

27th April 2017

Automatic Compensation consultation

Dear Ofcom,

Please find below the response of Andrews & Arnold Ltd to your consultation on automatic compensation.

About Andrews & Arnold

Andrews & Arnold is a small UK-based Internet Service Provider, offering high quality and specialised services to consumers and businesses throughout the UK. We make use of broadband carriers such as BT's wholesale division and TalkTalk Business to operate broadband circuits and backhaul in order to connect end users to our network.

We emphasise at this point that we do not have any relevant contracts with BT Openreach.

More information on our broadband offerings is available at: <http://aa.net.uk/broadband.html>

Summary of Andrews & Arnold's position

We have a number of significant concerns with Ofcom's proposal.

In particular, we are concerned that, as a smaller ISP, which buys upstream services from wholesale providers other than BT Openreach, we will be left between a rock and a hard place: forced to pay compensation in situations where an upstream provider is at fault, without any guarantee of complete or timely recovery of those sums from that upstream provider.

We also note that Ofcom proposes to require a broadband-only provider to pay compensation to a customer where a customer's PSTN line, from a different provider, is not working. Again, this measure is likely to have an undue impact on smaller providers, requiring them to pay out compensation where they are not at fault, for a duration entirely outside their control.

We urge Ofcom to ensure that any scheme which it imposes does not act to detriment of smaller ISPs, and fairly places the burden of compensation on the provider responsible for the problem. Where this is not the retail provider, it is incumbent on Ofcom to mandate that the responsible upstream provider pays compensation down the contractual flow, to reach the retail provider, for payment to the relevant end user.

Fundamentally, if Ofcom wishes to see the end of smaller broadband providers, imposing this draft GC would be a good way to hasten it.

A plurality of smaller providers, offering choice beyond the mainstream providers, is beneficial for competition and consumer choice. Supporting this plurality is not merely desirable: it is seen as being so important that it is one of the things which, as part of its statutory duty, Ofcom must secure.¹ Imposing this measure, and placing such an undue and heavy burden on smaller ISPs, would require Ofcom to act in a manner inconsistent with its duty, to the detriment of competition and consumers.

At the end of this response, we propose a solution which, in our opinion, would establish a clear and simple framework for the payment of compensation to affected customers, while avoiding many of the challenges and concerns raised in this document.

1. Question 3: Do you agree that it is appropriate for automatic compensation to be introduced for landline and broadband consumers?

As we stated in our response to your Call for Inputs, in principle, we feel that the idea of compensation for a failure in a service where such failure is the responsibility of the ISP, or an ISP's supplier, makes sense. However, our support is limited to the situation in which an ISP's suppliers are compelled to provide the same level of compensation to the ISP.

We are concerned that Ofcom's proposed General Condition attempts to impose a framework which would:

- compel ISPs to provide compensation for faults for which they were not responsible and could not control; and
- fail to ensure that the burden of compensation falls where it is due, by leaving the obtaining of compensation from an upstream provider to a matter of commercial negotiation, reliant on bargaining power which smaller ISPs simply do not have. This is particularly important where the smaller ISP's supplier is an intermediary, such as BT Wholesale, and not Openreach, as Openreach payments may not get to that smaller ISP.

1.1 An unjustified and unfair imposition of liability for faults outside an ISP's control

Ofcom's proposal would — by design — make ISPs liable to pay compensation for losses of service arising from conditions entirely outside their control.

As Ofcom is aware, most broadband services require a working phone line. An ISP which provides a broadband service over a third party's phone line is entirely dependent on the phone line operating correctly.

Where there is a fault in the phone line — a loss of service which triggers a compensation payment by that provider — which renders the Customer unable to access the public Internet, it is Ofcom's stated intention (footnote 124 to the consultation document) that the broadband provider should also pay compensation to the customer, notwithstanding that:

¹ s3(2)(b) Communications Act 2003

- a.) the fault is nothing to do with the broadband provider; and
- b.) there is nothing which the broadband provider can do to restore the customer's service.

We note that Ofcom considers that “the number of consumers purchasing their landline and broadband separately is <5%”, and that its proposal to require double compensation affects only a “small minority” of lines. This is of little comfort to broadband providers — including us — where the majority of customers purchase a broadband service to be delivered by us over another provider's phone line. There are many small ISPs which do not provide a phone line service, and so all of their broadband lines would fall into this category.

As such, it appears to be Ofcom's intention to put us in a position where we are required to pay a customer where there is absolutely no fault with the service which we are providing, and where we have no means of remedying the situation: we have no ability to get a third party's phone line fault fixed, and so have no control over the length of time for which we would be required to pay compensation.

We cannot comprehend how Ofcom considers that the imposition of a compensation requirement in such a circumstance is reasonable, and we ask that Ofcom reconsiders its position in respect of this unjustified and unfair burden placed on smaller broadband providers.

It is imperative that a Communications Provider which provides a Relevant Broadband Service is not required to pay compensation for a Loss of Service where the underlying fault pertains to a phone line which is supplied by a third party.

1.2 Failure to ensure that the burden of compensation falls where due

Ofcom's proposal fails to ensure that the burden of compensation falls where due, through Ofcom's intention to refrain from imposing an obligation on upstream providers to make compensatory payments to downstream retail ISPs for faults arising with their wholesale service.

As with many ISPs, we are reliant on services which we purchase from BT Wholesale and TalkTalk Business. We use these services as building blocks for the service which provide to our customers.

Where there is a fault with one of these upstream services, it is likely that our customers will feel the effects of that fault. Ofcom's proposal is that, as the retail ISP, we will be responsible for paying compensation to Relevant Customers as a result of such faults.

We do not object to this in principle, on the basis that we are the retail ISP, but Ofcom is not acting in a manner consistent with supporting competition in the retail services market by refusing to ensure that upstream providers compensate us for failures in their service, leading to us paying compensation to customers.

It appears to be Ofcom's position that regulatory intervention is not required, on the basis that compensation flow-down from upstream providers can be dealt with as a matter of contract. This is to misunderstand fundamentally, or overestimate considerably, the bargaining power afforded to a smaller customer and, by leaving it to commercial negotiations, Ofcom is putting smaller ISPs such as ourselves in an position likely to result in us paying out compensation for upstream provider

faults without receiving compensatory payments from the upstream provider in return, let alone on an automatic basis.

By way of example, we already have a commercial agreement with an upstream provider under which they can fail to provide an agreed service to us, but we are unable to recover any compensation: this imbalance of power is, regrettably, part and parcel of being a smaller ISP. We have no reason to believe that, if we were required to pay out compensation arising from the fault of an upstream provider, we would be able to recover this compensation from the provider, in the absence of a mandate from Ofcom compelling it to be paid to us.

If this happens, apart from the smaller provider being out of pocket and disadvantaged competitively, there will be no incentive for those upstream providers to improve service, as they do not bear the financial consequences of their faults.

We ask Ofcom to reconsider its position, and to impose an obligation on upstream providers to make full and timely compensatory payments to downstream retail ISPs for faults arising with their wholesale service.

2. Question 4: Do you agree with our proposal to provide automatic compensation when a loss of service takes more than two full working days to be restored?

No.

We consider that two working days affords insufficient time for fault diagnosis, allocation of action to a third party (where necessary) and for the third party to carry out the action.

Where a customer complains of an apparent fault with their service, we must carry out a number of tests to identify where the fault lies: a fault may lie with equipment or infrastructure the customer's side of the NTE, or with something our side of the NTE.

To determine where the fault lies, we may require the customer to eliminate a problem with internal wiring by connecting their modem to the test port of the master socket. Although this is a reasonably simple task, some customers are unable or uncomfortable in doing this, and may need to wait for a friend or family member to assist them, adding to the time of fault diagnosis.

In some cases, the customer may need to try replacing equipment to identify the precise point of error. For example, a customer may need to try a second router, to eliminate the possibility of a fault with their current equipment or its configuration. We send out equipment promptly but, even doing so on a next-day delivery basis, and allowing for time for the customer to plug it in and test it, carrying out necessary testing of this nature will consume much of the two days afforded by Ofcom.

If, following these tests, it transpires that the fault is with the service provided by a third party (e.g. BT Wholesale or TalkTalk Business), we then need to liaise with that third party to arrange for them to test and repair the fault.

All this must happen before they can even begin to repair the fault.

3. Question 10: Do you agree with our proposed exceptions?

We have six concerns with your proposed exceptions.

3.1 Cessation of compensation payment on termination of contract

There appears to be nothing which stops the payment of compensation when the contract ceases. We have seen cases where a fault is taking time to fix and a customer gives up and ceases or migrates service away. As worded now, we see nothing to stop the customer expecting compensation indefinitely in such cases.

There must be a clear statement that daily compensation stops when the contract is ceased.

Similarly, in the case of an aborted installation, daily compensation for installation delays must not apply, whether the installation is ceased or cancelled by the customer or the ISP. Otherwise there could be cases where, having received an order, it turns out service simply cannot be provided and the ISP would then be paying daily compensation forever. There must always be the option to cease or cancel by either party, in accordance with the contract terms.

3.2 As a result of a court order or other binding legal obligation

A service provider must be exempt from any requirement to pay compensation where the loss of service arises from an action taken by a provider under the direction of a court order or other binding legal obligation.

For example, if the Digital Economy Bill passes in its current form, a service provider may be faced with a drug dealing telecommunications restriction order, and so be compelled to suspend, restrict or terminate service. Clearly, in such circumstances, it would be inappropriate for a provider to be required to pay compensation.

3.3 Power failure at the customer premises

As currently drafted, an ISP would be responsible for paying compensation to a customer where a power failure at the customer premises led to a prolonged service outage.

The definition of “Loss of Service” encompasses a “planned or unplanned change in the operation of any Electronic Communications Network (and/or elements of that network)”.

In the case of a power failure, a customer's modem will not function — a change in its operation — rendering the customer unable to access the public Internet. As the modem may form part of the Electronic Communications Network, the ISP may be responsible for compensation arising from such a change.

None of the exceptions within CX.13 would appear to address this situation. The only potentially relevant exception would be CX. 13 a), but this requires that the event was “caused by the act or omission of the Relevant Customer”. It seems unlikely that a power failure by a consumer's power company would meet either of these criteria, unless one can argue that a customer should have made provision for such an eventuality and installed battery backup equipment.

3.4 act or omission of the Relevant Customer

We are concerned that limiting the exemption in CX.13 a) to the “Relevant Customer” exposes an ISP to a liability to pay compensation for circumstances outside its control, unless Ofcom interprets “omissions” of the Relevant Customer broadly.

CX.13 a) provides an exemption from the obligation to pay compensation where “the event giving rise to the obligation ... was caused by the act or omission of the Relevant Customer”.

“Relevant Customer” is defined in CX.2 b) as “any Customer who purchases a Relevant ... Service intended primarily for use by Consumers”.

As such, the exception is only made out where the person who purchases the service from the ISP acts, or omits to act, in a manner which causes the fault.

Taking the example of damage to a modem (to the extent that the modem forms part of the ECN) caused by someone who does not purchase the service, such as a family member or other visitor, is it Ofcom’s position that the failure by the purchaser to take sufficient safeguards to prevent such damage amounts to an “omission” by the Relevant Customer, such that no compensation is payable?

If not, we would ask that Ofcom ensures that the exemption is drafted with sufficient scope to exclude liability for compensation in such circumstances.

3.5 Where a customer reaches their purchased quota

Recognising that many services are subject to data caps, we would appreciate Ofcom’s clarification that there is no loss of service giving rise to a liability for compensation where a customer reaches their purchased quota, even though this may entail them losing access to the public Internet.

3.6 Lack of exemption for force majeure

We note that Ofcom does not propose to exempt from the requirement to pay compensation losses of service associated with force majeure.²

Ofcom's stated reasoning for this is that "providers can often take mitigating measures to protect their networks and operations against the impact of force majeure events".

One of the major mitigation measures which a downstream retail ISP could take against a failure of an upstream supplier is to back off the risk in the contract of supply. However, it is typical for such contracts — indeed, most contracts — to exclude liability for force majeure events.

If Ofcom's proposal were to proceed unmodified, a downstream ISP would be forced to pay out compensation in the event of force majeure, without any mechanism for recovery of the compensation from the upstream provider. This will be particularly damaging to smaller ISPs, which are highly unlikely to be able to improve this position through commercial negotiations.

² Paragraph 8.38 of Ofcom’s consultation document

If Ofcom is to proceed with this, to avoid the imposition of considerable risk on smaller providers, it must require upstream providers to back off any compensation payments arising from problems with its service, including those which arise from typically-excluded force majeure situations.

4. Question 12: Do you agree with our proposal on complaints and disputes?

No.

Ofcom's proposal is to extend the grounds on which a customer can seek ADR to include "the payment of Compensation or a refusal to pay Compensation".

It is already the case that a service provider must pay the costs associated with ADR, irrespective of the merits of the customer's case, or the eventual conclusion reached by the ADR provider.

The levels of compensation available from a provider under the proposed GC will be substantially less (in most cases) than the cost which a provider must pay for a dispute taken to ADR.

As such, in any case where a customer wishes for compensation (including where clearly not eligible for it, such as faults that are not total loss of service), or wishes for more compensation than they would be entitled to receive under Ofcom's proposals here, they can simply threaten to invoke ADR, forcing a provider to choose between paying out the undue compensation or paying the cost of the frivolous ADR dispute.

Given the likely lower cost of compensation, it is foreseeable that the service provider will end up paying the compensation to avoid the higher penalty of ADR costs.

Clearly, this would distort the careful work which Ofcom has done here in determining the cases in which compensation is available, and the quantum of that compensation. As such, it is incumbent on Ofcom to ensure that there is no possibility to use the threat, or actual instigation, of ADR, to either achieve more compensation than is due, or payment where no compensation is due at all. Cases brought to ADR seeking either of these must be dismissed summarily, without cost to the provider.

5. Question 17: Do you agree with our proposals for greater transparency regarding service quality and compensation for products targeted at SMEs?

We welcome your recognition that it is not appropriate to extend the automatic compensation requirements to small and medium enterprises.³

As we noted in our response to your CFI, there are many ways for a business to mitigate risks associated with loss of connectivity, including use of high availability services, multiple lines, multiple ISPs, mobile back up, and so on. These are not expensive or difficult even for a small business, and some ISPs, such as ourselves, even offer services especially tailored to providing small businesses with higher availability Internet access for a higher fee. There is a risk that

³ Paragraph 11.46 of Ofcom's consultation document

affording compensation for downtime will stop businesses making appropriate business continuity plans, on the basis that they can just recover compensation for outage.

However, the proposed General Condition seems to contradict Ofcom's policy statement: as we understand the drafting of the proposed General Condition, a customer of any size is entitled to receive compensation if they purchase a Relevant Broadband Service:

“Paragraphs CX.5 to CX.18 of this Condition apply to any Communications Provider who provides ... Relevant Broadband Services intended primarily for use by Consumers and ... any Customer who purchases a ... Relevant Broadband Service intended primarily for use by Consumers (or is seeking to purchase such a service) is a “Relevant Customer”.”

As such, an enterprise, of whatever size, which purchases a consumer-oriented product would be eligible to receive automatic compensation.

We ask that Ofcom reconsiders the drafting adopted in the proposed General Condition, to ensure that enterprises – of all sizes – are excluded from the right of automatic compensation, irrespective of the broadband package which they purchase, in line with Ofcom's policy position.

A better approach?

As set out above, there are a number of serious and substantial concerns and challenges with the framework currently proposed.

We consider that there is a simple alternative which would eliminate these concerns while ensuring that compensation is made available when due.

Ofcom is proposing that compensation is payable in three situations: missed appointments, delays in provisioning, and delayed repairs. It is likely, in our opinion, that, in the vast majority of cases, the need to pay compensation will be triggered by a failing by BT Openreach: an engineer failing to turn up or to complete an installation or provisioning, or failing to complete a repair in a timely manner.

In each case, Openreach will know when it has failed to perform within the requisite time period. As such, it would seem appropriate for Ofcom simply to impose an obligation on Openreach to pay compensation automatically to all affected retail ISPs (passing it to an intermediary service provider, for onwards transfer to the retail ISP, where necessary) when one of the trigger events happens, for the retail ISP to pass on to the affected end user.

Given the numerous challenges with the current proposed approach, we urge Ofcom to consider this simple, pragmatic alternative.

Adrian Kennard

Director.