

End user Terms and Conditions Guidance

Compliance Guidance prepared by ITSPA Associate member:

The logo for Preiskel & Co is displayed in white text on a dark blue rectangular background. The word 'PREISKEL' is in a bold, sans-serif font, followed by an ampersand '&' and the word 'CO' in a slightly smaller, bold, sans-serif font.

About ITSPA

Founded in 2004, ITSPA is a membership-led organisation that represents predominantly network operators, service providers, resellers and other businesses involved with the supply of next generation communications to business and residential consumers within the UK. ITSPA helps act as the voice for the sector to key stakeholders; ensures that standards created by or imposed on industry are fair; leads on developments of best practice; campaigns on key issues that members face, promotes competition and self-regulation and serves as the leading networking forum for the UK VoIP and next generation communications industry with events throughout the year.

Members also receive complimentary subscription to the dispute resolution scheme CISAS; summaries of Ofcom (and other) consultation papers; regulatory briefing documents; Government monitoring and intelligence reports; updates from legal professionals; anti-fraud information; and the opportunity to collaborate with peers to promote career development.

About Preiskel & Co

Preiskel & Co is a telecoms and tech boutique law firm based in the City that specialises in UK and international corporate, commercial, litigation, and regulatory matters. The firm is independently recognised as a leader in the telecommunications, media and technology sectors, also possessing significant expertise in intellectual property (including filing patents and trademarks), data privacy, retention and encryption.

Preiskel offers a range of services for a client base that spans from telecoms resellers, MVNOs/MVNAs, through to MNOs, major handset manufacturers and regulators across the telecoms and technology ecosystem. The firm's 4 partners are independently recognised as leaders in the telecoms field and are at the forefront of the sector with much telecoms industry experience between them. For example, Tim Cowen was general counsel for BT's international businesses and is a member of the Competition Appeal Tribunal; Ronnie Preiskel had legal and business development roles at BT and Vodafone and at a mobile content company, whilst Danny Preiskel was a specialist telecoms investment banker.

A. Introduction

- 1.1 This is a brief non-exhaustive guidance describing the key legal requirements (and issues) that communication providers ("CPs") should take into account in their end user terms and conditions when they provide communication services ("Services") to end users.
- 1.2 The provision of Services to end users by CPs is highly regulated, most notably by Ofcom's General Conditions of Entitlement as explained below.

B. OFCOM'S GENERAL CONDITIONS OF ENTITLEMENT

- 1.1 In the UK everyone is "generally authorised" to provide communications services or networks. However, this "general authorisation" is subject to Ofcom's General Conditions of Entitlement (the "GCs") which are conditions that apply to all CPs providing electronic communications services and networks. Ofcom may set, modify or revoke the General Conditions of Entitlement under section 45 of the Communications Act.

- 1.2 As set out further below, it is important to tailor the end user Ts&Cs depending upon the network or services you are providing and whether the end users are consumers, small businesses with 10 or fewer employees or larger businesses.

C. **What kind of network or service are you providing?**

- 1.1 The GCs set out three main types of network or service providers:
- a. Electronic Communications Services or Networks (ECSs or ECSNs): this category includes all types of electronic communications networks and services, including both public and private networks, mobile and fixed (unless otherwise stated) voice telephony, data and internet. It includes resellers as well as own-network providers. It does not include providers of terminal equipment, such as handsets. Only a few of the GCs apply to this category.
 - b. Public Electronic Communications Services or Networks (Public ECSs or Public ECNs): The second of the groups of providers narrows the first defined category and includes all providers of ECSs and ECNs who are not providing private networks or services (typically, private networks and the services run on private networks, and other bespoke services which are not offered to the general public). Some GCs would apply to this category.
 - c. Publicly Available Telephone Services or Public Switched Telephone Networks (PATs or PSTN): The third category further narrows the definition to CPs which provide networks or services which enable members of the public to make and receive Public Switched Telephony Network ("PSTN") phone calls. It excludes, for example, providers of data services or data networks, Internet access services and telephone services which are not available to the generality of the public. The category does, however, include most providers of indirect access services and resellers of PSTN services. Most of the GCs apply to this category and quite a number of the ITSPA members are likely to fall within this category.

The link below provides details about which GCs apply to each category of CPs:

<http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/general-conditions-guidelines/>.

D. **Who is My End User?**

- 1.1 A CP would need to comply with specific requirements depending on the category of end users to which the CP provides services. The end users are divided into the following categories:
- a. **Consumer:** any individual who uses or requests the Services for purposes which are outside his or her trade, business or profession. Consumers are protected by general consumer protection legislation. Some of the GCs also include enhanced protection to consumers. Consumer regulatory protections need to be taken into account while drafting end users Ts&Cs for consumers.
 - b. **Small Business Customer:** the GCs define small business customers as a customer who is neither himself a communications provider, nor a person who is such a customer in respect of an undertaking carried on by him for which no more than ten individuals work (whether as employees or volunteers or otherwise). Some GCs set out specific protections for Small Business Customers.

- c. **Larger Customer:** business customers who do not fall within the definition of Small Business Customers. Some regulatory protections included in the GC apply to Larger Customers when they are end users of communication services (e.g. all end users have the right to terminate the agreement with a CP if the CP makes changes that are detrimental to them).

A well advised CP providing services to Consumers and to business ought to have at least two separate sets of Ts&Cs (one set for consumers and another set to cover both small business customers and larger customers).

E. Providing services to consumers and small business customers

1 Compliance documents

- 1.1 CPs providing services to consumers and to small business customers, must have the following compliance documents:
 - a. **Complaints Code:** providers of Public ECSs and ECNs, PATS and PSTN, must have a complaints code compliant with Ofcom requirements, which shall be displayed on their website. The CPs' Ts&Cs must make reference to and tell customers how to access a copy of their complaints code.
 - b. **Code of Practice:** there is a list of minimum information that must be contained in the code of practice as specified by GC14. In case the CP provides premium rate services, NTS Calls, calls to 0870 numbers and calls to personal numbers (excluding payphone service providers), the code of practice must be specifically drafted according to the annexes of GC14. This code of practice must be made available on CP's websites.
 - c. **Privacy Policy:** if a CP collects personal data and determines the purposes for which and the manner in which any personal data is, processed then the CP must have a compliant Privacy Policy published and easily accessible on its website.
 - d. **Cookies Policy:** if your website sets cookies on users' equipment, you must provide your users with clear and comprehensive information about the purposes for which the cookie is stored and accessed through a cookies policy. You must also obtain users' consent to collect cookies, which may be achieved by placing a static information banner at a prominent place on your website. More information can be found at www.allaboutcookies.org.
 - e. **Security breach policy:** if you are collecting users' personal data, you must comply with the seventh data protection principle, which requires data controllers to have appropriate technical and organisational measures in place to prevent personal data being damaged, lost or stolen. In order to achieve this, you should have in place a security breach policy to respond to data breaches swiftly and effectively.

2 ADR schemes for Consumers and Small Business Customers

- 2.1 Any CP providing services to consumers and small business customers, must be a member of an Alternative Dispute Resolution Scheme ("ADR scheme"). The ADR scheme is an independent arbitrator between the CP and the customer when an initial complaint cannot be resolved, and is authorised to impose its decisions over the CP. Currently, there are two ADR schemes between which a CP must choose - Communications and Internet Services Adjudication Scheme (CISAS), accessible at www.cisas.org.uk; and Ombudsman Services: Communications (Ombudsman), accessible at www.ombudsman-services.org/communications.html. All ITSPA members (except Corporate members) are eligible to join CISAS free of charge as a membership benefit.

F. Important Clauses in CPs TERMS AND CONDITIONS

- 1.1 CPs should consider the following requirements when drafting or updating their Ts&Cs (this requirements will apply to providers of Public ECSs and ECNs, PATS and PSTN).

2 Requirement to offer contracts with minimum terms GC 9.2

- 2.1 GC 9 sets out the minimum terms that need be included in contracts with end users.

3 Initial Commitment Period and Early Termination Charges

- 3.1 CPs shall ensure that:
- a. conditions or procedures for contract termination do not act as disincentives for end users against changing their CP; and
 - b. end users are able to subscribe to a contract with a maximum duration of 12 months.

4 Early Termination Charges and Additional Charges

- 4.1 Ofcom's guidance on unfair terms in contracts for communications services¹ (the "**Unfair Terms Guidance**") covers standard terms and conditions for the provision of services provided to consumers where there is an ongoing monthly liability (i.e., it does not apply to pre-paid services).
- 4.2 The Unfair Terms Guidance provides specific guidance for several types of charges made to consumers such as: (i) non-direct debit charges; (ii) default charges (i.e. late payment charges, charges for payment failure and charges for reconnection); (iii) itemised and paper billing charges; and (iv) cease charges. The general rules is that these charges should be cost oriented.
- 4.3 CPs shall not include in any contract with a consumer early termination charges ("**ECT**"), which are higher than the remaining to be charged for the initial commitment period ("**ICP**"), such ICP shall be no more than 24 months from the commencement of the contract.

5 Automatic Renewable Provisions (GC 9.3)

- 5.1 CPs providing fixed-line telecommunications services and broadband services to consumers or small business customers must not, at the end of the ICP, renew those contracts for a further ICP without the customer's express consent, obtained separately for each ICP in a manner which has enabled the customer to make an informed choice.

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Guidance.pdf>

6 Modifications likely to be of Material Detriment to End Users (GC9.3)

- 6.1 CPs shall give end users notice of at least one month of any modifications likely to be of material detriment to end users. This notice must inform end users that they are able to withdraw from the contract without penalty if the proposed modification is not acceptable to them.
- 6.2 Ofcom’s Guidance on “material detriment” under GC 9.62 describes how Ofcom is likely to treat increases to the agreed core subscription price during the fixed term of a contract where such increase is considered as a modification that is of, or is likely to be of, material detriment to consumers and small business customers.

7 Fraud and minimum security standards

- 7.1 Please note that the Voiceflex case ruled that unless the contract has clear terms to attribute liability for fraudulent use to the end user, then the service provider will be on the hook for example if a 3rd party hacks in, even If it is alleged that end user had not properly secured their network.
- 7.2 Accordingly, the end user Ts&Cs should make it abundantly clear that the end user must take steps to secure the system, for example in terms of creating and safeguarding secure passwords, failing which the end user will be liable for any fraudulent calls.
- 7.3 Otherwise the service provider would be liable for the calls made by a hacker with the end user only obliged to pay for calls it had actually made, as long as it had not disclosed his password.
- 7.4 ITSPA maintains that prevention is better than cure, and we urge all our members to take heed of ITSPA Best Practice Documents in [Provisioning Security](#) and [IP-PBX deployment](#).

8 Information requirements regarding the limitations or restrictions to accessing emergency calls (GC14.6)

- 8.1 Ofcom requires CPs to inform Consumers and Small Business Customers of any limitations or restrictions to accessing emergency calls. This is relevant to you if you provide VoIP services, for example.
- 8.2 Annex 3 of GC14.6 details when and where such information should be provided by defining the following terms:
 - a. Terms and Conditions of Use: means the contract agreed by the customer for the provision of the Services;
 - b. User Guide: means the document giving the customer information about how to use the Services. This does not include any document concerned solely with the operation of the equipment used to access the Services.
 - c. Sales Process: means the process of providing information to the prospective customer about the Services and of establishing the customer’s requirements for the Services before the making of the contract. This includes leaflets and marketing material. It does not include advertisements.
 - d. Point of Signature: means the point in the process of concluding a contract immediately before the customer indicates his/her agreement to enter into the contract.

² <http://stakeholders.ofcom.org.uk/binaries/consultations/gc9/statement/guidance.pdf>

- 8.3 According to GC14.6, where the Service does not provide access to emergency calls, or where it provides access to emergency calls but the Service may cease to function if there is a power cut or failure, or a failure of the broadband connection, the CP shall:
- a. inform the customer about that in a clear and readily accessible manner in the Terms and Conditions of Use, in any User Guide and as part of the Sales Process; where the Service does not provide access to emergency calls, the relevant information should also be provided at the Point of Signature;
 - b. take reasonable steps to ensure that customer acknowledges in the form of a signature (or online equivalent), at the Point of Signature, that they understand that the Services will not provide any access to emergency calls or that it provides access to emergency calls but the Service may cease to function if there is a power cut or failure, or a failure of the broadband connection;
 - c. provide evidence to Ofcom of the acknowledgement mentioned in (b) above, within five working days following a written request from Ofcom;
 - d. during the Sales Process, give the customer the choice whether to receive labels (at no charge, other than reasonable postage and packaging if applicable) which state that emergency calls cannot be made using the Service, and if the Service does not provide access to emergency calls the CP shall also recommend that the customer use these labels on or near the relevant equipment;
 - i. where a screen or display is used with the Service, a label could be an on-screen message or display using a clear and readily accessible graphic, words or icon; or
 - ii. in these and other circumstances a label could be (at the customer's choice) either a piece of paper to be attached to the equipment or software facilities for producing such labels (e.g. a PDF file).
 - e. if the Service does not provide access to emergency calls:
 - i. as part of the Terms and Conditions of Use, supply its customer with a clear and readily accessible printed statement, or an on-screen statement that the customer is encouraged to print out, that emergency calls cannot be made using the Service;
 - ii. and emergency calls are made from the equipment, provide a network announcement stating that calls to emergency services cannot be made from the equipment and that the user should hang up and call from an alternative telephone service such as a traditional landline or mobile phone. This announcement shall be interspersed with a number unavailable tone for the benefit of hearing-impaired users.

G Other Information that must be made available on communication providers' websites

- 1.1 Apart from the compliance documents in section E1.1, other information that CP's must make available on their websites include:
- a. **Information requirements of GC10.2:** providers of PATS are required to publish clear and up to date information on tariffs and pricing (fixed and mobile calls) plus certain minimum information such as the CP address, description of the PATS offered, compensation or refund policy, maintenance services, minimum contract periods, etc.
 - b. **Information about Non-Payment of Bills:** GC 13 requires CPs that provide PATS at a fixed location (i.e. offering landline calls to members of the public) to publish on the website details of measures that

CPs may take to effect payment or disconnection in case its customers have not paid all or part of a bill for such services.

- c. **Information requirements of GC 22:** Providers of broadband and/or landline services to small business customers or consumers are required to comply with the modified GC 22, which includes the obligation to publish on their website a copy of GC 22 (or a link to a copy of GC 22 published on Ofcom's website). CPs must provide a copy of GC 22 free of charge upon reasonable request from small business customers or consumers.
- d. **Sales and Marketing Approach:** CPs providing PATS that is a mobile service (including any SMS service sold as part of the package), must publish a comprehensive summary of their obligations under General Condition 23 (Sales and Marketing of Mobile Telephony Services) in an easily accessible and reasonably prominent manner on their website and provide a copy of this General Condition 23 to customers free of charge upon reasonable request.

DISCLAIMER: This is a brief guidance for information purposes only and is general and educational in nature. The guidance does not intend to constitute legal advice for any specific situation or a definitive or complete statement of the law on any subject. The guidance may not reflect or include all recent legal developments and may not apply to all the specific facts and circumstances of individual transactions and cases. Preiskel & Co LLP and ITSPA do not undertake any obligation to consider whether the information provided in this guidance is sufficient or appropriate for any particular circumstances. You shall seek separate legal advice where necessary.

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