

ISPA response to the Ofcom consultation on end-of-contract and out-of-contract notifications

About ISPA

ISPA welcomes the opportunity to respond to the Ofcom consultation on end-of-contract and out-of-contract notifications.¹ ISPA is the trade association for internet services providers in the UK, with over 200 members, 90% of which are SMEs. Our members cover the whole spectrum of access provision in the UK using FTTP, FTTC, wireless and satellite connections at a wholesale and retail level. They also play a critical role in delivering broadband and internet services across the UK to consumers and businesses.

Introduction

ISPA appreciate that Ofcom's plans to implement end-of-contract and out-of-contract notifications for consumer and small business customers are driven by the desire to inform customers about the status of their contracts. ISPA welcomes these efforts to encourage consumers to better engage with the market. There is, however, a danger that by extending the proposals to small business customers Ofcom is acting disproportionately, given ISPA's view that it is underestimating the impact on business providers and resellers. The full complexity of the supply chains within the market is not necessarily addressed in the consultation. Therefore, the cost benefit analysis performed by Ofcom may not take full account of the number of providers affected and the difficulty in the application of proposals to small business customers. In absence of this, we therefore urge Ofcom to focus the scope of the regulation on consumers only.

Furthermore, whilst supportive of these efforts to engage consumers, ISPA would not necessarily agree with the general assumption driving this policy that loyalty is always a result of inertia. There also needs to be a greater appreciation of the existing levels of competition in the retail market and the range of choice available to consumers, which should inform consumer policy going forward.

Inclusion of Business Customers

ISPA's members note a few important points regarding the consultation and its applicability to small business customers.

Lack of evidence

The consultation only substantively addresses businesses in paragraphs 3.55-3.62 inclusive, which appears to be a somewhat simplified view of a sizable market: Micro-businesses, classed as 0-9 employees, numbered 5.5 million, in 2017², this does not include the entities in the government and charities sector covered in Ofcom's statutory remit. In any event, compared to the number of households in the same period, which was 27.2 million³, it is clear that small businesses are a material component of "domestic and small business customers" and should be analysed more fully.

¹ <https://www.ofcom.org.uk/consultations-and-statements/category-2/end-of-contract-notifications>

² House of Commons Library, Briefing Paper Number 06152 entitled "*Business statistics*" published 28th December 2018.

³ Office for National Statistics, Statistical Bulletin: Families and Households: 2017 published 8th November 2017.

What is significant is that whilst Ofcom have adduced evidence at paragraph 3.56 that small businesses apparently share a similar degree of confusion with residential consumers as to the status of the contract. However, there does not appear to be specific evidence in the consultation of any harm arising from end of contract price rises for business customers⁴. ISPA is not aware of Ofcom exercising its statutory powers under Section 135 of the Communications Act 2003 to understand if this is the case with the hundreds or even thousands of business specific providers referred to below.

With regards to large businesses and enterprises, we agree with Ofcom's analysis at paragraph 3.62 that such customers do not require the same level of protection (given their strong bargaining power) and are therefore rightly completely out-of-scope of this proposed regulation.

Incomplete cost benefit analysis.

The consultation contains an inherent assumption that the cost to small business providers is relatively minimal because, broadly, the incremental cost of compliance is small if the obligation is being fulfilled in the residential market. This ignores several key points:

- **Supply Chain Complexity:** There are far more suppliers of services to businesses, often uniquely to businesses, than there are residential providers. We are aware of wholesale providers that have hundreds, if not thousands, of exclusively business to business resellers, that this regulation will affect. This impact does not appear to have been included in Ofcom's model.
- **Impact on Enterprises:** The costs of building systems to accurately identify to which business customers the end of contract notification requirements apply has not been considered by Ofcom.
- **Contract Complexity:** A small business customer may not have a contractual relationship as "clean" as a single mobile subscriber. It is common to have staggered contract ends based on when new users are added to a system, or even a minimum commitment triggered by a contingent event, such as progress in a project. The cost of identifying the correct point to apply this algorithmically or the cost of end user confusion arising has not apparently been considered.

Inability to comply

There is no statutory register of the number of employees in a business that can be referenced by a communications provider. Nor is there any guidance from Ofcom on whether it is the number of employees at the time of order or any other point in time which can be used to inform the decision making and compliance of a provider. As businesses grow or contract, they can fall either side of the small business threshold at any point in time. As a result, the benefits to the small business community are likely to be small compared to the cost of governance and compliance. This suggests that employee numbers is not a robust way of delineating between those customers who require protection, and those who do not.

Overreach

The vast majority of business to business contractual relationships, are governed by the principle that the buyer is responsible for checking the quality of goods purchased. Whilst a debate can be had about whether a sole trader requires the same protection as a residential consumer, if larger

⁴ Paragraphs 3.18-3.20 inclusive of the consultation appears to be residential consumer evidence only.

businesses are expected to trade under their own risk generally, then why is telecommunications any different, especially given they are still covered by backstops such as General Condition of Entitlement 9.

Ofcom sometimes falls back on these stock definitions without considering the practical application, nor the over-regulation of specific customers who do not need, want, or require such protection. There is a need therefore for Ofcom to consider how it imposes its regulation in a targeted fashion and ISPA members would welcome further discussion about this in future. However, for the current consultation, in light of the evidence presented, we consider that it is appropriate to extend this regulation only to consumers.

Cost Implications

It should be remembered that creating any automatic notification system will incur a cost for the ISP. There is of course a risk that this cost will be passed on to the customer. Furthermore, a number of ISPA members have a large proportion of customers that request paper communications. To reduce the cost of compliance, ISPA would recommend that the notifications are incorporated into existing bills, thereby informing the customer but reduce this implementation cost.

Competition and consumer loyalty

As context for this consultation, it should be remembered that there is a great deal of competition at the retail level of the market giving consumers a great deal of choice. Whilst not all consumers chose to engage with the many discounts and options open to them, it is a mark of this competitive market that these are available. End of contract notifications may increase some engagement with this process, but as raised in a recent ISPA submission to the BEIS Green Paper on Modernising Consumer Markets,⁵ there are many reasons a consumer may remain with their ISP beyond price (e.g. performance, service quality, reliability, billing, technical support, customer support, additional features).

Whilst ISPA fully supports encouraging customers to engage with the market there is a potential difficulty within this narrative of conflating loyalty with ill-informed or unengaged customers. The idea of a “loyalty penalty” may also be used by regulators as a justification for intervention when there are a significant proportion of these customers that are not experiencing harm, instead choosing to remain with their provider for the range of non-price issues many customers value.

Conclusion

Whilst ISPA is generally supportive of the proposals put forward for residential customers to be more engaged in the market, members consider that the short-hand approach by the regulator to extend a residential obligation to small businesses is flawed and requires significant attention prior to any Statement being contemplated. Further thought and analysis is needed by Ofcom around the apparent underestimation of the impact on primarily business-to-business providers in the consultation, and the complex supply chain involved in the business broadband market.

Consideration more generally of how Ofcom can ensure that its regulation is targeted to the specific customer-types who are experiencing or at risk of experiencing harm (for example through impact

⁵ ISPA [response](#) to the BEIS Modernising consumer markets: Consumer Green Paper

assessments) should take place. The current broad-brush approach for certain General Conditions, for example, is of concern. ISPA would be happy to engage with such a discussion.

There is also a need for a wider appreciation of the existing choice in the market for consumers which many already engage with, alongside the fact that many remain with their provider beyond the initial contract because they want to, rather than as a result of inertia. This should be addressed in this and further consumer policy going forward.