

Guidance on Compliance with the Prohibition of ARCs under General Condition 9.3

Purpose of this Guidance

These Guidance notes are produced by Ofcom and do not form part of General Condition 9.3 (GC 9.3). They are intended to assist Communications Providers (CPs) by outlining Ofcom's expectations and providing some guidance as to Ofcom's likely approach to investigating compliance with GC 9.3. The Guidance is not binding on Ofcom and Ofcom will at all times determine compliance on the basis of individual circumstances whilst having regard to these guidelines. However, where Ofcom decides to depart from the Guidance it expects to give reasons for doing so. Words and expressions used in GC 9.3 shall have the same meaning when used in this Guidance.

GC 9.3 has been modified to prohibit the use of Automatically Renewable Contracts (ARCs) in the provision of fixed voice and fixed broadband services to residential Consumers and Small business Customers (together 'customers' for the purposes of this Guidance). An initial commitment period is the period beginning on the first day a contract takes effect and ending on a day falling no more than 24 months thereafter. The modifications to GC 9.3 mean that CPs cannot roll forward (or automatically renew) a customer contract to a new initial commitment period following the expiry of an initial or subsequent initial commitment period without having obtained the Express Consent of the customer.

The Guidance covers three main areas:

1. The implementation period by which the requirements of GC 9.3(a) (which relate specifically to ARCs) will come into effect.
2. The requirements of 'Express Consent' as it is defined in GC 9.3(b)(iv), and in particular 'informed choice'.
3. Particular issues raised by GC 9.3(a)(ii) which prohibits the provision of ARCs to small business customers.

1. Implementation period

Ofcom's objective is to ensure that the harm from ARCs is ended as soon as possible and is not extended in the meantime. However, we recognise that ARCs cannot be withdrawn from the market overnight. Therefore the modification to GC 9.3 includes an implementation period to allow time for an orderly withdrawal of ARCs. The modification to GC 9.3 (footnote 3 of the notification at Annex 2 of the ARCs statement) states both the period by which CPs must stop the sale of new ARCs, and migrate existing ARCs customers off ARCs. These periods are set out below.

Stop-sell

The prohibition against selling new ARCs to customers who are not currently on an ARC will come into force on 31 December 2011. This means that it will be unlawful to sell new ARCs after this date. This period was set to allow CPs selling ARCs to stop doing so, taking

account of the need to adjust their systems as necessary, and to avoid disruption to consumers or markets as a result of rushed implementation.

Before 31 December 2011, we expect all CPs who sell ARCs to take reasonable steps to limit additional sales. Also, we expect CPs to take a reasonable approach to new or existing ARCs customers who wish to exit their contract before the end of any subsequent (or further) initial commitment period. For example, in such circumstances we think it would be reasonable for CPs to waive any ETCs or exit penalties over and above sums required to recover any outstanding equipment subsidy and other costs directly incurred as a result of the termination.

Migration of existing ARCs customers

For customers who are on an ARC as at 31 December 2011, the prohibition against selling ARCs will come into force on 31 December 2012. This means that any customer who is on an ARC as at 31 December 2011 must be migrated off this ARC by 31 December 2012. This period recognises that the most efficient method of migration may be to transfer each customer at the expiry of the initial commitment period that they are on, to an alternative deal.

However, we recognise that other migration methods may be used, and that ARCs providers may proactively migrate customers away from ARCs at a time other than the ending of an initial commitment period. This will be necessary for ARCs which involve contract terms greater than 12 months where the expiry date does not fall until after 31 December 2012. In these cases, ARCs providers will need to ensure that customers are migrated away from ARCs before the end of the current initial commitment period of their ARC.

As with stop-sell, we expect CPs to take a reasonable approach to ARCs customers who wish to exit their contract before the end of any subsequent (or further) initial commitment period. For example, in such circumstances we think it would be reasonable for CPs to waive any ETCs or exit penalties over and above sums required to recover any outstanding equipment subsidy and other costs directly incurred as a result of the termination.

2. 'Informed choice'

General Condition 9.3(iv) defines 'Express Consent' as follows:

"Express Consent" means the express agreement of the Consumer or Small Business Customer to contract with the Communications Provider in relation to each initial commitment period, where the Communications Provider has obtained such consent separately for each initial commitment period in a manner which has enabled the Consumer or Small Business Customer to make an informed choice ;

The requirements of this definition are clear. However, we think it is important to clarify that the timing of Express Consent and method by which it is obtained are important in order for customers to be able to make an informed choice.

Method and timing for obtaining Express Consent

Where Express Consent is initiated by a customer, we think it is likely to be reasonable for it to be given at any time.

In all other circumstances, CPs should ensure that customers have sufficient time to properly consider the deal they are being offered (including, for example, allowing them time to

consider the market more generally) before setting deadlines requiring them to opt in to a further initial commitment period. For the avoidance of doubt, the guidelines on the timing of obtaining Express Consent are in relation to CPs contacting customers for the purposes of renewing an initial commitment period rather than, for example, for offering an upgrade or a different deal.

Ofcom has not prescribed specific time frames with which CPs must comply, however there are certain types of behaviour that are unlikely to satisfy the requirements of GC 9.3(iv). These include (but are not limited to) the following examples where:

- A CP has asked a customer to provide a “one off” consent which purports to cover all initial commitment periods that that Consumer or Small Business Customer may subsequently enter into (“stacking”);
- Consent is sought at a time which is too far in advance of the ending of the initial commitment period for a customer to reasonably know what other offers may be available at that time;
- A CP contacts a customer either on the day that their initial commitment period is due to expire, or very shortly before that day, and requests their consent to enter into a further initial commitment period in circumstances where that customer has not been given an opportunity to consider what other offers may be available,

Ofcom expects CPs to have reasonable steps in place to prevent stacking and to ensure reasonable and appropriate timing for obtaining Express Consent. Therefore, other things being equal, it is generally likely to be reasonable for Express Consent to be obtained by CPs no sooner than six months before the end of each initial commitment period.

3. GC 9.3(a)(ii)

The definition of ‘small business’

The definition of a small business customer for the purposes of General Condition 9.3(a)(ii) is consistent with the definition in Section 52(6) of the Communications Act 2003 which is reproduced here for ease of reference.

In this section “domestic and small business customer”, in relation to a public communications provider, means a customer of that provider who is neither—

(a) himself a communications provider; nor

(b) a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise).

This means that the prohibition in General Condition 9.3(a)(ii) applies to small business customers with 10 or less employees (the ‘10 employee threshold’).

We recognise that it may, at times, be difficult to identify whether or not a customer has 10 employees or less. CPs have informed us that they do not routinely collect or hold information about the number of employees of their business customers. Furthermore,

employee numbers can fluctuate over short timescales. We accept, therefore, that estimates as to whether or not a customer falls within the 10 employee threshold may not be precise.

Approach to Enforcement

We note that other regulatory requirements also apply to small business customers as defined by Section 52(6) of the Act. For example, General Condition 14 (GC14) requires that an alternative dispute resolution (ADR) scheme be made available to small business customers. We note also that Ofcom has indicated that it will take a pragmatic and flexible approach to compliance monitoring and enforcement for these requirements. For example, in guidance on GC 14 we said “...we would be satisfied if, rather than having to contact the Complainant to determine whether they have ten or fewer employees (and is therefore potentially ‘eligible’ to take a case to ADR), a CP instead had reasonable processes in place for determining whether business customers are likely to be small businesses for the purpose of this obligation (for example, making an assessment based on annual communications expenditure of that customer).”¹

We will take an approach consistent with this to enforcement of GC9.3(a)(ii). In assessing compliance, we will consider whether CPs have taken reasonable steps to identify business customers to whom the prohibition applies. For example, they may (but not be limited to):

- Identify the size of the business by the annual communications spend and ensure that packages without ARCs are targeted to low spending small business customers.
- Identify the size of the business by the number of lines it has, and ensure that packages without ARCs are targeted to small business customers with few lines.
- Ensure that where customers self select an ARC (for example, by purchasing online), they may easily identify themselves as being ‘eligible’ for an ARC.

In addition, in assessing compliance, we will expect CPs to take reasonable steps to inform staff and existing ARCs customers affected by the amendments to GC 9.3 of these new regulations. For example, CPs may:

- Ensure that sales staff are comprehensively briefed on the regulations.
- Provide clear information to customers about the regulations on ARCs.
- Ensure that sales scripts and contract negotiations include necessary information about, for example, migration process, key dates and charges, and any exit procedures.

We also expect that CPs will take a reasonable approach to redress in cases where a small business customer has been sold an ARC inadvertently. Generally, we would expect the CP to enable the customer to exit the contract or move to another package penalty free in such cases (after the ending of any initial MCP).

We believe this flexible approach is an appropriate way to monitor compliance and enforce the small business prohibition for businesses with 10 or less employees.

¹ <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/complaints-handling-guidance.pdf>

