

# Fair treatment and easier switching for broadband and mobile customers

Telefonica UK's response to Ofcom's consultation on Proposals to implement the new European Electronic Communications Code

**Non-confidential version**

## Contents

1. Executive Summary .....	3
2. Proposed timelines of implementation .....	6
3. Contract duration and Linked split contracts.....	11
4. Right to exit .....	18
5. Business customers .....	22
6. Pay-as-you-go (PAYG) customers .....	25
7. Emergency video relay services.....	29
8. Annex .....	32

## 1. Executive Summary

- 1.1. We welcome the opportunity to respond to Ofcom's consultation on its implementation of the European Electronic Communications Code (EECC).
- 1.2. As Ofcom is aware, we (Telefonica UK) are one of four mobile network operators in the UK. We provide mobile wholesale services to a number of mobile virtual network operators, including Sky and Tesco Mobile. We also provide mobile retail services to over 25 million customers through the O2 and giffgaff brands.
- 1.3. Ofcom's consultation is very broad in its scope, covering a wide range of end-user requirements that impact all mobile and fixed providers in the UK. In our response below we set out our key concerns about Ofcom's proposed implementation of the EECC requirements. Ofcom's consultation window has not allowed for enough time to conduct a comprehensive review of the implications of every proposed change. We therefore do not comment in great detail about the specifics of implementing these proposed changes. Ofcom must commit to remain engaged with industry throughout the implementation window, addressing problems and concerns raised by providers as implementation progresses.

### **Ofcom should not engage in "gold plating"**

- 1.4. Our response focusses on six implementation issues. However, more generally, Government policy clearly dictates that Ofcom must not transpose beyond the minimum requirements of European Directives, unless there are exceptional circumstances, justified by a cost benefit analysis and consultation with stakeholders<sup>1</sup>. This is particularly the case where Ofcom "gold-plates" with detrimental effect to providers. For example, Ofcom has unduly extended the definition of not for profit organisations beyond the intentions of the EECC. We urge Ofcom to remove these instances of gold-plating prior to the start of the implementation window.

### **Ofcom's duty to remove otiose regulation now that that the UK has left the European Union**

- 1.5. Ofcom is required by law to ensure that regulation does not impose an unnecessary burden or maintain burdens which have become unnecessary<sup>2</sup>. Ofcom's position in this consultation document is that it is seeking to implement the EECC via its traditional approach. However, we are not in "business as usual" territory anymore; as things stand, the transitional arrangements following the UK's departure from the EU will end a mere ten days after the EECC needs to be implemented. There is scant recognition of this significant milestone in

---

<sup>1</sup> HM Government – Transposition Guidance – How to implement European Directives effectively – para. 2.10

<sup>2</sup> Communications Act 2003, Section 6(1)

Ofcom's consultation document, let alone any realisation of its implications. We believe that the effect of UK statute is that, once the transitional regime ends and the UK is no longer bound by EU law, Ofcom *must* remove regulatory burdens that cannot be shown to be beneficial, including relevant provisions in the EECC. *The tectonic plates are shifting beneath Ofcom's feet, and Ofcom needs to acknowledge this and react accordingly.*

- 1.6. In our view, a number of regulatory provisions that Ofcom is seeking to implement in this consultation fall into the category of burdensome regulation which should be removed immediately after the end of the transitional regime. For example, lowering the threshold for a customer's right to exit their contract. The new threshold would create significant legal and commercial uncertainties for providers, which are likely to result in a rebalancing of prices to consumers' detriment and should be reviewed against the appropriate counterfactual – the effectiveness of the existing material detriment threshold.

#### **Consequences of Ofcom's delay in consulting**

- 1.7. It is also worth noting that, in our view, Ofcom's decision to delay consultation on these proposed changes is highly problematic and now places an unnecessary burden on providers to comply by the proposed deadline. Ofcom has had a significant amount of time to consult on and implement the requirements set out in the Code.
- 1.8. This delay in consulting leaves Ofcom and industry with insufficient time to implement effectively. Ofcom must consider providing an extended compliance window that gives sufficient time for necessary system and process changes to be made. This compliance window must be disaggregated (not a single deadline for all changes) and set according to the complexity of the required changes. In our response below we set out how long we think this compliance window should be.

#### **Linked Split Mobile Contracts**

- 1.9. We are extremely concerned about the approach that Ofcom has taken in relation to Linked Split Mobile Contracts and how this impacts the O2 Custom Plan tariff proposition.
- 1.10. Custom Plan remains enormously popular with consumers. We now have more than ~~8~~ Custom Plan customers, and we are connecting, on average, over ~~8~~ customers each month. Ofcom has had Telefonica UK's representations about the matter for almost six months, following the July Mobile Handsets document. But it has still to respond either to the arguments that the EECC doesn't, in fact, prohibit Custom Plan, or to the substantial economic evidence that Custom Plan provides significant customer benefits. This prevarication is

all the more troubling given (as Ofcom is aware), that ~~3~~, as Ofcom had initially assumed. Telefonica UK urges Ofcom to arrive at a view, as a matter of urgency, regarding the application of Article 105(1) of the EECC as it impacts Custom Plan, and to confirm our view that that tariff is not prohibited.

- 1.11. We strongly disagree with Ofcom's transposition of Article 105 (1) into General Condition C1.11. By extending the scope of the requirement to prohibit contracts that "stipulate" a commitment period of more than 24 months, rather than simply "mandate" (as set out clearly in Article 105(1)), Ofcom appears to have gone beyond the minimum requirements of the Directive. Such gold-plating has not been justified by cost-benefit analysis nor considered in Ofcom's impact assessment. As we set out below, Ofcom must revise the wording of General Condition C1.11 to bring the requirement back into alignment with the Article 105(1) provision.
- 1.12. In any event, as we set out above, our view remains that the EECC does not prohibit Custom Plan, for the reasons we set out in this response. Without prejudice to this position and as noted above, the conclusion of the Brexit transition period provides Ofcom with a duty to review the effectiveness and proportionality of the requirements transposed from the EECC. As we set out in this response, even if, contrary to our view, the EECC does prohibit Custom Plan, such prohibition would plainly act against consumers' interests and should be removed immediately after UK is no longer bound by the EECC (i.e. 31 December 2020).

### **Other matters**

- 1.13. Finally, we welcome Ofcom's new proposals seeking to make accessibility easier for customers with disabilities. However, we think that there are some practical considerations that Ofcom have not considered. Specifically, Ofcom's proposed requirement to provide documentation in accessible formats will not be effective for time critical communications – for example spend cap notifications, data usage warnings and network issue communications.
- 1.14. We also request that Ofcom explicitly sets out its proposed approach to funding the requirement to facilitate emergency video relay services. The cost of this requirement should be borne by the whole of industry and not solely by the mobile providers. To require mobile operators to cover the cost of this requirement would be discriminatory and not technologically neutral – a breach of Ofcom's statutory obligations<sup>3</sup>.

---

<sup>3</sup> Communications Act 2003 – Section 4(6) and 6(1)

## 2. Proposed timelines of implementation

- 2.1 Ofcom has proposed an implementation date of 21 December 2020 for many of the changes outlined in its consultation<sup>4</sup>. Given that we will not get certainty of Ofcom's proposals until the publication of the Final Statement, likely to be in either May or June, providers will have just six months to make significant systems, process and commercial changes. These timelines are not practicable, and risk conflicting with, and delaying existing regulatory projects<sup>5</sup>. Ofcom must explicitly set out a compliance window that goes beyond the proposed implementation deadline, where necessary allowing for even more time where the requisite changes are more complex.

### **Ofcom must provide clarity now on which EECC provisions it intends to retain after conclusion of the Brexit transition period**

- 2.2 Upon conclusion of the Brexit transition period the UK will no longer be bound by EU law and Ofcom will have a duty to review the effectiveness and proportionality of the requirements transposed from the EECC. In line with its statutory duties and regulatory principles<sup>6</sup>, Ofcom will need to carefully examine the rules implemented from the EECC. Where it has not previously done so Ofcom will need to assess the impact of such requirements, ensuring that the costs on providers are proportionate. Should it identify requirements that are ineffective, disproportionate or place an unnecessary burden on providers then Ofcom must remove these obligations.
- 2.3 In its consultation Ofcom suggests that even when no longer bound by the EECC there continues to be aspects of the Directive that Ofcom would still pursue<sup>7</sup>. Ofcom does not allude to which provisions this would be the case. Many of the requirements that Ofcom propose to implement will require substantial investment in systems and process changes, much of which will be wholly or partially sunk. It is vitally important that Ofcom clearly state which EECC provisions it is minded to retain after the conclusion of the Brexit transition period. This must be set out in its Statement to ensure that providers' time and resources are not wasted on requirements that are likely to fall away.

---

<sup>4</sup> Proposals to implement the new EECC – paras. 4.85, 5.30, 6.116, 7.224, 11.48

<sup>5</sup> Providers already have a significantly contested regulatory roadmap. For example, [38](#).

<sup>6</sup> Ofcom's 2005/06 Annual Plan, Ofcom, March 2005, Figure 2.2

<sup>7</sup> Proposals to implement the new EECC – paras. 2.4

- 2.4 To enable this review to happen we propose that Ofcom include a sunset clause or formal review deadline in the wording of new General Condition provisions it is minded to re-consider. This review would occur once the Brexit transition period has concluded and Ofcom is no longer bound by the provisions of the EECC.

**Providers should not bear the consequences of Ofcom's decision to delay consultation on the implementation of the EECC's provisions**

- 2.5 As a Member State, the UK currently has a requirement to give effect to the provisions of the EECC by 21 December 2020. Article 124(1) states that "Member States shall adopt and publish, by 21 December 2020, the laws, regulations and administrative provisions necessary to comply with this Directive". This has been a requirement since the EECC was ratified and adopted by the European Parliament in December 2018, over 14 months ago.
- 2.6 A significant amount of time has passed since ratification and there has been ample opportunity for Ofcom to consult on the new requirements set out under the new European framework. However, Ofcom has delayed consulting on these proposed changes until now, offering just a 12-month window to consult, confirm and implement the requisite changes to the General Conditions. As set out below, this is insufficient time for such a large undertaking. Where Ofcom had intended to ensure that providers were compliant with the new requirements by the EECC deadline it ought to have consulted on these proposed changes at a much earlier stage.
- 2.7 As we have already noted, implementation of these proposed changes will likely result in providers incurring substantial sunk costs. Some cost savings can be realised through economies of scope, where similar projects can be completed together. Providers will therefore only start implementing the proposed changes once Ofcom has published its Statement, along with its finalised General Conditions amendments. Providers cannot be expected to consistently pre-empt Ofcom's interpretation and proposed implementation of the EECC. To do so would be risky and inefficient, leading to additional cost and project complexity where implementation needs to be changed because pre-emptive interpretations are not aligned to Ofcom's.
- 2.8 In the absence of a compliance window or moratorium, providers will be unable to effectively implement these requirements in the proposed timescales. Furthermore, ongoing regulatory and commercial initiatives, that are designed to improve the service offerings of our customers, are likely to be delayed or put at risk by the short timescales<sup>8</sup>.

---

<sup>8</sup> For example, 3X.

**Six months will not be enough time to make all of the required changes; some changes will require significantly longer than others to fully implement**

- 2.9 Throughout its consultation Ofcom recognises that making these changes will have an impact on providers, including, where necessary, a cost burden<sup>9</sup>. However, in general, Ofcom sees this impact as small and does not provide additional implementation time where the impact of the regulatory change is likely to be greater.
- 2.10 Whilst many of these changes are straightforward in theory, in practice each change (or group of changes) will require a carefully planned and executed project, along with a dedicated project team and resource, which might need to be appropriated from other ongoing projects.
- 2.11 We anticipate that more straightforward proposed changes (3X<sup>10</sup>) will each be a small-to-medium sized project, requiring approximately 3X. Providers need time to scope out the requirements, identify and allocate the correct resource (both internal and external), and agree the correct levels of funding. This scoping phase will be followed by the crystallising, proving, building, testing and development of the requisite solutions. Where roadmaps are contested, it might be difficult to obtain the necessary resource immediately, meaning that further prioritisation is required.
- 2.12 Given that we are required to undertake these projects concurrently it is likely that we will need additional time, as resource constraints mean certain projects must be prioritised over others. For example, Project Managers and Business Analysts might need to split their time between projects rather than focussing on a single project. We anticipate that completing these projects concurrently will take between 3X. Ofcom's proposed deadline of 21 December 2020 would therefore not give us enough time to make even the more straightforward changes.
- 2.13 Other proposed changes are significantly more complex, requiring a much larger project, longer timelines and possible industry engagement. For example, we anticipate that a new system that allows a customer to port their number for at least one month after the date of termination<sup>11</sup> could require at least 3X<sup>12</sup>. Where automation, industry engagement and project concurrency are required by best practice this could further increase the timescales and the cost of implementation. For example, providers will be required to define new rules for processing post-termination port requests, create new facilities to suspend customer accounts, and then store and retrieve personal details for these customers for 30 days after termination. Providers will also

---

<sup>9</sup> Proposals to implement the new EECC – paras. 4.25, 5.28, 6.45 etc.

<sup>10</sup> 3X.

<sup>11</sup> Proposals to implement the new EECC – paras. 7.79 – 7.83.

<sup>12</sup> We note as well that we have experienced little demand for such a feature. Given the implementation costs we ask Ofcom to consider the proportionality of including such a requirement in the proposed General Conditions.



need to train customer service agents to be able to address questions on post-termination porting and create new processes to verify whether the request comes from a legitimate source (i.e. whether the request to port is being made fraudulently). Finally, providers will need to liaise with each other to ensure that the old number is provided to the customer at the right time.

- 2.14 We estimate that the systems and process changes required to automate a port-after-termination process would be akin to that required by the 2018 Auto-Switch reforms<sup>13</sup>. We therefore propose that Ofcom give industry a minimum of 30 to implement this requirement.
- 2.15 Similarly, Ofcom expects industry to develop the detailed switching processes necessary for providers to comply with these new general and specific switching rules. While there are established processes already in place for mobile, residential and micro-business fixed customers, this is not the case for businesses with more than 10 employees. A new, industry-wide process will need to be established to ensure that providers comply with the new general switching rules. We anticipate that the creation of a new, industry wide switching process for larger business customers will be a significant undertaking and will require a substantial amount of time. In the case of Auto-Switch, Ofcom allowed industry 18 months to complete implementation. This turned out to be *just* enough time to make the necessary systems changes. At this stage, we expect the creation of such a process for larger business customers will 30.

### **Ofcom must set out a compliance window to allow providers sufficient time to make the requisite changes**

- 2.16 At this stage, Ofcom's proposed timescales for implementation do not give providers sufficient time to make the necessary systems and process changes. Ofcom must address this by extending out the window for compliance. This can be done explicitly in its Statement or via an enforcement holiday.
- 2.17 We propose that Ofcom gives providers at least 30 from the publication date of the final statement to make the necessary small-to-medium changes (as outlined above). However, where projects are likely to be longer and more complex Ofcom must allow for additional time beyond this initial 30 window. As set out above, the creation of a new, industry-wide switching process for business customers and port-after-termination process will take significantly longer than this. We propose that Ofcom give providers until 30 to make the necessary switching and porting reforms and give effect to the general switching rules set out in Section 7 of Ofcom's consultation.

---

<sup>13</sup> Consumer switching - Decision on reforming the switching of mobile communication services – para. 1.13

2.18 Where necessary, taking into consideration the responses of providers to this consultation, Ofcom should be prepared to reconsult on its proposed timelines to better understand the challenges that providers face when making such systems changes.

### 3. Contract duration and Linked split contracts

#### **We do not agree that Ofcom has correctly interpreted and implemented the requirements of Article 105(1) of the EECC**

3.1. We note Ofcom's comments in paragraphs 6.14 – 6.34 of the consultation document. Given our response to the July 2019 mobile handsets document, we are obviously pleased that Ofcom has abandoned its proposal to implement early a 24-month limit for mobile handset bundles. As we set out in our response to that consultation, Ofcom's proposal was based on a misunderstanding of European law and, additionally, would have led to a reduction in consumer welfare to the extent that it would have prohibited the O2 Custom Plan tariff offering, as presently constituted. Clearly, and as we described in our earlier response, this would have breached numerous of Ofcom's statutory duties.

3.2. We are concerned however that although Ofcom has not yet made any ruling on this question, its proposed implementation of the EECC bears upon it. As we understand it, Ofcom is now proposing to implement Articles 105(1) and 107(1) through the new General Condition, C1.11:

*"Regulated Providers shall not include a term in any contract, other than an Instalment Contract for a Physical Connection, with a Relevant Customer, that **stipulates** a Commitment Period of more than 24 months in duration."* (emphasis added)

3.3. The relevant part of Article 105(1) reads as follows:

*"Member States shall ensure ... that contracts concluded between consumers and providers of publicly available electronic communications .... do not **mandate** a commitment period longer than 24 months"* (emphasis added)

3.4. Member States are therefore required to ensure that the relevant contracts do not *mandate* a commitment period longer than 24 months. However, Ofcom's proposed General Condition would prohibit terms that *stipulate* a commitment period of more than 24 months.

3.5. We believe that the distinction is important. O2's Custom Plan agreement comprises the Airtime Agreement, which is a monthly rolling contract,<sup>14</sup> and a device Consumer Credit Agreement ("CCA"). The latter might

---

<sup>14</sup> See section 3 of the Summary terms which defines the Minimum Period as "Your Pay Monthly Mobile Agreement has a minimum term called a Minimum Period, which could be as short as 30 days"

“stipulate” an arrangement greater than 24 months in duration (i.e., it provides the consumer a period of up to 36 months, to repay their 0% handset loan), but it doesn’t “mandate” such a commitment, in the sense that it is not mandatory for the consumer to maintain that CCA for a period of 36 months. In fact, it clearly states “You have a right to repay all or part of the credit early at any time”<sup>15</sup>. No penalty is incurred if the consumer chooses to make early repayment.

- 3.6. The Custom Plan CCA term is accordingly the *maximum* period for the loan, and not a mandated minimum commitment period (which is the mischief that Article 105 is designed to combat). In other words, the customer is required to repay the loan in its entirety within the period stipulated in the agreement. But they are not mandated to take a service from O2 for that period; if the customer repays the loan sooner than the initial term (which he or she can do without incurring any penalty or fee), he or she is required only to provide 30 days’ notice to end the service.
- 3.7. Accordingly, in our view, the O2 Custom Plan is clearly not contrary to the requirements of Article 105(1) and it is concerned that the wording of the proposed General Condition C1.11 would seem to go beyond what Article 105(1) requires, and that we may face argument that a consumer loan agreement of the kind above “stipulates” a period of 36 months, because it allows for a *maximum* period of repayment of 36 months. For the avoidance of doubt, we would not accept that interpretation was correct, but are concerned that the proposed wording creates regulatory uncertainty in this regard.
- 3.8. Further, no justification has been offered for such “gold-plating”. In our view, the proposed General Condition should be redrafted to use the word “mandates” which is used in the Directive, rather than “stipulates” which is at least arguably broader. To avoid any implication that a “maximum” period over 24 months is caught, GC 1.11 should be amended to refer to a “*minimum* commitment period longer than 24 months”. That is plainly the mischief that Article 105 is aimed at.
- 3.9. This is particularly important given Ofcom’s continuing failure to take any position on the application of these provisions.

---

<https://www.o2.co.uk/termsandconditions/mobile/our-latest-pay-monthly-mobile-agreement> and section 10.3 of the CCA (link in Footnote 2 below) which states “if you repay the credit in full early, you can choose to continue paying for the relevant Airtime Services **on a monthly basis** under your current Pay Monthly Mobile Agreement, upgrade to a different airtime plan or leave the O2 network” (emphasis added)

<sup>15</sup> See section 10.1 of <https://static-www.o2.co.uk/sites/default/files/2019-12/CCA%20-%20Flexible%20Refresh%2014%20June%202019.pdf>. Note also section 5 which relates to the Duration of the Credit Agreement, which at its outset notes that the duration applies “Unless terminated earlier in accordance with the terms of this Credit Agreement”.

### **Regulatory and commercial uncertainty created by Ofcom's lengthy consideration of Telefonica UK's earlier representations**

3.10. As Ofcom notes at paragraph 6.25 of the current consultation document, in response to the July 2019 mobile handsets document, it received representations to the effect that it had misinterpreted the effect of Articles 105(1) and 107(1), including representations from Telefonica UK. In its response to the July 2019 mobile handsets document, we:

- i. argued that, as a matter of law, the EECC does not prohibit O2's Custom Plan tariff proposition; and
- ii. provided significant evidence that the Custom Plan proposition provides huge benefits to consumers and that limiting the proposition to no more than 24 months would be detrimental. We attach a copy of the Alix Partners report that we submitted in response to the July 2019 mobile handsets document, as an Annex to this response. We note that, since then, the Competition and Markets Authority has issued its report, Regulation and Competition, A Review of the Evidence. The first of the CMA's three recommendations was that policy makers should "develop regulation that supports innovation and disruption". This goes to the heart of Telefonica UK's position on the issue: custom plan is an innovative tariff proposition, developed in the competitive mobile retail market, which provides benefits for consumers. Telefonica UK urges Ofcom to have regard to the CMA's review and recommendations, set out in its report, when considering this matter.

3.11. Those representations were made almost six months' ago. In the intervening period, the issue has been raised with Ofcom on various occasions, at various levels, including with Ofcom's CEO. Yet, as Ofcom notes<sup>16</sup>, it is still considering the matter. Further, Ofcom gives no indication as to when it will conclude its consideration.

3.12. This prevarication is creating significant regulatory and commercial uncertainty. As Ofcom is aware, Custom Plan tariff is our principal tariff proposition and we are the largest provider of "Linked Split Contracts" in the market:

*"Split contracts now make up 15% of pay-monthly mobile customers (5.9 million people) up from 4% in 2014..."*

*O2 is the largest provider of split contracts. It has offered this model through its direct sales channels on its 'Refresh' tariff, since 2013."<sup>17</sup>*

---

<sup>16</sup> Proposals to implement the new EECC – para. 6.26

<sup>17</sup> Helping consumers to get better deals in communications markets – mobile handsets – 22 July 2019, para 3.15 – 3.16

- 3.13. We now have over 3.5m customers on the Custom Plan tariff and are connecting customers to it at a rate of 3.5m per month (on average). Custom Plan is, therefore, a very attractive proposition to consumers; they clearly value the flexibility that allows them to buy relatively expensive devices, over a longer period of time, on an interest free basis. It is, accordingly, now increasingly urgent that we obtain regulatory certainty in respect of this key commercial product before the relevant provisions of the EECC are implemented.
- 3.14. Further, as we set out in our response to the July 2019 mobile handsets document, our customer management systems identify customers on the basis of the customer's mobile phone number. Therefore, 3.5m<sup>18</sup>.
- 3.15. In fact, and as we have previously advised Ofcom, we are 3.5m.
- 3.16. In view of the significant regulatory and commercial uncertainty created by Ofcom's prevarication, we urge Ofcom to conclude, as a matter of urgency, its consideration of the impact of Articles 105(1) and 107(1) on the Custom Plan tariff, to arrive at a decision as to whether or not the Custom Plan tariff, as presently constituted, is compatible with the EECC; and that Ofcom accepts our position that the Custom Plan tariff is compatible with the EECC. We will write to Ofcom separately in this regard outside the current consultation exercise.

### **Ofcom has a statutory duty to review regulatory burdens**

- 3.17. Section 6 (1) of the Communications Act 2003 states:

*"OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve—*

*(a) the imposition of burdens which are unnecessary; or*

*(b) maintenance of burdens which have become unnecessary."*

- 3.18. In the July 2019 mobile handsets document, Ofcom sought to argue that Linked Split Contracts acted against consumers' interests because they dis-incentivised switching. Ofcom asserted that that proposition was "self-evident"<sup>19</sup>.

---

<sup>18</sup> 3.5m

<sup>19</sup> Helping consumers to get better deals in communications markets – mobile handsets – 22 July 2019, para 5.16

- 3.19. As noted above, in its response, we provided significant evidence that the Custom Plan tariff<sup>20</sup> provided huge benefits to consumers and that limiting the proposition to no more than 24 months would be detrimental.
- 3.20. In summary, therefore, Ofcom's original position, as set out in the July 2019 mobile handset document, was that the EECC would prohibit the O2 Custom Plan tariff proposition. As we understand the current position, it is that Ofcom is currently considering the matter, following our representations. Further, on the basis of our (currently not disputed) substantial analysis, the O2 Custom Plan tariff proposition generates substantial benefits for consumers and is certainly very popular with consumers; it therefore follows that its removal from the market would be extremely detrimental to consumers.
- 3.21. By virtue of the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020, the UK has left the European Union. There is a transitional regime, which runs until the end of the calendar year (i.e. ten days after the EECC is required to be implemented in Member States), during which the UK must substantially comply with European law, including implementing the EECC. After the transitional regime, the effect of those Acts and the Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019/246 is that the UK is not bound to maintain the provisions of the EECC.
- 3.22. In our view, these are a unique set of circumstances. Ofcom's principal duty is to further the interests of consumers in relevant markets, where appropriate by promoting competition<sup>21</sup>. As we noted in our response to the July 2019 mobile handsets document, O2's Custom Plan tariff was developed as a competitive response to consumers' demand to afford increasingly expensive high-end devices.
- 3.23. In our submission, in circumstances where Ofcom has been required to introduce a regulatory provision by virtue of European law (but only for 10 days), and where there is evidence that the effect of such a provision (as initially interpreted by Ofcom) would operate against the interests of consumers, the combined effect of sections 3(1) and 6(1) of the Communications Act 2003 require Ofcom to amend the provision so that the detrimental effect of it is removed in substance or, for example, by inserting a sun-set clause so that it is automatically revoked, amended or reviewed after the end of the transition period.
- 3.24. Accordingly, if Ofcom arrives at a view that the Custom Plan is not compatible with the EECC, we request that Ofcom modifies the effect of its proposed General Condition C1.11 as we believe it is required to do by virtue of sections 3 and 6(1) of the Communications Act 2003 such that Custom Plan is compliant with the UK regulatory regime. We should be grateful if Ofcom would confirm (in such circumstances) its intention to modify that

---

<sup>20</sup> An example of a Linked Split Contract

<sup>21</sup> Communications Act 2003 – Section 3(1)

provision at the end of the transition period, when it publishes its final statement following this consultation exercise.

### **Non-coterminous linked contracts**

3.25. In our view, guidance about the way in which Ofcom would analyse the effect of non-coterminous linked contracts might be helpful, in principle, only if the both of the following conditions are met:

- i. a robust and cogent “theory of harm” is identified; and
- ii. evidence is presented to substantiate that theory of harm.

3.26. In our submission, the discussion presented in section 9 of the consultation document fails to meet either of those conditions. In particular, the “difference between the end of the commitment periods” criterion, described in paragraph 9.31 of the consultation, would seem to give rise to perverse outcomes, if applied. Of more concern is that, notwithstanding the large number of non-coterminous agreements currently in the market<sup>22</sup>, Ofcom presents no evidence at all to test whether the guidance it is proposing would, if applied, result in benefits to consumers. In our view, this is a serious oversight.

### **Difference between the end of the commitment periods criterion**

3.27. Ofcom states that:

*“we consider that a significant difference between the end of the commitment periods for the different elements of a bundle is more likely to cause harm because it is likely to raise switching costs.”<sup>23</sup>*

3.28. As Ofcom is aware, under O2's Custom Plan tariff, customers enter into a 30 day “rolling” airtime agreement and a 0% handset loan agreement of up to 36 months (the duration determined by the customer). As we set out earlier in this response, the term of the handset loan agreement should properly be regarded as a maximum period during which the loan is to be repaid, rather than a *mandated* commitment period. Nonetheless, if a customer elects to repay the loan over 36 months, he or she is able to do so. In these circumstances, it is not at all clear why the fact of the 35 months difference between maximum loan agreement terms and the minimum airtime term gives rise to consumer detriment, and Ofcom presents no evidence of such detriment.

---

<sup>22</sup> Proposals to implement the new EECC – para. 9.21 – Estimated by Ofcom to total 8.4m

<sup>23</sup> Proposals to implement the new EECC – para. 9.31



- 3.29. Furthermore, if Custom Plan was amended to replace the rolling 30 day airtime agreement with a two year minimum term, the difference between the maximum loan agreement term and the minimum airtime term would be reduced to no more than twelve months, but it is far from obvious why such a change would be beneficial, from the customer's point of view. Indeed, it would appear to be less favourable to the extent that the customer would be bound by a longer airtime minimum commitment.
- 3.30. Similarly, if the maximum loan agreement term was reduced to, for example, thirty months (from thirty six months) once again, the difference between the maximum loan agreement term and the minimum airtime commitment would be reduced, but the customer's flexibility would be reduced, the minimum monthly payments would increase and this would be detrimental to some consumers<sup>24</sup>.

#### **Benefits for customers generated by non-coterminous contracts**

- 3.31. We welcome Ofcom's acceptance that non-coterminous agreements can deliver benefits for customers<sup>25</sup>. We have provided compelling evidence to Ofcom in response to the July 2019 mobile handset document, that O2's Custom Plan tariff (a non-coterminous arrangement) provides significant customer benefits. As noted above, we have attached a copy of the Alix Partners report we submitted to Ofcom last September, to this response.
- 3.32. O2 now has 3.5m customers on its Custom Plan tariff and is signing customers up at the rate of, on average, 3.5k each month. Clearly, the Custom Plan tariff proposition is very attractive to customers; it must be obvious to Ofcom that it is providing significant customer benefits.

#### **Failure by Ofcom to present empirical evidence in support of the proposed guidance**

- 3.33. At paragraph 9.12 of the consultation document, Ofcom estimates that there are 8.4m non-coterminous linked contracts in the UK. It would surely have been possible for Ofcom to test its proposed guidance by reference to the non-coterminous agreements that are currently in the market, yet no such evidence is presented in the consultation document. We believe that this is a significant oversight.

---

<sup>24</sup> Under Custom Plan, the customer is, of course, currently free to choose a 0% thirty-month handset loan repayment term.

<sup>25</sup> Proposals to implement the new EECC – para. 9.25 – 9.27 refer

## 4. Right to exit

### **Ofcom must provide greater clarity on the meaning of the new right to exit requirement**

- 4.1. Article 105(4) affords customers the right to exit their contract, including any bundled products or services, where a change to the contract is made that is not exclusively to the benefit of the customer, purely administrative in nature or directly required by law<sup>26</sup>. Ofcom proposes to give effect to this provision via General Conditions C1.14 to C1.20.
- 4.2. This new requirement goes far beyond the existing obligation on providers – to allow customers the right to exit their contract where contractual modifications are likely to be to the 'material detriment' of the customer.
- 4.3. In order for this requirement to be implemented effectively, Ofcom must provide clarity on what this extended right to exit means in practice. Specifically, what does Ofcom mean by “exclusively to the benefit of the customer” and what would be considered to be a “purely administrative” change? These are subjective terms and, in the absence of further clarification from Ofcom, could result in uncertainty and inconsistent implementation between providers. What one provider considers to be purely administrative might be different to what another perceives.
- 4.4. To remedy this, Ofcom should include an explanation and definition of what these key terms mean the updated General Conditions.

### **The extension of the right to exit requirement creates significant legal and commercial uncertainty for providers; Ofcom should review its appropriateness once it is no longer bound by the EECC**

- 4.5. We note that in its revised General Conditions Ofcom no longer distinguishes between changes to the core subscription price and changes to other prices. Historically, Ofcom has narrowed the scope of 'material detriment' for price changes by setting out that only a contractual modification that results in an increase in the core subscription price would be considered materially detrimental.
- 4.6. Certain price changes, beyond the core subscription price, are not always within the control of the provider. For example, roaming charges will often need fluctuate in line with foreign exchange rate changes. Similarly, premium rate services (PRS), which providers do not control the price of, will also change over time depending

---

<sup>26</sup> Proposals to implement the new EECC – para. 6.69 – 6.115, and EECC Article 105(4)

on the services offered by the PRS provider and whether they also adopt annual inflation-based price increases (e.g. RPI or CPI).

- 4.7. Where a right to exit can be triggered by price changes outside the control of the provider, the commercial decisions of third parties will impose a negative externality on providers. This, in turn, will leave the provider with significant legal and commercial uncertainties that could translate into high prices, less choice and reduced total welfare.
- 4.8. To address the negative externality, providers will need to form new commercial arrangements with third party providers, where necessary including new reporting requirements and mechanisms to recoup the costs of early churn. Such arrangements are likely to drive additional cost which will ultimately translate into higher non-core prices for consumers.
- 4.9. Similarly, where providers are no longer able to incrementally increase prices for ancillary products and services, for example to align with increasing input costs, this could negatively impact long run profitability. Providers are likely to reflect this additional risk in upfront price increases to offset the fact that incremental price changes would no longer be permissible. Consumers would therefore face higher prices as a direct consequence of this change, clearly in breach of Ofcom's principal statutory duty of furthering the interests of consumers.
- 4.10. We are also concerned that lowering the right to exit threshold will have a chilling effect on providers' willingness to offer credit. ✂.
- 4.11. Additionally, where customers choose to terminate agreements sooner this reduces the lifetime profitability of the customer. Providers will need to mitigate against this by increasing upfront prices and removing other preferential terms which are currently on offer (for example cheaper airtime tariffs and lower cost of handsets).
- 4.12. As set out in our Executive Summary, Ofcom has statutory duty to ensure that regulation is proportionate and not unnecessarily burdensome. Moreover, Ofcom must seek to further the interests of consumers<sup>27</sup>. This will continue to be the case once Ofcom is no longer bound by the requirements of the EECC.
- 4.13. We consider it vital that any regulatory intervention is only considered in relation to areas where research and evidence has specifically identified customer harm. Ofcom has not as yet undertaken any kind of cost-benefit analysis to justify significantly lowering the right to exit threshold. It has also not provided any evidence to suggest that the current 'material detriment' threshold is ineffective.

---

<sup>27</sup> Communications Act 2003 – Section 3(1) and Section 6(1)

- 4.14. In light of the significant legal and commercial uncertainties caused by the reduced right to exit threshold, we urge Ofcom to review such a requirement against its statutory duty to ensure proportionality and effectiveness. Where it finds that the reduced threshold does not achieve these requirements Ofcom must consider removing this threshold and revert to the existing 'material detriment' threshold.

**Ofcom must remove Linked split mobile contracts from the scope of the right to exit requirement**

- 4.15. We are extremely concerned at Ofcom's proposed GC1.17. This reads as follows:

*"Without limiting the extent of Condition C1.16, where a Relevant Customer exercises their right to terminate a contract or contracts pursuant to Condition C1.15, they shall not be required to pay any Early Termination Charges. **In particular, where the Relevant Communications Service is provided under Linked Split Mobile Contracts, Regulated Providers shall not require the Relevant Customer to terminate their Mobile Device Loan Agreement and pay any amount due upon termination of that agreement, unless the Relevant Customer also exercises their right to terminate that agreement.**"* (emphasis added)

- 4.16. Our interpretation of this provision is that it would effectively prohibit *all* Linked Split Mobile Contracts, regardless of duration, if the right of exit is triggered. This is because draft GC1.17 would have the effect of automatically "unlinking" a mobile device loan agreement forms an airtime agreement; the former would simply "roll on" in the event that the latter is ended. In Telefonica UK's view, there are a number of problems with this proposal:

- 4.17. At paragraph 6.73 of the consultation document, Ofcom suggests that proposed General Condition 1.17 is intended to implement Article 105(4) of the EECC. That provision reads as follows:

*"End-users shall have the right to terminate their contract without incurring any further costs upon notice of changes in the contractual conditions proposed by the provider of publicly available electronic communications services other than number-independent interpersonal communications services, unless the proposed changes are exclusively to the benefit of the end-user, are of a purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law.*

*Providers shall notify end-users at least one month in advance of any change in the contractual conditions, and shall simultaneously inform them of their right to terminate the contract without incurring any further costs if they do not accept the new conditions. The right to terminate the contract shall be exercisable within one month after notification. Member States may extend that period by up to three months. Member States shall ensure that notification is made in a clear and comprehensible manner on a durable medium."*

- 4.18. Ofcom has not set out why it considers that a prohibition of Linked Split Contracts is necessary to implement Article 105(4). We do not believe that it is. Certainly, a prohibition cannot be justified on the basis that end users have the right to terminate a contract “without incurring any further costs”. Requiring a mobile linked split contract customer to repay a loan is not imposing “any further cost”, it is simply requiring them to settle a loan. In our view, Ofcom’s proposal to prohibit all linked split mobile contracts is clearly a case of “gold plating” European law and Ofcom has made no attempt at all to justify such gold-plating. In such circumstances, draft GC 1.17 would clearly be vulnerable to an appeal.
- 4.19. Seeking to prohibit Linked Split Mobile Contracts in the event that a right to exit is triggered appears to be inconsistent with Ofcom’s assertion that it is considering representations to the July Mobile Handsets document about the issue. At paragraph 6.26 of the consultation document, Ofcom states that it is considering submissions it received in response to the July Mobile Handsets document. As noted above, those submissions included our representations which:
- i. argued that, as a matter of law, the EECC does not prohibit O2’s Custom Plan tariff proposition (a Linked Split Mobile Contract); and
  - ii. provided significant evidence that the Custom Plan proposition provides huge benefits to consumers and that limiting the proposition to no more than 24 months would be detrimental. We attach a copy of the Alix Partners report that we submitted in response to the July 2019 mobile handsets document, as an Annex to this response.
- 4.20. We urge Ofcom to remove this unwarranted addition to the provisions set out in General Condition C1.17.

## 5. Business customers

### **Ofcom's demarcation of micro and small business customers does not align with how providers typically engage with their business customers**

- 5.1 In giving effect to the requirements of the EECC, Ofcom proposes to adopt new definitions for different categories of customers and extend a number of the end-user provisions set out in this consultation to those customers.
- 5.2 Specifically, Ofcom proposes to introduce three new categories of business customers: microenterprises, small enterprises and not for profit organisations. Ofcom distinguishes between the microenterprise and small enterprise categories of customers by annual turnover and employee numbers<sup>28</sup>.
- 5.3 Whilst this demarcation is clear, and we welcome Ofcom decision to provide clarity, these are not demarcations that we recognise. We do not currently collect information about our customers' annual turnover or organisation size. Costly systems and process changes would be required to give effect to Ofcom's proposed demarcation. These are likely to add complexity and cost to our "onboarding" process, ultimately increasing prices for end-users.
- 5.4 Furthermore, to ensure that our segmentation remains compliant with Ofcom's proposed General Conditions we would need to update information about employee numbers and annual turnover on a regular basis (as both might vary quite significantly year-on-year). Customer financial performance data is difficult to collect, and in some circumstances, customers might be unwilling to share this information with us. As customers will not have a regulatory obligation to provide this data, providers could be placed in a precarious position where compliance with a General Condition hinges on information provided by third parties.
- 5.5 We think there is a simple solution. TUK, along with many other providers, already has an established method of demarcating customers into relevant categories – volume of connections. This approach gives providers a clearly quantifiable and internalised way of demarcating customers. No further systems development would be required, and providers would be able to respond more adeptly to the changing status of customers over time.
- 5.6 Ofcom should amend the definitions of "Microenterprise", "Small Enterprise Customer", "Not for Profit Customer" (see below) to include an alternative measurement that is based on volume of connections. For example, the updated definition of a "Microenterprise" would be:

---

<sup>28</sup> Proposals to implement the new EECC – para. 3.27

- *“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, **or whose annual turnover and/or annual balance sheet total does not exceed £1.7m, or who purchase/rent fewer than X connections annually.**”*

**We do not agree with Ofcom’s definition and characterization of not for profit organisations; it does not reflect the intentions of the EECC provision**

- 5.7 Ofcom is proposing to extend end-user rights to all not for profit customers<sup>29</sup> on the basis that they have ‘a similar bargaining position to residential customers’<sup>30</sup>. Whilst we understand the rationale for extending some end-user protections to small charities and organisations, characterising all not for profit customers, without any limitations or demarcations on size, as requiring additional support when engaging with the market is a broad oversimplification.
- 5.8 Not for profit customers vary considerably by size, spend and need. The category includes anything from small charities to large public sector organisations and government departments – including NHS Trusts, Police departments, transport organisations and Ofcom. We service a large portfolio of not for profit organisations, and in our experience the way in which these customers engage with the market cannot be characterised homogeneously.
- 5.9 Larger organisations, for example  $\times$  generally negotiate contracts in a similar way to large businesses, spending  $\times$ . They often possess considerable countervailing buyer power and will seek to contract on bespoke terms and service levels.
- 5.10 Additionally, some public sector organisations can use government facilitated procurement frameworks, for example RM3808, to engage with utility markets (including telecommunications). In this process, tenders will be issued by the customer for service provision and providers will bid competitively for these service provision contracts. Providers will often contract on the customers terms, and the Crown Commercial Service mitigates many of the engagement risks faced by facilitating the competitive tender process.

---

<sup>29</sup> Proposals to implement the new EECC – para. 3.28 - Ofcom defines not for profit customers as ‘customers that apply the whole of its income for charitable or public services, and/or is prohibited from distributing its assets among its members’

<sup>30</sup> Proposals to implement the new EECC – para. 3.26

- 5.11 Ofcom's justification for extending the definition to include all not for profit customers is that the EECC requires it to do so<sup>31</sup>. This misrepresents the intentions of the EECC's provision. Recital 259 makes clear that not for profit organisations are typically charities and public interest organisations with comparable bargaining power to that of consumers<sup>32</sup>.
- 5.12 In our view, the EECC does not intend for all not for profit and public sector organisations to be caught by the requirements of the Directive. Rather, only those that engage with the market in a similar way to residential consumers should be afforded such protections. By including all not for profit organisations within its definition, Ofcom is "gold-plating" the requirements of the EECC without considering the detrimental effect this could have. This is despite concerns being raised by industry in response to Ofcom's Mobile Handsets consultation.
- 5.13 Ofcom must remove this "gold-plating" from its definition of not for profit customers. Instead, we propose that Ofcom demarcates not for profit customers in a similar way in which business customers have been segmented – on the basis of connections. In line with the provisions of the EECC, those smaller charities and public interest organisations that bear similarities to consumers when engaging with the market would be within scope. Larger charities and public sector organisations should be removed from scope.

---

<sup>31</sup> Proposals to implement the new EECC – para. 3.30

<sup>32</sup> European Electronic Communications Code – Recital 259, page 49



## 6. Pay-as-you-go (PAYG) customers

### **We do not agree with Ofcom's inclusion of PAYG customers in the requirement to provide annual best tariff notifications (ABTNs)**

- 6.1 In a meeting on 15 January 2020, Ofcom stated that it considered all pre-pay customers in scope of the requirement to be provided with ABTNs. Ofcom followed up this consideration with a letter, dated 11 February 2020, in which it set out why it believed the requirement extends to PAYG or pre-pay mobile consumers "depending on the exact terms of their contract". This provides insufficient clarification in respect of the matter, and we note that this assertion was not explicitly made in either its consultation<sup>33</sup> or Statement<sup>34</sup>. Furthermore, we note that 'Pay As You Go' was only mentioned in paragraph 3.17 of its consultation, in which Ofcom confirmed that it had been excluded from the quantitative consumer engagement research.
- 6.2 The provision of end-of-contract notifications (ECNs) and ABTNs has required significant systems and process changes and has led to industry incurring substantial build costs. Requiring providers ex post to facilitate for PAYG ABTNs will lead to further build costs being incurred, where economies of scope could have reduced these costs in the first instance.
- 6.3 We do not agree that the requirements of Article 105(3) extend to 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)<sup>35</sup>. Given that Article 105(3) and Ofcom only consider those customers that are subject to a fixed commitment period that will automatically prolong to be in scope of ECNs<sup>36</sup>, it necessarily follows that PAYG customers do not fall within scope of the Article 105(3).
- 6.4 Additionally, Ofcom made clear in its Statement that 'annual best tariff notifications should be sent to customers who are beyond their fixed commitment period'<sup>37</sup>. As outlined above, PAYG customers are generally not subject to a contractual fixed commitment period, and therefore by extension do not fall within scope of a requirement to provide ABTNs.

---

<sup>33</sup> Consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband – published 14 December 2018

<sup>34</sup> Statement on end-of-contract notifications and annual best tariff information – published 15 May 2019

<sup>35</sup> European Electronic Communications Code – Article 105(3) – "***In addition, and at the same time***, providers shall give end-users best tariff advice relating to their services. Providers shall provide end-users with best tariff information at least annually." [emphasis added]

<sup>36</sup> Statement on end-of-contract notifications and annual best tariff information – para. 3.29, page 16

<sup>37</sup> Statement on end-of-contract notifications and annual best tariff information – para. 3.30, page 17

- 6.5 We recognise that the purchase of a bundled product with pre-paid credit could be interpreted as having a fixed commitment period (for example ✕). Customers can, in some circumstances, also choose for some of these bundles to automatically prolong, subject to sufficient credit being available at the time. However, only a subset of PAYG customers purchase such bundles. It would therefore be disproportionate to extend the requirement to provide best tariff advice to all PAYG customers on the basis that some purchase bundles.
- 6.6 We, along with others in industry, will be writing to Ofcom separately on this issue to set out our concerns in more detail.

#### **Limitations should be placed on the requirement to refund pre-paid credit upon request**

- 6.7 Ofcom proposes to require providers to refund pre-paid credit, upon request, when the customer is switching away to another provider<sup>38</sup>. In light of our commitment to ensure customers get fair outcomes, we agree that providers should refund customers' outstanding pre-paid credit. However, Ofcom must ensure that suitable limitations are in place to prevent the refund process from being abused.
- 6.8 The PAYG market is characterised by flexibility and choice. Customers are able to obtain mobile services without the need to make any kind of minimum commitment or register their details with a provider. The corollary of this is that mobile providers hold virtually no personal data for PAYG customers and are therefore unable to verify who is asking for the refund and whether the requested refund address is correct.
- 6.9 We currently refund customers when they request it. However, this is done on a goodwill basis rather than as part of the terms and conditions of use or an internal policy. Additionally, we have ✕ where we think the credit could be the proceeds of money laundering or credit card fraud.
- 6.10 Credit card fraud occurs where a fraudster uses a credit or debit card to make a purchase (for example pre-paid credit or a mobile handset) that the cardholder has not authorised or has no knowledge of. The fraudster is then able to appropriate the money from this transaction by requesting a refund to their own card or selling on the purchased product. ✕.
- 6.11 A requirement to provide a refund upon request is also likely to enable the placement<sup>39</sup> and layering<sup>40</sup> of criminal proceeds via the pre-paid mechanism. For example, cash which is the proceed of crime could be used

---

<sup>38</sup> Proposals to implement the new EECC – para 7.69 and EECC Article 106(6)

<sup>39</sup> Placement is the introduction of criminal funds into the financial system.

<sup>40</sup> Layering involves creating a web of transactions aimed at concealing any audit trail.

to purchase PAYG top-up vouchers. This can be accumulated on a PAYG sim, or multiple PAYG sims, and refunded upon request and registered as a legitimate source of funds.

- 6.12 In order to mitigate against the risk of money laundering and fraud, and where necessary in line with our regulatory obligations<sup>41</sup>, we may need to undertake extensive customer due diligence. However, for most PAYG customers we do not have sufficient personal information that would enable us to complete additional customer due diligence. Instead, we mitigate by place limitations on our refund process that allow us discretion where we believe the process is being abused.
- 6.13 We are therefore concerned that a General Condition requirement to provide a refund upon request, without any limitations, is likely to drive further instances of credit card fraud and pose an increased risk of money laundering. We request that Ofcom limit the requirement to provide a refund upon request to on a best endeavours basis. This will give providers the opportunity to protect themselves against abuse of the refund process.

#### **Ofcom should remove PAYG customers from the scope of the requirement to provide a contract summary**

- 6.14 As part of information provided at the point of sale, Ofcom proposes to require the provision of a contract summary, free of charge, containing key information. This summary must be provided before the customer is bound by the contract<sup>42</sup>. The objective of the contract summary is to 'enable customers to easily compare different offers and providers, thus making an informed choice about what to buy'<sup>43</sup>.
- 6.15 Whilst we understand and agree that this objective could be achieved by including a contract summary in the sales process for residential pay monthly (PAYM) customers, the provision of a contract summary for PAYG customers would not be quite so straightforward nor would it achieve the objectives of the EECC's provision.
- 6.16 The sales journey for a PAYG customer differs significantly to that of a PAYM customer. PAYG sims are obtainable from a variety of locations, including supermarkets, local convenience stores and online<sup>44</sup>. Customers are not required to register personal details for a PAYG service and can purchase it without needing

---

<sup>42</sup> Proposals to implement the new EECC – para. 4.27

<sup>43</sup> Proposals to implement the new EECC – para. 4.28

<sup>44</sup> These third-party retailers often act as aggregators for mobile customers. They enable customers to easily compare different PAYG offerings by stocking sim cards in close proximity.

to speak to customer service staff prior to purchase. There is therefore limited scope to be able to provide customers with this contract summary before the contracting with a provider.

- 6.17 It would also not be feasible to provide a contract summary within the PAYG sim package that is purchased by the customer. These packages are limited in space and already contain a large amount of important information that relates to the terms and conditions of use. Customers would likely find it difficult to distinguish between the contract summary and other information, and providers will have no way of verifying whether the customer explicitly agrees to the contents of the contract summary<sup>45</sup>.
- 6.18 Moreover, Recital 261 states that the purpose of the contract summary is to allow customers to make well informed choices and allow comparability when purchasing communication services<sup>46</sup>. A contract summary that can only be provided after the purchase has occurred (as would be the case for a contract summary provided within the sim package) will not enable the customer to ex ante make a well-informed decision.
- 6.19 A unique selling point of traditional PAYG services is that sim cards can be obtained quickly, easily and anonymously. Requiring a provider to provide contract summaries for PAYG services would be significantly disruptive for the customer service journey. Providers of PAYG services would need to ensure that sim cards are sold in an environment that enables the provision of a contract summary before the customer purchases the sim card. The corollary of this will be that providers only offer PAYG sims in their own stores. This will significantly reduce intra-brand competition and customers will be limited in the ways in which they can obtain PAYG sim cards (to outlets where a contract summary can be provided – i.e. not supermarkets and local shops). The ease and flexibility of obtaining a PAYG sim would be greatly diminished.
- 6.20 Ofcom has a statutory duty to ensure that it carries out its functions in the interest of customers in a relevant market. Ofcom has not demonstrated that including a contract summary into the PAYG sales process would be consumer welfare enhancing. Rather we suggest that requiring PAYG customers to be provided with a contract summary prior to purchase would significantly reduce intra-brand competition, depriving customers of the unique benefits that PAYG provides.
- 6.21 We urge Ofcom to remove PAYG services from the scope of General Condition C1.5 – C1.7. Ofcom should set this out explicitly in its revised General Conditions.

---

<sup>45</sup> Proposed General Condition C1.6 makes clear that the contract shall only become effective until the terms in the contract summary has been expressly agreed to. How does Ofcom propose that PAYG customers expressly agree to the terms of the contract summary?

<sup>46</sup> European Electronic Communications Code – Recital 261, page 50

## 7. Emergency video relay services

- 7.1 We welcome Ofcom's decision to impose a requirement for fixed and mobile providers to provide emergency video relay services to residential customers. At TUK, we believe that everyone should have access to the products and services they need in order to thrive in a digital world. To that end, we provide our customers with 'Access for You' services that enable customers with disability and accessibility requirements to engage with our customer service teams. For example, we currently provide SignVideo and Next Generation Text Relay Services (RelayUK), which allow BSL users to contact our support teams.
- 7.2 We support Ofcom's proposal to mandate an emergency video relay service, provided it has the support of those that it is designed to serve (i.e. those who do not currently have access to emergency services that is equivalent to that enjoyed by others). Where an emergency video relay solution is put in place it must meet the demands and requirements of those using the service.
- 7.3 However, we urge Ofcom to consider and reflect on the experience and lessons learned from the previous implementation of the Next Generation Text Relay service. A solution of this scale will need to be planned carefully, ensuring that it works correctly first time and within any agreed timelines. Ofcom will need to engage in this process, coordinating and communicating effectively with providers.

**Ofcom must clearly set out how it expects the cost of providing emergency video relay services will be covered; the costs should be borne by the whole of industry**

- 7.4 We agree that the obligation to provide emergency video relay services for free to the end-user should be imposed on regulated firms that provide either/both internet access services or/and number-based interpersonal communications services. In line with this approach, we propose that the cost of providing this service be spread across industry, including both fixed and mobile providers. To require mobile operators to bear the cost of this requirement would be discriminatory and not technologically neutral, a breach of Ofcom's statutory duties<sup>47</sup>.
- 7.5 We request that Ofcom explicitly set out the funding mechanism and how costs are expected to be apportioned. Where services will be free to the end-user this may prompt changes to current wholesale arrangements

---

<sup>47</sup> Communications Act 2003 – Section 4(6)

between providers. Providers will require certainty about how costs can legitimately be recovered when forming new agreements with wholesale providers of emergency video relay services.

- 7.6 We are concerned that the absence of clarity and certainty could give rise to disputes or result in the exploitation of market power where there is only one wholesale provider of such services available.
- 7.7 Ofcom has a key role to play in ensuring the effective and timely delivery of emergency video relay services. In the absence of Ofcom intervention prolonged commercial negotiations, and subsequent disputes, could delay the timely availability of these services. We urge Ofcom to be pro-active in ensuring commercial negotiations can progress in a timely and effective manner. Where appropriate Ofcom should consider a requirement for access to wholesale emergency video relay services to be on fair, reasonable and non-discriminatory terms, conditions and charges (FRAND). This would be consistent with the requirements set out for the existing Next Generation Text Relay service.
- 7.8 Ofcom makes clear that it expects the cost of providing emergency video relay services to be borne by all providers of internet access services or number-based interpersonal communications services – i.e. fixed and mobile providers<sup>48</sup>.
- 7.9 Given that the obligation to provide emergency video relay services will apply to both internet access service providers and number based interpersonal communications service providers, we believe that the costs should be recovered proportionately from across the industry. Customers will be able to access emergency video relay services via fixed broadband connections as well as a mobile data connection. It is therefore likely that a significant proportion of these service connections may not be initiated by a mobile customer, nor using any part of the MNO's network. Ofcom must take this into consideration when apportioning efficiently incurred costs.
- 7.10 We are therefore concerned by Ofcom's proposal to use the approach taken for emergency SMS as a proxy for cost recovery of emergency video relay services<sup>49</sup>. Using emergency SMS as a proxy for cost recovery would be both inappropriate and discriminatory, placing an undue cost burden on mobile network operators (MNO). This would be a breach of Ofcom's statutory duties as a regulator, where Ofcom is required to not favour one form of electronic communications service over another and to ensure that regulation is not unnecessarily burdensome<sup>50</sup>. For the avoidance of doubt, we would not accept a funding mechanism that meant MNOs solely bear the costs of emergency video relay services implementation.

---

<sup>48</sup> Proposals to implement the new EECC – para 10.49

<sup>49</sup> Proposals to implement the new EECC – para 10.50

<sup>50</sup> Communications Act 2003 – Section 4(6) and 6(1)

**There are a number of operational and technical complexities that Ofcom must consider before mandating provision of emergency video relay services**

- 7.11 Currently, voice call traffic to the emergency services is prioritised by mobile networks over other normal call traffic. However, the proposed emergency video relay service will use an internet access connection.
- 7.12 Open Internet Regulations do now allow specific types of traffic to be prioritised over other standard forms of internet access. As a result, there could be significant stability and resilience risks that Ofcom must be aware of. Ofcom should take into consideration that the provision of emergency video relay services is effectively an overlay service, which may not provide the same level of stability as existing methods of connecting to emergency services.
- 7.13 Additionally, existing connections to emergency services (over voice or SMS) are required to automatically provide accurate and reliable caller location information to the emergency services. Emergency video relay services are unlikely to have this capability, and emergency call handlers will need to be notified that the location being received by the emergency video relay call might not be the end-user's location<sup>51</sup>. This must be borne in mind by Ofcom and any wholesale providers when agreeing the technical specifications of any video relay services. We also ask that Ofcom does not include emergency video relay services in scope of the existing regulatory requirement to provide caller location.
- 7.14 We request that Ofcom clarifies the position for end users of the service in relation to data usage. Given that the connection to the emergency video relay provider will be made via an Internet access service and not a voice call, end users should be aware that their data usage, in the case of using a mobile data connection, for example using a smartphone, will decrement from their data allowance.
- 7.15 Finally, we also request that Ofcom clarifies that there will be no requirement for Regulated providers to provide a special tariff scheme for data usage, in the way that the Text Relay service requires a special tariff scheme for the call element. The two services are very different, and we believe that replicating this approach for a data connection would not be viable.

---

<sup>51</sup> If that connection is made over a fixed or mobile voice connection, then the emergency call handling centre and agent will need to be made aware, via some kind of flag or system, that the person that is calling them, via the onward call, is not the end person requesting the emergency assistance and is therefore not in the location which will display to the emergency call handler as part of the existing technology in place for voice calls.

## 8. Annex

Ofcom's consultation questions:

**Question 1: Do you agree with our proposed changes and additions to the defined terms used in the GCs in order to align with the EECC, as set out in Annex 11?**

We do not agree with Ofcom's proposed definition of "Not for Profit" customers. To consider all charities and public sector organisations, irrespective of size, as requiring additional support when engaging with the market is a broad oversimplification. Large charities and public sector organisations engage with us in a similar way to large enterprises, with strong countervailing buyer power, bespoke terms and public procurement mechanisms to aid engagement. Ofcom must distinguish between not for profit organisations that have similar characteristics to residential customers, as per the intentions of the EECC and those that do not.

We also urge Ofcom to include a demarcation of micro and small business customers that is based on connection volumes, rather than just employee numbers or annual turnover. Providers do not generally have access to this information and customers may not be inclined to share such information with us. This leaves providers in a difficult position where compliance with General Condition requirements is reliant on information that they might be unable to obtain.

**Question 2: Do you agree with our proposed changes to the GCs to implement Article 102, as set out at Annexes 11 and 16?**

We agree that the proposed changes set out in Annexes 11 and 16 reflect the requirements of the EECC. However, Ofcom must give providers sufficient time to make these requisite changes. As set out above, we anticipate that we will need between 3 to 6 months to make the changes set out in Annexes 11 and 16.

We do not agree that the requirement to provide a contract summary should extend to PAYG customers. There is limited scope to provide PAYG customers with contract summaries before they are bound by the terms of use. Requiring providers to do so could have unintended consequences, especially for intra-brand competition. We urge Ofcom to remove PAYG from the scope of proposed General Condition C1.5 to C1.7.

**Question 3: Do you agree with our proposed guidance in Annex 6 on our expectations for how providers should comply with the provision of contract information and the contract summary?**

We welcome Ofcom's decision to provide guidance on how contract information and the contract summary should be provided to the customer. Where appropriate, Ofcom should extend out its guidance to address the questions and concerns raised by industry in relation to the provision of information and the contract summary.



**Question 4: Do you agree with our proposed changes to the GCs to implement Article 103 and our proposed approach to implementing Article 104, as set out in Annex 11?**

We agree that the proposed changes set out in Annex 11 reflect the requirements of the EECC. However, Ofcom must give providers sufficient time to make these requisite changes. As set out above, we anticipate that we will need between 3< to make the changes set out in Annex 11.

**Question 5: Do you agree with our proposed changes to the GCs to implement the requirements in Article 105, as set out in Annex 12?**

No. We believe that the proposed General Condition c 1.11 goes beyond what is required under Article 105. We suggest replacing “stipulates” with “mandates minimum” for the reason set out in this response.

In any event, we are of the view that the O2 Custom Plan tariff proposition is consistent with the EECC

In the event that Ofcom concludes that the proposed General Condition C 1.11 and/or Article 105 precludes Custom Plan, by virtue of sections 3 and 6 of the Communications Act 2003, Ofcom must amend General Condition C 1.11 so as to remove any harmful effects that operate in breach of Ofcom’s statutory duties.

Ofcom must also provide clarity on what it means by “exclusively to the benefit of the customer” and “purely administrative” with regard to the right to exit. These terms are open to interpretation and are likely to be implemented inconsistently if Ofcom does not provide clarity. Upon conclusion of the Brexit transition period, we urge Ofcom to conduct a cost-benefit analysis of this lowered threshold of right to exit. We anticipate that such a requirement will cause significant legal and commercial uncertainty, especially where the right to exit applies to price changes beyond the core subscription price.

We urge Ofcom to remove linked split contracts from the scope of General Condition C1.17 until it has concluded its broader review of linked split mobile contracts. Ofcom’s decision to include this requirement is incongruous with its earlier statement that it continues to consider representations made in response to its Mobile Handsets consultation in July 2019.

**Question 6: Do you agree with our proposed changes to the existing guidance as summarised here and set out in Annex 7?**

No comment.

**Question 7: Do you support our proposals to introduce (a) new general switching requirements for all types of switches for residential and business customers and (b) specific switching requirements on information, consent, compensation and notice period charges for residential customers?**

Whilst we support Ofcom's proposed switching rules for residential customers, we are concerned that Ofcom has not provided sufficient time to implement the new general switching requirements for business customers. Business customers with more than 10 employees currently do not have an established industry switching process in place. Industry would be required to create this process, bespoke for the needs of larger business customers. Based on the timelines provided for auto-switch we urge Ofcom to give industry  $\times$  to establish this process.

With our Fairness for Customer commitments in mind, we agree that switching or porting providers should be refunded pre-paid credit upon request. However, Ofcom must put in place suitable limitations on this requirement. Specifically, we recommend that Ofcom make this requirement to be on a best endeavours basis. This will allow providers discretion over whether to refuse refunds for transactions that could be a result of credit card fraud or money laundering.

**Question 8: Do you support our proposed guidance in Annex 8 on compensation for residential customers?**

No comment.

**Question 9: Do you agree with our assessment that device locking can deter customers from switching and cause customer harm?**

No comment.

**Question 10: Do you agree with our assessment of the effectiveness of Options 1 and 2 in reducing the consumer harm that can result from device locking and the impact on providers of Options 1 and 2?**

No comment.

**Question 11: Do you agree with our proposal to prohibit the sale of locked mobile devices?**

No comment.

**Question 12: Do you agree that we should protect customers by issuing guidance on our proposed approach when considering the case for enforcement action against non-coterminous linked contracts?**

We believe that Ofcom's proposed guidance may harm consumers and should not be adopted on the strength of the case advanced by Ofcom in the consultation document.

In our view, guidance is helpful if it satisfies two criteria:

1. it is based on a robust and cogent "theory of harm"; and
2. empirical evidence supports such a theory of harm

Guidance issued in any other circumstances is likely to be harmful, since it would have the capacity to deter innovative commercial arrangements which might be beneficial to consumers. That is to say that there is risk of arbitrary regulation inhibiting the competitive process, which is likely to act against consumers' interests (in breach of Ofcom's statutory duty).

**Question 13: Do you agree with our proposed guidance in Annex 9 which sets out our proposed approach to assessing whether certain types of non-coterminous linked contracts are likely to act as a disincentive to switch?**

No, we do not agree with Ofcom's proposed guidance. As we have set out in this response, in our view, Ofcom has neither presented a robust, cogent theory of harm, nor empirical evidence in support of such a theory. If it proceeds to seek to implement the guidance, there is a risk that the competitive process would be distorted in the sense that Ofcom would be increasing regulatory uncertainty in respect of tariff propositions that may well deliver consumer benefits and this would act against the interests of consumers, in breach of Ofcom's statutory duties.

**Question 14: Do you agree with our proposal to mandate emergency video relay for emergency communications to be accessed by end-users who use BSL?**

We agree with Ofcom's proposal to mandate an emergency video relay service, provided it has the support of those that it is designed to serve (i.e. those who do not currently have access to emergency services that is equivalent to that enjoyed by others). Where an emergency video relay solution is put in place it must meet the demands and requirements of those using the service.

**Question 15: Do you agree with our proposal that the obligation to provide emergency video relay free to end-users should be imposed on regulated firms that provide internet access services or number-based interpersonal communications services?**

We agree that the obligation to provide emergency video relay services for free to the end-user should be imposed on regulated firms that provide both internet access services and number-based interpersonal communications services. In line with this approach, we propose that the cost of providing this service be spread across industry, including both fixed and mobile providers. However, we are concerned by Ofcom's proposal to use the approach taken for emergency SMS as a proxy for cost recovery of emergency video relay services. Using emergency SMS as a proxy for cost recovery would be both inappropriate and discriminatory, placing an undue cost burden on MNOs. This would be a breach of Ofcom's statutory duties as a regulator, where Ofcom is required to not favour one form of electronic communications service over another and to ensure that regulation is not unnecessarily burdensome.

**Question 16: Do you have any comments on our proposed approval criteria for emergency video relay services, or the proposed approval process?**

We suggest that Ofcom is best placed to set out the approval criteria based upon its knowledge of existing schemes both in the UK and other countries.

However, as the Wholesale provider will need to contract with the approved video relay provider in order to provide onward access to all the Regulated providers, we re-iterate the point that Ofcom should clarify and confirm that in providing access to other communications providers, the Wholesale Provider will be obliged to provide access to Regulated providers on fair, reasonable and non-discriminatory terms, including cost-oriented charges. This would be consistent with the requirements set out for the existing Next Generation Text Relay service.

**Question 17: Do you agree with our proposal to a) extend the current requirement to cover the other specified communications i.e. any communication (except marketing) that relates to a customer's communication service, and b) extend the GC so that any customer who cannot access communications due to their disability should also benefit from accessible formats? When answering please provide evidence of any benefits or costs.**

In line with the Fairness for Customer principles and our commitment to customers requiring additional support, we welcome the inclusion of this requirement. However, we have one observation and concern that we wish to raise regarding a requirement to send service messages in accessible formats. We think that Ofcom should limit the scope of this requirement to exclude time sensitive messaging, for example, roaming notifications, spend cap limits, data usage notifications. These notifications are sent at random intervals, dependent on the customer's usage at any given time or any given period and are not conducive to being produced in accessible formats (which take time to create and send to customers).

We note in paragraph 11.17; Ofcom confirm that once a disabled customer has requested communications in an accessible format, communications would thereafter automatically be provided in a reasonably acceptable format. Ofcom should set out examples of what would constitute "unreasonable" to benchmark what Ofcom would consider unreasonable requests and what factors providers could consider when assessing the reasonableness of a customer's request.

**Question 18: Do you agree that implementation by December 2020 is reasonable?**

No. We do not agree that Ofcom has given providers sufficient time to make the necessary changes. As set out above, we anticipate that many of these changes will require up to 36 months to complete where roadmaps are significantly contested. Moreover, where certain changes are particularly complex or require industry engagement, we suggest that Ofcom allow at least 36 months to complete implementation.

**Question 19: Do you agree with our proposed changes for implementing the requirements in Article 108 and Article 109 to reflect the differences between these EECC provisions and their predecessors in the Universal Service Directive?**

No comment.