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## Ofcom General Conditions and Universal Service Conditions consultation

### Executive summary

Vodafone welcomes the opportunity to respond to Ofcom's consultation: 'Changes to General Conditions and Universal Service Conditions: Implementing the revised EU Framework', published on 24 February.

Vodafone welcomes many of the draft General Conditions as representing a sensible and proportionate interpretation of the Framework. Serious concerns remain over the text relating to bulk mobile porting however, which we believe is seriously misconceived. While we note the approach proposed in relation to fixed porting with interest, we also note that it is *prima facie* inconsistent with that advanced for bulk mobile. Vodafone submits that the proposed approach to bulk mobile is unnecessary and undesirable from a policy perspective, as well as flawed from a legal perspective. We present our detailed legal arguments at annexe 1.

Some concerns also remain over the text pertaining to contract terms, the extension of consumer-facing General Conditions to business users and porting compensation. On emergency SMS, Vodafone believes that Ofcom's basis for formal regulation is very weak.

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## Questions

*Q1. Do you agree with our proposed approach to definitions?*

No objection.

*Q2. Do you agree with our proposal to add CEPT to the list of standardisation bodies?*

No objection.

*Q3. Do you agree with our proposals to extend the requirements of GC3 beyond 'fixed locations' and to require CPs to 'take all necessary measures' to maintain their networks and services and access to emergency services?*

Vodafone already takes all necessary measures to ensure the fullest possible availability of its network and takes all necessary measures to ensure uninterrupted access to the emergency services, so we have no objection to the new text. Vodafone welcomes Ofcom's necessary clarification that: "To ensure proportionality, any assessment of "all necessary measures" will need to take into account the costs and benefits of maintaining availability in the context of the network or service in question"<sup>1</sup>.

*Q4. Do you agree with our proposals for emergency call numbers - which includes amending the definition of CP and requiring that location information is provided free of charge, as soon as the call reaches the emergency organisations and is accurate and reliable (in line with our proposed high level criteria)?*

Vodafone already provides accurate and reliable cell ID information to the emergency services free-of-charge and as soon as the call reaches the emergency organisation. Therefore Vodafone has no objection to the new text.

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<sup>1</sup> Ofcom General Conditions and Universal Service Conditions consultation, February 2011, paragraph 5.7

Ofcom mentions the Zone Code, which can be used by emergency organisations to identify the geographic region in which the call was originated, and that in 'exceptional circumstances' it may be provided instead. This is a helpful reference as the provision of cell ID information is not possible for national roamers and inbound roamers as we do not have access to the other networks' Home Location Registers (HLRs). As Ofcom is aware, such access would present significant legal, technical and security questions.

Vodafone will engage in Ofcom's future, separate consultation on the creation of a more detailed set of accuracy and reliability criteria. Vodafone would stress that developments must be:

- proportionate
- technically feasible
- deployable (i.e. usable, wanted and affordable to the emergency organisations)
- available to all (i.e. not a location technology on a minority of handsets)
- practical (i.e. a technology which allows the network to locate a caller in an emergency – not a technology which is usually deactivated at a handset level)

*Q5. Do you agree with our proposed approach to contract related requirements relating to the provision of additional information, the length of contracts and the conditions for termination?*

Taking the four main elements in turn:

- a. Contracts will have to provide additional specific information to consumers, and such information will also have to be made available to other end-users on request

Vodafone is continuously seeking to ensure that its contracts with customers are as clear and concise as possible. This is why Vodafone sought and has obtained the Plain English Crystal Mark for both its consumer pre-pay and post-pay airtime agreements.

In order to ensure that our airtime agreements remain as clear and concise as possible, Vodafone would urge Ofcom to confirm that the information required

by GC 9.2 can be incorporated by reference into the consumer's contract – i.e. the information itself can appear on the Vodafone website provided that the customer's contract states where it can be found and that such information can be legally enforced through the customer's contract.

Vodafone does question how useful some of the 'additional specific information' will be in reality. For example, it is hard to see how covering the "action that might be taken by the CP in reaction to security or integrity incidents or threats and vulnerabilities"<sup>2</sup> could be properly encapsulated in a contract and how it could be useful to the vast majority of consumers. A real concern is that genuinely useful information gets swamped by a huge amount of mandated-by-regulation small-print to the detriment of clarity of consumer information.

The requirement 'to actively communicate this new information'<sup>3</sup> is a concern in terms of customer experience, resource and cost. We are not convinced that customers need or would want to be 'actively communicated with' on this new information and are concerned that it could degrade our ability to handle genuine customer enquiries by tying up resource unnecessary.

It is also the case that some of our customers do not want to hear from us – they do not wish to receive any information from us. Whilst we have a regulatory 'get out clause' that we are under an obligation, it is still the network that has to deal with the consequences of a customer who does not want to be contacted being contacted with information that is neither of use nor interest to him.

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<sup>2</sup> Op. cit., 7.5 (final bullet)

<sup>3</sup> Op. cit., 7.8

- b. Subscribers must be able to withdraw from contracts penalty-free following a notice of proposed contract modifications. Additionally, Ofcom should be able to specify the format of such notifications

Vodafone has no objection to this on the basis that the threshold of 'material detriment' remains.

- c. The maximum term of initial contracts will be 2 years for consumers and all users must be offered an option to contract for a maximum duration of 12 months

Vodafone accepts Ofcom's interpretation that this requirement should mean that communications providers should have a single entry-level 12 month contract and that the obligation does not extend to all, notably high-end, devices.

- d. Contract termination conditions and procedures for termination must not act as a disincentive to end-users from switching their providers

Vodafone does not 'disincentivise' switching. The market is already highly competitive, with switching being quick and simple – and marked by consumer satisfaction.

*Q6. Do you agree with our proposals to ensure equivalent access to the emergency services for disabled users and to mandate the provision of Emergency SMS?*

Vodafone and the other mobile networks already offer an emergency SMS service for customers who are deaf, seriously hard of hearing or speech-impaired. This service, set up on a voluntary basis in 2009<sup>4</sup>, is national, free-to-caller and across all mobile networks. It was set up under the auspices of the 999 Liaison Committee of the Department for Communities and Local Government, which involves representatives of the emergency services, the relevant

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<sup>4</sup> See [www.emergencysms.org.uk](http://www.emergencysms.org.uk) for more information

organisations representing disabled users, the networks handling emergency calls (principally BT and Cable and Wireless) and the mobile network operators.

The setting up of the service required some considerable debate and not inconsiderable good will from all parties concerned, given that SMS is not a technology that lends itself to emergency situations and that there exists the alternative, mandated text relay solution. The SMS 999 service recognised however that there are those who are unable to make a voice call and that text relay has a low take-up.

Vodafone would question Ofcom's observation that: "There is significant consumer benefit in making the scheme compulsory". Vodafone fails to see these benefits, given SMS 999 is already a national, free-to-use, cross-network scheme and will continue to be so.

By making SMS 999 mandatory we believe that Ofcom also opens up the obligation to provide the service on 112. As Ofcom will be aware, 112 is not a well-known number in the UK, whereas knowledge of 999 is near universal (the only number that has such status). The only practical benefit of having the emergency services available on 112 is that citizens of other European states can access the emergency services by using the same number as at home<sup>5</sup>. As access to SMS 999 is, by necessity, by registration only however the benefit of having 112 open will be practically nil.

Whilst adding 112 to 999 as an emergency access number by SMS should not cause any serious problems, it is creating an obligation without obvious benefit. Vodafone would add that care must be taken with the deployment of 112; almost all calls to 112 in the UK are mistaken, accidental or hoax calls tying up valuable time and resource that could be used on genuine emergency calls.

Vodafone would conclude by welcoming Ofcom's confirmation that the registration system should be kept in place. This is absolutely essential to its continuing successful operation. Vodafone also welcomes Ofcom's recognition that the Limited Service State (LSS) specification

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<sup>5</sup> Even for other European citizens, European Commission research revealed in 2008 that only 22% of Europeans surveyed recognised 112 as a pan-European number for emergency services ([http://ec.europa.eu/cyprus/news/emergency\\_number112\\_en.htm](http://ec.europa.eu/cyprus/news/emergency_number112_en.htm)). The figure for the UK is 8%.

does not exist for SMS and therefore that subscribers will not be able to 'roam' off their own network.

*Q7. Do you agree that given the existing measures that are in place to help disabled users to access 116XXX services, it is not necessary to make further changes to GC15 in this respect?*

Yes.

*Q8. Do you agree with our proposals on conditions for transferring the rights of use of telephone numbers and also for granting their use for a limited period of time?*

No objection.

*Q9. Do you agree with our proposals on the one working day requirement in relation to bulk mobile ports and in relation to fixed porting? If not, please explain why?*

No, we do not agree with Ofcom's proposals in relation to bulk mobile ports which we believe are seriously misconceived. While we note the approach proposed in relation to fixed porting with considerable interest, we also note that it is *prima facie* inconsistent with that advanced for bulk mobile.

Vodafone respectfully submits that the proposed approach to bulk mobile is unnecessary and undesirable from a policy perspective as well as flawed from a legal perspective (see annexe 1). In contrast with Ofcom's approach to consumer mobile, there is not even a hint of any cost-benefit analysis to ensure the over-arching requirement of proportionality is met. In any event, even if there were any demand for it, next day bulk porting is impracticable to implement by 25 May 2011.

For all these reasons, and as discussed further below, we strongly urge Ofcom to reconsider its approach.

### *No evidence of customer demand*

Ofcom acknowledges that service continuity and advance planning is far more important to business customers than speed for its own sake, and that the current process is effective in meeting customer needs.

*"In order to ensure a seamless transfer (i.e. minimising loss of service), businesses undertaking bulk ports of this type will probably want to ensure that on the day of the switch, all logistical requirements to facilitate the port have been completed and that SIM cards and handsets have been distributed to employees in advance. The planning for a bulk port, potentially involving hundreds or even thousands of numbers, is therefore a detailed logistical exercise that can take a number of weeks (or months) to plan and is usually tied in with contractual periods which are known well in advance.*

*The current bulk process seems to adequately support business subscribers requirements, even though this currently takes longer than the non-bulk process. The available evidence suggests that business subscribers are more interested in knowing when exactly porting will take place and a smooth migration process, rather than completing the port process in a shorter time frame."*<sup>6</sup>

Nevertheless, in spite of this clear acknowledgement that the logistical challenges are real and that there is no current problem, Ofcom suggests that bulk porting rules must be amended to meet the 'one working day' requirement.

### *Inconsistent treatment of fixed and mobile*

The essential problem is that Ofcom proposes to take a completely different and unjustified approach to the application and interpretation of the 'one day' requirement in relation to mobile porting, including bulk mobile, than for fixed porting.

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<sup>6</sup> Op. cit., 10.27 - 10.28



For mobile, Ofcom proposes that the 'one day' clock starts ticking from the moment the customer submits their PAC to the GP, which Ofcom interprets as the 'conclusion of an agreement' to port.<sup>7</sup> For fixed porting, by contrast, the customer's agreement with the gaining provider to port their number apparently has no bearing whatsoever on the operation of the 'one day' requirement. Ofcom states:

*"Our interpretation of the Directive is that once an agreement to port has concluded, the one working day requirement must commence from that point. In relation to fixed porting, this point must necessarily be after the consumer protection/verification measures have been completed and any necessary line provisioning has taken place.*

*Therefore, we propose that the one working day port requirement applies from the point that the request for activation has been made by the GP to the LP i.e. after the consumer protection steps and line provisioning have been completed. Where the port date has been fixed, the one working day porting requirement would apply from the time of day on the agreed port date that the activation process is usually commenced by the GP and the LP (and where relevant, the RH). For example, for non-geographic number portability, the scheduled time for a port activation is 00.01 on the day of the port and will take place between 00.01 and 04.00 depending on the queue."<sup>8</sup> (Emphasis added)*

It is plain from this account that in reality there is no prospect of a fixed customer being able to port their number 'next day' as is the case for consumer mobile. Rather, the customer's agreement with the gaining provider results in the establishment of a default port date in a fortnight's time. It is the activation of the number on the new network that takes place within one working day, but the elapsed time measured from the customer's agreement with the GP is considerably longer.

Ofcom is quite explicit on this point, stating:

*"Therefore, our proposed approach for fixed is that it is the port activation that must take place within one working day from when the GP requests activation from the LP. The*

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<sup>7</sup> Op. cit., 10.29

<sup>8</sup> Op. cit., 10.39-10.40

*proposed modifications to GC18 in relation to fixed porting are set out in Annex 7.”<sup>9</sup>*

*(Original emphasis)*

*No objective justification*

Ofcom’s attempt to reconcile and rationalise its approach to fixed with its previous quite different approach to mobile cannot disguise that what it proposes for fixed porting is completely at odds with its previous reasoning for why mobile porting obligations should be triggered by customer submission of the PAC. Vodafone recalls that Ofcom previously asserted that this approach was appropriate on the grounds that porting is a customer right.

As Vodafone has previously observed, terminological distinctions between so-called ‘gaining provider led’ and ‘losing provider led’ processes are of no assistance in this regard. From the point that the customer has their PAC, the mobile porting process is ‘gaining provider led’. There is simply no justification for saying that in the case of mobile, next day porting has to be interpreted as being triggered by the customer’s agreement with the gaining provider while for fixed porting it is clearly not. A customer’s agreement with a new provider and a new provider’s agreement with an old provider are plainly not the same thing.

While we agree with Ofcom’s statement that “the existing fixed porting processes are not without issues”<sup>10</sup> and may merit review, we also recognise that no serious reform is practically possible by the 25 May 2011 deadline for implementation of the new framework. Moreover, we agree that Ofcom’s common sense interpretation and approach in relation to fixed porting is perfectly compatible with the revised Article 30. We strongly disagree, however, that Ofcom’s peculiar and idiosyncratic interpretation in relation to mobile is correct or appropriate, and that its hands are somewhat tied in relation to bulk porting despite the clear practical difficulties and risk of perverse policy outcomes identified.

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<sup>9</sup> Op. cit., 10.44

<sup>10</sup> Op. cit., 10.18

Our conclusion is that Ofcom should align its approach to bulk mobile with its approach to fixed porting rather than compounding the difficulty it has already caused through its flawed approach to consumer mobile.

### *Risk of consumer harm*

To understand the folly of the approach Ofcom advances for bulk mobile, one need only recall the practical consequences of porting a number the day after submission of a PAC code but before other necessary planning and logistical arrangements have been put in place. As noted, Ofcom openly acknowledges that it is not possible to complete other essential aspects of customer provisioning within one working day. If numbers were nevertheless ported the day following submission of a PAC but before the customer has the necessary handsets and SIMs to make use of the number, the inevitable result is service interruption – the very opposite of a seamless customer experience.

Ofcom's commentary suggests that, to some extent at least, it recognises these difficulties. However, its further remarks about how its proposals might be interpreted and what it does and does not expect to happen in practice are contradictory and incoherent.

On one hand, Ofcom suggests that customers should have the option to choose a later port date if they want and can agree that with the GP without offending the 'one day' requirement.

*"As we stated in our April and July 2010 statements on mobile number portability (for non bulk mobile numbers) last year, the consumer may request an alternative port date that is later than the default date if they so chose. We believe this should apply equally to bulk ports i.e. MNOs and the subscriber in this instance would be able to agree an alternative port date. We recognise the logistical requirements, such as the distribution of SIM cards and handsets, associated with a large number of ports and believe this approach provides the flexibility for subscribers and GPs to agree an alternative port date to ensure a seamless migration occurs"<sup>11</sup>*

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<sup>11</sup> Op. cit., 10.30

A few paragraphs later, Ofcom speculates that in the event GPs get any such one day porting requests they are unlikely to be able and willing to service them, implying that GPs are at liberty to decline to accept a request to provide a service they have no practical means of delivering.

*"The decision whether to accept a request from a bulk customers for one day porting would be made by the GP and it is the GP that must facilitate most of the porting process, for example organising the distribution of any new equipment to end-users. However, a decision to accept a request for one day porting would also have consequences for the LP. Our current view is that such requests for one-day porting are (a) quite unlikely to be made in practice, and (b) might not be accepted by a potential GP."<sup>12</sup>*

Yet, a few paragraphs previously, Ofcom appears to suggest that GPs do not, in fact, have a free hand in which they can decline to accept one day porting requests. On the contrary, Ofcom suggests that if subscribers are given the impression that they have no option (which would be the case if GPs routinely declined to accept next day porting requests they could not practically or responsibly meet) Ofcom would consider opening an investigation for non-compliance.

*"However, we note that providers should not use this [i.e. the facility to agree a later port date described at paragraph 10.30] as an opportunity to make subscribers feel that they have no option but to agree to a different port time. If Ofcom were to have evidence of such undue influence, we would consider opening an investigation under GC18 for non-compliance with its obligations."<sup>13</sup> (Emphasis added)*

Put simply, Ofcom cannot have it both ways. Either, GPs are free to decline to offer one day porting without falling foul of GC18 or they are not.

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<sup>12</sup> Op. cit., 10.34

<sup>13</sup> Op. cit., 10.31

### *Misinterpretation of the Common Regulatory Framework (CRF)*

Vodafone remains of the view that it makes no sense to suggest that a GP, rather than a LP, faces any regulatory obligation at all. There is no general obligation under the CRF on CPs (other than specifically designated SMP or USO CPs) to take on new customers, let alone to take them on on particular terms. Accordingly, CPs are perfectly at liberty to decline to provide services (including the ability to port in numbers) to prospective customers.

Similarly, consumers do not have an unqualified right to port in their number to any network of their choosing. Rather, if they can find a new provider prepared to take them on with their old number, they have a right exercisable against their old provider to let them take their number with them.

At root, there is no need for regulatory rights and obligations in relation to gaining providers because CPs operating in a competitive market have every incentive to accommodate the wants and needs of prospective customers on appropriate commercial terms. That is why regulatory obligations in relation to number portability have always been essentially directed at losing providers as Ofcom itself has previously recognised.

Ofcom's view is recorded plainly at 5.51 of its July 2007 Statement<sup>14</sup>, which states:

*This statement makes no specific proposals in relation to bulk ports of 25 numbers or more. Ofcom has noted comments received in this regard. Ofcom also notes the comments of respondents with regards to complex ports for business customers involving porting of less than 25 numbers. Ofcom appreciates that certain subscribers may consider broader issues to be of more importance than porting lead times when changing provider. However, the requirement to port numbers within a specified time does not bind the Recipient Provider. Therefore, in the event that a Recipient Provider requires additional time in which to establish the contractual package or to deliver handsets, it may agree a longer porting lead time with the subscriber. The Recipient Provider is able to determine when to make a*

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<sup>14</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/gc18review/summary/numberportability.pdf>

*request to the Donor Provider at which time the obligation under General Condition 18 to port will be applicable.’ (Emphasis added)*

This analysis, which remains valid, is consistent with Ofcom’s proposed approach to fixed porting, but not with its more recent (erroneous) approach to mobile porting. The appropriate response is not to invent a new and inconsistent doctrine for mobile porting, consumer or bulk, but rather to apply long-established principles consistently to fixed and mobile alike.

*Q10. Do you agree with our proposed approach to the porting compensation scheme requirement?*

Vodafone welcomes Ofcom’s suggestion on what the comparable level of compensation could be for mobile subscribers and that compensation in the event of a delay or fault with porting does not have to be proactive. Vodafone does have some concerns in principle and in practice however.

Compensation in fixed is there because of loss of service and considering that a “delay or fault in porting is analogous to a delay or fault in service provision”<sup>15</sup> is surely not reflective of consumer experience. Just in common sense terms, not having your number ported but being able to use all your services on the one hand, and not having any service at all on the other, are simply not the same thing. Having a compensation scheme in place for loss of service makes sense; having one in place for a delayed port makes much less sense. We would recommend to Ofcom therefore that the compensation scheme is restricted to those instances where the consumer loses service.

Vodafone recognises that the switching process could potentially already be subject to ADR, but putting a specific requirement around porting compensation may just add to a cost the market as a whole bears. Vodafone has explained its views on the costs of ADR to Ofcom<sup>16</sup>; of specific importance are the cost of claims and the cost of maintaining the scheme as a whole.

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<sup>15</sup> Op. cit., 10.56

<sup>16</sup> Vodafone response of 24 November to Ofcom’s ‘Review of Alternative Dispute Resolution Schemes – Call for Inputs’, published on 20 October

At 10.53 Ofcom observes that: "At the moment, subscribers can access a CPs ADR scheme eight weeks after lodging their initial complaint with a CP" and that: "This would also seem an appropriate timeframe to apply to porting compensation claims." Vodafone would remind Ofcom of its new policy from the July 2010 Complaints Handling Statement that: "A CP must promptly issue a written Deadlock Letter when requested by a Complainant"<sup>17</sup>. This means that the eight week 'cooling off' period does not necessarily apply, negating any suggested conclusion that this period of time ameliorates the burden of the new regulation.

Ofcom observes that: "[porting compensation scheme] costs will ultimately be borne by the CP responsible for the delayed port, so all CPs will have an incentive to keep such costs to a minimum". This seems to misunderstand the porting process as well as network behaviour. Working out in each instance which network is responsible for a port delay does not seem a productive use of time and practically it would seem likely that the gaining network would have to pick up the cost of the compensation<sup>18</sup>. It would be impractical and arguably not possible for the losing provider to provide such compensation, given the consumer would no longer be its customer. It furthermore does not seem a productive use of time to develop a complicated reciprocal money-flow arrangement between operators for the small amounts of money that very occasionally have to be moved around. And all this is predicated on the fact that a network, rather than the Syniverse system or the consumer, was at fault.

According to Ofcom's own research consumers are happy with switching in mobile. Against this background, a complicated, burdensome scheme, with little or no benefit for consumers, is not a sensible approach as consumers who feel that they have been delayed for some reason are already entitled to go through the complaints and ADR processes. Therefore any porting compensation scheme should be limited to those customers who have lost service.

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<sup>17</sup> In July 2011, clause 4 of the mandatory 'Code of Practice for Complaints Handling' comes into effect': [http://stakeholders.ofcom.org.uk/binaries/consultations/complaints\\_procedures/statement/statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/complaints_procedures/statement/statement.pdf)

<sup>18</sup> Though porting obligations clearly cannot attach to gaining providers, as there is no obligation to accept the customer

*Q11. Do you agree with our proposed approach on requirements relating to ensuring access to all numbers within the Community, the charging of ETNS numbers and calling the hotline for missing children on 116000?*

As Ofcom observes access to geographic numbers across the EU is already provided and that access to international numbering plans, if not already provided, is subject to technical and economic feasibility. Vodafone welcomes the blocking of access to numbers and services on a case-by-case basis where justified by reasons of fraud and misuse.

Vodafone would urge Ofcom to monitor any development of the potential ETNS to ensure that consumers and communications providers are protected from any misuse. For example, there may be serious questions over the ability of national or European authorities to protect consumers from fraudulent premium rate services running over the ETNS.

Vodafone has no objection to Ofcom's proposals on 116 000, but would remind Ofcom of our previous concerns over consumers' recognition and memory of specific numbers (except 999) and the value of prefixes starting '11' in the UK.

*Q12. Do you agree with the proposed obligation on universal service providers to notify us when they are disposing of part or all their local access network assets?*

No comment.

### **Miscellaneous**

Vodafone does not see it as helpful to extend rules that apply to consumers to end-users, which can include businesses. Different treatment should be given to business-to-business dealings compared to consumer relationships. Reasons include:

1. The strength of the bargaining positions of the parties relative to each other. The courts may assume that businesses should be in a better position to protect themselves than consumers dealing with a business.



2. Inequality of bargaining powers between business and consumers. One party to the contract/agreement may have more or better alternatives than the other party. This results in one party having greater 'power' than the other to choose not to take the offer and makes it more likely that this party will gain more favorable terms based on competition and choices.
3. Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept the similar term. Business customers may have more opportunities to enter into similar contracts with businesses without having to accept similar terms. For example, businesses looking for business customers may offer specific terms in a deal tailored to the business they want to attract because of the level of revenue it can generate. It's very unlikely that a company will create one specific deal for an individual consumer.
4. Whether the goods or services sold or supplied are to a special order for the customer. In business-to-consumer relationships, the goods which are the subject of the contract are of a type ordinarily supplied for private use or consumption. However, in business-to-business contracts, the goods might be of a different nature subject to specific requirements of the business customer.
5. The ability of the customer to negotiate the terms. Consumer customers will usually be asked to accept a standard form agreement which requires appropriate consumer protections to ensure appropriate fair competition and fair dealings for consumers. Businesses may have specific requirements and can tend to negotiate the terms of a contract with the business supplier.

When assessing the reasonableness of terms forming contracts under the Unfair Contract Terms Act 1977 ('UCTA'), consideration is given to: "a fair and reasonable [term]... having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". It may be reasonable to assume that a business will have a different bargaining power compared to a consumer, and a business may have a better 'legal' understanding of the consequences of certain contractual terms compared to a consumer.

The extension of the consumer-facing General Conditions to business users is an unnecessary burden on CPs.

Vodafone Ltd

## LEGAL ANNEXE

### Summary

As currently articulated, Ofcom's proposed modifications to the regulatory regime for mobile bulk ports is likely to be flawed and vitiated for a number of clear and compelling reasons:

- (i) the approach stems from an erroneous interpretation and inconsistent application of the revised provisions of the USD relating to number portability; and/or
- (ii) Ofcom has to date failed to discharge the burden upon it to ensure that its proposed course of conduct is consistent with its statutory obligations when modifying a General Condition.

We therefore invite Ofcom to reconsider its proposed modifications to the regulatory regime governing mobile bulk ports. Specifically, we would urge Ofcom to adopt a course of action that is compatible with the principles of proportionality and legal certainty.

### **Misinterpretation and inconsistent application of Article 30 of the USD**

As noted above, Vodafone continues to question the way in which Ofcom is seeking to construe the revised version of Article 30 of the USD when proposing changes to the regulatory regime for *mobile* number portability.

There are no clear grounds, on a reading of the USD, for the argument set out at paragraph 10.29 of the consultation document that the one-day porting obligation is to apply from the point when the customer presents the PAC to their new provider and concludes an agreement for the provision of mobile airtime services by that provider. In this respect, the actual provisions of the USD are, for the purposes of this analysis, particularly instructive:

*"Porting of numbers and their subsequent activation shall be carried out within the shortest possible time. In any case, subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within one working day."*<sup>19</sup>

Had it been the intention of the legislature for the one-day porting obligation to apply from the moment that a customer concluded an agreement with a new provider, it would have been explicit on the face of the directive. Yet, Article 21 of the Citizens' Rights Directive, which amends the existing provisions of the USD relating to number portability does not make such a stipulation.

Indeed, Ofcom itself only a few paragraphs later in the consultation document proposes that the amended Article 30 is capable of being interpreted entirely differently in the context of the regime governing number portability in the fixed line market. Where customers wish to port their number to a new fixed line provider, the obligation to port a number will be triggered only when such an agreement is concluded over the mechanics of the port between the existing provider and the new provider.

Noticeably, the obligation is not to apply to the new fixed line provider when the customer enters into a contractual arrangement with that provider, but when the new provider formally issues the request to the existing provider to be transferred:

*"we propose that the one working day port requirement applies from the point that the request for activation has been made by the GP to the LP i.e. after the consumer protection steps and line provisioning have been completed."*<sup>20</sup>

Ofcom subsequently goes on to clarify that:

*"...it is the port activation that must take place within one working day from when the GP requests activation from the LP."*<sup>21</sup>

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<sup>19</sup> Directive 2009/136/EC of the European Parliament and of the Council [2009] OJ L 337/1, Article 21 (amending Article 30 of the Universal Service Directive)

<sup>20</sup> Ofcom General Conditions and Universal Service Conditions consultation, 10.40

<sup>21</sup> Op. cit., 10.44

Ofcom considers that such its approach to fixed line porting is justifiable given that there is a risk that an alternative approach would potentially result in consumers losing their service:

*"porting might take place before a line is ready which could result in an unintentional loss of service for the subscriber."*<sup>22</sup>

In the context of porting in the mobile market (whether for consumer or bulk ports), similar preparatory steps and agreement are needed between the existing and the mobile communications provider for mobile numbers to be ported. Indeed, Ofcom also recognises that the mobile bulk porting process is not without its own complexity:

*"The planning for a bulk port, potentially involving hundreds or even thousands of numbers, is therefore a detailed logistical exercise that can take a number of weeks (or months) to plan and is usually tied in with contractual periods which are known well in advance."*<sup>23</sup>

It is therefore entirely possible that a similar scenario could arise – because of the logistical and planning issues – in the context of a mobile bulk port in the mobile market where a corporate customer would be left without service if Ofcom were to formally mandate an obligation to ensure that a port were to take place in one day.

Ofcom's response to this possible outcome is to suggest that the port might be deferred to an alternative date with the agreement of the customer. However, Ofcom then warns mobile operators that it may be minded to take enforcement action where it considers that customers are effectively forced to accept a porting process that will take longer than the prescribed one day.<sup>24</sup>

Mobile operators will thus be in the invidious position of seeking to advise customers that they will in reality lose service if they wish a bulk port to take place within a day. Simultaneously, they will run the risk that the national regulatory authority may contemplate opening enforcement

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<sup>22</sup> Op. cit., 10.43

<sup>23</sup> Op. cit., 10.27

<sup>24</sup> Op. cit., 10.31

proceedings into their commercial arrangements for bulk ports if they consistently advise customers that one day porting along the lines currently envisaged by Ofcom is not feasible.

Vodafone would therefore suggest that Ofcom's interpretation of Article 30 of the USD in relation to the regulation of fixed line porting as articulated in paragraphs 10.39-10.46 of the consultation document is more likely to be consistent with the provisions of the USD.

However, if Ofcom does indeed accept that Article 30 of the USD is capable of the construction proposed at paragraphs 10.39 to 10.46 of the consultation, then it has failed to provide a clear explanation for why an entirely inconsistent interpretation and approach is being adopted in respect of the regulatory regime governing mobile bulk ports. Specifically, it is difficult to reconcile this difference in interpretation and application of Article 30 of the USD given that the planning and logistical issues that arise in the context of fixed line porting are equally relevant to the mobile bulk porting process. Put simply, a mere assertion at paragraph 10.29 that Article 30 of the USD can be "reasonably interpreted" in the way that Ofcom contends is not sufficiently robust given the very different alternative reasoning and interpretation that is proposed in respect of fixed line porting.

Accordingly, were Ofcom to proceed with its current course of action, it would be likely to be in breach of its obligation, pursuant to the Communications Act 2003, to act in a consistent and transparent manner when undertaking its regulatory duties.

### **Proposed approach is not compatible with Ofcom's obligations when modifying a General Condition**

However, putting aside the issue of the inconsistent application of the USD, even if Ofcom's proposal were simply to be considered on its merits, there is no evidence that the proposed changes to the regulatory regime governing bulk ports of mobile numbers would be capable of satisfying Ofcom's statutory obligations when modifying a General Condition. These obligations are set out below.

The Communications Act 2003 provides that Ofcom must ensure that any modification to a General Condition is:

*“(a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;*

*(b) not such as to discriminate unduly against particular persons or against a particular description of persons;*

*(c) proportionate to what the condition or modification is intended to achieve; and*

*(d) in relation to what it is intended to achieve, transparent.”<sup>25</sup>*

More generally, Ofcom is bound by its wider duty to ensure it gives effect to:

*“(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and*

*(b) any other principles appearing to OFCOM to represent the best regulatory practice.”<sup>26</sup>*

Ofcom currently asserts that these obligations in relation to the proposed modification of the current regulatory regime governing mobile number portability would be met. With respect, Ofcom has not provided any evidence that substantiates this assertion. Any decision to proceed on the current basis would be therefore be invalid due to a clear deficiency in reasoning.

Indeed, if each of these limbs is examined in turn, it is clear that none of them would be likely to be satisfied if Ofcom were to proceed to adopt its current course of action in respect of mobile bulk ports.

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<sup>25</sup> Communications Act 2003, section 47(2)

<sup>26</sup> Op. cit., section 3(3)(a) and (b)

## No objective justification

Ofcom has not provided any evidence that the current system for bulk ports is somehow failing to address the needs of mobile consumers that wish to port in excess of 25 mobile numbers. Indeed, to the contrary, Ofcom concedes that the current bulk ports process operates effectively for larger corporate customers who attach greater weight to their numbers being ported seamlessly on a given day (rather than the speed at which the numbers are ported):

*"The available evidence suggests that business subscribers are more interested in knowing when exactly porting will take place and a smooth migration process, rather than completing the port process in a shorter time frame."<sup>27</sup>*

This is entirely logical, given the potential range of mobile numbers and equipment that may be involved in a port. Given Ofcom's recognition of the needs of corporate customers, it is difficult to understand the justification for its proposed course of action. This is particularly the case when, less than a year ago, Ofcom advised industry stakeholders:

*"Our [previous] consultation [in August 2009 in relation to mobile number portability] was primarily about the arrangements for consumer ports, because we had not identified any evidence of harm arising from the bulk porting process."<sup>28</sup>*

Given Ofcom's own findings, the case for further regulatory intervention at this time remains unjustified.

## Inconsistent approaches to mobile and fixed porting

As described above, mobile operators face a number of challenges when planning a bulk port that may be similar to those encountered by fixed line providers. If Ofcom accepts that these preparatory measures determine the point at which the porting obligation is to arise in the fixed

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<sup>27</sup> Ofcom General Conditions and Universal Service Conditions consultation, 10.28

<sup>28</sup> Ofcom, Changes to the Mobile Number Porting Process consultation, 1 April 2010, paragraph 3.11



line market, then it follows that such considerations should be equally applicable when determining when the one day porting obligation is triggered in the case of bulk mobile ports. The inescapable corollary of this analysis is that Ofcom's current approach would be in breach of its obligation to ensure that any modification to a General Condition is not discriminatory.

### **The proposed approach is disproportionate**

The principle of proportionality is well-established in Community law. In simple terms, it means that a Member State must ensure that the measures adopted are necessary and appropriate. Furthermore, when intervention is deemed to be necessary and there are a number of potential courses of action available, the least onerous way of achieving the objective should be adopted.<sup>29</sup>

This is a formulation that the Competition Appeal Tribunal has also adopted when interpreting how Ofcom's duty to comply with the principle of proportionality is to operate in practice:

*"The principle of proportionality requires that any action by OFCOM shall not go beyond what is appropriate and reasonably necessary to achieve their stated objectives. Also, where a choice exists between equally effective measures that might be adopted to address a problem, recourse should be had to the least onerous measure that will achieve the stated aims."<sup>30</sup>*

Ofcom has identified no obvious problem with the existing arrangements for porting mobile numbers in bulk and has expressly conceded this fact. Accordingly, it is far from clear how further regulatory intervention in relation to bulk ports that will create additional new burdens for mobile operators can be deemed to be compatible with the principle of proportionality.

In this context, if Ofcom were able to identify a compelling need for a change to the current arrangements for bulk ports, Vodafone would expect Ofcom – before proceeding any further – to undertake a full cost-benefit analysis that would be subject to a thorough industry consultation

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<sup>29</sup> Case C-331/88 R v Minister of Agriculture ex parte Fedesa [1991] paragraph 13.

<sup>30</sup> Vodafone v Ofcom [2008] CAT 22, paragraph 22

## The proposed approach is ambiguous and creates uncertainty

Ofcom states at paragraph 10.65 of the consultation document that its proposed approach is compatible with the principle of transparency in that: (i) the purpose of the change is clear; and (ii) mobile operators are able to understand what action must be taken in order to comply with the proposed revisions to General Condition 18. Regrettably, on the basis of the approach proposed in the consultation document, this is not the case.

As noted above in some detail, the purpose behind Ofcom's change to the current regime governing mobile bulk ports as set out in the consultation document is far from clear.

In this context, Vodafone would highlight that it is incumbent upon Ofcom to ensure that its transposition of the Directive (a Community harmonisation measure) must be undertaken in a way that ensures that those undertakings subject to the provisions of the Directive are fully aware of their obligations and rights. This has been expressly confirmed by the European Court of Justice:

*"...the principle of legal certainty is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly..."<sup>31</sup>*

In this case, mobile operators would be left in a position of considerable uncertainty as to their precise obligations if Ofcom were to proceed along the lines proposed in the consultation document.

Ofcom suggests that mobile operators may be free to negotiate alternative porting processes and timetables with customers where appropriate. Where a customer does not wish to agree to an alternative porting process, Ofcom proposes that the mobile operator should decline the request of a customer to port. However, Ofcom then states that mobile operators should *"not use this [guidance] as an opportunity to make subscribers feel that they have no option but to*

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<sup>31</sup> Case C-94/05, *Emsland-Starke v Landswirtschaftskammer Hannover*, paragraph 43

*agree to a different port time.*"<sup>32</sup> Mobile operators who engage in such conduct are advised by Ofcom that they will face the prospect of enforcement proceedings for non-compliance with General Condition 18.

Accordingly, to the extent that mobile operators are in practice unable to comply with the one-day porting obligation on a regular basis due to logistical and planning reasons, they may be required to advise a customer that the request to port within one day will not be possible and the customer will need to accept an alternative port date. In this scenario, the mobile operator potentially faces an investigation for a failure to comply with the provisions of General Condition 18 even though compliance would potentially result in a customer being without service. The mobile operator is therefore ultimately left in a position where it cannot be certain that following Ofcom's guidance will reduce or eliminate the risk of enforcement proceedings. Any reading or analysis of the purpose behind the USD would suggest that such an unsatisfactory and uncertain outcome was clearly not envisaged by the Community legislature.

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<sup>32</sup> Ofcom General Conditions and Universal Service Conditions consultation, 10.31