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Network & Communications Group

Letter to mobile providers offering
roaming services

28 May 2021

Dear Sir/Madam

Roaming services and customer rights to exit following contractual modifications

As part of our engagement with providers on the implementation of changes to our General Conditions (GCs) as a result of the European Electronic Communications Code (EECC), several providers have requested clarification on the application of our new guidance on contractual modifications from June 2022.¹ In particular, questions have been raised about Ofcom's expectations for how providers should apply the GC C1 guidance² when dealing with changes to charges for roaming services.

Annex 1 of this letter therefore seeks to provide some additional clarification as to how providers can apply the requirements of the new GCs C1.14 and C1.15, and the associated guidance, with respect to roaming services.

We expect to keep the guidance set out in Annex 1 under review. We may revisit our position if necessary, for example if evidence of consumer harm comes to light as a result of use of price variation clauses.

If you have any questions about the contents of this letter, or on the implementation of the EECC more generally, please contact: EECCenduserrights@ofcom.org.uk.

A copy of this letter will be published on our website.

Yours sincerely,



Cristina Luna-Esteban

¹ The full text of the revised General Conditions that will come into force from 17 June 2022 is available [here](#).

² Set out in [Annex 11](#) to our December statement at paragraphs A11.81 to A11.116.

Annex 1: Guidance on contractual modifications to roaming services from June 2022 onwards

When they come into effect on 17 June 2022, GCs C1.14-C1.15 will require providers to give customers at least one month's notice of changes to the contractual conditions and inform them of their right to exit without incurring any further costs, unless the changes are exclusively to the customer's benefit, of a purely administrative nature (and having no negative effect on the customer), or directly imposed by law.

We want to emphasise that the revised requirements in GCs C1.14-C1.15 specifically relate to modifications to the contractual terms and conditions. The purpose of these requirements is to ensure that customers are protected where changes are made to their contractual terms which do not benefit them. This includes changes to the contract information and contract summary that will be required to be provided to customers in advance to them entering into the contract under GCs C1.3-1.7, and which will be incorporated into the contract.

We recognise that there is some uncertainty around wholesale roaming rates, in particular whether other EEA-based providers may decide to make changes to these rates following the removal of the regulated caps at the end of the transition period. Because of the number of different roaming agreements usually in place, we note that such changes could occur frequently. We also recognise that providers who offer retail roaming services may, in some cases, need to be able to adjust their retail roaming charges to reflect changes to wholesale roaming rates. Any such changes must be provided for in a way which is compatible with the right to exit under GCs C1.14-C1.15 and consumer law relating to unfair contract terms under the Consumer Rights Act 2015 (CRA).

Below we provide further guidance on how price variation clauses and add-ons may be applicable in this context in relation to roaming services.

Use of contract variation clauses

Our guidance on GC C1 (as it will apply from June 2022) recognises that the requirements in GCs C1.14 and C1.15 will not apply to a change which takes place in accordance with a contract variation clause, provided that at the time the customer signed the contract those terms were sufficiently prominent and transparent, such that the customer can be said to have agreed to those terms.³ Our guidance also states that we expect variation clauses should only be used where there is reasonable justification on practical grounds.⁴

Providers should also have regard to the requirements under the CRA related to unfair contract terms, and the CMA's [associated unfair terms guidance](#).⁵ While the unfair contract terms

³ This is consistent with the judgment of the CJEU in [Case C-326/14 Verein für Konsumenteninformation EU:C:2015:782](#).

⁴ Paragraphs A11.102 to A11.105 of our guidance.

⁵ Ofcom is a "designated enforcer" under Part 8 of the Enterprise Act 2002, meaning that we are empowered to take action to enforce certain specified consumer protection legislation, including the unfair contract terms requirements under the CRA.

requirements are separate to the EEC-derived rules in the GCs regarding customers' right to exit following contractual modifications, they work towards similar goals.

Among other things, the CRA requirements seek to protect consumers' legitimate interests from unilateral price variation clauses in contracts that may result in unfairness to them. Specifically, a term in a consumer contract may be unfair under the CRA if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The indicative and non-exhaustive list of terms which may be regarded as unfair, as set out in Schedule 2, Part 1 of the CRA, includes references to:

- terms which enable the supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;⁶ and
- terms which have the object or effect of permitting a supplier to increase the price without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded⁷ (although this does not include a price-indexation clause where the method by which prices vary is explicitly described).⁸

The CMA guidance relating to variation clauses explains that price variation clauses will be more likely to be found fair if the circumstances in which a variation may occur, and the method of calculating the price variation, are clearly set out so that consumers can foresee the changes that might be made and can evaluate the practical implications; transparency in this regard is important.⁹ The CMA's guidance also states that a variation clause is more likely to be found fair if it is narrow in effect, so that it cannot be used at the discretion of the supplier to change the balance of advantage under the contract to the consumer's detriment and/or where consumers are genuinely free to escape its effects by ending the contract.¹⁰

In the specific context of price variation clauses which may be intended to reflect changes in wholesale roaming charges, we recognise that there may be reasonable grounds for providers to consider the use of price variation clauses with respect to retail roaming services. This is because of the large number of different agreements needed to offer roaming services, and the potential for frequent changes in the wholesale rates in each of those agreements, as well as the removal of regulated caps for EEA roaming. In such circumstances, we would expect providers to ensure that such clauses are used in accordance with our guidance and the CMA's guidance. In particular, it would be necessary to ensure that any such terms are sufficiently prominent and transparent to ensure that the customer is fully informed about the impact of the clause on the prices they can expect to pay during the lifetime of the contract, such that the customer can be said to have agreed to those terms.

⁶ Schedule 2, Part 1, Paragraph 11.

⁷ Schedule 2, Part 1, Paragraph 15.

⁸ Schedule 2, Part 2, paragraph 25.

⁹ CMA guidance on unfair contract terms, paragraph 5.21.5 -5.21.7; see also paragraph 5.23.3 in relation to price variation clauses specifically.

¹⁰ CMA guidance on unfair contract terms, paragraphs 5.21.8 and 5.23.5.

Our GC C1 guidance indicates that contract variation clauses should normally set out the different amounts that customers would be expected to pay at different times during the contract. However, we recognise that this may be less practicable with respect to certain roaming services given the uncertainty about when wholesale changes may occur, which wholesale prices may be affected and by how much. This, in turn, may make it challenging for providers to seek to deal with wholesale roaming price increases by specifying when any related increases in retail roaming charges will occur, and by precisely how much, in advance of when the contract terms are set.

We also recognise that there may be many customers who may not use roaming services at all, or who may only use roaming in a limited set of countries. For these customers, a price increase in relation to roaming charges for particular countries which does not affect them may be unlikely to result in detriment to them or be seen by them as central to the bargain they have struck in that contract. In contrast, there may be other customers who do make use of the relevant roaming services and for whom a price increase may result in material detriment. Therefore, it will in practice be necessary for providers to consider whether a price variation clause that allows price increases for roaming charges will result in a significant imbalance or material detriment for their customers, which may vary depending on the practical effect of the clause on particular customers in relation to specific price increases.

Where a price variation clause does not specify a price increase by reference to a price index and/or does not make clear the maximum amount by which a price may increase and the precise timing of when those increases may occur, we consider that it will be necessary for any price variation clauses used for roaming services to, at a minimum:

- (i) specify that any potential increases in roaming charges would be explicitly linked to increases in wholesale rates notified to you by other providers, and provide a clear explanation about how frequently such changes may occur;
- (ii) make clear that customers would be notified of any increases to their roaming charges, including the method by which such notification would occur; and
- (iii) specify that, where an increase to any particular roaming charge is likely to cause material detriment to an individual customer, the provider would allow that customer to terminate the contract without incurring further costs (in accordance with the same process used to comply with your obligations under GCs C1.15-1.20).

Under the above approach, we would expect providers to assess whether a particular consumer is likely to experience material detriment using the same approach as currently used to comply with the existing requirements in GCs C1.6-1.9. In particular, we would expect providers to undertake a review of billing records to identify affected customers (i.e. customers that have used the relevant service and will be affected by the price rise). In deciding the length of the billing period that is used for the purpose of this assessment, we would expect a longer period of assessment (e.g. up to 12 months or more) to be used for roaming services which tend to be used less frequently and/or seasonally.

Use of add-ons for roaming services

We are aware that several mobile providers offer roaming services as an add-on to a customer's core package. As set out in our GC C1 guidance, where a modification is made to an optional add-on service, the right to exit does not apply to the rest of the bundle as long as that add-on is not part of the customer's core service, and it is offered on a short-term basis. It also notes we expect providers to assess whether the service provided is genuinely an optional add on to the customer's core service(s).¹¹ An example of when an add-on might be considered to be part of the core service includes when:

- (i) a customer is likely to consider it central to their service; and
- (ii) if a recurring charge for it appears on the customer's bill each month.

The extent to which roaming services may be considered by customers to be central to their service may depend on the extent to which roaming services were emphasised in the marketing and point of sale material of the package they signed up for.

¹¹ Paragraphs A11.98 to A11.101 of our revised C1 guidance ([Annex 11](#)).