



## The Mobile Broadband Group

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The Mobile Broadband Group (MBG) welcomes the opportunity to respond to Ofcom's consultation on proposed changes to the General Conditions and Universal Service conditions.

The MBG has comments on three of the questions:

***Question 5: 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.***

No. The footnote (39) to section 7.26 reads "*Ofcom expects that existing... contracts cannot be longer than two years. This may mean that communications providers have to amend their terms and conditions to reflect this new obligation.*"

This interpretation of the Directive has the effect of applying regulation retrospectively. As a matter of principle, retrospective regulation should be avoided. It is very unusual to apply rules retroactively. Ofcom has not offered any justification for taking this approach rather than the more natural route of requiring that only initial contracts signed after 25<sup>th</sup> May 2011 be subject to the regulation. Indeed, the wording of the Directive, specifically the use of the word "concluded" in 20.5, would suggest that the requirements are only to apply to contracts that are agreed from the transposition date and not all contracts (new and existing).

Moreover, the impact assessment provided rather misses the point. It is the number of subscribers affected that is the relevant issue, not the number of providers. Ofcom must also consider whether there is any objective justification for requiring providers to change their terms and conditions, when the Directive is silent on this point.

As Ofcom points out, the main reason for the longer contracts was to enable more consumers to gain access to the higher end mobile devices, which Ofcom will know come with a very heavy subsidy from the mobile operator. The market currently offers a wide variety of choice such as prepaid contracts, SIM only 30 day contracts, 18 month contracts and many others. Ofcom should not now be offering those customers that have made a free choice to enter into a 24+ month contract, in order to benefit from the value offered, an option to terminate without cause. The MBG is uncertain of the full commercial impact of Ofcom's proposal – but so is Ofcom. In the scheme of things, the impact of this requirement may not

be significant but is incumbent upon Ofcom, as a matter of good practice, to find out and to explain why it believes a retrospective approach is justified on this occasion.

*Question 6: Do you agree with our proposals to ensure equivalent access to the emergency services for disabled customers and to mandate the provision of Emergency SMS?*

The MBG believes that Ofcom's given reasons for mandating the emergency SMS scheme are extremely thin. As Ofcom acknowledges in paragraph 8.23, the MNOs had already agreed to make the trial system permanent. To the extent that access to SMS 999 is being mandated, we agree that GC15 is the correct place for it and that the service should be positioned purely as a service for hard of hearing customers. The potential shortcomings of the service are of sufficient significance that it should not be positioned as a service for the general population, even if they are pre-registered. For one thing, we do not know whether the details are genuine and it would create a serious public policy issue if the service were to be abused.

Ofcom must at least ensure the obligation on providers is to make the service available to consumers who are deaf or hard of hearing as opposed to being applicable to all "End Users". This approach is consistent with that taken for other services already provided for in GC 15 (e.g. Free Directory Enquiries is available to End Users who are "visually impaired or otherwise disabled as to be unable to use a printed directory").

And so, while we do not disagree with what is proposed, we feel that Ofcom is adopting an unnecessarily risk-averse stance in formalising the regulation. This is not a good example of progressive light touch regulation.

First of all, this approach is a reprise of the discussions around the last telecommunications package. Last time round mobile operators offered a self-regulatory code of practice for the development of services for disabled customers. Ofcom killed this off by mandating access to text relay through General condition 15. In the event mobile text relay has been adopted by very few customers and Ofcom would find it hard to argue that its approach last time has achieved more than the self-regulatory code would have done.

Secondly, if Ofcom insists on converting every self-regulatory initiative into formal regulation (as it also did with General Condition 23), it will only serve to discourage future self-regulatory initiatives. Self-regulation is a valuable component of the regulatory landscape and should be nurtured and encouraged. Ofcom's highly risk averse approach to GC15 may achieve certainty over SMS 999 but the approach sacrifices greater potential gains by making sponsors of self-regulation also more risk averse.

*Question 10: Do you agree with our proposed approach to the porting compensation scheme?*

The compensation scheme should compensate customers that experience loss of service as a consequence of any delay in porting.

Ofcom's general responsibility is to regulate in a way that observes technological neutrality. For various practical reasons, there are significant differences between the way account transfer happens in the mobile environment and the way it happens in the fixed/ISP situation. These differences should also be reflected in the way a compensation scheme is set up.

In mobile, the point at which a customer starts with a new provider and the point at which an old number is ported across to the new provider do not have to be exactly the same. Typically a customer will start using the new phone as soon as possible and the number port follows. Because of the way account transfer and number portability works in mobile, it is very exceptional that the transfer of a customer from one mobile provider to another will result in the loss of service.

As Ofcom will be aware, when a customer acquires a new SIM card from the gaining provider (GP), he or she is able to activate the account as soon as the date specified on the contract is reached. Outgoing calls can be made and incoming calls received on the temporary number allocated by the GP as soon as the account is activated. In the normal course of events receiving incoming calls on the ported number follows shortly thereafter. Even if there is a delay, for whatever reason, in the porting of the old number, there is no loss of service to the customer as such. This is different to the fixed world, where the losing provider (LP) service has to be terminated before the GP service can commence.

A further point that is not discussed in the consultation document is which party would be liable to pay any compensation. It will not always be the case that any loss of service would be the fault of the LP. It could be:

- The RP (whose network might have an outage, for example)
- Syniverse
- The customer
- The LP

A compensation scheme for mobile porting should therefore have the following elements:

- Compensation should only be payable from a delay in number porting that actually results in a loss of service i.e. an inability to make outgoing calls or receive incoming calls on either the temporary number or the ported number. There may be some consequential inconvenience from not being able to receive calls on the old number. However, the compensation scheme is designed to compensate for the direct losses arising from complete loss of service (i.e. an inability to make or receive calls) owing to a delayed port, not consequential losses.
- Compensation would not be payable if the fault lies with the customer.
- Compensation would not be payable if the delay was caused by *force majeure*.
- In the event that there is loss of service, compensation should not be paid for the first two days (although, of course, the customer should not be billed for these days). A hiatus of this length is more likely to be accidental. The MBG has made no assessment of how many compensation claims this would eliminate (as loss of service is rare) but common sense suggests that a majority of issues would be resolved in this time and a certain amount of give would greatly reduce administrative costs. It would also make it easier to establish which party was at fault and thus liable to pay the compensation. Such an approach would be consistent with similar compensation schemes. For example the Great Eastern Rail compensation scheme for train delays doesn't cut in until a train is at least 30 minutes late. The EU airline compensation scheme does not cut in until a plane is delayed by 4 hours.

- Basis for payment: the amounts suggested by Ofcom seem reasonable and broadly consistent with other schemes of this type.

It is clear that there are a few tricky issues to sort out before 25<sup>th</sup> May. Ofcom should exercise some forbearance in implementing section 18.10 (which effectively requires T's & C's to be changed by then too). The Directive does not specify that the transparency and promotional aspects also have to be in place on implementation date. There are obvious logistical issues with getting the compensation scheme agreed and terms and conditions changed to reflect the compensation scheme within the short time remaining.

Finally, Ofcom should take this opportunity to clarify its intention in relation to GC18.2, namely that PAC delivery within 2 hours by SMS is intended to be a requirement for residential and small SME customers only – not all subscribers as the amended GC18 states (as of 11 April 2011). As the text stands, there is a risk of non-SME corporate customers circumventing the bulk porting rules by breaking down their requests into less than 25 ports. PAC requests from non-SME businesses should continue to follow timeframes supported by the industry Porting Manual. The purpose of this clarification is to ensure that businesses do not misuse a process designed for residential customers.