



Internet Telephony Services Providers' Association

ITSPA Response to further consultation: Implementing the new European Electronic Communications Code – revised proposals for annual best tariff information and business customer definitions

About ITSPA

The Internet Telephony Services Providers' Association ("ITSPA") represents over 100 UK businesses involved with the supply of next generation communication services over data networks to industry and residential customers within the UK. Our traditional core members are VoIP providers. ITSPA pays close attention to both market and regulatory framework developments on a worldwide basis in order to ensure that the UK internet telephony industry is as competitive as it can be within both national and international markets.

Please note that certain aspects of the ITSPA response may not necessarily be supported by all ITSPA members. Individual members may respond separately to this consultation where a position differs. However, the ITSPA Council is confident that this response reflects the views of the overwhelming majority of ITSPA members.

A full list of ITSPA members can be found at <http://www.itspa.org.uk/>.

Definitions of micro-enterprise, small business and not-for-profit.

Having previously highlighted the deficiencies with Ofcom's previous proposals, ITSPA is pleased that Ofcom has decided to revise its proposed definitions of 'microenterprise' and 'small enterprise' customers, as well as its definition of not for profit organisations. Along with much of the industry, we believed the previous proposals were much too broad and would have resulted in many businesses and organisations receiving residential-style protections that would not have been appropriate for them.

Whilst ITSPA continues to note that there are a plethora of problems¹ with an arbitrary employee threshold, as it stands, noting the limitations on information gathering, the equivalent thresholds in other contexts submitted by Gamma², cited at §4.18(b) of the Consultation, ten employees remains the only credible upper benchmark to date. Other thresholds, such as that used by the Financial Conduct Authority ("FCA"), would indicate a lower benchmark of one to four³.

¹ ITSPA has made numerous previous submissions to Ofcom regarding it being unworkable in practice.

² §25 of "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"

³ <https://www.gov.uk/offering-credit-consumers-law> [accessed 17th August 2020] states that the FCA authorisation regime only extends to those offering credit to natural persons (defined as consumers in the FCA handbook), sole traders and partnerships upto 4 partners. Unincorporated Associations are also cited, but there is no reference point to the number of "employees" anticipated in such entities.



Internet Telephony Services Providers' Association

ITSPA therefore supports Ofcom's Option 2 on how to define small enterprises: 'Reduce the headcount threshold for small enterprises down to 10 staff members, and consolidate the small enterprise and microenterprise definitions into a single customer definition'.

ITSPA notes that the bargaining power of a sole trader is comparable to a residential consumer and we acknowledge and accept that the regulator will likely be able to justify an intervention with commensurate protections in both cases.

As to whether or not scenario-specific evidence gathered in the future concludes the answer is lower than 10, higher, or that 10 is indeed the correct number, we anticipate that an effective regulator will monitor the situation and conduct a further review at a later date, if required.

Best Tariff Information

ITSPA disagrees with Ofcom's exemption of pay-as-you-go tariffs from the annual best tariff notification.

We believe that just because there is no initial period on this kind of tariff does not mean that there is no potential for a customer to suffer harm from being on out-dated and relatively inflated prices.

Indeed, ITSPA also believes that the risk of paying what Citizens Advice⁴ and others refer to as the "loyalty penalty" does not disappear in these cases. The risk of a consumer's lethargy in not going to the market being exploited is identical in both situations. We find it difficult to see how the underlying principle is vastly different to the prepayment market in the domestic supply of energy as summarised in the CA Complaint⁵.

A conscious decision to "top-up", as used in §3.27 of the Consultation to justify the variation, cannot be taken at face value.

In economic terms, the search cost will vary with the urgency of the situation. A consumer on a pre-pay tariff that is prevented from making the call or sending the message they need to in the moment is more likely to just top-up without checking the market, than if they otherwise had time to spare. This applies equally to the hybrid and the traditional pricing models cited by Ofcom.

We would suggest that, once the variability of the search cost is considered, the voracity of the argument that there is a conscious decision is at worst reduced and possibly even nullified.

The argument that Article 105(3) does not go that far (even though we say below it does) is only relevant if Ofcom were using the "copy out" power⁶ to implement this provision. Ofcom is not – in the first

⁴ *"Excessive prices for disengaged consumers: A super-complaint to the Competition and Markets Authority"* published by Citizens Advice (the "CA Complaint").

⁵ CA Complaint Introduction and page 27.

⁶ Section 51(2)(b) of the Communications Act 2003



Internet Telephony Services Providers' Association

consultation⁷, the “home-grown idea” power is being used⁸. Ofcom has the freedom, when backed by appropriate evidence that the remedy is proportionate, to interpret the provision the way it originally did.

With respect to Article 105(3) we would suggest that any pre-payment tariff that has an automatic charge to a means of payment is captured by the ordinary and natural meaning of the legislation, if it features any time-based expiry of any credit (e.g. a monthly ‘pack’ of minutes). In fact, it could be argued that such an arrangement, with an auto-recharge, is an Auto Renewing Contract addressed by General Condition C1.3 too.

Reassurances (e.g. such as those at cited at §3.27) from those that the Article is seeking to address does not, as a matter of Union law, remove the requirement to transpose the provisions of the Article.

We are also concerned that Ofcom has allowed itself to be influenced by submissions from just one relevant stakeholder group; the issue at hand applies as much to tariffs offered to small businesses by non-mobile operators (for example, Microsoft Teams, Zoom, etc) as it does to mobile packages.

ITSPA recognises that the COVID-19 situation has limited the ability for Ofcom to use its statutory information gathering powers to inform itself to the usual level of detail when making such decisions. ITSPA also notes the transposition deadline of the EECC and we understand why Ofcom has chosen this path, even though we consider Ofcom to have erred. To that end, we urge Ofcom, at the first available opportunity, to appropriate review the pay-as-you-go market to verify (or otherwise) its decision here.

⁷ *“Fair treatment and easier switching for broadband and mobile customers Proposals to implement the new European Electronic Communications Code”* published by Ofcom on 17th December 2019.

⁸ *Ibid* at §2.34