

# **FCS Response to Ofcom's Consultation on Proposals to implement the new European Electronic Communications Code**

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## **Introduction**

The Federation of Communication Services represents companies which provide professional communications solutions to (primarily) business users. Our members deliver telecommunications services via mobile and fixed line telephony networks, broadband, satellite, wi-fi and business radio.

Our members' customers range from SMEs, home-workers and micro-businesses up to the very largest national and international private enterprises and public-sector users. FCS is the largest trade organisation in the professional communications arena in the UK, representing the interests of around 300 businesses who supply B2B services nationwide.

## **Summary & Key Issues**

FCS is pleased to have the opportunity to respond to this very important consultation. The introduction of a General Authorisation Regime in the UK, deriving from the old EU Regulatory Framework for Electronic Communications, has been instrumental in creating and supporting competition in the UK telecoms market. This has led to widespread and diverse provision, serving both consumers and business customers of all types and sizes.

It is important that the balance between customer protection and support for competition is maintained as we move into the new regulatory regime. Considering this, we have a number of concerns about the scope of certain aspects of the new regulation - particularly as it applies to business customers, as follows:

### ***Customer Switching***

We strongly support the implementation of a true gaining provider led process for customer switching across networks and for this reason have been closely involved in development of the "Option Y" solution. This is, in our view, is the closest to a pure gaining provider led process as it does not require any contact with the losing provider - as we understand is very much not the case with the "Option X" process.

### ***Customer Definitions and Scope of Regulation***

The proposed introduction of new business definitions adopted from EU recommendations referenced within the EECC will have the effect of significantly, and in our view inappropriately, increasing the scope of various aspects of the new regulation which are not intended or appropriate for business customers. Whilst we understand that Ofcom has some discretion on the adoption of these recommendations, and their limits, they have proposed to adopt these recommendations verbatim from the EECC.

"Micro Enterprise" covers companies with up to 9 employees. This is very close to the current definition of Small Business Customer which is likely to cause some discrepancies and confusion with overlapping sections of the regulation.

"Small Enterprise Customer" covers companies with up to 49 employees and turnover up to £8.8 million. The scope of this definition will take in a very high proportion of all the business customers

in the UK and we believe that Ofcom needs to consider very carefully the areas in which it is appropriate to extend consumer type protections to these customers.

"Not For Profit Customer" covers charities and other organisations which are prohibited from distributing profits or assets other than "for public and charitable purposes". The concern here is that the proposed definition does not limit the size of the organisations in question and, as currently drafted, central and local government bodies and, for example, schools and hospitals will all be in scope.

Ofcom is also proposing to maintain the existing definitions of Small Business Customer (no more than 10 employees) alongside the new definitions of Small Enterprise Customer (see above) and Microenterprise Customer (fewer than 10 employees and turnover to £1.7 million). While close, the definitions of Small Business Customer and Microenterprise Customer are not identical, which will inevitably create discrepancies, difficulties in interpretation and confusion. We recommend, therefore, that Ofcom should "backfill" and replace the old definitions, where appropriate, to avoid this.

### ***Contract Information and Contract Summary***

The new regulation requires that CPs provide the customer with Contract Information and a Contract Summary in a format prescribed by Ofcom (and separately from the communication provider's normal Terms & Conditions). It is proposed that this will apply to Small Enterprise and Not For Profit Customers.

The FCS Position is that this requirement is not appropriate for (or of particular value to business users and will be onerous for communications providers to provide.

### ***Customer Right to Exit Contracts Without Penalty***

Ofcom is proposing to change the detail of existing regulation under General Condition C1.6 - so that customers have the right to exit their contract without penalty unless the change(s) exclusively benefit(s) the customer. It is proposed that this right will also be extended to Small Enterprise and Not For Profit Customers.

The FCS position is that this level of protection proposed here is far too broad and is not appropriate or necessary for these larger organisations. We also believe that the approach set out in the current version of the General Conditions, which effectively limits these protections to changes to the Core Subscription Price is a far more practical and proportionate way to provide protection for smaller business customers and consumers.

### ***Non-coterminous Contracts***

General Condition C1.8 prohibits "conditions or procedures for contract termination (which may act as disincentives for Relevant Customers against changing their Communications Provider".

Ofcom has indicated that, in certain circumstances, it would consider the operation of "Non-coterminous contracts", (agreements which are linked but which have different commitment periods) to constitute such a disincentive.

The FCS position is that this type of arrangement is very often beneficial to business customers, who change their requirements frequently and add and subtract products on a regular basis, and that these protections should, therefore, be limited to Consumers.

### ***Porting Charges***

The EECC bans communication providers from charging end user customers for number porting.

FCS is asking Ofcom to ensure that customer facing CPs are not exposed to charging by wholesale providers which they cannot pass on to their own customers.

### ***Access to Emergency Services and Location Information***

In this case, Ofcom is proposing to make some minor changes to the relevant General Condition (A3) which, however, do not address long-standing FCS concerns about the guidance on location information for VoIP services and the obligation to inform customers that services may cease in the event of a power cut or failure of the internet connection. FCS is, therefore, seeking two additional changes to General Condition A3:

Firstly, to the current wording in General Condition A3.6, which requires CPs to update the Emergency Services Database (ESDB) whenever the service is used at a new location, This is not practical for VoIP services which may be used at several locations in a single day and we would suggest, as an alternative, that Ofcom mandates use of a VoIP flag to enable the ESDB call centre agents to recognise these nomadic services as such and to establish the location of the caller as a priority. We understand that such a facility already exists and is used to some extent by industry - but awareness is currently far from universal

Secondly, to the wording in A3.3 which requires communications providers to inform customers that services may cease if there is a power cut or power failure or a failure of the internet connection. This requirement currently applies strictly to **VoIP Outbound Services**, the definition of VoIP Outbound Services effectively excludes VoIP services which can both make and receive calls into and from the PSTN - which seems to us to put users of this type of service at unnecessary risk.

### ***Prices to be quoted inclusive of VAT***

For micro and small enterprise business Ofcom is proposing that prices should be quoted inclusive of VAT. This has no precedent in the business supply chain and will introduce unnecessary complexity and cost.

### ***Implementation***

The proposed changes to the General Conditions are numerous and complex and will require major changes to communications providers' documentation and processes and we believe that implementation within the proposed timeframe will be extremely challenging. This is particularly the case for implementation of new switching processes. It is disappointing that, following adoption of the EECC in December 2018, there was no substantial engagement with industry until September 2019 and that this consultation was not then issued until December 2019.

## **Responses to Individual Consultation Questions**

### ***Changes to the defined terms used in the General Conditions:***

**Question 1:** *Do you agree with our proposed changes and additions to the defined terms used in the GCs in order to align with the EECC, as set out in Annex 11?*

No, we believe that adoption the new definitions as proposed will be both problematic and disproportionate as this will effectively result in inappropriate application of the scope of the regulation.

Ofcom have adopted definitions for micro-enterprise and small enterprise customers directly based on the ceilings in Commission Recommendation 2003/361/EC of 6 May 2003 without adequate consideration of the proportionality or impact of these thresholds.

The adoption of these definitions should not represent a simple transposition from the EECC, as we understand that Ofcom is able exercise discretion in this area. Article 288 of the Treaty of the Functioning of the European Union makes it clear that the Recommendation is not binding on Member States and both the EECC and the Recommendation separately make it clear that the relevant thresholds are a matter for national law. In other words, they are a matter, in this instance, for Ofcom to determine.

In exercising such discretion, Ofcom is also clearly bound by Section 47(2)(b)-(d) inclusive of the Communications Act 2003 (the "Act"). This and in our view adoption of the new EECC is no different to when Ofcom generates policy on its own initiative and requires Ofcom to demonstrate that it is acting proportionately, transparently and in a non-discriminatory manner.

We accept that there is a level at which a businesses's bargaining power is comparable to that of a consumer and that a sole trader, for example, is very close in this respect to a domestic consumer. However, to take the view that, because the bargaining power of a 50 employee business isn't the same as a multi-national conglomerate it must therefore be treated in the same way as a consumer, is not a sustainable argument.

### ***Provision of information to customers about their services***

**Question 2:** *Do you agree with our proposed changes to the GCs to implement Article 102, as set out at Annexes 11 and 16?*

No. We believe that these requirements should be restricted to consumers (or possibly micro-enterprises)

**Question 3:** *Do you agree with our proposed guidance in Annex 6 on our expectations for how providers should comply with the provision of contract information and the contract summary?*

Our main concern is with the scope of the requirement. See our response to question 2 above.

### ***Publication of information and provision of data to third parties***

**Question 4:** *Do you agree with our proposed changes to the GCs to implement Article 103 and our proposed approach to implementing Article 104, as set out in Annex 11?*

We agree that existing requirements on information publication are adequate. With regard to the provision of information to e.g. price comparison sites, we believe that in practice this is likely to be relevant to consumer services only.

### ***Contract duration and termination***

**Question 5:** *Do you agree with our proposed changes to the GCs to implement the requirements in Article 105, as set out in Annex 12?*

No we have specific concerns about the following:

Automatic renewal - we do not agree with the extension of these protections o Small Enterprise Customers

Length of agreement - we would prefer if this limitation did not apply to businesses at all but the right to waive this makes it workable.

Rights to Exit - as noted above, we do not believe that this level of protection is appropriate or necessary for larger businesses or not for profit organisations. Further, we believe that the approach set out in the current version of the General Conditions, which effectively limits these protections to changes to the Core Subscription Price is a far more practical and proportionate way to provide protection for smaller business customers and consumers.

End of contract - we note some changes to the wording but that there is no significant change in requirements for businesses, which we believe to be proportionate as applied to those business customers.

**Question 6:** *Do you agree with our proposed changes to the existing guidance as summarised here and set out in Annex 7?*

We suggest that the guidance should be amended to reflect our views on application of the regulation to businesses, as set out in the response to Question 5 above.

### **Switching and porting**

**Question 7:** *Do you support our proposals to introduce:*

*(a) new general switching requirements for all types of switches for residential and business customers and*

*(b) specific switching requirements on information, consent, compensation and notice period charges for residential customers?*

Broadly yes. However, we believe that “gaining provider led” should mean a true gaining provider led process is adopted. The end customer should not be required to contact the losing provider at any stage. For this reason we support the option Y process.

**Question 8:** *Do you support our proposed guidance in Annex 8 on compensation for residential customers?*

We are concerned that the wording of General Condition C7.43 is ambiguous and appears to create an unqualified obligation on CPs to pay compensation to Switching Customers (including business customers) for failures to comply with C.7 generally. We would welcome confirmation that this is not the case.

### **Disincentives to switch: mobile device locking**

**Question 9:** *Do you agree with our assessment that device locking can deter customers from switching and cause customer harm?*

Yes

**Question 10:** *Do you agree with our assessment of the effectiveness of Options 1 and 2 in reducing the consumer harm that can result from device locking and the impact on providers of Options 1 and 2?*

We would prefer option 1, that locked mobile devices can't be sold. This simplifies the switching process for all stakeholders and will remove unlocking charges which can be as much as £75.00. We note that at the moment the Ofcom proposal is only to apply to the consumer market, we would suggest that the banning of locked devices should apply equally to the business market regardless of business size

**Question 11:** *Do you agree with our proposal to prohibit the sale of locked mobile devices?*

Yes, we would also ask that Ofcom look at the bigger question of "Locked" communication devices including IP Telephones which in some case are being locked and charges made to unlock them. With the PSTN switch off and customers migrating to IP services, applying the same rules across the board remove a potential problem in the future

### ***Disincentives to switch: non-coterminous contracts***

**Question 12:** *Do you agree that we should protect customers by issuing guidance on our proposed approach when considering the case for enforcement action against non-coterminous linked contracts?*

We do not believe that this regulation should be applied to contracts with business customers. However, we would welcome more detailed guidance on the approach Ofcom would take to business customers for whom the mix of products and contracts is considerably more dynamic and complex. The examples used in the current draft are very consumer oriented.

**Question 13:** *Do you agree with our proposed guidance in Annex 9 which sets out our proposed approach to assessing whether certain types of non-coterminous linked contracts are likely to act as a disincentive to switch?*

See our response to Question 12 above.

**Question 14:** *Do you agree with our proposal to mandate emergency video relay for emergency communications to be accessed by end-users who use BSL?*

No comment

### ***Emergency video relay***

**Question 15:** *Do you agree with our proposal that the obligation to provide emergency video relay free to end-users should be imposed on regulated firms that provide internet access services or number-based interpersonal communications services?*

No comment.

**Question 16:** *Do you have any comments on our proposed approval criteria for emergency video relay services, or the proposed approval process?*

No comment.

### ***Communications in accessible formats***

**Question 17:** *Do you agree with our proposal to:*

- a) *extend the current requirement to cover the other specified communications i.e. any communication (except marketing) that relates to a customer's communication service, and*

b) *extend the GC so that any customer who cannot access communications due to their disability should also benefit from accessible formats? When answering please provide evidence of any benefits or costs.*

No comment

**Question 18:** *Do you agree that implementation by December 2020 is reasonable? Please provide evidence to support your response.*

No comment

### ***Availability of services and access to emergency services***

**Question 19:** *Do you agree with our proposed changes for implementing the requirements in Article 108 and Article 109 to reflect the differences between these EECC provisions and their predecessors in the Universal Service Directive?*

We have no problem with the changes proposed in the consultation but would also like to see changes made to the guidance on location information for VoIP services and the obligation to inform customers that services may cease in the event of a power cut or failure of the internet connection, as set out in more detail earlier in this response.

### **Conclusion**

FCS hopes that this response is helpful to Ofcom in its considerations and we would be very keen to discuss our response in further detail prior to the publication of the statement.