

BT's response to Ofcom's Consultation on Additional Charges for Consumers

Introduction

BT is pleased that Ofcom is proposing to issue guidance on its interpretation of the Unfair Terms in Consumer Contracts Regulations, and is fully supportive of Ofcom's aims to protect consumers from hidden charges and to aid compliance for CPs. The importance of transparency and fairness in all dealings with consumers cannot be over-estimated .

In general BT agrees with the approach that Ofcom is taking in relation to each type of charge; the few exceptions to this are explained in our response below.

In relation to enforcement, it is also extremely important that there is a level playing field such that all CPs are treated equally. If there are to be administrative thresholds set, this must be done on the basis of equally detailed data (on costs, for example) from all CPs across all types of services. Otherwise there is a risk that competition will be distorted and consumer detriment will continue unchecked in certain parts of the industry.

BT will continue to co-operate with Ofcom and will be happy to provide any further information required to enable Ofcom to reach its conclusions.

Consultation Questions

Question 1: Do you agree that it is helpful and appropriate for Ofcom to issue guidance on the application of the Regulations to consumer contracts for communications services?

BT welcomes Ofcom's guidance, which it is hoped will bring greater clarity both for consumers and Communications Providers (CPs) as to what is reasonable, and greater consistency in the approach taken by different CPs. Whilst it is ultimately for the courts to decide whether a term is fair or unfair, it is helpful and appropriate for Ofcom to set out its interpretation of the Regulations so that CPs are given greater certainty on whether or not, in Ofcom's opinion, they are likely to be compliant.

It is extremely important that consumers are able to make an informed choice when deciding which CP to use, and therefore that all charges are fair and transparent. BT already follows Ofcom's guidance in most respects, and will be reviewing its charges in the few instances where they may be deemed to be out of line with the Regulations.

Question 2: Do you agree with Ofcom's proposed guidance regarding core terms and transparency?

BT agrees that transparency is vital from a customer's perspective and no customer should be misled by hidden charges or other terms when making their choice of supplier and signing up to a contract.

BT also agrees that where core terms are concerned, it is competition and not regulation that should determine the level of the charges and ensure that they are fair. Non-core terms, on the other hand, should be subject to a test of fairness which will usually require cost-justification.

BT agrees with Ofcom that non-direct debit charges, minimum contract periods and charges for itemised and paper billing are all core terms because they are an essential part of the bargain which customers will assess when making their decision on whether or not to contract.

However from a legal perspective we do not agree with Ofcom's interpretation that a core term can be made "non-core" simply as a result of lack of transparency or prominence. There is no support for this interpretation in the Regulations. Prominence and transparency are a feature of the Regulations in that they go to the issue of "good faith", but we consider that the draft guidance elevates the importance of these concepts to an extent that is not warranted. It is only if a term is *not* a core term that the two concepts are relevant. Even if non-direct debit charges, for instance, were to be subject to the test of fairness, we see no support for the interpretation that fairness will depend on cost justification.

These are largely academic points, since BT is and will continue to be as transparent as possible about its charges and other terms. For example BT's Payment Processing Fee (the £1.50 a month charge for payment by means other than Direct Debit or Monthly Payment Plan) is prominent in BT's marketing, printed literature, on our website and in our point-of-sale discussions with customers because we want to ensure that customers are clear on what they will be paying. We expect Ofcom to require that all CPs are equally transparent, and in particular that those CPs who do not allow customers to pay by means other than Direct Debit will be required to make this much clearer in their marketing.

Question 3: Do you agree with Ofcom's proposed guidance (including any administrative thresholds we have set) on non-core terms to which we apply the test of fairness?

Late Payment Charges, charges for payment failure and charges for restoring service

BT agrees that these charges are non-core terms, are unlikely to be considered by consumers when making their purchasing decision and should be subject to a test of fairness.

We accept that there is only an indirect causal relationship between customers incurring these charges and those who subsequently go on to default on their payments and become bad debtors. Therefore we accept that overall bad debt should not be included in the cost justification for these charges.

We also agree that late payment charges should only be applied after consumers have had a reasonable opportunity to pay.

Minimum contract periods and early termination charges

BT agrees with Ofcom that whilst a Minimum Contract Period (MCP) is likely to be a core term, Early Termination Charges (ETCs) are a non-core term and should be subject to a test of fairness. (As above, we do not accept that definition as a core or non-core term is dependent on transparency or prominence in CPs' customer communications. However this is an academic point since BT is keen to ensure that customers are never misled and will

therefore explain MCPs and ETCs as clearly as possible to customers in our literature and our sales scripts.)

On Ofcom's three key points regarding fairness:

- BT agrees that CPs should not charge an amount greater than the remaining monthly payments due during the MCP when a customer leaves prior to the end of the MCP.
- BT accepts that in setting the level of an ETC, CPs should look only at the anticipated profit on services within, and not beyond, the MCP in terms of timescales. However in the case of contracts for fixed telephone service, we believe it is reasonable to include anticipated profit from calls outside the applicable service package as well as line rental, despite the fact that a consumer is only obliged by the contract to pay for the line rental/package charge. This is because, whilst there is case law that damages for breach should be assessed on the basis that a defendant will perform a contract in the manner that is most beneficial to him, there is equally case law that the method must in all the circumstances be regarded as *reasonable*. It is clearly reasonable to expect a customer to have made calls outside of their service package (which they are not contractually *obliged* to make) if they had stayed for the remainder of the MCP.
- BT also accepts that payment of an ETC should not leave a CP better off compared to the situation where the consumer stays until the end of the MCP. Therefore CPs should take account of variable costs saved when they cease providing service to an individual customer who leaves early. However it is essential, in setting any administrative thresholds, that Ofcom ensures an even playing field between CPs whose costs are relatively transparent (e.g. BT Retail, and other CPs who pay wholesale charges to Openreach and/or BT Wholesale for WLR and IPStream), and LLU operators and other vertically-integrated CPs who own their own networks, for whom the variable costs saved are less obvious. We are reassured by Ofcom's statement at para 5.79 that "Ofcom expects to work with network operators in order to better understand what these costs would be and, if appropriate, determine a benchmark figure which would be used to help inform a decision on whether to take enforcement action." **If Ofcom is going to set any administrative thresholds at all, it is vital that a full investigation into all CPs' variable costs is carried out in order to ensure equal treatment of all CPs, and to ensure that no over-recovery of costs is allowed.** Otherwise the result will be an unfair competitive advantage for those CPs whose costs are opaque, enabling higher charges to continue unchallenged; and resulting in clear consumer detriment.

Likewise, in the interests of a level playing field it is extremely important that Ofcom establishes the relevant variable costs saved by CPs offering Pay TV services when the ETCs are calculated for such services. This issue is currently only referred to fleetingly by Ofcom in para 5.96, but BT expects a full investigation to ensure equal treatment. This is particularly important given the prevalence of bundles of services which include Pay TV, where often the ETCs for a consumer's Pay TV subscription will determine whether or not they will migrate to another CP for broadband or fixed telephony.

Similarly Ofcom needs to set out how it expects CPs to calculate ETCs when there is a single contract covering a bundle of services (any combination of fixed telephony, broadband, mobile and Pay TV). The Guidance is currently silent on this issue.

BT would also like to make the point that the concerns Ofcom expresses at para 5.106 – i.e. the need to make it very clear to consumers the level of ETCs they will incur at the point at which the consumer is considering terminating the contract – is inconsistent with the approach Ofcom is taking in the context of the migrations debate, where Ofcom is currently insisting on the benefits of a “gaining provider-led” process. If the losing provider is denied the opportunity to have contact with their outgoing customer, that provider will not be able to explain the potential ETCs they will incur if they are still within their MCP, as advocated by Ofcom here.

Minimum contract periods and early termination charges for subsequent contracts

BT believes that a subsequent MCP might, like an initial MCP, be a core term of the contract – part of the main subject matter. As before, however, this is somewhat of an academic point because a) a subsequent MCP can only be enforced if ETCs are fair and b) BT will in any case always ensure that all its contract terms, particularly those relating to MCP, are clear and transparent to the customer before they sign up.

BT agrees that subsequent MCPs will only be fair when the CP has to make a new investment, or incur additional direct cost, and/or the consumer derives a tangible benefit that they would not enjoy if they did not commit to a further MCP. BT’s own subsequent MCPs will only be imposed where there is a clear benefit to the consumer, such as a new or renewed discount (in the case of fixed voice telephony), a new piece of kit (in the case of BT Total Broadband) or a new handset (in the case of BT Mobile).

Minimum Notice Periods

BT supports the proposal that Minimum Notice Periods (MNPs) should be transparent to consumers within the contract at point of sale, that MNPs should not exceed a reasonable period to deal with the necessary administration, and that where there is an industry-agreed or Ofcom-imposed migrations process, MNPs should in principle be no longer than the transfer period specified in that process.

Itemised billing

BT agrees that charges for itemised billing should be clear and transparent to consumers, although we have no plans to raise such charges at present.

Cease charges

BT agrees that it is fair for cease charges to reflect a pass through of wholesale charges incurred, and that consumers should be made aware of such charges at the point at which the consumer is considering terminating their contract.

Question 4: Are there any other issues that are covered by the Regulations which Ofcom should give guidance on?

BT is not aware of any other issues that should be covered by Ofcom’s guidance.

Question 5: Do you agree that three months is an appropriate period during which suppliers can adjust their terms and marketing practices to ensure they are in line with Ofcom guidance?

Whilst BT is generally supportive of Ofcom's proposals, it is possible that from a purely practical perspective we will need longer than the suggested three months after Ofcom's final statement to implement certain changes to our standard terms, in particular in relation to ETCs, given the massive systems developments currently underway to migrate our customers away from CSS as required by the Undertakings. We would be happy to discuss this further with Ofcom in due course.

BT Retail
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