Internet Telephony Services Providers' Association

ITSPA Response to Ofcom consultation proposals to implement the new European Electronic Communications Code

About ITSPA

The Internet Telephony Services Providers' Association ("ITSPA") represents over 100 UK businesses involved with the supply of next generation communication services over data networks to industry and residential customers within the UK. Our traditional core members are VoIP providers. ITSPA pays close attention to both market and regulatory framework developments on a worldwide basis in order to ensure that the UK internet telephony industry is as competitive as it can be within both national and international markets.

Please note that certain aspects of the ITSPA response may not necessarily be supported by all ITSPA members. Individual members may respond separately to this consultation where a position differs. However, the ITSPA Council is confident that this response reflects the views of the overwhelming majority of ITSPA members.

A full list of ITSPA members can be found at http://www.itspa.org.uk/.

Executive Summary

ITSPA notes that the Consultation represents an exercise in attempting to transpose a hefty instrument. Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the "**EECC**") has many aspects to consider, in what is essentially the first major review of European Union telecommunications law in 15+ years.

However, this EU Directive is not a "copy and paste" exercise for the regulator; the transposition of a Directive must follow the procedure in national law. This procedure, for the United Kingdom, explicitly requires that changes to the General Conditions of Entitlement ("**GCs**") are demonstrated to be proportionate, non-discriminatory and transparent.

ITSPA notes that the Office of Communications ("**Ofcom**") have elected to use their powers under Section 51(1)(a) of the Communications Act 2003 ("**CA2003**") as opposed to the EU transposition power in Section 52(2)(b). Strictly, this means that the Consultation is no different to if the EECC had no effect in EU law

and was merely a metaphorical "shopping list" of ideas. This would require a full impact assessment and cost benefit analysis to the same standard as any "home grown" idea.

Article 288 of the Treaty of the Functioning of the European Union ("**TFEU**") says:

> *'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'*

As a matter of international law, the United Kingdom is required to procure the intended results of the EECC and, as a matter of Government policy, Ofcom's CA2003 powers are the means in which this duty is discharged in this case.

Had Ofcom proposed to exercise the Section 52(2)(b) power in the CA2003, the "short-hand" approach of saying it is *de facto* proportionate, non discriminatory and transparent such as at §7.225 of the Consultation, would likely be sufficient.

Regardless of the precise CA2003 power exercised, the end result doesn't change; regardless of whether Ofcom followed the correct route to get to the destination, the destination is the same. The United Kingdom is currently required to give effect to the intended outcomes of the EECC and, for all intents and purposes, a copy-out exercise of the *Directive* is a mechanism to achieve that.

However, this "copy-out shortcut" is limited to just what the Directive itself intends to achieve. There are substantial parts of the EECC, taken as a whole with the other instruments to which it refers, where Ofcom has significant *discretion* in the transposition.

Business Definitions

ITSPA members are specifically concerned that Ofcom has adopted, with little or no analysis, the ceilings in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (the "**Recommendation**") concerning categories of businesses.

This approach is problematic; firstly, as we say above, each measure that refers to these *discretionary* categories has to pass the relevant domestic thresholds for the introduction of a GC. This requires a full impact analysis, cost benefit study and significantly more reasoned argument than the Consultation contains because the very existence of discretion negates the "copy-out shortcut".

Such an exercise is required for each proposed modification to the GC where the definitions in the Recommendation apply, not just a single consideration of the Recommendation in isolation. For example, whilst Ofcom may adduce evidence that the bargaining power of a 15 employee business is such that it is proportionate mandate contractual summaries, it does not automatically follow that it is proportionate for it to be presumed the starting point for the same business is a 2 year contract term absent the appropriate waiver.

As far as we are aware, Ofcom has not undertaken any analysis to justify merely implementing the ceilings in the Recommendation nor is there any domestic or European legislation binding Ofcom to adopt them.

Indeed, there is clear evidence that the European Union had intended for there to be a more nuanced approach to business sizes and the protections afforded them by each Member State:

- Micro-enterprises are a subset of Small Enterprises in the Recommendation. Had the European Union intended for all the same provisions to apply to both groups, then the drafting of the EECC would only have referred to Small Enterprises.
- Recital 259 of the EECC refers to the categories as being those "*defined in national law*".
- Article 2 and Recital 7 of the Recommendation make it clear that the categories therein are ceilings.

In conducting such an analysis, we say that Ofcom should have regard to the work of other competent authorities when assessing the proportionality of exercising their discretion. We note that in respect of applying domestic consumer like protections to businesses:

1. Parliament considered whether businesses should have similar statutory protection to consumers in the passing of the CA2003; Parliament concluded the appropriate threshold was 10 employees.
2. The Law Society considered the matter when analysing unfair contract terms and concluded 9 employees was an appropriate threshold[1].
3. Parliament did not apply any of the provisions of the Consumer Rights Act 2015 to businesses, not even sole traders.

[1] *Unfair Terms In Contracts (LC NO 298; SLC NO 199) Summary*" published jointly by the Law Commission and Scottish Law Commission on 24th February 2005

The consequence of the Consultation's approach is that Ofcom has concluded that a business of 50 employees, potentially with multiple sites and sophisticated telecommunications needs looks and feels like a residential consumer. Or, more specifically, that because it doesn't look like a global enterprise, it must therefore look like a consumer – a logic we believe that the Competition Appeal Tribunal was critical of in *British Telecommunications plc v Office of Communications* [2017] CAT 25.

Of course, we do not say that Ofcom should blindly adopt the work of Parliament or the Law Society we discuss above, just as we say it shouldn't blindly adopt the ceilings in the Recommendation. However, it is at the very least an informative starting point for the required impact assessment.

Such end users of 50 employees will be afforded materially more statutory protection in buying a SIM card for a portable WiFi hotspot than they are when they buy vehicles, or photocopiers, or other higher value transactions or more business critical services. Creating a homogenous market with a portion of the largest 5%[2] of UK businesses and residential consumers is not likely to result in positive outcomes.

We also note that the definition of not-for-profit, which is also delegated to the Member States to define, encompasses large institutions such as central government and multi-national charities.

No reasonable person can credibly say that the Crown Commercial Service, itself with hundreds of employees negotiating thousands of contracts worth billions of pounds a year[3], has such low bargaining power, that it must be protected in the same way as a residential consumer.

ITSPA broadly agrees that sole traders and small charitable enterprises deserve an amount of protection commensurate with their bargaining power. Indeed, a sole trader is, for all intents and purposes, a

[2] Percentage of 10-49 employee businesses of total businesses derived from Table B, Business Population Estimates for the UK and the Regions 2019 published by the Department for Business, Innovation and Skills on 10th October 2019.

[3] Crown Commercial Service - "About Us" https://www.gov.uk/government/organisations/crown-commercial-service/about [accessed 30th January 2020]

residential consumer. However, to suggest the bargaining power of the UK Government, with an income of £811bn[4] and 5.39 million employees[5] is the same as a plumber, cannot be correct.

We note there are some elements of the EECC that are likely unavoidable; where there is no discretion afforded to the United Kingdom in the transposition. However, each change that refers to the categories of business size in the Recommendation, as a matter of domestic law, requires that Ofcom conduct a proper impact analysis.

While we say that it will be clear in any consideration of the proportionality of each proposed measure in relation to the actual impact on larger businesses, central government and multi-national charities that the definitions of not-for-profit, microenterprise and small enterprise require revision, a failure to conduct any such analysis would represent a statutory overreach and render the resulting GCs unlawful.

Contract Summary, Additions and Duration

Where the proportionality of the proposals which adopt the ceilings in the Recommendation become acute are where any ITSPA member that provides a service to businesses with fluctuating employee numbers over a contract term (which we confidently assert is virtually all business end users).

It is especially problematic in scenarios which rely on the amortisation of related equipment over the contract term. By way of example:

1. The contract duration proposals at best over-complicate the sales process (which, ironically, itself becomes a disincentive to switch) and at worst will cause an impact on the working capital position of UK businesses by forcing the market to tend to amortising expensive CPE over two year terms instead of 3 or 4. Whilst we acknowledge that the end user has the right to waive their right to a 2 year term, there are still obvious issues about how the industry markets to Microenterprises and Small Enterprises; will it be acceptable to advertise pricing with a 3-5 year amortisation of CPE, for example?

[4] Office of Budget Responsibility – "A brief guide to the public finances" https://obr.uk/forecasts-in-depth/brief-guides-and-explainers/public-finances/ [accessed 30th January 2020]
[5] Office of National Statistics – "Public sector employment, UK: March 2019" https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/publicsectorpersonnel/bulletins/publicsectoremployment/march2019 [accessed 30th January 2019]

2. The wide-ranging and non-specific "disincentive to switch" prohibition and Ofcom's position on non-coterminous linked contracts is highly problematic when a business wants to add a handset for a new employee 18 months into a 2-year term. Will providers be forced to align new users of an existing system to the existing contract end date, and thus have a situation where new users have an ever decreasing amortisation period and each new user is incrementally more expensive? The Guidance at Annex 9 of the Consultation is unhelpful in considering this scenario; it is clear where the subject matter is the provision of televised sports at a discount alongside a broadband subscription, but the read across into the business to business environment requires some nuancing.
3. While we note the exemption for where physical infrastructure is installed into a premises in terms of contract duration, we are unclear as to how this interacts with linked contracts; for example, if a business end user with two sites running an MPLS network between them opens a third and installs an Ethernet circuit which included civils, what is the regulatory situation?

We also consider that the less strict regime for leasing to businesses (either by how the Financial Conduct Authority approaches business lessors or by the apparent exemption that would be gained from the EECC by leasing CPE rather than bundling it) is likely to cause competitive distortions. At the very least a shift to a leasing model from an inclusive bundle would be expected to reduce the protections enjoyed by end users relative to today.

Value Added Tax ("VAT")

The construction of Table A in Annex 1 states that business to business affairs must be conducted *inclusive* of VAT, a situation that would be unique to telecommunications. We assume, given the radical nature of the proposal and the lack of any discussion on the matter in the Consultation, that this is an error and will be duly corrected. As an aside, we hope that Ofcom will reflect on whether there are improvements to its governance process given the potential magnitude of the issue.

Contractual Modifications

The current scope of the regulations is such that a penalty-free exit to a contract is afforded to a relevant customer in two scenarios:

1. A change to the core subscription price;
2. A materially detrimental change.

ITSPA considers the amendments to these provisions in the Consultation represent a widening of the scope to be to the point of not being workable. ITSPA also notes that many of the reasons why the original scope was so limited were because of Ofcom's work in the area in 2013[6] which illustrated that the dynamics of the market are such to render it impossible to fix the cost of the entire portfolio of products for an extended period. Indeed, Ofcom concluded at the time the current proposed scope was not proportionate[7].

> *"Our consideration of the responses, however, has led us to re-consider the options proposed. Having done so, our policy judgment is that, at this time, the appropriate and proportionate action is to issue Ofcom guidance as to the application of GC9.6 to core subscription price rises"*

Many submissions were made to Ofcom[8] on the subject, but some pertinent examples are:

- Service Charge movements for non-geographic calling services. We especially note that directory enquiries services have a reputation for frequent material changes.
- International destinations; certain countries, when short of hard currency, materially increase their termination rates (often denominated in USD), such as Pakistan and the Democratic Republic of Congo.
- Geopolitical changes such as the separation of South Sudan from Sudan.

To comply with the regulation, we would expect to see, in the retail market, an extension of the principle of the Consumer Price Index conditions in contracts, which Ofcom criticise at 4.48 of the Consultation, to international destinations with ranges, or a materially higher ceiling quoted. For example, "*the price to*

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[6] "*Price rises in fixed term Contracts. Options to address consumer harm*". Consultation by Ofcom, 3rd January 2013.
[7] "*Price rises in fixed term Contracts: Decision to issue Guidance on General Condition 9.6".* Statement by Ofcom, 23 October 2013
[8] *Ibid* §4.50-4.52 is Ofcom's own summary.

call the USA will be no more than 40 pence per minute, please refer to the website for the actual price each day".

Alternatively, we may see contracts with "knock out clauses" such as "*if the wholesale cost to call a destination exceeds x, then we reserve the right to discontinue service to that destination*".

Neither of these outcomes, we suggest, is a positive one for end users.

Fundamentally, there was a reason why the current regime was implemented in the manner it was; Ofcom recently considered a structure like that which it is now consulting upon and rejected it.

However, while this provision applies to all "end users" and thus the discretion afforded to Ofcom by the Recommendation does not apply, there remains a significant element of interpretation to consider.

Article 105(4) of the EECC refers to a right to "*terminate their contract*". The definition of contract is where such the interpretation arises. We say that the meaning to be construed is that of the "core subscription price", which is as the regulation works today.

This is because the core subscription, or bundle, is the unavoidable component of the relationship between the end user and their chosen provider. If the end user stopped paying for their service, the most recourse the CP would have is to sue the end user for breach of contract and, as a matter of well established legal principle, the damages that would be awarded would be merely to restore the CP to the position they would have been in had the end user honoured their contract. In other words, the value of the obligations, being core subscription alone.

The widening of the scope of this provision now applies to where there are substitutes; number-independent communications services are already readily available (and are commonly already used) for international calling for example. These are elements where is no obligation for the end user to consume the product or service in question.

If we take a residential consumer analogy; a person entering into an agreement for Amazon Prime would reasonably expect to have free delivery for a year and inclusive TV content. Nothing in that arrangement is forcing that person to buy all of their goods via Amazon. The analogous intent of the EECC in this case would be to protect them from Amazon introducing a delivery charge, or materially altering the TV

content service, not changing the price of a book because the USD-GBP exchange rate varied that day. The person in question is free to decide, in the moment, if they wish to purchase the book at that day's price from Amazon, or an alternative provider, or postpone their purchase.

The proper remedy, therefore, for an in increase in the cost of international calling is for the end user to find a substitute; however, if a bundle included 500 minutes a month to an international destination for a fixed commitment period, it would be entirely proper for that user to be offered an exit if the bundled minutes were to be reduced or surcharged.

The conclusion is that "contract" is clearly meant to be construed by reference to the *obligations* of the end user to pay i.e. the core subscription price over the minimum term, it cannot be said to imply that a subsequent and potential future *discertionary* purchase of minutes to Pakistan.

Switching

ITSPA has long campaigned for a change in switching, notably number portability for business customers, and is pleased that Ofcom recognises the challenges in this part of the market. The EECC does provide an opportunity to introduce improvements. However, these need to do more good than harm.

We are ever conscious of events in 2008[9] when the Competition Appeal Tribunal overturned Ofcom's original intervention. We are also aware of vested interests in certain parts of the industry and the challenges that are created for reaching a consensus on how to proceed.

A review of the published responses to Ofcom's consultation involving number portability last year[10] suggests that ITSPA is not alone in its view that many of the problems with switching can be handled by Ofcom articulating the desired end user outcome it wishes to see and then allowing the industry to create a solution to cater for it.

ITSPA has been made aware that Ofcom is considering consulting on and imposing a switching process, based on a binary choice between two options debated at the Office of the Telecommunications

[9] *Vodafone Limited v Office of Communications* [2008] CAT 22
[10] "*First consultation: Promoting trust in telephone numbers*" published by Ofcom on 11th April 2019.

Adjudicator ("**OTA**"). This news conjures a sense of *deja-vu* and memories of the failed 2008 attempt to improve switching. It is a flawed approach for several reasons:

1. Regulator mandated processes are unlikely to be the most efficient or the best outcome for a technologically advanced industry;
2. It assumes that the OTA has arrived at the two best options. We are aware that some Communications Providers are critical (and are planning to voice the same to Ofcom in parallel to this Consultation) of the OTA and would, therefore, question whether the process was effective;
3. The procedures have been designed to fit the majority of scenarios encountered by the group but without a properly defined outcome. To this day, there is no guidance on what Ofcom considers *"the shortest possible time"* for GC B3, or what *"reasonable terms and conditions"* are, which would include the balancing of consumer protection in the form of preventing slamming and fraud versus promoting switching and a liquid market.

There is nothing particularly objectionable about what the EECC intends to achieve as articulated by Ofcom in Section 7 of the Consultation. However, it is unlikely to result in improvements for business customers, which are the sector currently experiencing the most significant headaches in switching.