



*Clear. Creative. Communications.*

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LONDON  
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16 Sept 2019

By e-mail

**Reference: Helping consumers to get better deals in communications markets – mobile handsets (the “Consultation”)**

Dear Lorna,

Gamma Telecom Holdings Limited (“**Gamma**”) welcomes the opportunity to respond to the Consultation published on 22 July 2019; our response is appended.

## **Introduction**

Gamma is a Public Electronic Communications Network that provides wholesale fixed and mobile telephony and data services, to some 1,100 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 *one billion* pounds.

This 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 for further detail in the first instance.

## General Comments

1. Following previous comments Gamma, and others, have made regarding Ofcom’s *laissez-faire* use of language, we are concerned we appear to have a repeat of the situation with this Consultation.
2. The current approach to the engagement of business stakeholders is becoming increasingly untenable and risks alienating or disenfranchising half of the market which Ofcom has a duty to secure the best outcomes for.
3. This Consultation uses the term “Consumer” in its title, yet, the ordinary and natural meaning of the word does not apply to businesses. We recognise that the Communications Act 2003, uniquely, classifies Consumer as close to “End User”, but that definition is not carried forward by Ofcom in the General Conditions of Entitlement, which use the ordinary and natural meaning. Nor, for that matter, is this unique definition used in legislation specific to natural persons, such as the Consumer Rights Act 2015. We also have a lazy use of the word “customer” which can, erroneously, be taken as meaning wholesale relationships.
4. In any event, we say the implementation of the proposals in the consultation would be *ultra-vires* beyond their application to domestic end users and also represent a worrying “thin-end of the wedge” in respect to jeopardising the choice available to business users and an impact on other industries.

## Reasons why Ofcom's Proposals are *ultra-vires*

### Error One – Necessary and Proportionate.

5. Section 47(2)(c) of the CA2003 requires a GC to be “*proportionate to what it intends to achieve.*”. Ofcom have adduced no evidence whatsoever of any harm being experienced by business customers of any size. There are just 11 references to business in the Consultation; these are split between definitions and mere assertions that the bargaining power of a business is the same as a domestic user.
6. In order to impose these conditions directly, there either needs to be the statutory power to do so absent a proportionate test (i.e. after transposition of the European Electronics Communications Code (“**EECC**”)) or Ofcom needs to conduct research and justify its proposals.
7. With respect, we do not believe that Ofcom will ever be able to adduce any credible evidence of harm being experienced by well resourced businesses of 49 employees and/or a turnover of EUR10 million relating to an ability, or not, to expressly waive a minimum contract duration in excess of two years.
8. Finally, for the measure to be proportionate, by definition, the ability to verify whether an entity has a given number of employees or a given turnover is required. There is no statutory register of employee numbers in the UK and the provisions of the Companies Act 2006 mean that an entity of the turnover envisaged does not have to make it in the public record. For the avoidance of doubt, simply asking the end user in question is insufficient – there is too great a moral hazard involved in their response.

### Error Two – Statutory Overreach

9. The will of Parliament in respect to protections for businesses is explicit in the CA2003; it is limited to businesses of 10 employees or fewer. The EECC is not directly binding and needs transposition, therefore Parliament must reassert its will in this regard by amending the CA2003 to match the definitions in the EECC. Indeed, the definition of micro-enterprise and small enterprise in EU terms is a Recommendation and Parliament (not Ofcom) is free to use different metrics as it sees fit.
10. These problems with implementing this provision, in terms of the information asymmetry between the service provider and the end user, are precisely why Parliament needs to transpose the provision first.

## Error Three – Conflict with Government’s Position

11. Ofcom are continuing a path based on an assumption that EU law will continue to apply past the 31<sup>st</sup> October 2019. Whilst it is an ever-moving feast, the current position of DCMS appears to be one of a watching brief; it is therefore premature to transpose the EECC until this position changes, or the transposition deadline becomes impossible to meet. Neither are currently the case.

## Further Impact on Business Users and Other Industries

12. The entire Consultation appears to focus on the domestic contract position in relation to how a mobile handset is paid for. Ofcom then are proposing to transpose (unlawfully, as we say above) the EECC provision regarding contract duration to solve this, whilst also introducing new rules for business providers.
13. If Ofcom had sought to ensure that its measures were “*proportionate to what it intends to achieve*” then Ofcom would have realised that its definition of terminal equipment impacts the data services market;

*‘Bundle’ means where Mobile Communication Services and Terminal Equipment are sold by the Regulated Provider under the same or closely related or linked contracts;*

*‘Terminal Equipment’ means equipment directly or indirectly connected to the interface of a public telecommunications network to send, process or receive information. In either case (of direct or indirect connection), the connection may be made by wire, optical fibre or electromagnetically. A connection is indirect if equipment is placed between the terminal and the interface of the network;*

*‘Mobile Communications Service’ means a Public Electronic Communications Service consisting in the conveyance of Signals by means of a Public Electronic Communications Network through the agency of Wireless Telegraphy to or from Apparatus which is designed or adapted to be capable of being used in motion;*

14. Whether a high-end Cisco router with 4G back-up (as sold to business customers meeting the definitions in this Consultation) would meet the definition which requires it to be capable of being used “in motion” is another point. It does however, illustrate, how this is the “thin end of the wedge”. It is a very short stretch from domestic mobile handset to the routers used in MPLS deployments, or the IP handsets in a hosted PBX deployment, and we seek assurances from Ofcom that these provisions will not be used in the future for such intervention without further consultation.

15. That said, telemetry solutions using a PECN, perhaps such as those in vehicle automation, or vehicle tracking, would be caught by this definition. In one fell swoop, Ofcom are potentially intervening and curtailing innovation in the automotive industry, which is generally characterised by 3-year contracts.
16. Indeed, this cannot be construed as the will of the European Parliament, because many provisions in the EEC explicitly exclude “machine to machine” communications<sup>1</sup>. This is directly at odds with the definition of Wireless Telegraphy<sup>2</sup> relied upon in this Consultation.
17. We therefore have a situation where Ofcom intended to address harm in the residential market in relation to how an iPhone is paid for, that rapidly draws in companies that operate machine to machine telemetry, which may not, presently, consider themselves to be subject to any form of regulation.

## Conclusion

18. The lack of rigour applied to the Consultation, in terms of the evidence of harm and the potential for impact in other industries demonstrates, categorically, that Ofcom need to reconsider their position – in fact, we can see no alternative but to perform a re-consultation once the situation is more fully understood. This would also afford Ofcom the ability to make sound policy decisions in fuller knowledge of the UK’s future relationship with the EU.

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

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<sup>1</sup> Paragraph 1 of Article 102 - [DIRECTIVE \(EU\) 2018/1972 OF THE EUROPEAN PARLIAMENT](#)

<sup>2</sup> As defined in the Wireless Telegraphy Act 1996