NON-CONFIDENTIAL VERSION

BT's response to Ofcom's consultation on helping consumers get better deals in communications markets: mobile handsets

16 September 2019

Comments should be addressed to:
BT Group Regulatory Affairs, BT Centre, London EC1A 7AJ
Regulatory.affairs@bt.com

We are pleased Ofcom has accepted voluntary commitments as the best way to address the handset 'loyalty penalty'

1.1 The voluntary commitments are flexible, quick to implement and allow providers to tailor price reductions to their specific customer base. We are pleased to have worked constructively with Ofcom on EE's commitment - which provides a fair outcome for our consumers - we want customers to be engaged in the market, and our solution strikes the right balance between protecting customers, who might be unable to engage in the market, whilst not dampening engagement generally.

We agree with Ofcom that 'linked' split contracts may present a barrier to switching

1.2 A large number of consumers buy bundles of telecoms services from providers. We think consumers appreciate both the efficiency of doing this and the favourable pricing this enables providers to offer. For the large part, providers are clear and transparent with customers about the process of buying and leaving bundled offers, which ensures customers understand what their obligations and costs are.

1.3 We do recognise however, Ofcom's concern, where consumers enter into a 36-month finance agreement linked to a 30-day or 24-month mobile airtime agreement and customers have to pay off any remaining handset loan in order to switch airtime. Consumers with these contracts who wish to switch airtime provider (before the end of their 36-month handset finance agreement) have to make the choice to pay off their remaining handset loan, potentially a large amount to pay in one go or stay with their current provider. We agree that this may act as a barrier to switching.

1.4 We therefore agree Ofcom should take action to ensure better customer outcomes in this situation. We also broadly agree with the EECC provisions around bundles (Article 107).

We are concerned that there are different definitions of 'bundle'. How Ofcom has defined 'bundle' in this case may not fully address the issue identified

1.5 We are concerned that Ofcom and DCMS have proposed different definitions of 'bundle' than that in the new EECC. The EECC definition encompasses a telecoms service plus one or more of linear broadcasting/ M2M/ equipment/ digital content & services sold under closely related or linked contracts by the same provider.

1.6 The definition of 'bundle' proposed by Ofcom in the draft General Condition at Annex 7, is narrower than that in the EECC. We presume this is deliberate, and the definition will be extended when Ofcom consults further on the new EECC rules to ensure it

encompasses the EECC provision. Whilst, the DCMS[1] definition is potentially wider than that defined by the EECC, as it would encompass any product that is sold with a telecoms service.

1.7 We would therefore be grateful if Ofcom would clarify the definition it intends to use when implementing the EECC. As we set out in paras 1.10-1.16, we consider there to be risk in adopting a piecemeal approach to consulting on the EECC bundling requirements and propose that Ofcom instead consult on all bundling requirements at one time. This would ensure providers have a clear view on Ofcom's interpretation and the implications of the new EECC rules.

1.8 Ofcom is looking to use the new EECC bundling rules to address its concerns in regards to 'linked' contracts. In this instance, Ofcom proposes to define a 'bundle' as a telecoms service (whether mobile or fixed line/broadband) together with an item of equipment - where the two are sold under closely related or linked contracts by the same provider. We agree that for the large part this definition will limit the minimum contract periods of financing arrangements, where there is a link between the finance arrangement and the airtime element. However, the proposed definition may not be entirely sufficient to meet Ofcom's concerns about 36-month finance agreements representing a barrier to switching.

1.9 There are potential loopholes in the current definition, which may allow the regulations to be circumvented, and so expose consumers to the harm - from barriers to switching - Ofcom has identified and is looking to prevent:

a) Ofcom requires that the elements of the bundle are sold by the same regulated provider for the rules to apply, so if elements of the bundle are sold by different providers, there are good arguments that the rules don't apply; for example:

- *If a mobile plan is sold by an independent retailer*: if the customer contracts with a communication provider for the airtime services but the device is sold to the customer by the retailer, the 'same regulated provider' does not sell both elements of the bundle and so the rules would not apply.
- *If a 3rd party financing house is involved*: if the customer contracts with a regulated provider for airtime and to purchase a device, but the handset financing is provided by a 3rd party (whether linked to that regulated provider or not), the rules would not apply to the 3rd party finance. So it is possible that a link could be made between the financing and mobile contracts and the rules not apply.

b) In most cases where customers take out finance to cover the cost of the device, the contract is what is known as a credit sale agreement: under this contract the customer both purchases the device and obtains credit to pay for that device. Ofcom's proposed definition would capture this kind of sale. However, it is possible that the customer enters into a hire purchase or conditional sale arrangement. In this case the sale of the device and the financing arrangement are not contained in the same document. While the telecoms service and sale of the device would fall under Ofcom's proposed definition, it is arguable the financing arrangement would sit outside and not be

[1] DCMS (2019), Implementing the Electronic Communications Code p.37.

caught. To remedy this loophole the definition of bundle would need to refer explicitly to financing contracts.

Ofcom should implement the EECC bundling requirements in one go and address the 'linked' split contacts issue using existing regulation

1.10 A number of provisions in the EECC - that are yet to be consulted on - will apply to bundles, and until providers know exactly how Ofcom will interpret all of these provisions (in particular Articles 102(3), 103(1), 105 and 106(1)) it is difficult to appreciate the extent of the changes that may be needed.

1.11 In this context, Article 105 (contract termination) is particularly important as the extent to which customers may or may not be able to terminate entire bundles is a crucial driver for providers when designing and taking to market products and propositions. Without clarification from Ofcom on how it will interpret and enforce Article 105, providers may not be able to design the best type of products and propositions to meet customer needs, and provide good value while complying with applicable rules.

1.12 A piecemeal approach to consulting and lack of clarity on interpretation, creates unhelpful uncertainty for consumers and unnecessary complexity for providers.

1.13 Ofcom states that "*because the use of split contracts is growing, and more providers are planning to offer them, we propose that these provisions should be implemented as soon as possible to protect people*." [2] We agree with Ofcom. Linked contracts have been in the market for c.18-months[3] and Ofcom estimates that 5.9 million[4] people now have 'linked' split contracts. As an indication of how this issue is developing, we estimate that the number is likely to increase at a rate of c. 230k to c. 380k customers per quarter. We further estimate that c.70% of consumers who have longer term (24m+) contracts have linked contracts and cannot leave their airtime contract without paying off their device first.[5]

1.14 We share Ofcom's concern that 'linked' split contracts *"are likely to deter customer switching."*[6] As Ofcom clearly concludes linked contracts can present a barrier to switching, we suggest that rather than implementing the EECC bundling requirements in a piecemeal way, Ofcom instead use its current enforcement powers under C1.3 to address the issue. C1.3 states "*without prejudice to any **Fixed Commitment Period**, **Regulated Providers** shall ensure that conditions or procedures for contract termination do not act as disincentives for **End-Users** against changing their*

[2] Ofcom (2019), Helping consumers to get better deals in communications markets: mobile handsets para 1.37.
[3] Sky Mobile, https://www.uswitch.com/mobiles/features/sky-mobile-swap-contracts-everything-you-need-to-know/; Tesco Mobile, https://www.tescomobile.com/the-hub/tesco-mobile-launches-lowest-ever-monthly-prices-with-new-anytime-upgrade-flex-contracts/; 02, https://news.o2.co.uk/press-release/o2-custom-plans-2/
[4] Ofcom (2019), Helping consumers to get better deals in communications markets: mobile handsets para 3.15.
[5] Note: this is based on BT estimates and market insight and Ofcom should get the insight directly from Sky mobile, Tesco mobile and 02. BT has used market data and then applied a series of assumptions – these numbers should be used as an indication only.
[6] Ofcom (2019), Helping consumers to get better deals in communications markets: mobile handsets para 5.5.

***Communications Provider**."* The requirement for customers to pay off any outstanding handset cost if they wish to leave their airtime contract contravenes this condition.

1.15 Using C1.3 will allow Ofcom to address the issue as quickly as possible: as it could act immediately, and benefit more customers: as current customers on 'linked' split contracts would also be protected.

1.16 If Ofcom addresses the issue through the EECC route – it is likely that a further c. 760k customers would be on 'linked' split contracts before the new regulation is in place. If Ofcom does proceed with this route it must determine how it will address the consumer harm of those customers already on 'linked' split contracts.

The new business customer definitions will drive huge complexity. Ofcom should consider all EECC provisions affecting business bundles at the same time to avoid unintended consequences

1.17 We do not share Ofcom's broad view that "*microenterprises, small businesses and not for profit organisations are in a similar bargaining position to consumers as far as contract durations, switching and bundles are concerned and need similar protection in those regards*."[7] Whilst we do agree that there is a subset of microbusinesses - who display similar characteristics to residential consumers and opt for consumer-like products - on the whole, business customers are generally better equipped to engage and manage their contractual arrangements than residential customers.

1.18 Ofcom took a similar view to us in its Statement on end-of-contract notifications and annual best tariff information in May 2019: "*the business landscape is large and varied and […] different types of businesses have different needs […] research [shows] that companies with more than 10 employees were more likely to have a specialist in telecoms or IT who was responsible for their telecoms services, and that there was higher awareness of the details of their terms and conditions for business contracts. It is reasonable to expect that business customers are generally better equipped with the skills and resources to manage their telecoms contracts than residential customers, as well as more likely to have knowledge about the information provided under their contracts*"[8]

1.19 It is therefore not proportionate nor appropriate to infer similarities with residential consumers and apply remedies designed for residential customers across to business customers. Consequently, and as a general principle, we consider it is vital that any regulatory intervention is only considered in relation to areas where research and evidence has specifically identified business customer harm.

1.20 Notwithstanding our reservation in the preceding paragraph about the need for Ofcom to have a robust evidence base before acting, we welcome the proposal that business customers can continue to take 'linked split' contracts over 24-months,

[7] Ofcom (2019), Helping consumers to get better deals in communications markets: mobile handsets para 5.31.
[8] Ofcom (2019), Statement on end-of-contract notifications and annual best tariff information para 3.24.

where they have expressly agreed to do so. We believe that this can be demonstrated through an explicit tick box, or equivalent, in our existing sales journey.

1.21 Ofcom has used new definitions of 'Microenterprise', 'Small Enterprise' and 'Not for Profit' in this consultation. These definitional changes have not been consulted on and are not aligned with how BT (and potentially the rest of industry) currently capture information about their customers. These definitional changes will have significant unintended consequences for providers that have not been considered in this consultation.

1.22 BT does not collect turnover and/or balance sheet data for 'Microenterprise' and 'Small Enterprise' ✂. We have no reason to capture this information when we contract with our business customers, and our customers may well be unwilling to share this information with us.

1.23 In particular, customer financial performance data is difficult to collect as it is often not publicly available, and may also vary significantly over time (potentially leading to customer confusion about the applicability of the regulation). Furthermore, it is likely that not all business customers will be willing to share this information with Communication Providers as they may not understand the relevance or be suspicious about the underlying motives.

1.24 The Commission Recommendation 2003/361/EC states that Member States, in the interests of administrative simplification, "*may use only one criterion – the staff headcount – for the implementation of some of their policies.*"[9] We would therefore encourage Ofcom to explore whether the financial criterion is strictly required in the definitions of 'Microenterprise' and 'Small Enterprise Customer', in terms of meeting its overall objectives.

1.25 If we are required to collect information under the new definitions, we would need to make significant systems changes. These would add complexity to our processes and require periodic updates:

- **Complexity**: we have multiple platforms that service our business customers, combined with many sales channels in which we contract with customers in different ways. A requirement to change the definitions will require a change to all of our systems and existing sales journeys, which could take ✂ to implement.[10]
- **Updates**: in order to ensure that customers are always segmented correctly within the definitions, data would need to be periodically validated and adjusted manually. This would require ongoing contact with the customer.

1.26 BT already operates an internal way of segmenting customers according to their market need and size. We consider a quantifiable way of being able to accurately segment customers is by volume of connections. We can monitor this internally and

[9] Commission Recommendation 2003/361/EC para 7.
[10] ✂

re-segment customers where appropriate to ensure they fall within the correct definitions.

1.27 Furthermore, Ofcom's broad definition of 'Not for Profit Customer' - without any size limitations - means that large organisations in strong negotiating positions, potentially with bespoke contracts, would also be captured by these rules. Ofcom has not evidenced why such large not for profit organisations should be subject to these rules especially given that other large businesses are outside the scope of such regulations. Not for profit organisations cannot not be treated as a homogenous group and any interventions should be targeted where there is potential harm.

1.28 Any changes to business customer definitions will be complex to implement and may lead to disproportionate interventions. We therefore believe any changes should be carefully considered with providers to ensure focused interventions. This is a further reason why we urge Ofcom to implement all of the EECC changes at the same time and also ensure adequate time is given to work through the new requirements in the round.

We call on Ofcom to provide as much clarity as possible on the new EECC rules

1.29 As discussed, we would urge Ofcom to use existing regulations to address its concerns with regards to 'linked' split contracts. We do however ask Ofcom to be as clear as possible, as early as possible, as to how it will interpret all end-user provisions of the EECC. Providers will already be planning for December 2020 (and beyond) and for some provisions it is likely new technical processes or changes to systems could be required. Implementing such changes – particularly to ensure a great customer experience - takes time, planning and resource.

We are concerned that as the market develops there may be a risk of regulatory clash that will need to be addressed

1.30 We have some concerns about regulatory clash and the impact this could have on providers and consumers. We have already highlighted this in our response to the DCMS consultation. We suggest the rules are made clear as to which regulator is responsible for which element. We appreciate that as the market further evolves this may need to be revisited. However, it would give providers certainty as to what to expect for the time being, enabling them to best serve customers.

1.31 Many providers are already subject to the FCA regulatory regime, in addition to Ofcom, for example: because they sell consumer credit, device insurance or allow customers to purchase 3rd party products and services via the telecoms bill. We believe that individual regulators should continue to regulate specific sectors and it should be clear to providers and customers who the relevant regulator of any product is. It would not be appropriate - for example - for Ofcom to start regulating aspects of

consumer credit agreements, as this would likely lead to confusion, regulatory uncertainty and customer uncertainty.

1.32 While it may be the case that at the present time, supply of telecoms services in a bundle along with other services is limited, the telecoms market is a fast-evolving market. Providers build for the future far in advance of services launching and regulatory uncertainty – as to the applicable rules and/or relevant regulator - is likely to have a detrimental effect on the roll out of innovative products and services, and could impact business ability to operate in an effective way and best serve consumers.

1.33 There is also the likelihood of consumer confusion (presuming the new rules come into force). For example, a customer with a bundle of mobile service and a mobile phone bought under a consumer credit agreement may have a complaint about termination processes of the bundle and not know which regulatory process their issue should proceed through. It must be made clear that, once the customer had exhausted options with their provider, that Ofcom regulations apply to the airtime element and the FCA regulations apply to the finance element.