Annex 1

Guidance on unfair terms in contracts for communications services

Introduction

A1.1 Contracts for the supply of products and services in the UK, between sellers or suppliers and consumers, must comply with the Unfair Terms in Consumer Contracts Regulations 1999 (“the Regulations”). The OFT, together with a number of other bodies including Ofcom, share the task of enforcement. As a qualifying body, Ofcom has certain duties in relation to the consideration of complaints about contracts in organisations which fall within Ofcom’s regulatory scope.

A1.2 The OFT has published general unfair contract terms guidance, based on its experience of enforcing the Regulations, which addresses a wide range of terms in consumer contracts. While in many cases this has been helpful for consumer contracts within communications markets, it does not directly address some of the contractual situations which are particularly common in contracts for communications services.

A1.3 Ofcom believes that sector-specific guidance on a limited range of such issues will benefit suppliers and consumers of services that it regulates. This Guidance focuses principally on contract terms which provide for the payment by the consumer of additional charges, default charges, minimum contract periods and notice periods, and contract terms which may lead to additional charges being incurred.

A1.4 Ofcom expects suppliers of communications services to review their conditions in light of the Guidance and to amend or remove any unfair terms. Unfair terms are not legally enforceable against consumers (see Regulation 8(1)), and it is therefore in the interests of suppliers as well as consumers to ensure that terms are fair.

Aims of the guidance

A1.5 Ofcom recognises that the decision as to whether a term is unfair is a matter ultimately for the courts.

A1.6 However, given that there is very little case law to assist suppliers and consumers in this area, and no guidance which directly addresses terms in contracts for communications services, Ofcom considers that it is in the interests of all parties for our views as to the likely application of the Regulations to be clearly set out.

A1.7 The aim of this Guidance, therefore, is to set out how Ofcom considers the Regulations are likely to apply to certain standard terms in contracts for the supply of communications services and on terms that in our view may be unfair (or potentially unfair). It is intended to help suppliers of communications services to meet the requirements of the Regulations, as well as assisting Ofcom and any other bodies which have powers to enforce the Regulations. It complements OFT guidance and does not replace it.
Ofcom review of additional charges

A1.8 We recognise that enforcement action we may take will depend on the facts of any individual case. But the Guidance sets out the approach we expect to take in performing our obligations and exercising our powers under the Regulations.

A1.9 We expect to take an active role in enforcing the Regulations. We will monitor complaint levels and examine suppliers' standard terms to see whether they are consistent with our view of the law as set out in the Guidance. Where they are not, we will consider the best way to enforce the Regulations, including taking the necessary formal enforcement action using our powers under the Regulations and/or the Enterprise Act 2002.

A1.10 Whilst it sets out the approach we are likely to take, this guidance is not binding on Ofcom. We may depart from it where there are good reasons for doing so. If, in any given situation, we decide to depart from the principles set out in this Guidance, we will normally set out our reasons for doing so.

A1.11 We note that in addition to the Regulations, suppliers are also subject to General Conditions (under the Communications Act 2003), including GC 10 on transparency and publication of information and GC 12 on itemised bills.

Scope of the Guidance

A1.12 While the Regulations apply to all suppliers of services or products to consumers, this Guidance relates in particular to all suppliers of services in sectors that Ofcom regulates. In this document we use the term 'services' to include fixed and mobile telephony services, broadband, and pay-TV; and we use the term 'suppliers' to cover all those who provide such services.

A1.13 This Guidance relates to standard terms and conditions for the provision of services where there is an ongoing monthly liability and does not therefore cover, for example, pre-pay mobile telephony or pay on demand TV. Contracts for such services are also subject to the Regulations but the charges addressed here do not usually apply.

A1.14 The Guidance covers the following terms and charges provided for by them:

A. Non-direct debit ("non-DD") charges (i.e. charges imposed by suppliers on customers who do not pay their bills by direct debit or a similar method)

B. Default charges (i.e. late payment charges, charges for payment failure and charges for reconnection)

C. Initial Minimum Contract Periods ("MCPs") and Early Termination Charges ("ETCs")

D. Subsequent Minimum Contract Period ("subsequent MCPs")

E. Minimum notice periods ("MiNPs")

F. Itemised or paper billing charges

G. Cease charges

A1.15 Although we have not examined all of the types of terms in suppliers' contracts in this Guidance, they are, of course, also subject to the Regulations and the OFT's
general guidance will apply to them. If it becomes appropriate, we may in the future
decide to issue further sector-specific guidance in relation to other terms (for
example, where this may be helpful in supplementing or clarifying existing
guidance). We will also apply the principles set out in this Guidance insofar as they
are relevant to any other types of term. The fact this Guidance does not cover other
terms does not mean Ofcom may not have concerns about their fairness nor
preclude Ofcom action in relation to them.

A1.16 In addition to providing Guidance on the Regulations, Ofcom has identified areas of
best practice. We recognise that some practices which we consider important for
consumer protection do not fall within the requirements of the Regulations. In these
cases we have identified the actions we would like to see suppliers take. These
aspects cannot fall within our enforcement activity under the Regulations but if we
identify consumer harm arising from a failure to adhere to these standards we may
consider using other powers and legislation to address that harm.

The Regulations and Enforcement

A1.17 All suppliers using standard contract terms with consumers must comply with the
Regulations, which implement EU Directive 93/13/EEC on unfair terms in consumer
contracts. The Directive was initially implemented in the Unfair Terms in Consumer
Contracts Regulations 1994, which came into force on 1 July 1995, and which were
subsequently replaced by the Regulations (coming into force on 1 October 1999).

A1.18 The OFT has issued extensive guidance on the Regulations, both general and
sector-specific. The two documents below provide general guidance:

- the briefing note *Unfair standard terms* (OFT143,

- the comprehensive *Unfair contract terms guidance* (OFT311,

A1.19 These documents give a fuller explanation of certain points made below about the
Regulations and consumer contract terms in general. Reference will also be made
to the OFT’s guidance on *Calculating fair default charges in credit card contracts*

A1.20 Unfair terms are not binding on consumers and it is open to consumers themselves
to challenge in court terms they consider unfair. In addition, under the Regulations
the OFT, or a qualifying body such as Ofcom, has a duty to consider any complaint
it receives about unfair standard terms. Where that body considers a term to be
unfair, it has the power to take action on behalf of consumers in general to stop the
continued use of the term, if necessary by seeking an injunction in England, Wales
and Northern Ireland or an interdict in Scotland.

A1.21 In addition, Part 8 of the Enterprise Act 2002, which came into force on 20 June
2003, gives the OFT and other bodies including Ofcom another enforcement
mechanism against traders that breach consumer legislation.

A1.22 The legal framework introduced by Part 8 of the 2002 Act enables the OFT and
other enforcers to seek enforcement orders against businesses that breach UK
laws giving effect to EC Directives listed in Schedule 13 of that Act, where the
collective interests of consumers are harmed. These UK laws include EU Directive
93/13/EEC on unfair terms in consumer contracts. In addition, the Enterprise Act gives the OFT a co-ordinating role to ensure that action is taken by the most appropriate enforcement body. More information on the Enterprise Act can be found at http://www.opsi.gov.uk/acts/acts2002/ukpga_20020040_en_1

A1.23 Ofcom exercises its enforcement powers in accordance with its draft enforcement guidelines. For example, while Ofcom will operate with a bias against intervention, we will intervene firmly, promptly and effectively where required, and we will strive to ensure that our interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome. You can find further information about Ofcom’s draft enforcement guidelines at http://www.ofcom.org.uk/consult/condocs/enforcement/.

A1.24 Ofcom may take action against unfair terms under either the Regulations or the Enterprise Act (or both) and may accept an undertaking from the business concerned that it will stop the infringing conduct (for example, using or recommending for use an unfair term drawn up for general use in contracts with consumers).

A1.25 If the concerns are not satisfactorily addressed by this means or otherwise, Ofcom can apply to the courts and seek an injunction under the Regulations, or an enforcement order under the Enterprise Act. If the infringement needs to be tackled urgently, the court may make an interim injunction or enforcement order. In very urgent cases, where we think that an enforcement order should be sought immediately, we can start court proceedings without entering into consultation as ordinarily required. If we do propose to take such urgent action, we must first obtain the OFT’s agreement that an application for an order should be made without delay.

A1.26 There are a number of key elements to the Regulations, to which we shall refer specifically in this Guidance.

- **Core and non-core terms.** Terms which define the main subject matter of the contract are exempt from the test of fairness, provided that they are in plain, intelligible language (Regulation 6(2)(a)). Similarly the test of fairness does not apply to the adequacy of the price as against the goods or services provided in exchange, again provided that plain, intelligible language is used (Regulation 6(2)(b)). These are the terms and matters which reflect the essential bargain between the parties – what they, but primarily the consumer, would say the consumer is buying under the contract and the price for it – and which are often referred to as “core terms” and will be referred to as such in this Guidance. Any other term is a “non-core” term.

- **Test of fairness.** If a term is not a core term, or is not expressed in plain intelligible language, it is subject to assessment as to its fairness. The test of fairness is set out in Regulation 5(1).

- **Transparency.** All terms are required to be expressed in plain, intelligible language (Regulation 7(1)). Terms must also, in our view, be set out with due prominence which reflects their importance to the parties. These requirements, which we link in the concept of “transparency”, apply to both core and non-core terms.

- Schedule 2 of the Regulations sets out a non-exhaustive list of terms which may be regarded as unfair.
A1.27  The following parts of the Regulations are of particular relevance to this Guidance.

A1.28  Regulation 6(2) provides that:

“(2)  In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

(a)  to the definition of the main subject matter of the contract; or

(b)  to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.”

A1.29  Regulation 7 provides that:

“(1)  A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2)  If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail …”

A1.30  Regulation 5(1) provides that:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”

A1.31  Paragraph 1 of Schedule 2 of the Regulations states that terms may be unfair if, amongst other things, they have the object or effect of:

“(b)  inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; …

(e)  requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation; or …

(h)  automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early.”

Guidance on the individual charges and terms

A1.32  This section sets out our guidance on contract terms which provide for each type of charge. In each case there is a description of the charge, followed by the applicable guidance and, where Ofcom considers it appropriate, the areas on which Ofcom will place particular emphasis in its investigation and enforcement activity. The absence of any such indication in relation to a particular type of term should not be taken to indicate that Ofcom does not intend to undertake investigation and enforcement
work in that area. Priorities have been identified based on our research into current market conditions and those priorities are subject to review.

A. Non-Direct Debit Charges

A description of the charge

A1.33 Consumers may pay for their services by a range of methods, including direct debit, cheque, credit card and cash (e.g. at a Post Office). Some, but not all, suppliers make a charge for payment by methods other than direct debit. We refer to this as the non-direct debit (“non-DD”) charge.

A1.34 While the non-DD charge is generally for payment by means other than direct debit, some suppliers may differentiate on the basis of whether the payment is by a recurring, or non-recurring method.

A1.35 Some suppliers only accept payments by a limited range of methods, typically direct debit and/or credit card.

Ofcom's guidance

Instances when a non-DD charge may be a core term

A1.36 We consider that there may be circumstances in which a contract for communications services is structured so that a non-DD charge may be considered to be a core term and therefore not subject to the test of fairness, provided it is in plain and intelligible language.

A1.37 We take the view that, in order to be likely to be considered a core term, the non-DD charge must be set out in such a way that the typical consumer would regard it as part of the price paid in exchange for the services he is buying under the contract and would consider it part of the essential bargain with the supplier, rather than as an incidental, additional charge, separate from that price.

A1.38 We consider that core terms must also be given the prominence and transparency which reflect their importance to the consumer. If the typical consumer would not readily appreciate that a term defines the main subject matter of the contract, or sets out the price to be paid, it is our view that such a term is unlikely to be considered to be a core term.

A1.39 In the context of non-DD charges, we consider these requirements as to prominence and transparency are likely to be satisfied where both of the following elements are present:

- the contract term and any marketing material clearly set out to the consumer the prices of the different services being bought so that consumers will readily appreciate that the non-DD charge is part of the price for them.

For example, if the prices are set out with equal prominence as follows:

- 'contract A - £11 per month paying by non-DD; or
- contract B - £10 per month paying by direct debit';
• consumers are fully aware of and informed of the price that they will be required to pay when they buy a service if they are unable to pay by DD, or choose to pay by a method other than DD.

A1.40 In other words, one way in which we consider a non-DD charge is likely to be a core term is if it is clearly presented to consumers as part of the headline price for the services under the contract.

A1.41 We consider that the analysis set out above will apply whether the non-DD charge is expressed as an additional charge or as a discount on the headline price. The consumer will incur the same liability to pay extra for payment by an alternative means whether the charge is expressed as a discount for DD payment or an additional charge for a different payment method.

The fairness test for non-DD charges where they are not a core term

A1.42 Where a non-DD charge is not expressed as part of the price in the transparent and prominent manner described above, we consider that it is unlikely to be a core term. As such, it may be assessed for fairness. Similarly, if such a term is not expressed in plain, intelligible language, it will be subject to the same assessment. The way in which we consider the fairness test is likely to apply in this context is set out below.

A1.43 A consumer who chooses not to pay by DD may cause the supplier to incur additional processing costs which are directly attributable to that method of payment. We consider it is likely to be regarded as fair for suppliers to recover these additional costs through the non-DD charge.

A1.44 However, we consider that it may be unfair for consumers to pay, as part of the charge, a cost component which does not reflect the suppliers’ increased cost of taking payment by a means other than direct debit. So, for example, we believe it is unlikely to be fair for suppliers to include as a component of the non-DD charge the recovery of general “bad debt” costs.

A1.45 In our view there is little evidence of a causal link between a consumer’s choice of method of payment and the risk that the same consumer will fail to pay for the services provided. In particular, it is unclear how and why the choice of payment method will actually cause the consumer to go into bad debt. The principles applied in this context are consistent with the OFT’s guidance on credit card default payments.

A1.46 We recognise that the method of payment might affect how promptly consumers pay. Consumers who pay by an automated method will only ever pay late when that payment mechanism fails (e.g. due to insufficient funds). However, those who pay by non-DD may pay late due to a number of additional reasons, for example they may forget to pay, they may be away on holiday or they may not receive the bill in time due to postal delays.

A1.47 We believe that in some circumstances it may be fair to recover costs associated with chasing late payment, such as reminder letters/bills, as part of the non-DD charge (provided these costs are not being recovered by a specific late payment charge). This would be where there is evidence of a clear, causal relationship between payment method and the need to chase late payment.

A1.48 One way in which we think it may be fair for a supplier to calculate and apportion the costs recoverable in what we consider a likely fair non-DD charge is as follows.
The supplier could add up the overall annual costs (in line with our view above) of processing non-DD payments (of whatever method). It could then divide that total by a reasonable estimate of the total number of consumers it expects will be required to pay the charge, to give the annual costs recoverable from each relevant consumer. These can in turn be divided so as to enable their periodic collection.

**Best practice**

As a matter of best practice, Ofcom also considers that it is also important that:

- bills should clearly detail the level of any non direct debit charges as a separate line item; and
- bills should also provide information about alternative payment methods.

**B. Default charges (late payment charges, charges for payment failure, charges for restoring service)**

**A description of the charges**

A1.49 Some suppliers levy charges in the following circumstances:

- a late payment charge where a consumer does not pay a bill by the due date for payment;
- a payment failure charge where, for example, a cheque ‘bounces’ or a call for payment under a recurring mandate fails due to insufficient funds;
- a charge for restoring service where a consumer has earlier had their service suspended or restricted due to non-payment. For example, if payment is still not received after a certain period of time the supplier may, before terminating the contract entirely, bar outgoing calls, and the status of the line will be set as Outgoing Calls Barred (“OCB”). The supplier may continue to attempt to recover payment, and if it does so before it has disconnected the service entirely, it may reinstate the services but make a charge for doing so. This is known as the “OCB restored charge”.

**Ofcom’s guidance**

**Default charges (late payment charges, charges for payment failure and charges for restoring service) are non-core terms**

A1.50 These charges are only incurred where the consumer is in default. It is our view, supported by the decision of the House of Lords in Director General of Fair Trading v. First National Bank plc [2002]1 AC 481, that default charges will not be core terms. Consumers entering into a contract with a supplier would not as a matter of course expect to pay any of these charges, which are all associated with a failure to do something which they are contractually obliged to do, e.g. to pay a bill by the due date. This will be the case whether the charges are described as default charges or are presented as a form of “contractual option”, such as the “option” to pay late. The Regulations are concerned with the substance of terms, not merely their form.
Accordingly, terms which impose such charges, however they are described, are, in our view, subject to review for fairness.

**The fairness test for default charges (late payment charges, charges for payment failure and charges for restoring service)**

**A1.51** We consider it is likely to be unfair for suppliers to include within such charges any element which does not relate to the direct costs incurred as a result of the consumer’s default. In common with the approach of the OFT in relation to credit card default charges, we consider that the inclusion of generalised “bad debt” costs within these charges is likely to be unfair. It is our view that there is no evidence to suggest a sufficiently strong causal link between individual instances of default and failure to pay at all which would, for example, allow a supplier to recover such sums from a consumer as damages for breach of contract.

**A1.52** We consider terms providing for late payment charges, charges for payment failure and reconnection charges are likely to be fair where:

- the terms relating to these charges are transparent to consumers within the contract at the point of sale; and
- the charge includes only the direct costs incurred.

**A1.53** So, for late payment charges, only costs such as the costs for chasing payments, postage, and loss of interest on bills unpaid should be included. For payment failure we think it likely to be fair to reflect external costs such as bank charges. For charges for restoring service, only direct costs such as the wholesale costs of restoring service should be included (as well as the cost categories for late payment).

**A1.54** In addition, in relation to terms which impose charges for late payment, we consider that such terms will only be fair if suppliers make clear in their contracts that such charges may only be levied after consumers have had a reasonable opportunity to pay their bills and have failed to do so. This should take into account possible postal delays as well as reasonable absence from home.

**A1.55** We also consider that these kinds of default charges are likely to be unfair where they deny a consumer the right of set-off, as follows.

**A1.56** Where a consumer has an arguable claim under a contract against a supplier the law generally allows the deduction of the disputed sum from other sums the consumer has to pay. This is relevant, where, for example, a consumer disputes part of a bill and refuses to pay it. A term that allows a default charge to be levied in these circumstances, with the effect that the right of set-off is effectively denied is, in our view, likely to be unfair.

**A1.57** Such a term is likely to fall within the indicative list of terms that may be unfair set out in Schedule 2 to the Regulations. It is likely to fall within paragraph 1(b) of that Schedule, which states that terms may be unfair if they have the object or effect of:

‘inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier … including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.’
C. Initial Minimum Contract Period (MCP) and Early Termination Charge (ETC)

A description of the charge

A1.58 Suppliers of communications services may require consumers to commit to a contract of a fixed duration i.e. a Minimum Contract Period (“MCP”). This is common practice and is most likely when there are significant up-front costs for the supplier, such as:

- the cost of consumer equipment provided free or at a subsidised rate (e.g. a mobile handset or broadband modem); or
- wholesale connection charges.

A1.59 Most MCPs are currently 12-18 months. However, suppliers also offer services with no MCP, or three months MCP (such as for fixed voice) or 24 months (for mobile).

A1.60 When a consumer terminates a contract of fixed duration before the expiry of the MCP, suppliers usually levy an early termination charge (“ETC”).

A1.61 The ETC is typically the total of the remaining monthly payments. There are some exceptions, in which suppliers:

- set the outstanding rental at the level of the lowest priced package;
- cap the total charge at a maximum level; or
- in some cases, require consumers to pay the remaining monthly payments as well as return (or pay for) equipment which they would have been able to retain had they not terminated their contract early.

A1.62 Some suppliers, rather than setting a MCP, may instead levy a charge on termination of the contract which is dependent on the period for which the contract has been running. While this is not expressed as an ETC, its effect is the same. In such a case a consumer would be required to pay a sum upon termination of a contract if he terminated before, say, 12 months but not if he terminated later. Under the Regulations, we are concerned about the effect of a term and therefore this type of term may be regarded as an ETC.
Ofcom’s guidance

Terms providing for MCPs are likely to be core terms

A1.63 We consider that the term providing for a MCP is likely to be viewed as a core term. It is also one of the most important terms for consumers.

A1.64 As stated above, all core terms must be set out with appropriate prominence and transparency. We would expect this term to be sufficiently prominent in terms and conditions and to be easily recognised by consumers as a key element of the contract. Suppliers must also take care to ensure that any marketing material is expressed with sufficient clarity that it does not mislead the consumer in relation to such terms. Such material may, in our view, fall to be considered as part of “the circumstances attending the conclusion of the contract” as set out in Regulation 6(1). We would expect such material to make clear the duration of any minimum term.

A1.65 Where an MCP is not expressed in a transparent and prominent manner, we consider that it may not be a core term. As such, it may be assessed for fairness. Under the Regulations, an unfair term shall not be binding on the consumer, and therefore a supplier which fails to make the MCP sufficiently transparent and prominent will, insofar as the MCP is unfair, be unable to enforce the MCP and any requirement to pay an ETC.

A1.66 While in certain sectors the existence of MCPs is well known to consumers, in others it is not. We consider that the existence and/or duration of MCPs for fixed voice contracts may not currently be sufficiently well known or brought to the attention to consumers. We expect suppliers to follow the guidance above in ensuring that MCPs are made both prominent and transparent for all services.

Terms relating to ETCs are non-core terms

A1.67 In our view, terms providing for ETCs (which are default charges or charges analogous to default charges even if they do not apply on breach of contract) will not be core terms.

A1.68 In the contracts we are concerned with here, the consumer agrees to purchase a service for a certain minimum period. Where the consumer terminates the contract early, the supplier levies a charge. That charge, the ETC, is paid on termination of the contract and cessation of service, not, as it would need to be in order to be a core term, in exchange for services. We consider that a similar analysis to that set out in paragraph A1.50 above applies. So, we consider ETCs will not be core terms and will be subject to the test of fairness.

The fairness test for ETCs

A1.69 The following sets out the principles we consider likely to apply in the assessment of fairness of ETCs, which we consider suppliers should apply in setting ETCs, and which are likely to guide us in carrying out our enforcement duties under the Regulations.

A1.70 We consider it likely to be unfair if a supplier sought to recover in an ETC a sum that would put it in a better position than if the consumer had performed his contractual obligations (and no more). Put another way, in our view it is unlikely to
be fair if the ETC is more than the supplier could recover in damages at common law where the consumer breached the relevant contract.

A1.71 If the term providing for the ETC had the effect in [A1.70] it would put the supplier in a better position, and the consumer in a worse one, than they would be in without the term. In effect, the supplier would receive a disproportionately high sum for not having to provide services under the contract and the consumer would have to pay such a sum for not receiving them. The consumer would be paying a disproportionately high sum for failing to adhere to the fixed term of his contract.31

A1.72 So, in our view, such a term would cause a significant imbalance between the supplier’s rights and obligations and the consumer’s, to the latter’s detriment, and contrary to the requirement of good faith.

A1.73 Accordingly, in setting ETCs, we consider a supplier must make a reasonable pre-estimate of the position it would have been in had the consumer done what the contract obliged him to do (and no more) (i.e. the losses it incurs because the contract is not performed for its fixed term). All we consider the supplier may fairly recover in an ETC is a sum that reflects that position. That involves making a reasonable pre-estimate of the costs it saves and the losses it can mitigate, and deducting those from the fixed contractual retail payments outstanding on termination.

A1.74 That pre-estimate will include, for example, any variable costs the supplier saves on the particular contract terminated (or, in practice, on contracts for the type of services concerned to the types of consumers concerned). It will also include a reasonable pre-estimate of any network costs the supplier saves in a particular, reasonable period averaged over the group of consumers terminating contracts early. We do not expect that suppliers will need to calculate each individual consumer’s ETC at the time of contract termination.

A1.75 We consider that an ETC is likely to be fair where:

- the terms providing for it are transparent at the point of sale with sufficient prominence that the consumer is fully aware of the consequences of terminating early, and what the level of the ETC would be (or the method by which this would be calculated e.g. the amount that would be charged for each outstanding month);

- it is never greater than the amount of the (usually monthly) contractual retail payments remaining due at the date of termination;

- it also takes account of any costs associated with the provision of the service which will no longer be incurred, including any:
  - variable costs which can be avoided; and
  - costs of shared network elements which the consumer is no longer using, and which can be used to provide services to another consumer (whether a new customer or increased demand from an existing customer);

31 We note that paragraph 1(e) of Schedule 2 to the Regulations says terms may be unfair if they have the object or effect of, ‘requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.’
• it reflects any ability of the supplier to reduce its loss by 'reselling' the service to a new consumer;\(^{32}\) and
• it makes allowance for the supplier's accelerated receipt of any sums. \(^{33}\)

A1.76 We do not consider that it is likely to be fair to include in an ETC recovery of anticipated profits from charges, or other sources of revenue, which are not themselves part of the consumer's contractual obligations (assuming the consumer would not do things, and incur charges, where he is not required to do so under the contract). This excludes from a fair ETC, in our view, charges for calls outside any inclusive bundle on a fixed voice or mobile phone contract, for example.

A1.77 We also take the view it is unlikely a fair ETC will normally include sums in respect of 'lost' revenues from incoming call termination charges for fixed voice and mobile phone services. We think it is unlikely, on the grounds of remoteness, that they would normally be recoverable from consumers as a matter of common law contractual damages. It is unlikely in most cases that a consumer contracts with a supplier on the basis he will be liable for the loss of such revenues were he not to fulfil his contractual obligations. A supplier would need to show otherwise in any particular case(s).

A1.78 We also acknowledge there is an alternative basis on which, in our view, a likely fair ETC may be recovered. Instead of recovering an ETC on the basis above, a supplier may fairly seek to recover its unrecouped expenditure on the early terminated contract. This may include its unrecouped customer acquisition or equipment subsidy costs. But, we do not consider such recoverable costs may exceed the fair ETC that may be recovered on the first basis described above.

A1.79 This on the basis that in the common law contractual damages rules, an innocent party may, broadly speaking, in response to the other party’s breach of contract, claim damages in respect of either: (1) lost net profits (subject to matters such as the duty to mitigate); or (2) wasted costs. But, it cannot claim the same losses twice. Nor can it claim more on the wasted costs basis than its lost net profits.

Best practice

As a matter of best practice, Ofcom also considers it is important that suppliers make very clear to consumers the level of the early termination charge at the point at which the consumer is considering terminating their contract.

D. Subsequent Minimum Contract Period (subsequent MCPs)

A description of the term

A1.80 A subsequent MCP may be triggered when some aspect of the contract is changed, and in return the supplier requires that consumers are committed to purchasing the services for an additional fixed, minimum duration.

\(^{32}\) This will be particularly relevant for network elements specific to a particular property (such as a copper pair or cable connection) where the elements may subsequently be used by a new occupant.

\(^{33}\) We agree there may also, in theory, be costs the supplier is obliged to pay third parties on early termination of contracts and which may be recovered from terminating consumers. However, we are not aware of any such charges (other than the 'cease charges' dealt with elsewhere in our guidance). And, we think it likely the rules on remoteness may well preclude recovery of any other such costs. Further, account would, in any event, need to be taken of costs to the third party saved. Together, these mean it is unlikely this point has practical relevance.
Subsequent MCPs may be triggered within the initial MCP or outside it. For mobile phone contracts, subsequent MCPs will most commonly occur when a consumer makes a new commitment for a minimum term in return for a handset upgrade. For other contracts, including fixed line, broadband and pay-TV, the main triggers are upgrading or downgrading of the service level and moving house.

We have also seen contracts which are automatically renewed for a subsequent MCP at the end of each existing one, without there being any change in circumstances. The trigger in these cases has simply been reaching the end of the existing MCP.

This Guidance is primarily concerned with terms in communications contracts that provide for the imposition of subsequent MCPs on the occurrence of “trigger” events or in “trigger” circumstances (“SMCP terms”). We acknowledge there may be some circumstances where the consumer agrees to new terms and services where what arises is a new contract between the supplier and the consumer, on new terms, and in which the MCP may be a core term.

**Ofcom’s proposed guidance**

**SMCP terms are likely to be non-core terms**

We consider that SMCP terms are likely to be non-core terms. This is because we consider that it is unrealistic to expect a reasonable consumer to consider the trigger for a subsequent minimum term to be part of the main subject matter of the contract.

We believe that any term that has the same effect as a SMCP term should be treated in the same way i.e. it is the effect, not the form that is important.

We consider, therefore, that SMCP terms, and terms to the same effect, imposing subsequent MCPs are likely to be subject to the test of fairness under the Regulations.

**The fairness test for SMCP terms**

In general terms, we consider it is likely to be fair for suppliers to require a commitment to a subsequent MCP where consumers get a commensurate benefit in return for that commitment and the commitment is clear to the consumer. This is necessary to ensure that contracts do not create a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer.

So, we consider the requirement for a subsequent MCP is likely to be fair where:

- any SMCP term explaining the events (such as a decision to upgrade), that will trigger a requirement for a subsequent MCP, is transparent to consumers within the contract at the point of sale;

- the term sets out that the supplier will make it very clear to the consumer that the event (such as a decision to upgrade) will trigger a new MCP, and the length of that new MCP, at the point that the consumer is considering the change (for example, the term says the supplier will write to the consumer stating when changes to the services will result in a subsequent MCP);
• the costs incurred by the supplier and the benefits to the consumer in relation to the subsequent contract are commensurate with the subsequent MCP.

A1.89 We consider the requirement for a subsequent MCP is likely to be unfair where:

• there is little benefit to the consumer arising from the relevant variation and the supplier incurs no costs or costs at only a low level. Examples of this may include where:
  o a consumer wants to upgrade their tariff, (either within or outside the initial MCP) and there are no/low upfront cost implications for the supplier; or
  o where a consumer wants to downgrade their tariff outside the initial MCP and there are no/low upfront cost implications for the supplier;

• the supplier wants to change the underlying wholesale service and there is no consumer benefit. Examples of this may include where a supplier wants to migrate to using LLU and consumers do not have a choice of staying on their original tariff and original MCP; or

• there is automatic renewal upon reaching the end of an existing MCP and one or more of the conditions set out below applies.

A1.90 Where suppliers include a term providing for an ETC in respect of early termination of a subsequent MCP, we consider that such terms are also unlikely to be core terms and likely to be subject to the test of fairness. We consider that the amount of ETCs charged should be calculated in accordance with the principles set out in paragraphs A1.69 – A1.79 above.

Terms providing for automatic renewal of fixed term contracts

A1.91 Terms providing for automatic renewal of fixed term contracts are a particular category of SMCP terms providing for subsequent MCPs, where the trigger is reaching the end of the existing MCP.

A1.92 Our concern about such terms is that they may be used to bind a consumer to a series of fixed-term contracts, without the consumer intending and agreeing to be so bound and without receiving any commensurate benefit for being so. The consumer may experience only an unintended extension to his payment obligations.

A1.93 So, an automatic renewal term may cause the necessary imbalance under the Regulations by virtue of, in the words of Lord Bingham in Director General of Fair Trading v. First National Bank plc [2002] 1 AC 481, ‘…imposing on the consumer [of] a disadvantageous burden or risk or duty.’

A1.94 However, we also consider that the possible unfairness of an automatic renewal term may be counter-balanced by other terms in the same contract. And, in assessing any such term for fairness we would expect to have regard to all the relevant terms.

A1.95 We consider automatic renewal terms are more likely to be unfair where one or more of the following applies:

• the renewal term itself is not transparent in the contract at the point of sale;
• there is no accompanying term which commits the supplier to sending a clear and unambiguous reminder notice at a reasonable time before the renewal term is to take effect (and no equivalent measure like a charge-free cancellation period of reasonable duration after renewal and no contractual commitment to sending a reminder of that period at the time of renewal);

• the terms do not provide for a clear and easily effected opt-out (or cancellation) mechanism, without unnecessary formal or procedural requirements;

• there is no cost to the supplier and benefit to the consumer commensurate to the renewed obligation the consumer takes on;

• there are other terms which seek to restrict the opt-out window or require too long a notice period;\(^{34}\) or

• the ETC is unfair (or so high as to have a prohibitive effect on the consumer’s right to terminate the renewed contract).

A1.96 We also consider that, as matters of good and fair business practice, it is important any automatic renewal reminder notice is genuinely aimed at informing the consumer and prompting them actively to consider whether they wish to commit to a renewed fixed-term contract. For example, we would expect that the reminder should:

• be sent at an appropriate point in time (neither too close to nor too far away from the renewal date);

• be written in plain, intelligible language;

• have the explanation about the automatic renewal as the only (or main) subject matter; and

• make it clear what the consumer needs to do to prevent the automatic renewal (which procedure should not be unduly onerous – see above).

A1.97 In any case where it became apparent these sorts of conditions were not being adhered to, we would consider whether there was appropriate legislation under which we could take action, whether under the Regulations or other provisions, such as the Consumer Protection from Unfair Trading Regulations 2008.

The areas on which Ofcom will focus in investigations

A1.98 We are likely to focus on circumstances where there are no (or very low) additional upfront cost implications for the supplier, in particular, tariff upgrades and downgrades, and on terms providing for automatic renewal that we consider are likely to be unfair as set out above.

\(^{34}\) and there should in any event be a term allowing early termination of the contract by the consumer with any accompanying ETC being fair.
E. Minimum Notice Period (MiNP)

A description of the charge

A1.99 Even where there is no MCP, suppliers usually require consumers to provide formal notification of an intention to terminate a contract where regular payments are made directly to the supplier.

A1.100 The Minimum Notice Period (“MiNP”) is often either 30 days or one calendar month, and consumers are required to make payments up to the end of that period even if they wish to terminate the contract (and the service) earlier. Lesser MiNPs are generally applied to fixed voice services.

Ofcom’s guidance

Terms providing for MiNPs are likely to be non-core terms

A1.101 We consider that the MiNP is unlikely to be part of the main subject matter of the contract and that terms providing for a MiNP are likely to be non-core terms.

A1.102 In our view, consumers entering into a contract for services would not consider the manner in which they are required to terminate that contract as part of the service they are buying. As such, these terms cannot be regarded as part of the main subject matter of the contract. MiNPs are therefore subject to the test of fairness.

The fairness test for MiNPs

A1.103 We consider a term providing for an MiNP is likely to be fair where the following conditions are fulfilled:

- the MiNP is transparent to consumers within the contract at the point of sale; and
- the MiNP reflects a reasonable period in which to carry out the necessary administration of terminating the contract.

A1.104 Failure to set MiNPs according to the principle in the second bullet point would be likely to lead to consumers having to bear an unjustified risk of ceasing service with the losing supplier before the end of the MiNP or of having to pay two suppliers for a period of time in order to ensure a sufficient degree of overlap and no loss of service.

A1.105 For fixed voice and broadband services, where formal service migration processes apply which are likely to take between 5 and 10 working days, we consider this is likely to be a sufficient period for the necessary administration of terminating the contract. We consider that a longer MiNP in a contract for such services is likely to be unfair. This should mean the cessation date for charging by the supplier does not go beyond the date on which the migration occurs.

A1.106 For mobile services, and in any sector where no formal migration process applies, we consider that the MiNP should be no longer than reasonably necessary for the required administration. We see no reason why this should in any event be longer than 30 days and likely much less.
A1.107 If the consumer gives notice of termination such that the end of the MiNP would fall within the MCP, the guidance in respect of early termination, set out above, will apply.

Best practice

As a matter of best practice, Ofcom also considers it is important that suppliers make it very clear to consumers what the minimum notice period is at the point at which the consumer is considering terminating their contract.

F. Itemised or Paper Billing

A description of the charge

A1.108 The itemised or paper billing charge is a charge made to consumers for the provision of a fully itemised or paper bill. For broadband suppliers itemisation is not relevant, but some of these suppliers charge for paper bills.

A1.109 Our research indicates that as at August 2007, about half of non broadband suppliers charged for itemised paper bills – generally between 50p and £1.50 per bill. BT offers a discount of 50p a month from the headline service price for paperless billing (i.e. £1.50 per bill for those billed quarterly).

A1.110 All the suppliers we looked at provided at least a basic level of paper billing for no extra charge for voice or mobile telephony services. (Since by definition broadband users have online access, the fact that some suppliers charge for any level of paper billing is less of a concern to us.) Some provided a free paper bill for tariffs above a certain level. However, all the suppliers that we looked at provide online itemised bills at no charge.

Ofcom’s guidance

Instances where a term providing for an itemised or paper billing charge may be a core term

A1.111 An itemised bill is a means by which the supplier sets out the nature of the service that has been provided under the contractual agreement, enabling the consumer to verify this.

A1.112 As with the non-DD charge, we consider that there may be circumstances where the charge for itemised or paper billing may be considered a core term and therefore not subject to the test of fairness, provided it is in plain and intelligible language.

A1.113 We take the view that, in order to be likely to be considered a core term, any term which provides for an itemised or paper billing charge must be set out in such a way that the typical consumer would: (1) regard it as part of the price paid in exchange for the services he is buying under the contract and part of the essential bargain with the supplier, rather than as an incidental, additional charge, separate from that price; and (2) would be aware of the level of information or billing which is thereby provided by comparison with the basic, or standard, level of billing.

A1.114 We consider that the latter requirement arises from the fact that, in order to benefit from the Regulations’ core terms exemption, as terms relating to the adequacy of
the price, relevant billing charges must be presented as part of that price and the consumer must know what is he getting for it. If he does not, the plain, intelligible language requirement is not met and the core terms exemption cannot apply.

A1.115 To fulfil these requirements, we consider it likely the following conditions must all be met:

- the contract term and any marketing material must make clear in a prominent manner whether there are any separate billing options for which there are different charges;

- any such information must clearly set out what these options are, together with the price for each option. This must include whether the options are related to charges or discounts for receiving printed or Internet bills, and/or for different levels of billing information;

- where there are different levels of billing information which incur different charges, the contract terms must clearly set out what level of billing information is being provided under each option; and

- the contract terms and the marketing material must set out the required information in such a way that the consumer who chooses itemised billing would regard that as part of the services he is buying under the contract.

A1.116 We consider that the analysis above will apply whether the options are presented as additional charges or as discounts on the headline price. If suppliers do not meet all of these conditions, the term providing for itemised or paper billing charge is likely in our view to be subject to the test of fairness.

The fairness test for terms providing for itemised or paper billing charges where they are not a core term

A1.117 Where an itemised or paper billing charge is not expressed as part of the price in the transparent and prominent manner set out above, we consider that it is unlikely to be a core term. As such, it may be assessed for fairness. Similarly, if such a term is not expressed in plain, intelligible language, it will be subject to the same assessment. The way in which we consider the fairness test is likely to apply in this context is set out below.

A1.118 A consumer who wishes to have itemised and/or paper billing may cause the supplier to incur additional costs which are directly attributable to that level of billing. So, for example, we consider it may be fair for a supplier to include to include in these billing charges the reasonable incremental costs of paper, printing, postage, and information processing (over and above those incurred for basic, or paperless, billing). We do not suggest that it is likely to be unfair for suppliers to recover these additional costs through a charge for itemised and/or paper billing.

The areas on which Ofcom will focus in investigations

A1.119 As an administrative priority, where the test for fairness applies, we would not propose to take action on the basis of the level of charges observed as at August 2007 and costs we have observed.
G. Cease Charges

A description of the charge

A1.120 These are charges made when the consumer ceases its service from the supplier. They are unrelated to the ETCs and MiNPs.

A1.121 During our review the clearest example we noted of a cease charge was that made to consumers in respect of suppliers passing on wholesale charges levied by BT Openreach upon termination of wholesale broadband agreements. However, this applies only in limited circumstances where the consumer is ceasing to use a broadband service altogether or is moving to a cable service such as Virgin Media or to Kingston Communications.

Ofcom's guidance

Terms providing for cease charges are likely to be non-core terms

A1.122 We consider that terms providing for cease charges are unlikely to be core terms. Such charges are not, in our view, part of what a typical consumer would consider to be the main subject matter of the contract or the price of the service. Accordingly, they are subject to the test of fairness.

The fairness test for cease charges

A1.123 We consider cease charges are likely to be fair where of the following conditions are fulfilled:

- the terms relating to cease charges are transparent to consumers within the contract at the point of sale; and
- they reflect only the direct costs associated with ceasing service.

The areas on which Ofcom will focus in investigations

A1.124 We are likely to take seriously any deviation from actual, specific direct costs incurred. This is because artificially high cease charges can affect switching costs which impede competition in the market.

Best practice

As a matter of best practice, Ofcom also considers it is important that suppliers make it very clear to consumers the level of any cease charge at the point at which the consumer is considering terminating their contract.