, in this context. It is therefore imperative that the industry, in its advertising, gives consumers the ability easily to calculate any such price increases. The CMA does not consider some of the examples in the Appendix to the consultation to be compliant with this. For example:

*“Monthly price will increase every April by the Retail Price Index rate of inflation + 3.6%”*

It is unclear on its face whether the 3.6% is 3.6% of the initial price, the go-to price after the RPI increase is applied, or 3.6% of the RPI. This therefore fails the test of transparency in our view. Even if it could be made grammatically clear how the go-to price will be calculated however, it would still be impossible for the average consumer to know what the price will be, and therefore we consider it fails the transparency test for this reason as well.

A clear example calculation might go some way towards remedying this, but even better would be a clear statement of the actual go-to price.

13. The CMA is happy to discuss this response with the CAP.

*CMA, 17 November 2022*