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Ofcom
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Sent by email to: EECCenduserrights@ofcom.org.uk

3rd March 2020

Re: Business Carrier Coalition submission to Ofcom's consultation "Fair treatment and easier switching for broadband and mobile customers - Proposals to implement the new European Electronic Communications Code"¹

Dear Matt,

This letter is on behalf of Verizon, AT&T, Orange Business Services, CenturyLink, and Colt (collectively "we" or "us" in this letter).

All of us exclusively provide services to large business customers in the UK as well as across Europe. None of our companies provide services to consumers, and so we face challenges when we come up against obligations that have been designed specifically to deal with consumer protection issues. We would therefore like to make strong representations with regard to Ofcom's proposed implementation of the European Electronic Communications Code ("EECC"). In particular:

- Inconsistent use of "end-user" bringing large business providers into scope;
- Not-for-Profit definition;
- Business porting;
- Complexity of General Conditions; and
- Timelines.

Inconsistent use of "end-user" brings large business providers into scope erroneously

The intention of the EECC is to differentiate the needs of different types of customers and ensure that large businesses are not subject to the same regulatory requirements as residential consumers. In particular, the EECC notes that "larger enterprises usually have stronger bargaining power and do, therefore, not depend on the same contractual information

¹ Ofcom consultation, published 17 December 2019, <https://www.ofcom.org.uk/consultations-and-statements/category-1/proposals-to-implement-new-eecc>

requirements as consumers".² Ofcom further notes that "larger businesses, especially those that are significant users of communication services, tend to have a stronger bargaining power than residential customers".³

Unfortunately the welcome distinction between the different categories of end-users is not consistently reflected throughout the end-user rights provisions of the EECC (e.g. Articles 103-107), and in turn, in the proposed revised General Conditions ("GCs"). While in some provisions larger enterprises have been rightfully carved out, in others they are erroneously still captured. We see this as a missed opportunity for clearer regulation which is proportionate to the potential for harm.

One example which is of particular concern is Article 105 (revised GC C1.14 to C1.19), which deals with requirements around contract modification and the right for the customer to exit within a month as a result of such a change.

Such large business customers simply do not require this type of protection. This is because (but not limited to):

- they buy business-focused, complex and bespoke solutions and products;
- their associated contracts are tailor-made, with negotiated terms and prices and specific contract termination clauses;
- they have very strong countervailing buyer power
- they have large procurement teams and teams of lawyers and external advisors to assist them in reviewing and negotiating on any proposed change to their contracts;
- they increasingly frequently outsource the RFP process to external consultants who are dedicated to extract maximum value from the contract through multiple rounds of negotiation; and
- they make use and value specific contract renewal processes to investigate new terms and conditions and prices for when the original contract duration expires.

As a result, we urge Ofcom to carve out large business customers from the scope of the Revised GCs C1.14 to C1.19. In the alternative, we urge Ofcom to follow its own example in relation to End-of-Contract notices⁴ and allow flexibility for large business providers.

More generally, we urge Ofcom to test and verify the actual theories of harm to larger business customers in its consultation and to consider all of the GCs where the term "end-user" is used, ensuring that none of the consumer protection provisions are extended to larger businesses.

² Recital 259 of the EECC

³ Paragraph 7.90 of the Ofcom consultation, https://www.ofcom.org.uk/_data/assets/pdf_file/0032/184757/consultation-proposals-to-implement-new-eecc.pdf

⁴ <https://www.ofcom.org.uk/consultations-and-statements/category-2/helping-consumers-get-better-deals>

Not-for-Profit definition

We are strongly concerned that Ofcom's definition of "not-for-profit customer" brings a lot of large business customers into scope of a large number of consumer protection regulations unnecessarily.

It is clear that both the EECC⁵ and Ofcom⁶ intend for only those not-for-profit organisations which have similar bargaining powers as consumers to fall in scope of the relevant consumer protection conditions.

However, Ofcom's chosen definition in the proposed Revised GCs goes far beyond both the EECC and its own intentions, without explanation or an impact assessment to support such an extension. Of particular concern to us is that charities and government bodies of any size are in scope of around 20 additional GCs solely due to this definition. We consider that larger not-for-profit organisations have very strong bargaining power and to all intents and purposes act like large business customers.

We also note that many other Member States have not adopted such problematic definitions, but instead have explicitly referenced that not-for-profit customers are comparable to consumers in terms of bargaining power either in the legislation or in accompanying memorandums.⁷ In particular, we note that:

- France has added in the draft explanatory note to the legislation that not-for-profit entities are considered to be in a situation comparable to that of the consumers in terms of bargaining power.⁸
- The Netherlands has explicitly excluded government agencies from the not-for-profit definition in the explanatory note to the draft Dutch implementation act⁹ and included thresholds limiting the definition to organisations similar to small businesses: *"non-profit organization that has met at least two of the following requirements on two consecutive balance sheet dates, without interruption afterwards on two consecutive balance sheet dates:*
 - a. The value of the assets according to the balance sheet with explanatory notes, on the basis of the acquisition and production price, does not exceed € 6,000,000;*
 - b. the net turnover for the financial year does not exceed € 12,000,000;*

⁵ Recital 259 of the EECC

⁶ Paragraphs 2.10 and 9.51 of the Ofcom consultation.

⁷ For example, France, Netherlands, Sweden.

⁸ https://www.entreprises.gouv.fr/files/files/directions_services/numerique/consultations-publiques/ANNEXE_8_-_Transposition_consommateurs.pdf ("The directive extends to microenterprises, small businesses and non-profit organizations the benefit of certain provisions provided for consumers (on the terms of contractual information, on the maximum duration of contracts and on bundled offers) unless expressly waived from them. These entities are considered to be in a situation comparable to that of the consumers in terms of bargaining power." Translated from the original French)

⁹ <https://www.internetconsultatie.nl/telecomcode/document/4787>

c. the average number of employees for the financial year is less than 50.” (Translated from the original Dutch)¹⁰

Given there is no definition in the EECC, Ofcom has full discretion to define “not-for-profit organisations”. We urge Ofcom to limit the scope of the definition in line with the EECC and its own intentions - that is to exclude large not-for-Profit organisations and government bodies (who do not act like consumers, and do not need additional protection).

Business porting

We support efforts to ensure that customer transfers are simplified and run smoothly. However it must be recognised that larger enterprise solutions are generally extremely complex. For example:

- they often involve a large volumes of lines;
- there is a need to avoid porting in business hours; and
- the customer has bespoke arrangements such as batch porting while still under contract in case of offset contracts or due to business continuity concerns.

While such arrangements are valuable to large business customers and respect the principles of the EECC, some of those clash with the strict requirements under Article 106 of the EECC. We therefore consider that providers serving larger businesses should in cooperation with their larger enterprise customers have the freedom to agree on tailor-made transition arrangements and processes without being constrained by a process developed by an NRA under paragraphs 6 to 9 of Article 106 of the EECC.

While we recognise that Ofcom is proposing to give more freedom to providers which focus on larger business customers, we are still concerned that the EECC and resulting revised GC C7 puts additional requirements on providers which do not meet the needs of large business customers. We urge Ofcom to recognise the realities of business porting in its statement and allow maximum freedom for such customers and their providers.

Complexity of General Conditions

The proposed revisions have resulted in an extremely complex document which is difficult to understand and comply with. It is also difficult to map the GCs to the EECC which makes it harder for pan-European operators to manage compliance across the EU. We therefore urge Ofcom to consider simplifying the GCs to make them more usable for regulated providers.

¹⁰ <https://zoek.officielebekendmakingen.nl/kst-35368-2.html> (see under article 1.1) and <https://zoek.officielebekendmakingen.nl/kst-35368-3.html> (see page 38 of the PDF version)

Timelines

The deadline of December 2020 is for many of the changes required; especially given that industry as a whole is heavily engaged in a large number of strategic regulatory and government-driven programmes in the UK and across the EU.

We therefore urge Ofcom to be reasonable in its expectations around implementation timings, and to ensure that it does not commence monitoring and enforcement programmes until a reasonable implementation time has passed (even if that is beyond 21 December 2020).

Signed by:

- Verizon
- AT&T
- Orange Business Services
- CenturyLink
- Colt