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Helping consumers get better deals - Ofcom consultation on end-of-contract and annual best tariff notifications

INTRODUCTION

1. UKCTA is a trade association promoting the interests of fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.org.uk.
2. Many UKCTA members supply telecommunications services to UK business customers. As an organisation we therefore have considerable collective market experience in the business market, appreciating first hand both the challenges and the opportunities in the market today.
3. UKCTA is grateful for the opportunity to comment on Ofcom's proposals for imposing obligations regarding end-of-contract and annual best tariff notifications. This response focuses on the expansion of scope of Ofcom's proposal to include all business providers and the impact of that change. It does not address aspects related to residential consumers and individual members will be making their own comments on these separately.
4. UKCTA's believes that Ofcom should adopt a more granular approach to how the proposed requirements would apply to business customers. There are reasonable grounds for excluding enterprise/corporate customers from Ofcom's proposals and for applying the proposals only to small business customers as already defined in the Communications Act 2003. This approach is supported in law as well as in fact. We set out our views in relation to the following:
 - a. EU legislation
 - b. UK legislation
 - c. Disproportionate impact on business providers – practical impacts
 - d. Timing
 - e. Conclusion

EU LEGISLATION

5. UKCTA understands that Ofcom's position is that it needs to take account of the definitions in the European Electronic Communications Code and that Ofcom has suggested a more flexible approach to business customers in its draft guidance. We applaud Ofcom for aiming for harmonization. This is also laid down in Article 101, which prohibits Member States to maintain or introduce end-user protection provisions diverging from the relevant articles in the Code, According to 101 (2) of the Code, Member States may only continue to apply more stringent national consumer protection provisions, provided that those were already in force on 20 December 2018.

6. 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. In other words, including such customers in the Proposal is neither necessary nor proportionate (see for further background the paragraphs on disproportionality below).
7. Also, the European Electronic Communications Code does not envisage that residential and large business customers should be treated the same way. Rather the intention in the Code 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.
8. In particular, recital 259 of the new Code notes that *“larger enterprises usually have stronger bargaining power and do, therefore, not depend on the same contractual information requirements as consumers.”*
9. Ofcom’s proposal is contrary to the harmonisation objectives. It is clear from the above that the *intention* of the Commission was to minimise disincentives to change service providers and for there to be differing requirements for small/micro enterprises and large businesses. 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.
10. Finally, with regards to transposing the Code, 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 C.1.10(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 Code can be considered – see our comments on timing below.

UK LEGISLATION

11. Ofcom is proposing to use the powers under s.45 of the Communications Act 2003 to set a General Condition. However, Ofcom does not appear to have met the requirements under s.45 of the Communications Act 2003 which say that general conditions must be non-discriminatory, proportionate and transparent in relation to business customers.
12. 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).
13. Ofcom does not however present any specific evidence of harm being caused to enterprise/corporate customers. Ofcom has provided an abundance of research on consumers opinions about the needs and formats of the relevant notifications proposed, yet provides no equivalent for business customers. Our business-focused members also do not recall having been involved in any discussion about the impact this would have on their businesses. It is unclear what basis Ofcom is using to justify its proposals to include all businesses in scope.
14. UKCTA believes 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. We discuss the practical implications of this below.

DISPROPORTIONATE IMPACT ON BUSINESS PROVIDERS – PRACTICAL IMPACTS

15. Enterprise/corporate customers reasonably do not 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 business-focused

providers, with many of the proposals simply irrelevant or impossible to implement. Notwithstanding our view that businesses should be carved out from the proposed General Condition, we offer some practical considerations of the impact of the proposals.

16. Firstly, the concept of a “contract” is far more complicated for business customers and varies between customers and business-providers. For example, some members 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 a customer and the relevant current contractual / service details very difficult.
17. The renewal of contracts for these customers is already typically subject to complex negotiations where the customer wields considerable negotiation power. The communication provider has a strong incentive to discuss and share all relevant information with the customer who will have a large, well-resourced, dedicated procurement team 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.
18. 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.
19. 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.
20. 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.
21. Ofcom have 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, and believe a carve out for businesses is the best solution, Ofcom should consider the following possible solutions to lessen the burden:
 - a. **Account manager** - Having a carve-out based on where the customer has a dedicated account manager at the communications provider (CP). 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 carve-out based on 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.
 - c. **Bespoke terms and prices** - Have a carve-out based on “bespoke contracts” or a variation of this – this is currently used in General Condition (GC) C2 so is not new to Ofcom and would be able to carve out those contracts, customers and CPs whose contracting structures do not easily map onto the requirements and concepts in the proposed GC.

- d. **Small business only** - Change scope to “domestic and small business customers” based on the 10 employees rule. While not perfect, this is used in many of the General Conditions (A3, C1, C2, C4, C7, and C8) and is therefore well understood and recognised. This would provide protection for those small and micro-businesses who effectively contract like residential consumers and are arguably in need of some protection, while carving out those larger businesses who do not need or want protection.
- e. **Waiver for large businesses** – 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 Code – for example, in Art.105(2).
- f. **Investigation forbearance** - Refrain from investigation and enforcement into business providers’ compliance with this GC – 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 business-focused CPs.
- g. **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 CPs 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 CPs 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.

TIMING

- 22. 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 European Electronic Communications Code. 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 Code 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 Code. 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.
- 23. Furthermore, while we understand that the Government and Ofcom’s intention is to implement the new European Electronic Communications Code despite Brexit, this is far from being confirmed or set in stone. Indeed, UKCTA 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 Code and its intention (as discussed above).
- 24. 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 UKCTA does 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.

CONCLUSION

25. UKCTA argues 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. 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.

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