

ISPA's response to Ofcom's Consultation on the European Electronic Communications Code

About ISPA

ISPA is the trade association for providers of internet services in the UK, we have over 150 members, 90% of which are SMEs. Our membership covers the whole spectrum of access provision, using FTTP, FTTC, wireless, satellite and hybrid solutions at a wholesale and retail level. All play a critical role in the delivery of broadband and internet services to consumers and businesses across the UK.

Introduction

ISPA welcomes the opportunity to respond to Ofcom's consultation on the transposition of the European Electronic Communications Code (EECC). Given the wide-ranging nature of the consultation, ISPA's response will focus on a selected number of areas including:

- Timelines for implementation
- Regulatory approach to protecting vulnerable and disabled customers
- Thresholds and scope for changes to a consumer's right to exit
- Definitions of end-users and application to business
- Definitions of not-for-profit organisations
- Implications of new gaining provider-led, cross-platform switching process
- Complying with Open Internet Regulations
- Adaptation of voluntary code of practice on automatic compensation

Timelines for implementation

The fundamental changes the EECC brings about in the telecommunications market should not be underestimated, particularly the scope and complexity of this consultation. This consultation closes less than nine months prior to the implementation date of 21st December 2020 as set out in EU law. Falling just days before the end of the UK's transition period with the EU, ISPA's membership are concerned that complying with the regulations as they are presented in this consultation will be particularly difficult in this time period. For reference, the last time Ofcom revised the General Conditions (GCs), industry was given 12 months to implement.

In this context, and that of the current progress of other EU States in adopting the Code¹, ISPA would urge Ofcom to consider extending the implementation period, or alternatively take a reasonable approach in its expectations around implementation timings. ISPA would urge Ofcom to ensure that it does not commence monitoring and enforcement programmes until a reasonable time has passed.

The industry is also concerned by the complexity of the changes to the GCs. ISPA would encourage Ofcom to explore if there is a way to make the GC document more user-friendly. This ultimately helps industry comply and meet the objectives of the EECC and reduces regulatory risk. We also urge Ofcom to consider harmonising definitions with the EECC so that Ofcom's transposition can be easily compared with the source Directive and with other Member States – this is particularly important for pan-European providers. ISPA would also urge Ofcom to publish an updated version of the guidelines to the GCs well ahead of the transposition deadline to allow operators to best prepare for the changes.

¹ According to Cullen, we note that only 10 out of 28 Member States (incl. the UK) have transposed or begun public consulting on the transposition of the EECC – [EECC transposition status](#), Cullen, December 2019

Switching

One specific area where the short timescale for implementation is particularly pressing is the new requirements for gaining provider led (GPL) switching across infrastructure platforms. This consultation does not directly look at a new switching system, rather it highlights the ongoing efforts of the Office of the Telecoms Adjudicator (OTA) and industry on the issue. ISPA and its members have engaged with this process and continue to do so.

A key concern for ISPA members is the very short timelines for implementation posed by these ongoing discussions, particularly as the solutions under discussion will take a considerable amount of time to build and implement. Furthermore, throughout these discussions Ofcom and the OTA have ensured that the focus is exclusively on the future switching system with no consideration given to a “day one” solution. With the consultation process for this still ongoing, and no day one solution discussed, there is considerable concern that the level of risk has not been appropriately addressed and acknowledged by Ofcom.

Furthermore, ISPA members are concerned about the requirements for large business customers. While ISPA supports efforts to ensure that customer transfers are simplified and run smoothly; it must be recognised that large business solutions and the transfer of them are generally very complex. This can include large volumes and batches of lines, bespoke arrangements and the avoidance of porting in business hours. Whilst these practises respect the principles of the EECC, there are concerns around potential clashes with requirements of Article 106 of the Code.

Given the specific needs of this market, ISPA’s membership would argue for greater freedom for large business customers and their respective providers to agree upon tailor-made transition arrangements.

ISPA notes that Ofcom proposes to give more freedom to large business-focused providers by only focusing on the required sections of Article 106, we are still concerned that the EECC and resulting revised GC C7 puts additional requirements on business providers which do not meet the needs of large business customers. We therefore urge Ofcom to acknowledge the practicalities and benefits of business porting in its statement and continue to allow maximum freedom for such customers and their providers.

Rights to exit following contract modification

Ofcom’s proposed shift to strengthen customers’ right to exit following mid-contract changes to cover any changes that do not exclusively benefit the customer require further clarification. In some paragraphs (including 1.11) these changes are referred to as changes in price. However, the drafting of the consultation and updated GCs do not sufficiently clarify that this is the full scope of the measures.

There is concern that, as drafted, these changes would put a disproportionate burden on operators whereby customers could have the right to exit any contract without penalty following any slight change to a contract or package. Given the increasing multiplicity and bundling of services offered across the industry, the scope for small, and relatively inconsequential changes for customers is broad. Therefore, in their current form, these changes could have unintended negative outcomes for customers.

A broad application of the updates to rights to exit would create a substantial disincentive to provide value added services alongside an internet connection. This in turn, is likely to impact competition, with the potential for providers to freeze packages throughout a contract period rather than risk triggering this condition. Alternatively, this could see a shift to re-contracting customers every time a small change is made, adding to the administrative burden of providers, as well as for consumers. This would fundamentally undermine what Article 6 of the EEC on contract modification is looking to achieve.

ISPA would therefore urge that this is implemented in a pragmatic way - such that customers are protected from price increases but are able to benefit from the rich and varied services provided by our membership in a competitive environment.

In addition, ISPA have a particular concern about the application of this GC to large business customers due to the use of “end-user”. Given the stronger bargaining power of larger enterprises, ISPA’s membership would argue that large business customers do not require such contractual protection. These contracts are tailor-made, with negotiated terms and prices and specific contract termination clauses. Unlike domestic consumers, these businesses often have large procurement teams and teams of lawyers and external advisors to assist them in reviewing and negotiating on any proposed change to their contracts, and very strong countervailing buyer power.

Therefore, ISPA would urge Ofcom to take a proportionate approach and only impose GCs where there is a harmful or an unbalanced negotiating position to resolve. As such, we urge Ofcom to carve out large business customers from the scope of the Revised GCs C1.14 to C1.19. Alternatively, we urge Ofcom to follow its own example in relation to End-of-Contract Notices and allow flexibility for large business providers to follow the principles of the EEC while tailoring their practises to their customers’ needs.

Vulnerable and disabled customers

ISPA’s members are keen to deliver the best outcomes for all their customers, particularly vulnerable customers. The industry continues to work hard to ensure best practices are adopted and consumers properly protected. ISPA believes that any approach to tackle these issues should be strongly focused on addressing the actual and specific needs of vulnerable consumers instead of generic criteria. Our members would encourage Ofcom to keep this at the heart of all vulnerability requirements and their implementation in practice.

ISPA members would also encourage a pragmatic approach to implementing the provisions in the Code for disabled customers. Given the technological advances in this area, and the importance for solutions being appropriate for the individual customer, ISPA would encourage Ofcom to allow operators greater flexibility. By defining particular solutions in the GCs, Ofcom could risk discouraging innovation in this space.

Interventions should be proportionate and related to a reasonable understanding of vulnerability to ensure that the industry is best placed to bring about a truly outcome-based approach rather than falling into a box ticking exercise.

Definitions of Business and End-users

Small Business Definitions

ISPA would like to highlight the importance of consistency within the implementation of the Code, and wider Government and Ofcom policy. Our members are concerned that Ofcom's adoption of the 2003 European Commission recommendations regarding business ceilings is both inconsistent with existing legislation, and an unnecessary burden on the business communications industry.

Given this recommendation is just that, ISPA would urge Ofcom to implement a more nuanced approach in this respect, particularly as Micro-enterprises are seen as a subset of Small Enterprises in the Commission's recommendation. There are considerable operational issues for ISPs in applying regulation using inconsistent small business definitions, particularly those based on employee numbers, which are often difficult to discern and unstable. By layering the 0-9, 10-49 employee categories on top of the existing 10 employee threshold in UK law, Ofcom will only increase this confusion and unnecessary burden.

If Ofcom insist on maintaining employee thresholds as a metric, there is a clear need to ensure a consistent application of such. A clearer, more targeted and proportionate definition of business customers would be based on contract type. We urge Ofcom to move to such a model which would be straightforward to implement for providers and, crucially, would be easy to understand for customers. A contract-type would clearly signal to customers what protections they have and allow them to make more informed choices.

End-User Definition

Secondly, there are many areas of the Code that have little application in the large enterprise market,² and the use of the term 'end-user' in the Code has done little to acknowledge this. The intention of the EECC was not to treat all types of "end-user" in the same way. Recital 259 clearly notes that "larger enterprises usually have stronger bargaining power and do, therefore, not depend on the same contractual information requirements as consumers". Ofcom also recognises at paragraph 7.90 of the consultation that "larger businesses, especially those that are significant users of communication services, tend to have a stronger bargaining power than residential customers". This must be reflected in the GCs.

While in some provisions large businesses have been rightfully carved out, in others they are incorrectly still captured. This is a missed opportunity for better regulation which is proportionate to the potential for harm.

We therefore call upon Ofcom to test and verify the theories of harm to large business customers in its consultation, reviewing each condition where the term "end-user" is used. ISPA would consider the absence of such analysis a fundamental flaw in Ofcom's application of the Code. This could lead to inappropriate outcomes and undermine Ofcom's statutory duties, under the Communications Act 2003, to ensure regulatory activities are proportionate and targeted only at cases in which action is needed.

Alternatively, we would urge Ofcom to make it explicit that large business customers are different to consumers in its statement and/or guidance documents; and in light of this, for Ofcom to take a lighter approach to monitoring and enforcement based on likelihood of harm where consumer

² Particularly Articles 103-107 of the EECC

protection provisions fail to carve out large businesses. This would follow the precedent Ofcom set in its transposition of the End-of-Contract Notifications Requirements.³

Definition of a Not-for-Profit customer

We are strongly concerned that Ofcom’s definition of “not-for-profit customer” unnecessarily brings a lot of large business customers and their respective providers into scope of a number of consumer protection regulations.

There is no official definition of “not-for-profit organisation” in the EECC Articles (contrary the suggestion in Paragraph 3.30); however recital 259 does describe them as follows:

“Not-for-profit organisations are legal entities that do not earn a profit for their owners or members. Typically, not-for-profit organisations are charities or other types of public interest organisations. Hence, in light of the comparable situation, it is legitimate to treat such organisations in the same way as microenterprises or small enterprises under this Directive, insofar as end-user rights are concerned.”

The clear intention, therefore, is to capture those organisations that have a similar degree of bargaining power to consumers, and effectively act like them. This explains why they would need additional protection in regulation.

ISPA welcomes Ofcom’s acknowledgment of the difference in type of end-user and difference in need for protection, in paragraph 2.10 of the consultation. Ofcom also states in paragraph 9.51 that “Micro and Small Enterprise customers as well as many not-for-profit organisations are likely to behave in a similar way to residential customers”. Therefore, whilst it is clear that Ofcom’s intention is only to capture *certain* not-for-profit organisations, namely only those that are comparable to Micro and Small Enterprise customers, the definition proposed by Ofcom does not include the same distinction.

Ofcom’s definition erroneously captures all not-for-profit organisations, regardless of size or bargaining power and therefore goes far beyond the EECC and its own intentions. There is no explanation or impact assessment to support such an extension beyond the scope envisaged by the EECC, and therefore we consider that this is an error.

Contrary to the above, larger not-for-profit organisations have very strong bargaining power and, to all intents and purposes, act like large business customers. For example, Government organisations tend to have very tough procurement frameworks and requirements (sometimes specified in legislation); and often insist on demanding contractual terms as a prerequisite.

The practical impact of the chosen Ofcom definition is also a challenge for providers e.g. how to identify not-for-profit customer without a central source of information; the cost and complexity having multiple sets of contracts, information and notification templates.

Lastly, while it is recognised that a waiver can be obtained, there is no detail on how this is expected to work in practice nor is there an impact assessment of the amount of negotiation and legal resource and cost needed to secure such waivers from such highly empowered not-for-profit

³ [Helping consumers get better deals: initial conclusions from our review](#), Ofcom, 2019

customers. At worst, the definition would be a barrier to entry for some providers who may not target not-for-profit organisations as it is simply too complicated to comply with the additional requirements. This would ultimately reduce choice and competition for such customers.

Ultimately Ofcom's current definition brings into scope organisations that have no need nor desire for additional regulatory protection, and triggers a disproportionate level of complexity and risk for the providers serving this industry segment. ISPA would urge Ofcom to follow the example of other Member states, including the Netherlands and France who have included explanatory notes which limit the definition to specific criteria such as employee numbers and turnover size (similar to small businesses)⁴ and not-for-profit organisations with higher bargaining power respectively.⁵

In this context ISPA would urge Ofcom to limit the definition of not-for-profit organisations explicitly in the exclude large not-for-profit organisations and Government bodies (who do not act like consumers and do not need protection). Failing this, an explanatory statement to allow communications providers to apply this definition flexibly, targeting only those which act like consumers.

Definition of a bundle

The new definition of a bundle increases the scope to encompass any services bundled with a communications service and gives Ofcom the "express powers to regulate non-communications elements". ISPA's membership is particularly concerned about the potential for regulatory clash given Ofcom will have power over services that are subject to different regulatory regimes.

ISPA would argue that the Government assessment in 2019⁶, that the risk of such clash would be "limited", is a short-sighted view based on a limited assessment of the current market environment. Bundles and services, especially in the business and enterprise market, are constantly evolving and even if the risk for regulatory clash was low at present, there is clear risk that such clashes will happen in the near future.

This consultation makes no indication of how any disputes between conflicting regulatory regimes would be resolved. The uncertainty and potential inconsistency that this approach provokes would have a considerable impact on providers of such bundles and a clear acknowledgment of this is needed.

Publication of quality of service information

This consultation references Ofcom's existing work to increase the transparency of information for customers, including GCs around SME Customers. It also highlights the EU Open Internet Regulations, which are a pre-existing obligation on providers to provide minimum, maximum and average upload and download speeds at peak and off-peak times. This consultation further notes the Broadband Speeds Code of Practice, which has been signed by a number of (mainly) larger providers and can be used to prove compliance with the Open Internet Regulations. Whilst all our members

⁴ [Kamerdossier 35368](#), Tweede Kamer der Staten-Generaal, December 2019

⁵ [Annexe 8 - transposition des dispositions relatives aux droits des consommateurs](#), 2019

⁶ [Implementing the European Electronic Communications Code](#), Department for Digital Culture Media and Sport, 2019, p38

are committed to providing the best information to their customers as possible, elements of the Speeds Code of Practice are not compatible with many of the networks run by smaller, full-fibre providers. The testing mechanisms involved in the Code of Practice do not necessarily take account of the difference in types of infrastructure and can make it difficult for those with multiple wholesale providers to comply with. Furthermore, the current methodology is increasingly out of date in light of changing internet standards.

ISPA's membership is concerned that this consultation does not acknowledge the ongoing discussions Ofcom is having with many of these providers on how they can comply with the Open Internet Regulations outside the existing Code of Practice. The implication, in this consultation, that this will move from being a voluntary to non-voluntary code is concerning in this context and ISPA would urge the regulator to clarify its position, taking the varied nature of the market and individual networks into account.

Compensation

This consultation sets out Ofcom's view to implement compensation requirements to overlap with their existing voluntary Automatic Compensation Scheme. This scheme was built with agreement from the largest providers of residential broadband and landline services and launched in April 2019 with a clear understanding of the need for proportionality in its reach. As this consultation states, the six current signatories account for the "vast majority" of the fixed residential market.

There are concerns that by applying large parts of the Scheme to all customers through the Code this proportionality threshold is lost and does not adequately account for the different business models and challenges of the whole industry beyond the current signatories. Furthermore, there is not enough distinction for vertically integrated operators where a delay to rollout, and therefore installation, could result in compensation. This is a very different situation to a delayed installation due to a switching process, over which operators would have much greater control and this should be directly addressed by Ofcom.

Moreover, ISPA would urge Ofcom to acknowledge the centrality of the switching process to the compensation process, and the knock-on effect of a delay to the creation of a new switching process. ISPA's members feel that the proposed obligations do not appropriately consider the impact of the new switching process or the particularly tight timelines for its adoption.

Conclusion

The need for a quick resolution to the concerns raised in this response is increasingly apparent given the timelines for implementation. ISPA would urge Ofcom to acknowledge the impact of these condensed timescales and consider how their approach to implementation can be as pragmatic as possible. As detailed in this response, ISPA is particularly concerned about the timelines for a new switching process, and the impact this could have on other factors of the Code, including compensation schemes.

Furthermore, ISPA would like to see a more consistent approach to business definitions across regulation, and greater clarity on how regulatory clash would be managed effectively regarding bundled services. The diversity of networks and business models in the industry should also be better reflected in Ofcom's attitude towards enforcing the Open Internet Regulations and Automatic Compensation Scheme. ISPA would urge Ofcom to ensure a proportionate approach is maintained,

and existing voluntary codes are not wholly adopted as mandatory without due consideration of the various issues raised here.

Finally, ISPA would welcome any further engagement with Ofcom regarding any of the points made in this response and looks forward to gaining further clarity around the issues raised above in a timely manner.