

Ofcom's Proposals to implement the new
European Electronic Communications
Code

UKCTA Response to Ofcom's
Consultation

11th March 2020



Executive Summary

1. UKCTA is a trade association promoting the interests of fixed line telecommunications companies competing against BT as well as each other, in the residential and business markets. Its role is to develop and promote the interest of its members to Ofcom and the Government. Details of membership can be found at www.ukcta.org.uk.
2. UKCTA notes that the new European Electronic Communications Code (EECC) is the most significant review of the relevant EU framework since its inception in 2002. We agree with the focus, where appropriate, on protecting and empowering consumers and customers. Indeed, UKCTA members and the industry as a whole have been constantly improving the customer experience with Ofcom over the last 17 years – both through regulation but also voluntary action. It is important to recognise that the industry is not starting from zero – both in terms of consumer protection and in terms of purpose.
3. Ofcom with the support of a broad church of Communications Providers has taken significant steps over the last few years to improve consumer protection including the following:
 - a. Strengthening the customer switching process by adopting a truly gaining provider led process (2015)¹
 - b. Improved customer awareness and access to alternative dispute resolution (2016/2018)²
 - c. Strengthening the protection of vulnerable customers (2018)³
 - d. Introduction of the industry automatic compensation scheme (2019)⁴
 - e. Agreeing to adopt customer fairness commitments (2019)⁵
 - f. Agreeing to adopt broadband pricing commitments (2019)⁶
 - g. Introduction of end-of-contract and annual best tariff notifications (2020)⁷
4. In many cases, the UK is already ahead of the European Electronic Communications Code in terms of consumer protection. For instance, the four largest providers agreed to implement automatic compensation already in 2019 and have only last month launched the new requirements around end-of-contract and annual best tariff notifications (as Ofcom chose to implement this change ahead of the EECC).

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0032/69179/statement.pdf

² https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01101

³ https://www.ofcom.org.uk/_data/assets/pdf_file/0026/106397/Statement-and-Consultation-Review-of-the-General-Conditions-of-Entitlement.pdf

⁴ <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/automatic-compensation2>

⁵ <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/broadband-and-phone-firms-put-fairness-first>

⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0018/168003/broadband-price-differentials.pdf

⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0018/148140/statement-helping-consumers-get-better-deals.pdf

5. Extending many of the consumer protection style measures to enterprise and corporate business customers has the real potential to inhibit competition in the business market. We believe it is sensible and proportionate for Ofcom to carve out large business customers from the scope of the Revised General Conditions C1.14 to C1.19. (See paragraph 70).
6. The same concern applies to the inclusion of all not for profit organisations (regardless of size).
7. The political environment within the UK, during the period of the development of the EECC has changed numerous times. This has led to great uncertainty for providers as to how the EECC will be implemented in the UK. Whilst UKCTA members appreciate that Ofcom has like them had to contend with a level of uncertainty, it simply isn't practical for CPs to begin the immense task of implementation until a Statement from Ofcom is published giving effect to the clearly identified regulatory requirements. Given that Ofcom's Statement is likely to be published (at the very earliest) around 9 months before the planned implementation date CPs will not have adequate time to fully implement.
8. Ofcom's statutory duties require that it ensure regulatory activities are transparent, accountable, proportionate. Ofcom has told UKCTA that CPs should start the implementation process before Ofcom's full consideration of the consultation responses and the publication of a Statement. This position simply does not satisfy these statutory requirements. Ofcom's statutory duty to consult under section 48A of the Act is reinforced by general principles of administrative law, including "the Gunning principles", on what constitutes a fair and adequate process. The first Gunning principle provides that the consultation must be made at a time when proposals are at a formative stage. The fourth principle is that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.
9. Ofcom should not pre-empt the outcome of this Consultation and should certainly acknowledge that if the proposals are to be implemented with a clear outcome of enhanced consumer protections and minimisation of consumer harm the focus should be on the accuracy of the implementation rather than an artificial deadline.
10. To enable CPs to implement those requirements as detailed in the Statement (not the consultation document) UKCTA members believed that an implementation timescale of 18 months from the date of the Statement is realistic. If Ofcom considered that a staggered implementation timeline could be achieved UKCTA members would be pleased to work with Ofcom to agree a staged timetable.
11. UKCTA members are very willing to continue to work with Ofcom to achieve an effective updating of the existing regulatory requirements, within an achievable timeframe ensuring a vibrant communications market that has at its core consumer protection and choice.

12. There are a number of areas where the drafting and/or the practical implementation of the EECC is extremely challenging or leads to perverse outcomes for customers. We address these issues in the definitions and scope section from paragraph 43.

The Consultation and Publication of an Ofcom Statement should be completed before any final decision is made on the implementation timescale.

13. It is wholly unreasonable for Ofcom to expect CPs to have begun the implementation process on a set of regulatory requirements that have yet to be confirmed. UKCTA expects that responses to this consultation will be plentiful and that Ofcom will have a considerable job on its hands in reviewing responses and considering whether changes to the proposals are necessary. The timescales are unrealistic and do not accord with any best practice principles. A presumption that there will be no changes to the proposals contained within the consultation is contrary to Ofcom's performance of its statutory duties.
14. In any event implementing the proposed changes will require significant resource and planning regardless of the size and complexity of a CP's business.
15. Ofcom is proposing that the following changes would take effect from 21 December 2020:
- a. Making broadband switching easier and more reliable;
 - b. Banning mobile providers from selling "locked devices";
 - c. Better contract information;
 - d. Stronger rights to exit; and
 - e. Ensuring customers with disabilities have equivalent access to, and choice of, communications services.
16. Based on UKCTA members' experience and initial assessments as to what would be required were Ofcom's proposals to be confirmed following its consultation, Ofcom's consultation process and proposed implementation date would not allow operators sufficient time to implement these changes. Budgeting, procurement, software development and staff training are just some of the implementation tasks that will need to be completed. Implementing the proposed changes will require significant resource and planning.
17. Based on UKCTA members' experience and initial assessments as to what would be required the proposed implementation date would not allow CPs sufficient time to implement the required changes.
18. There has been considerable uncertainty as to whether and how the EECC Directive would be implemented as a result of the Brexit process and political context.

There is a significant consumer harm as the result of a rushed implementation of the proposals

19. Whilst it is without question that CPs would make every effort to implement the changes, given the extremely short timescales unfortunate, but likely consequences could be:
- a. Cutting other pro-consumer developments from existing product roadmaps; and
 - b. Compromised implementation as a result of:
 - Reduced time for devising potential options;
 - Having to choose between options based on what is possible within the deadline rather than what is the best overall solution; and
 - Reduced time for testing options (and training staff) before roll-out.
 - c. Significant risk of material consumer harm.

Ofcom must take account of operators' feedback on implementation timelines

20. Section 3(1) of the Communications Act 2003 (“Act”) states that it shall be Ofcom’s principal duty, in carrying out its functions:
- a. to further the interests of citizens in relation to communication matters; and
 - b. to further the interests of consumers in relevant markets, where appropriate by promoting competition.
21. In performing its duties under section 3(1) of the Act, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, as well as any other principles appearing to Ofcom to represent best regulatory practice (section 3(3) of the Act).
22. Section 3(4) of the Act provides that Ofcom must have regard, in performing its duties, to a number of matters, as they appear to us to be relevant in the circumstances, including the desirability of promoting competition in relevant markets and the desirability of encouraging investment and innovation in relevant markets.
23. It would not be transparent, accountable or proportionate for Ofcom to ignore operators’ feedback on implementation timelines. Failing to take account of key stakeholders could also discourage investment and innovation.
24. Ofcom must therefore take account of operators’ feedback on implementation timelines, or else risk breaching its statutory duties.
25. **Ofcom must set realistic timelines (taking account of operators’ feedback) before commencing enforcement action**

- a. Ofcom has discretion in relation to how it enforces the proposals.
- b. In light of feedback from operators, Ofcom would not be performing its duties in the best interests of consumers if it enforced the proposals from 21 December 2020.
- c. Ofcom must give operators sufficient time (taking account of operators' feedback) to implement the necessary changes before taking enforcement action. Ofcom must communicate these realistic timelines to operators.
- d. We believe that Ofcom would satisfy its obligations by publishing the updated General Conditions and new guidance by the 21st December whilst having confirmed in the Statement that enforcement action will not be taken by Ofcom until 18 months after the date of the Statement.

In the alternative, Ofcom must set out that enforcement of the changes will not be an administrative priority

26. Ofcom must set out that enforcement of the changes will not be an administrative priority, at least for a reasonable period of time. There is precedent for Ofcom confirming that enforcement of particular general conditions will not be an administrative priority. For example, in relation to GC A1.3 (previously GC 1.2) with regards to reactive save. Again, we think Ofcom could cover this off in its final Statement.
27. Given that the obligation to implement the EECC Directive will fall away a mere 10 days after Ofcom is proposing to implement it, Ofcom should also consider whether enforcing the proposals after the UK have left the European Union would constitute the maintenance of burdens which have become unnecessary, in breach of Section 6(1)(b) of the Act.

UKCTA's proposed timeframes for implementation deadline and commencement of enforcement action

28. To enable CPs to implement those requirements as detailed in the Statement (not the consultation document) UKCTA members believed that an implementation timescale of 18 months from the date of the Statement is realistic. If Ofcom considered that a staggered implementation timeline could be achieved UKCTA members would be pleased to work with Ofcom to agree a staged timetable.
29. UKCTA members are very clear that protecting customers from consumer harm is a top priority and a more considered implementation timeline is appropriate in all of the circumstances.

Ofcom has failed to conduct appropriate impact assessments for the proposed changes.

30. Ofcom has a duty under section 7 of the Act to carry out impact assessments for "important" proposals.

The proposals are undoubtedly “important” given that implementation will have a “significant impact” (section 7(2)(a)) on operators’ businesses. Operationally, the proposed changes will impact the contracting process for all customers and the content of those contracts. Strategically, the proposed changes will require significant cost/resource to implement and are likely to impact existing development roadmaps.

31. UKCTA further notes that Ofcom’s guidance on Better Policy Making⁸ states:

- a. that an impact assessment should be “a core part of the policymaking process, **not a bureaucratic add-on**” (1.6); and
- b. “a decision which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders will have **a more comprehensive** Impact Assessment than a decision which will have a less significant impact” (1.7).

32. Section 7(5) of the Act provides that an impact assessment may take such form and relate to such matters as Ofcom considers appropriate.

33. Ofcom’s Better Policy Making guidance states more specifically that an impact assessment will generally:

- a. identify the impacts of each option on the interests of particular groups of stakeholders;
- b. identify any impacts which each option would have on competition;
- c. identify and, where possible, **quantify the costs** and benefits flowing from the impacts which each option would have; and
- d. assess the key risks associated with each option.

34. Ofcom’s impact assessments for the proposals are not “appropriate” and do not comply with Ofcom’s own guidance. Ofcom should be mindful of its duties under Section 7 of the Communications Act. In particular, we cannot see that Ofcom has undertaken a quantification of the costs of each proposal (especially important given the proposals are likely to have “a wide-ranging impact”). We highlight a few examples (not an exhaustive list) of where Ofcom is making assumptions on costs rather than actually attempting to quantify them:

- a. Helping customers manage their use of communications services. Ofcom simply states that “We do not **expect** the changes we are proposing here to have a significant impact on providers” and “We do not **expect** the inclusion of information on charges in the notification to significantly increase costs for providers.”
- b. Provision of data to third parties. Ofcom states that: “We recognise that the provision of data to third parties **could** lead to an additional cost burden for providers. The cost impact **may vary** across providers and could depend on factors

⁸ https://www.ofcom.org.uk/data/assets/pdf_file/0026/57194/better_policy_making.pdf

such as the open data format used to provide data to relevant third parties, the datapoints being made available and the current data-sharing arrangements between providers and relevant third parties.”

- c. Extending contract duration when adding a service or equipment. Ofcom states that: “We **expect** the impact on providers to be small. In particular, we would expect providers to already be taking all necessary steps to ensure that their customers are making informed decisions, which would include expressly agreeing to any extension of their contractual period. To the extent that they do not already do so, then any additional safeguards that may be required will be an important protection for consumers and we **expect** operators to be able to incorporate them into their existing processes at a low cost.”

Ofcom must consult again if implementation occurs after the end of the transition Period.

- 35. If the timelines change and the UK leaves the European Union before the EECC Directive has been implemented, then the strict obligation to fully transpose the EECC Directive into UK law would fall away. In this scenario, the UK would have full direction as to which, if any, elements of the EECC Directive it wishes to implement into UK legislation.
- 36. If this scenario arises, then Ofcom must reconsider the changes, if any, that it is proposing to make to UK legislation. Ofcom must then consult on these changes. As part of this consultation, it would also be necessary for Ofcom to undertake a full impact assessment in accordance with its duties under section 7 of the Act.

Section 4 of the Consultation outlines Ofcom’s proposals for implementing the requirements in Article 102 of the EECC.

- 37. The requirement to provide the contract information before the customer is bound by the contract means that customers buying voice services may be required to engage with their provider a second time in order to confirm their agreement rather than being able to conclude the purchase in a single call. These proposals are unlikely to result in an engaging sales process and could result in delays to switching compared with the journey they might currently experience. The current journey should already provide customers with the key facts of their new tariff as well as provide them with a cooling-off period to review their selection.
- 38. The ease of this process would also be removed for customers selecting another fixed-term tariff. In these instances, they would need to respond to the summarised information to avoid moving onto a default option, despite already actively choosing a different tariff. The current approach provides a more efficient use of time for customers in terms of being able to make an informed choice.

39. The proposal also introduces the potential of delays for some vulnerable customers who might not have immediate access to summary information via email but would have to wait for details to be provided by post.
40. In A6.9 Ofcom refers to a provider making the contract information available via a downloadable document and gives the example of “a non-personalised pdf”. It would be helpful to understand how Ofcom envisages a non-personalised pdf as being capable of meeting the requirements for personalised information.
41. All customers, including those who cannot receive information in a durable form during the call, should therefore be given the opportunity to confirm they wish to proceed on the call without an additional step being imposed on them of needing to re-contact the provider to confirm they wish to proceed.
42. Overall the proposals to provide such a high level of personalised information in a real time scenario not only have the real potential to inhibit customer choice primarily because of customers dislike of information overload, and will come at a significant cost which will ultimately be passed on to customers in one way or another. Ofcom has not adequately considered this in its impact assessment.

Definition and scope issues

43. Ofcom seeks views on proposals to extend the end of contract notification provisions added to the General Conditions of Entitlement last year to bundled services, for both to residential and business customers. We are concerned that there are already real difficulties in complying with these provisions in many business contexts involving resellers. Layering on requirements in relation to bundled services will complicate matters further.
44. Our concern in this area relates to the following type of scenario which typically occurs:
 - a. Openreach provide the network infrastructure
 - b. BT Wholesale sell it on to a CP
 - c. The CP, at the request of their reseller, sell it on to the end business customer, billing them directly
 - d. The reseller bills the CP for the difference between the end customer price and the trade price (“commission”).
45. The difficulty here is that the tariffs for the end customer are set not by the CP but by the reseller which is able to select a range of packages (speeds, tariffs, terms) from the CP’s customer portal. It is impossible for the CP (who bills the customer and has the direct customer relationship) to advise on the best tariffs since they are determined by someone else.
46. It is far from clear how the General Conditions would apply to this type of relationship. Adding in the requirement to advise on bundled (non-telecoms) contracts and services seems to us to complicate matters unduly. It is clear to see how this could be applied in

the realm of consumer triple play services but in a business context with complex relationships between infrastructure providers, wholesalers, resellers and end users we struggle to see how it might operate.

47. In the consultation, Ofcom considers that Art 107 can extend regulation under the EECC to *any* service, including services that are outside the scope of the EECC itself (such as energy or insurance). For example, that would mean that a customer taking a bundle of fixed and mobile services and energy would have EECC regulation applying to *all* the individual services in that bundle as if those services were an electronic communications service (ECS). This approach goes well beyond the intended purpose and jurisdiction of the EECC. As well as being legally flawed, this approach could lead to worse outcomes for consumers. Similar commercial features or terms in consumer contracts arise in different sectors for different reasons and to solve different problems. There is no automatic ‘read-across’ that rules for communications will be apt in other sectors. Nor does Ofcom have the requisite expertise or focus to regulate services in other sectors. The inevitable effect would be to make it unduly costly and inconvenient to include ECS in cross-sector bundles, leading to less choice and less innovation. Such outcomes are contrary to Ofcom’s statutory duties, and stated aims, to improve outcomes for consumers and to deliver more choice and more innovation.
48. Ofcom should adopt a more targeted view of Art 107: that the inclusion of internet access services (IAS) and publicly available number-based interpersonal communications services (ICS) in a bundle would extend EECC regulation to all *the ECS elements of that bundle*. This is the correct reading of Art 107: only an ECS is capable of being within the scope of the EECC and Art 107 does not (and cannot) extend EECC regulation to non-EECC services.
49. UKCTA members have noted that there are inconsistencies in definitions proposed and those already contained within other parts of the General Conditions. We would urge Ofcom to do a complete check of the General Conditions of Entitlement to ensure consistency throughout. We have detailed below examples of inconsistencies. We comment further on this at paragraph 77.

“Microenterprise and Small Enterprise”

50. Ofcom have lifted the definitions for microenterprise and small enterprise in the Consultation directly from the *ceilings* in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (the “**Recommendation**”) without any consideration of the proportionality or impact of these thresholds.
51. This is a matter of Ofcom exercising discretion; Article 288 the Treaty of the Functioning of the European Union, makes it clear that the Recommendation is not binding and both the EECC and the Recommendation make it clear that the relevant thresholds of microenterprise and small enterprise are a matter for national law. In other words, they are a matter, in this instance, for Ofcom to determine.

52. In exercising such discretion, Ofcom is bound by Section 47(2)(b)-(d) inclusive of the Communications Act 2003; requiring Ofcom to demonstrate that its exercise of discretion (in this case lifting the ceilings in the Recommendation verbatim) are proportionate, transparent and non-discriminatory.
53. In exercising that discretion, a proper impact assessment (see Section 7 of the Act) is required. This would include a properly specified cost-benefit analysis with input from appropriate experts and from those likely to be affected, including UKCTA and its membership. As to what that entails, see the Competition Appeal Tribunal's decision in *Vodafone v Ofcom* [2008] CAT 22.
54. There is no such analysis or justification in the Consultation, which, if left unchecked prior to any statement imposing these new General Conditions, is an egregious overreach and a breach of Ofcom's clear statutory duties.
55. However, to suggest that (we paraphrase) "because a business of 50 employees does not look like a FTSE-100 company, it must therefore look like a residential consumer" is an intellectually flawed logic that Ofcom has been criticised for previously; for example, see the Competition Appeal Tribunal's judgment regarding geographic market definitions in *British Telecommunications plc v Office of Communications* [2017] CAT 25. A proper analysis of where bargaining power "tips" is required prior to the consideration of imposing any thresholds regulating a sector that has previously been considerably lighter touch.

"End-user" vs "consumer"

56. The EECC does not envisage that residential and large business customers should be treated the same way. Rather the intention in the EECC is to differentiate the needs of different types of customers and that large businesses should not be subject to the same regulatory requirements as residential consumers. In particular, recital 259 of the EECC notes that "larger enterprises usually have stronger bargaining power and do, therefore, not depend on the same contractual information requirements as consumers".
57. We welcome that Ofcom acknowledges this, for example in paragraph 7.90 of the consultation: "larger businesses, especially those that are significant users of communication services, tend to have a stronger bargaining power than residential customers".
58. Unfortunately, the welcome distinction between the different categories of end-users is not consistently reflected throughout the end-user rights provisions of the EECC (e.g. Articles 103-107). While in some provisions larger enterprises have been rightfully carved out, in others they are erroneously still captured. We see this as a missed opportunity for better regulation which is proportionate to the potential for harm.

59. Referring to general principles of good governance and effective regulation, UKCTA calls upon Ofcom to test and verify the actual theories of harm to large business customers arising in the context of the proposed revised GCs. The lack of evidence that these theories have been tested using impact assessment or other acceptable verification tools highlights a flaw in Ofcom’s methodology that could easily lead to inappropriate outcomes whereby communications providers serving large business customers are unnecessarily caught in parts of consumer protection regulation. It also conflicts with Ofcom’s statutory duties under the Communications Act 2003 (the “Act”), and in particular section 3(1) of the Act where Ofcom is required to ensure regulatory activities are transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. Over prescriptive consumer protection regulation forced upon sophisticated enterprise business customers could lead to a stifling of the competitive market and be a complete disbenefit to that class of customer.
60. This is especially disappointing given that Ofcom did make a good start of identifying the realities of serving such customers in its statement on End-of-Contract Notifications in May 2019⁹ and adapting the regulation accordingly.
61. We therefore urge Ofcom to consider all General Conditions (GCs) where the term “end-user” is used and to make sure that none of the consumer protection provisions are extended to large enterprise customers. Indeed, all instances where the scope of the condition depends on the type of “end-user” should be tested to ensure only those end-users and their respective providers should be included e.g. Not-for-Profit customers - see more detail below.
62. In the alternative we would urge Ofcom to make explicit that large business customers are different to consumers in the explanatory memorandum, or statement, as recognised in the EECC, and in light of this it would intend to take a lighter approach to monitoring and enforcement based on likelihood of harm where consumer protection provisions fail to carve out large businesses. This reasonable and understandable approach leads to a situation in which larger enterprises are de facto carved out, as currently is already the case in some other EU Member States.
63. We note that other EU States have effectively taken account that large enterprise customers do not have the same consumer protection needs that domestic and small business users might have. For example, in the Netherlands the government has announced that it will publish secondary legislation in the summer, further laying down rules on provider switching. Only consumers, micro-enterprises and NGOs will be protected and thus larger enterprises will be left out of scope.
64. In France the transposition of the end-user rights is almost entirely done by amending the French "Code de la Consommation" (Consumer Code) This code is in the main for

⁹ <https://www.ofcom.org.uk/consultations-and-statements/category-2/helping-consumers-get-better-deals>

consumers only, (subject to some designated articles which extend to non-profit organisations, microenterprises, and small enterprises.

Not-for-profit definition

65. UKCTA members are concerned that Ofcom’s definition of “not-for-profit customer” brings a lot of large business customers and their respective providers into scope of a large number of consumer protection regulations unnecessarily. There is no official definition of “not-for-profit organisation” in the EECC Articles (contrary to what Ofcom suggests is true at paragraph 3.30); however, recital 259 does describe them as:

“Not-for-profit organisations are legal entities that do not earn a profit for their owners or members. Typically, not-for-profit organisations are charities or other types of public interest organisations. Hence, in light of the comparable situation, it is legitimate to treat such organisations in the same way as microenterprises or small enterprises under this Directive, insofar as end-user rights are concerned.”
(emphasis added)

66. The clear intention therefore is to capture those organisations that have a similar degree of bargaining power to consumers, and effectively act like them. This explains why they would need additional protection in regulation.
67. We welcome that Ofcom acknowledges the difference in type of end-user and difference in need for protection. In paragraph 2.10 of the consultation, Ofcom mentions: *“The scope of end-user rights provisions varies, with some applying to residential customers, some also applying to certain legal entities such as microenterprises or not for profit organisations, and others applying to all end-users, including larger businesses”*.
68. In paragraph 9.51 of the consultation, it is further mentioned: *“In our view, micro and small enterprise customers as well as many not for profit organisations are likely to behave in a similar way to residential customers (and have more limited bargaining positions than some larger businesses). We therefore consider that these customers should have the right to similar protections to residential customers as far as conditions and procedures for termination are concerned”*.
69. It is clear from the above that Ofcom’s intention is only to capture certain Not for Profit organisations, namely only those that are comparable to Micro and Small Enterprise customers. However, Ofcom’s chosen definition in the Revised General Conditions goes far beyond both the EECC and its own intentions and effectively captures any charity of any size (from small to multinational) and any government body. There is no explanation or impact assessment to support such an extension beyond the scope envisaged by the EECC.
70. Larger not-for-profit organisations have very strong bargaining power and to all intents and purposes act like large business customers. For example, Government departments, bodies and agencies tend to have very tough procurement frameworks and requirements

(sometimes specified in legislation), and rightly so, as they are often using public money to procure their services and insist on tough demanding contractual terms as a prerequisite if providers want to bid for provision of their communications services.

71. Large not-for-profit organisations act like large businesses and therefore many of the 20 or so additional General Conditions that potentially apply to Not-for-Profits do not make sense when considered in terms of the actual outcome. For example, GC C3.13 and C3.14 around billing against plans makes sense for consumers who are purchasing data or minutes plans, but are completely irrelevant for large not-for-profit customers who do not get billed in this manner.
72. If such a definition and the related General Conditions applied, this presents very significant practical challenges. Firstly, identifying which customers are not-for-profit is not simple with no central source of information that can be built into a system. Secondly, having multiple sets of contracts, information and notification templates, and porting/switching requirements is complicated and increases cost.
73. While it is recognised that a waiver can be obtained, there is no detail on how this is expected to work in practice. Indeed, we believe that it is likely that customers may be confused given that most of the provisions will be irrelevant, leading them to push back on waiver requests. It would add another layer of needless complexity and burden to contract negotiations that are already very lengthy and detailed. There is also the practical challenge of obtaining waivers for the current customer base already being served which, for large not-for-profit customers, would be a significant amount of negotiation and legal resource.
74. At worst, the impact of such a definition could be a barrier to entry for some communications providers who may not target not-for-profit organisations as it is simply too complicated to comply with the additional identifying steps and resulting additional complexity of the additional General Conditions for a subset of customers. This would ultimately reduce choice and competition for such customers.
75. Ultimately Ofcom’s current definition brings into scope organisations that have no need nor desire for additional regulatory protection and triggers a disproportionate level of complexity and risk for the providers serving this industry segment.
76. Furthermore, UKCTA members who operate in other EU Member States note that Ofcom is the only competent authority so far that has come up with a definition for “not-for-profit organisations” that does not match the intention of the EECC. Ofcom therefore appears to be going against the harmonisation goal of Article 101 of the EECC. Other Member States have done the following:
 - a. The Netherlands – The proposed legislation now incorporates thresholds into the definition of not-for-profit organisations which limits the definition to only such organisations which are like small businesses, and is supported by reasoning in the explanatory memorandum which echoes recital 259 – see translation below:

- i. “non-profit organization that has met at least two of the following requirements on two consecutive balance sheet dates, without interruption afterwards on two consecutive balance sheet dates:
 - ii. The value of the assets according to the balance sheet with explanatory notes, on the basis of the acquisition and production price, does not exceed € 6,000,000;
 - iii. the net turnover for the financial year does not exceed € 12,000,000;
 - iv. the average number of employees for the financial year is less than 50;”¹⁰
- b. France - In the explanatory note, the French legislation refers to the Directive’s intention, and states (translated in English below):

“The directive extends to microenterprises, small businesses and non-profit organizations the benefit of certain provisions provided for consumers (on the terms of contractual information, on the maximum duration of contracts and on bundled offers) unless expressly waived from them. **These entities are considered to be in a situation comparable to that of the consumers in terms of bargaining power.**” (emphasis added)¹¹.

77. Given the sum of the above, and that the choice of definition is discretionary and should align with both Ofcom’s intentions and that of the EECC, we would urge Ofcom to consider one of the three options below:

- a. **Option 1 [preferred option]** - Limit the definition explicitly in the General Conditions to exclude large Not-for-Profit organisations and Government bodies (who do not act like consumers and do not need protection).
- b. **Option 2** - Do not define Not-for-Profit organisations and leave this to the discretion of communications providers, with an understanding that this should be treated as flexibly as possible. Add clarification in explanatory memo or the statement that the intention is for only those Not-for-Profits which act like consumers should be in scope, and that Government bodies are explicitly carved out (the approach in France).
- c. **Option 3** - Limit the definition to those Not-for-Profit organisations that are actually like consumers and who need protection. We propose an employee threshold of 10 employees (in line with Small Business Customers definition) and an explicit carve out for Government customers (who are subject to Procurement Regulation in any case) (similar to the approach in the Netherlands).

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

¹¹ https://www.entreprises.gouv.fr/files/files/directions_services/numerique/consultations-publiques/ANNEXE_8_-_Transposition_consommateurs.pdf

78. In making these proposals, we note that Ofcom is required to perform the same impact assessment it is legally required to do so when exercising a similar discretion in relation to microenterprise and small enterprise customers.

Contract modification and right-to-exit – enterprise business customers

79. Based on Article 105 of the EECC, the proposed GC C1 specifies many requirements around contract modification and the right for the customer to exit within a month as a result of such a change.
80. The intention of this Article is to ensure that consumers are protected as they do not have sufficient bargaining or negotiating power when compared to a consumer-focused communications provider. However as recognised in Recital 259 this is not true for large business customers.
81. Such customers simply do not require this type of protection. They are buying an entirely different sort of product from consumers, involving highly complex, bespoke solutions. The associated contracts are designed for a specific timeframe with tailor-made, negotiated terms and prices and specific contract termination clauses. Larger enterprises have very strong countervailing buyer power. They have large procurement teams and teams of lawyers and external advisors to assist them in reviewing and negotiating on any proposed change to their contracts. They increasingly frequently outsource the RFP process to external consultants who are dedicated to extract maximum value from the contract through multiple rounds of negotiation. They are in every sense deal makers rather than takers, and as a result it is a fundamental misunderstanding of the market to suggest, through overly-broad regulatory provisions, that they need equivalent protections to consumers.
82. Larger enterprises and their providers generally use specific contract renewal processes to investigate new terms and conditions and prices for when the original contract duration expires.
83. Given all of these facts we believe it is sensible and proportionate for Ofcom to carve out large business customers from the scope of the Revised GCs C1.14 to C1.19. In the alternative, we urge Ofcom to follow its own example in relation to End-of-Contract notices and allow flexibility for large business providers. Specifically, Ofcom could issue guidance on interpretation related to consumers only and provide a greater degree of discretion in terms of how large business providers meet the intention of the EECC themselves and it could make clear its intention to exclude large business providers from any enforcement and monitoring programmes.
84. In addition to the above, we note that the scope of the right-to-exit condition has changed significantly from the current General Conditions which focus on a change of “material detriment” to the customer, with Ofcom providing specific interpretation guidance for consumers only. The threshold has now been significantly lowered in the revised GCs (C1.14-C1.15) to be *any change* to the contract (with a few minor exceptions).

85. Practically this is a huge change and the scope could be disproportionate. For example, if a provider relies on wholesale inputs to serve a customer and something changed to that wholesale input, a contract change may be required. This is a particular concern for large business customers who will often have very large volumes of lines and services which could be subject to change. In this scenario under the new General Conditions, there was no deliberate change on the provider's side as they are just passing through wholesale changes, yet they are at risk of losing a customer because of their third party supplier. This adds a large element of risk.
86. We consider that Ofcom should offer further guidance on this to limit the disproportionate impact of this requirement e.g. similar to material detriment in the current GCs.

Number porting and switching

87. We note with some surprise that no distinction has been made for larger enterprises in the EECC. Although we support efforts to ensure that transfers are simplified and run smoothly, it must be recognised that larger enterprise solutions are generally extremely complex due not least to large volumes of lines, the need to avoid porting in business hours and batch porting while still under contract in case of offset contracts or due to business continuity concerns - some of which may clash with the requirements under Art. 106 EECC.
88. Providers that serve large enterprises should, in cooperation with their large enterprise customers, have the freedom to agree upon tailor-made transition arrangements and processes without being constrained by a process developed by NRAs under paragraphs 6 to 9 of Article 106.
89. While we recognise that Ofcom is proposing to give more freedom to business-focused providers, we are still concerned that the EECC and resulting revised GC C7 puts additional requirements on business providers which do not meet the needs of large business customers. We urge Ofcom to recognise the realities of business porting in its statement and allow maximum freedom for such customers and providers.
90. We underline that processes should be easy to use for all participants (gaining and losing providers) and take into account complexities and specific requirements by different customer bases, particularly large enterprises. It is also essential for pan-European providers to be able to apply a single (internal) process in order to ensure the most efficient and least burdensome compliance.

Complexity of General Conditions document

91. The General Conditions were revised in October 2018 and a large effort was put into them by Ofcom and industry in order to make them more concise and "user-friendly".

The proposed revisions to the General Conditions are a step backwards and are frankly very complicated to use. Largely this is due to the front-loading of each General Condition section with the definitions per condition and having to refer back and forth between conditions and then the definitions and associated guidance.

92. This makes for bad regulation which lacks the necessary transparency and makes it harder for providers to comply, increasing the risk of non-compliance based purely on struggling to understand their requirements.
93. We would recommend that Ofcom tries to categorise different types of provider and respective customer base, and then works out from their own document which rules apply to them. In addition, it would be helpful if Ofcom were to follow the EECC definition names rather than create separate ones. For example, the EECC refers to “consumers, microenterprises or small enterprises, or not-for-profit organisations” whereas Ofcom uses “customers” of different types. This makes it harder for providers to compare their obligations directly with the EECC, but also makes it harder for multinational providers to ensure consistency across Member States.
94. We therefore urge Ofcom to consider whether the structure of the Revised General Conditions could be improved to help with clarity and make them more “user-friendly” and easier to interpret. Additionally, perhaps Ofcom could introduce some kind of searchable or filterable tool which would help providers identify which obligations apply to them and their customers.
95. Ultimately all stakeholders will want to be able to interpret the obligations easily to improve customer outcomes, have better regulation and avoid non-compliance. We recognise that this is also Ofcom’s intention, and so we would really appreciate further thought given to how the provisions could be presented more clearly as suggested above.
96. We note that there is a proposal to make an amendment to GC A.32:

*‘uninterrupted access to Emergency Organisations and **uninterrupted transmission of public warnings** as part of any Voice Communications Services offered’.*

Given that Ofcom states in the body of the consultation ‘*We are not proposing to make any changes to the GCs in relation to the requirement for voice communications providers to ensure uninterrupted transmission of public warnings at this time. This is because the suitability of such a public warning system for the UK is still under consideration*’ we do not believe it is necessary to make this amendment.

-End-



Annex 1

Dame Melanie Dawes
Chief Executive
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

By email: chiefexecutive@ofcom.org.uk

11th March 2020

Dear Dame Melanie,

Ofcom's proposals to implement the new European Electronic Communications Code

1. The new European Electronic Communications Code ('EECC') is the most significant review of regulation for the communications sector since the inception of the framework in 2002. We support the focus on protecting and empowering consumers. UKCTA members and the industry as a whole, have been constantly innovating, improving the consumer experience over the last 17 years, through the introduction of voluntary initiatives as well as implementing updated regulatory requirements.
2. In many cases the UK, with the support and work of both Ofcom and communication providers is well ahead of other EC states in terms of constantly improving consumer protection. For instance, the four largest providers implemented automatic compensation in 2019 and only last month end of contract notifications and best tariff notification schemes were launched well ahead of the full EECC implementation.
3. Ofcom's consultation proposals on fully implementing the EECC in the UK by December 20th 2020 highlights significant difficulties with great potential for consumer harm. The political environment during the negotiation of the EECC has led to great uncertainty for communications providers as to how the EECC will be implemented in the UK. It is fair to say that Ofcom has also had to

endure this uncertainty whilst endeavouring to draft the proposals for implementation. This has resulted in a significant delay in Ofcom publishing its proposals for implementation. Given the enormity of the proposals UKCTA members urge Ofcom to:

- a. Take full account of CP's responses to the consultation and feedback on implementation timelines.
 - b. Review the proposals in relation to enterprise business customers.
 - c. Complete the consultation process before any final decision is made on the implementation timescale.
 - d. Advise the UK Government on when implementation of the EECC will be possible and work with the UK Government to ensure that a realistic implementation date is set.
4. UKCTA has responded to the consultation proposals and members continue to be very supportive of Ofcom's aims, but believe that the timescales proposed are impossible. UKCTA members are keen to continue to work with Ofcom to achieve a transparent and proportionate updating of the regulatory requirements and to work towards implementation once a Statement has been published by Ofcom. Several matters need to be resolved and we would expect that the Statement will differ in a number of respects from the consultation proposals.
 5. The proposals around issuing consumers with a standalone summary to review and then consent will have a significant impact on the customer journey which in its current form is unlikely to result in an engaging sales process and could result in delays to switching compared with the journey consumers currently experience. We believe that these proposals are too complicated to benefit consumers and Ofcom should take more time to consider the options to improve the provision of information to consumers.
 6. UKCTA's review has highlighted that the proposals impact the entirety of the General Conditions and are not limited to the consumer protection conditions in Part C. Definitions and the mixed usage of 'End User', 'Customer' and 'Consumer' are a major issue that appear not to have been addressed by the consultation.
 7. On current estimates a Statement is unlikely to be published by Ofcom before the early summer and a six month implementation period is unachievable. A

timeframe of 18 months would ensure the underpinning of a vibrant communication market that has at its core consumer protection and choice. If Ofcom considers that a staggered implementation is appropriate UKCTA members would be pleased to work with Ofcom to agree a timetable.

8. The EECC did not intend for large enterprise customers, or even not-for-profit and small businesses to be extended precisely the same protections as consumers. Quite the opposite; it clearly intended for Member States to differentiate and refine the thresholds at which the rules applied and Ofcom have failed to justify (either generally or by reference to the required statutory impact assessment) a “copy-out” of the ceilings in a non-binding recommendation.
9. The consultation must be fully completed before a Statement is published. Communications providers need to be fully aware of the regulatory requirements to enable budget planning, vendor engagement, customer service training and consumer awareness programmes. A rushed implementation is most likely to result in consumer harm through confusion and uncertainty and the management of costs will be severely compromised.
10. Overall, the proposals together with the timetable envisaged do not align with Ofcom’s commitment to *‘continue to provide a stable regulatory environment that supports investment in the UK’s communications networks and services’*¹².
11. UKCTA members are keen to work with Ofcom to ensure an orderly updating of the consumer protection regulations in a post Brexit environment and would be a happy to meet with the EECC project team to further the discussion following Ofcom’s consideration of the UKCTA response to the consultation.
12. A copy of this letter is annexed to the UKCTA submission and both will be sent to DCMS.

Yours sincerely,



Rosaleen Hubbard
Company Secretary

¹² Ofcom’s Annual Plan 2019-20 Page 54 Annual Plan Statement A3.119

