

Mr S Green
Floor 2
Consumer and External Affairs
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Colt Technology Services
Beaufort House
15 St. Botolph Street
London EC3A 7QN

Tel: +44 (0)20 7390 3900
Fax: +44 (0)20 7390 3901
www.colt.net

7 May 2013

Dear Mr Green

Review of Metering and Billing Direction - Consultation

We very much welcome this consultation and Ofcom's intentions to ensure that the Direction's scope and requirements continue to remain appropriate. When seeking to revise policy, Ofcom must remain cognisant that there is sufficient evidence of market failure or consumer harm. Based on the extremely limited evidence presented in this consultation, this is not the case for the business sector.

In the consultation, Ofcom acknowledges that General Condition 11 was adopted for the protection of consumers. Further, Ofcom acknowledges that the evidence they have gathered on the extent of billing inaccuracy and on the level of complaints is inconclusive and sometimes points in different directions. Despite this, Ofcom have pressed ahead and recommended particular policy approaches. As a result, we are concerned that Ofcom's intentions have resulted in a set of proposals which will have unintended consequences and as a result will not deliver upon Ofcom's original intentions.

The regime, if adopted, will continue to apply to all Communication Providers (CPs) whose annual turnover exceeds £40m. In addition, Ofcom proposes to introduce a three tiered approach of regulations for consumers, 'small' and 'large businesses'.

Although we have a number of concerns, our key concerns relating to the proposals to CPs who provide services to businesses are as follows:

1. the proposals are reliant on extremely limited empirical evidence and where evidence has been provided, it is clear that there is no market failure. In addition, although the regime in its current form has been in place since 2008 and the three Approval Bodies (ABs) have significant empirical evidence on the performance of CPs, it is unclear what evidence Ofcom has gleaned from ABs and how this has shaped the proposals in this consultation.

2. the introduction of a threshold to distinguish between 'small' and 'large businesses', will necessitate further unnecessary and disproportionate burdens on CPs who provide electronic communication services to businesses.
3. furthermore, this regime is completely extraordinary when compared with other EU Member States. The requirements in the Direction are a legacy of old UK regulation; the EU on the other hand does not have such draconian measures either at the EU Directive level or via other EU-level measures. Even in Germany, where there are regulations, these are much less onerous¹.

We elaborate further on these key concerns in the remainder of this response.

About Colt

Colt is the information delivery platform, enabling its customers to deliver, share, process and store their vital business information. An established leader in delivering integrated computing and network services to major organisations, midsize businesses and wholesale customers, Colt operates a 22-country, 43,000km network that includes metropolitan area networks in 39 major European cities with direct fibre connections into 19,000 buildings and 20 carrier neutral Colt data centres.

To demonstrate the potential scale of the services we offer, in our financial services segment, our network carries trillions of Euros worth of transactions securely and reliably on a daily basis, thus enabling mission-critical trading activities of financial markets to successfully operate.

All Colt customers have a named account manager and 98% of these customers have bespoke tariffs.

Detailed concerns with the proposed policy reform

Building on the key concerns already identified above:

- a) Ofcom propose the introduction of an annual financial threshold of telecoms spend by business users to segregate small and medium businesses from larger businesses. This threshold is proposed at £50k. This figure has been proposed for two reasons. Firstly Ofcom undertook research between August through to September 2012; the evidence of which is not included in the consultation. Based on this research, Ofcom have indicated that UK businesses with a total communications spend (fixed, mobile and related services) over £50k plus per annum are likely to have more than 250 UK employees and that most businesses that spend £50k plus per annum have an annual turnover of £25m plus. There is a lack of consistency in that Ofcom has calculated the threshold on the basis of total communications spend although the Direction does not mandate the inclusion of all telecommunication services ie. fixed, mobile and related services.

¹ In Germany there is a requirement for an annual independent audit to be undertaken; this has limited impacts on CPs when compared to Ofcom's current and proposed new regime.

In addition, when comparing this definition with that used by others, there are inconsistencies. For example, the Inland Revenue have inversed the EU SME definition so that a large business is one '... having EITHER >250 employees; OR >€50M turnover AND €43M assets. However in practice, the Inland Revenue also include UK businesses owned by multi-nationals having >100 employees in the UK and which otherwise satisfy the criteria for number of employees, turnover and assets, globally. They apply these definitions flexibly, rather than rigidly². Secondly, Ofcom believe this threshold would be indicative of large businesses who are more likely to have certain relevant attributes, for example, they are likely to have account managed services and bespoke/flexible arrangements in place in relation to charging and they may have the ability to use their negotiating power and apply leverage in addressing billing issues with their CP more effectively. We have already indicated that all Colt customers have their own dedicated account manager, irrespective of their size and annual spend and in addition 98% of our customers have a bespoke tariff. Ofcom's approach therefore introduces both an artificial distinction between business customers and in addition does not recognise that CPs such as Colt have sophisticated customer management tools for all business customers.

- b) the General Conditions already contain a number of specific provisions relating to small businesses. This is intended to treat and therefore protect small businesses in the same manner as consumers. For example, the General Conditions require consumers and small businesses alike to have equivalent dispute handling treatment procedures in place. A small business in this context, is one which has ten or less employees³. The provisions of the revised Direction however would in effect mean that a business with up to 250 employees would be treated in the same manner as a consumer. This is clearly disproportionate.
- c) Ofcom undertook some analysis in 2009⁴. This concluded that the mean annual spend on telecoms services was £14,600 per year, while the median spend was £3,600 per year. In other words, businesses with five or more employees spent just under 19 times more per year on telecoms services than the average household consumer. This evidence demonstrates the disparity between the expenditure of these very distinct sectors and therefore that a common approach between even small businesses and consumers is not appropriate.
- d) the regime will lead to a further fragmentation in the way that the General Conditions are applied to CPs who provide services to businesses. Such CPs already need to factor into their business operations (notwithstanding other regulatory obligations):
 - general regulatory obligations that apply to all CPs; and
 - specific regulatory obligations that affect consumers and small businesses.

² Inland Revenue definition - <http://www.hmrc.gov.uk/large-business/forum-tor.htm>

³ 9.3 (b) (v) of the General Conditions.

⁴ <http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/bce.pdf>. The average household expenditure at this time was estimated to be £780 per year.

With the introduction of this revised Directive, these CPs will need to further separate elements of their processes, so that they can achieve distinct compliance for:

- business customers falling below the proposed threshold; and
- business customers above the proposed threshold.

This is clearly beyond what is intended by the Better Regulation principles, whereby regulation should be used as '... last resort and the best way of achieving the outcome we want whilst avoiding unintended consequences and keeping costs on the economy as low as possible ...'.

- e) Ofcom has recognised that the tolerances currently defined in the Direction are not practicable for those CPs providing services to large businesses. There is no evidence however underlying why Ofcom has focused on large businesses in reaching these conclusions. From Colt's perspective, the application of the tolerances across all businesses is not workable. For example, the Direction currently requires that CPs who have a total relevant turnover of less than £360 million per year (exclusive of VAT and other taxes directly related to turnover), shall not issue more than £600 worth of credits in total in a given calendar month. This threshold can be breached by just one credit exception, even for a small business.

As all customers are treated in the same manner by Colt from a billing and metering perspective, the issues experienced by smaller businesses will be reflective of the situation for all customers.

In terms of context, at Colt:

- refund levels are extremely low and in the region of 1% of total revenue.
- there is on average less than 1 complaint per month.

Therefore Ofcom's intention to retain the current thresholds for those businesses that do not fall into the large business definition is still likely to result in disproportionate impacts on CPs.

- f) Ofcom's limited evidence included:

- market research of consumers' use and experience of bills,
- formal information requests from CPs and ABs about billing arrangements and the operation of the Direction;
- analysis of complaints data from the Ofcom Consumer Contact Team; and
- a number of other stakeholders (e.g. Which?, Ombudsman Services, Communication and Internet Services Adjudication Scheme (CISAS)).

Clearly the majority of the above are focused on the consumer experience rather than any business user experience. As indicated already, ABs have extensive experience on the performance of the market and it is unclear what elements of this experience Ofcom has used in developing the consultation proposals.

- g) Ofcom has not demonstrated that businesses are at risk because of CPs billing systems.
- h) Ofcom recognises that the three ABs are interpreting the Direction in different ways. Consequently their approaches can lead to inconsistent approaches, and as a result, some CPs may potentially benefit from reduced scrutiny when compared with other CPs who may be the subject of extensive intrusion. It is essential that moving forward, that the AB's adopt a fair and transparent approach in the application of the Direction.

Paragraph 47 of The Communications Act 2003 places a duty on Ofcom that any regulation must be justifiable, non-discriminatory, proportionate and transparent. We do not believe that these duties are being met based on Ofcom's current set of proposals for CPs who provide services to businesses. We therefore seek that Ofcom re-think their approach and our preference, is that such CPs are removed from the Direction in totality. However we recognise that Ofcom is reluctant to adopt such an approach, therefore we set out below proposed alternative approaches which may provide the assurances that Ofcom appear to require.

Proposed Alternatives

Alternative approaches that Ofcom may wish to consider are:

- a) revising the threshold so that it mirrors the current definition of small businesses in the Code ie. a business with 10 or less employees. As a result this distinct set of business customers would fall into the Direction's small business scope and any business above, would fall under the simplified 'high level requirements for accuracy'.
- b) introducing a 'lighter touch' assessment approach for all of businesses (rather than just larger businesses) and adopt this on a trial basis. Quantitative data would then be available to shape the future direction of this policy area.
- c) introducing a requirement on CPs to appoint an independent auditor (this could be their usual Financial auditor). Such an auditor would be required to periodically assess the robustness of the CPs billing and metering scheme and report their findings into the board as well as to Ofcom. This would not be an onerous obligation, as in practice, CPs will already have in place an independent auditor for such a business critical operation.

Annex 1 contains Colt's specific responses to the questions raised in the consultation.

To conclude, Ofcom's proposals for CPs who provide services to businesses has unintended consequences and as a result will introduce disproportionate burdens on such CPs without delivering any additional level of protection.

We would very much like to take the opportunity to meet with Ofcom to discuss the concerns we raise in this response.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'C. Owen', with a stylized flourish at the end.

PP. Ceri Owen
Regulatory Specialist
Commercial, Legal and Regulatory

Annex 1 - Colt's response to the specific questions raised in the consultation

Question 1: Do you agree that the Direction should continue to apply fixed and mobile voice services (aside from wholesale services and services for large business) and that its requirements should remain unchanged? Please provide reasons to support your response.

No. Ofcom's proposals, albeit an attempt to simplify some of the regime, result in regulation which is gold plating and unnecessary. CPs, particularly those who operate exclusively in the business sector, have sufficient commercial incentives in place to ensure that they effectively manage all aspects of the relationship with the customer, including metering and billing. At contract renewal a dissatisfied customer will switch CP.

There is no empirical evidence within the consultation which justifies the continued existence of the Direction relating to any business customers. Further there is no evidence underpinning Ofcom's proposal to segregate larger businesses from the remainder. For this reason, we do not believe it is appropriate that the Direction should apply to any business.

Ofcom have made a number of statements in the consultation which we would like to specifically provide a response on:

- a) Ofcom have suggested the introduction of a £50k threshold is in part, because this represents the annual spend of those businesses with 250 or more UK employees (as well as having an annual turnover of £25m+).

The proposed £50k threshold has gone significantly beyond those business customers which Ofcom normally seeks to protect. In addition, as already indicated, the annual spend, even for smaller businesses is approximately 17% higher than for consumers.

- b) Ofcom has suggested that the £50k threshold will mean that such businesses will have an account manager as well as bespoke/flexible arrangements relating to charging.

For Colt, this statement has no foundation. All Colt customers have an account manager and over 98% of Colt customers have a bespoke tariff. For these reasons, all Colt customers have the ability to discuss any concerns they have with their account manager. In the event that the customer is dissatisfied with the account manager, the customer will have an escalation route that they can follow. Ultimately, at contract renewal the customer will move to another CP if they believe they have experienced a poor service.

- c) Ofcom stated that 'Most CPs and ABs favour the removal of large businesses services from the Direction altogether.'

There is limited reference and certainly no empirical evidence of what information Ofcom has been able to glean from CPs and ABs ahead of this consultation. Further, there is no indication from Ofcom, of the numbers of CPs and ABs favouring the removal of the Direction in totality in the business sector.

- d) Ofcom has suggested that 'large businesses have bespoke tariffs which need additional oversight and checking by the CP which minimises the risk of errors.'

As stated already, over 98% of Colt's customers have bespoke tariffs. Although the tariff associated with the services offered are bespoke and can be very complex, Colt's billing system has the in-built capability to 'check' all bills not just those for bespoke tariffs. Where errors occur, Colt works to resolve these as quickly as possible.

- e) the CPs and ABs that Ofcom have 'canvassed' have not been able to provide Ofcom with a workable definition to date for larger businesses.

At Colt, there is a single billing system in operation irrespective of business customer size / spend. Therefore considering a definition for larger businesses is inappropriate and the consultation proposals will result in a further level of unnecessary regulation.

- f) Ofcom state that they are concerned about using an alternative approach for determining the size of the business customer, for example, whether or not the customer has a bespoke tariff, whether or not a customer has an account manager on the basis that these may be difficult to implement in practice.

From Colt's perspective, 98% of customer's have a bespoke tariff and each customer has a named account manager. Therefore the suggestion that there is the need to separate businesses does not hold true at least from a Colt perspective.

Question 2: Do you agree that encouraging, but not mandating, the inclusion of data services in the Scheme represents the best way of protecting the users of those services from inaccurate billing?

There is no empirical evidence that there is a concern in the business sector relating to the billing of data services, therefore we believe that this should continue to remain a voluntary measure.

Question 3: Do you agree that the provisions on data billing in Annex D of the Direction should be reviewed and updated? Please identify any issues that you believe the review should consider.

In principle, all provisions should be reviewed on a periodic basis to ensure that they remain fit for purpose. Any changes in the provisions should be based on empirical evidence.

Question 4: Do you agree that the scope of the scheme should continue to apply to large businesses? Please provide evidence for your views in particular providing evidence on whether large businesses are able to and do monitor their bills more effectively than other consumers?

We do not believe it is appropriate for the scheme to apply to any business customer, irrespective of customer size or spend.

Question 5: Do you agree that with the proposal that error rates and tolerances set in the Direction should not apply in respect of business? What requirements should apply in the absence of error rates and tolerances, if any?

We do not believe it is appropriate that the regime should apply to CPs who provide business services. Further the error rates and tolerances are unrealistic as they fail to recognise the levels of business customer expenditure and as result can be regularly breached. When breaches occur, CPs must then work to fix the breaches which in turn redirects resources from business critical operations.

Question 6: Do you agree with the suggested definition of a large business as having a communication spend in excess of £50K? Please provide reasons and any evidence for any response.

No. For the reasons outlined above, we believe Ofcom's approach is gold plated regulation.

Question 7: Do you agree with the proposal that wholesale services should be removed from the scope of the Direction? Please provide reasons for your views.

Yes. We believe that there are sufficient commercial incentives in place to ensure that wholesale service billing are adequately dealt with.

Question 8: If wholesale services are removed from the Direction, to what extent should the relationship between retail and wholesale CPs be covered in the Direction?

We do not believe it is appropriate that the Direction should have any provisions relating to the relationship between retail and wholesale CPs on the basis that such matters can be dealt with through commercial arrangements.

Question 9: Do you have any further observations or evidence on the Metering and Billing Direction?

We seek that Ofcom relies upon transparent empirical evidence in determining the final policy reform proposals for metering and billing.