

Trials team  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

By email to [trials@ofcom.org.uk](mailto:trials@ofcom.org.uk)

Our ref: DP/DATG

22 November 2019

Dear Sirs,

## **Consultation response - Trialling consumer remedies**

1. This is the response of Gamma Telecom Holdings Limited ("**Gamma**"), the public electronic communications network in the business-to-business sector, to the consultation document *Trialling consumer remedies* (the "**consultation document**"). We are solicitors for Gamma.
2. This response comprises Gamma's general comments in response to question 6 in the consultation document.
3. Gamma wishes to repeat its previously stated concerns that the use of language within the consultation document – particularly around the use of customer and consumer without clear context or definition – has resulted in it having to respond to what may be a consultation intended by Ofcom as only ever impacting Communications Providers supplying Consumer customers (as defined in the General Conditions).
4. For the reasons set out below, Gamma avers that the approach proposed in the consultation document is flawed, unrealistic, anti-competitive and unlawful. In particular, the suggested use of primary legislation for the proposed purpose:
  - a. is outside what was intended by Parliament in enacting the Communications Act and so is an abuse of statutory power;
  - b. does not take account of its effect on the business-to-business sector; and
  - c. is disproportionate.

**Abuse of statutory power**

5. The consultation document asserts that Ofcom is intending to impose a new general condition to oblige providers to take part in the proposed trials (paragraph 4.8).
6. Ofcom acknowledges that there will be "*direct costs of running a trial*" on providers and that "use of this general condition "*will impose burdens on providers*" (paragraph 4.18).
7. The consultation document then admits that such a burden *could "result in customers switching away from a participating provider"* and that "*a direct consequence of a trial may be that some providers in the trial lose customers and revenue*" (paragraph 4.18).
8. The imposition of these costs and this burden would be a serious misuse of statutory powers.
9. Trials are in their nature unpredictable. If an outcome of a trial was certain there would, after all, be no need for a trial. The benefit of any trial is therefore a matter of speculation and, it would seem, academic theory. The consultation document itself cannot put the benefits as any higher than "*likely*" (paragraph 4.19 and 4.20). A hard close look at the consultation document's paragraphs 4.17 to 4.22 reveals Ofcom to be certain there will be added costs on providers but that there will only be "*likely*" benefits at best for consumers.
10. Furthermore, if a provider is facing competition from a provider for whom Ofcom is reducing or removing a regulatory burden under the trial, then that first provider will be facing unfair competition.
11. What will happen in practice is that real-world companies (with employees and customers) will face actual burdens with adverse direct consequences, just so Ofcom can experiment with academic theory at the expense of private and institutional investors, potentially diverting resources away from innovation. Gamma also notes Ofcom is not proposing to indemnify companies for their losses, though of course misuse of a statutory power can open Ofcom to a claim for damages.
12. Gamma does not necessarily object to the public interest goal of a general duty, applicable to all providers, in respect of customer interests. There may be serious problems in practice, but this is not Gamma's objection to the proposed general condition.
13. There are various approaches Ofcom could follow to consulting on and developing such a policy that does not involve using the telecoms market as, in effect, a guinea pig to test theories. The consultation document gives the appearance of Ofcom

wanting a segment of the market to do Ofcom's own job of developing practical regulatory policy.

### **Disregard of the business-to-business sector**

14. The consultation document takes little or no account of the business-to-business sector.
15. The business-to-business sector will nonetheless be under the proposed general condition as much as consumer facing providers. But there is no attempt in the consultation document at considering the impact the proposal will have on the business-to-business sector.
16. Gamma notes, in particular, that the three case studies chosen are all in respect of consumers. Gamma has made several previous representations about Ofcom's failure to pay due attention to the business sector, either in relation to the differing needs of the users, or the complexity of the value chain.
17. Gamma fears that the business-to-business sector in which they have substantially invested is nothing more than acceptable collateral damage in Ofcom's current preoccupation on residential matters.

### **Disproportionality**

18. In the event Ofcom introduces the proposed general condition, Gamma avers that it will also be found to be as unlawful as disproportionate, as well as being a misuse of a statutory power. This is because there appears to be no evidence that Ofcom has seriously considered voluntary trials before seeking to use statutory (coercive) powers.
19. Here Gamma notes that in paragraph 3.10 a voluntary trial is cited in support of the proposed approach and there is further confusion with the two case studies mentioned in respect of the FSA, which are also voluntary. The evidence base in the consultation paper itself does not even support the use of statutory (coercive) powers.
20. There is nothing in law to prevent Ofcom seeking voluntary participation in the proposed trials. And there is nothing in the consultation document to explain why a voluntary approach is not being seriously considered.

Yours faithfully,

*DAT Green, for and on behalf of Preiskel & Co LLP*

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