



November 22nd, 2019

By e-mail

Consumer Policy – Trials Team
Office of Communications
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Dear Sirs,

**Subject: Trialing Consumer Remedies (the “Consultation”)
 Non-Confidential**

Introduction

Exonia is a specialist telecommunications consultancy, providing regulatory and analytical support to several communications providers in various countries. This response is based on our own experience and we have not received any specific client instruction in relation to this response to the Consultation.

Executive Summary

Whilst there is often a need to improve consumer engagement and to mitigate the one-sided bargaining power between a domestic user and a communications provider, the Office of Communications (“Ofcom”) has erred on a number of fronts in relation to its proposed approach to trialling its ideas in practice.

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- The proposed General Condition of Entitlement (“GC”) fails the statutory test of proportionality on the basis that Ofcom has not adduced sufficient evidence to prove the potential efficacy of the proposals;
- The plans have the effect of setting a General Condition of Entitlement by way of the identity of specific communications providers, a scenario explicitly foreseen and prohibited in the Communications Act 2003 (“CA2003”);
- We are unaware of any attempt to first discuss a voluntary basis for performing trials with the industry; (over)reaching straight for a statutory provision is not in keeping with Ofcom’s historical position of “light-touch” regulation.

The Proposals are Unlawful

We say this intervention by Ofcom is unlawful for two main reasons.

Proportionality

Section 47(2)(c) of the CA2003 requires that a General Condition of Entitlement, such as the one proposed in the Consultation, is “*proportionate to what the condition or modification is intended to achieve.*” Proposed GC 9.1 states that it shall apply to all providers of Public Electronic Communications Services.

Firstly, we note that the title of the Consultation uses the word “consumer”, which is a confusing use of language. While the statutory definition of “consumer” in the CA2003 does extend to all users, including businesses, the ordinary and natural meaning generally limits it to domestic users. Indeed, other legislation, such as the flagship Consumer Rights Act 2015, adopts the domestic user orientated meaning any reasonable person would assume.

Ofcom operate in a highly technical environment where addressing ambiguity is “par for the course”; we strongly suggest, given the risk of disenfranchising affected stakeholders through confusing language, that Ofcom urgently create a set of editorial guidelines to ensure that there are no issues. From our engagements with various industry stakeholders over the last 18

months, we do not believe we are alone in considering that Ofcom need to have a more precise lexicon.

Secondly, Ofcom has not adduced any evidence that the proposal is proportionate for all business telecommunications.

The word “business” appears just six times in the Consultation. In terms of any operative parts of the Consultation, business users are merely asserted to be like residential users at §3.19(e) of the Consultation, “[.] *that small business customers are likely to behave in a similar way and raise similar concerns to residential consumers.*”. This is a potentially disingenuous reference as §3.55 – 3.62 of the consultation referenced therein relates to sole traders, being just the bottom part of the CA2003 definition of “small business”. It is not applicable for multi-employee businesses and it certainly is not applicable to enterprises.

In terms of the other evidence Ofcom have adduced;

- Case Study 1. We see no evidence that the Office for Gas and Electricity Markets’ (“**Ofgem’s**”) work is reliable in relation to business energy contracts. Indeed, the link in footnote 23 of the Consultation takes the user to Ofgem’s “Household Consumers” page.
- Case Study 2. We can see nothing in the Financial Conduct Authority’s (“**FCA’s**”) publication that businesses’ credit facilities were included in the sample.
- Case Study 3. The trial was conducted on personal account holders only by the FCA.

At best, this evidence demonstrates that there may be some efficacy in trials in the residential/domestic telecommunications market. It is likely, indeed probable, that it can be demonstrated that sole traders are in that category, however, the evidence cannot, and should not, be extrapolated to cover FTSE-100 companies.

Therefore, it should be apparent to any reasonable person that, given there is no evidence of harm nor of the efficacy of the proposal in relation to business users, any remedy, as it stands, cannot be said to be proportionate. As it is not proportionate, the proposed GC is, therefore, *ultra-vires*, and its implementation would be unlawful.

Identity of a Specific Communications Provider

Section 51(3) of the CA2003 limits Ofcom's power concerning setting conditions which are specific to individual Communications Providers;

- (3) *The power to set general conditions in relation to a description of electronic communications network or electronic communications service does not include power—*
- (a) *to set conditions that are made applicable according to the identity of the provider of a network or service; or*
 - (b) *to set conditions that differ according to the identity of the provider of the networks or services to which they relate.*

While proposed GC9 does not, itself, name individual communications providers, when Ofcom attempt to invoke it, by definition, it will be specific to the entities Ofcom have decided should be mandated to perform the trial.

Specifically, it is clear that Parliament foresaw this risk and actively sought to negate it in the drafting of Section 51(3)(a) when it states "*made applicable*".

Lack of Industry Co-Operation

Whilst we note that Ofgem, through its Licence Condition 32A.3 for both gas and electricity supply has a statutory power, and that the FCA considers it has a wide range of statutory powers¹, their approach to their industries appears different to that proposed by Ofcom.

It is our understanding of some of the evidence adduced by Ofcom regarding the work of the FCA that the trials in question were conducted at least partially voluntarily.

Specifically, we note that in Case Study 2, the second lender ended their participation early over concerns about the impact of the proposed remedy and we don't see reference in the published materials in the other case study to the FCA using its statutory powers to force participation.

Indeed, an ordinary person reviewing "*When and how we use field trials*", published by the FCA in July 2018 (the "**FCA Trials Guidance**"), could reasonably conclude that all FCA trials are voluntary. We especially note §4.8 which states;

When we seek collaboration from industry to conduct a field trial, we will issue a general call for partnerships to firms within the relevant market. This will either be published alongside any related market study or policy papers, as with the Credit Card Market Study, or we will approach firms in the particular market directly, as we did for our research into general insurance automatic renewal. Where we publish the request, we often follow up directly with firms in the market.

We are unaware of any industry dialogue regarding voluntary participation in trials. In any event, if either such a dialogue occurred and ended without a satisfactory conclusion, or if no

¹ Sections 1 and 2 of "*FG15/9: Market studies and market investigation references: A guide to the FCA's powers and procedures*" published by the FCA in July 2015.

such dialogue occurred and Ofcom have reached (we say unlawfully) straight for its statutory powers, then it raises legitimate questions regarding the state of the relationship between the industry and its regulator. Whilst we do not, at all, suggest that regulatory capture is a good thing and that the regulatory should, of course, operate independently at arm's length, the UK has a long history of voluntary co-operation as it knows this is a requirement of a light touch regulatory regime.

Secondly, Ofcom's analysis on whether voluntary trials would be effective is somewhat lacking and contradictory;

- At §4.4 of the Consultation, Ofcom considers that statutory measures are required because voluntary trials could be in areas against a provider's commercial interests. Yet at §3.10, Ofcom cite as a positive experience the voluntary trial conducted by BT in relation to landline only customers. As we recall from the statutory intervention in relation to those customers, it was significantly against BT's commercial interests for there to be an intervention in its supernormal profit of between £5.6m and £7m per annum.
- At §4.5 of the Consultation, Ofcom attempt to justify mandatory trials by reference to controlling the parameters. Yet the FCA, which is responsible for 2 of the 3 Case Studies adduced by Ofcom in support of its proposal, appears to emphasise voluntary participation. We would be surprised if any reasonable person would review the FCA Trials Guidance and conclude that the FCA did not have appropriate control of the process and parameters. In any event, it becomes incumbent on Ofcom to demonstrate, with evidence, that it would not have such control in order for the proposal to be proportionate (and therefore lawful).
- At §4.7, Ofcom qualify the preceding paragraphs by recognising the merits of voluntary trials, but has proposed a power that is unqualified by reference to attempting a trial voluntarily before mandating it. §4.25 suggests that Ofcom would consider whether or

not there was scope for there to be voluntary participation before exercising its proposed power; yet the proposed GC9.1 is not fettered or restricted in this regard.

Conclusion

There are a number of significant issues with the Consultation that require review by Ofcom prior to any Statement.

We would suggest that these issues are profound enough that a re-consultation is required prior to a Statement.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'P. Farmer', is centered on a light blue rectangular background.

Peter J Farmer, MA MSc MBA.

Director