

TOTSCo Bulletin No 25
DATE: 1 September 2023
SUBJECT: User Agreement and Schedules

We publish today our proposed [User Agreement and draft User Agreement schedules](#) for industry feedback by **Friday 15 September 2023**. Please provide comments by emailing us on enquiries@totsco.org.uk. Please insert the documents title in the subject line when providing feedback. All responses are open and publishable.

In this bulletin we set out:

- Our responses to issues raised by industry.
- Next steps.

The annex to this bulletin provides background and context for our responses.

Our proposed User Agreement is for use by retail communications providers requiring an RCPID. It permits those communications providers to sub-contract the performance of their obligations to a managed access provider (defined as an **intermediary**). Communications providers using a managed access provider will need to directly negotiate and agree a sub-contract with their managed access providers. Managed access providers will not sign this agreement, and we will be in touch with them separately.

Key issues

1. We set out below some key issues raised by industry and our response in the drafting of the User Agreement and schedules published today:
 - a. The supply chain management requirements of communications providers.
 - b. The onboarding and suspension of communications providers, and termination of the agreement.
 - c. The dispute resolution process.
 - d. TOTSCo's responsibilities, including indemnities and exclusions and limitations of liability.

Supply chain management

2. Many communications providers (especially the larger communications providers or those that are part of international groups) have detailed supply chain requirements they seek to impose on their suppliers before doing business with them. These may include (sometimes intrusive) measures such as due diligence, supplier questionnaires, on-boarding processes, requirements for specified policies, requests to contract on their terms or for particular contract terms to be included (e.g. anti-bribery, audit, etc) to be included. Whilst the most detailed requirements are typically those of the largest communications providers, even medium and small communications providers place

(and in some cases, are obliged to place) requirements on their suppliers for (by way of example) security policies and processing of personal data.

3. Whilst communications providers maintain a public position that they can only work with suppliers that fulfil all their supply chain requirements, in practice not all suppliers comply with these requirements. By way of (non-exhaustive) examples:
 - a. large (often US based) providers of cloud hosting and/or software will only do business on their standard terms and will not comply with other supply chain management requirements;
 - b. UK communications providers providing services pursuant to a regulated 'reference offer' will not negotiate their contract terms, nor comply with supply chain management requirements; and
 - c. Spectrum and numbers may only be licensed/allocated by Ofcom if a communications provider follows Ofcom's processes.
4. TOTSCo has carefully considered its response to communications providers' supply chain management requirements. A broad range of responses are possible - at either end are:
 - a. We could seek to fully comply with all communications providers' requirements. This would likely require significant incremental resource and delay, raising costs for all communications providers and not be in accordance with the approach set out in paragraph 5 of the annex; and
 - b. We could ignore the requirements entirely and only do those things legally required of us. This would minimise cost, but could lead to a material proportion of UK communications providers unable to do business with us, which would not be in accordance with our objects.
5. After careful consideration, the board of TOTSCo is minded to pursue a middle course as follows:
 - a. TOTSCo has identified the key supply chain requirements of UK communications providers. These include some things (e.g. adopting an anti-modern slavery policy) that whilst TOTSCo is not legally obliged to adopt, represent best practice and can be implemented without material additional cost.
 - b. TOTSCo's compliance with its customers' identified supply chain management requirements have been documented and will be operationalised through the User Agreement and its Schedules published today. In some areas, we may make choose to make available (on a standard, not bespoke, basis) additional detail if there is widespread demand.
 - c. TOTSCo will not invest in resource to individually respond to supply chain management requirements or enter into individual discussions with communications providers. To the extent that a material number of communications providers have a common requirement, we will consider how most efficiently to respond.
 - d. TOTSCo will not permit each individual communications provider audit rights. However, we recognise that it is important that we are subject to independent

operational audit(s) and plan to arrange for these to be transparently carried out and their conclusions reported to industry.

- e. In line with paragraph 5(e) of the annex we will contract only on our standard published terms.

QUESTIONS

Q1: Do you agree with our overall approach to dealing with your supply chain management requirements? If not, what approach should we adopt?

Q2: Do our proposed schedules address all your requirements? If not, what should be added?

Q3: What operational audits should we undertake and how often?

Q4: Who should arrange and supervise operational audits: should this be the TOTSCo executive, the TOTSCo Board or someone else?

Onboarding, suspension and termination

6. We received extensive feedback from industry that our initial draft User Agreement published in March 2023:
 - a. (Potentially) made it difficult for communications providers to onboard;
 - b. Gave TOTSCo broad and unfettered suspension and termination rights.
7. We carefully considered industry feedback and in light of our general approach in paragraph 7(a) have made the following changes:
 - a. To make it as easy as possible for all CPs to onboard, we have removed the onboarding contract schedule and have simplified (as far as possible) the actual onboarding process, minimising the information required of communications providers and reducing our due diligence. A potential consequence of this process is to make it easier for entities that are not communications providers to on-board with us. We are taking appropriate steps to manage and mitigate this risk.
 - b. Whilst we have retained a suspension right, we have limited this to circumstances in which harm is likely to the hub, other communications providers or consumers. By way of example, we will not as a first step suspend communications providers for non-payment, although we will vigorously collect debts through other means.

QUESTION

Q5: Do you agree with our revised approach to onboarding, suspension and termination? If not, what are your concerns and what changes would you like us to make?

Dispute resolution

8. We received feedback that the approach our initial draft user agreement of relying on TOTSCo governance to resolve disputes was not adequate or appropriate, particularly for bi-lateral issues.
9. Whilst it remains the case that we consider that TOTSCo governance is the appropriate way of dealing with industry-wide issues, we accept that a more detailed process is needed to resolve disputes between TOTSCo and each individual customer. We have adopted the approach of:
 - a. Defining operational processes and escalations for service and billing issues. If this does not resolve the issue (or it relates to something else), then:
 - b. You should discuss with us informally in the first instance; then
 - c. There is an escalation path between us and you; then
 - d. Non-binding mediation; then
 - e. Binding arbitration.

QUESTION

Q6: Do you agree with our revised approach to dispute resolution? If not, what are your concerns and what changes would you like us to make?

Our responsibilities, indemnities, exclusions and limitations of liability

10. The draft User Agreement published in March took the approach of excluding our liability to the maximum extent possible. Industry feedback was that TOTSCo needed to take responsibility for its actions and provide meaningful remedies if things went wrong. The board of TOTSCo has considered the range of approaches it could take, which range between the extremes of:
 - a. Seeking to exclude all responsibilities and liabilities. This would minimise TOTSCo's risk, but would be unacceptable to many communications providers.
 - b. Providing contractual guarantees of performance, backed by unlimited indemnities and/or uncapped liability with no exclusions. If things go wrong, in this scenario TOTSCo could find itself either insolvent or having to (unpredictably) increase charges to cover its liabilities.
11. The board of TOTSCo wishes to be responsive to industry concerns, but is mindful of both the risks to TOTSCo and the wider systemic risk of any TOTSCo failure. It is therefore minded to take a middle ground, informed by the factors set out in paragraph 5 of the annex. As a result, our proposed user agreement does not adopt positions that would be necessarily be considered usual in the context of an arms-length customer-supplier agreement, instead adopting an approach consistent with paragraph 5 of the annex, and

in particular seeking to avoid the systemic risk described in paragraph paragraph 5.b of the annex We therefore propose:

- a. Exclusion of implied terms and warranties
- b. Exclusion of 'consequential' economic losses
- c. Exclusion of our liability for losses resulting from a (systemic) failure affecting materially all of customers.
- d. (Aside from 2 specified indemnities) a general mutual liability cap of [150% of charges paid or payable each year]¹
- e. In relation to data protection and third party intellectual property claims, a mutual indemnity cap at a level to be specified.

12. We have secured contractual commitments and indemnities from our technology supplier. We are investigating the availability and cost of insurance. The structure of indemnities, liability exclusions and liability caps (including their level) will be considered and decided by our board for the final User Agreement in light of our potential risks, your responses, the availability of insurance and the contract with our technology supplier.

QUESTIONS

Q7: Do you agree with the overall approach we have adopted? If not, what alternative approach would you suggest (and please set out how your proposal addresses the issues set out in paragraphs 5 of the annex)?

Q8: Do you agree with the proposed structure for exclusions and caps? If not, please provide your suggestion, together with justification (and references back to the issues set out in paragraph 5 of the annex)?

Q9: What should be the level of the Liability Cap? Why?

Q10: What should be the level of the Indemnity Cap? Why?

Q11: What insurance (i.e. risks covered and amount) would you expect TOTSCo to carry? Why?

Q12: Would you be prepared to pay increased charges if we buy more insurance?

Next Steps

We look forward to your comments by **15 September**. Please provide comments by emailing us on enquiries@totSCO.org.uk. Please insert the documents title in the subject line when providing feedback. All responses are open and publishable.

We plan to publish an updated final User Agreement and Schedules by **6 October**.

We plan for User Agreement (which will incorporate by reference the schedules) to be executed before **20 October**.

Given the highly compressed timetable for this consultation, we draw your attention to clause 8(a) of the proposed user agreement which anticipates that further agreement

¹ Note: this is subject to review and may change.

changes may needed to be before OTS go-live. We propose that these changes will be done by notification, subject to the proviso that communications providers may terminate their agreement with us if they are unhappy with notified changes. After OTS go-live, changes will be through TOTSCo governance. We have specified how TOTSCo governance will work specifically in relation to agreement changes in our revised draft.

QUESTIONS

Q13: Please provide us with any other comments you have on the proposed User Agreement and the draft schedules.

A note on testing

Testing is current taking place subject to the Testing User Agreement (no commitment, no payment, no liability).

Q14: What would you expect to be in place contractually to start integration testing on 20 October? Would you be able to proceed on the basis of the Test User Agreement (or would you want the full User Agreement to be signed?)

Annex - Background, context and our approach

1. TOTSCo is a not-for-profit company limited by guarantee (of its members), set up by the UK communications industry. TOTSCo does not have ‘shareholders’ in the traditional sense and so is neither profit maximising nor seeking to increase shareholder value. Instead, TOTSCo is required to act in the best interests of its members as a whole to achieve its objects²:

“the delivery of fixed voice and broadband switching processes in the UK. In giving effect to the purposes or that purpose the Company must consider:

- (i) the need for Providers to comply with any relevant General Conditions set by Ofcom;*
- (ii) the need for switching both within and between network platforms;*
- (iii) the desirability of promoting an efficient switching process for business as well as residential users; and*
- (iv) the interests of all hub users.”*

2. TOTSCo is the only entity in the UK providing all residential communications providers with the ability to send and receive residential switching messages. This position both:
 - a. places a special responsibility on TOTSCo to act fairly; and
 - b. creates a risk of systemic failure in addition to the normal range of business risks.
3. TOTSCo may not, and will not, pay dividends to its members. If TOTSCo’s costs increase, its charges will increase. Conversely if TOTSCo’s costs decrease, its charges will decrease.
4. TOTSCo’s governance operates through its board, which consists of 6 industry directors directly elected by groups of communications providers (as members³) and 3 independent directors (including its chair) appointed by the board. TOTSCo’s board is responsible for its strategic direction, governance, finances, management (including the appointment of its executive, setting of executive objectives, delegation of specified matters), monitoring and oversight. Whilst the 6 industry directors do not directly represent the interests of their employers nor their constituency in making decisions as board directors, they are both aware of, and represent, the broad interests of communications providers as a whole.
5. The background above has informed our approach to drafting the user agreement and its schedules as follows:
 - a. our ‘base-line’ assumption is that our user agreement should reflect the approach and terms customary in a **services agreement between a joint-venture and its shareholders**, rather than those customary in a supplier – customer supply contract between unconnected arms-length parties.

² Definition of ‘Objects’, TOTSCo Articles of Association.

³ All communications providers may (but are not obliged) to become members of TOTSCo and thereby participate in its governance as TOTSCo members.

In particular, we are mindful of the **circular financial dependency** between TOTSCo and its customers: by way of example if TOTSCo were to pay service credits to our customers these would form part of TOTSCo's costs and then be recovered from our customers by means of increased charges.

Conversely, whilst for example, service suspension is a common contractual lever for a supplier in arms-length supply contract, it would be a disproportionate first contractual response by TOTSCo when we have been set up by industry to help them comply with their regulatory obligations for the benefit of consumers.

Whilst some issues are properly dealt with on a bi-lateral contract basis between TOTSCo and each of its customers, other issues, especially those with an **industry wide impact** are more appropriately addressed through **TOTSCo's governance** structures.

- b. The **systemic risk of TOTSCo or its service failing**, which would prevent consumers from switching, thus placing all residential communications providers in breach of their regulatory obligations, is a key concern for our board and informs our approach to the user agreement and the exclusion and limitation of liability.

Put simply, whatever the level of loss or damage we cause to any *individual* communications provider, that impacted communications provider should not be in a position to put TOTSCo out of business given our **systemic importance to UK communications providers (and their customers) as a whole**.

- c. We seek to strike an **appropriate balance** between providing a **reliable, secure service** with appropriate performance incentives and remedies for failure, and **cost minimisation**. By way of two examples (there are others):
 - i. our fault response times (set out in Schedule D) could potentially be reduced by engaging more staff. However, that would directly lead to an increase in our costs, and therefore increased charges; and
 - ii. we could buy insurance that would allow us to offer a higher indemnity cap (see main user agreement). However, additional insurance premiums will increase our costs and therefore increase our charges.
- d. Subject to (a), (b) and (c), **TOTSCo should take responsibility** for the service it is providing to its customers. If things go wrong causing loss and damage to our customers and we are able to recover from our technology supplier and/or insurers we should pass on that recompense to our customers. However, we should avoid circular arrangements such as service credits that if implemented will increase our costs with little overall benefit to our customers.

- e. To ensure that we treat our customers fairly, are transparent, provide a level playing-field and do not unduly discriminate, **we will contract only on the basis of our published user agreement and its schedules**. We will not enter into individual contract negotiations, nor conclude 'sweetheart deals' with any communications provider and/or managed access provider.
- f. to ensure that we are accessible and do not impose additional unnecessary compliance costs on communications providers, we will keep our user agreement and its schedules as **simple** as possible and written in **plain English**.

TOTSCo

September 2023