

TO: John O'Keefe
CC: Siobhan Pointer, Matt Hall

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11 September 2020

By email only

Dear John,

Implementing the European Electronic Communications Code (EECC): Revised proposals for annual best tariff information and business customer definitions

Please find below Telefonica UK Ltd's (TUK) response to Ofcom's revised proposals regarding the implementation of the EECC, specifically in relation to annual best tariff information and business customer definitions. The response also comments on the UK Government's decision to limit the scope of the EECC's Article 107 requirements.

Annual best tariff information

As set out in our first EECC consultation response¹, dated 10 March 2020, and in subsequent correspondence, we do not agree that the requirements of Article 105(3) extends to pay-as-you-go (PAYG) customers. The wording of the Article clearly states that the requirement to provide best tariff information is in conjunction with the provision of the end-of-contract notification (ECN). It therefore necessarily follows that PAYG customers (who do not receive ECNs) do not fall within intended scope of the provision. In our view, the prevailing General Condition (GC) C1.16 does not properly implement Article 105(3) as it should only apply to contracts with a fixed commitment period which auto-renew as a matter of law or contract.

Furthermore, we raised concerns about the disproportionality of extending the requirement to provide best tariff advice to PAYG customers on the basis that some purchase bundles (which could, in some circumstances, be interpreted to be in scope of Article 105(3)).

[Redacted]

¹ Telefonica UK (O2) response to Ofcom's consultation on Proposals to implement the new European Electronic Communications Code, 10 March 2020 – para. 6.1 – 6.6

² Email from Telefonica UK (O2) to Ofcom, dated 4 May 2020.

We therefore welcome and support Ofcom's proposal to amend the relevant GC C1.16 to specify that annual best tariff information only needs to be given for contracts which were previously subject to a commitment period, which has subsequently expired. In our view, this is a pragmatic and sensible solution.

We also welcome that Ofcom has considered the submissions put forward by TUK in regards to the disproportionality of including a subset of prepay customers who would have been in scope of the amended GC C1.16.

Definitions for microenterprise, small enterprise and not for profit organisations

In our response to Ofcom's December 2019 EECC consultation, we set out our concerns about how Ofcom proposed to delineate between business and not for profit customers³. Specifically, we noted that demarcating between customers on the basis of financial turnover and organisation size would be both complex and error-prone. We also highlighted that Ofcom's interpretation of not for profit customers in scope of the EECC's end-user protections was not consistent with the Recital 259 of the EECC.

In order to address industry's concerns, Ofcom's mini consultation sets out the four counter-proposals, namely:

- i. To remove the financial threshold from the definition of microenterprise and small enterprise customers;
- ii. To use a single definition of 'microenterprise or small enterprise customer' with a headcount threshold set at 10 staff members;
- iii. To set a headcount threshold of 10 staff members for not for profit organisations; and
- iv. To extend the guidance for providers on identifying employee headcount to not for profit organisations.

We briefly address each of these proposals in turn.

In relation to (i) we strongly support the removal of the financial threshold. [REDACTED] it is likely to change year on year. Moreover, compliance with Ofcom's General Conditions would become contingent on reliable information being provided by the customer. Removing the financial threshold in favour of organisation size and/or a connection-based proxy is a pragmatic solution which we welcome.

In relation to (ii), we agree with Ofcom's decision to propose a single definition for both 'microenterprises' and 'small enterprise customers'. This aligns with the prevailing threshold in the GCs.

We also note Ofcom's suggestion in the consultation that, where headcount is not available, providers may use "reasonable headcount proxies, such as the number of connections". In our experience, the headcount benchmark may be confused by temporary staffing, contractors or the use of flexible hours contracts. Small businesses with these types of employees may fall outside of the threshold but would benefit from being within the microenterprise definition. Additionally, some business customers may choose not to provide this information. Having a connections-based proxy will enable us to consistently delineate between those customers that require additional

³ Telefonica UK (O2) response to Ofcom's consultation on Proposals to implement the new European Electronic Communications Code, 10 March 2020 – Section 5

protections and those larger organisations that require greater flexibility. We support the inclusion of this connections-based proxy.

We particularly welcome the proposals set out in (iii) and (iv), as it acknowledges the varying scale of the not for profit customer base and that larger enterprise, not for profit organisations, are able to negotiate contracts suitable for their needs. The proposed headcount threshold will afford protections to those customers who do not have the market power or relevant staff to undertake such negotiations.

The scope of the Article 107 obligation (Bundled offers)

On 22 July 2020, the Department for Culture, Media and Sport (DCMS) published its Statement on the implementation of the EECC. This Statement confirmed the UK Government's intentions for when and how the EECC should be implemented.

Whilst Ofcom already has the necessary powers to effectively implement many of the provisions in the EECC, for others it does not. One such provision is Article 107 – a requirement to extend certain end-user protections to products and services bundled in with internet access services (IAS) and/or number-based interpersonal communications services (NBICS). The DCMS has proposed to give Ofcom the express powers required to implement Article 107, but in doing so will also limit the scope of those powers.


Specifically, the DCMS states that the provision should only apply to 'those services that are most relevant and closely related to telecoms'. That is, those products and services that are most commonly included in telecoms bundles⁴. This is a significant development, and TUK welcomes the DCMS' pragmatism in providing clarity on the scope of the provision.

Ofcom must now reflect this limitation of scope in its proposed General Conditions. The proposed definition of 'Bundle' should now be amended to clearly reflect the UK Government's intention – that bundled products and services are only those that are 'most commonly included in telecoms bundles'. We urge Ofcom to set this out explicitly in its updated General Conditions. For example, Ofcom could amend the definition to state:

*'Bundle' means where public electronic communications services and **those** service(s) and/or terminal equipment **that are most commonly bundled with public electronic communications services** are provided or sold by the same Communications Provider under the same or closely related or linked contracts.*

For the avoidance of doubt, implicitly narrowing the scope of the 'Bundle' definition (for example, through guidance in its Statement) would *not* be sufficient.

Yours sincerely,


Regulatory Manager
Telefonica UK Ltd

⁴ Government response to the public consultation on implementing the European Electronic Communications Code, page 52