Fair treatment and easier switching for broadband and mobile customers: Proposals to implement the new European Electronic Communications Code ("EECC")

Non-Confidential response of Gamma

Contents

A. About Gamma and this Consultation Response

1. Gamma Telecom Holdings Limited ("**Gamma**") is a Public Electronic Communications Network ("**PECN**") that provides wholesale fixed and mobile telephony and data services, to some 1,200 channel partners. Two of these channel partners are wholly owned subsidiaries and represent themselves over 20% of our business. In all cases, our partners and subsidiaries sell almost exclusively to all sizes of businesses and not-for-profit entities throughout the UK and increasingly to various European Union member states. Gamma has a turnover c£285m per annum and is ultimately owned by Gamma Communications plc, a company listed on the Alternative Investment Market with a market capitalisation of over one billion pounds.

2. This consultation response relates to Gamma and its subsidiaries. Any conflict between the implied position of Gamma in any UK Competitive Telecommunications Association (UKCTA), Internet Telephony Services Providers Association (ITSPA) or Federation of Communication Services (FCS) responses or that of any other association in which Gamma is involved, or implies Gamma is involved, is accidental and we consider that our views in this response should prevail.

3. Gamma trusts that this response addresses the questions posed by the Office of Communications ("**Ofcom**") and would welcome the opportunity to elaborate on any points in more detail if required. Please don't hesitate to contact Lee Turner ([redacted], address as per letter head), for further detail in the first instance.

B. Preliminary Points

4. Gamma's detailed response to the particular issues raised in the Consultation are set out below. There are, however, three preliminary points which bear emphasis.

1. Ofcom's duties under EU law

5. Article 288 of the Treaty on the Functioning of the European Union ("**TFEU**") states that: "A directive shall be binding, as to the result to be achieved, ***upon each Member State*** to which it is addressed, but shall leave to the national authorities the choice of form and methods." (emphasis added). Despite this, at various points in the Consultation, Ofcom seems to suggest that EU law and the EECC impose obligations directly upon *Ofcom*, rather than on the United Kingdom as a Member State. For example, at para. 7.77 of the Consultation, Ofcom states: "*Article 106(2) [of the EECC] requires Ofcom to ensure*

that […]". This is incorrect. Ofcom has the power to transpose the directive into national law, as set out in the Communications Act 2003 ("**CA2003**"), but is not obliged to do so automatically. As explained further below, it is of paramount importance that Ofcom properly understands the extent of its duties when exercising that power and we are concerned that statements such as that quoted above indicate that Ofcom has not done so at all times during the consultation process.

6. We also note that Ofcom has stated that it is amending the General Conditions ("**GCs**") in the exercise of its power under section 51(1)(a) CA2003. It makes no reference to its power under section 51(2)(b) CA2003 to set conditions in order to give effect to EU law obligations to provide protection for such end-users.[1]

7. This has important consequences. As explained below, Ofcom's obligation to satisfy itself that it has complied with its obligations under CA2003 is more onerous and exacting when it exercises its discretion to amend GCs, as opposed to merely "copying-out" EU law into national law.

2. Ofcom's duties under domestic law

8. Gamma agrees that the subject matter of the proposed GCs falls within Ofcom's powers in sections 45, 51(1)(a) and 52(2)(b) CA2003**.** However, pursuant to section 47(2) CA2003, Ofcom must not set or modify a condition unless it is satisfied that the new condition satisfies the test in subsection (2). Sub-section 2 imposes the following obligations on Ofcom:

> *That test is that the condition or modification is—*
>
> *[...]*
>
> *(b) not such as to discriminate unduly against particular persons or against a particular description of persons;*
>
> *(c) proportionate to what the condition or modification is intended to achieve; and*
>
> *(d) in relation to what it is intended to achieve, transparent.*

[1] That is striking, given that Ofcom also asserts – throughout the EECC – that it is making changes to the GCs in order to implement the EECC.

9. Gamma makes the following four comments as to the application of this test:

9.1. Ofcom must satisfy itself that this test is met, whether it is exercising its power in section 51(1)(a) CA2003 to create or modify conditions *of its own motion* or its power under section 51(2)(b) to give effect to EU law. In this case, in any event, Ofcom has identified that it is not exercising the power in section 51(2)(b). As a result, any difference of approach does not arise.

9.2. Even where Ofcom is transposing an EU directive into national law (and even if it were to use the power in s. 51(2)(b)), the obligation in s. 47 is engaged wherever Ofcom has a discretion as to how to give effect to the UK's EU law obligations. As Ofcom recognises in §2.19 – 2.20 of the Consultation, many of the provisions in the EECC leave little discretion to the Member States as to how they should be implemented. However, other important provisions of the EECC do. Wherever Ofcom has a discretion as to the form and method of implementation, it is making a decision about the appropriate form of regulation in precisely the same way that it would make such a decision absent the directive. Ofcom must, therefore, satisfy itself that any proposed modification is proportionate, non-discriminatory and transparent. That obligation arises in the same was as if the modification were exclusively the result of "home grown" regulation.

9.3. When the obligation in s. 47 is engaged, in this manner, Ofcom is required to carry out a full impact assessment pursuant to section 7 CA2003, including cost benefit analyses, input from appropriate experts and input from providers.

9.4. As set out more fully below a number of the proposed GCs are not legally sustainable, because Ofcom has:

9.4.1. Failed to recognise that it *has* relevant discretion; and

9.4.2. Failed to carry out the analysis necessary properly to satisfy itself that the test in section 47(2) CA2003 is satisfied where it is exercising such a discretion.

3. Government Policy

10. The UK is under an obligation to implement the EECC insofar as the deadline for implementation falls during the implementation period provided for in the European Union (Withdrawal) Act 2018.

However, Ofcom must keep the fact of Brexit and the Government's stated position with respect to future regulation in mind when exercising its power to implement the EECC.

11. The Department of Culture, Media, and Skills ("**DCMS**") has confirmed its intention to implement the EECC in accordance with its obligations under the Withdrawal Agreement. However, Gamma notes that, following the election, a number of senior members of the Government have indicated that, after Brexit, the United Kingdom will not necessarily align UK regulations with those of the EU. In the circumstances, Ofcom should engage proactively with DCMS in order to ensure that implementation of the EECC in the manner indicated in the DCMS consultation of July 2019 remains Government policy. In any event, the Government's position with regards to regulatory divergence after Brexit should be taken into account by Ofcom when exercising any discretion with respect of the implementation of the EECC.

C. Definition of Microenterprises, Small Enterprise and Not-For-Profit Organisations

12. The EECC distinguishes (for certain purposes) between different categories of customer for communication services: (i) end-users; (ii) consumers; and (iii) microenterprises, small enterprises and not-for-profit organisations.

13. The EECC does not, however, define microenterprises, small enterprises or non-for-profit organisations. Recital 68 to the EECC refers to Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (the "**Recommendation**"), but recital 259 makes clear that the precise meaning of the terms "microenterprises", "small enterprises" and "non-for-profit organisations" is ultimately a question for domestic law:

> *Some of those end-user protection provisions which a prior apply to customers, namely those on contract information, maximum contract duration and bundles, should benefit not only consumers, but also microenterprises and small enterprises, and not-for-profit organisations* ***as defined in national law****.* […] (Emphasis supplied)

14. This is an important point. The EU legislature has deliberately granted Member States a discretion as to how they define those categories of customer, when implementing the EECC into domestic law. Ofcom appears not to have appreciated this. At para. 3.27 of the Consultation, Ofcom states:

We propose to make the following changes or additions to the definitions in the GCs to align with the different categories of customer in the EECC (and in doing so we take into account relevant definitions used in EU law more generally):

[…]

c) […] For the purposes of EU law generally, microenterprises are those with a staff headcount of fewer than 10 people and whose turnover or balance sheet total does not exceed 2 million Euro [fn: Commission Recommendation 2003/361/EC].

[…]

We propose to add the following definition to our GCs:

'Microenterprise' means a Small Enterprise Customer who carries on an undertaking for which fewer than 10 individuals work (whether as employees or volunteers or otherwise) and whose annual turnover and/or annual balance sheet total does not exceed [£1.7m].

d) […] For the purposes of EU law generally, small enterprises are those with a headcount of fewer than 50 individuals and whose annual turnover and/or annual balance sheet does not exceed 10 million Euros [fn: Commission Recommendation 2003/361/EC].

[…]

Consistent with this, we propose to add the following definition to our GCs:

'Small Enterprise Customer', in relation to a Communications Provider which provides services to the public, means a Customer of that provider who carries on an undertaking for which fewer than 50 individuals work (whether as employees or volunteers or otherwise) and whose annual turnover and/or annual balance sheet total does not exceed [£8.8m], but who is not himself a Communications Provider.

e) […] We propose to add the following definition to our GCs:

'Not For Profit Customer', in relation to a Communications Provider which provides services to the public, means a Customer which, otherwise than as a Communications Provider, is a Customer of that provider and which by virtue of its constitution or any enactment:

(a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes; and

(b) is prohibited from directly or indirectly distributing among its members any part of its assets (otherwise than for charitable or public purposes).

15. Ofcom has fallen into this error before. At para. 3.29 of the Consultation, Ofcom notes that some market participants objected to its adoption of materially identical[2] definitions of microenterprises, small enterprises and not-for-profit customers in response to their July 2019 consultation on mobile handsets. In particular, some providers "noted that the definition of 'not for profit' customer could mean that large public sector bodies and multinational charities would be included in scope. Verizon noted that such large organisations generally negotiated contracts in a similar way to large business customers and had similar strong bargaining power". Ofcom states, however, that it is "using these definitions because they are required by the EECC". (Emphasis added)

16. This is wrong. Ofcom's approach to the adoption of these proposed definitions is flawed for three reasons:

    16.1. Ofcom has misunderstood the scope of its powers in respect of the proposed definitions. As a result, it has failed to recognise that it has a discretion and failed to exercise its discretion properly or at all.

    16.2. Ofcom has failed to carry out a proper assessment of the proportionality of the proposed definitions, as required by s 47(2)(b) CA2003.

    16.3. Ofcom has failed to have regard to its general statutory duties under sections 3 and 4 CA2003 to, amongst other things, have regard to the desirability of the promotion of competition in the relevant market(s).

17. As a result, the proposed conditions which Ofcom proposes to make or modify to incorporate those definitions are not a lawful and proper exercise of Ofcom's powers under section 45 CA2003.

1. Ofcom is not bound to adopt the definitions in Recommendation 2003/361/EC

18. In proposing to adopt the definitions of microenterprise and small enterprises in Commission Recommendation 2003/361/EC with only a single, minor amendment (converting the relevant financial thresholds from EUR into GBP) Ofcom has erred three times in its understanding of its powers:

[2] In the July consultation, the relevant financial thresholds were proposed to be expressed in EUR rather than GBP: see para. 5.34.

18.1. First, as set out above, the EECC makes clear that the definition of microenterprise and small enterprise is a matter for domestic law. Members States must of course have regard to the EECC and its recitals in determining what would be an appropriate definition, but the EECC does not *prescribe* any such definition.

18.2. Second, Article 288 TFEU provides that "Recommendations and opinions shall have no binding force". Recommendation 2003/361/EC is therefore not binding upon the Member States and *a fortiori* is not binding Ofcom as a matter of EU law. Therefore, neither the Directive nor the Recommendation impose a binding *obligation* upon the UK (or Ofcom) as a matter of EU law in respect of the definitions of microenterprises and small enterprises.

18.3. Third, and critically, Recommendation 2003/361/EC makes clear that the definitions it suggests "are to be regarded as maximum values" and that "Member States … may fix lower ceilings": see Art. 2 and Recital 7. Even if Ofcom decided to adopt the definitions set out in the Recommendation, the definitions themselves require Ofcom to exercise its discretion. Ofcom may only lawfully determine that the proper definition of a small enterprise is a company with fewer than 50 employees if it has assessed that this figure is the appropriate definition to apply to the UK telecommunications market. That is the upper ceiling imposed upon the definition by the (non-binding) Recommendation. Were Ofcom uncrticially to adopt that figure – on the false assumption that it was required to do so – it would err in law.

19. Therefore, the suggestion that Ofcom's proposed definitions are "required" by the EECC *at all* is incorrect as a matter of law. Furthermore, the implicit suggestion that Ofcom is required to adopt the *maximum* headcount and finance thresholds set down by the Recommendation is incorrect as a straightforward question of interpreting the Recommendation alone.

2. Ofcom was obliged to exercise its discretion properly: proportionality

20. As explained above, where Ofcom has a discretion with respect to the implementation of the EECC (as it does here), it is incumbent upon it exercise that discretion properly. In this context, the result is that Ofcom had to satisfy itself that the proposed definitions are proportionate to what the conditions or modification (into which the definitions are incorporated by reference) are intended to achieve.

21. That, in turn, requires Ofcom to carry out a proper impact assessment (see section 7 CA2003), including a properly specified cost-benefit analysis with input from appropriate experts and from

those likely to be affected, including Gamma. As to what that entails, see the Competition Appeal Tribunal's decision in *Vodafone v Ofcom* [2008] CAT 22.

22. However, Ofcom has not properly explained what the proposed definitions are intended to achieve, nor how it considers that the proposed definitions are proportionate to those ends. Indeed, Ofcom has not carried out any impact analysis, let alone a proper one. Ofcom states simply at para. 3.30: "[…] We are using these definitions because they are required by the EECC. We recognise that their implementation will require providers to make changes to how they engage with relevant customers, including potential process changes for identifying the business size of their customers." (emphasis added). In this sentence, Ofcom errs as to what it is required to do and recognises that the proposed changes will have effects that Ofcom is obliged to assess properly.

23. Even absent a proper impact assessment, it is clear that the proposed definitions are not proportionate to the ends they seek.[3] For example:

    23.1. Central Government departments, of considerable size, fall within the definition of not-for-profit organisation.[4] The net result is that the Crown Commercial Service ("**CCS**") will enjoy the same level of protection as a sole-trader. This is clearly wrong. The CCS oversees an annual spend of £13bn[5] across more than 1,200 contractual relationships[6] and has 738 Full Time Equivalent staff.[7] Pausing there, it is worth recalling why not-for-profit organisations are granted additional levels of protection: they are considered to have a lower level of bargaining power and market sophistication. Having been part of various procurement frameworks for several years, Gamma can safely say that if any entity suffers from a lack of bargaining power in dealing with CCS, it is the Public Electronic Communications Service ("**PECS**"), not the CCS itself!

[3] Gamma infers that the intended end is the protection of customers with less bargaining power: see para. 3.26 of the Consultation.

[4] By way of further example, both the Government Legal Department, which has more than 2,000 employees and an annual budget in excess of £100m, and the Serious Fraud Office , which has 450 employees and an annual budget of nearly £45m, would seemingly fall within the scope of the definition. Indeed, we are aware [redacted]

[5] Crown Commercial Service Annual Report and Accounts 2017/18, page 8.

[6] *Ibid*

[7] *Ibid,* page 58

23.2. The not-for-profit organisation definition would also capture substantial national and multi-national charities with turnovers or balance sheets that would qualify them for inclusion in major share indices if they were commercial organisations. By way of example, [redacted][8] [redacted][9] [redacted][10] [redacted] has bargaining power that is relevantly similar to that of a sole-trader.

24. Moreover, the costs of complying with the proposed conditions as they apply to microenterprises, small enterprises and not-for-profit organisations does not affect all providers equally. On the contrary, large vertically integrated providers can amortise the costs of complying with the proposed conditions by, e.g., cross-subsidising that part of their business which supplies business customers with revenues generated through its residential business. For example, a provider like Vodafone, which will have to comply with the full range of the EECC's measures in their residential business, only has to incur the *incremental* cost of extending those measures to its business to business operations. A provider, such as Gamma, that specialises in business-to-business telecommunications for entities above 10 employees (indeed, such providers may have actively chosen to avoid the regulatory burden of smaller end-users) will have to incur the entire cost over their business to business estate alone. This is a significant cost. Gamma estimates the cost implementation in its direct business to be, at a minimum, [redacted] These additional costs in the business-to-business market will not only affect a small number of providers[11]. Quite the opposite: the implementation cost estimated by Gamma could be orders of magnitude higher for the market as a whole by virtue of the proposed definition of small enterprise. This too must be taken into account in any proper cost benefit analysis.

25. For the avoidance of doubt, Gamma does not dispute that businesses below a certain size do have lower bargaining power and should therefore be afforded additional protection under the proposed conditions. Who those businesses are, and where the relevant thresholds should be drawn, must however be determined by reference to proper and relevant evidence: see, by analogy, *British Telecommunications plc v Office of Communications* [2017] CAT 25. For example, a proper analysis may determine that, in the United Kingdom, the appropriate headcount ceiling for a small enterprise

[8] [redacted]
[9] [redacted]
[10] [redacted]
[11] At the time of submission, only the project management and business analysis overhead had been identified; systems development (internal and external) are pending.

is 20 employees, rather than 50, and that appropriate ceiling for microenterprises is 4 employees, rather than 10. As set out above, EU law intentionally leaves it to the UK Government (in this case Ofcom) to determine the appropriate thresholds in the light of the relevant evidence about each particular national market. It sets out no more than a maximum threshold. In determining the appropriate thresholds for the UK telecoms market, Ofcom must also keep in mind that the EECC only differentiates between the treatment to be afforded to microenterprises and small enterprises in one (relatively minor) respect. For practical purposes, it is, therefore, the definition of small enterprises that is critical and delineates those who should be afforded additional protection in light of their relative bargaining power and those who should not. Gamma considers that it would be disproportionate and unlawful for Ofcom to uncrticially adopt the legal maximum, set out in the Recommendation, without further analysis. In Gamma's view, and in light of its experience of the UK market, a threshold considerably lower than 50 would be appropriate. In that regard, Gamma notes that in similar statutory contexts it has been determined that the most significant distinction is between those companies that have fewer than 10 employees and those that are bigger. For example:

25.1. The CA2003 defines "Small Business Customers" as "a customer of [a] provider who is neither— (a) himself a communications provider; nor (b) a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise)."

25.2. When the Law Commission reviewed the bargaining power of small businesses in the context of its report on unfair contract terms, it concluded that it would be appropriate to extend protection to organisations with nine employees or fewer.[12]

25.3. Gamma accepts, of course, that Ofcom should not unthinkingly adopt a definition found elsewhere in the statute book (in the same way that it cannot unthinkingly adopt the definitions in the Recommendation[13]). But it is nonetheless instructive that the 10 employee threshold has

[12] "*Unfair Terms in Contracts (LC NO 298; SLC NO 199) Summary*" published jointly by the Law Commission and Scottish Law Commission on 24th February 2005

[13] Gamma accepts of course that Commission Recommendation 2003/361/EC is relevant to the exercise of Ofcom's discretion and can be taken into account, but insofar as Ofcom is exercising its discretion in (a) taking the Recommendation into account and (b) determining whether adopt a definition based on the Recommendation it must have regard to the proportionality of the proposed definition in the particular circumstances of the case before it. Likewise, Ofcom should of course have regard to the terms of the EECC and the recitals thereto, including recital 259 which makes clear that certain businesses are entitled to additional protection because their bargaining power is comparable to that of consumers.

been identified in other contexts as representing the critical 'cutoff', for the purposes of consumer protection and commercial barganining power.

26. Ofcom must, therefore, reconsider and properly exercise its discretion as to the appropriate definitions for microenterprises, small enterprises and not-for-profit organisations. In particular, it must satisfy itself as to the proportionality of those proposed definitions, in the light of the ends they seek to achieve. That will require, amongst other things, a proper impact assessment.

3. Ofcom was obliged to exercise its discretion properly: promotion of competition

27. Section 3(4) CA2003 provides that when Ofcom is performing its duties under the Act, it must have regard to, amongst other things, "the desirability of promoting competition in relevant markets". Similarly, section 4(8) CA2003 provides that it shall be the duty of Ofcom when carrying out its functions under the Act to act in accordance with the six Community requirements, which require, amongst other things, Ofcom to encourage efficiency and sustainable competition.

28. Gamma has serious concerns, however, the proposed definitions will reduce competition in the relevant market(s). The residential market, which is the focus of the Consultation, is characterised by a small number of large, vertically integrated operators (e.g., Sky, TalkTalk, Vodafone). By contrast, the market serving businesses is characterised by a large number of smaller operators, each with complex supply chains. Gamma alone has around 1,200 independent PECS consuming its network products ([redacted] which are Mobile Virtual Network Operators) and we are far from being the only wholesale provider. We note there are some 450 entities allocated resources from the National Telephone Numbering Plan, of which only a handful are known residential operators.

29. The proposed definitions do not however affect these two broad types of provider in the same way. On the contrary, PECNs and PECSs which form part of the same corporate group can comply more easily with the proposed conditions as explained in greater detail below . For example, where the PECN and PECS form part of the same group, their trading relationship is more stable and the PECS can therefore comply more easily (indeed, at all times) with the porting obligations discussed in section E below. By contrast, it is likely that PECS that are not part of a large corporate group will source wholesale products from a number of wholesale partners, which increases the costs and complexity of ensuring compliance with, for example, the number portability requirements under the proposed GCs. The risks to competition are clear. In this market, complex supply chains go hand in

hand with competition (and innovation). However, the cost and ease of compliance with the proposed conditions may force PECS to reduce their supply chain to single supply.

30. The proposed definitions would therefore inadvertently provide the large vertically integrated suppliers with a substantial competitive advantage. That is precisely what Ofcom should, in discharge of its duties under sections 3 and 4 CA2003, be seeking to avoid.

D. Value Added Tax

31. Proposed GC C1.3 provides that, before a customer is bound by a relevant contract, the provider shall provide the customer with certain contract information. Point 3 in Table A of Annex 1 to proposed GC C1 specifies that the contract information to be provided pursuant to GC C1.3 must include "the price of the service (including VAT) …". Proposed GC C1.1 provides that the obligation in GC C1.3 to provide contact information applies not only to Consumers (as defined) but also to Microenterprises Customers, Small Enterprise Customers and Not-for-Profit Customers (as defined), unless the latter three have expressly agreed otherwise.

32. There is however no basis in the EECC for the putative requirement that price information provided in contract information be expressed as inclusive of VAT and no explanation is given in the Consultation as to Ofcom's reasons for proposing to adopt this requirement. Gamma seeks confirmation from Ofcom that the requirement to express prices as inclusive of VAT is limited only to Consumers (as defined).

33. It is entirely normal for a price to be expressed as *exclusive* of VAT, in the context of Business to Business transactions. That includes in the context of a contract for Relevant Communications Services (as defined). This is in line with business customers' expectations and market norms. It is not clear to Gamma what the perceived harm to business customers would be of continuing to receive prices exclusive of VAT. As a result, it is not clear what harm this provision would remedy. By contrast, the cost to providers of complying with the proposed requirement as currently drafted would be very considerable, as it would require re-engineering systems, processes and the approach to a market, including advertising and prospecting. In simple terms, they will need to determine – up front – the size of the possible customer business, in order to determine whether they are lawfully required to quote a price that is exclusive or inclusive of VAT. We also consider there to be substantial risk for

confusion with businesses at risk of receiving ostensibly different prices for the same product and therefore encountering difficulty in price comparison.

34. In the circumstances, if the proposed requirement is indeed intentional, it is not clear on what basis Ofcom has concluded that the test in section 47 CA2003 is satisfied. Contrary to sub-paragraph (d), there is no transparency whatsoever with respect to what it is intended to be achieved and Gamma has concerns that, contrary to sub-paragraph (b), the requirement is not be proportionate to that aim (whatever it is).

E. Number Portability after Contract Termination

35. Proposed GC C7.6 states that "All Regulated Providers shall ensure that: […] (b) they provide Number Portability for a minimum of one month after the date of termination by the Switching Customer of the contract [...]".

36. However, as Ofcom notes at para. 7.203, it is necessary to make provision in respect of wholesale resellers in order to ensure that number portability works effectively. Whilst, Gamma welcomes the changes Ofcom has proposed to GC B3 to bring wholesale resellers "back into scope", we are concerned that more is needed in order to ensure that number portability after contract termination works effectively.

37. Under GC C7.6, the PECS is required to ensure that Switching Customers can port their number from the relevant PECN for a minimum of one month after the date of the termination of the contract by the customer. This places the PECS in a difficult position. Following termination of the customer contract, a PECS may well terminate its agreement with the relevant PECN, within the following one month period. If it has done so, the PECS will be unable to comply with their obligations under GC C7.6. That is because GC C7.6 does not impose an equivalent obligation on the PECN to keep that number available for the same period of time.

38. Gamma suggests that Ofcom consider further modifying GC B3 to provide that a PECN shall also ensure that they enable Number Portability in respect of any Switching Customer for a period of a minimum of one month after the date of termination of the wholesale agreement.

F. Clarifications

39. In addition to the points set out above, there are a number of maters in the Consultation which are unclear. This section of Gamma's consultation response seeks clarity in respect of each of those issues.

1. Number Porting After Contract Termination

40. As set out above, proposed GC C7.6 states that "All Regulated Providers shall ensure that: […] (b) they provide Number Portability for a minimum of one month after the date of termination by the Switching Customer of the contract [...]". However, at para. 7.77 of the Consultation, Ofcom states that "Article 106(2) requires Ofcom to ensure that customers have the right to port their numbers. Article 106(3) requires Ofcom to ensure customers can retain that right for 'a minimum of one month after the date of termination, unless that right is renounced by the end-user.'"

41. In Gamma's view, proposed GC C7.6 accurately transposes Article 106(3) in that it makes clear that a provider is under an obligation to ensure portability for a minimum period of one month after *the customer* has terminated the contract in question. Gamma is concerned however that para. 7.77 could be read as suggesting that the provider is under the same obligation if the *provider*, rather than the customer, terminates the contract. We do not think that this is what the EECC provides and infer from the terms of proposed GC C7.6 that neither does Ofcom. However, we would welcome clarification of this, in order to avoid any confusion in future.

2. Non-coterminous Linked Contracts

42. Gamma acknowledges that a residential consumer may experience harm when they have a bundle of services or services and equipment (such as a mobile handset), but the contracts which comprise the bundle are not-coterminous. There is a fundamental difference, however, between a residential consumer with a simple bundle and a business with numerous employees and a complex bundle. We would therefore welcome clarity in respect of how Ofcom envisages applying the proposed GCs to business providers and business customers.

43. Gamma is particularly concerned about the impact of Ofcom's proposals in situations in which a business requires additional services or equipment part-way through an existing commitment period. For example:

43.1. A business of 30 employees is 18 months into a 2-year contract and hires another employee. Must the 31st employee's handset be provided pursuant to (and amortised over) a 6-month contract instead of 2-year contract, creating a working capital impact for the small enterprise in question? Gamma assumes that this cannot be Ofcom's intention, because it would be wholly uncommercial and unrealistic.

43.2. A small enterprise is 21 months into a 2-year term, outgrows its original premises and moves administrative staff to a second location. Does the Ethernet circuit at the new premises, with its expensive router, have to be provided pursuant to (and amortised over) a 3-month contract?

44. We note that at para. 9.27 of the Consultation, Ofcom states:

> *Non-coterminous contracts also occur when customers take up a new service whilst they are already under contract for another service from the same provider. Under these circumstances, non-coterminous contracts could deliver benefits compared with coterminous contracts if, in addition to the benefits arising from linking the contracts, aligning the commitment periods would undermine providers' recovery of costs, or would impose costs on providers and/or increase tariff complexity.*

45. In Gamma's experience, business users are increasingly sourcing certain products, such as SIP, on shorter terms to take advantage of increasing competition and cost reductions, but prefer to take equipment-based services, or other capital intensive products, such as fibre to the premises or Ethernet, on longer terms. For example, Gamma provides close to 10,000 Ethernet lines to its resellers, with over 90% purchased on a minimum initial term of three years or more.

46. Can Ofcom confirm that avoiding unnecessary and onerous working capital commitments on businesses provides an example of a non-coterminous contract delivering a benefit, as compared with a coterminous contract. Please also confirm that non-coterminous contracts of this kind would not, ordinarily, be considered a "disincentive" to customers changing their provider, within the meaning of the proposed GCs?

3. Switching

47. Gamma seeks clarification with respect to the following issue with respect to proposed GC C7.6(a).

48. Will a Regulated Provider be required, pursuant to GC C7.6(a), to provide Number Portability to a Switching Customer wishing to port some, but not all, numbers in a multi-line block. Gamma's long-standing view is that numbers should be portable regardless of block allocation and would welcome confirmation that this is indeed the intended effect of proposed GC 7.6(a), but note that some providers, including BT, are still unable (and/or unwilling) to perform so-called "split blocks"[14]. Clarity from Ofcom on this issue will greatly assist Gamma – and the market as a whole – in securing the objectives of GC C7.6(a).

4. Contract duration: offer prior to waiver

49. Proposed GC C1.11 provides that relevant providers can only offer a contract greater than 2 years in length to a microenterprise, small enterprise or not-for-profit enterprise if that organisation has "*expressly agreed*" to a longer contract or if the contract in question is an Instalment Contract for a Physical Connection.

50. Gamma understands that proposed GC C1.11 will require a provider to take the following steps in order contract with one of the organisations in question:

    50.1. Enquire as to how many employees the customer has.

    50.2. Ask the customer to sign a waiver so that a dialogue can occur about the full array of offers that might be available to them.

    50.3. Provide the customer with a Contract Summary.

    50.4. Get the customer to sign an actual contract.

[14] A complaint under section 96A of the CA2003 was made previously by Gamma; the resolution was that BT, with the assistance of the Office of the Telecommunications Adjudicator, would develop a process. This process is limited in its application and does not cover relevant scenarios. The core issue is that (notably) BT are only able, in normal operations, to export numbers in the arbitrary blocks in which they were originally allocated, which could be decades ago.

51. Before any of this even happens, it is unclear whether a provider would be able to target adverts at these organisations, offering contracts greater than 2 years in length, and still comply with proposed GC C1.11.[15]

52. This is a point of some practical and commercial significance. In Gamma's experience, many smaller organisations prefer to be able to amortise large capital costs over the course of a longer contract. In simple terms, they like a longer and cheaper contract. If providers are not allowed to offer them such contracts before they have signed a waiver, the practical effect will be that these organisations never become aware of some of the best – and most competitively priced – offers that are available to them on the market. This in turn creates an obstacle to switching, which is precisely the opposite of what GC C1.11 seeks to achieve: if it is more difficult for a small organisation to ascertain on what terms a provider is able to provide products and services, they will be less likely to switch from one provider to another.

53. Gamma asks Ofcom to clarify that providers are authorised to advertise contracts that would extend for a period of more than 24 months, prior to the organisation signing a waiver, as long as any such advertisement clarifies that it is subject to a waiver of the right to a contract limited to 24 months duration.

5. Contract Modifications

54. Proposed GC C1.15 requires providers to allow customers to terminate their contract and/or any contracts forming part of a bundle (as defined) within one month of being notified of a contract "modification", unless the proposed modification is exclusively to the benefit of the customer, of a purely administration nature and has no negative effect on the customer, or is directly imposed by law. This applies to all end-users, not only consumers or consumers, microenterprises, small enterprises and not-for-profit organisations.

55. Gamma is concerned that, as currently drafted, C1.15 could be read to suggest that *any* contractual modification, however minor, gives the customer a right to terminate. For example, if a provider, in response to, say, an increase in termination rates by the Pakistani Government, increases the charge to the customer of calling Pakistan, does the customer have a right to terminate? Or if a directory service materially increases charges to the provider, is the provider unable to pass on that increase

[15] Gamma encourages Ofcom to clarify this question in any subsequent Statement.

charge to the customer without the customer acquiring a right to terminate? Is it Ofcom's position that providers may build certain modifications into the contract itself, for example call charges to the Democratic Republic of Congo will be up to x pence per minute but may vary below that rate? Or does Ofcom anticipate that providers will impose the highest likely rate on customers at the outset and modify the rate in favour of the customer if input prices are lower over time? Gamma considers that this latter option is neither in the interests of consumers or providers and would welcome Ofcom's clarity that the former approach is acceptable.

56. For the avoidance of doubt, Gamma accepts that customers need to be afforded protection from *unfair* contract changes, Ofcom's apparent interpretation cannot, in Gamma's view, be required by the EECC. It is absurd to suggest that a FTSE 100 company would acquire a right to terminate an entire bundle of contracts simply because the price of one extremely minor element of that bundle increased unavoidably. Gamma therefore asks Ofcom to clarify that GC C1.15 will, ordinarily, only be applied to contractual changes which go to the heart of the bargain struck by the parties and not to any change, however minor.