

CONSUMER PROTECTION AND TELECOMMUNICATIONS

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9.1	Introduction: Why Is There Consumer Protection for Telecommunications?	491
9.2	EU Provisions	495
9.3	UK Provisions	505
9.4	Concluding Remarks	531

9.1 INTRODUCTION: WHY IS THERE CONSUMER PROTECTION FOR TELECOMMUNICATIONS?

Since the last edition of this book, there has arguably been a shift in focus in favour of consumer protection in the telecommunications industry both at EU and at UK level, which is illustrated through two developments. First, in 2016, the European Commission published its proposal for an Electronic Communications Code to codify and amend the four main telecommunications directives, which for the first time explicitly takes full account of the Charter of Fundamental Rights of the EU.¹ It states that the proposed measures aim at achieving higher levels of connectivity ‘with a modernised set of end-user protection rules’. It mandates end-user rules where existing regulation has only set out minimum requirements. Second, in the UK in May 2017, the consumer association Which? awarded Ofcom Chief Executive, Sharon White, who took up the position in March 2015, the Positive Change Award for her work on putting consumers at the heart of Ofcom’s agenda.²

¹ Proposal for a Directive establishing the European Electronic Communications Code, COM(2016) 590 final, 14 September 2016 (‘2016 Proposals’).

² Which? Press Release, 17 May 2017.

This chapter looks at why special consumer protection measures exist for telecommunications services, over and above the consumer protection measures that apply to other products and services more generally. The answer is twofold.

9.1.1 Utility

First, some telecommunications services have become analogous to public utilities: like gas, electricity, water, and sewage, they are considered to be so important to people's lives that measures have been put in place to ensure that people have access to them and are not prevented from using them. In the EU, the Universal Service Directive³ ensures provision of a 'universal service': an affordable basic telephony service available to everyone.⁴ In the UK, the Universal Service Order⁵ sets out the minimum requirements for the universal service, and has been implemented through the General Conditions of Entitlement (GCs) and through specific conditions on BT and KCOM, who are designated as the universal service providers in the geographic areas they cover.⁶ Across the EU, the universal service obligation has historically been limited to fixed-line voice services.⁷ However, the European Commission's 2016 proposals to amend the telecommunications regulatory framework included an extension of the universal service obligation to basic broadband (defined on the basis of a minimum list of online services needed to enable end-users to participate in civil society⁸). The Commission has also proposed removing the obligation in relation to some older technologies (payphone provision, comprehensive directories, and directory enquiry services⁹). Under the proposals, Member States will have flexibility to extend affordability measures to mobile as well as fixed line.¹⁰

³ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108, 24 April 2002.

⁴ *Ibid*, Art 1(2). See further Chapter 4, at Section 4.8.

⁵ Electronic Communications (Universal Service) Order 2003, SI 2003/1904.

⁶ Designation of BT and Kingston as universal service providers, and the specific universal service conditions: Statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive, 22 July 2003.

⁷ The European Commission concluded in 2011 that it was not appropriate to extend the obligation to broadband. See, European Commission Communication, COM(2011) 795.

⁸ Defining functional broadband by way of a list was criticized by the European Economic and Social Committee (EESC) in its opinion on the proposals (2017/C 125/56), as it created an arbitrary list of accessible internet services, as opposed to a neutral minimum quality link and might give rise to discriminatory practices detrimental to end-users.

⁹ Removing the obligation in respect of older technologies was also criticized by the EESC (*ibid*).

¹⁰ 2016 Proposals, at Arts 79–86.

9.1.2 Competition

The second reason why special consumer protection measures exist for telecommunications is that, since the end of monopolies in the sector, operators have been regulated to provide for a competitive sector. The introduction of competition is seen as being generally beneficial to consumers in terms of choice, cost, and quality. In a fully competitive market, it could be argued that there would be no need for sector-specific consumer protection rules, because the availability of choice means that in theory a disgruntled subscriber could simply switch to a provider offering a better service, and the availability of alternative services means that each communications provider has to have an eye to its competitors and ensure that its subscribers remain happy enough with their service that they do not want to switch provider.

So, concerns about consumers could be seen as being an issue only during the process of liberalization, before markets are fully competitive and while operators with 'significant market power' continue to be prevalent. Indeed, when the European Commission first proposed the Universal Service Directive in 2000, it considered that as competition continued to develop it was likely that the consumer protection environment would become more homogenous among the existing EU Member States and that regulation of consumer protection would not be so necessary. It based its inclusion of consumer protection measures on the prospect of EU enlargement, which was expected to introduce a wide range of national differences, and make it necessary to ensure regulatory intervention to uphold a minimum set of consumers' rights throughout the Community.¹¹

The 2002 Universal Service Directive included consumer protection measures to increase the ability of consumers to optimize their choices and so benefit fully from competition.¹² In fact, consumer protection issues remain a central constituent of the EU regime now, and further measures to strengthen and improve such protections have been included in subsequent amendments and in the latest proposed amendments in 2016.

The continued inclusion of consumer protection measures in the light of competition law is justified in two ways. First, competition alone may not be enough to satisfy the needs of all citizens and protect users' rights. Additional protections are needed, both in the form of the universal service (for more on the universal service, see Chapter 4 European Union Communications Law, Section 4.8), and in the form of consumer protection laws that help to balance the respective bargaining

¹¹ European Commission Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, COM(2000) 392 final 2000/0183(COD).

¹² Universal Service Directive, Recital 30.

positions of consumers and the companies with whom they contract. Secondly, consumer protection law also plays a role in stimulating competition. Most EU measures are focused on stimulating competition from the supply-side, but consumer protection measures help to stimulate competition from the demand-side. In order to create demand, consumers need to be educated about the services on offer. Even in a competitive environment, consumers who purchase telecommunications services are likely to know less about the product or service than the supplier, be required to contract on the supplier's terms, and possibly vulnerable to pressure to buy.

9.1.3 What is a consumer?

It is worth looking at what is meant by the term 'consumer' and some related terms.

A 'consumer' is someone who uses or requests a service for non-business use, and would include someone not contractually bound to the supplier.¹³

A 'subscriber', by contrast, means someone who has actually signed up to receive a service. The term is defined in the context of electronic communications legislation as someone party to a contract with the service provider.¹⁴

A 'customer', in a telecommunications context, includes people to whom a network or service is provided, those the communications provider wants to supply and those who want to receive the network or service.¹⁵ A customer therefore includes consumers and business users, other than other telecommunications operators.

An 'end-user', as defined in Section 151(1) of the Communications Act 2003, encompasses users who are both customers of the provider, and those who use a service with authority from the customer, for example, family members or employees.¹⁶

Although a consumer is someone who is not acting in the course of business, a number of consumer-protection provisions also apply to 'small business customers'; for example, requirements for communications providers to get express consent to renew an initial commitment period¹⁷ and to provide codes of practice.¹⁸ Small business customers are businesses with no more than ten workers.¹⁹

¹³ See definition of 'consumer' in the GCs. In the Enterprise Act 2002, ss 129 and 183, a consumer is a person to whom goods and services are supplied (whether by sale or otherwise).

¹⁴ See, for example, the definitions of 'subscriber' in art 2 of the Electronic Communications (Universal Service) Order 2003/1904, in Regulation 2 of the Privacy and Electronic Communications (EC Directive) Regulations 2003/2426 and in the GCs.

¹⁵ See definition in GCs.

¹⁶ See also the definition in the GCs in force from 1 October 2018.

¹⁷ GC C1.3 (GC9.3(a) in the version of the GCs that applies up until 1 October 2018).

¹⁸ GC C4 (GC14 in the version of the GCs that applies up until 1 October 2018).

¹⁹ See definition in GCs.

9.2 EU PROVISIONS

In the EU, the telecommunications industry is regulated through a framework of five directives, which were adopted in 2002 and amended in 2009 and 2015.²⁰ As already mentioned, in September 2016, the European Commission put forward proposals to amend the framework again and to consolidate four of the five directives (Framework, Authorisation, Access, and Universal Service) into one 'Electronic Communications Code'. At the time of writing, there is no clear timeline for adoption of these proposals, but it seems likely that the date for implementation will fall after the UK has left the EU, and it is uncertain whether the amendments will be incorporated into UK law under the European Union (Withdrawal) Bill 2017–19.²¹

Chapter IV of the Universal Service Directive sets out a number of consumer protection measures. It was revised by the Citizens' Rights Directive,²² which strengthened these provisions, particularly in the light of the increased use of the internet. Additional rights for end-users were introduced by the 2015 Regulation on Open Internet Access and Roaming.²³

The main areas of consumer protection covered by the Universal Service Directive are provisions on minimum contract terms, transparency of information, quality of service (QoS), switching, and number portability. The 2015 Regulation introduced rights of access and requirements for internet access service (IAS) contracts.

9.2.1 Minimum contract terms

Provisions regarding customer contracts were included early in the liberalization process under the Equipment Directive and the Services Directive, which granted telecommunications customers a right to terminate long-term contracts subject to minimum notice periods to facilitate their ability to switch provider.²⁴

²⁰ See further Chapter 4. ²¹ See further Chapter 3, at Section 3.4.6.

²² Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, 18 December 2009.

²³ Regulation 2015/2120 of the European Parliament and the Council laying down measures concerning open internet access and amending Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services and Regulation 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310/1, 26 November 2015 ('2015 Regulation').

²⁴ Respectively, Directive 88/301, Art 7 (minimum notice one year) and Directive 90/388, Art 8 (minimum notice six months).

However, the European Court of Justice annulled these provisions on the basis that such private contractual arrangements were not ‘State measures’ to which Article 86(3) of the then EC Treaty was applicable.²⁵ Subsequently, provisions governing subscriber contracts and QoS issues were introduced under the ONP framework.²⁶

In 2002, Article 20 of the Universal Service Directive introduced a requirement for a clear set of minimum contract terms to be included in contracts for connection to the public telephone network and other services, because contracts are an important tool for consumers to ensure a minimum level of transparency of information and legal security.²⁷ These minimum terms include:

- The identity and address of the supplier.
- The services provided, the service quality levels offered, as well as the time for the initial connection.
- The types of maintenance service offered.
- Particulars of prices and tariffs and the means by which up-to-date information on all applicable tariffs and maintenance changes can be obtained.
- The duration of the contract, the conditions for renewal and termination of services and of the contract.
- Any compensation and the refund arrangements that apply if contracted service quality levels are not met.
- The method of initiating procedures for settlement of disputes using out-of-court procedures.

Subscribers also have a right to withdraw from contracts without penalty on notice of proposed modifications in the contractual conditions, and must be given at least one month’s notice.

The amendments made by the Citizens’ Rights Directive strengthened these requirements.²⁸ In particular, amended Article 20 sets out more detailed requirements of what should be included in the description of the services.

It must be clear whether or not the service allows access to emergency services and whether caller-location information is available, and whether there are any limitations on the provision of emergency services. This is particularly relevant for VoIP services, as mobility and location independence mean that, unlike during a PSTN call, it may be difficult to locate the user when an emergency call is made,

²⁵ Case C-202/88: *France v Commission* [1992] 5 CMLR 552; and Case C-271/90 *Spain v Commission* [1992] ECR I-5833. Article 86 is now Article 106 of the Treaty on the Functioning of the European Union.

²⁶ See Chapter 4, at Section 4.5.

²⁷ Universal Service Directive, Recital 30.

²⁸ Citizens’ Rights Directive, Art 1(14).

meaning that calls may not be directed to the nearest emergency service call centre. With some VoIP services, emergency calls cannot be made at all.²⁹

Service description must also include information on any other conditions limiting access to or use of services and applications. This would include any caps on bandwidth or connection speed.

Minimum service quality levels must also be given. This includes the time for the initial connection, and any other QoS parameters required by the national regulatory authority (NRA). This provision backs up NRA powers to impose minimum QoS requirements on communications providers. For more on this, see Sections 9.2.3 and 9.3.1.1.

Under Article 4(1) of the 2015 Regulation, end-user contracts with IAS providers must include information on any traffic management measures that could impact on the quality of the IAS, the privacy of end-users, and on the protection of their personal data. Explanations of the following must also be included:

- How any volume limitation, speed, and other QoS parameters may impact on IAS and, in particular, on the use of content, applications, and services.
- How other services to which the end-user subscribes might impact on the IAS.
- Minimum and maximum upload and download speeds, and how significant deviations from advertised speeds could impact the end-user.
- Remedies available in the event of any continuous or regulatory recurring discrepancy between the contracted and actual performance of the IAS.

The introduction of these requirements was a response to the introduction by internet service providers of methods to discriminate between different types of traffic delivered over their networks, for example, to restrict certain services at peak times or to block certain services altogether, which could affect service quality or even compete with their own service.³⁰ The European Commission's 2016 proposals to amend the regulatory framework make no changes to the requirements of Article 4(1) of the 2015 Regulation.³¹

Other service information required under Article 20 includes the types of maintenance service offered and customer support services provided and the means of contacting those services, and any restrictions on the use of terminal equipment supplied. Also, contracts must include details of the subscriber's options as to whether or not to include his or her personal data in a telephone directory, and

²⁹ However, most VoIP services would not consider themselves to be ECSs. The linking of interpersonal communications services (as VoIP services are defined under the 2016 Proposals for an Electronic Communications Code) with the use of public numbering resources has been contested by service providers.

³⁰ See further Chapter 15.

³¹ 2016 Proposals, at Art 95(4).

the data concerned.³² Details of prices must include details of payment methods offered and any differences in costs due to payment method.

Contracts must also include details of:

- Any minimum usage or duration required to benefit from promotional terms.
- Any charges related to portability of numbers and other identifiers.
- Any charges due on termination of the contract, including any cost recovery with respect to terminal equipment.

Some of these issues are discussed in more detail in the section on the UK implementation of these provisions (Section 9.3 below).

Lastly, contracts must also include the type of action that might be taken by the undertaking in reaction to security or integrity incidents or threats and vulnerabilities.

The European Commission's 2016 proposals for an Electronic Communications Code have shifted the emphasis for end-user rules. Rather than providing a minimum harmonization approach, they mandate end-user rules, making these subject to full harmonization to the extent possible. Member States must not introduce more or less stringent provisions for end-user protection, except where specified.³³ This approach is in line with the aims of the Commission's Digital Single Market Strategy,³⁴ which aims to increase the ability of individuals and businesses to access services seamlessly across national borders within the EU by removing the opportunity for different consumer protection rules to evolve in each Member State. However, the European Economic and Social Committee has expressed doubts about the maximum harmonization approach in the context of end-user rights.³⁵

In the light of the increasing number of software-based communications services and uncertainty about whether the rules apply to those services, the Commission is proposing to redefine 'electronic communications service' so that it applies to:

- IASs.
- Interpersonal communications services. This term is intended to catch over-the-top (OTT) software-based applications where the service enables a

³² See further Chapter 13.

³³ eg the proposals on contract duration (in Art 98 in the first draft) are not subject to maximum harmonization, so providers can in certain circumstances agree contract periods longer than the general maximum of two years: 2016 Proposals, at Art 94.

³⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192 final.

³⁵ Opinion of the European Economic and Social Committee on the proposal for a directive of the European Parliament and of the Council establishing the European electronic communications code (Recast) (COM(2016) 590 final, 2016/0288 (COD)) (2017/C 125/56).

direct interpersonal and interactive exchange of information between a finite number of persons determined by the people initiating or participating in the communication. They can be number-based or number-independent services depending on whether they connect with the public switched telephone network.³⁶

- Services consisting wholly or mainly of the conveyance of signals, such as transmission services used for M2M communications and for broadcasting.³⁷

Most end-user provisions will not apply to number-independent interpersonal communications services, such as WhatsApp, which will be subject to more limited obligations, such as security and interoperability, compared to other ECSs.

Under the consumer protection proposals, Article 20 is replaced by a provision that would apply to publicly available electronic communications services other than number-independent interpersonal communications services.³⁸ The information requirements are expressly aligned with those in the Consumer Rights Directive,³⁹ so minimizing the risk of overlap between specific telecommunications consumer protection measures and consumer protection measures in general. Before consumers are bound by a contract, they must be given the information in Articles 5 and 6 of the Consumer Rights Directive. Article 5 sets out information to be provided for contracts other than those made at a distance or off premises, for example in a high-street shop. Article 6 contains information to be given in distance or off-premises contracts, for example where the contract is made over the telephone or online. The provisions cover, among other things, the characteristics of the service, the identity and contact details of the trader, information on pricing and payment, duration of the contract, the functionality of any digital content and its interoperability with likely hardware or software. There are additional protections for consumers making contracts at a distance.

The Code elaborates on these provisions. For example, as part of the characteristics of the service provided, the Code requires the provider to set out any minimum service quality levels and any restrictions on the use of terminal equipment supplied. Details are required on any compensation and refund arrangements applicable if service quality levels are not met. The Code sets out detailed requirements on provision of information on tariffs and on duration, termination, and switching. Details must also be given on products and services for disabled end-users, the means of initiating dispute procedures, and the type of action that might

³⁶ See further Chapter 4, at Section 4.2.

³⁷ 2016 Proposals, at Art 2(4).

³⁸ 2016 Proposals, at Art 95.

³⁹ Directive 2011/83/EU on consumer rights, OJ L 304/64, 22 November 2011.

be taken by the undertaking in reaction to security or integrity incidents or threats and vulnerabilities. The Code also requires providers of number-based interpersonal communications services to provide information on any constraints on access to emergency services and or caller location information, and the end-user's right to determine whether or not to include his or her personal data in a directory in accordance with Article 12 of the Privacy Directive.⁴⁰

Under the Code, BEREC must provide a contract summary template identifying the main elements of the information requirements, which providers would be required to complete and give to consumers and micro and small enterprises⁴¹ prior to conclusion of the contract. This would ensure that consumers and small businesses receive readable short-form summaries of their contractual provisions.

The Code also requires providers of IASs and providers of publicly available number-based interpersonal communications services to offer end-users the facility to monitor and control the usage of services billed on the basis of either time or volume consumption. Currently, the requirement to provide consumers with warnings about their consumption only applies where consumers are roaming abroad in the EU,⁴² and not to domestic contracts, although some providers already offer this service.

9.2.2 Transparency

Provisions that require communications providers to publish information about their services enable end-users and consumers to make informed choices about the services they plan to purchase, and back up the provisions on what must be included in contracts.⁴³ The transparency provisions also provide some protection for those end-users who are not also subscribers and so do not benefit from the requirements for certain information to be made available in contracts. Article 21 of the Universal Service Directive introduced a number of transparency requirements, which reflect the requirements for information to be provided in contracts under Article 20.

Article 21 of the Directive, as originally drafted, required member states to ensure that transparent and up-to-date information on applicable prices and tariffs,

⁴⁰ Directive 2002/58/EC (the European Commission proposed in January 2017 replacing this Directive with an E-Privacy Regulation). See further Chapter 13.

⁴¹ Micro and small enterprises are a category of small and medium enterprises as defined in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC, L124/36). A microenterprise is defined as an enterprise that employs fewer than ten people and whose annual turnover and or annual balance sheet total does not exceed EUR 2 million.

⁴² Regulation 531/2012, Art 15(3) and Regulation 531/2012, Art 15(2a) as amended by Regulation 2015/2120.

⁴³ Universal Service Directive, Recital 30.

and on standard terms and conditions, in respect of access to ‘publicly available telecommunication services’ (PATS), was available to end-users and consumers. Details of what information had to be published were set out in Annex II to Article 21. Article 21(2) required NRAs to encourage the publication of information aimed at enabling end-users and consumers to make an independent evaluation of the cost of alternative usage patterns, by means of, for instance, interactive guides. This was aimed at encouraging independent organizations to publish comparative information on different services, for example, via price comparison websites.

The amendments made by the Citizens’ Rights Directive gave NRAs powers to require all undertakings providing public ECNs and ECSs to publish information themselves.⁴⁴

Amended Article 21 also specifies a wider range of information, including information on:

- Tariffs for numbers or services subject to particular pricing conditions.
- Change of access to emergency services or caller-location information.
- Changes to conditions limiting access or use of services and applications.
- Procedures to measure and shape traffic and how they could impact on service quality.
- Subscriber rights to include their personal data in a directory.
- Products and services designed for disabled subscribers.

A particularly important change here was the requirement that obliges operators to inform consumers, before contracting, of any service restrictions, which would include caps on bandwidth or connection speed.⁴⁵

Also, price comparison continued to be a concern in 2007 so, under the amendments, where comparator guides are not made available by the market, NRAs are now obliged to make them available, either themselves, or through third parties; and, to support this, third parties have a right to use published information free of charge to provide such guides.

Member States can also require undertakings to distribute public interest information on how ECSs can be used for unlawful activities or to disseminate harmful content, including infringements of copyright and related rights and their legal consequences, and on means of protecting personal data when using ECSs.

Under the European Commission’s 2016 proposals, Article 21 is to be replaced. Under the Code, national regulatory authorities are obliged to ensure that end-users have access free of charge to at least one independent comparison tool, and the Code sets out requirements for the comparison tool itself.⁴⁶

⁴⁴ Citizens’ Rights Directive, Art 1(14).

⁴⁵ See further Chapter 3, at Section 3.2.3.

⁴⁶ 2016 Proposals, at Art 96.

9.2.3 Quality of service

NRAs were given powers to ensure QoS in the ONP Voice Telephony Directive, which allowed them to require alterations to the conditions of contracts.⁴⁷ However, the European Commission did not consider that these sorts of powers of intervention were appropriate in a competitive market. In its 1999 Review,⁴⁸ the European Commission noted:

... good quality services are more likely to be provided as a result of competition between suppliers than from regulation, and consumers may demand services of different quality at different prices. (at 4.5.5)

But the Commission concluded:

It is considered prudent to maintain some reserve powers for NRAs to take action in the event of market failure, particularly to deal with issues of end-to-end quality in a multi-network environment where no single operator has overall control.

The latter reference is clearly applicable to the growth of the internet as a communications environment.

Article 22 of the Universal Service Directive as originally drafted enabled NRAs to require providers of publicly available ECSs to publish comparable, adequate, and up-to-date information for end-users on the quality of their services, and set out parameters, in Annex III, that NRAs may use.

The amendments to Article 22 made by the Citizens' Rights Directive⁴⁹ extended this to providers of publicly available ECNs. It also introduced a new right for NRAs to set minimum QoS requirements on an undertaking providing public communications networks, in order to prevent the degradation of the service and the hindering or slowing down of traffic over the networks. This had become relevant in the context of the internet, particularly as higher volumes of data in the form of moving images, for example, via the BBC's iPlayer, which launched in December 2007, were being transmitted, causing traffic to slow where the bandwidth was not large enough to cope.

These are reserve powers, which enable NRAs to introduce regulation where they consider that market players are not using their commercial freedom in an effective way to satisfy users' and consumers' demands, which could be detrimental to consumer choice and, by extension, competition in the market.

Under the European Commission's 2016 proposals, stricter requirements are placed on NRAs to enable more comparability between service providers including across the whole EU.⁵⁰ Under the proposals, NRAs are under a requirement to

⁴⁷ Directive 95/62/EC, Art 7(3).

⁴⁸ COM(1999) 539, November 1999.

⁴⁹ Citizens' Rights Directive, Art 1(14).

⁵⁰ See Recital 243 and new Art 97.

specify QoS parameters. In doing so, they have to take account of guidelines to be produced by BEREC. NRAs would also have to specify the applicable measurement methods and the way the information should be published including possible quality certification mechanisms. NRAs can, where appropriate, use the parameters, definitions, and measurement methods set out in the Annex.

9.2.4 Switching provider

Being able to switch provider easily is an important aspect of a competitive market, and a commitment to a lengthy contract could hinder this. The amendments made to the Universal Service Directive by the Citizens' Rights Directive introduced into Article 30 restrictions on the terms of consumer contracts, so that providers of ECSs cannot require consumers to sign up to an initial commitment period that exceeds 24 months, and must always offer a contract option with a maximum duration of twelve months.⁵¹ In addition, conditions of termination must not act as a disincentive against changing service provider. In the European Commission's 2016 proposals, there are new provisions allowing a consumer to terminate where a contract or national law provides for a fixed duration contract to be automatically prolonged.⁵² End-users also have the right to terminate without cost on notice of any changes in their contractual conditions unless the proposed changes are exclusively to the benefit of the end-user or required by law.

9.2.5 Number portability

Number portability, the facility that allows customers to keep their telephone number when they change provider, was first introduced for fixed-line services by the Numbering Directive,⁵³ with effect from 1 January 2000, although the facility was available in some instances before then.

Number portability is seen as a key facilitator of consumer choice and effective competition⁵⁴ because, without it, the inconvenience of having to switch phone numbers would have the potential for discouraging subscribers from switching provider. However, number portability is only available when subscribers switch between services using the same number range as set out in national telephone

⁵¹ Citizens' Rights Directive, Art 1(21).

⁵² 2016 Proposals, at Art 98.

⁵³ Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection, OJ L 268/37, 3 October 1998.

⁵⁴ Universal Service Directive, Recital 40.

numbering plans, for example, mobile services, or fixed-line services with the same geographic area code.

Article 30 of the Universal Service Directive sets out a right to number portability for all subscribers of PATS, including mobile services. The right is restricted in the case of geographic numbers to numbers within the same location, or exchange. Following the amendments made by the Citizens' Rights Directive, numbers must be ported within the shortest possible time and, once there is an agreement with a subscriber to port a number, the number must be activated within one working day. NRAs can also order compensation in cases of abuse or delay in porting a number.

The 2016 amendments proposed by the European Commission include a requirement that the switching and porting process should be led by the receiving provider. There is also a requirement that in the event of a failure of the porting process, the transferring provider must reactivate the number until the porting is successful.⁵⁵

9.2.6 Bundled offers

The European Commission's 2016 proposals add a new provision on bundled offers intended to avoid unwanted lock-in effects, so that adding on additional services to a bundle cannot restart the overall contract period unless a special promotional price is available only on conditions that the existing contract period is restarted. Key provisions, such as the information requirements for contracts, maximum contract duration and termination rights, and switching rights, would apply to the entire bundle.⁵⁶

9.2.7 Non-discrimination

For the first time, the 2016 proposals overtly take account of the fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union. This may have impacted the new requirement that providers of electronic communications networks and services must not apply any discriminatory requirements or conditions of access or use on end-users based on nationality or place of residence unless such differences are objectively justified and the introduction of a fundamental rights safeguard.⁵⁷

⁵⁵ 2016 Proposals, at Art 99.

⁵⁶ *Ibid*, at Art 100.

⁵⁷ 2016 Proposals, at Arts 92 and 93.

9.3 UK PROVISIONS

The UK regime for providing consumer protection in relation to telecommunications services is mainly contained in the GCs,⁵⁸ which implement the consumer-protection measures in the Universal Service Directive. The amendments to the Universal Service Directive made by the Citizens' Rights Directive led to amendments to the Communications Act 2003 through the Electronic Communications and Wireless Telegraphy Regulations 2011/1210 and consequently to amendments to the GCs. Ofcom can make GCs that relate to end-user and domestic and small business customers' interests under ss 51 and 52 of the Communications Act 2003. Other regulation, for example, in relation to advertising telecommunications services, also plays a part (see Section 9.3.1.2).

The rest of this chapter looks at how the specific consumer protection measures for telecommunications services apply in the UK, by looking at how the rules apply to marketing services, contractual arrangements, and dispute resolution.

In September 2017, Ofcom published a replacement set of GCs to take effect from 1 October 2018.⁵⁹ The new conditions are divided into three, with Part A containing network functioning conditions, Part B containing numbering and technical conditions, and Part C containing consumer protection conditions.

9.3.1 Marketing

When consumers are considering signing-up for a new communications service, or switching providers, the main information they need to know is what service they should expect to get and how much it will cost them. With an increasing range of telecommunications services available via different technologies and packaged in different bundles, getting the right information about service options can be a challenge for consumers. Competition, which creates more supply-side options, may have an adverse effect on demand, because it can create confusion among consumers who find themselves faced with such a myriad of options, it may be hard to understand which service would best suit their needs. The Citizens' Rights Directive sought to deal with this, by giving national regulatory authorities the right to publish their own price comparison guides, where the market has not provided them.⁶⁰ For the UK's approach, see Section 9.3.1.5.

⁵⁸ See further Chapter 6.

⁵⁹ Ofcom, 'Review of the General Conditions of Entitlement, Statement and Consultation', 19 September 2017. See further Chapter 6.

⁶⁰ Citizens' Rights Directive, Recital 32, and Universal Service Directive, Art 21(1), (as amended).

9.3.1.1 *Quality of service*

Ofcom has varied its approach to QoS over the last few years.

GC21 required providers of public electronic communications services to publish comparable, adequate, and up-to-date information for end-users on the quality of their services, where directed by Ofcom. In January 2005, Ofcom published a Direction requiring most fixed-line communications services (operating at £4 million in net revenues per quarter and handling 100 million minutes of calls to end users per quarter) to publish QoS information.⁶¹ At the time, Ofcom considered that the voluntary schemes for providing QoS information applicable at that time, the 'Comparable Performance Indicators' schemes, were not entirely effective at providing adequate QoS information to consumers. Relatively few consumers were aware of the schemes or regularly made use of the information provided. Ofcom considered that QoS information should be provided to consumers in both the fixed-line and the mobile markets, but that a formal direction was only needed for the fixed-line market, where, at the time, there was a growing number of CPS⁶² providers, and WLR⁶³ was about to be introduced, facilitating market entry.⁶⁴

The Direction required communications providers to publish information on supply time for initial connection, fault-rate per access line, fault repair time, and bill-correctness complaints according to standards set by the European Telecommunication Standards Institute (ETSI), plus the time for end-user complaints received by the communications provider to be resolved. Ofcom also required a co-regulatory industry group to be set up to gather and publish the QoS information required by the Direction, and, as a result, a website to provide this information was established by the communications providers concerned. However, by 2009, Ofcom concluded that this system was not working and withdrew the Direction.

Subsequent research led Ofcom to conclude in July 2010 that there was no case for further intervention to require communications providers to supply QoS information at that time.⁶⁵ Research had also helped to isolate what QoS information consumers were particularly interested in, and it became clear that network performance was a particular issue for consumers, particularly in the context of broadband.⁶⁶ Following the 2009 amendments to the Universal Service Directive, Ofcom has a right to set minimum QoS requirements on network operators.⁶⁷

⁶¹ Ofcom Direction under General Condition 21.1 on quality-of-service, 27 January 2005.

⁶² Carrier pre-selection. ⁶³ Wholesale line rental.

⁶⁴ See further Chapter 8, at Section 8.3.4.3.

⁶⁵ Ofcom statement about research report by GfK, 13 July 2010.

⁶⁶ Ofcom research document: Provision of quality of service information, 30 January 2009.

⁶⁷ Communications Act 2003, s 51(2), as amended by the Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011/1210, Sch 1, para 27.

However, Ofcom's recent approach has been to regulate by using existing competition tools and consumer transparency options, rather than imposing minimum QoS requirements,⁶⁸ an approach which is supported by the government.⁶⁹

To improve transparency for consumers, since 2011, Ofcom has published complaints data, periodically,⁷⁰ and has taken action to improve the way in which consumer complaints are handled by the communications industry, for example by ensuring that consumers have an increased awareness of their rights to use ADR.⁷¹ In July 2010, Ofcom introduced new rules to require communications providers to improve awareness of dispute resolution services.⁷²

Ofcom has the power to require communications providers to provide Ofcom with information to enable it to carry out comparative overviews of services.⁷³ In order to improve the availability of comparative information on quality and prices, the government has recently granted Ofcom a new express power to carry out and publish wide-ranging comparative overviews.⁷⁴ Further new provisions set out the scope of Ofcom's powers to require communications providers to collect, generate, and retain information for publication and these represent stronger powers than Ofcom had previously to require information from communications providers.⁷⁵ In revising the GCs, Ofcom has removed the power in GC21 to make directions relating to quality of service, as this is now redundant.⁷⁶

In April 2017, Ofcom launched an online interactive tool to allow consumers to compare QoS between providers.⁷⁷ At the same time, Ofcom published its first annual report comparing QoS between providers, which addressed in particular call waiting, complaints handling, and reliability.⁷⁸

9.3.1.2 Advertising broadband speeds and 'unlimited' services

The advertising of telecommunications services is regulated by the codes published by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP), which are enforced by the Advertising Standards Authority (ASA).⁷⁹

⁶⁸ See Ofcom discussion document on traffic management and 'net neutrality', 24 June 2010.

⁶⁹ See speech by Ed Vaizey, 'The Open Internet', FT World Telecoms conference 2010, 17 November 2010.

⁷⁰ See Ofcom Telecoms Complaints papers, 21 April 2011, 22 September 2011, and so on.

⁷¹ Ofcom quality of service research report, 13 July 2010.

⁷² See Ofcom statement: A review of Consumer Complaints Procedures, 22 July 2010, and GC C4 and Annex to C4 (GC14.4 and Annex 4 to GC14 in the GCs that apply up to 1 October 2018).

⁷³ Communications Act 2003, s 136.

⁷⁴ Ibid, s 134D, inserted by Digital Economy Act 2017, s 86.

⁷⁵ Ibid, ss 137A and 137B, inserted by Digital Economy Act 2017, s 86.

⁷⁶ Ofcom, 'Review of the General Conditions of Entitlement: Statement and Consultation', 19 September 2017, at paras 8.13–8.14.

⁷⁷ <<https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/quality-of-service/report/interactive-report>>.

⁷⁸ Ofcom report, 'Comparing service quality', 12 April 2017.

⁷⁹ <<http://asa.org.uk>>.

CAP and BCAP have published guidance on the use of 'unlimited' claims in telecommunications and broadband advertising.⁸⁰

The guidance says that when describing services as 'unlimited,' advertisers must only use the term where the user incurs no additional charge or suspension of service as a consequence of exceeding a usage threshold associated with a fair-usage policy, a traffic management policy or similar, and where limitations that do affect the speed or usage of the service are moderate only and are clearly explained in the advertisement.⁸¹ Following a review in November 2017, CAP published new guidance on broadband speed advertising applicable to residential broadband services, which came into effect on 23 May 2018.⁸² Claims about broadband speeds now have to be based on the speed available to at least 50 per cent of customers at peak time (8pm–10pm), which must be described as 'average'. The previous position was that advertised 'up to' speeds were acceptable if they were available to at least 10 per cent of customers. The guidance also contains a recommendation that speed-checking facilities should be promoted in advertisements wherever possible. The review followed publication of a report by the Advertising Standards Authority that indicates that consumers do not correctly understand claims made in advertising about broadband speeds. In particular, the review found that most consumers believe they are likely to receive a speed at or close to the headline speed claim, although for many people this is unlikely to be the case.⁸³ CAP believes that the new standard will help consumers better understand what is available when deciding to switch providers and to appreciate that there are a range of factors that will affect the broadband speed they receive (location, technology, number in their household using broadband). Most of the major fixed-line ISPs have signed up to a voluntary code of practice on broadband speeds published on the Ofcom website, but initiated by the Broadband Stakeholders Group, under which they are required, among other things, to give specific information on broadband speeds at the point of sale and on their websites. An update in 2015 gave consumers improved rights to leave their broadband contract if speeds fell below an acceptable level.⁸⁴ A similar code was published for business customers in 2016. Amendments to both codes that come into force on 1 March 2019 require speed estimates given at point of sale to reflect the speeds customers are likely to experience at peak times

⁸⁰ Guidance on making 'unlimited' claims in advertising for telecommunications services. See also Chapter 14.

⁸¹ See, for example, ASA Adjudication on UK2 Group (29 February 2012), in which the ASA upheld a complaint in respect of an advert stating that a Business Cloud package offered 'unlimited' storage space.

⁸² <<https://www.asa.org.uk/uploads/assets/uploaded/dbf3043b-02b4-4134-9ba50f2ad0be4d06.pdf>>.

⁸³ ASA News item: 'ASA calls for a change in the advertising of broadband speed claims', and research report by GfK.

⁸⁴ Voluntary code of practice: broadband speeds, version 3.0, June 2015.

(8–10pm for residential services and 12–2pm for business services). A minimum guaranteed speed and the right to exit connected to this speed must be given at point of sale. The right to exit will also apply to bundled products. There will be a thirty-calendar day limit to the time providers have to improve speeds before they must offer the right to exit, and providers will be required to make after-sale information about the right to exit more prominent and clearly link it to the minimum guaranteed speed. Because the codes will measure customer speeds at peak time, they can apply to all types of access technologies.⁸⁵

In 2016, the Broadband Stakeholder Group established an ‘Open Internet Code’ to clarify the rules on internet traffic management. It brought together the BSG’s early Traffic Management Transparency Code, its 2012 Open Internet Code, and the requirements of the 2015 Regulation. The new Code is built round four ISP commitments:

- Supporting access to the Open Internet as the norm.
- Clarifying the ability of ISPs, under certain conditions, to deliver managed or alternative services (such as Internet of Things applications).
- Permitting the deployment of traffic management tools under certain conditions and not on the basis of commercial rivalry.
- Ensuring that traffic management practices are transparent and communicated effectively to the user.

All the major ISPs have signed up to the Code, representing 90 per cent of UK subscribers on fixed and mobile contracts.

9.3.1.3 *Transparency and information provision*

Under Ofcom’s revised GCs, it has consolidated all the information publication and transparency requirements, which currently exist across a number of GCs, into a single condition, C2, and has aimed to simplify and clarify the requirements where possible, particularly in relation to price transparency. The requirements are also extended from PATS providers to all providers of public electronic communications services.⁸⁶

These provisions implement Article 21 of the Universal Service Directive and set out minimum information communications providers must publish about their standard prices and standard terms and conditions.

The amendments made by the Citizens’ Rights Directive to Article 21 of the Universal Service Directive on transparency have been implemented in the UK by

⁸⁵ Ofcom statement, ‘Better broadband speeds information—Voluntary codes of practice’, 1 March 2018.

⁸⁶ Ofcom consultation, ‘Review of the General Conditions of entitlement: Consultation on the general conditions relating to consumer protection’, 20 December 2016.

amending Section 51 of the Communications Act 2003, to allow Ofcom to impose a general condition that requires undertakings to provide information of a specified kind to end users.⁸⁷ Section 146A was added into the Communications Act, to implement the amendments to Article 21(2), giving third parties a right to use published information for interactive price comparison guides, free of charge.⁸⁸

9.3.1.4 *Price*

In its March 2016 budget, the government noted that broadband pricing can be opaque and asked for industry to act to improve clarity. Accordingly, since 31 October 2016, the ASA has required that, in order to comply with ASA rules, broadband adverts that include price claims must convey a consumer's full commitment required to purchase the service. The ASA has determined that, if followed, the following three 'key principles' should produce advertisements that are in line with the advertising code:

- The advertisement presents all compulsory elements of the total financial commitment (up-front costs, ongoing costs, and contract length) together, avoiding undue emphasis on any one element.
- The advertisement presents one inclusive price for compulsory up-front costs and an inclusive price for a consumer's ongoing monthly cost (combining the line rental and broadband cost where line rental is offered by the provider).
- The advertisement makes clear if an introductory discounted price for one/some of the elements applies and, if so, for how long.⁸⁹

9.3.1.5 *Comparing bundles*

In the UK, a number of price comparison websites exist to help consumers understand what they are getting when they buy a 'bundle' of telecommunication services. Consumers can make savings from taking a number of services from one provider (for example, fixed-line voice, mobile, pay TV, and broadband), and are billed for all the services they receive on one bill. However, the risk for consumers is that an individual service provided within a bundle does not actually meet their requirements, or that other aspects of the deal, such as the length of the minimum term, are disadvantageous.

Ofcom's approach to being given increased rights to take control of the publication of comparable information⁹⁰ has been to operate an accreditation scheme to ensure that these comparison websites operate effectively, by providing accurate,

⁸⁷ Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011/1210, Sch 1, para 27(b).

⁸⁸ *Ibid*, Sch 1, para 88.

⁸⁹ ASA advice online: Compulsory charges: Telecommunications, 7 July 2016.

⁹⁰ Universal Service Directive, Art 21 (as amended).

up-to-date, and accessible information. Ofcom subjects the comparison sites to an independent audit, and once accredited, these companies can display the Ofcom Price Accreditation Scheme logo on their websites and in any publicity campaigns. Following a review in 2013, Ofcom introduced 'spot-checks' to monitor compliance between audits, and introduced a requirement for accredited price comparison websites to have fair and timely processes for complaints handling.⁹¹ At the time of writing, Ofcom has accredited eight providers: broadbandchoices.co.uk, simplifydigital.co.uk, broadband.co.uk, broadbanddeals.co.uk, billmonitor.com, mobilephonechecker.co.uk, ctrl.io, and handsetexpert.com.

9.3.2 Contractual arrangements

9.3.2.1 *Contract requirements*

The GCs set out a number of requirements for consumer contracts. In the revised GCs, these are contained in C1.⁹²

C1 requires providers of public electronic communications networks and public electronic communications services to include certain minimum information in contracts. The following is a summary:

- Name and registered address of the provider.
- Description of services provided, including whether access to emergency organizations and caller location information is being provided.
- Any other conditions limiting access to or use of services and applications.
- Minimum service quality levels including the time for initial connection.
- Information on any traffic management procedures and their impact on service quality.
- Maintenance services and customer-support information.
- Restrictions on the use of terminal equipment supplied.
- Options on including personal data in directories.
- Prices, tariffs, and payment methods. The revised GCs contain more detailed requirements on the explanation of pricing than the previous version.
- Duration of the contract and conditions for renewal or termination including any minimum usage to benefit from promotional terms, charges for portability of numbers, and termination charges.
- Compensation or refund arrangements if quality service levels are not met.
- How to initiate dispute settlement.

⁹¹ Ofcom statement, 'Accreditation scheme for price calculators: Decision on changes to the scope and operation of the Scheme', 6 November 2013.

⁹² In the version of the GCs that applies up until 1 October 2018, this information is set out in GC9.

- Action that might be taken by the provider in reaction to security or integrity incidents or threats and vulnerabilities.

The 2015 Regulation introduced new provisions affecting contracts that include IASs and that are concluded or renewed from 29 November 2015. Such contracts must also include the following information:

- Information on how traffic management measures applied by that provider could impact on the quality of the IASs, the privacy of end users, and the protection of their personal data.
- A clear and comprehensible explanation as to how any volume limitation, speed, and other quality of service parameters may in practice have an impact on IASs and, in particular, on the use of content, applications, and services.
- A clear and comprehensible explanation of how any services referred to in Article 3(5) (services other than IASs which are optimized for specific content, applications, or services, or a combination thereof, where the optimization is necessary in order to meet requirements of the content, applications, or services for a specific level of quality) to which the end-user subscribes might in practice have an impact on the IASs provided to that end-user.
- A clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the IASs in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the IASs in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1) (the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their IASs).
- A clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the IAS regarding speed or other quality of service parameters and the performance indicated in accordance with the points above.⁹³

In addition, contracts for IASs should take into account provisions in Article 3 of the Regulation on safeguarding open internet access: end-users have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's

⁹³ Art 4(1).

or provider's location or the location, origin, or destination of the information, content, application, or service, via their IAS. Agreements between providers of IASs and end-users on commercial and technical conditions and the characteristics of IASs such as price, data volumes or speed, and any commercial practices conducted by providers of IASs, shall not limit the exercise of these end-user rights.

The EU Regulation requires NRAs to monitor compliance with the requirement in the Regulation to safeguard open access, publish annual compliance reports, and promote the continued availability of non-discriminatory IAS at levels of quality that reflect advances in technology. NRAs may impose requirements concerning technical characteristics, minimum quality of service requirements, and other appropriate and necessary measures. NRAs must publish annual reports on their monitoring and findings. NRAs can request information on compliance. BEREC was required to issue guidelines on the implementation of the obligations of NRAs. The EU also gives Member States leeway to impose 'effective, proportionate and dissuasive' penalties.

The UK government implemented these requirements through the Open Internet Access (EU Regulation) Regulations 2016.

9.3.2.2 *Term and termination*

The GCs⁹⁴ also set out a number of requirements on communications providers that are aimed at ensuring that subscribers are not unreasonably tied to a contract whose terms could be a disincentive to switching provider. Providers of fixed line or broadband services to domestic or small business customers must not renew fixed commitment periods without express consent. Consumers must not be required to sign up for a contract that is excessive in length, and must be given an option of a contract that does not exceed 12 months in duration. Fixed commitment periods for user contracts cannot exceed 24 months. Communications providers cannot include conditions or procedures for termination that act as disincentives against end-users changing provider. Communications providers must give subscribers at least one month's notice of any contractual modification likely to be of 'material detriment' to the subscriber, and allow subscribers to withdraw from the contract without penalty.⁹⁵ Ofcom previously published guidance clarifying what was meant by 'material detriment'. In the revised GCs, this is included within the condition itself, which says that material detriment is likely to mean any increase in the core subscription price during the fixed commitment period.⁹⁶ Details of what could be meant by an increase in the core subscription price are set out.⁹⁷ In

⁹⁴ CI in the revised GCs and GC9 in the version in force until 1 October 2018.

⁹⁵ GC C1.6.

⁹⁶ GC C1.7. ⁹⁷ GC C1.8.

March 2018, Ofcom published new guidance on the procedures for terminating contracts.⁹⁸

9.3.2.3 *Rollover contracts*

An automatically-renewable or ‘rollover’ contract (ARC) automatically rolls forward to a new minimum-contract period, unless the subscriber actively opts out of the renewal. During the minimum-contract period, a subscriber is usually subject to an early termination charge if they want to end the contract and switch supplier. Research has shown a direct link between ARCs and reduced levels of consumer switching. Ofcom initially banned these contracts for fixed-line and broadband services to residential customers and small businesses with no more than ten employees⁹⁹ and extended this in the new GCs to all public electronic communications services.¹⁰⁰

9.3.2.4 *Number portability and handset locking*

The GCs set out the method for communications providers to provide number portability to their subscribers, and incorporate the requirements of Article 30 of the Universal Service Directive, as amended, that relate to number portability.¹⁰¹

Communications providers must provide number portability within the shortest possible time and on reasonable terms and conditions.

Subscribers can port their mobile numbers by requesting a PAC (Porting Authorization Code) from their current provider, which the current provider must give them immediately over the phone where possible or by SMS within two hours of the request, or by another reasonable method agreed. The subscriber gives the new provider the PAC and the number must be ported and activated within one business day from the receiving provider’s receipt of the PAC.

Non-mobile numbers must be ported and activated within one business day once all necessary validation processes have been completed, the network connection is ready for use by the subscriber, and the donor provider has received a request to activate the porting of the number from the recipient provider.

Communications providers must have a compensation scheme to compensate subscribers that suffer from abuse of or delay in porting numbers, and publish information on how subscribers can access compensation.¹⁰²

In the government’s March 2016 budget, it said it would consult and consider legislating on ending the practice of handset locking for consumers outside any

⁹⁸ Ofcom statement on emergency planning direction, number withdrawal and guidance on contract termination, 26 March 2018.

⁹⁹ Ofcom statement on automatically renewable contracts, 13 September 2011. ¹⁰⁰ GC C1.3.

¹⁰¹ GC B3 in the revised GCs and GC18 in the version that applies up to 1 October 2018.

¹⁰² See further Chapter 3, at Section 3.4.1.

initial contract period, if voluntary action by telecommunications companies did not deliver results.¹⁰³ A 'voluntary solution' was agreed in October 2016.

9.3.2.5 *Misselling of mobile and fixed-line services*

In 2009 and 2010, Ofcom introduced GCs to regulate the sales and marketing of mobile and fixed-line services respectively, following problems with cases of misselling in both areas.

Problems with misselling began to arise in the fixed-line industry once British Telecommunications PLC no longer had a monopoly, and competition in the market began, particularly using CPS and WLR. These services were in many cases sold using direct marketing techniques such as doorstep-selling, unsolicited telephone calls, and selling in public places such as shopping centres, and were often sold through independent retailers. The main practices customers complained of included the following:

- Omitting relevant information or providing false or misleading information, for example, on tariffs, potential savings or offers or gifts that do not materialize.
- Applying unacceptable pressure on a customer to change provider by, for example, using threatening or intimidating behaviour or refusing to leave until the customer signs a new contract. Also, refusing to allow, or making it difficult for a customer to change provider.
- Slamming, that is, switching a customer to another fixed-line provider without their knowledge. This was done in a number of different ways. For example, a representative of one company might pass himself off as representing another company to obtain information from a customer, which then allowed him to switch the customer. A customer might also be told that they are only signing up to receive information about a service, rather than entering into a new contract. Slamming also involves forging customer signatures.¹⁰⁴

There were also problems with cashback schemes. A cashback scheme is a form of promotion offered by independent retailers promising a payment or, for example, a mobile handset in exchange for signing up to a service contract. Ofcom received complaints on the following issues:

- The independent retailer refused to honour the cashback promise on the basis that the contractual terms of the offer had not been met, although these were often designed so that it was difficult to claim successfully.

¹⁰³ HM Treasury: Budget 2016, para 2.341.

¹⁰⁴ Ofcom statement and consultation, Protecting citizen-consumers from misselling of fixed-line telecoms services, 22 November 2004.

- The independent retailer was unable to honour the cashback offer because it had gone out of business.

Ofcom started taking action against misselling in April 2004, when it published a consultation on misselling in the fixed-line market. At that time, there were a number of applicable consumer-protection measures in place. For example, Section 52(2)(e) of the Communications Act 2003 gave Ofcom the power to set GCs on any matter appearing to Ofcom to be necessary for securing effective protection for the domestic and small business customers of public communications providers, but at the time Ofcom said that it would only use this power if it was persuaded that there was evidence that there was a serious problem and that current safeguards were not effective. There was also an industry-agreed CPS and WLR customer transfer process in place between the fixed-line telecommunications industry and consumer representatives aimed at preventing misselling and, in particular, slamming.¹⁰⁵ It required a switchover period of ten working days before a customer order could be fully processed during which time both the transferring and the receiving provider would send the customer a 'notification of transfer' letter, to ensure that the customer was not being transferred without its knowledge and consent. Also, at this time, voluntary guidelines on sales and marketing had been agreed between the industry and consumer representatives, and Ofcom had published a consumer guide to using alternative phone companies.¹⁰⁶

There were also a number of applicable non-telecommunications-specific consumer protection laws in place at the time, which variously prohibited false, inaccurate, or misleading descriptions about goods and services;¹⁰⁷ made it an offence for a person in the course of business to give a consumer a misleading indication of the price of services;¹⁰⁸ protected consumers against unfair standard terms in contracts they made with traders;¹⁰⁹ prohibited unfair (misleading) commercial practices;¹¹⁰ allowed consumers to cancel contracts made on their doorstep;¹¹¹ and required consumer rights information to be provided when orders were made online or over the phone.¹¹² Ofcom is also a designated 'enforcer' under Part 8 of the Enterprise Act, which means that it can get an enforcement order from the courts against anyone who breaks consumer protection legislation.¹¹³

¹⁰⁵ Ibid. ¹⁰⁶ Ibid. ¹⁰⁷ The Trade Descriptions Act 1968.

¹⁰⁸ Consumer Protection Act 1987.

¹⁰⁹ Unfair Terms in Consumer Contracts Regulations (SI 1999/2083).

¹¹⁰ Control of Misleading Advertisements Regulations (SI 1988/915).

¹¹¹ Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations (SI 1987/2117).

¹¹² Consumer Protection (Distance Selling) Regulations (SI 2000/2334).

¹¹³ Enterprise Act 2002, s 213(5A).

9.3.2.6 *Codes of practice*

In light of the responses to its April 2004 consultation, Ofcom concluded that the existing consumer safeguards did not provide adequate consumer protection against fixed-line telecommunications service misselling. Although the evidence of whether misselling of fixed line services was a serious problem was mixed, Ofcom had seen evidence of it as a growing problem since the publication of the consultation document. Ofcom considered that, given the evidence and the risk of not being able to take effective enforcement action should a serious problem arise, it should introduce additional regulatory safeguards.

Its solution was to introduce a requirement on communications providers selling and marketing fixed-line services to small businesses and domestic customers to establish and comply with a code of practice on sales and marketing. This was achieved through an amendment to GC14. The codes were to be drawn up in accordance with guidelines, which were published by Ofcom in April 2005, and were based on the existing industry-agreed guidelines on sales and marketing, updated in light of the issues that had emerged from the April 2004 consultation.

The revised GC14 came into effect on 26 May 2005, and was intended to lapse after two years unless a positive need could be demonstrated for it to be continued, because Ofcom felt that this would cover the period when most problems were likely to occur as CPS and WLR were rolled out. Ofcom hoped that beyond this period, these formal requirements could be replaced by self-regulatory mechanisms.

However, when, in 2007, Ofcom reviewed the system, it concluded that insufficient progress had been made for it to relax the restrictions.¹¹⁴ It had had to open several investigations against communications providers who had not complied with the requirements, and there continued to be unacceptably high cancelled orders using the Cancel Other mechanism (see Section 9.3.2.7).

Ofcom decided to maintain the requirement for communications providers to establish codes of practice on sales and marketing for the time being, and at the same time extend it to local loop unbundling (LLU).¹¹⁵ Although sales of LLU were in their infancy at the time, and complaints about misselling of LLU were low, the process for switching to LLU was the same as for fixed-line telecommunications, so there were the same opportunities for misselling.

¹¹⁴ Ofcom statement, Protecting consumers from misselling of telecommunications services, 21 May 2007.

¹¹⁵ The requirement for communications providers to establish codes of practice on sales and marketing was contained in GC14, Annex 3, which, until December 2009, was Annex 4. The extension to LLU was achieved by amending the definition of 'fixed-line telecommunications service' in GC14.9(h) so that instead of covering a specific list of fixed-line services, it covered all types of fixed-lined services, so capturing LLU (see Ofcom statement, Protecting consumers from misselling of telecommunications services, 21 May 2007, para 3.19).

In 2007, the mobile network operators introduced their own voluntary code to tackle misselling.¹¹⁶

9.3.2.7 *Cancel Other*

At the same time as Ofcom introduced the requirement for communications providers to establish codes of practice on selling and marketing, it also published a draft proposal for resolving a dispute between BT and a number of communications providers relating to BT's use of the 'Cancel Other' function. BT used this to cancel orders for CPS and WLR in certain circumstances, including where a customer had been slammed.

At the time the dispute arose, BT was subject to a Direction issued in 2003 specifying the circumstances in which BT was permitted to use Cancel Other. However, it only applied to CPS because it was made before WLR was introduced. The alternative providers were concerned that under the 2003 Direction BT could inappropriately cancel transfers and that the system limited their ability to address allegations of slamming, because a customer who believed he had been slammed was not required to contact the service provider that placed the transfer request. The alternative providers wanted customers who wanted to cancel a transfer to be required to contact the gaining provider (the one that placed the transfer request) first, while still allowing the losing provider to cancel in certain circumstances. They also argued that the system should apply to all providers, not just BT, as customers might want to transfer between alternative providers.

In January 2005, Ofcom published a new Cancel Other Direction to BT,¹¹⁷ the detail of which was further amended in July 2005.¹¹⁸ The Direction set out the circumstances in which BT could use Cancel Other. BT could continue to use the Cancel Other function in cases of slamming but was required to provide more information to alternative providers on its use of Cancel Other. Ofcom also provided further guidance on the definition of slamming, and expected that the Direction would lead to a reduction in the number of cases in which BT used Cancel Other. Ofcom resolved to reconsider BT's use of Cancel Other before the anticipated two year period for the sales and marketing codes of practice under GC14 ended. If slamming was no longer a problem at that stage, the role of Cancel Other as a consumer protection mechanism would also be reduced, and Ofcom thought it might remove BT's ability to use Cancel Other at this point.

¹¹⁶ Code of practice for the sales and marketing of subscriptions to mobile networks, 31 July 2007.

¹¹⁷ Ofcom Direction under section 49 of the Communications Act 2003 and Condition AA1(a) imposed on British Telecommunications plc as a result of the market power determinations made by the Director General of Telecommunications that BT has significant market power, 20 January 2005.

¹¹⁸ Ofcom Direction modifying a Direction, 28 July 2005.

9.3.2.8 *Sales and marketing of mobile telephony services*

By March 2008, Ofcom considered that the voluntary code for mobile sales and marketing was not working sufficiently well. Ofcom's review of the effectiveness of the code indicated that although its introduction had brought about some positive changes in practices by mobile-service providers and retailers, these changes had not been uniformly applied and had not brought about an adequate reduction in consumer complaints or consumer harm. Introduction of the code had caused some mobile-service providers to review their sales and marketing procedures and those of independent retailers, and some retailers had ceased trading following the application of new rules under the code requiring cashback terms to be fair. However, Ofcom had found that the extent of monitoring and compliance activity varied between mobile-service providers and that the focus had remained on cashback and slamming problems rather than more general misselling. Ofcom concluded that the continuing high level of complaints (which were higher in January and February 2008 than in July 2007) meant that the code did not provide adequate protection for consumers.

Ofcom therefore introduced GC23 on the sales and marketing of mobile telecommunications services, which came into force on 17 September 2009, and was tougher than the voluntary code of practice.

Under GC23, when selling or marketing their services, mobile service providers must not engage in dishonest, misleading, or deceptive conduct, engage in aggressive conduct, or contact the customer in an inappropriate manner. This prohibition is removed from the revised GCs and replaced with requirements that information provided to customers is not misleading and that providers offer the information in a 'durable medium' (eg paper or email).^{119, 120}

Because so many of the misselling problems were caused by independent retailers, mobile service providers must ensure that those selling their products on their behalf do not engage in such behaviour and must ensure that retailers are trained to comply with the GC, monitor their compliance and, where appropriate, sanction non-compliance. Mobile service providers and third parties acting on their behalf have to carry out due diligence on independent retailers.

Mobile service providers must ensure that customers entering contracts are authorized to do so, intend to contract, and are provided with key information about the terms of contract. Where the contract is made during a sales call, the mobile service provider must use reasonable endeavours to ensure that the

¹¹⁹ GC C8.2.

¹²⁰ The phrase 'durable medium' originally came from the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334. These were replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013/3134 in relation to contracts entered into on or after 13 June 2014.

information is sent to the customer in a durable medium. Retailers, whether the mobile service provider themselves, or independent companies, have to create and keep records about the sale for six months, and potentially longer in relation to sales-incentive¹²¹ deals.

The terms and conditions of sales incentives, where the customer does not benefit immediately, must not be unduly restrictive and the customer must be given written information about the details of the sales incentive. This provision was a response to the cashback problems mentioned above.

9.3.2.9 *Sales and marketing of fixed-line services*

In 2009, Ofcom concluded that the codes of practice on sales and marketing for fixed-line providers were not working and proposed regulating the sales and marketing of fixed-line services directly through the GCs. Ofcom introduced what was then GC24 with effect from 18 March 2010. This included an extension of the Cancel Other rules to all fixed-line providers, and Ofcom removed the Cancel Other Direction.

In December 2013, the rules for switching fixed-line and broadband provider were amended again so that the customer only has to contact the gaining provider to initiate the switch. The former requirement for the customer to obtain a migration authorization code (MAC) was abolished. These provisions were included in GC22 on service migrations and home moves and at the same time the provisions on the sales and marketing of fixed-line services that had been included in GC24 were incorporated into GC22 and GC24 was deleted. Under the revised GCs, the obligation to prevent misselling is included in GC C7, Switching.

Unless stated otherwise, the remainder of this Section 9.3.2.9 sets out the rules as they will apply from 1 October 2018. The GC applies where a domestic or small-business customer switches fixed-line or broadband service to one offered by the same provider or a different provider, but only applies where the migration takes place within Openreach's or KCOM's access networks. As with the provisions on the sales and marketing of mobile services, the GCs that apply from 1 October 2018 no longer contain a prohibition on engaging in dishonest, misleading, or deceptive conduct, and so on, and focus instead on a requirement to provide customers with accurate and not misleading information and to offer to provide it in a durable medium. In addition, there is a specific prohibition on slamming.¹²²

¹²¹ Sales incentives are described in GC C8.11 (GC23.10 in the version of the GCs that applies until 1 October 2018), and are incentives from which the customer does not benefit until he has entered into the contract for the mobile service. The terms and conditions of such offers must not be unduly restrictive and the customer has to be provided with certain information about the deal.

¹²² GC C7.3 in the version in force from 1 October 2018 and GC22.3 in the old version.

Communications providers that engage representatives such as sales agencies must make sure such representatives comply with the GC, and must train all staff and sales agency representatives to comply with the GC.

The gaining provider must take all reasonable steps to ensure that before entering into a contract, the customer transferring the line is authorized to do so, intends to enter the contract, and is given the information about the contract specified in the GC. The customer must be provided with a description of the key charges; payment terms; the existence of any termination right, termination procedures and the customer's right to cancel at no cost from the point of sale to the completion of the transfer period; the arrangements for provision of the service, including the order process and, as accurately as possible, the likely date of provision of the service and any minimum fixed contract period.

Both the gaining communications provider and the losing communications provider must send the customer a dated letter stating that the customer is transferring their service, the communications services that will be transferred, any calling line identification and include relevant contact details. In addition, the gaining provider's letter must include the customer's right to terminate before completion and the losing provider's letter must include all services it provides that the provider reasonably expects to be affected or unaffected by the transfer, and a reasonable estimate of the migration date.¹²³ The losing provider's letter must also include an explanation of the transfer process, which includes information about any early termination charge and information about the final bill. Ofcom has removed the 'reactive save' prohibition, which prohibited losing providers from trying to induce the customer to remain with them. It has noted that the UK courts have found that the provision in the GCs¹²⁴ restricting the use by one provider of information acquired from another in confidence during the process of negotiating network access can apply to certain switching scenarios. It also notes that the prohibition is less necessary now that most customers do not have to contact their losing provider, and in some cases customers who do contact their losing provider may be able to obtain a better deal from doing so. Ofcom also says that it does not intend to make the enforcement of the provision on information obtained during negotiations for network access, insofar as it applies to reactive save activity, an administrative priority.¹²⁵

The customer has a right to terminate the contract from the point of sale until the completion of the transfer period (ten working days as set out in the definition of 'Transfer Period'), without charge.

¹²³ GC C7.9 and C7.10 in the version in force from 1 October 2018 and GC22.10 and GC22.11 in the old version.

¹²⁴ GC A1.3 in the version that applies from 1 October 2018. GC1.2 in the old version.

¹²⁵ Ofcom consultation, 'Making switching easier and more reliable for consumers', 29 July 2016.

The gaining provider must have procedures in place to enable the customer to terminate their contract without unreasonable effort, including by telephone, email, and post. Gaining providers also have to keep sales records for at least six months and records of consent for not less than twelve months.¹²⁶ The requirement to keep records of consent aims to reduce the incidence of slamming by enhancing Ofcom's enforcement capabilities.¹²⁷

Gaining providers are under an obligation to ensure that where they have elected to coordinate a migration of broadband and fixed-line over the same line, they submit an order to Openreach or KCOM as applicable for the simultaneous transfer with minimal loss of service of both communications services.¹²⁸

Where the switch involves a company not using the Openreach or KCOM access network, such as a cable company, consumers will sometimes have to contact the losing provider: a process known as 'cease and re-provide'.

9.3.2.10 *Switching provisions going forward*

The Digital Economy Act 2017 amended the Communications Act 2003 by adding into section 51 a new matter to which GCs may apply.¹²⁹ Ofcom can now specify requirements in relation to arrangements that enable an end-user to change communications provider on request. Although it seems as though such provisions were already contained in the GCs, the intention of this provision was to give Ofcom the power to require communications providers to coordinate switching and for Ofcom to be able to help consumers make more informed decisions about which communications provider to use.¹³⁰

Between 2016 and 2017, Ofcom reviewed the rules on switching. For switching between mobile providers, Ofcom consulted on proposals to address difficulties arising from the interaction of switching processes with charges imposed on mobile consumers pursuant to notice periods. It subsequently decided to prohibit providers from charging for notice beyond the date when a consumer switches and/or ports their mobile number. Ofcom also decided to implement an 'auto-switch' system, whereby consumers will be able to request and automatically receive a PAC or cancellation code by text or through their online account. Mobile providers will be subject to additional requirements to provide consumers with clear information about the switching and porting process.

¹²⁶ GC C7.6 and C7.7 in the version in force from 1 October 2018 and GC22.7 and GC22.8 in the old version.

¹²⁷ Ofcom statement, 'Consumer switching, A statement on the GPL NoT+ elements', 20 December 2013.

¹²⁸ GC 7.13 in the version in force from 1 October 2018 and GC22.14 in the old version.

¹²⁹ Digital Economy Act 2017, s 2.

¹³⁰ Queen's Speech 2016 background briefing notes, 18 May 2016.

Both changes are implemented through amendments to GC7 and take effect from 1 July 2019.¹³¹

Ofcom also looked at introducing rules on switching between providers who operate on different platforms, for example, switching landline, broadband, and pay TV between the Openreach, KCOM, Virgin cable, and Sky satellite platforms. It consulted on two options. The first was an enhanced cease and re-provide process that would give consumers flexibility in how they contact their old provider to cancel their existing services. The new provider would be required to offer to organize the switch on the consumer's behalf. The second was a gaining provider-led process.¹³² However, ultimately, Ofcom decided not to take any regulatory action.¹³³ Instead, it considered that it could better further consumer interests by increasing its focus on helping consumers navigate the communications market; subsequently, it published a call for inputs to inform a new project on customer engagement.¹³⁴

9.3.2.11 *Billing limits for mobile phones*

The Digital Economy Act 2017¹³⁵ introduced a new requirement in the form of an amendment to the Communications Act 2003¹³⁶ preventing mobile phone providers from entering into customer contracts unless the customer has been given an opportunity to specify a billing limit in the contract. This is intended to help protect consumers against the risk of 'bill shock'. At the time of writing, this provision is not in force. It can only be brought in by statutory instrument.

9.3.3 Dispute resolution

Competition tends to bring with it increased potential for disputes, because of a higher number of market players, a wider range of services, and an increased range of technologies by which services are provided. A well-functioning dispute resolution mechanism is therefore important to support a competitive environment, and necessary, because the normal procedural route through the courts would be too slow and costly to provide an effective constraint on suppliers' behaviour. A dispute resolution system needs to provide quick and clear results

¹³¹ Ofcom consultation, 'Consumer switching: Further proposals to reform mobile switching', 29 July 2016, Ofcom consultation, 'Consumer switching: Proposals to reform switching of mobile communications services', 19 May 2017 and Ofcom decision on reforming the switching of mobile communications services, 19 December 2017.

¹³² Ofcom consultation, 'Making switching easier and more reliable for consumers', 29 July 2016.

¹³³ Ofcom statement, 'Decision on switching landline, broadband and/or pay TV between different platforms', 14 July 2017.

¹³⁴ Ofcom call for inputs, 'Helping consumers to engage in communications markets', 14 July 2017.

¹³⁵ Section 102. ¹³⁶ Section 124S.

and incorporate an appeals process. A dispute system that allows consumers to achieve resolution quickly and easily will tend to support a competitive market by limiting the resources being diverted to dispute resolution and providing certainty and confidence in the market for consumers.

The system in the EU and UK is loaded towards identifying and solving disputes at an early stage, and avoiding the courts.

9.3.3.1 *Complaints handling*

Ofcom has a duty to set GCs to ensure that communications providers establish and maintain procedures to handle complaints and resolve disputes between them and their domestic and small business customers, where the complaint relates to contractual conditions, or to the performance of a supply contract. Procedures established and maintained for complaints-handling and dispute resolution must be easy to use, transparent, non-discriminatory, and effective, and domestic and small business customers must be able to use them free of charge.¹³⁷

Until January 2011, communications providers were required to have and comply with a complaints code of practice that they drafted themselves but that was approved by Ofcom under GC14.4. But an Ofcom review of consumer-complaints procedures, started in December 2009, found that a significant proportion of consumers were having a very poor experience when pursuing a complaint with their provider. In particular, 30 per cent of complaints were still unresolved after 12 weeks; the majority of consumers who could not resolve their complaint promptly were having difficulty getting their provider to recognize that they were making a complaint and in finding out about the complaints process; and those consumers who were unable to resolve their complaint within 12 weeks were much more likely to suffer financially or through stress. Ofcom considered that the evidence suggested that incentives on providers to compete on the basis of customer service were not proving sufficient to ensure that individuals would receive satisfactory treatment from their provider when they try to pursue a complaint.

Ofcom therefore replaced the requirement for communications providers to have complaints codes of practice approved by Ofcom, with a set of minimum standards for complaints-handling procedures, to apply directly to communications providers set out in a Code for complaints handling.¹³⁸ As already mentioned, Ofcom also imposed an obligation on communications providers to increase awareness of ADR by providing additional information to domestic and small business customers about the right to take unresolved complaints to ADR.¹³⁹

¹³⁷ Communications Act 2003, s 52.

¹³⁸ Annex 4 to GC 14 in the version that applies until 1 October 2018 and Annex to GC C4 in the version that applies from 1 October 2018.

¹³⁹ *Ibid.*

9.3.3.2 *Ofcom code for complaints-handling*

Following concerns about the scope and clarity of the current rules and low awareness by customers of their communication provider's complaints-handling procedures and their rights to complain,¹⁴⁰ the new version of the code that will apply from 1 October 2018 includes strengthened provisions on the transparency of the complaints process, strengthened requirements on the provision of information to consumers at different stages of the process, more effective signposting of access to ADR when complaints become deadlocked, and improved record keeping and monitoring requirements for communications providers.

The new code, like the old one, requires a communications provider to have a written customer complaints code for domestic and small business customers, which must comply with the detailed requirements in the Ofcom code and must be well publicized as specified in the Ofcom code. There must also be clear time frames for resolving complaints. All bills, except those sent by text, must contain information about how to access ADR. Customers whose complaints have not been resolved within eight weeks must be sent written notification about their right to go to ADR if they have not been sent one before. The new code has also been expressly extended to include complaints about customer service. Communications providers must accept complaints lodged at least by any of the following means: phone, letter, email, or webpage, and must proactively inform the complainant about the process and timeframe for dealing with the complaint. The code contains specific instructions about how staff should be trained in dealing with complaints.

9.3.3.3 *Complaints about IASs*

In addition to complying with Ofcom's complaints-handling code, providers of IASs are also required by Article 4(2) of the Regulation on Open Internet Access and Roaming to put in place transparent, simple, and efficient procedures to address complaints of end-users relating to their rights to open internet access¹⁴¹ and their contractual rights¹⁴² Ofcom has been empowered under the Open Internet Access (EU Regulation) Regulations 2016¹⁴³ to impose requirements to ensure compliance. So far, at the time of writing, Ofcom's compliance activities have focused on monitoring.¹⁴⁴

¹⁴⁰ Ofcom review of the General Conditions of Entitlement, 'Consultation on the general conditions relating to consumer protection', 20 December 2016.

¹⁴¹ 2015 Regulation, Art 3.

¹⁴² *Ibid*, Art 4(1).

¹⁴³ Reg 7.

¹⁴⁴ Ofcom, 'Monitoring compliance with the EU Neutrality regulation: A report to the European Commission', 23 June 2017.

9.3.3.4 *Dispute resolution schemes*

Before the Communications Act 2003 came into force, the Director of Of tel was developing the idea of an Ombudsman scheme as a way to resolve disputes without the parties involved having to use the courts. In September 1999, Of tel consulted on possible ways forward in relation to the resolution of consumer complaints. The responses to the consultation showed no clear consensus. There were those who argued for improvements to the arbitration schemes that existed at the time, to ensure they were fit for purpose, leaving complaints which were not then satisfactorily dealt with to go to the regulator's own consumer representation staff for resolution. Others argued that arbitration was inappropriate, time-consuming, and inaccessible. The Director General considered that an Ombudsman service would command wide support and confidence amongst the public, whilst ensuring that disputes were dealt with fairly for all parties, and that its presence would give operators greater incentive to improve customer care and their own complaint handling.¹⁴⁵

When the Communications Act was introduced, it was not specific about the type of dispute resolution system communications providers had to operate. Ofcom has powers to set GCs for public communications providers and their domestic and small business customers, to resolve disputes.¹⁴⁶ Any procedures established must be easy to use, transparent, non-discriminatory and effective; and must be free to domestic and small business customers.¹⁴⁷ Any dispute resolution GCs must require public communications providers to establish and maintain procedures for resolving disputes, and have these approved by Ofcom,¹⁴⁸ and Ofcom is required to approve all dispute resolution procedures.¹⁴⁹

Ofcom has accordingly established GCs requiring all providers of public ECSs to domestic and small business customers to be a member of an alternative dispute resolution scheme that has been approved by Ofcom.¹⁵⁰

There are two approved dispute resolution schemes. One is an ombudsman service, called Ombudsman Services: Communications (formerly called Otelo),¹⁵¹ and the other is a customer adjudication service operated by CISAS.¹⁵² Ombudsman Services is a not-for-profit private company that runs four national ADR schemes in different market sectors. CISAS was set up in 2003 and is administered by the Centre for Effective Dispute Resolution (CEDR), a private company. CEDR provides conflict management and resolution consultancy worldwide and also operates

¹⁴⁵ Of tel consultation, 'Developing a telecommunications ombudsman', March 2001.

¹⁴⁶ Communications Act 2003, s 52(2)(b). ¹⁴⁷ *Ibid*, s 52(3). ¹⁴⁸ *Ibid*, s 52(5).

¹⁴⁹ *Ibid*, s 54.

¹⁵⁰ GC C4.3 in the version in force from 1 October 2018 and GC14.5 in the old version.

¹⁵¹ <<http://www.ombudsman-services.org/communications.html>>.

¹⁵² <<http://www.cisas.org.uk/>>.

the ADR scheme for the postal sector. The fact that one is an ombudsman and the other is a consumer adjudication service makes the two schemes fundamentally different in their approach to dispute resolution, although the fact that providers can choose between schemes also effectively creates a competitive market in dispute resolution schemes.

The ombudsman scheme offers a high degree of customer support. This includes helping consumers to fill out their dispute resolution application form and providing advice on any evidence that a consumer may wish to consider submitting.

An investigations team examines the allegations and submissions from the communications provider and will contact either party to seek further information on any points. The process is an iterative one and each party has the opportunity to make submissions on the provisional conclusion before it is passed to the ombudsman for a final decision (if one or other party does not accept the provisional conclusion).

As the operator of an adjudication scheme, CISAS places great weight on treating consumers and communications providers equally. It will not help either party to put their case together and will not advise either of them on what evidence they would need to support their case, although it does publish guidance including evidence checklists for enquirers and consumers. Consumers can complete applications online or by post. On request, CISAS staff will guide and assist applicants on completing their application. CISAS does not investigate consumer complaints, but consumers are provided with an opportunity to comment on the communication provider's response to their claim. Adjudicators have the ability to request further information from either party in order to help them to make a fair determination of the claim. Adjudicators apply legal principles to determine whether the consumer has proven, on the balance of probabilities, that their communications provider has breached the contract or their code of practice. Neither consumers nor communications providers have a right to challenge an adjudication, although the complainant can choose to accept or reject the decision.

Ofcom has to secure consistency in standards between the schemes,¹⁵³ and undertakes reviews periodically. Some differences are an inevitable by-product of having two schemes, and some are a direct result of differences in scale. However, where those differences mean that consumers will receive a lower standard of treatment depending on which ADR scheme their communications provider belongs to then Ofcom has to take steps to ensure an appropriate degree of alignment. Any significant discrepancies between the two schemes could potentially create concern about whether the ADR schemes are meeting the needs of consumers and

¹⁵³ Communications Act 2003, s 53(5)(b).

could also create incentives for the communications providers to choose to belong to a particular ADR scheme if there is a perception that dispute resolution under one scheme is more likely to favour them than under another.

The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 introduced requirements for businesses to provide information about certified ADR providers to consumers. Ofcom has certified four schemes: Ombudsman Services, Centre for Effective Dispute Resolution, Promediate, and The Retail Ombudsman.

9.3.3.5 *Compensation*

In March 2017, Ofcom proposed the introduction of a system of automatic compensation for consumers and smaller businesses when things go wrong with their communications services.¹⁵⁴ However, a voluntary initiative was proposed by industry, which Ofcom decided to accept instead of pursuing regulatory action.¹⁵⁵ The scheme contains automatic compensation for the following failures:

- Delayed repair following loss of service. £8 per day if the service is not repaired after two working days.
- Delayed provision. £5 per day.
- Missed appointments. £25 per missed appointment if the engineer does not turn up or the appointment is cancelled with less than twenty-four hours' notice.¹⁵⁶

Ofcom was given an express power to require a communications provider to pay compensation to an end-user on failure to meet a specified standard or obligation by an amendment to section 51 of the Communications Act 2003 in the Digital Economy Act 2017.¹⁵⁷

9.3.3.6 *PRS customer enquiry and complaints code*

PRs offer content, products, or services that consumers can buy by charging the cost to their phone bills and pre-pay accounts. The charges for PRs comprise an access charge, which goes to the phone company, and a service charge, which goes to the organization the consumer is calling. The cost of making a call to a PR is usually significantly higher than the cost of a standard landline or mobile call.

¹⁵⁴ Ofcom Consultation, 'Automatic Compensation: Protecting consumers from service quality problems', 24 March 2017.

¹⁵⁵ Ofcom Statement, 'Automatic Compensation: Protecting consumers from service quality problems', 10 November 2017.

¹⁵⁶ These amounts were less than originally proposed by Ofcom, which provided for £10, £6, and £30 respectively.

¹⁵⁷ Section 3.

Originating communications providers who provide PRS are required to comply with certain requirements. Under the GCs that apply until 1 October 2018, providers must establish a code of practice for handling customer enquiries and complaints about PRS according to the guidelines set out in Annex 1 to GC14.¹⁵⁸ The code of practice must include information on pricing, and a number of other specific issues that relate to PRS and that can cause problems for consumers. It must also refer to the code of practice operated by the Phone-paid Services Authority (formerly PhonepayPlus), the PRS co-regulator, with which PRS providers must comply. From 1 October 2018, the requirements on providers are set out in the GCs themselves rather than in an annex¹⁵⁹ and only apply to controlled premium rate service providers. Providers no longer have to have a code of practice for handling customer complaints and queries, they just have to follow the requirements of the GC in making information available.¹⁶⁰

9.3.3.7 *Unbundled tariff and personal numbers information publication requirements*

Unbundled tariff numbers¹⁶¹ are used as a micro-payment mechanism for a wide variety of value-added services. A significant proportion of retail call revenues from these numbers is passed on to service providers receiving the call. Because of issues particularly over the transparency of pricing, Ofcom introduced regulation to improve customer information.

Until 1 October 2018, this comprises a requirement for these services to have a code of practice for the publication of prices of such calls, drafted to comply with Ofcom's guidelines.¹⁶² This requirement was first introduced in relation to what were known as number translation services in 2006 after Ofcom identified a number of consumer-protection issues in relation to these types of services, and subsequently extended to 0870 calls and personal numbers in 2009. Under the version of the GCs in force from 1 October 2018, the requirement to publish information about pricing is included in the GC itself¹⁶³ and the obligation to maintain a code of practice has been removed.

The Phone-paid Services Authority (PSA) also regulates these services and numbers.¹⁶⁴

9.3.3.8 *Complaints outside Ofcom's jurisdiction*

Some issues fall outside Ofcom's jurisdiction, such as mobile phone hardware and therefore complaints about faulty handsets. The Consumer Protection Partnership made repairs and redress in the mobile phone sector a priority for its work in 2017–18.¹⁶⁵

¹⁵⁸ GC14.2. ¹⁵⁹ GC C2. ¹⁶⁰ See further Chapter 14, at Section 14.7.

¹⁶¹ Non-geographic numbers starting 084, 087, 090, 091, 098, and 118. ¹⁶² In Annex 2 to GC14.

¹⁶³ GC C2.4–2.9. ¹⁶⁴ See further Chapter 14, at Section 14.7.

¹⁶⁵ Consumer Protection Partnership: fourth report, October 2017.

9.3.4 Regulation of VoIP services

VoIP services can look and feel like traditional telephone services, but may not be able to deliver the features consumers have come to expect as standard, because of the technological differences in the way they are delivered. In particular, services may cease to function if there is a power cut because, unlike the PSTN, which derives its power through the telephone lines or from the telephone exchange, VoIP telephones require connection to a local power source in order to function.¹⁶⁶ Some VoIP services do not provide access to emergency calls, or, if they do, their reliability could be affected by a power cut. Also, VoIP services may not be able to offer number portability.

In May 2007, to deal with issues with VoIP services, Ofcom introduced a requirement for service providers to ensure that their domestic and small business customers were informed about any feature or limitation to the service that differs from a PATS. This requirement was contained in the code of practice in Annex 3 to GC14. In the version of the GCs that applies from 1 October 2018, this Annex and much of its contents have been removed. Two requirements have been retained and moved to the main body of the GCs.¹⁶⁷ These are the requirement for providers to inform their domestic and small business customers that access to emergency organizations may cease if there is a power failure or failure of the internet connection, and the requirement to recommend that its domestic and small business customers register their location so as to help emergency organizations identify the location of a caller making an emergency call. Ofcom considered that the other requirements it had formerly imposed on VoIP providers now go beyond what is necessary to achieve the original policy objectives of providing additional information to VoIP customers in order to ensure they were aware of the characteristics of the service they were buying, because users are now widely familiar with this technology.

The position may change again once the EU Electronic Communications Code is adopted, because the current proposals will also apply additional rules to 'interpersonal communications services'.

¹⁶⁶ This is also a problem for FTTP (fibre to the premises) networks, as optical fibre networks do not continue to operate during a power failure. Ofcom published Guidelines on the use of battery back-up to protect lifeline services delivered using fibre optic technology on 19 December 2011 but announced in its statement to its Strategic Review of Digital Communications (25 February 2016) that it was withdrawing this and would proceed by assessing what operators were doing on a case-by-case basis and keeping under review the resilience of operators' networks.

¹⁶⁷ GC A3.3 and A3.6(c).

9.4 CONCLUDING REMARKS

It appears that consumer protection measures in the telecommunications market are here to stay. Ironing out national differences in regulation of the sector across the EU does not remove the need for consumer protection. There is still a need to ensure a universal service for basic telecommunications services (and, as internet access becomes increasingly important to everyday life, extending this to broadband services), and a need to stimulate competition by creating demand through informing consumers.

Indeed, the European Commission's 2016 proposals to reform the regulatory framework show no watering down of consumer protection measures. The proposals reveal a couple of main aims for consumer protection. They update the rules to take account of technological advances, for example, by changing in the definition of 'electronic communications service' to clarify what rules apply to software-based services, and extend universal service provision to basic broadband. They also propose increased harmonization of consumer protection provisions with a view to improving cross-border access to services. However, whether these proposals will be implemented in the UK, given the UK's withdrawal from the EU, remains to be seen.