



*Clear. Creative. Communications.*

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SE1 9HA

15<sup>th</sup> February 2019

By e-mail

**Reference: Helping consumers get better deals - consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband (the “Consultation”)**

Dear Oliver,

Gamma Telecom Holdings Limited (“**Gamma**”) welcomes the opportunity to respond to the Consultation published on 14 December 2018; our non-confidential response is appended. We are also grateful for the extension granted so that we may fully consider the issues and respond constructively.

## **Introduction**

Gamma is a Public Electronic Communications Network that provides wholesale fixed and mobile telephony and data services, to some 1,100 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£245m per annum and is ultimately owned by Gamma Communications plc, a company listed on the Alternative Investment Market with a market capitalisation of *three-quarters of a billion* pounds.

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. Please don’t hesitate to contact me, Lee Turner (address as per letter head), for further detail in the first instance.

## Executive Summary

There is a strong case for intervention in the residential market (and by extension sole traders). Unfortunately, a General Condition of Entitlement (“GC”) is required in statute to be proportionate and Ofcom has adduced no evidence that (a) there is any harm to other businesses, especially larger businesses and (b) that there will be any positive policy outcome as a result of these proposals.

To that end, we say that Ofcom should proceed with the implementation to domestic consumers only (this, by extension, will capture many sole traders due to them having residential contracts) and await the transposition of the new European Directive (“EECC”)<sup>1</sup> into legislation to grant Ofcom the power to interfere in the business market.

There is also an increasingly acute conflation of the unique needs of businesses and residential users of telecommunications. We expect to engage constructively with Ofcom on this matter in the near future, however, at the moment it risks disenfranchising business focussed Communications Providers (“CPs”) from the regulator’s engagement and their customers alike. We also say that it creates artificial barriers to entry and stifles the prospect for innovation and ultimately competition. There is an increasing risk of a self-fulfilling prophecy that small businesses will be subject to the lowest common denominator service – residential communications.

<sup>1</sup> Directive (EU) 2018/1972 Of The European Parliament And Of The Council of 11 December 2018 establishing the European Electronic Communications Code



Whilst we recognise the evidence in the domestic market and that it justifies Ofcom’s intervention there, we also say that the reliance on a statutory provision that may not apply in 6 weeks’ time means the proposals were premature in that regard, especially in their application to businesses.

The present and future complexity within the business communications market also needs to be recognised. There is an increasing usage of both traditional telecommunications services being used in conjunction with non-traditional, emerging technologies. Business communications utilise communications cloud services and applications running over broadband or Ethernet circuits, with such applications and services replacing the traditional PABX and multi-channel communications methods. Convergence within the business communications markets will further muddy the waters on what constitutes a communications service, and therefore is covered under a communications service contract. A business communications provider should not be expected to dissect the various services that comprise a suite of services offered to the end subscriber in order to determine which is or isn’t a communications service in terms of the proposed regulation within this Consultation.

## 1. Conflation of Business and Consumer

Ofcom’s approach to the consultations raises a significant issue in relation to Ofcom’s general duty to its stakeholders.

The current Consultation makes reference to “consumers” alone in its title.

*“Helping consumers to engage in communications markets: Consultation on end-of-contract and out-of-contract notifications”* published on 31<sup>st</sup> July 2017 (the “**July 2018 Consultation**”) has the same issue. That issue, is that the current Consultation applies to all users to communication services, including businesses, and the July 2018 Consultation only to small businesses (being the much maligned and unworkable ten employee threshold).

There is a statutory definition of consumer in telecommunications and indeed, Ofcom refer to it in footnote 19 of the July 2018 Consultation. Consumer is defined in section 405(5) of the Communications Act 2003 (“**CA2003**”) and includes people acting in their personal capacity or for the purposes of, or in connection with, a business.

So, in a literal sense, with reference to a relevant statutory provision, Ofcom has acted appropriately.

However, given the ordinary and natural meaning of “consumer” being in relation to personal use alone<sup>2</sup>, and given that there are other definitions Ofcom could have deployed, such as “users”, “end users” or “subscribers”, it should be clear why there is an immediate cause for concern. This is compounded by the definition of consumer in, *inter alia*, Section 2(3) of the Consumer Rights Act 2015 clearly excluding businesses.

This is not just semantics. This approach to a title does a disservice to business users of communications in that they may not engage with the subject when they might otherwise do, and thus risks a disenfranchisement of 5.7 million<sup>3</sup> stakeholders. Most importantly, it also serves to reinforce long-standing submissions made by Gamma, and others, that Ofcom’s work does not do due adequate justice to businesses or business focussed communications providers.

For as long as the team at Gamma can remember, we have had to make repeated representations about the differing needs of business users relative to residential users and on the impact of complex value chain. For the same period, Gamma has been increasingly frustrated that Ofcom’s work continues to work on the same flawed assumptions Gamma has repeatedly made submissions on.

A casual conflation of consumers and businesses, of business-centric and residential-centric providers and of direct versus indirect value chains by Ofcom will lead to negative real world outcomes.

We would like to make it clear we do not consider this is a deliberate action by Ofcom. But it does harm the industry. It harms the citizen-consumers that Ofcom has a statutory duty to protect.

Its perpetuation risks adding unnecessary entry barriers to the market and thus deny new entrants the ability to innovate and differentiate to the benefit of society.

<sup>2</sup> We have taken the definition from the Oxford Dictionary of English 2<sup>nd</sup> Edition, 2006 reprint, which correlates with at least 3 alternative on-line dictionary sources.

<sup>3</sup> Section 1, House of Commons Library Briefing Paper 06152 “*Business Statistics* “ published 12<sup>th</sup> December 2018

Gamma has never sought to argue that a sole trader doesn't deserve the same statutory protection as a residential consumer (vulnerable or otherwise). Quite the opposite, Gamma has always supported targeted intervention to ensure a level playing field and negate exploitative behaviour.

However, for the European Union to conclude that Ofcom must intervene to provide the Crown Procurement Service, or the constituents of the FTSE-100, the same statutory protection as a vulnerable residential user is wholly inexplicable.

We do think it would be helpful for Ofcom to lay out the engagement that it had with the European Union on this subject (either directly with relevant institutions or indirectly via another Government department) to reassure the industry that Ofcom understands the issues at stake.

## 2. Brexit

As it currently stands and in any event was the position at the time the Consultation was published, absent direct Parliamentary intervention, Article 105(3) of the EEC will not apply on March 29<sup>th</sup> 2019. This is the entire basis upon which these proposals are based and we cannot see how Ofcom would have the power to implement these on the basis of current national legislation alone.

Therefore, it would have been prudent for Ofcom to wait a few weeks for the outcome of the Brexit situation to proceed with the expenditure of its own, and stakeholder, resources on the basis of a fuller factual environment. With reference to Ofcom's guardianship of the public purse and the resources it has expended on this matter in advance of a date of further certainty as to the legislative position, we find it surprising that Ofcom felt the matter to be so urgent that it couldn't be consulted upon in the Spring.

In the event of a so-called "no deal" Brexit, we would expect Ofcom to re-consult on either amended proposals or on the required new legislation to give its proposals lawful effect in the UK.

## 3. Adverse Consequences

The obvious loop-hole in Article 105(3) is that it only applies where a contract continues to "roll on". Communications Providers will then have an incentive to issue contracts with a fixed duration and no prolongation as envisaged by the Revised Framework.

Two outcomes could then occur, neither of which we respectfully submit are in keeping with Ofcom’s statutory objectives.



Switching is not a remedy to this, because in order to switch a service, a business user will want to take their telephone numbers with them. The average time to switch can be measured in weeks or months in many cases, especially in business related scenarios.

#### 4. Proportionality & Statutory Overreach

We have made previous submissions to Ofcom that it does have the power to alleviate the disproportionate burden of matters such as inappropriate applicability to business<sup>4</sup>. By way of summary, our recent position is that Ofcom could make it clear (as it has done before) that it would not consider enforcement of a breach of these proposed rules as being compatible with its administrative priorities, except in extreme cases.

We would respectfully submit that a failure to remind HSBC plc (market capitalisation £131bn<sup>5</sup>) that they have a single line contract coming to the end of their term, is not worthy of Ofcom’s time. We would additionally add that the proposed notifications add no value to such telecommunications users, and if anything, could cause confusion and thus cause more harm than Ofcom seek to avoid.

This is very important because the entire premise of the Consultation is that the Article 105(3) of the EEC can be directly transposed into a GC with neither primary nor secondary legislation. We respectfully submit that this is not the case for the proportionality reasons we outline above.

Section 47(2)(c) of the CA2003 requires a GC to be “*proportionate to what it intends to achieve.*”. Ofcom’s evidence base is predominantly residential consumers – which we do not seek to argue with. Indeed, we agree that there is read across into sole traders and we can debate the merits of whether or not it is proportionate to businesses meeting the (unworkable) 10 employee threshold. Ofcom have adduced no evidence whatsoever that it is proportionate for the constituents of the FTSE-100 or the Crown Procurement Service, to use two examples, even if the guidance attempts to “water-down” the provision. If the intent is to reduce the so-called “loyalty-penalty” and increase the liquidity in the market for switching, then evidence of harm is required.

<sup>4</sup> Page 10 of our response to the previous consultation in this series

<sup>5</sup> As at close 4<sup>th</sup> January 2018



Absent this, then Ofcom has no choice but to wait for primary or secondary legislation to give it the power to introduce a disproportionate or unevidenced remedy.

We also note that Recital 259 of the EECC refers to size of businesses in domestic law – as to whether or not this recital is directly referring to Article 105(3) is not clear, but if it isn't, it is a complete tautology for the EECC to limit some transparency powers with reference to a size of business and not others. We respectfully submit that it is clearly the will of the European Parliament that Article 105(3) was intended to be limited to small businesses in domestic law, which is the 10 employee threshold already embedded in the CA2003. This reason alone should be enough for Ofcom to wait for Parliament to transpose the provisions prior them being enforced.

We have no issue whatsoever with the power being implemented for residential consumers and sole traders prior to the transposition of the EECC. If Ofcom are able to adduce evidence that says a boutique law firm of 9 technology commercial solicitors requires this statutory protection more than a women's shelter with 11 volunteers, then I am sure we can have a sensible debate in a short, targeted, follow-up consultation on the issue. However, until either there is a transposition of the EECC or there is further evidence of harm, we would strongly suggest that the interference with business contracts is at best premature and at worst, unlawful.

Finally, in the event that Ofcom is not moved by the strong arguments above, we do acknowledge and appreciate that Ofcom have attempted to take the "sting out of the tail" in terms of the Draft Guidance in Section 12 of the Consultation in terms of the precise messaging for business subscribers. Therefore, we would further suggest that it would not be proportionate for the failure of the entire message to be provided to a business over ten employees to be an "administrative priority" for enforcement should such a provision be enacted.

## 5. Unintended Consequences

In addition to the issue regarding the "roll on" versus fixed term above, there are a few other issues Ofcom need to consider in its analysis

1. An annual best tariff reminder is essentially a pro-active "reactive save", an activity which Ofcom has had divergent views on historically. A "best tariff" is undefined in the proposed General Condition of Entitlement. Taking the summary in §8.34(c) this is a potential for the situation to be gamed as the "best tariff" can be a bespoke pre-emptive retention offer in our interpretation of the rule.

2. Granted, Ofcom have attempted to mitigate this in §8.35(d), and taking the more detailed definition in §6.68 we read this as Ofcom saying that a provider should tell a consumer about a best tariff they are not eligible for. Proposed GC C1.11 and C1.17 use the language “clear and comprehensible form”. We respectfully submit that Ofcom have created a regulatory tautology – requiring regulators to state a best tariff (with the underlying policy objective of promoting switching) for which the recipient of the message doesn’t qualify is not clear and comprehensible.
3. Reinforcing our view that the Consultation was premature, Article 102 of the EECC introduces enhanced comparison tool requirements, which have an inter-relation with this Consultation which has not been analysed. For example, referring a customer to such a tool could be an effective and proportionate form of the messaging regarding a subscriber’s options at the end of the contract. It would be prudent to defer a final decision until the later of Brexit certainty or a further consultation on the transposition of Article 102.

## 6. Spectrum of Proportionality

As we outlined above, we do not consider that any interference in the business market meets the statutory test in the CA2003 for a GC. However, there is clearly a scale of proportionality and it is clear that Ofcom have acknowledged this to some degree by virtue of the differences between business and residential notifications in the proposed guidance.

At one end of this spectrum would be the extreme position; applying the precise same requirements to the largest entity in the FTSE-100 as a demonstrably vulnerable consumer. At the opposite end is the position we say is accurate, which is avoid any interference until such time as legislation is enacted to modify (or not) this restriction – and even then, regardless of Article 105(3) of the EECC, whilst it would become the good law of the day, we say it wouldn’t be proportionate.

There are ways that Ofcom can move more towards what we say is the proportionate position. We say this, not because it is a “silver bullet” to passing the statutory test of proportionality, but to inform Ofcom’s future engagement with Parliament on transposing the EECC and modifying legislation.

1. It has to recognise that of the 1100+ Public Electronic Communications Services that resell Gamma’s portfolio (of which two are wholly owned subsidiaries), a great number of them are themselves small



businesses and suffer from the detrimental effects of one-sided bargaining power. The assumption that customers of telecoms need to be protected from their suppliers does not pass intellectual muster when applied to businesses. The best example to illustrate this with are the calls in society for dairy farmers to be protected from the dominance of the supermarkets in relation to milk supply. Indeed; the same underlying logic of protecting the weak from the strong applies to consumers being protected from the dominant bargaining position of large residential telecommunications providers in this Consultation. But how is that any different to also arguing that a PECS of 9 employees needs protection from a FTSE-100 company? Ofcom must recognise that the direction of bargaining power is not one way from CP to Subscriber; far from it. Gamma has seen “take it or leave it” purchasing contracts from the Crown Procurement Service that break Ofcom’s own rules on contractual requirements, for example. Fundamentally, the entire underlying premise of intervention breaks down the moment Ofcom attempt to impose conditions on businesses to negate their bargaining power when they have less bargaining power than their customers; anything other than explicitly recognising this relationship often gets inverted in business to business relationships cannot be considered as “proportionate” by any reasonable bystander.

2. A threshold for applying any differentiated rules must be easy to understand by all parties involved and easy to verify. There is no statutory register of the number of employees (or volunteers) or otherwise in an organisation and therefore there is no way for any CP to algorithmically (or even manually) determine which course of action to take with any given business customer. Even if such a database did exist, it would not be real-time, so questions such as “If an animal shelter has 10 volunteers and one brings a friend to help one afternoon, does that mean they lose statutory protection?” and “Did Parliament really intend to give a women’s shelter with 11 volunteers less statutory protection than a boutique law firm of 9 commercial solicitors?” still apply. Unless the thresholds are unambiguous, independently and algorithmically verifiable, they cannot be proportionate by definition. In the UK, that means the lowest possible threshold is a turnover of more than £10.2m and/or more than 50 employees and/or a balance sheet total more than £5.1m at the last reporting date<sup>6</sup>; entities with lower metrics are not required to disclose them. Any such threshold also must be immune to compounding issues, such as federations of charities, buying consortia, central government procurement and group companies.

<sup>6</sup> Section 382 of the Companies Act 2006

3. Any intervention up to a threshold has to be justified; we accept that a sole trader looks and feels like a residential consumer and reiterate both that we have long stated this and support Ofcom’s intervention in the Consultation at this level of the market. We do not accept that a firm of 10 solicitors looks like a window-cleaner. We certainly do not accept, and nor can any reasonable bystander, that a global bank looks like a plumber. Therefore, justification is required both for the intervention and for the nature and scale of intervention. We absolutely recognise that Ofcom have attempted to mitigate this effect in the Guidance, but that’s essentially engineering the outcome to fit the circumstance, not justifying intervention and the intervention as proportionate. This is important, because as it stands, we say the CA2003 does not permit Ofcom to blindly transpose Article 105(3) of the EEC.
  
4. Whilst signalling that enforcement over a threshold won’t be an administrative priority gets the industry to the same point as not enacting the instrument in the first place, strictly speaking, the condition is still not proportionate in such a circumstance.
  
5. There must be recognition that business arrangements are complex. Even a small business can have multiple contracts with inter-dependencies and bespoke, or niche applications. The issue of “ragged end” contracts also has to be addressed because a providers best deal may involve a bundle which cannot be enjoyed by all subscribers. The inability for CPs to give businesses algorithmic notifications was recognised by Ofcom in the mobile switching statement<sup>7</sup> – the same applies here. The proposals either have to be sufficiently bland so as to be a one-size fits all, i.e. that a taxi driver is given the same form letter that contains no useful information as it’s the same form letter a FTSE-100 conglomerate receives, or, a cost benefit analysis has to be conducted (noting the point about arbitrary thresholds) about generating the information manually, across the industry’s 5.7m business customers. The most information which a business CP is likely to be able to generate reliably and automatically will say “You have a contract expiring on [date], it may be one of several inter-related contracts<sup>8</sup>. It will automatically roll on per the conditions of your original order. Please contact us to discuss your options<sup>9</sup>.”

<sup>7</sup> Pending GC C7.29 and C7.30 implemented by “*Consumer switching Decision on reforming the switching of mobile communication services*” published by Ofcom on 19<sup>th</sup> December 2017

<sup>8</sup> We may not know absolutely because different entities in a group may contract for services and there is no guidance or precedence about group companies in interpreting business thresholds.

<sup>9</sup> The issue here is that Ofcom will have to specify “best tariff advice” and rules about the engagement on such contact to ensure that its policy objectives are met.

In practical terms, we would therefore suggest edits to Section 12 of the Consultation as follows (on the presumption that Ofcom gets the required statutory power):

Proposed content of the notification	Suggested Draft guidance
A message that the contract is not currently subject to a fixed commitment period	<b>Business subscribers only:</b> <u>the message may merely refer to the fact that an element of their relationship no longer has a fixed commitment applied to it.</u>
Any applicable notice period (or, for mobile <b>or business subscribers</b> , a message that a notice period may apply)	
The current monthly subscription price for that contract	<b>Business subscribers only:</b> <u>not applicable</u>
Details of the services that are provided under the contract	<b>Residential subscribers only:</b> a comprehensive list of all services which form part of the contract, including all ancillary services but excluding services billed by third parties. <b>Business subscribers only:</b> a message explaining that there may be multiple services as part of the contract.
Details of other contracts with the same provider and, for residential subscribers only, the dates on which the fixed commitment periods end for those other contracts	<b>Residential subscribers only:</b> a list of other contracts where there is a financial link to the core contract (i.e. the contract for which the annual best tariff notification is given), or where there is an interdependency between the core contract and the other contract. <b>Business subscribers only:</b> a message that other contracts may be affected if they terminate the core contract, where relevant.
Options available to the customer	<b>Residential subscribers only:</b> include advice that they can stay on existing contract; switch to a new contract with same provider; switch to a new contract with a different provider; or, for mobile consumers on bundled handset and airtime contract

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	<p>only, the option to switch to a SIM-only deal. The advice should also state that some providers may offer new customers better deals and that they may get a better deal if they bundle the services they have with that or any other provider.</p> <p><b><u>Business subscribers only: a message giving contact details to discuss their options</u></b></p>
<p>The provider's best tariffs</p>	<p><b>Residential subscribers only:</b> details of between one and three tariffs based on similarity to the consumer's previous usage where relevant and otherwise based on service packages that are most similar to what the consumer currently receives. They should include: (i) the cheapest tariff the consumer is eligible for; (ii) the cheapest tariff the provider offers (to any customer); (iii) a SIM-only deal (for consumers on bundled mobile handset and airtime deals only). Tariffs should be for bundled services where consumers have multiple services with the same provider. They may also include the cheapest upgrade tariff.</p> <p><b><u>Business subscribers only: a message giving contact details to discuss their options</u></b></p>
<p><b>Proposed timing of the notification</b></p>	<p><b>Suggested Draft Guidance</b></p>
<p>Providers must send an annual best tariff notification within 12 months of condition coming into effect, or within 12 months of the subscriber receiving an end-of contract notification, and at least once per year after that point.</p> <p>If a subscriber has two or more contracts outside their fixed commitment periods at the time an annual best tariff notification is sent, those notifications should be combined</p>	<p><b><u>Business subscribers only: a message giving contact details to discuss their options</u></b></p> <p><b><u>Business subscribers only: not applicable</u></b></p>

Proposed form of the notification	Suggested Draft Guidance
Providers must send the notification by durable medium	
Notifications should be a standalone communication (separate to service messages)	<b><u>Business subscribers only: not applicable</u></b>
The notification should be sufficiently prominent	<p><b><u>Residential subscribers only:</u></b> Providers are to provide information in the annual best tariff notification with the following given first: the message that the fixed commitment period for a particular contract (or contracts) has ended; and the current monthly subscription price under that contract (or contracts). The provider's best tariffs should come at the end of the notification.</p> <p>For a notification sent via SMS the following information must appear in the SMS message: a message that the fixed commitment period for a particular contract (or contracts) has ended; the current monthly subscription price paid by the subscriber under that contract (or contracts); details of the options available at the end of the fixed commitment period; and a message that further information, including the provider's best tariffs, is available and where it is available.</p> <p><b><u>Business subscribers only: sufficiently prominent only</u></b></p>
Providers must send annual best tariff notifications in an accessible format for customers who have alternative format bills	
Proposed monitoring requirement	Suggested Draft guidance
A record of each notification, and the date on	

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<p>which it is sent, must be kept for at least 12 months.</p>	
<p><b>Proposed implementation timeline</b></p>	<p><b>Suggested Draft guidance</b></p>
<p>These requirements to take effect 6 months after our final statement</p>	

Please do not hesitate to contact me if you wish to discuss anything further.

Yours faithfully,

Lee Turner

