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By email only

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RE: Response to Ofcom consultation “Helping consumers get better deals - Ofcom consultation on end-of-contract and annual best tariff notifications” (the “Consultation”)

Dear Oliver,

Having reviewed the Consultation entitled “Helping consumers get better deals - Ofcom consultation on end-of-contract and annual best tariff notifications”¹, several communications providers serving businesses have decided to write a collective response. We are very grateful for the opportunity to comment on Ofcom’s proposal and for the meeting we had with your team on 23rd January 2019.

This letter is on behalf of Verizon, AT&T, Gamma, Colt, CenturyLink– collectively referred to as “we” throughout this letter. All of us exclusively provide services to businesses of varying sizes.

Summary

We note that the Consultation represents a large expansion in scope to include all business providers and this causes us great concern on a number of levels. We strongly believe that Ofcom should adopt a more granular approach to how the proposed requirements would apply to business customers. There are reasonable grounds for, at the very least, providing revised and clearer guidance about how the requirements of the New European Electronic Communications Code (EECC) and the proposed General Condition can be implemented in a business supply chain, given the general complexity typically involved in business-to-business relationships.

We set out view in the following order:

1. New EECC
2. UK legislation
3. Timing
4. Practical impacts for business providers and possible solutions
5. Other concerns beyond this consultation
6. Conclusion

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0022/130378/Consultation-helping-consumers-get-better-deals.pdf

New EECC

1. From our meeting on 23rd January, and as explained in the Consultation, we understand that Ofcom's position is that it needs to take account of the definitions in the new EECC and that Ofcom has suggested a more flexible approach to business customers in its draft guidance. We applaud Ofcom for aiming for harmonization but note that according to Art. 101 (2) of the New EECC, Member States may only continue to apply more stringent national consumer protection provisions, provided that those were already in force on 20 December 2018. This suggests a conflict in the provisions of the New EECC.
2. It follows from Article 105 (1) that the main objective of Member States in the context of contract duration and termination is that there is no disincentive to changing service provider. In the highly competitive B2B-market we do not see any barrier to switch providers; indeed Ofcom has not produced any evidence to suggest that there is any harm in the business sector as a whole. In other words, including such customers in the Proposal is neither necessary nor proportionate (see for further background the paragraphs on disproportionality below).
3. Additionally, the New EECC does not envisage that residential and large business customers should be treated the same way. Rather the intention in the New 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. This is clearly shown in Art.105 as a whole, where the focus is on consumers and small and micro-enterprises.
4. In particular, recital 259 of the New EECC notes that *"larger enterprises usually have stronger bargaining power and do, therefore, not depend on the same contractual information requirements as consumers."*
5. We consider that the drafting of Art.105(3) does not represent the Commission's intention and is merely a drafting error. Indeed the Commission's original drafting proposed this Article with reference to "consumers" only and this is supported by the language in the recitals. In the same vein, it also appears from the consultation document that Ofcom does not have any evidence that would contradict the broader point that large business customers do not need the same level of protection as residential consumers in this area.
6. Finally, with regards to transposing the New EECC, Ofcom needs to ensure that it consistently applies changes. For example, while Ofcom does include the carve out for Machine-to-Machine (M2M) from the definition of Electronic Communications Services at draft GC C1.10(a) in Annex 6 of the consultation, it must ensure that this is applied consistently throughout this GC and beyond. This adds further weight to our arguments regarding this being a premature change before the whole

implications of the New EECC can be considered – see our comments on timing below.

UK legislation

7. Ofcom is proposing to use the powers under s.45 of the Communications Act 2003 to set a General Condition. Section 47 of the Communications Act 2003 says that General Conditions must be non-discriminatory, proportionate and transparent. In relation to business customers, we say that this test has not been met.
8. Ofcom recognises that *“whilst not all businesses employ specialist staff to handle communications services, it is reasonable to expect that businesses by and large are better equipped with the skills and resources to manage operations. Businesses are likely to have better knowledge of, or are able to find out more easily, information about the services provided under their contract, in a way that residential consumers may not”* (paragraph 4.24 of the consultation document).
9. There is no evidence presented in the consultation of the harm suffered by large businesses – this brings into question the basis for making a General Condition, and further justifies the need for a lighter touch approach for business-serving providers.
10. We believe that Ofcom’s proposals are therefore unnecessary and disproportionate in that they would mean an increased regulatory burden on communications providers without any corresponding benefit for their customers. The proposals do not therefore meet the requirements for the imposition of a General Condition.

Timing

11. There is a separate argument that Ofcom may be acting prematurely in this area by seeking to implement this narrow set of obligations well ahead of the overall implementation date in the New EECC. It might be more appropriate to delay the introduction of the proposed requirements for business customers until the wider stakeholder community can consider the impact of the New EECC in the upcoming consultations from Ofcom and DCMS. This would allow for a more considered debate about the most appropriate delineation between end-users and consumers in all of the relevant provisions from the End User Rights section of the New EECC. Indeed, we understand that Ofcom will be conducting such a review later in 2019. It is not clear to us why this particular issue cannot be discussed in that consultation. The only justification for pushing ahead with this sub-section of Article 105 is to prevent delays of the benefits of the regulation to consumers; yet Ofcom has failed to set out what those benefits will be for business customers.
12. Furthermore, while we understand that the Government and Ofcom’s intention is to implement the New EECC despite Brexit, this is far from being confirmed or set in stone. Indeed, some of us have had conversations with representatives of DCMS who said they may consider flexibility in changes to the legislation which might

provide opportunities to align the wording of the New EECC and its intention (as discussed above).

13. For example, Ofcom's only reason for including all businesses in scope is because it says that the new Code requirements are "full harmonisation" requirements with no flex to be more or less stringent. However, the harmonisation is normally associated with the aim for harmonisation across the Digital Single Market – which the UK will in theory no longer be part of after we have left the EU. That is not to say that we do not want to see harmonisation across Europe *per se*, but it does put into question Ofcom's justification for imposing this Condition. This adds further weight to our view that the proposals are disproportionate and unjustified for business providers.

Practical impacts for business providers and possible solutions

14. We do not consider that business customers, especially larger business customers, require any additional regulatory protection regarding end-of-contract and information obligations (including annual best tariff notifications). The proposed expansion of scope will therefore have a strong negative impact on us as business-focused providers, with many of the proposals simply irrelevant or impossible to implement.
15. Firstly, the concept of a "contract" is far more complicated for business customers and varies between customers and business-providers. For example, some providers will use main service agreements and then order forms for additional products and services; while others will have contracts per circuit or service. Even more complex would be looking at right-to-buy contracts with annual volume-based commitments. The contractual structure is highly complex which makes even identifying the right time to contact our customers and the relevant current contractual / service details very difficult.
16. The renewal of contracts for these customers is already typically subject to complex negotiations where the customer wields considerable negotiation power. We, the providers, have a strong incentive to discuss and share all relevant information with our customer who will have a large, well-resourced, dedicated procurement team or manager with a strong incentive to use their bargaining power to the company's benefit. In these circumstances, the proposed requirements would therefore be complex and burdensome to implement with no corresponding benefit to the customer.
17. Many large business customers have highly complex solutions which are designed for a specific time in their digital journey with bespoke terms and prices. Business customers often use renewal processes to look at business and/or digital transformation for the coming years i.e. looking at recent product and technological developments and how they could be added to their solutions package. Indeed it is rare that customers will take exactly the same product set as the previous term (unlike consumers who typically require some form of single-connection product).

This highly-tailored process therefore does not map easily to the best tariff information to be included in end-of-contract notifications and in annual notifications.

18. Similarly, Ofcom has not appreciated the complexity of the business telecoms supply chain. A number of communications providers do not provide services directly to the end customer and utilise third party channel partners to provide this service, who may in turn also utilise third party partners to contract with the end user. Such business services may be comprised of a number of products; for instance, an IP based voice service which relies on an underlying connectivity product and cloud PABX services. This means that renewals processes and by extension, the best tariff information proposal, must take these into account which requires significant resource and is highly complex. It is difficult to see how these operational realities can work with Ofcom's proposals.
19. In order to meet the proposals in this consultation, large systems changes and resources would be needed. Renewals for complex business customers can take several employees many weeks/months to produce, and to do so for every customer, for every contract, and at least annually is simply not possible. Furthermore, to do so would incur great expense. We note that Ofcom has not considered the cost impact of compliance for business-providers and any possible implications for prices.
20. Ofcom has recognised the above issues to some extent in its guidance however a full solution is not addressed. Although we strongly disagree with the justification for the scope to include business customers, we note that Ofcom was open to suggestions of ways to lessen the burden on business-focused providers like us. As such, we offer some practical changes that Ofcom could – either through additions to the accompanying Guidance or through managing its own resources – which might make a difference (within the limitations of the New EECC language). These are:
 - a) **Account manager** - Having a recognition in the Guidance that where the customer has a dedicated account manager at the communications provider (CP), this would be seen as sufficient to meet the requirements. Account managers whole purpose is to manage such discussions with customers proactively based on the customer's specific situation, needs and preferences. Having such bespoke, individual interactions is surely preferable to an automated notification process and meets business customer needs more effectively.
 - b) **Procurement** - Having a recognition in the Guidance that where the customer has a procurement team in place – such a team is incentivised to get a good deal and is likely to be proactive in contacting a CP and therefore not in need of protection. These cases would be recognised in the Guidance as being sufficient to meet the requirements.

- c) **Bespoke terms and prices** - Where “bespoke contracts, terms and conditions (including prices)” or a variation of this, would be seen as sufficient to meet the requirements in the Guidance. This wording is currently used in General Condition C2 so is not new to Ofcom and would be able to carve out those contracts, customers and providers whose contracting structures do not easily map onto the requirements and concepts in the proposed General Condition.
- d) **Waiver for large businesses** – Not that we agree that these classes of business should be subject to the envisaged protections, Ofcom could replicate the waiver system envisaged for microenterprises, small enterprises or not-for-profit organisations from certain consumer protection requirements that are used elsewhere in the New EECC – for example, in Art.105(2).
- e) **Investigation forbearance** - Refrain from investigation and enforcement into business providers’ compliance with this General Condition – as Ofcom only feels compelled to expand the scope because of the full harmonisation requirement, going against the analysis it did in its previous consultation on this subject, it clearly cannot be an administrative priority. This would provide some comfort to us as business-focused CPs.
- f) **Map to current business practices** - Make the requirements as flexible as possible – mapping the intention of the provision onto real-life business practices rather than requiring the mechanistic approach suggested. E.g.:
 - i. Allowing business providers to decide the appropriate time to contact a customer (to get round the complexity of contracts and terms) and in a manner appropriate to the customer and relationship.
 - ii. Allowing business providers to have simple notifications to customers teams that remind them to contact their account managers or to contact their CP for individual bespoke discussions about terms, products and services.

Other concerns beyond this consultation

- 21. Many of us have further views on the New EECC and its provisions which Ofcom indicates it will be consulting on later in 2019. The End-User Rights section of the New EECC has potential to include lots of other painful issues for business providers and we would like Ofcom to ensure it fully considers the impact and harm trying to be addressed before imposing regulation.
- 22. Many of us are still working through the provisions to identify the potential impacts on our businesses. From an initial review, we note one possible example where there could be issues. Namely, the imposition of a two year maximum contract duration, unless expressly accompanied with a customer signed waiver, will have untold disruption on the business communications market, and would most certainly

result in price increases for some businesses. The majority of business services are today based around a minimum three year term, a term that is reflected throughout the supply chain. Equipment and connection charges are amortised over this term, providing a lower cost of entry for high speed business communication. Any regulated reduction in contract term would require this amortisation period to be shorter, or such amortised costs having to be recovered up front.

23. We are also more generally concerned at the number of pieces of consumer protection in which they are being included in scope, despite their being a recognition of a lack of harm. For example, the recent guidance on VoIP Emergency calling in a power cut included business providers in scope, gave inconsistent guidance, and left business providers in an uncertain regulatory position.
24. Finally, Ofcom must ensure it gains a robust understanding of the business market, its customers, and its providers. This understanding must go across the Ofcom silos of its various groups. One way to achieve this would be to have a Business Champion at Ofcom to ensure the needs and requirements of the business sector are met.

Conclusion

In conclusion, we believe that there are strong legal and factual grounds for applying the proposed obligations (with the accompanying guidance) only to smaller business customers whilst excluding enterprise/large corporate customers, for example, through Guidance. It would be appropriate for Ofcom to use the standard definition of small business customers (i.e. ten or fewer employees) that already underpins other regulatory obligations, e.g., complaints handling (GC C4) and sales and marketing (GC C7). This definition is already familiar to communications providers serving the market for business customers and would represent an appropriate regulatory response to any harm being caused to small business customers.