

THUS plc

1-2 Berkeley Square T 0141 567 1234

99 Berkeley Street

Glasgow G3 7HR

[www.thus.net](http://www.thus.net)



Louise Marriage  
Ofcom  
4:79 Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

**By email:** [louise.marriage@ofcom.org.uk](mailto:louise.marriage@ofcom.org.uk)

4 October 2006

Dear Louise

**Broadband migrations: enabling consumer choice (including consultation on a notification of a proposed new General Condition on Service Migrations for broadband services)**

THUS is pleased to respond to the above consultation dated 17 August 2006. THUS is a leading alternative network operator providing data, voice and Internet services to business and public sector customers throughout the UK. We own the Demon and Legend ISP brands.

*Question 1: do respondents agree that the evidence from cases logged by OCC suggests that there is a need for regulation?*

Yes, but any new regulation must be carefully targeted to areas where there is clear evidence of a problem, and not extend beyond those areas. The main area where regulation appears to be needed is migrations by residential end-users from one service provider to another. There does not appear to be any need for regulation to cover:

- migrations by businesses from one service provider to another (other than very small businesses);
- resellers migrating customers en masse from one wholesaler to another (except to the extent that there is a direct impact on residential end-users).

*Question 2: do respondents agree that given the problems caused by tag on line there is a need for further regulation?*

We understand from Ofcom's consultation paper that BT has a project underway which is intended to address the problem of tags on the line. If there is evidence that BT is failing to fix the problem within reasonable timescales, then we agree it may be appropriate for Ofcom to assume

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Registered Office: 1/2 Berkeley Square

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additional powers to compel BT to fix the problem. However, Ofcom should not assume new powers until it is clear that it is necessary to do so.

*Question 3: do respondents agree that given the problems experienced by consumers where a broadband service provider fails or refuses to issue MACs, it is appropriate to introduce a process that enables customers to obtain MACs from another party? How do respondents see such a process working?*

We would expect the number of problems experienced by consumers to reduce dramatically if Ofcom imposes a mandatory code of practice, as proposed in the consultation document. We therefore believe it would be premature to consider any form of regulatory intervention to mandate 3<sup>rd</sup> party MAC provision until the extent of any residual problem has been assessed.

There are a number of risks and drawbacks associated with widespread use of a 3<sup>rd</sup> party to provide MACs, including additional costs for the industry, the possibility of abuse by unscrupulous operators and the risk that it will substitute for effective enforcement by Ofcom of the mandatory CoP.

If arrangements are to be made for 3<sup>rd</sup> party MAC provision, the role of the 3<sup>rd</sup> party should be tightly constrained, and limited to the following situations:

- Persistent, serious non-compliance with the CoP: we would expect Ofcom to take swift enforcement action, and establish sufficient deterrents to make this behaviour unlikely. However, in rare cases where SPs are unable/unwilling to comply (eg because of financial distress) it may be desirable for Ofcom to be able to authorise a 3<sup>rd</sup> party to provide MACs to the SP's customers.
- Temporary system or process failures within the SP: if this happens, a responsible SP may well wish to 'outsource' the provision of MACs to a 3<sup>rd</sup> party, but this should only happen by explicit arrangement between the SP and the 3<sup>rd</sup> party.
- Where the SP ceases trading: in most cases, it will be possible to effect an orderly transfer of the customer base to another SP within a few days (as recently happened with one of THUS' resellers). In the rare situations where customers are left stranded for a prolonged period, it may be appropriate for a 3<sup>rd</sup> party to issue MACs, but this should only be done after other avenues have been exhausted, and only with explicit authorisation from Ofcom.

So in conclusion, we see a very limited role for voluntary provision of MACs by 3<sup>rd</sup> parties: as a backup when a SP's systems fail, or as a last resort when an SP ceases trading or persistently breaches the CoP. No decision on mandatory 3<sup>rd</sup> party provision should be taken before the mandatory CoP has had a chance to bed down.

*Question 4: do respondents agree that Ofcom's proposed high-level obligations would effectively address the problems described in this document?*

Yes.

*Question 5: do respondents agree that a mandatory version of the MAC process is appropriate?*

Yes, we agree that a mandatory version of the MAC process is appropriate. However, we believe the regulations as currently drafted are too broad in three key areas:

Larger business customers

The draft GC22 and associated CoP appears to cover all end user migrations whether residential or large business. As noted above, it would be disproportionate to extend regulations to govern the commercial relationship between SPs and their large business customers, and we understand informally from Ofcom that this was not the intention. We request that Ofcom confirm this position and amend the draft general condition and code of practice accordingly. This could be done by:

- modifying the definition of “Account Holder” in GC22 to restrict it to residential and small business end users (as defined by section 52(6) of the Communications Act);
- modifying A1.1(b) to read “another Communications Provider who acquires a Broadband Service from the Communications Provider, where such request has been initiated by an End-user”.

For the record, there are several reasons why we do not believe that large business customers should be in scope:

- It appears that the problems cited by Ofcom relate overwhelmingly to domestic and small business consumers, and there is no evidence that the problems extend to larger businesses.
- Business customers are generally able to negotiate and enforce contracts without the need for additional protection (and may indeed be in a stronger position than the reseller they are purchasing from).
- A service provider can generally absorb the impact of individual domestic users defaulting on their debts, but may be bankrupted by a large business customer defaulting.

Wholesale supply to resellers

We are concerned that GC22 and the CoP, as currently drafted, will unnecessarily interfere in the commercial relationship between SPs and reseller customers. We understand informally from Ofcom that the intent of the regulation is exclusively focused on consumer protection. In which case we would request that general condition and CoP be redrafted to make this clear and avoid any regulatory spillover into areas where intervention is not required to prevent consumer harm. (The amendment proposed to A1.1(b) above would substantially address this concern.)

A particular concern for CPs involved in wholesale supply is the bad debt risk posed by resellers. There have been a number of instances in the past where 'rogue' resellers have run up large debts with wholesale CPs, and have then attempted to evade their contractual responsibilities by moving their customer base to another wholesale provider. (A variant on this manoeuvre is to bulk migrate the customers to a second reseller on a different wholesale provider, where the second reseller is under the same ownership/control as the first reseller).

In these circumstances, the losing wholesaler would normally refuse a request from the reseller to migrate the customer base, since this would prevent him applying further measures to manage the bad debt (eg refusing to accept new orders until debt levels were reduced to an acceptable level) - a position analogous to 'bad debt blocking' in the consumer context. The proposed amendment to A1.1(b) would permit the wholesaler to reject requests made by the reseller for its own purposes, ie where there was no end-user involvement, but it would still oblige the wholesaler to honour requests originating from an End-User<sup>1</sup>. (The reseller would need to provide reasonable evidence that this was the case).

One remaining consumer protection issue would be where a reseller goes out of business, and needs to transfer its customer base in its 'death throes' to avoid customers being stranded. It is not unreasonable for the wholesaler to retain some influence/control in this process, since he will generally be exposed to large bad debts, but clearly this should not cause excessive detriment to end-users. The provisions of GC22.2 should be sufficient in this respect.

#### Obligation to provide service

The current proposals appear to place a new blanket obligation on the gaining service provider (paragraph A1.17) to accept requests for incoming migrations. There are many reasons why a gaining service provider may wish to decline a request from a prospective customer (eg if the customers fail credit checks or has previously misused a broadband service) and a blanket obligation would be hugely disruptive and disproportionate. We presume that Ofcom's intention is to encourage gaining service providers to use the migration process rather than forcing customers to go via cease and provide, in which case paragraph A1.17 should be amended accordingly. However, we are not convinced that even this narrower obligation is necessary, given the wide range of service providers available for end-users to choose from; a more proportionate obligation would be to require GSPs who were unwilling to support the migration process to explain this fact to prospective customers and make them aware that other service providers can offer migration.

*Question 6: do respondents agree that six months is an appropriate timescale for development of these further proposals? If not, what alternative period do respondents suggest, and why?*

Yes, six months is an appropriate target, but we do not believe that there is any need to make this a hard deadline.

*Question 7: do respondents agree that it is appropriate to make arrangements for provision of MACs by a third party mandatory?*

No, or at least not until there has been a chance to evaluate the effectiveness of GC22 (see our answer to Question 3).

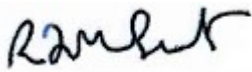
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<sup>1</sup> This situation was discussed during the negotiation of the voluntary CoP, and there was agreement that the CoP was intended to protect the interests of end users rather reseller businesses. Hence the obligations in the voluntary CoP apply only to situations where the MAC has been requested by the 'customer' (defined in the CoP as the user of the broadband connection). This would include situations where a reseller is relaying a request from its customer, but not situations where the reseller is requesting a MAC for its own purposes.

*Question 8: do respondents agree that it is appropriate to make arrangements for other migration processes, such as reverse migrations mandatory?*

We understand that Ofcom is using the term “reverse migrations” to refer to migrations from LLU to IPStream and DataStream. We agree that in the long term reverse migrations should be covered by GC22, since regulations should be technology neutral and should not treat LLUOs any differently from BT. However in the short term, they should not be included until the processes are sufficiently robust and stable for use by all SPs.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Sweet'.

**Richard Sweet**  
Director of Government Affairs