

Consultation on Ofcom's proposals for implementing the new European Electronic Communications Code

Response from Mobile UK

Introduction

1. Mobile UK welcomes the opportunity to respond to Ofcom's consultation on their proposals for implementing the new European Electronic Communications Code.
2. We do not comment on all aspects of the consultation and are focusing on some of the key points that are of strategic importance to the future prosperity of the communications industry in the UK.
3. As the UK leaves the EU and, with the indication that there will not be legally binding regulatory alignment beyond 2020, it is vital that innovation and investment in the sector is not stifled by heavy handed regulation that is out of line with the rest of Europe and that Ofcom shows some flexibility, within the overall framework, to find solutions that work well in the UK market.
4. For example, Ofcom is proposing a very significant change to its approach on 'in contract' terms and conditions, by apparently abandoning Ofcom's existing 'material detriment' approach. This is not necessary, not proportionate and will give rise to many practical issues that will benefit neither consumers nor providers.
5. Mobile UK is also raising practical points, where the EECC lacks specificity, and where there need to be operational discussions about how best the measures can be put in day to day effect at a proportionate cost.
6. Finally, the timetable proposed by Ofcom seems to be unnecessarily headlong, considering the amount of work involved in some projects and the need to work in parallel on multiple projects. This is especially the case, when our information is that Ofcom is well ahead of where some EU member states have so far reached in their respective implementations, which would indicate that Ofcom have, in practice, some flexibility on timetable.

Provision of information to customers

Summary contract information

7. In paragraph 4.26, Ofcom sets out the requirements of Article 102 with respect to summary information.
8. Ofcom then goes on to lay out in extraordinary detail how they expect providers to fulfil this obligation, including the formats for ‘durable form’ and other matters of detail.
9. This approach appears to go far beyond what would be a proportionate way of implementing the EECC and is an overreaching attempt to micro-regulate the operation of the communications market in the UK.
10. It is really not appropriate for Ofcom to be so ‘top’ down’ and prescriptive about how providers communicate with their customers, particularly in the sales scenarios covered by the Distance Selling Regulations, where customers have a 14-day cooling off period in any event.

Not-for-profit - definition

11. Mobile UK is very unclear as to how Ofcom has come to its definition of ‘not-for-profit’. In the consultation document Ofcom has said: *“we are using these definitions [of not for profit] because they are required by the EECC”*.
12. And yet, in section 259 to the recitals, the EECC states that not-for-profit organisations are defined in national law, and so the definition has become a bit circular.
13. That said, later in recital 259, the EECC states: *“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.”*
14. This clearly indicates that the intended beneficiaries are not-for-profit organisations that are of equivalent size to small businesses. Ofcom’s definition potentially goes way beyond this.

Contract duration and termination

Right to exit following contract changes

- 15.** Mobile UK does not agree with Ofcom's proposed new approach for dealing with 'in contract' changes.
- 16.** The 'material detriment' approach has, over the years, evolved and bedded down. It has protected consumers from unfair practices; it has been effective and proportionate; it has provided the sector with a practical way of dealing with the complexities of this market (with the raft of wholesale prices and tariffs); it has allowed the market to be dynamic, without deluging customers with information that would be of little or no interest to them – and potentially obscuring information that would be of interest.
- 17.** It is unclear to industry why Ofcom appears to have abandoned the existing 'material detriment' approach in relation to contractual modifications. Mobile UK considers that Ofcom's revised approach is not proportionate or necessary, particularly so close to the end of the Transition Period for EU withdrawal, when Ofcom will have the scope, while staying broadly aligned, to continue with their existing solution which has served the UK market well.
- 18.** Mobile UK's assessment is that Ofcom's proposals for the implementation of Article 105(4) will have a very material and negative impact on the workings of the UK market – risk making pricing much more static (reducing incentives to pass on lower prices, for example) - and will place a huge administrative burden on providers, without any commensurate benefit to customers.
- 19.** We strongly urge Ofcom to maintain the existing regime for the time being, and, in the meantime, carry out an Impact Assessment on its proposals for 105(4). Changes to the 'material detriment' approach should only be done when evidence from the Impact Assessment would indicate that there would be a net positive impact for consumers.

Switching and porting

Prepaid balances

- 20.** Paragraph 7.125 that the general switching rules now *“require providers to refund, upon request, any remaining credit to customers using pre-paid services. We propose that in addition losing providers should explain to residential customers any credit balance they have in relation to pre-paid services, the right to a refund of that balance and the process for claiming a refund.”*

21. Both the EECC and Ofcom’s proposals are silent on whether the right for a refund is open ended. Mobile UK argues that the right to request a refund be limited to **30 days**.
22. There are some very practical reasons for this. First, mobile operators need to be able to close accounts and not have to maintain an ever-increasing balance of prepaid balances as liabilities on their balance sheets (some of which would include VAT that would become irrecoverable). There must be cut-off point beyond which they can be sure a balance will not be reclaimed.
23. Secondly, they need to be able to have some certainty that the person claiming the refund is the person that is entitled. As prepaid customers do not have to be identity verified (for very sound public policy reasons of social inclusion etc.), the longer it takes for a balance to be reclaimed, the harder it is to be certain that the correct person is claiming it.

Porting process

24. Mobile UK’s members have expressed material concerns about the new porting process. As currently set up, the porting process is predicated on the process being triggered by the issuance of a PAC Code and then the transfer being executed with the minimum of disruption in service.
25. Porting is very much NOT set up for the contingency that the customer will want to end a contract with one provider, start a contract with an new provider and then subsequently want to port a number by returning to the prior provider as an afterthought to retrieve and transfer the original number, potentially up to thirty days later. Mobile UK’s members are not aware of any consumer harm arising from the absence of this requirement today, so it may be that this requirement is more relevant for other EU Member States.
26. There is much detail to consider as to how the new requirement can best be implemented. Ofcom and industry must work collaboratively to agree a timetable and process that works for all parties and that is cost effective and proportionate to the number of occasions when this facility could be required.

Provision of video relay service

27. Mobile UK notes that Ofcom proposes to introduce a video relay service for emergency services. It is proportionate that this requirement applies only to emergency services.

- 28.** The proposals, as they stand, though, lack a fair amount of detail and will need further discussion with Ofcom to resolve. For example, we note that a data connection will be required (to link the customer by video link to the VRS platform). This is understood, but it must be noted that there may be practical technical issues in relation to availability of services due to the very different technical environment that applies for data (e.g., EU net neutrality restrictions on prioritising data, provision of data services can involve multiple-service providers and different third-party applications), when compared with a simpler technical voice calls environment.
- 29.** Also, battery back-up is achievable through the customer's mobile device, but the capacity is essentially determined by the customer, not the provider. How will compliance be agreed in this situation?
- 30.** Thirdly, details on funding are ill-defined. We note that share of 999 voice calls was used as a proxy for attributing costs for SMS. However, SMS is a service unique to mobile operators. When the requirement is placed on the mobile and fixed sector (some of whom may not enable traditional voice access), what is the appropriate method of cost attribution? Mobile UK would ask that any wholesale rates applied for this service should also be fair and non-discriminatory.
- 31.** All these are practical points that we feel need resolution before initiating a major procurement for a VRS platform.

Timetable

- 32.** Even as the UK leaves the EU, Mobile UK recognises that Ofcom would wish to retain its reputation for close observance of implementation timetables. Nevertheless, our information is that Ofcom is in the advance guard of EECC implementation, when compared to EU members, and that the timetable for certain aspects of the implementation are not realistic.
- 33.** For example, it will be extremely stretching to complete the large amount of work involved in reworking the new contract information requirements. There are multiple contracts and customer journeys and many distribution channels. This is a very large task.
- 34.** Moreover, with some knock-on effects in the supply chain (e.g. setting up new video relay), project timelines are very tight.
- 35.** It also must be remembered that providers are taking on all these projects at the same time; progressing many different projects in parallel inevitably adds to individual project timetables, as each competes for the same internal (often scarce) resource.

36. Mobile UK recognises that Ofcom is working to an externally set deadline, but in the light of the timetables being followed by some of the EU member states, who are not nearly as far advanced as Ofcom, there must be some limited scope for flexibility.
37. Ensuring that all these measures are accomplished in an orderly and thorough way will, in practice, be of the greatest benefit to consumers.

Conclusion

38. In all the points that Mobile UK has raised in our response, there are material compliance costs imposed that go beyond what the EECC requires. In addition, there are significant practical problems arising that could, if not addressed sensibly and proportionately drive up costs, particularly if undertaken at the precipitate timetable currently envisaged.
39. Taking all these factors together, the cumulative impact puts unnecessary pressure on costs, costs that are ultimately born by consumers, when it is very doubtful, they will benefit commensurately. This is not a good precedent to set for regulation of the market in a post EU environment.