



## **Trialling Consumer Remedies**

Sky's response to Ofcom's consultation

November 2019

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## Introduction

Ofcom has proposed introducing new formal regulation giving it the power to require communications providers to undertake consumer trials of alternative remedies to problems that it has identified (the “Trials GC”).

Whilst Sky understands the rationale for Ofcom’s proposal, it is important to recognise that consumer trials are burdensome and often disliked by customers. It is for these reasons that Sky limits its own use of such trials.

A voluntary regime enabling Ofcom to undertake consumer trials from time to time for testing alternative remedies would offer greater flexibility, speed and collaboration than seeking to achieve Ofcom’s objective via a new General Condition. Notwithstanding Ofcom’s dismissive comments, there is a growing track record of communications providers implementing voluntary arrangements in order to deliver Ofcom’s desired outcomes more quickly than would have happened using formal powers. These include providers voluntarily informing customers of broadband speeds and allowing them to leave without penalty if the minimum guaranteed speed is not achieved, the industry scheme on automatic compensation, and the examples given in the Consultation of previous voluntary trials and schemes carried out by Ofcom.<sup>1</sup>

Ofcom also cites the experience of regulators in sectors such as energy and financial services. However, our understanding is that consumer trials in financial services are undertaken on a voluntary basis, with no formal backstop powers.

We consider that prior to considering the imposition of new statutory obligations Ofcom must engage properly with communications providers to consider voluntary arrangements that would enable Ofcom to achieve its objectives. The evidence indicates that Ofcom is being unduly pessimistic in believing that providers will not participate in trials on a voluntary basis.

Unless and until Ofcom properly considers how a voluntary scheme could work, pressing ahead with the introduction of a new General Condition as proposed is not consistent with Ofcom’s own principles, including seeking the least intrusive form of regulation necessary to achieve its policy objectives. Moreover, it does not meet the legal tests for the introduction of new regulation as set out in Sections 3(3), 3(4), 47(2) and 47(3) of the Communications Act 2003.

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<sup>1</sup> Paragraphs 2.7, 3.16 and 3.17. All references are to the Consultation unless otherwise stated.

## The use of consumer trials

Whilst Sky understands the rationale for Ofcom's proposal, it is important to recognise that consumer trials are burdensome. They are time consuming and costly to run effectively. Accordingly, greater use of such trials will impose new regulatory costs on firms in the communications sector. In Sky's experience consumer trials are also not particularly well received by customers. For both these reasons Sky limits its own use of large-scale consumer trials, using them relatively infrequently.<sup>2</sup>

### A voluntary regime would be more a more flexible and efficient approach

We consider that Ofcom has inappropriately rejected the possibility that an effective regime for the use of consumer trials for testing remedies could be established via a voluntary industry agreement.

Notwithstanding Ofcom's dismissive comments, there is a growing track record of communications providers implementing voluntary arrangements in order to deliver Ofcom's desired outcomes more quickly than would have happened using formal powers. The Consultation itself acknowledges that a successful trial has already been run with BT as part of Ofcom's intervention into BT's landline-only customers. There are numerous other successful examples of voluntary regulation including Ofcom's Voluntary Code of Practice on Better Broadband Speeds, and the Voluntary Code of Practice for an Automatic Compensation Scheme.<sup>3</sup>

It should be noted that the Financial Conduct Authority, which is prominently and approvingly referenced in the Consultation<sup>4</sup>, runs its consumer trials on a voluntary basis and we understand without having formal powers to compel financial service providers to participate.

Sky therefore consider it clear from both the evidence of Ofcom's own experience and that of other regulators that Ofcom is not correct in saying that providers will not participate in consumer trials because "*it is not in their commercial interests*".<sup>5</sup>

Sky agrees with Ofcom that "*trials run on a voluntary basis may be quicker to implement*"<sup>6</sup>. Sky also considers that a voluntary regime has the benefit of being less constrained by the regulatory framework (for example, the need for formal consultation) and the additional time and resources needed by both Ofcom and providers in dealing with that process.

Sky is working closely with other firms in the industry to agree principles to help shape a framework under which a voluntary regime could be adopted.

We consider that Ofcom's belief that communications providers would not be prepared to engage in trials on a voluntary basis due to a single past example is erroneous. Ofcom refers to how it previously invited providers to participate in a

<sup>2</sup> Instead, Sky tends to undertake consumer research or when undertaking trials, use small groups of users.

<sup>3</sup> These can be found at: <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/codes-of-practice>

<sup>4</sup> Paragraphs 3.16 and 3.17.

<sup>5</sup> Paragraph 4.4.

<sup>6</sup> Paragraph 4.7.

trial to test end of contract notifications and that nobody responded to the invitation.<sup>7</sup> This 'invitation' consisted of two paragraphs within a consultation of 155 pages and was not followed up with any individual communication with the main providers involved.<sup>8</sup>

The lack of response from communications providers to this one particular invitation for voluntary participation does not indicate that the significant new powers set out in the Trials GC are necessary and does not justify Ofcom overlooking the many examples both in the telecoms sector and elsewhere of voluntary trial arrangements working effectively.

### The proposed General Condition is legally flawed and too wide in scope

For the reasons set out above Ofcom must properly engage in a voluntary approach to consumer trials in the communications sector before it can further consider implementing formal obligations. If, at that time, Ofcom still decides to pursue the implementation of the Trials General Condition it is important that such significant new powers given to Ofcom:

- (i) satisfy the legal tests that must be met to introduce new regulation of this type; and
- (ii) are appropriately limited.

We discuss each of these below.

*Any new General Condition must satisfy the legal tests that must be met to introduce new regulation of this type*

The legal conditions that must be met for Ofcom to introduce significant new regulation are well known.<sup>9</sup> Among other things, Ofcom must only introduce new regulation if it is targeted at cases in which action is needed. It must demonstrate that proposals for new regulation are so targeted on the basis of cogent analysis and clear evidence capable of withstanding profound and rigorous scrutiny. The burden of proof rests with Ofcom to demonstrate that proposals for new regulation are necessary.

Furthermore, any such proposals must be consistent with Ofcom's own regulatory principles which state that it will: (i) operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required; (ii) strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; and (iii) always seek the least intrusive regulatory mechanisms to achieve its policy objectives.<sup>10</sup>

The analysis of whether the proposal to introduce the Trials GC meets these requirements set out in the Consultation is manifestly inadequate. It is brief and comprises principally of assertions, unsupported by any relevant evidence or analysis, that the requirements are met. We do not consider that Ofcom has

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<sup>7</sup> Paragraph 2.7.

<sup>8</sup> Paragraphs 9.26 and 9.27 of 'Helping consumers get better deals, Consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband', Ofcom, December 2018.

<sup>9</sup> They are set out in Sections 3(3), 3(4), 47(2) and 47(3) of the Communications Act 2003, and relevant case law relating to the application of those sections of the Act.

<sup>10</sup> 'Ofcom's regulatory principles'. (<https://www.ofcom.org.uk/about-ofcom/what-is-ofcom>).

demonstrated to a sufficient standard that its proposal meets the relevant legal tests and is in conformity with Ofcom's own regulatory principles.

Above all, as discussed above, Ofcom's rejection of a voluntary approach to this issue means that it has failed properly to ensure that the proposed General Condition is necessary and the least intrusive way of achieving its regulatory objectives.

*Any General Condition should be limited appropriately*

If a Trials GC is ultimately adopted, in order to ensure that it is the least intrusive regulation, necessary and proportionate, it is critical to build in safeguards on its use, on the face of the condition. In this section we suggest how the proposed Trials GC should be modified and include our proposed changes in Schedule 1.

Most importantly, the Trials GC should be limited to the role that Ofcom has proposed for it, which is a General Condition to conduct consumer trials on potential remedies to problems that it has identified. The current drafting of the Trials GC goes beyond this and is not limited to testing consumer remedies once a harm has been identified.

In addition:

- trials should be limited to communications with customers (i.e. not requiring new, or amendments to existing, systems or products);
- there should be a limit on the number of trials so that each communications provider can only be required to participate in one trial in any twelve month period;
- there should be appropriate limits on the cost to communications providers of undertaking trials;
- trials should be limited to existing customers of the communications provider;
- trials should not impose significantly different burdens among communications providers; and
- Ofcom can only use the data for the purposes it sets out to trial unless otherwise agreed with the communications provider.

The sensitivity of consumer data issues means that safeguards would be needed to ensure that Ofcom does not use such powers in a way which puts in question a communications provider's compliance with data protection requirements. Each communications provider will have a different privacy policy and its own view of what is appropriate to ensure compliance with data protection laws. Although data protection laws are unlikely to be a block for a reasonable consumer trial, communications providers should not be required to do things which they reasonably consider would breach or carry an unacceptable level of risk of non-compliance with data protection laws and regulations.

In several places within the Consultation Ofcom mentions application of the Trials GC to 'Pay TV'. As Ofcom is aware, Sky's view is that its TV service is not regulated by

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Ofcom's General Conditions because it does not comprise an Electronic Communications Service.<sup>11</sup>

In Schedule 1 of this Consultation Sky has marked up the draft Trials GC to indicate where it considers amendments need to be made for the Trials GC to be more proportionate and to help address the risk of potentially uneven regulatory burden.

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<sup>11</sup> Sky's arguments on this issue are set out in Section 3 of Sky's response to the consultation: 'Making switching easier and more reliable for consumers- proposals to reform landline, broadband and pay TV switching between different platforms', July 2016.

## SCHEDULE 1 – Draft General Condition

Ofcom proposes that the following new general condition shall be inserted into Part C ('Consumer protection conditions') of the General Conditions as Condition C9:

### "C9 Trials

*This condition aims to ensure that Ofcom can require communications providers to participate in trials of certain measures. In particular, it requires providers to comply with directions given to them by Ofcom to take part in trials of measures which are aimed at protecting the interests of end users and affect the ways and/or extent to which some of them engage with the markets for electronic communications services. For example, trials of remedies which aim to address barriers to effective engagement faced by certain customers.*

- C9.1 This **Condition** applies to all providers of **Public Electronic Communications Services**, each of whom is a '**Regulated Provider**' for the purposes of this **Condition**.
- C9.2 **Regulated Providers** must comply with any direction which falls within **Condition** C9.3 made by **Ofcom** for ~~the any~~ purposes ~~of connected with its consideration of~~ any **Customer Engagement Measure** subject to the **Regulated Provider's** reasonable assessment of any data protection requirements.
- C9.3 A direction falls within this **Condition** if:
- (a) it is made as part of the assessment by **Ofcom** of the need for, design or effectiveness of, measures aimed at protecting the interests of **End-Users**; and
  - (b) it requires a **Regulated Provider** to trial, test or evaluate a **Customer Engagement Measure** in accordance with the **Pre-Trial Document**~~the manner and time specified by **Ofcom** or a third party agent appointed by it.~~
- C9.4 Measures aimed at protecting the interests of end-users within the meaning of **Condition** C9.3 ~~consists of~~ include measures:
- (a) specifying requirements in relation to communications about the provision of services to disabled **End-Users**; and
  - (b) requiring the provision of specified information, or information of a specific kind, to **End-Users**;
  - ~~(c) ensuring that conditions and procedures for the termination of a contract do not act as a disincentive to switching **Communications Providers**;~~
  - ~~(d) specifying requirements in relation to arrangements that enable an **End-User** to change **Communications Provider** on request.~~

C9.5 A direction under **Condition** C9.3 may include:

- (a) a requirement for different **Regulated Providers** to trial, test or evaluate a **Customer Engagement Measure** at different times or stages by reference to one or more of the selection criteria in **Condition** C9.6;
- (b) the imposition on different **Regulated Providers** of different requirements in connection with the trial, testing or evaluation of a **Customer Engagement Measure**, for example in relation to the size of the relevant sample, by reference to one or more of the selection criteria in **Condition** C9.6.

C9.6 The selection criteria referred to in **Condition** C9.5 are:

- (a) the **Regulated Provider's** customer base and its relevance to **Ofcom's** consideration of the **Customer Engagement Measure**;
- (b) the capabilities the **Regulated Provider** has or should reasonably be expected to have in relation to the trial, test or evaluation of the **Customer Engagement Measure**, by reference to any factors that **Ofcom** may consider relevant, such as the size, resources and processes of the **Regulated Provider** and those resources and processes it should reasonably be expected to have;
- ~~(c)~~ the burden the trial would impose on the **Regulated Provider**, taking account of its participation at the different stages of a trial, test or evaluation of the **Customer Engagement Measure** or prior participation in the trial, testing or evaluation of other **Customer Engagement Measures**; ~~and~~
- ~~(e)(d)~~ whether a **Regulated Provider** has participated in another trial within the previous 12 month period (in which case they cannot be compelled to participate in more);
- ~~(d)(e)~~ any other considerations **Ofcom** may reasonably and objectively consider appropriate in relation to a direction made pursuant to **Condition** C9.2.

C9.7 A **Regulated Provider** must provide **Ofcom** (or such other **Approved Third Party person as specified by Ofcom**) with any information specified by **Ofcom** in relation to the following matters, in the manner, form and time ~~specified~~ agreed in the Pre-Trial Document by Ofcom:

- (a) **Ofcom's** consideration of whether and in respect of which **Regulated Provider** to make a direction pursuant to **Condition** C9.2;
- (b) the design or development of any **Customer Engagement Measure** for the purposes of making a direction pursuant to **Condition** C9.2;
- (c) the way in which the **Regulated Provider** intends to implement any direction made by **Ofcom** pursuant to **Condition** C9.2; ~~and~~
- (d) the results relating to the trial, testing or evaluation of any **Customer Engagement Measure** specified in a direction pursuant to **Condition** C9.2, including any underlying data; ~~and~~



(e) ~~any other information relating to the implementation of this **Condition C9**, as **Ofcom** may consider appropriate.~~

## DEFINITIONS

In the 'Definitions' section of the General Conditions, the following new definition shall be inserted in the appropriate alphabetical place:

**'Approved Third Party'** means a third party who is impartial to all **Regulated Providers**, appointed by **Ofcom** to conduct a trial or analyse data from trials conducted.'

**'Customer Engagement Measure'** means any customer engagement communications remedy requirement, process, action, communication or behaviour which may affect Customer engagement with the markets for **Electronic Communications Services** and their provision by **Communications Providers** and for which consumer harm has been identified.

**'Pre-Trial Document'** means the scope, timings and process on which a trial under Condition 9.3 has been agreed between the **Regulated Provider** and **Ofcom**, including whether an **Approved Third Party** will be involved.'