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Carmen To
Office of Communications
Riverside House
2a Southwark Bridge Road
LONDON
SE1 9HA

9th October 2018

Dear Carmen

Reference: Helping consumers to engage in communications markets – Consultation on end-of-contract and out-of-contract notifications (the “Consultation”)

Gamma Telecom Holdings Limited (“**Gamma**”) welcomes the opportunity to respond to the Consultation published on 31st July 2018; our response is appended.

Introduction

Gamma is a Public Electronic Communications Network that provides wholesale fixed and mobile telephony and data services, to some 1,150 resellers. Two of these resellers are wholly owned subsidiaries and represent themselves over 20% of our business. In all cases, our partners and subsidiaries sell almost exclusively to businesses throughout the UK and increasingly to various European Union member states. Gamma has a turnover c£230m per annum and is ultimately owned by Gamma Communications plc, a company listed on the Alternative Investment Market with a market capitalisation of£800m.

This consultation response relates to Gamma Telecom Holdings Limited and its subsidiaries.

Any conflict between the implied position of Gamma in any UK Competitive Telecommunications Association (UKCTA), Internet Telephony Services Providers Association (ITSPA) or Federation of Communication Services (FCS) responses or that of any other association in which Gamma is involved, is accidental and we consider that our views in this response should prevail.

Gamma trusts that this response addresses the questions posed by the Office of Communications (“**Ofcom**”) and would welcome the opportunity to elaborate on any points in more detail if required.

General Comments

Fundamentally, Ofcom have identified a problem and sought to intervene to remedy it, without fully thinking through the consequences of its actions.

If the proposals contained in the Consultation were to be applied solely to a single service residential consumer offering, then we would be broadly supportive of such proposals. The complexity of applying the Consultation proposals to both business consumers and multi play residential offerings will result in a program that is both extremely difficult and costly to implement. Contract overlap can create inter dependencies that affects a consumer's ability to exit a contract and, in some cases, the price of products not covered by the contract that is at the end of term. Such a complexity needs to be recognised and addressed to achieve any successful implementation of proposals such as those detailed in the Consultation.

We consider (or at the very least, we say that Ofcom have not done enough to rule out) that the proposals may lead to inflation for the poorest in society and reduce the liquidity in the market for switching.

Furthermore, Ofcom's cost benefit analysis appears to grossly understate the number of affected CPs; to the extent it could underestimate the costs by orders of magnitude.

That said, Gamma always welcomes interventions to protect consumers from harm and to increase the liquidity of the market for switching; we understand that Ofcom's intention is well-meaning, but we do not consider these specific proposals have been properly considered.

Specific Questions

Question 1: Do you agree with our assessment of harm relating to residential consumers and Small Businesses?

Gamma notes that the consultation is backed by some research and evidence which *prima facie* supports Ofcom's conclusions. However, we have a number of significant observations to make, which we split between Small Business and Residential users.

Businesses

Contract Complexity

As stated above, consumers can face issues caused by overlapping contracts and product inter dependency. For instance, Gamma incentivises customers buying cloud-based voice services to purchase their broadband connection from Gamma. If the business consumer migrates their broadband service at the end of the contract to another supplier, then their voice service will increase in price should this voice service still be within contract. Whilst not typically sold in the same manner as a residential multi play offering it is not uncommon for a multi-product business solution to comprise of a combination of broadband, cloud voice, PABX and mobile services, each with potentially differing contract lengths and pricing inter dependencies.

It must be recognised that resolving such issues is not as simple as merely aligning contract dates to the consumer. The suppliers of services to business providers such as Gamma often have different contractual terms on their products. Whilst many broadband and Wholesale Line Rental voice services are supplied on a twelve month contractual term, many Ethernet services are supplied on longer terms, such as three years. Mobile and PABX services typically also have longer contract terms as standard. It's also not always a clean start to a contract that can be used algorithmically with businesses. It is not uncommon to have the minimum term triggered by an event such as percentage project completion.

Flawed Logic

10 employees (or volunteers or whatnot) is a fundamentally flawed metric by which to decide whether or not an entity requires statutory protection. Ofcom are saying (by virtue of what Parliament said, granted) that a boutique telecommunications consultancy of 9 procurement specialists gets more statutory protection than an animal shelter with 11 volunteers.

It only has to be stated to see how ludicrous this part of the Communications Act 2003 (“**CA2003**”) is.

There is no statutory register of businesses and the number of employees that have (and even if they were, it would be unlikely to cover charities and volunteers). How will Ofcom address enforcement of this given the information asymmetry? If a company signs up to a package with 11 employees, do the rules magically change if they make 2 redundant? Does a charity with 10 “employees” lose its statutory protection just because a dog-walker brings her friend to help one morning?

The Consumer Rights Act 2015 is fundamentally focussed on consumers; Parliament, 12 years after the aforementioned small business provision in the CA2003, concluded that businesses don't need the sort of gold-plated provisions being discussed here, so it is a surprise that Ofcom considers they do and on the basis of limited evidence too.

It is open to Ofcom to separate residential and small businesses on a case by case basis.

Section 52(2)(e) CA2003 states;

*any other matter appearing to OFCOM to be necessary for **securing effective protection** for the domestic and small business customers of such providers.*

[Emphasis Added]

The reference to "effective protection" clearly makes the power contingent on the circumstances; it would not be an effective protection, for example, for Ofcom to mandate certain provisions for a boutique law firm when compared to a window cleaner. It certainly cannot be Parliament's intent to consider that both the window cleaner and the boutique law firm should be considered, blindly, as part of a single group, which is how Ofcom appear to interpret the provision in practice.

Whilst a highly forensic and narrow debate could be had on whether or not the CA2003 definition of "domestic and small business consumer"¹ considers them as a homogenous group or severally whereby each group is to be considered individually, there is an alternative way to handle the issue.

As mentioned above, Ofcom recently performed a reversal of its position on the so-called "reactive save"². Whilst they are strictly still prohibited, Ofcom made it clear that in terms of enforcement, its administrative priorities were such that it gave an *ex-ante* signal it would only enforce breaches of this prohibition in certain circumstances³.

Therefore, it is open to Ofcom to impose a remedy on "domestic and small business consumers" but to only take enforcement action where the said "domestic and small business consumers" are not incorporated, or a limited liability partnership, for example.

¹ Specifically the definition applying to Section 52 CA2003 which is the relevant power Ofcom is proposing to use in the Consultation.

² §14.19 GC Statement.

³ GC Statement §4.11

In the next section, we point out that the cost benefit analysis is substantially flawed; a subtle tool such as above can make a significant difference as to how many service providers are (in practice) caught by such conditions.

Lack of Evidence

Once again, Ofcom have essentially done a detailed analysis on residential consumers and added “and businesses” to it. The business specific research and analysis, by our count, is just 8 operative paragraphs⁴ in the Consultation.

Gamma has never sought to argue against the premise that sole traders are essentially residential consumers; it is justifiable to consider the two groups interchangeably. However, a small town law firm with 8 employees is very different.

This short hand approach by Ofcom changes the scope of such proposals from being a few major residential CPs to include, at the stroke of a pen, many more major CPs and, in the case of Gamma, 1100+ business only resellers.

§5.33 is an example; Ofcom state *“While we recognise there are additional providers who would incur implementation costs to send notifications to Small Businesses, the residential analysis suggests that these costs are relatively limited. Moreover, some of these implementation costs may be lowered further, to the extent that they can be shared with the introduction of notifications to residential consumers.”*

We have no doubt that the incremental cost to TalkTalk to include business as well as consumer (notwithstanding the difficulty in identifying the number of employees) is less than twice the cost of introducing it for consumer alone.

However, the additional providers are likely to be in the majority. There are far more business only CPs that contract with businesses than there are residential ones. Orders of magnitude more. Gamma has far from a monopoly in the small business reseller market, but has 1,146⁵ reseller partners in scope for this change alone. We count around just 10-15 residential providers of note.

⁴ Consultation §3.55-3.62 inclusive

⁵ Gamma Communications plc Half Year Report 2018, https://otp.tools.investis.com/clients/uk/gamma_telecom/rns/regulatory-story.aspx?cid=950&newsid=1171699 [accessed 3rd September 2018]

§5.26 states that the combined cost is around £8-10m for the residential market. If we extrapolate that, based on 15 residential providers and Gamma's 1,146 business reseller partners, that comes to an implementation cost of £611-746m. Ofcom has been previously criticised for flawed cost benefit analyses⁶ and has misunderstood the scale of the supply chain for businesses before too⁷. Prior to any Statement, Ofcom need to understand the implications in the business sector properly before relying on a flawed cost benefit analysis.

Residential

Contract Complexity

As with business consumers, the issue of individual contracts for the supply of triple and quad play services must be addressed. It is not unusual for the individual products of a multi play offering having both different contract lengths and termination dates. It is also not unusual for product pricing of an individual product, for example the mobile offering, to be dependent upon the consumer continuing to take service of most or all of the associated bundled products. It could be viewed that having these pricing and contract dependencies in itself acts as a type of retention activity. For instance, if the consumer cancels their voice and broadband service upon receipt of an end of contract notification then their TV package, mobile package or both may be affected from a pricing perspective. If these other products are still within their contract periods, then it is not possible to cancel the additional multi play elements without financial penalty.

Reliability of the Survey Data

Ofcom recently intervened in the market for standalone landline services⁸. This, we assume, is why footnote 1 of the Consultation states that the research excluded it. However, the paragraph to which the footnote is linked (§1.5), gives an insight that gives rise to questions.

Many don't know the status of their contract. Up to 26% of people taking landline, broadband and pay TV services (standalone or as a bundle) do not know or are confused about their contract status.¹ The same is true of 15% of mobile phone customers.

⁶ *Vodafone Limited v Office of Communications* [2008] CAT 22

⁷ Gamma's May 2016 response to the Consumer Switching - Proposals to reform switching of mobile communications services consultation.

⁸ <https://www.ofcom.org.uk/consultations-and-statements/category-1/review-of-landline-telephone-services> [accessed 8th October 2018]

If 26% of people taking services, do not know the status of their contracts, or “*are confused*”, how reliable is that statement “*The research did not cover standalone landline, standalone broadband, or quad play packages.*”?

If all 26% (or 15% for mobile) turned out to be confused to the extent that they are not actually part of the group they are included in, how reliable is Ofcom’s conclusions? For this to be robust decision making, we would suggest Ofcom review the raw data to gain certainty over the conclusion or perform a Monte Carlo analysis to see if there are any combination of “confusion” in which the conclusion does change.

Laziness as a rational choice

At the very core of Ofcom’s analysis is the assumption that being out of contract and not on the best tariff is irrational and warrants intervention. This is flawed; “laziness” is a rational choice and the logic behind that statement is two-fold. Firstly, there is the quantitative version - depending on the individual in question, the search cost (or cost of engaging with the issue) can exceed the benefit.

For example, an experienced barrister could forgo billables in the hundreds of pounds in order to save £20 a year. This is clearly an irrational outcome.

Secondly, there is the qualitative response, for example, in a single person residence, the search/engagement cost and benefit can be competing with a night out with friends or family etc.

At the heart this issue is that not knowing the status of the contract (being the line of investigation summarised at §1.5) and not caring about the status of the contract could easily be conflated.

We would suggest there is a need to acknowledge that not knowing and not caring are different things. It may well be that the same conclusion is reached, but it is presently a gap in the analysis.

One benchmark that may assist in this is in the banking industry; some institutions (for example Nationwide Building Society) send out notifications to their customers assessing whether they are on the best tariffs for their perceived circumstances – the consumer behaviour upon receipt of those notifications would appear, *prima facie*, to provide an insight into the extent of “not caring despite now knowing”. Ofcom’s statutory information gathering powers in Section 135 of the Communications Act 2003 (“**CA2003**”) covers any entity which can assist, and we would suggest thought is given into analogous industries where similar interventions or activity already occurs.

If we look to the energy industry, we see the sectorial regulator allowing a form of auto-renewing contract (“ARC”) for disengaged customers⁹ alongside “regular prompts” for those that have not “actively engaged”. Aside from the irreconcilable Ofcom position of an outright ban on ARCs in one utility market and another regulator in a more oligopolistic utility market having a “whitelist” of permissible ARCs, the Ofgem initiative is derived from some work of the Competition and Markets Authority. Of note and relevance to this Consultation are ideas such as the “Disengaged Customer Database”¹⁰. Again, we appear to have a pre-existing dataset that could give some insight into the efficacy of Ofcom’s proposals. We find it surprising that there is no analysis of similar initiatives in other sectors in the Consultation, merely evidence of harm as justification for a set of proposals.

Not that Gamma is advocating such a database, merely that Ofcom could make a far more robust policy decision by availing itself of data from other industries.

Inflation

The Consultation acknowledges that the best deals go to those actively engaged in the market and switching (or threatening to switch). The effect of Ofcom’s proposals will be to incentivise communications providers to induce current customers to renew contracts on better terms to lock out the competition. This would have the effect of reducing the price paid by the “lethargic” group, or a subset of it.

At a macro-level, this reduces the revenue earned by the CP which would translate straight to a reduction in distributable profits (be that as a dividend or reinvestment). Therefore, the CP is faced with a choice to potentially increase prices across the board to offset the losses.

Which leads to a situation where we may currently have cross subsidy from the “lethargic” group to the “actively switching” group. A change in the regulatory paradigm would mean that both these group’s prices tend to the mean; there appears to be no assessment by Ofcom of the impact of this. It would stand to reason that those most engaged in switching are those to whom the price is the most important – potentially meaning they are of the more vulnerable (or poorer) in society. It would be remarkable for a regulator to sponsor a policy that took from the poorer and gave to the

⁹ Modification of the electricity and gas supply licences to allow suppliers to roll customers onto further fixed-term tariffs at the end of their existing fixed-term deals, an open letter published by the Office of Gas and Electricity Markets (“Ofgem”) on 11th October 2017.

¹⁰ <https://www.ofgem.gov.uk/consumers/household-gas-and-electricity-guide/how-switch-energy-supplier-and-shop-better-deal/ofgem-disengaged-customer-database> [accessed 8th October 2018]

richer. That said, the Citizen's Advice Bureau's report¹¹ onto what they call the "loyalty penalty" says (broadly) that the poorer in society are less likely to switch, so may become more pronounced victims of inflation from the other side by being a target for operators to protect their existing margins.

Where this contradictory thought experiment takes us is that there is a risk of adverse consequences that haven't been properly thought through.

Existing Interventions

The theme of the Ofcom evidence base is that consumers are disadvantaged in relation to price increases at the end of their minimum commitment. Granted, this is in part due to the relative price of the product or service relative to a SIM only deal or switching, but there is a sense that there is an actual increase in pricing at the end of the term; §1.6 of the Consultation summarises this as 10m consumers in such a scenario.

That's 50% of the evidence base, which is already covered by an intervention; specifically General Condition of Entitlement ("GC") 9.6 (renumbered C1.6 from 1st October 2018) which provides for at least one month's notifications of any changes that are likely to be "materially detrimental" to customers, including provision for contract termination without penalty and an obligation to inform customers of these changes. This obligation covers all Subscribers, and not just residential consumers.

If this obligation were being discharged as intended, then surely the harm arising from these price rises would not exist? Or, in the alternative, perhaps the users in question are fully aware of the impact due to the existing, mandated, communication and have made a conscious choice to do nothing.

It is surprising that Ofcom have not referenced this condition in the Consultation (even allowing an outright duplicate of the messaging in its summary in §4.44), barring in a footnote relating to transparency at the point of sale. If, indeed, this obligation is not working as intended, why impose a significant burden on an entire industry because of the actions of a few CPs? The cohort of Subscribers in question are a significant part of Ofcom's justification for these proposals but a

¹¹ <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Cross-sector%20loyalty%20penalty%20report%20-%20VERY%20FINAL%20VERSION.pdf> [accessed 12th September 2018]

thorough analysis of the root cause and efficacy of existing measures appears to have been omitted, which undermines the policy.

Regulator-Endorsed Auto Renewing Contracts

There is a fundamental information asymmetry between the incumbent CP for a customer and the competition. The incumbent CP will have the “first shot” i.e. a marketing approach to induce the customer into renewing. Logically, this will be at a price point that wouldn’t be the best price they would obtain by exposing the incumbent to the actual threat of leaving and/or engaging fully with the market.

Does the end user take £10 a month now in savings for a renewed term and forgo a better deal (which would be net of the search costs)? If the answer is they are more likely to, then essentially we have a return of the auto-renewing contract. The liquidity in the market for switching will reduce and fundamentally we have a self-fulfilling prophecy by way of regulatory policy. In terms of addressing this question, there is a conflict between two recent Ofcom positions.

Firstly, Ofcom prohibited reactive saves around 2013¹². Ofcom stated around the time;

*[A reactive save] is when LPs launch targeted special offers to customers thinking of leaving them. And under the LPL process, LPs are notified about every customer who is intending to switch. **Although an individual customer in that situation may get a better deal, reactive save may make providers less likely to keep their prices competitive for the majority of customers who don’t switch.** It also makes it more difficult for smaller providers and new entrants to challenge the bigger players, and risks weakening the incentive of existing providers to compete against each other.*

[Emphasis added]

5 years ago, Ofcom took the view that this situation caused harm, but in 2017 reversed it citing evidence that end users liked reactive saves and signalled it would not consider certain breaches of any reactive save prohibition as an administrative priority¹³.

¹² Making Switching Easier: Executive Summary of Ofcom’s Statement. A summary of Ofcom’s Statement and Consultation on switching for landline and broadband providers published by Ofcom on an unknown date available at https://www.ofcom.org.uk/__data/assets/pdf_file/0020/78032/switching-plain-english.pdf

¹³ §14.19 Review of the General Conditions of Entitlement Statement and Consultation published by Ofcom on 19th September 2017 (“**GC Statement**”).

Both positions cannot be correct as they are mutually exclusive. Frankly, this is somewhat unfinished business and further interventions in consumer switching, as this Consultation, need to address this polarisation of policy – the industry craves certainty above almost all else and a definitive ruling on this matter would be welcome.

Question 2: Do you agree that providers should send both end-of-contract and out-of-contract notifications?

If we assume that the requirement is justified (which, as it stands, we do not consider it to be), then there is logic to suggest that both pieces of information are required.

Question 3: Do you agree with our proposal that notifications should be sent to all residential and Small Business customers who take Public Electronic Communications Services?

We outlined our objections in our response to Question 1. We do not consider the policy is adequately justified for residential consumers, nor Small Businesses with the added issue of a lack of robust cost analysis.

Question 4: Do you agree with our proposals on the content of the end-of-contract notification?

If we assume that the requirement is justified (which, as it stands, we do not consider it to be), then we have some points to raise on the content.

Firstly, we note in our answer to Question 1 that an end of contract notification, where the service provider increases the price, already has a form of provision in GC9.6 (recently renumbered C1.6). There is a risk of duplication of messaging or conflicting messaging without a review of how this proposed requirement dovetails into existing obligations.

Secondly, Ofcom have not made reference to mobile switching proposals in respect of how to deal with the alleged “double billing” issue¹⁴. Whilst knowing the point at which a contract may be ended without early termination charges is only one part of the information required to make an informed decision to switch; whether the contract becomes rolling 30/60/90 days (noting that the same condition applies to businesses which are more likely to have a range of such provisions) and whether or not charges are daily pro-rata or there’s a monthly “use it or lose it” are relevant data.

¹⁴ §4.120 of Ofcom statement 19 December 2017 – Decision on reforming the switching of mobile communications services

Consumers are likely to be aggrieved if incited into expending search costs only to find blockers after such an investment of time and energy; this psychology needs to be considered by potentially laying out more such information upfront.

Thirdly, there are obligations when conducting a switch (GC 22.11 recently renumbered C7.10) to outline the consequences of switching, which appear to be duplicated in the proposals.

Taken in isolation, which is how we assume the proposals were drafted, the content has a degree of logic, but it has to be considered in the context of all the permutations of a journey the customer may take.

Question 5: Do you agree with our proposals on the structure, method, timing and frequency of the end-of-contract notification?

If we assume that the requirement is justified (which, as it stands, we do not consider it to be), then we have no comments to make save to emphasise that it would be somewhat perverse if it led to attempts to pre-emptively switch which may either incur early termination fees or other adverse consequences. We do not see reference to that concept being tested and would suggest Ofcom consider this in its final analysis.

Question 6: Do you agree with our proposals on the content of the out-of-contract notification? And Question 7: Do you agree with our proposals on the structure, method and frequency of the out-of-contract notification?

There is nothing substantive to add to the out of contract notifications over and above what we have said about the end-of-contract notification.

Question 8: Do you agree that our proposals are both effective and the minimum necessary to achieve our policy objectives?

Gamma disagrees for the reasons set out elsewhere herein.

Question 9: Do you agree with the impacts we identify, and the approach we take to quantify these impacts, in our assessment in Annex 6?

For the reasons set out in our response to Question 1, whilst Annex 6 is entitled “Residential” we consider that the cost benefit analysis is fundamentally flawed.

Question 10: Do you agree with our provisional assessment that the potential costs for providers are not disproportionate in order to achieve our policy objectives?

In our response to Question 1, we laid out evidence that the costs are potentially grossly understated. We also make an observation in Question 11 about the opportunity cost of regulator-required developments.

Question 11: Do you agree with our proposed implementation timescale for end-of-contract notifications and for the one-off notification to customers who are already outside of their minimum contract period?

Whilst, in absolute isolation, a 6 month implementation period is not inconceivable between final Statement and deadline, Ofcom has not considered the other interventions it has already required or is planning to require in this. Nor has Ofcom considered that CPs committed development roadmaps are anywhere between 3 and 12 months; regulator required systems changes come at the expense of innovation and efficiency and other components that also need to be considered in a cost benefit analysis; there is a direct cost of development and the indirect opportunity cost of the resources deployed.

CPs have limited development resource and some of that is already scheduled to be deployed working on mobile switching changes coming into force in 2019. Given a reasonable time between this Consultation closing, a statement being issued and adding 6 months, there would appear to be an overlap in those two projects. Whilst there may very well be some synergies, these are also distinct projects.

We would respectfully suggest that Ofcom deploy some form of “regulator-required industry development Gantt chart” and consider the impact of proposals across its entire policy programme. More realistically in this case, we would say 9-12 months is the implementation period, subject to anything else Ofcom has in the pipeline.

Question 12: Do you have any comments on the draft condition set out in Annex 9 to this document?

Notwithstanding our comments above that, if adopted, would lead to a change in the condition, we have only one comment.

The proposed wording of C1.12(h) has the consequence of mandating all CPs with minimum terms over 6 months to offer a SIM only contract. Whilst we are struggling to think of any mobile service

providers that do not offer this, certainly in the residential space, we would not want to say that it is uniformly correct and note that it is not overtly considered as an impact in the Consultation.

As ever, we trust that this consultation response has been useful to Ofcom and are at your disposal to answer any questions arising.

