

Notification of Contravention of General Condition 1.2 under Section 94 of the Communications Act 2003

Notice served on Post Office Limited by the Office of
Communications ('Ofcom')

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NOTIFICATION

Notification of contravention of General Condition 1.2 under Section 94 of the Communications Act 2003 to Post Office Limited

Ofcom's Determination

1. Ofcom hereby determines that there are reasonable grounds for believing that Post Office Limited (the 'Post Office') has contravened, and is contravening, General Condition 1.2. Specifically:
 - a. the Post Office is a communications provider offering telephony services to customers using Carrier Pre-Selection ('CPS').
 - b. Where an end-user arranges to transfer the provider of his or her telephony services, from the Post Office to another communications provider, the Post Office as the 'losing' provider acquires information (such as the identity of the transferring customer) from another communications provider in connection with this transfer process.
 - c. the Post Office has used and is using this information (the identity of transferring customers) which is acquired from another communications provider in connection with the provision of CPS for a purpose other than that for which that information was supplied (facilitating CPS transfer), namely undertaking CPS Save Activity which could provide the Post Office with a competitive advantage.

The reasons for Ofcom's decision are set out in the accompanying Explanatory Statement.

General Condition 1.2

2. Under section 94 of the Communications Act 2003 (the 'Act'), Ofcom may give a notification to a person where it determines there are reasonable grounds for believing that person is contravening, or has contravened a condition set under section 45 of the Act.
3. On 22 July 2003, the Director General of Telecommunications issued a notification under section 48(1) of the Act setting, pursuant to section 45 of the Act, certain general conditions as set out in the schedule to the notification (the 'General Conditions'). The General Conditions took effect from 25 July 2003.
4. General Condition 1.2 ('GC 1.2') requires that: "where [a] Communications Provider acquires information from another Communications Provider before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Communications Provider shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage."

Action required by the Post Office

5. The Post Office shall comply with GC 1.2 by 3 October 2005 by not using customer-specific information acquired from another communications provider in connection with the provision of CPS for the purposes of carrying out CPS Save Activity as described in the accompanying Explanatory Statement.
6. The Post Office has until 3 October 2005 to make representations to Ofcom about the matters set out in this Notification and the accompanying Explanatory Statement.

Interpretation

7. Words or expressions used in this Notification have the same meaning as in the Act, except for the following:

'Call Origination Market Review' means the review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, published 28 November 2003.

'Carrier Pre-Selection' means a service for telephony customers that allows consumers to select, in advance, an alternative communications provider (or providers) to carry their calls without having to dial a prefix or install special equipment at their premises and while retaining their existing telephone line – as described within the Call Origination Market Review and the functional specification for which is set out in Annex B thereto.

'CPS Save Activity' means marketing activity undertaken by a communications provider during the period between a customer of that communications provider electing to contract with an alternative communications provider by means of CPS and the actual transfer taking place, in an attempt to persuade that customer not to transfer. For the avoidance of doubt, CPS Save Activity includes all forms of marketing activity, whether by telephone, letter or otherwise during such period.

David Stewart

Director of Investigations

30 August 2005

Explanatory Statement

Section 1

Summary

Decision

- 1.1 This Explanatory Statement sets out Ofcom's reasons for determining that there are reasonable grounds for believing that the Post Office has contravened, and is contravening, General Condition 1.2 ('GC 1.2').
- 1.2 The relevant contravention involves the Post Office's use of customer-specific information provided to it by other communications providers in connection with the CPS transfer process for the purposes of carrying out CPS Save Activity. In particular, Ofcom considers that the letters sent to customers when the Post Office is the losing provider includes content that comprises marketing activity and therefore is prohibited under GC1.2.
- 1.3 Pursuant to section 94(3) of the Communications Act 2003, Ofcom has given the Post Office until 3 October 2005 to comply with GC 1.2. If the Post Office does not comply with GC 1.2 by this date, Ofcom may issue an enforcement notification under section 95 of the Act and/or may impose a penalty on the Post Office under section 96 of the Act. The Post Office has until 3 October 2005 in which to make any representations to Ofcom about matters contained in this Notification.

Section 2

Background

CPS Notification of Transfer letters

- 2.1 Carrier Pre-Selection ('CPS') permits providers of telephony services to offer such services to their customers. CPS allows customers to select, in advance, an alternative communications provider (or providers) to carry their calls without having to dial a prefix or install special equipment at their premises and while retaining their existing telephone line.
- 2.2 For the purposes of this document, 'CPS Providers' are communications providers which offer CPS services. CPS Providers may be a CPS Operator or a CPS Reseller. A 'CPS Operator' is a provider of a public electronic communications network ('ECN') (see paragraph 3.13) which interconnects with British Telecommunications Plc's ('BT') network and which has put in place the necessary functionality on its network and has arranged to have the necessary functionality put in place on the BT network to provide a CPS service. A 'CPS Reseller' does not have its own ECN, rather it has a commercial agreement with a CPS Operator that allows it to sell CPS services, with the CPS calls being carried on the CPS Operator's network. The CPS transfer process is as set out in the following paragraphs.
- 2.3 In all circumstances for a CPS service the 'Access Operator' is BT Wholesale. The Access Operator is the network operator providing the direct network connection to the customer i.e. the copper loop to their premises (also known as the local loop provider or infrastructure operator). BT Wholesale is the division of BT that provides this service and in the context of CPS provides the CPS Gateway. The 'CPS Gateway' is an electronic interface between BT Wholesale's systems and the CPS Operator which allows the latter to place orders for CPS transactions and for these orders to be automatically processed.
- 2.4 A customer wishing to have a CPS service may subscribe to the services of one or more CPS Provider, choosing the type of calls (e.g. all national calls or national and international calls) to be carried by them. The customer is billed for these calls by their CPS Provider, whether they are a CPS Operator or a CPS Reseller.
- 2.5 When a customer arranges to transfer the provider of their calls, whether from BT Retail (the division of BT which provides consumer services) to a CPS Provider, from one CPS Provider to another CPS Provider or from a CPS Provider to BT Retail, i.e. a 'CPS-related transfer', they are sent two 'Notification of Transfer' letters. One letter is sent by the provider to which the customer is transferring (the 'gaining provider'); the other is sent by the provider from which the customer is leaving (the 'losing provider'). These letters are referred to as the 'gaining letter' and the 'losing letter', respectively. The purpose of these letters is to ensure that the consumer is fully informed that their service is about to be transferred, before the transfer takes place.
- 2.6 Between the order for the transfer of the calls being placed and the transfer occurring there is a ten working-day period during which the Notification of

Transfer letters are sent. The purpose of this ten working-day period is to allow the customer to receive both letters and, if necessary, to take action such as to cancel the order if they have been 'slammed'. (Slamming is the unauthorised transfer of a customer's line requested by a communications provider without the knowledge and/or express consent of the customer.) The requirement to send Notification of Transfer letters is, therefore, an 'anti-slamming' measure.¹

- 2.7 In order to be able to send the losing letter to the customer, the losing provider is informed of the pending transfer. The process is triggered by the gaining provider placing a transfer order on BT Wholesale's CPS Gateway.
- 2.8 BT Wholesale's CPS Gateway will either communicate directly with the losing provider if it is a CPS Operator, or indirectly if it is a CPS Reseller. If the latter, the order is placed on BT Wholesale's CPS Gateway by the CPS Operator with which the CPS Reseller has a contractual relationship.
- 2.9 If the losing provider is a CPS Operator it will be informed that the consumer will be transferred by a notification from BT Wholesale's CPS Gateway. This is called a 'pending cease notification'. If the losing provider is a CPS Reseller it will be informed that the customer will be transferred, by a notification from its CPS Operator. These notifications may be called different things by different CPS Operators; however, they will be based on, and triggered by, the pending cease notifications received by the CPS Operator from BT Wholesale's CPS Gateway.
- 2.10 In each case the losing provider is informed of the customer's intention to transfer directly or indirectly from BT Wholesale's CPS Gateway, as a result of the gaining provider placing an order with BT Wholesale's CPS Gateway.

The CPS Notification and Appeal

- 2.11 On 7 July 2003, two CPS Providers submitted a complaint to the Director General of Telecommunications (the 'CPS Complaint') in which they alleged that certain BT 'CPS Save Activity' was being carried out in breach of Condition 49.7 of BT's then licence.
- 2.12 In summary, the complainants alleged that BT's use of customer-specific information provided to it by communications providers (in this case CPS Providers) during the CPS transfer process for the purposes of carrying out marketing activity involved the use of that information for a purpose other than that for which it was provided, contrary to Condition 49.7 of its licence. Specifically, BT was carrying out CPS Save Activity, which is marketing activity aimed at persuading the customer not to transfer during the ten working-day transfer period.²
- 2.13 On 25 July 2003 a new regulatory framework for electronic communications networks and services entered into force in the UK. The basis for the new framework is five new EU Communications Directives that are designed to

¹ For further details of Ofcom's work on anti-slamming, see paragraphs 2.28 to 2.35 below.

² 'CPS Save Activity' is defined as marketing activity undertaken by a communications provider during the period between a customer of that communications provider electing to contract with an alternative communications provider by means of CPS and the actual transfer taking place, in an attempt to persuade that customer not to transfer. For the avoidance of doubt, CPS Save Activity includes all forms of marketing activity, whether by telephone, letter or otherwise during such period.

create harmonised regulation across Europe. One of these Directives, the Access and Interconnection Directive (the 'Access Directive')³ relates to access to, and interconnection of, electronic communications networks and associated facilities.

- 2.14 The new Directives required, amongst other things, the introduction of a 'general authorisation' to provide electronic communications networks and services. Pursuant to this a set of General Conditions of Entitlement (the 'General Conditions') came into force on 25 July 2003.
- 2.15 General Condition 1.2 ('GC 1.2'), which implements Article 4(3) of the Access Directive, replaced Condition 49.7 in BT's licence. The Director General of Telecommunications ('the Director'), therefore, decided to investigate and determine the CPS Complaint by reference to GC 1.2, rather than Condition 49.7.

2.16 GC 1.2 requires that:

“where [a] Communications Provider acquires information from another Communications Provider before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Communications Provider shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage.”

- 2.17 After considering the information provided and the representations made by BT during the course of the investigation, the Director notified BT on the 7 November 2003 (the 'CPS Notification')⁴ that he had reasonable grounds for believing that BT was acting in contravention of GC1.2 as BT was using customer specific information provided to it by other communications providers during the CPS transfer process for the purposes of carrying out CPS Save Activity which involves using such information for a purpose other than that for which it was provided.
- 2.18 By the CPS Notification, the Director required BT to cease using customer specific information acquired from another Communications Provider in connection with the provision of CPS for the purposes of carrying out certain marketing activity to CPS customers.
- 2.19 The Director concluded that the broad purpose of CPS Providers in providing the information to BT was to facilitate the CPS transfer process which included ensuring against slamming activity in order to protect the transferring consumer. There may therefore be a number of specific uses to which BT could put this information so long as it falls under this broad umbrella. However, any use of that information for another purpose, that is, one that does not facilitate the CPS transfer process the Director decided is expressly prohibited by the clear terms of GC 1.2 and Article 4(3) of the Access Directive.

³ Directive 2002/19/EC, [2002] L108/7

⁴ <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/contra1103.pdf>

- 2.20 The Director considered that CPS Save Activity was carried out by BT to discourage and/or prevent customers transferring from it to CPS Providers; hence, the use of the term 'save' activity. CPS Save Activity was therefore not a purpose for which the information is provided to BT by CPS Operators.
- 2.21 The Director made it clear that GC 1.2 applied to all CPS Providers. Of particular relevance, in relation to the Notification of Transfer letter, the Director stated⁵:
- “The Director’s view is that this letter is a vital consumer protection measure and should therefore be maintained. However, the Director would expect BT to remove any marketing information in this letter. Given that General Condition 1.2 applies to all Communications Providers, not just BT, the Director expects all Communications Providers to adhere to this requirement.”*
- 2.22 On 7 January 2004, under section 192 (1) (a) of the Act, BT lodged with the Competition Appeal Tribunal (the 'Tribunal') a notice of appeal against the decision of the Director, contained in the Notification (the 'CPS Appeal').
- 2.23 The CPS Appeal was heard by the Tribunal on 5 and 6 May 2004 and the Tribunal issued its judgment on 9 December 2004, with the Final Order being given on 12 April 2005. A copy of this judgment is available from the Tribunal's website at: <http://www.catribunal.org.uk/documents/Jdg1025BT091204.pdf> (the 'CPS Judgment'). In that judgment, the Tribunal upheld the Director's CPS Notification. A Final Order, closing proceedings in this case, was given on 12 April 2005. A copy of the Final Order is available from the Tribunal's website at: <http://www.catribunal.org.uk/documents/Order1025BT120405.pdf>

Ofcom’s current investigation

- 2.24 At a case management conference relating to the CPS Appeal on 10 March 2005, BT drew the Tribunal's attention to evidence that it had which it believed demonstrated that some CPS Providers may be marketing to leaving customers during the ten working-day CPS transfer period, contrary to GC 1.2.
- 2.25 Having reviewed the initial evidence provided by BT, on 8 April 2005 Ofcom opened an own-initiative investigation to determine whether or not any CPS Providers had and/or were contravening GC 1.2 and if so, what action should be taken to address such contravention. Ofcom's on-line Competition Bulletin entry for this investigation can be found at: http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_824/?a=87101.
- 2.26 On 16 May 2005, Ofcom issued a notice under section 135 of the Act to the Post Office. The notice requested all forms of written correspondence that may be sent to a Post Office customer who has opted to switch to an alternative CPS Provider or to BT (i.e. cease to take a CPS service at all) within the ten working-day transfer period.
- 2.27 The Post Office responded on 24 May 2005. The Post Office provided the notification of transfer letter sent to small business and residential customers of the Post Office who is switching to an alternative CPS Provider.

⁵ Paragraph 3.33 of the CPS Notification.

Ofcom's anti-slamming work

2.28 In addition to the protection against slamming afforded by the Notification of Transfer letters there are a range of other initiatives which Ofcom has been involved in to ensure that consumers are adequately protected from the risks of being mis-sold, which slamming is a form of.⁶ For example:

Mandatory codes of practice for sales and marketing:

2.29 On 26 May 2005, Ofcom imposed new rules requiring all communications providers who engage in sales and marketing activities for fixed-line telecoms services, or who provide the wholesale inputs for these services, to establish and comply with codes of practice on sales and marketing, in accordance with published guidelines.⁷ Ofcom has the power to take enforcement action against those providers who breach the provisions of their code, including ultimately imposing a financial penalty on the relevant communications provider.

2.30 On 27 May 2005, Ofcom opened an own-initiative investigation to actively monitor compliance with the new requirements for codes of practice for sales and marketing. Ofcom is currently establishing whether certain communications providers have a code of practice and whether any codes of practice are adequate and being applied in practice. This investigation is on-going.

Monitoring

2.31 Ofcom actively monitors mis-selling complaint levels using two different approaches: the number of complaints coming into Ofcom directly (for example, people calling Ofcom's Contact Centre), and the number of transfers cancelled by BT on the request of end-users who are alleging slamming i.e. 'Cancel Other' (see below).

2.32 In light of that data, Ofcom has initiated a series of meetings with companies over the course of the last year in order to discuss their sales and marketing activities, and to identify various strategies aimed at reducing the volume of complaints arising from such activities. In this way, Ofcom is able to continue to keep the pressure on those companies who generate the most complaints to improve their behaviour. This programme of encouragement is additional to, and without prejudice to, Ofcom's enforcement action in relation to the requirements for Codes of Practice for sales and marketing noted above.

Cancel Other

2.33 Cancel Other is a functionality which enables communications providers to cancel orders, including for CPS, in certain defined circumstances; primarily where slamming has occurred. Ofcom considers that Cancel Other plays a useful role as a consumer protection mechanism in cases of slamming.

⁶ The term 'mis-selling' covers a range of sales and marketing activities that can work against the interests of both customers and competition and undermines confidence in the industry as a whole. It can include: the provision of false and/or misleading information (for example, about potential savings or promising offers or gifts which do not actually exist); applying unacceptable pressure to change Providers, such as refusing to leave until the customer signs, or using threatening or otherwise intimidating behaviour; or slamming.

⁷ <http://www.ofcom.org.uk/consult/condocs/mis-selling/statement.pdf>

- 2.34 Pursuant to a dispute, on 21 January 2005 Ofcom published a Direction specifying when BT is permitted to use Cancel Other and what information BT must provide to its competitors about its use of Cancel Other. Ofcom's Direction and Determination permitted BT to use Cancel Other in cases of slamming as well as other certain specified cases. In the Direction, Ofcom provided further details on the definition of slamming and clarified the types of behaviour covered by the definition. An amended version of the Direction was published on 28 July 2005 and is available on Ofcom's website at:
<http://www.ofcom.org.uk/consult/condocs/cancel-other/amendment2direction/#content>.
- 2.35 Ofcom considers that the above initiatives, alongside the Notification of Transfer letters, are sufficient to protect customers against mis-selling, including slamming. Ofcom, will, however, continue to monitor this.

Section 3

Ofcom's decision and reasoning

Breach of GC 1.2

- 3.1 As set out in the CPS Notification, the purpose of CPS Providers providing the information about transferring customers to BT or the appropriate CPS Provider is to facilitate the CPS transfer process (which includes ensuring against slamming activity). Any use of that information for another purpose, for example to engage in CPS Save Activity, is expressly prohibited by the clear terms of GC 1.2 and Article 4(3) of the Access Directive.
- 3.2 For example, losing letters from the losing provider that contain marketing information such as brand promotion, reference to services, prices, bundles, quality of service, the unnecessary solicitation of customer contact or any similar information will constitute CPS Save Activity and contravene GC 1.2.
- 3.3 On 24 May 2005, in response to Ofcom's formal notice, the Post Office provided the losing letter sent to small business and residential customers who are switching to an alternative CPS Provider.
- 3.4 Below is an extract of the marketing information contained in the losing letter sent to the Post Office's small business and residential customers:

"We're really sorry that you've decided to leave us. Please let us know if there's anything we can do to change your mind, as we would love to carry on giving you big savings, rewards, and great Customer Care where there is someone to answer any question 24 hours a day, 7 days a week." (emphasis added)
- 3.5 Ofcom considers that this information is marketing information as it promotes the services of the Post Office. This information that does not facilitate the CPS transfer process and is contrary to GC 1.2.

Ofcom's interpretation of GC 1.2

The scope and purpose of GC 1.2

- 3.6 As noted in Section 2, GC 1.2 was introduced in order to implement Article 4(3) of the Access Directive. It is important to note that the obligation in Article 4(3) of the Access Directive was implemented via a General Condition (applying to all communications providers) and not via a Significant Market Power condition (applying only to those communications providers which have been determined to have SMP in an identified market). The new Directives make it clear that the new regulatory framework is intended to introduce a level playing field for all communications providers involved in the provision of electronic communications networks and services.
- 3.7 Article 4(3) of the Access Directive was drafted to address the impact that improper use of certain information supplied as a necessary part of Network Access and/or Interconnection by one communications provider to another could have on achieving such a level playing field.

- 3.8 In Ofcom's view, the purpose of Article 4(3) of the Access Directive, and thus GC 1.2, is to prevent the abuse of information by the receiving communications provider when it is obtained in such a context.

Ofcom's approach to interpreting GC 1.2

- 3.9 It is a well established principle of Community law that GC 1.2, as a UK legislative measure introduced in order to implement a provision in an EC directive, must be interpreted in the light of the wording and purpose of that directive. Ofcom therefore relies on Article 4(3) of the Access Directive to inform the correct interpretation of GC 1.2 in this Explanatory Statement. It is necessary to do so, in Ofcom's view, where there is a difference in wording between Article 4(3) of the Access Directive and GC 1.2.

- 3.10 For the purposes of analysis, it is useful to break down GC 1.2 into its constituent elements. Ofcom considers that any analysis of GC 1.2 should follow the actual text of the condition. For that reason, Ofcom has broken down the wording of GC 1.2 into the following constituent elements:

- (1) Where a communications provider acquires information from another communications provider
- (2) before, during or after the process of negotiating Network Access
- (3) and where such information is acquired in confidence,
- (4) in connection with and solely for the purpose of such negotiations or arrangements,
- (5) the communications provider shall use that information solely for the purpose for which it was supplied
- (6) and respect at all times the confidentiality of information transmitted or stored
- (7) such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage.

- 3.11 This structure mirrors the structure of Article 4(3) of the Access Directive, which GC 1.2 implements, and that set out by the Tribunal in the CPS Judgment⁸.

Element (1): where a communications provider acquires information from another communications provider

- 3.12 The question of who is a 'Communications Provider' for the purposes of GC 1.2 is answered by the definition set out in General Condition 1.4, namely:

"...[(a)(ii)] otherwise, a person who provides an Electronic Communications Network or provides an Electronic Communications Service;"

⁸ Paragraphs 90 to 119.

- 3.13 Paragraph 1 of Part 1 of the Schedule to the 22nd July Notification setting the General Conditions defines the terms 'Electronic Communications Network' ('ECN') and 'Electronic Communications Service' ('ECS') for the purposes of that definition as follows:

“Electronic Communications Network” means—

(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of Signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the Signals—

- (i) apparatus comprised in the system;*
- (ii) apparatus used for the switching or routing of the Signals; and*
- (iii) software and stored data;*

“Electronic Communications Service” means any service consisting in, or having as its principal feature, the conveyance by means of [an ECN] of Signals, except in so far as it is a Content Service;”

- 3.14 Ofcom has considered whether the parties relevant to the matters addressed in this Notification are communications providers. It is satisfied that the Post Office, BT and Cable & Wireless, (Cable & Wireless being the Post Office's CPS Operator) the latter two as the suppliers of the information that the customer is transferring its service (whether directly or indirectly), are communications providers for the purposes of GC 1.2. Furthermore, Ofcom is satisfied that all CPS Providers will be ECN providers or ECS providers or both. Ofcom notes that nothing in element (1) (still less in Article 4(3) of the Access Directive) requires information passed between undertakings to be information of any particular class before element (1) is satisfied.
- 3.15 The reason why the information that the customer is transferring its service is provided to the losing CPS Provider is to facilitate the transfer of that customer's service to that gaining provider. The losing CPS Provider is sent the information by BT Wholesale, as the Access Operator, indirectly through the losing CPS Operator if it is a CPS Reseller, to enable it to send the losing letter. But for the necessity of involving the Post Office for that purpose, the information would not be conveyed at all. CPS Save Activity carried out by the Post Office is by its very nature intended to discourage and/or prevent customers transferring from it to communications providers offering CPS based services. It is not impartial information provision.
- 3.16 BT Wholesale itself is conveyed this customer specific information from the gaining CPS Provider (or indirectly through its CPS Operator as the gaining CPS Provider is a CPS Reseller) in its capacity as the Access Operator so that it might carry out the necessary technical changes to enable the customer to be transferred to the gaining CPS Provider. Although the losing and gaining CPS Providers may not be directly interconnected, nevertheless the customer transfer is still predicated on the existence of Network Access arrangements. At paragraphs 258 and 259 of the CPS Judgment, the Tribunal considers the circumstance where CPS Operators are not directly interconnected, concluding that in these circumstances the information is indirectly acquired from the gaining CPS Operator, who has passed the information to BT, who in turn passes the information to the losing CPS Operator. In Ofcom's view this chain

of logic equally applies when the information is also passed via the gaining and losing CPS Operators from the gaining CPS Reseller to the losing CPS Reseller respectively.

- 3.17 In conclusion, therefore, a communications provider i.e. the losing provider, acquires information from another communications provider i.e. BT Wholesale or indirectly via its CPS Operator if the losing provider is a CPS Reseller and therefore Element (1) is met.⁹

Element (2): before, during or after the process of negotiating Network Access; and Element (4): in connection with and solely for the purpose of such negotiations or arrangements

- 3.18 The text of element (2) of GC 1.2 requires the information to be acquired “before, during or after the process of negotiating network access”. The text of element (4) requires that information to be acquired “in connection with and solely for the purpose of such negotiations or arrangements”. The equivalent text of Article 4(3) requires that the information must be information that was acquired “before, during or after the process of negotiating access or interconnection arrangements”. Article 4(3) is thus more broadly drawn than GC 1.2, in two respects:

1. first, Article 4(3) Access Directive refers to the process of negotiating access or interconnection arrangements, while GC 1.2 refers only to the process of negotiating Network Access. However, Network Access as defined in GC 1.4 encompasses interconnection (see below);
2. secondly, Article 4(3) contains no equivalent to element (4) of GC 1.2.

- 3.19 To the extent that it is necessary to do so, Ofcom relies on the broader wording of the Directive as an aid to the proper construction of GC 1.2.

- 3.20 In respect of these elements, the provision of CPS falls within the broader meaning of the term 'Network Access' as 'Network Access' includes interconnection. That term is defined in General Condition 1.4 as follows:

“(b) “Network Access” means

(i) Interconnection of Public Electronic Communications Networks; or

*(ii) any services, facilities or arrangements which—
(A) are not comprised in Interconnection; but
(B) are services, facilities or arrangements by means of which a Communications Provider or person making available Associated Facilities is able, for the purposes of the provision of Electronic Communications Services (whether by him or another), to make use of anything mentioned in sub-paragraph (c);*

and references to providing Network Access include references to providing any such services, making available any such facilities or entering into any such arrangements;

⁹ For the Tribunal's full assessment of this element, see paragraphs 231 to 260 of the CPS Judgment.

- 3.21 Providing a CPS service is only directly possible for ECN providers since they must be able to interconnect with BT's network in order to use CPS. Interconnection with BT clearly falls under the definition of Network Access at (b)(i) above. Although the Post Office does not have direct interconnection with BT, rather reselling a CPS service from Cable & Wireless through a contractual arrangement, this is also a form of Network Access as it is an arrangement by means of which the Post Office is able to provide a ECS, and consequently falls under the definition of Network Access at (b)(ii) above.
- 3.22 Therefore, based on either contractual relationship, Network Access is intrinsic to supplying a CPS service. Thus, supplying a CPS service is a form of Network Access. It follows that, when a gaining provider places a CPS transfer order with BT Wholesale (in its capacity as Access Operator) and customer specific information is transferred to the losing provider, this losing provider acquires information from another communications provider before, during or after the process of negotiating Network Access and therefore such information is subject to the obligations set out in GC 1.2.
- 3.23 It should be noted that the reference to the "process of negotiating Network Access" refers not only to the initial negotiation for Network Access between BT (in its capacity as CPS Gateway) and gaining providers, but also to the overall CPS transfer process in which the provision of customer specific information to BT as Access Operator by gaining providers and the transmission of such information by BT to the losing provider is an integral part.
- 3.24 It is Ofcom's view that that the information passed by gaining providers in the CPS context is information which is thereby acquired by the losing provider "before, during or after the process of negotiating network access" and is information acquired "in connection with and solely for the purpose of such negotiations or arrangements" for without such negotiation the information would not be passed, and that therefore elements (2) and (4) of GC 1.2 are likewise satisfied.
- 3.25 However, should it be necessary, Ofcom relies on the fact that the text of Article 4(3) does not require the information to be acquired in connection with the negotiations, so long as the information is acquired from an undertaking (i.e., the gaining CPS Provider) (which it is) and there is an access relationship in existence between two undertakings (e.g. between the gaining CPS Provider and BT Wholesale or BT Wholesale and the losing CPS Provider) (which there is).
- 3.26 The actual wording of Article 4(3) of the Access Directive refers to information acquired "before, during or after the process of negotiating access or interconnection arrangements ...". There is no textual support for the suggestion that there is an additional requirement that the information be information acquired in connection with the process of negotiating access arrangements. If network access in this context is to be given practical effect, information relating to customers who wish to switch service provider is precisely the type of information that will be communicated "after" the process of negotiating access or interconnection arrangements.
- 3.27 Any argument that the words "before, during and after" in Article 4(3) remain dependent on the connection between the information covered and the

processes of access negotiations/interconnections in Article 4(3) is thus not supported by the text.

- 3.28 Ofcom considers that the words “before, during and after” contained in Article 4(3) of the Access Directive should be interpreted in their natural sense, that is, as defining (very broadly) the temporal scope of the application of Article 4(3). If it had been intended that Article 4(3) should cover only a specific class of information passing between undertakings, words to that effect could have been inserted into Article 4(3). Such words are not to be found.
- 3.29 Even if there is some implicit requirement for there to be a connection between the information covered by GC 1.2 and the processes of access negotiations/interconnection arrangements, Ofcom considers that such a connection is, in any event, clearly present. The provision of the customer information to the losing CPS Provider by BT Wholesale or indirectly by its CPS Operator as the losing provider is a CPS Reseller is, as outlined above, consequent upon the access/interconnection negotiations having taken place, and the subsequent availability of access/interconnection.
- 3.30 Therefore, it is clear that the Post Office acquires information from another communications provider during the CPS transfer process. In particular, it is clear that the customer specific information ultimately used by the Post Office for CPS Save Activity is provided via the gaining provider’s CPS order placed with BT Wholesale in order to transfer a particular customer’s service. Accordingly, elements (2) and (4) of GC 1.2 are satisfied in the case of information provided to the losing providers during the CPS transfer process.¹⁰

*Element (3): and where such information is acquired in confidence; and
Element (6): and respect at all times the confidentiality of information
transmitted or stored*

- 3.31 Element (3) of GC 1.2 requires that “[a] Communications Provider acquires information...and where such information is acquired in confidence”. Element (6) of GC 1.2 requires the acquiring communications provider to “respect at all times the confidentiality of information transmitted or stored”. The equivalent element of Article 4(3) of the Access Directive provides that “undertakings that acquire information ... respect at all times the confidentiality of information transmitted or stored”.
- 3.32 Reading element (3) of GC 1.2 in the light of element (6) of GC 1.2 and Article 4(3), Ofcom considers that GC 1.2 must be taken to confer the same confidentiality on the information acquired by the Post Office, and that all information to which GC 1.2 applies is therefore confidential. Put a different way, the term “in confidence” in element (3) of GC 1.2 must be construed consistently with the term “confidentiality” in element (6) of GC 1.2, so as to render both terms consistent with Article 4(3).
- 3.33 Further, to the extent that there is any difference between the wording of GC 1.2 and Article 4(3) in relation to a requirement for prior confidentiality, such that GC 1.2 might, on one reading, be seen as narrowing the application of Article 4(3), GC 1.2 must be interpreted in the light of Article 4(3) so as to give the correct scope to the intended application of that provision.

¹⁰ For the Tribunal’s full assessment of elements (2) and (4), see paragraphs 261-296 and 308-316 of the CPS Judgment respectively.

- 3.34 Ofcom considers that the information provided by a gaining provider is confidential in the sense that, absent the request for CPS, the information would not have been so communicated. In any event, it is Ofcom's view that even if the information is not, ex ante, confidential information, confidentiality is conferred upon it by the provisions of GC 1.2 as interpreted in the light of Article 4(3) of the Access Directive.
- 3.35 The information provided by the gaining provider is being provided to a competitor (the losing provider) from whom the gaining provider seeks to take business. In Ofcom's view, it is therefore plainly confidential in the sense that, absent the request for CPS and the ensuing CPS transfer process, the information would not have been communicated either to BT in its capacity as Access Operator or to the relevant losing provider. In any event, the provisions of GC 1.2 and/or Article 4(3) of the Access Directive confer confidentiality upon the information by virtue of its transmission in the circumstances of the CPS Transfer Process.
- 3.36 In addition, the information is not in the public domain. The facts that the customer has been "shopping around", that the customer has decided to switch, what calls s/he has decided to switch, in respect of which telephone number and from what date, are not publicly known. Furthermore, all that information is commercially sensitive, and particularly valuable to a competitor. The list of potentially "biddable" customers (i.e. customers known to be willing to switch providers) is of particular commercial value.
- 3.37 Ofcom considers that the information in question: (i) is communicated to the Post Office in the context of a commercial confidential relationship; (ii) is information which is commercially sensitive in the hands of a competitor; (iii) is not accessible to the public; and (iv) is information whose use for some unauthorised purpose could or might be potentially injurious to the gaining provider, that the information is transmitted "in confidence" for the purposes of General Condition 1.2. The information has the 'necessary quality of confidence about it'.
- 3.38 Therefore, Ofcom considers that the Post Office has acquired the information it uses for CPS Save Activity in confidence and therefore such information falls within the protection afforded by GC 1.2.¹¹

Element (5): the communications provider shall use that information solely for the purpose for which it was supplied

- 3.39 Element (5) of GC 1.2 requires that "[w]here [a] Communications Provider acquires information...the Communications Provider shall use that information solely for the purpose for which it was supplied". The text of Article 4(3) of the Access Directive contains identical terms in that respect.
- 3.40 In the CPS Judgment, the Tribunal determined that BT (as a losing provider in the case in question) acquired the information that the customer wished to transfer to a CPS Provider for two purposes: the first, and in the Tribunal's view, primary purpose is to make the "necessary reconfiguration of the switch".¹² A further, subsidiary purpose, is so that BT (as a losing provider in the case in

¹¹ For the Tribunal's full assessment of element (3) see paragraphs 297-307 of the CPS Judgment.

¹² At paragraph 315.

question) "may take such reasonable steps as may be necessary for consumer protection, of which the sending of the Notification of Transfer letter is the most important." The Tribunal went on to add:

*"We are unable to identify any other purpose for which the CPS Operator transmits the information to BT. It follows from GC 1.2 that BT may use that information only for those two purposes. Whether BT "Save Activity" is within those purposes is the main issue of the case."*¹³

- 3.41 Information is supplied to BT in its capacity as Access Operator in order that a customer can be transferred from the losing provider to the gaining provider in question. Information is further supplied to the losing provider for the subsidiary purpose of taking such reasonable steps as necessary for consumer protection, in particular the sending a Notification of Transfer letter.
- 3.42 Therefore, as set out above, in Ofcom's view CPS Save Activity does not fall within such purposes, rather it is carried out by The Post Office, on the basis of information acquired by it during the CPS transfer process, to discourage and/or prevent customers transferring from it to an alternative CPS Provider and to encourage them to return to the Post Office. This CPS Save Activity falls outside the purpose for which the information was supplied.
- 3.43 Any use of the information acquired in the course of the CPS transfer process by the Post Office, in its position as the losing provider, not solely for the purpose of facilitating the CPS transfer process (including the subsidiary purpose of consumer protection) is expressly prohibited by GC 1.2 and Article 4(3) of the Access Directive.¹⁴

Element (7): such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage.

- 3.44 Ofcom considers that the obligation in the first sentence of GC 1.2 is independent of the obligation in the second sentence.
- 3.45 The second sentence constitutes a specific example of circumstances in which the use of information is outside the purpose for which it is supplied, namely where the information is passed to, for example, "another department" of the network provider for whom the information "could provide a competitive advantage". In effect, the second sentence makes clear that providing a competitive advantage to the retail arm of the network provider is not part of the purpose for which the information is transmitted during the CPS Transfer Process.
- 3.46 However, to the extent that a specific finding in respect of competitive advantage is required under Section 3(3)(a) and 47(2)(c) of the Act¹⁵, Ofcom's activities must be proportionate and targeted only where action is needed. In the present case it is clear that the passing of information by the gaining provider and its use in the manner described below could provide the Post Office with a competitive advantage during the ten working-day transfer period.

¹³ Paragraph 316.

¹⁴ For the Tribunal's full assessment of element (5) see paragraphs 317-326 of the CPS Judgment.

¹⁵ See paragraph 330 of the CPS Judgment.

3.47 The use of the information in question by the Post Office for the purposes of CPS Save Activity described in this Notification “could provide a competitive advantage” to it. The possibility of contacting the customer during the CPS transfer period, with a view to persuading the customer not to switch providers, is a valuable competitive opportunity for the Post Office. By means of the information passed to it, as previously mentioned, the Post Office knows that that specific customer may be “biddable”. In addition, the Post Office knows the pattern of that specific customer’s existing calls, and is in a position to make suggestions as to how that specific customer can take advantage of the various packages and offerings which are available from the Post Office. In those circumstances the misuse of the information supplied to the Post Office plainly “could provide a competitive advantage” to the Post Office.¹⁶

3.48 Applying an analysis similar to the analysis set out by the Tribunal in the context of BT undertaking CPS Save Activity in the CPS Save Judgment at paragraph 334, although in the normal case there is no regulatory objection to the Post Office contacting its existing or prospective customers with marketing information of various kinds, the key factors here are that:

- (i) the Post Office is undertaking marketing activity at a particular time, i.e. during the CPS transfer period;
- (ii) the purpose of the marketing activity is specifically to defeat a particular transaction, namely the customer’s move to an alternative CPS provider;
- (iii) the Post Office would not be able to undertake the marketing activity at that particular time or for that specific purpose had the information as to the impending CPS transfer not been passed to it from its CPS Operator which in turn had received the information from BT Wholesale as the Access Operator;
- (iv) BT Wholesale in its capacity as network provider / Access Operator received the information (directly, or indirectly if the gaining provider is a CPS Reseller) in confidence from the gaining provider for the purpose of facilitating a customer’s transfer of service; and
- (v) the Post Office did not receive the information for the purpose of enabling the Post Office to use that information so as to defeat the very transaction for which the information was supplied in the first place.

3.26 This demonstrates that the information could be used, for a purpose other than the purpose for which it is supplied and that there could be a competitive advantage to the Post Office.

Decision

3.27 For the reasons set out above, Ofcom considers that there are reasonable grounds for believing that the Post Office has contravened GC 1.2. the Post Office’s use of customer specific information provided to it by other communications providers in connection with CPS for the purposes of carrying out CPS Save Activity involved the use of such information for a purpose other

¹⁶ For the Tribunal’s full assessment of element (7) see paragraphs 328-335 of the CPS Judgment.

than that for which it was provided which could provide the Post Office with a competitive advantage.

- 3.28 Pursuant to section 94(3) of the Act, Ofcom therefore requires that the Post Office not use customer specific information acquired from another communications provider in connection with the provision of CPS for the purpose of carrying out CPS Save Activity 3 October 2005.
- 3.29 If the Post Office does not comply with this Notification, Ofcom may issue an enforcement notification under section 95 of the Act and/or may impose a penalty on the Post Office under section 96 of the Act.
- 3.30 As set out at section 94 of the Act, the Post Office has a month in which to make any representations on this decision. The Post Office until 3 October 2005 in which to make representations to Ofcom about the matters set out in this Notification and the accompanying Explanatory Statement.