



Vodafone response to Ofcom's consultation on the implementation of the new European Electronic Communications Code

Summary

Implementation timescales in light of Brexit

Ofcom's proposed implementation of the EECC has failed to sufficiently take account of the uncertainties that the Brexit process has had on operators. It is not reasonable to expect industry to have put in place the structures and to have allocated the requisite resources to be in a position of full compliance with Ofcom's proposed measures by the end of this year when a number of the requirements uncertain.

Implementing these proposed changes, which cover such a broad scope, requires significant resource and planning by all operators and, therefore, Ofcom must consider the potential for consumer harm if operators are forced to implement changes without sufficient time. It would be appropriate for Ofcom to conduct a fresh consultation following the end of the transition period, so as to assess what parts of the EECC would be in the interests of consumers and the UK to retain.

Impact assessments

Ofcom has not conducted a sufficient impact assessment of its proposed measures, despite meeting the threshold of importance under section 7 of the Act, and do not satisfy the standards laid out in Ofcom's own guidance.

Ofcom has failed to quantify the costs of each proposal, instead relying on assumptions, which gloss over and/or downplay the costs that operators are likely to face¹. This is not appropriate in light of the wide-ranging impact that these measures will have, which require a precise and considered quantification of the costs to industry.

We are also concerned at the extent to which Ofcom has relied on guidance, which in some instances seems to go beyond what has been proposed in the new GCs.

Switching and porting

¹ 4.77 of *Fair treatment and easier switching for broadband and mobile customers* claims that "the main mobile and broadband providers that offer services with a limited allowance already notify customers when they use up the services included in their tariff plan." The data notifications for EE, Three and O2 are then cited, Vodafone is conspicuous by its absence and no consideration has been made as to whether voice and SMS requirements are similarly notified in order to reach Ofcom's conclusion that the requirements do not "have a significant impact".



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The proposal requiring providers to provide number porting to customers who request it for at least a month after the termination of a contract is unclear in terms of both the consumer harm it seeks to remedy and also the nature of the actual requirements. From our interpretation, it presents a number of practical difficulties and potential unintentional consequences, which Ofcom has not considered in its assessment. We have set out a number of clarificatory questions on the application of the proposed measures.

We consider that it is appropriate to apply a time limit in which a PAYG customer could request a refund for any unused credit on their account. This will reduce the risk of money laundering or potentially fraudulent activity based around handsets disused for some time.

Annual Best Tariff advice to PAYG customers

We are concerned that Ofcom's extension of the obligation to provide best tariff advice to PAYG customers goes beyond the obligations set out in Article 105(3) EEC, which in our view, requires providers of ECS to provide best tariff information at least annually only where a fixed duration contract is automatically prolonged. We do not consider PAYG contracts to fall within the definition of a fixed duration contract that is automatically prolonged.

Information requirements

Ofcom's requirement to provide key contract information within a timeframe which allows a customer to make an informed decision is unclear and ill defined, and goes beyond maximum harmonisation.

The EEC does not prescribe the exact point at which the information should be provided, nor does it require that the timeframe be such that the customer has had a "reasonable" amount of time to make "an informed decision". Moreover, this proposed requirement is a question of subjective interpretation and inconsistent with the principle of legal certainty that rules be definite and clear. Therefore, we are of the view that the GC should not specify that that the information be provided to the customer in such time as to which enables them to make an informed decision.

Not for Profit Customers

We have concerns around Ofcom's definition of "Not for Profit Customers", which means that many large business customers are brought within scope of consumer protection regulations that are unnecessary and inappropriate, and not the intention of the EEC.



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Ofcom should reconsider the scope of this definition and, at a minimum, exclude large Not for Profit organisations and Government bodies.

OTTs

The recitals of the EECC are clear that it has broadened the definition of ECS to include certain OTT services such as WhatsApp, Snapchat and Facebook Messenger into the scope of the regulatory framework. We are disappointed that Ofcom has not taken this opportunity to embrace these new powers and to extend the scope of its regulation beyond individual definition changes in a meaningful way. Vodafone welcomes the inclusion of ICS within the definition of ECS, however we would welcome further clarity on how different services in the eco-system will be defined and fundamentally how Ofcom intends to incorporate ICS providers into its funding and enforcement of the EECC. Vodafone does not expect industry to absorb the cost of regulating major ICS as they are captured by the regulations.

Bundling

We are disappointed that Ofcom is no longer proposing early implementation of the 24-month limit for mobile handset bundles, as had previously been proposed. We expect Ofcom to uphold its view that certain handset financing offerings currently available on the market are incompatible with the requirements of the EECC.

Uninterrupted transmission of public warnings

Finally, we have sought clarification of the proposed GC A3.2b on uninterrupted transmission of public warnings, which we assume has been included in error.

Extending accessible communications requirements

We are concerned that, rather than being specific and precise about what operators are required to do with respect to accessible communications for vulnerable customers, Ofcom's proposals are vague and open the possibility of additional obligations which have not been defined in this consultation. We therefore ask Ofcom to specify what its expectations are in this regard.

Comparison tools

Operators must have the freedom to tailor their offerings in a way which preserves innovation and choice for consumers.



(1) OFCOM'S IMPLEMENTATION TIMESCALES IN LIGHT OF BREXIT UNCERTAINTY ARE INAPPROPRIATE AND UNREASONABLE

We appreciate that the political events brought about by the UK's exit from the European Union has put Ofcom in the difficult position of trying to pre-empt the outcomes of the Brexit process whilst fulfilling its legal obligations to implement EU regulation. However, Ofcom's proposed implementation of the EECC, as set out in the consultation document, has failed to sufficiently take account of the uncertainties that the Brexit process has had on operators.

When the EECC was adopted in December 2018, the UK was scheduled to leave the European Union on 29 March 2019, well in advance of the 21 December 2020 deadline for implementation of the EECC. At that time, the UK Government did not provide a conclusive view as to how Brexit would impact the implementation of the EECC in the UK. Since then, Government has indicated that it would transpose the EECC into UK law, but that it would then review the framework once the UK is no longer subject to EU law. Industry, therefore, has had no certainty around how the EECC will ultimately be implemented in the UK, and when these measures will take effect.

As a result of this political landscape, the Brexit timeline has changed a number of times since the EECC was adopted and the date of the UK's departure was still uncertain when Ofcom issued this consultation on 17 December 2019. At present, the transition period provided for under the Withdrawal Agreement is set to expire on 31 December 2020, ten days after the deadline for implementation of the EECC. Our assessment of the preparedness of other European national regulatory authorities where Vodafone has operations is that only Finland is likely to implement ahead of Ofcom.

Ofcom noted (at paragraphs 1.3 and 2.3) that if the UK was no longer under an obligation to transpose the EECC, there may nonetheless be aspects of this consultation that it would still pursue. In this scenario, it could no longer rely on the maximum harmonisation requirement to implement the provisions of the EECC without conducting a full impact assessment, and therefore would need to issue a fresh consultation. Indeed it would be a far more appropriate and pragmatic exercise of Ofcom's powers, in light of the current political environment, to focus on those areas of the EECC which Ofcom regards as worth pursuing, rather than overburdening industry with such a breadth of new regulation, rushed through in unrealistic timescales.

Government has published its trade priorities for negotiation with the EU and made it clear that it is prepared to walk away without a deal if adequate progress has not been made. This is an ideal opportunity for Ofcom to take stock and determine what level of implementation is best for the UK. An indication of those areas which Ofcom considers



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beneficial in the form of EECC implementation guidance would be warmly welcomed and allow operators to target developments in the most efficient manner.

It is unreasonable to expect industry to have put in place the structures, and to have allocated the requisite resources, to be in a position of full compliance with Ofcom's proposed measures by the end of this year, given the lack of clarity and uncertainty that has accompanied the implementation of the EECC.

Implementing these proposed changes, which cover such a broad scope, requires significant resource and planning by all operators. [X] Ofcom seems to have either disregarded or downplayed this significance by considering impacts in isolation and pushing ahead with an unrealistic timeline for implementation.

Ofcom must consider the potential for consumer harm if operators are forced to implement changes without sufficient time. Faced with the threat of enforcement action, operators will be forced to rush through the changes needed to comply with new measures, to the potential detriment of other pro-consumer initiatives. [X].

Moreover, the implementation of the measures, potentially, would be compromised by the unreasonably short timeframe for devising the necessary structures and processes for compliance. Operators will be forced to choose between options based on what is possible within the deadline rather than what is the best overall solution and have reduced time for devising and testing those options and adequately train staff before roll-out. The resulting significant risk of material consumer harm is clear.

Ofcom must take account of these concerns, particularly against the backdrop of uncertainty and lack of clarity brought about by the unprecedented political landscape in the UK.

Section 3(1) of the Communications Act 2003 (the "Act") states that it shall be Ofcom's principal duty, in carrying out its functions:

- to further the interests of citizens in relation to communication matters; and
- to further the interests of consumers in relevant markets, where appropriate by promoting competition.

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).



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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.

Accordingly, in the interests of transparency, accountability and proportionality, and securing investment and innovation in the industry, Ofcom must take into account the concerns of operators regarding the proposed timeframe for implementation of these proposed measures; provide guidance on the elements of the EECC which are most important to the UK and adopt a more realistic expectation of industry's readiness to comply with these requirements.

Ofcom has already acknowledged the need for flexibility on its implementation timescales, in light of the time needed for industry coordination on fixed switching and porting. We refer to Ofcom's letter of 20 January 2020, which demonstrates that where industry-wide factors render the desired timeframes unrealistic, those timeframes need to be reconsidered in order to overcome the challenges faced by operators. Ofcom should apply the same level of flexibility to implementation of all of its proposals.

Finally, it would be appropriate for Ofcom to conduct a fresh consultation following the end of the transition period, so as to assess what parts of the EECC would be in the interests of consumers and the UK to retain.

(2) OFCOM HAS FAILED TO CONDUCT APPROPRIATE IMPACT ASSESSMENTS

Ofcom has a duty under section 7 of the Act to carry out impact assessments where it appears to them that its proposals are "important", meaning they would be likely to have a significant impact on businesses or the general public, or when there is a major change in Ofcom's activities. As a matter of policy Ofcom is committed to carrying out impact assessments in relation to the great majority of its policy decisions. This is acknowledged at paragraph 2.24 of the consultation document.

It is clear that the measures proposed by Ofcom in this consultation are "important" in terms of their impact on the general public and that implementation will have a significant impact on operators' businesses. As discussed above, the proposed measures will require significant resource at significant cost across industry, and will severely impact existing development roadmaps. At an operational level, the proposed changes will impact the contracting process for all customers and the content of those contracts.



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According to Ofcom’s guidance on Better Policy Making,² which Ofcom refers to at paragraph 2.24 of the consultation document:

- an impact assessment should be “a core part of the policymaking process, not a bureaucratic add-on” (paragraph 1.6); and
- “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” (paragraph 1.7).

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

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

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

The limited impact assessments that Ofcom has undertaken with respect to these proposals are not appropriate, despite meeting the threshold of importance under section 7 of the Act, and do not satisfy the standards laid out in Ofcom’s own guidance.

Ofcom has failed to quantify the costs of each proposal, instead relying on assumptions, which gloss over and/or downplay the costs that operators are likely to face. This is not appropriate in light of the wide-ranging impact that these measures will have, which require a precise and considered quantification of the costs to industry.

Examples of insufficient impact assessment

Ofcom’s proposal to amend GC C3.7 to include a requirement that the billing information must be “up-to-date” and to introduce a new GC to ensure residential customers are notified when a service included in their tariff plan is fully used up, including information on the charges customers would pay if they go on to use those services outside their tariff plan.

² https://www.ofcom.org.uk/_data/assets/pdf_file/0026/57194/better_policy_making.pdf



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Ofcom states (at paragraphs 4.77 and 4.78): *“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.”*

These assumptions are based on the contention that operators already universally notify customers when they use up their allowance, and where operators do not do so already changes required will be limited where the information is provided through a link in a text message or email. However, Ofcom has considered this requirement in isolation, it has not considered whether this assertion covers all products, or the complex interaction of the requirement with other measures such a bill capping or roaming or, indeed, the capability to send notifications for specific individual allowances. Nor has Ofcom turned its mind to the interaction with the ICO’s prohibition on sending messages that are marketing service messages.

Ofcom assessment: No significant impact or significant increase to costs.

Vodafone assessment: [X<]

A further example is Ofcom’s proposal to prohibit operators from selling locked devices to residential customers, in line with the EECC requirement that the conditions and procedures for contract termination should not act as a disincentive to switching provider.

Whilst Ofcom devotes most of the section 8 discussing how handset locking practices vary across different providers, there is very little in the way of evidence that handset locking actually acts as a barrier (psychological or practical) to consumer switching. We would expect to see evidence of more switching of customers from those operators that do not sell locked handsets, like O2 and Three (such as higher churn rates) over those operators selling handsets locked to their network. Ofcom has not provided any such evidence.

Ofcom also needs to ensure that the proposed requirements would be limited to mobile handsets, and could not be construed to apply to any other devices sold by providers (such as routers).

Guidance

Finally, we are concerned at the extent of the guidance that Ofcom has included as part of its proposed new measures. In particular, where the guidance seems to extend and/or build on the requirements proposed in the GCs.



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An example of this is Ofcom's statement, at paragraph 7.172 that, in determining minimum levels of compensation, Ofcom's enforcement decisions, providers should consider any direct payments and costs incurred by the customer as a result of the provider failing to comply with their switching or porting responsibilities.

However, we note that the requirement under Article 106(8) EECC requires Ofcom to set rules regarding the compensation of customers by providers for failures to comply with the switching and porting obligations of Article 106 EECC. It specifies that compensation should be given in an 'easy and timely manner' and should include compensation for 'delays in, or abuses of, porting and switching processes, and missed service and installation appointments.'

This requirement is reflected in Ofcom's proposed GCs C7.43-C7.45. Nowhere in the proposed GCs does Ofcom specify that the compensation will be determined with reference to direct payments and costs incurred by the customer. That is entirely provided for in the guidance. The guidance therefore goes beyond the requirements laid out in the GCs and, moreover, goes beyond the requirements of the EECC, thereby breaching the maximum harmonisation rule.

Another example is Ofcom's proposal of additional guidance on how providers comply with the requirement to set out core subscription prices as part of the contract information. In particular, its proposing that providers should ensure that where the customer's core subscription price is set on a basis such as £X for contract period 1 and £X+ inflation index for period 2, providers should explain, in accessible terms, how this increase might affect the price they will pay. For example, the guidance states that where the core subscription price is linked to a specific pricing index (such as RPI or CPI), providers should give customers an example of how an application of the pricing index would affect the core subscription price they will pay.

(3) SWITCHING AND PORTING

One month timeframe for number portability post-termination

The proposed requirement to allow a terminating customer to port their number to a new provider is unclear in terms of both the consumer harm it seeks to remedy and also the nature of the actual requirements. From our interpretation, it presents a number of practical difficulties and potential unintentional consequences, and therefore we would request Ofcom's clarification.



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Article 106(3) requires Ofcom to ensure customers can retain the right to port a number for *“a minimum of one month after the date of termination, unless that right is renounced by the end-user.”*

Ofcom proposes to add to the existing GCs requiring providers to provide number porting to customers who request it for at least a month after the termination of a contract unless the customer expressly agrees otherwise when terminating that contract.

The following GC has been proposed:

“C7.6 All Regulated Providers shall ensure that:

[...]

they provide Number Portability for a minimum of one month after the date of termination by the Switching Customer of the contract for the provision of the Relevant Communications Service(s), unless the Switching Customer expressly agrees otherwise at the point when they terminate the contract;”

Ofcom assessment: Update or develop and implement new systems and processes in order to comply... particularly the case in relation to ultrafast broadband switches and switches between networks.

Vodafone assessment: [X<]

Fundamental change from the porting of live services to needing to reactivate and port a number terminated from the network and account closed. Potential unintended consequences in terms of the impact to customer service processes, particularly in relation to customer identification.

Where a customer terminates their Vodafone service, the number is removed from the network and customer accounts are “closed” on the systems. Associated numbers are placed into quarantine before being freed up for reallocation to another account. In order for the number to be ported, the quarantine requirements would need to be changed. However, this leads to a number of practical difficulties.

Today porting is only possible for ‘live’ services. The porting of a ‘ceased’ service would require a number to be retrieved from quarantine (should a customer decide to exercise that right within a month after termination), and would also require that the account remain open on our systems until the 30-day timeframe expires. Ofcom expects this to be possible through a variety of channels, adding to development complexity and resulting in customer identification checks that have to validate previously ceased accounts. It also



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requires online accounts to still be available and quarantined numbers to remain associated with previous accounts.

None of this has been considered or assessed against the benefits of a specific use case where a customer wants a number back once it has been ceased. Nor has Ofcom considered the unintended consequences. [X<]

Moreover, we are not clear from Ofcom's proposal whether:

- a) a customer can only port their number for thirty days after closure if requested at the point of termination? or
- b) a customer can request to port within the 30 day period after termination and for the port to be completed in this timeframe? or
- c) a customer can request a PAC within the 30 day period after termination, in effect increasing the period to 60 days (as a PAC is valid for 30 days)?

In addition Ofcom has not considered the technical implications of requesting a PAC after a STAC has been generated and whether the Syniverse systems can cope with such a request. Without such clarity it is impossible for an operator to create business requirements for, let alone implement, any such change by December 2020.

Time limit for PAYG refunds

We consider that it is appropriate to apply a time limit in which a PAYG customer could request a refund for any unused credit on their account. This will reduce the risk of money laundering or potentially fraudulent activity based around handsets disused for some time.

Article 106(6) requires losing providers to 'refund, upon request, any remaining credit to [customers] using pre-paid services. [The refund] may be subject to a fee only if provided for in the contract. Any such fee shall be proportionate and commensurate with the actual costs incurred by the [losing] provider in offering the refund.'

The following GC has been proposed:

"C7.7 The Regulated Provider that is the Losing Provider must:

[...]

(d) refund, upon request, any remaining credit to the Switching Customer using prepaid services, minus any fees provided for in their contract with the Switching

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Customer, in so long as such fees are proportionate to the actual costs incurred by the Losing Provider in offering the refund.”

Ofcom assessment: None

Vodafone assessment: Significant fraud and money laundering risk for anonymous customers

The refund of PAYG customers in the UK carries a notable risk of fraud and money laundering in the absence of enforced customer registration. Operators have no way of checking for fraudulent applications for refunds where customers remain anonymous. This is particularly an issue where PAYG SIMs have been bought at a supermarket or corner shop. It also raises the question of who should fund such requests where the top-up revenues have been paid to the corner shop or supermarket.

Vodafone is of the view that refunds can only be made where PAYG customers have registered their details and applied credit to their account direct with Vodafone.

(4) ANNUAL BEST TARIFF ADVICE TO PAYG CUSTOMERS

We are concerned that Ofcom’s extension of the obligation to provide best tariff advice to PAYG customers goes beyond the obligations set out in Article 105(3) EECC.

We note that Ofcom is proposing to extend the scope of the requirement to send end-of-contract and annual best tariff notifications to non-ECS (in accordance with Article 107(1) EECC), by requiring providers to include details of other contracts taken by the customer as part of a bundle and the dates on which the commitment periods end for those other contracts. (Ofcom is proposing to extend the requirements such that providers would have to send standalone notifications for non-ECS within a bundle.)

Ofcom acknowledges that the sending of annual best tariff advice is linked to the customer being locked in to a contractual commitment period. We note that this seems to be at odds with Ofcom’s previous conclusion that annual best tariff advice must also be sent to customers who are on PAYG.

As we have previously communicated to Ofcom, Vodafone is of the view that applying the requirement to send annual best tariff advice to PAYG services goes beyond the obligations set out in Article 105(3) EECC. In our view, the proper construction of Article 105(3) EECC is that it requires providers of ECS to provide best tariff information at least



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annually in a specific situation only, namely where a fixed duration contract is automatically prolonged. Accordingly, as Ofcom's annual best tariff requirement imposes an obligation to provide best tariff information in circumstances other than those involving the automatic prolongation of a fixed duration contract, it introduces end-user protection measures that diverge from Article 105(3) EECC. This measure therefore constitutes a measure prohibited by Article 101(1) EECC.

(5) INFORMATION REQUIREMENTS

Timing requirements for contract information

Ofcom's requirement to provide key contract information within a timeframe which allows a customer to make an informed decision is unclear and ill defined, and goes beyond maximum harmonisation.

Article 102 EECC requires operators to provide consumers with certain key information and a contract summary free of charge, prior to the conclusion of the contract. That information will become an integral part of the contract. However, where, for objective technical reasons, it is impossible to provide the contract summary at that moment, it shall be provided without undue delay thereafter, and the contract shall become effective when the consumer has confirmed agreement with the terms.

These obligations have been transposed by Ofcom by way of proposed new GCs C1.3 to C1.7. We are, of course, supportive of Ofcom's efforts to ensure that customers have clear information about the nature of the services and terms they are signing up to. We already do this and support initiatives to make sure all operators do so. We note, however, that under the proposed GCs C1.4 and C1.6, operators would be required to provide that information "*at a time that reasonably allows the Customer to make an informed decision*". We have concerns about the inclusion of this requirement in the proposed GCs and are of the view that this should not be included in the GC.

First, we are not clear on where this requirement comes from, as it is not provided for in the EECC. As noted above, the EECC requires contract information and the contract summary to be provided prior to the customer entering into the contract, such that the information forms part of the contract, which comes into effect when the customer agrees with the terms set out. The EECC does not prescribe the exact point in the process of engagement with a prospective customer at which that information should be provided, nor does it require that the timeframe be such that the customer has had a "reasonable" amount of time to make "an informed decision". Accordingly, the addition



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of that requirement to the GCs seems to go beyond what is required by the EECC, and therefore, constitutes a measure prohibited by Article 101(1) EECC.

Secondly, we are concerned at the inclusion within the GCs of a requirement that is, ultimately, a question of subjective interpretation. We do not regard the requirement to provide customers with the relevant information *“at a time that reasonably allows the Customer to make an informed decision”* to be consistent with the principle of legal certainty that rules be definite and clear.

Maximum speeds

We note the requirement in Article 4(1)(c) of the Open Internet Regulation to provide the minimum, normally available, maximum and advertised download and upload speed. [X] We would welcome Ofcom’s views on whether, in its view, providing speed information to our customers in this way complies with Article 4(1)(c) of the Open Internet Regulation.

(6) DEFINITION OF ‘NOT FOR PROFIT CUSTOMER’

Vodafone welcomes Ofcom’s acknowledgement of the different types of end-users, with corresponding differences in the appropriate level of protection. However, we have concerns around Ofcom’s definition of “Not for Profit Customers” as:

“a Customer which ... which by virtue of its constitution or any enactment: (a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes; and (b) is prohibited from directly or indirectly distributing among its members any part of its assets (otherwise than for charitable or public purposes).”

This definition means that many large business customers and their respective providers are brought within scope of consumer protection regulations that are unnecessary and inappropriate.

We do not agree with Ofcom’s contention at paragraph 3.30 of the consultation document that Ofcom is required by the EECC to adopt this definition and are extremely disappointed that Ofcom has chosen to ignore and dismiss, rather than engage with the valid concerns raised by major stakeholders in this area.

Ofcom notes the proposed extension of certain end-user provisions applying to residential customers to micro enterprises, small enterprises and not-for-profit organisations, with reference to Recital 259 of the EECC: *“the bargaining position of those categories of enterprises and organisations is comparable to that of consumers and they should*



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therefore benefit from the same level of protection unless they explicitly waive those rights.”

Recital 259 describes not for profit organisations as *“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)

The intention of the EECC, therefore, is to capture those organisations that act like, and have a similar degree of bargaining power to, consumers, thereby warranting additional protection.

Ofcom acknowledges this at paragraph 9.51 of the consultation, which states that in Ofcom’s 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 that some larger businesses) [...] these customers should have the right to similar protections to residential customers as far as conditions and procedures for termination are concerned.”*

This seems to suggest that Ofcom intends only to capture those Not for Profit organisations that are comparable to Micro and Small Enterprise customers. The proposed definition, however, is far wider, capturing any charity of any size (from small to multinational), as well as any government body. Ofcom has provided no explanation or impact assessment as to how such a wide definition would be appropriate or necessary (and indeed, go beyond the scope envisaged by the EECC). Nor has it adequately addressed the genuine concerns raised by a number of communications providers prior to the consultation.

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.

Therefore, the application of additional protections to such organisations is entirely inappropriate. For example, the proposed GCs C3.13 and C3.14 requiring notifications of exhausted allowances is completely irrelevant for large not for profit customers.



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Ofcom should reconsider the scope of this definition and, at a minimum, exclude large Not for Profit organisations and Government bodies, for whom an extension of the protections afforded to Consumers and Micro and Small Enterprise customers would wholly inappropriate and unnecessary.

Finally, we note that the Dutch national regulatory authority has recognised the need to be more precise in its treatment of Not for Profit organisations in this respect. The proposed legislation implementing these measures in the Netherlands includes thresholds into the definition of Not for Profit organisations which limits the scope of the definition only to those organisations which are like small businesses. The explanatory memorandum of the Dutch regulator echoes Recital 259 of the EEC (translated from the original):

“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:

a. 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;

b. the net turnover for the financial year does not exceed € 12,000,000;

c. the average number of employees for the financial year is less than 50;”³

We urge Ofcom to take a similar approach in revising its definition of Not-for-Profit organisations.

Ofcom assessment: None

Vodafone assessment: Creates significant difficulties when seeking to apply particular regulations to individual customers in the large business segment. This includes needing to make changes to legacy and / or bespoke systems and products which would otherwise would not require development.

(7) OTTs

³ <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)



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The recitals of the EEC are clear that it has broadened the definition of ECS to include a fuller range of services, including bringing certain OTT services such as WhatsApp, Snapchat and Facebook Messenger into the scope of the regulatory framework.

It is therefore deeply disappointing that Ofcom has entirely failed to take this opportunity to embrace these new powers and to extend the scope of its regulation beyond individual definition changes in a meaningful way. For example, it is unclear to Vodafone how Ofcom intends to apply its Administrative Fee to OTT providers now that they are captured by regulation and presumably are expected to fund Ofcom in the same way as more existing operators. Nor is it clear how Ofcom intends to enforce compliance with the relevant regulations for these companies.

Vodafone would also welcome clarity on the services that fall into the NB- and NI-ICS.

Whilst Vodafone welcomes the introduction of the new categories of ECS, specifically ICS, further clarity on how different services in the eco-system will be defined would be welcomed.

For example, voice applications such as Skype / Skype for Business / Microsoft Teams, when offered stand-alone, as a closed-user-group service, would be considered NI-ICS. However, it is becoming common for customers (in particular large business customers) to want to interconnect their voice application service with a public voice service (an NB-ICS). The interconnection would enable end-users on the voice application to make and receive calls from the PSTN, and be associated with public numbering.

Whilst in some cases, the NI-ICS and NB-ICS may be bundled as a single service, in many cases the customer may purchase them separately, from different providers. This can therefore be distinguished from a 'Skype-Out' type scenario, where Microsoft itself held the relationship with the terminating public voice service providers. Furthermore, in some cases the 'service' could be reduced to providing a connecting link between the voice application, and the public voice service provider.

We would welcome Ofcom's view as to how these kinds of scenarios would affect the definition of these services.

(8) BUNDLING

We note that Ofcom is no longer proposing early implementation of the 24-month limit for mobile handset bundles, as had previously been proposed in its consultation on mobile handsets, published on 22 July 2019.



Non-confidential

This is a disappointing development. [X]

Accordingly, we expect Ofcom to uphold its view as set out in the mobile handsets consultation that certain handset financing offerings currently available on the market are incompatible with the requirements of the EECC. We note that, to date, Ofcom has failed to take any action in relation to the consumer harm these offers lead to, despite assurances it would look into individual offers, that guidance would be published and finally that measures would be implemented ahead of time.

[X]

(9) UNINTERRUPTED TRANSMISSION OF PUBLIC WARNINGS

We note that Ofcom has chosen not to make any changes to the General Conditions in relation to the public warning system (12.9). However the updated General Conditions at A3.2b contain this very clause:

(b) uninterrupted access to Emergency Organisations and uninterrupted transmission of public warnings as part of any Voice Communications Services offered.

We assume that this is a mistake and request that A3.2b is removed. If Ofcom does indeed have a timescale in mind to introduce this requirement, we ask that Ofcom makes this clear in the statement as significant resource and development of the network will be required.

(10) EXTENDING ACCESSIBLE COMMUNICATIONS REQUIREMENTS

Ofcom has proposed to a) broaden the types of communication to be provided in an accessible format and b) broaden the types of disability in relation to which a customer may make a request for an accessible format so that anyone who cannot access standard communications due to their disability is covered (see paragraphs 9.16 and 9.17).

We are committed to ensuring that all of our customers are provided communications in a format that sufficiently meets their accessibility requirements. We are, therefore, keen for Ofcom to be specific in setting out its requirements and expectations in this regard, particularly in light of the challenging implementation timescales that Ofcom has set, and which we have addressed above.



Non-confidential

At paragraph 11.38, Ofcom notes that the proposed measure to extend the accessible communications requirement might, for example, be of benefit to customers with dyslexia. Ofcom goes on to state that it welcomes views on other groups who may benefit from this proposal.

We are concerned that, rather than being specific and precise about what it expects from operators, this call for views leads to further uncertainty on the part of operators as to its obligations to vulnerable customers. We therefore ask Ofcom to clarify what its expectations are.

(11) COMPARISON TOOLS

Finally, we note Ofcom's proposal to introduce a new GC, in order to implement Article 103(2) EECC, which would require providers to make available to qualifying third parties, free of charge and in open data formats, information related to prices and tariffs of services and the minimum quality of service of such services, for the purposes of providing a comparison tool.

Vodafone notes that, while comparison tools such as price comparison websites are certainly useful, operators must have the freedom to continue to structure and tailor their offerings in a way which preserves innovation and individuality of their offerings to consumers. The provision of information for the purposes of featuring on comparison tools, must not, inadvertently, lead to the commoditisation of the industry, whereby the choice and variety that is available is sacrificed, to the detriment of consumers.