

Review of the general conditions of entitlement—Ofcom

20/04/2018

TMT analysis: As a continuation of its review of the general conditions of entitlement (GCs), Ofcom has now issued a new statement on emergency planning direction, number withdrawal and guidance on contract termination. Philip Woolfe of Monckton Chambers analyses the changes.

This statement follows on from Ofcom's statement and consultation of September 2017, which revoked and replaced the previous version of the GCs with effect from 1 October 2018.

Original news

Ofcom publishes statement on emergency planning direction, number withdrawal and guidance on contract termination [LNB News 26/03/2018 85](#)

As part of the review and update of its General Conditions (GCs), Ofcom has published a statement which sets out its conclusions on a number of proposals which it consulted upon at the same time as it published the new GCs. The statement updates a direction which specifies which public bodies may request industry to make arrangements for the restoration of communications services in the event of disasters; sets out new rules for a further extension of Ofcom's power to withdraw telephone numbers where they are used inconsistently with the national telephone numbering plan or otherwise misused; and provides guidance about procedures for terminating contracts.

What are the primary changes which will be introduced by Ofcom?

This statement addresses three separate issues, each of which was included in Ofcom's September 2017 consultation.

Emergency Planning

Under both the existing and revised GCs, communications providers ('CPs') are required to make arrangements for the provision or rapid restoration of such communications in disasters at the request of and in consultation with:

- emergency organisations
- 'such departments of central and local government as Ofcom may from time to time'

A direction specifying the relevant central and local government departments was made under the equivalent paragraph of previous versions of the GCs in 2003, but is out of date. Ofcom has now issued a fresh direction under Condition A4.2 of the Revised General Conditions of Entitlement specifying the types of central and local government departments whom CPs are required to consult if requested.

These are as follows:

Region Bodies

UK—all ministerial and non-ministerial departments of government

- England Metropolitan districts
- London boroughs

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- The City of London
- The Greater London Authority
- Local Government Regulation
- Unitary authorities
- The Council of the Isles of Scilly
- County councils
- District councils

Wales

- County councils
- County borough councils

Scotland

- a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994

Northern Ireland

- local Councils

Number Withdrawal

Condition B1.18 of the revised GCs sets out the circumstances in which Ofcom may withdraw a number allocation. As published in September 2017 it simply rolled over the wording of the previous condition. However, in line with its consultation, Ofcom has now decided to supplement that condition by adding new sub-paragraphs (d) and (e) to Condition 1.18. Those sub-paragraphs set out further circumstances in which Ofcom may withdraw a number allocation, namely:

- where a CP has used a significant proportion of those telephone numbers, or has used such allocation to a significant extent, inconsistently with Condition B1 or engaged in fraud or misuse
- where Ofcom has advised the CP in writing that a significant proportion of those telephone numbers have been used to cause harm or a nuisance, or has used such allocation to a significant extent to cause harm or nuisance, and the CP has failed to take adequate steps to prevent such harm or nuisance

(It should be noted that the new sub-paragraph (e) contains a grammatical error, which presumably will be corrected in due course. The summary above gives what appears to be the intended sense, rather than using the precise wording of the new condition.)

Guidance on Contract Termination

Ofcom has published new guidance on how it will apply Revised GC C1, which relates to contract termination. The full guidance is available.

The guidance both sets out what Ofcom considers to be minimum requirements to comply with GC C1, and examples of 'best practice'. It should be noted that Ofcom has taken a broad view of the scope of Condition C1.3, which governs 'conditions or procedures for contract termination'. Ofcom considers that this covers not only contractual terms governing termination, and customer-facing practices, but even internal processes insofar as they are not sufficient to ensure that customer service agents act appropriately or if such processes were to incentivise inappropriate behaviour.

Ofcom has also adopted a low threshold for what qualifies as a 'disincentive' to switching, taking the view that it is sufficient if the condition or procedure causes hassle, unreasonable effort or undue difficulty for the end-user.

The new guidance covers the following topics:

- communication options and accessibility of contract termination procedures—Ofcom requires CPs to offer a range of communication options for end-users to terminate their contracts, which should be clearly and prominently displayed on the CP's website, along with information about the steps required to end a contract
- identification and verification procedures: verification procedures should not themselves act as a disincentive to switch providers. In particular Ofcom suggests that good practice would be to adopt identification and verification procedures that are consistent with the communication option—email, post, telephone etc.—that the end-user has selected to make their termination request
- maximum notice periods—subject to any maximum technical limits or other regulatory requirements, CPs should allow end-users reasonably to give more than the minimum period of notice. Conditions or procedures should not suggest that exact notice must be given by end-users
- internal processes—Ofcom acknowledges that retention conversations may be good for some consumers, but that others will not welcome them. Ofcom states that CPs should have procedures in place to ensure that:
 - incentive schemes do not encourage poor behaviour by customer service agents that give rise to a disincentive to switching
 - end-users intentions are recorded and actioned correctly
 - customer service agents understand what retention activity is appropriate

Automatically renewable contracts

Under Condition C1.3 automatically renewable contracts are prohibited for fixed voice and fixed broadband services to residential and small business customers, and CPs are required to obtain the customer's express consent to renewal. In the guidance Ofcom clarifies the timing of express consent and the method by which it is obtained. Ofcom states that, where the customer takes the initiative, he or she should be able to give express consent at any time, but otherwise CPs should ensure that customers have sufficient time to properly consider the deal they are being offered. Ofcom also indicates certain practices that are unlikely to comply with the Condition, such as requesting consent for all future commitment periods, seeking consent too far in advance or seeking consent with an excessively tight deadline at the end of the fixed commitment period. Ofcom indicates that it is generally likely to be reasonable for Express Consent to be obtained by CPs no sooner than six months before the end of each fixed commitment period.

Small Business Customers

In relation to automatic renewal, Ofcom accepts that a CP may not know whether its business customers have ten employees or fewer (and so would qualify as a small business under [section 52\(6\)](#) of the Communications Act 2003). Ofcom therefore states that, as in other areas, in deciding whether to take enforcement action it will consider whether CPs have taken reasonable steps to identify business customers to whom the prohibition applies.

Changes to contractual prices

Ofcom has largely reproduced existing guidance on notification of changes to contractual prices and when such changes will constitute material detriment.

Are there any major differences between their original proposals and the final versions?

Ofcom has published its direction on emergency planning in the same form proposed in the September 2017 consultation.

Similarly, the revision to GC B1.18 on number withdrawal is identical to the version proposed in the September 2017 Consultation. However, in its Statement, Ofcom has clarified certain practical points relating to number withdrawal. These relate in particular to concerns that Ofcom may withdraw an entire allocated block of numbers in response to concerns that relate to the misuse of only a subset of those numbers and in circumstances where some numbers from the block have been ported to another CP.

Ofcom stresses that the withdrawal power relates to cases of significant misuse, and is subject to the safeguards in [section 61\(5\)](#) of the Communications Act 2003 (namely that it may be exercised only in a manner that does not discriminate unduly against particular CPs, against particular users of allocated numbers or against a particular description of CPs or users) and in section 3(3) of the Act—namely that Ofcom must have regard to principles of best regulatory practice, proportionality, consistency and targeting action only at cases where it is needed—see Statement at paragraphs 4.19-4.20.

Ofcom states that it would seek information from the CP holding the allocation to confirm how the numbers in the block are being used, and in particular whether any numbers have been ported to another CP.

Ofcom explains that, due to technical routing constraints in some long-established networks, it can only withdraw numbers in blocks above a certain size. It states that it will usually withdraw numbers in the same block size at which they were allocated. It accepts that, in circumstances where some numbers within a block have been sold on, or are being used legitimately, withdrawal of the block may impact entities who are not engaging in misuse of numbers. Ofcom states that it 'will endeavour to minimise the impact of number block withdrawal on entities that are not misusing their numbers as far as possible'.

Ofcom's guidance on contract termination differs significantly, at least in its presentation, from the version published for consultation in September 2017. In particular, the detailed requirements set out in the consultation version have mostly been transformed into examples of best practice, whilst the guidance itself has been stripped back to present the broad outcomes that Ofcom wants CPs to secure.

Are these changes positive for consumers? Are they likely to be onerous for communications providers?

Broadly, these changes are positive for consumers. Whilst the ongoing burden for CPs appears manageable, there will inevitably be implementation costs, especially around contract termination.

The new direction on emergency planning is uncontroversial, since it simply updates and clarifies an existing requirement. Given the large number of local authorities now included in the Direction, a CP might in principle be bombarded with requests for consultation, but this appears to be unlikely based on past experience.

The new direction on number withdrawal is intended to add to Ofcom's enforcement powers to prevent nuisance calls in particular, and should therefore be positive for consumers. There will

inevitably be implementation costs for all CPs, such as the risk assessment and mitigation steps set out below. In the longer term it should not be excessively burdensome for reputable CPs, provided that Ofcom adopts the sensible and reasonably restrained approach to enforcement which it has signalled in the statement, in particular in cases where numbers have been ported to another CP. However, notwithstanding Ofcom's commitment to minimise disruption, there remains a significant risk of disruption to users of telephone numbers if a number block is withdrawn. For example, it is unclear how Ofcom could in fact minimise disruption in circumstances where certain numbers in the range are being seriously misused, which warrants withdrawal, but other numbers are being used by legitimate businesses who will suffer significant disruption if their number is withdrawn from use. In the longer term the problem may be solved as telephone networks move to an IP architecture, which will enable specific numbers to be withdrawn.

As regards the changes to the guidance on contract termination, these are intended to reduce disincentives to switching and therefore should be positive for consumers. However, there is a risk that, for example, customer service agents may be discouraged from taking proactive steps to retain customers which would be beneficial to the customer in question—for example by telephoning a customer who has indicated an intention to switch in order to offer a better deal—there are also likely to be implementation costs for CPs in the short term, as it will be necessary to assess the extent of compliance with the new guidance and whether to adopt Ofcom's proposed 'best practice'.

What should communications providers be doing to prepare for these changes coming into force?

As regards the Direction on Emergency Planning, CPs should ensure that personnel responsible for emergency planning liaison are aware of the new direction and will respond appropriately to any requests made by the listed bodies.

As regards the changes on number withdrawal, it would be advisable for CPs to undertake a risk assessment of the extent to which their users could be affected by number withdrawal and, if appropriate, a mitigation plan. The risk assessment should if possible include an assessment of (i) whether any numbers on ranges which have been allocated to the CP are suspected of being misused and are at risk of withdrawal, but also (ii) the extent to which customers of the CP are using numbers which have been ported in and which therefore at risk of being withdrawn due to the action or inaction of third party CPs.

The mitigation plan should include a management strategy in the event that Ofcom raises concerns about the misuse of numbers on ranges allocated to the CP, covering:

- communication with Ofcom
- what steps may be taken to bring to an end any misuse which is established, including contract termination
- what steps may be taken in the event that Ofcom indicates it intends to withdraw but the CP considers that such a step is unfounded or disproportionate. Such steps may in principle include an appeal to the Competition Appeal Tribunal

The plan should also include a strategy for communicating both with customers who may be misusing numbers and customers who are not misusing numbers but who are nonetheless having their number withdrawn.

As regards the guidance on contract termination, CPs should conduct a full audit of their present contractual terms and internal processes relating to contract termination, including in particular guidance and training given to customer service agents, to consider whether the terms and processes comply with Ofcom's guidance. Following such an audit, the CP should consider whether

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its contractual terms and both its customer-facing and internal processes require changes. In particular the CP should consider whether to adopt Ofcom's proposed 'best practice' in this area.

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Interviewed by Barbara Bergin.

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