



## **Changes to General Conditions and Universal Service Conditions**

### **Sky Response**

This is the response by British Sky Broadcasting Group PLC (“Sky”) to Ofcom’s consultation on changes to the General Conditions (“GCs”) and Universal Service Conditions (“USCs”) to implement the revised EU electronic communications framework (“ECF”) in the UK (the “Consultation”).

#### **Summary**

Sky acknowledges that Ofcom has a limited discretion in relation to the transposition of the revised ECF in the UK and that these requirements have driven many of the proposed amendments to the GCs and USCs. However, despite this, Sky considers that Ofcom must be mindful of the burden that some of the proposals will have on stakeholders, especially the new extensive requirements of GC9 as well as the compensation requirements under GC18, and that Ofcom should seek to minimise the potential regulatory burden on communications providers (“CPs”) as far as possible.

In this regard, Sky notes that at the BIS/Ofcom workshops that took place last year to discuss the implementation of the revised ECF, Government emphasised that the transposition approach would be to adopt light touch regulation. Sky considers that Ofcom should reflect this approach in its implementation and avoid gold-plating any requirements. In addition, Sky considers that Ofcom should rely on existing regulation to the fullest extent possible before seeking to create additional obligations on CPs.

The revised definition of “Public Electronic Communications Network” together with the deletion of the current definition of “Public Telephone Network” widens the scope and application of many of the GCs and Ofcom should consider the full implications of these changes very carefully. It does not appear that Ofcom has given this the requisite level of consideration. Sky considers that it is appropriate for many of the GCs to apply only to providers of Publicly Available Telephone Services (PATS) services, as currently, and therefore the application of many of the GCs should be suitably curtailed. If Ofcom intends to widen the scope of application of the GCs this should be clearly set out together with full justification and guidance provided to CPs.

In terms of implementation, some of the revised GCs will place a considerable burden on CPs. Given the relatively short timeframe for this Consultation Sky would urge Ofcom to allow for proportionate and pragmatic implementation of the new obligations within a reasonable time period and that this be reflected in Ofcom’s enforcement approach.

Finally, Sky notes that Government is still to publish its final statement on implementation of the ECF and therefore Sky’s comments are subject to any confirmation of the Government’s

approach. Similarly, Sky would expect Ofcom to consider the implications of the Government's final statement prior to finalising any changes to the GCs and USCs.

### **Sky's comments on specific proposals**

In the Consultation Ofcom asked for views on its proposals to amend a number of GCs and USCs. Sky has considered the proposals and has a number of comments in relation to the following provisions:

- Definitional changes;
- General Condition 3;
- General Condition 4,
- General Condition 9;
- General Condition 17;
- General Condition 18; and
- General Condition 20.

Sky sets out its position in relation to the proposed amendments to these GCs below.

#### ***Definitional Changes***

Sky considers that it is helpful to align the definitions contained within the GCs and USCs to those contained in the Communications Act 2003 (the "Act") provided this does not extend the scope and application of the GCs and USCs beyond the requirements of the revised ECF.

Sky does have some concerns over the introduction of a new definition of "Public Electronic Communications Network" or "PECN". It is very important for there to be clarity as to the scope and application of the GCs. Sky notes that the scope of the current definition of "Public Telephone Network" is limited to the provision of PATS services and that following revisions to the ECF this limitation will no longer apply. Instead, the GCs will apply to the provision of PECNs defined by reference to the definition of PECN provided in section 151 of the Act. As Ofcom recognises this will broaden the scope of the affected GCs. Sky considers that Ofcom should clarify and provide additional guidance as to the intended scope of the new requirements.

Sky also notes that the revised ECF amended the definition of "Public Communications Network" to include the additional words "***which support the transfer of information between network termination points***" (Article 2(d) of the revised Framework Directive). This amendment is important and serves to limit the potential scope of the PECN so as to require the transfer of information between subscribers which is an important limitation. Ofcom notes at paragraph 3.7 of the Consultation that the definition of PECN is likely to change following the Government's transposition of the revised ECF. However, Sky seeks Ofcom's assurance that the scope and application of the GCs and USCs will be limited to reflect the revised ECF requirements.

In the Consultation, Ofcom has stated that the revised definitions will apply across a number of GCs – 3, 4, 5, 9, 12, 14, 16, 17, 18 and 24. We provide comments on some of these GCs separately below. However, in relation to the a number of the GCs identified, it appears to Sky that the nature of these GCs is of particular relevance to telephony services and that it would

be nonsensical to apply these conditions to non-telephony networks (e.g. access to emergency numbers and planning, dial tone, number allocation etc) and therefore Ofcom needs to consider carefully the impact of the proposals to ensure that these definitional changes do not extend the scope of the relevant GCs beyond the scope permitted by the ECF.

Sky has no comments on the revised definition of Publicly Available Telephone Service (PATS).

### **General Condition 3**

Sky notes that the requirements of the revised ECF (Article 23 of the Universal Service Directive (“USD”)) requires Member States to take *all necessary measures* to ensure the *fullest possible* availability of telephony services in the event catastrophic network breakdown or in cases of force majeure. In particular, Sky notes that the requirements of Article 23 of the USD are limited to ensure the “availability of **PATS provided over public communications networks**”. Accordingly, Sky considers that the scope of GC3 should be limited to the provision of PATS over a PECN. However, with the proposed revised definition of PECN (discussed above) it appears that the scope of GC3 may extend beyond the provision of PATS.

In addition, Sky notes that revised wording of GC 3 appears to adopt this broader position with the definition of “Communications Provider” extending to a person who provides a “PECN” and/or a PATS. Equally, revised GC3.1(a) applies to “*the proper and effective functioning of the PECN*” without any limitation to PATS. This goes beyond the requirements of Article 23. Sky seeks clarification from Ofcom as to the intended impact of the revisions to GC3 and requests that Ofcom limit the scope of GC3 to reflect the requirements of Article 23 of the USD. Sky also considers that GC3 should only be applicable to network elements under Sky’s direct control.

Sky also notes that the revised Framework Directive (“FD”) includes new provisions relating to the security and integrity of networks and services (Article 13(a) and (b) of the FD). Sky considers that GC3 goes some way to ensure compliance with these requirements and this should be recognised by Ofcom. Disappointingly, any discussion of how Ofcom intends to implement these requirements is notably absent from the Consultation. Sky understands that Government and Ofcom are considering the impact of these proposals. Sky considers that when implementing these requirements a high materiality threshold should be applied and careful consideration should be given to existing obligations as well as the cost and burden that any new requirements may place on industry.

Finally, in relation to implementation of these requirements, Sky considers that, in accordance with its statutory obligations, it is essential for Ofcom to adopt a proportionate approach. There is no guidance or discussion in the Consultation as to how Ofcom intends to apply the new requirement of “all necessary measures” and “fullest possible”. Sky requests that Ofcom provide such guidance and also adopt a pragmatic approach to enforcement noting again the burden that this requirement could place on industry and also the steps already taken by a CPs to ensure their networks are robust. After all, in a competitive market, any failure to provide the highest standards of network resilience will likely result in customers choosing a different provider.

#### **General Condition 4**

Sky has no comments on the proposals to amend GC4.

However, Sky notes that Ofcom, at paragraph 6.31 of the Consultation, stated that it will be consulting separately on the creation of a more detailed set of accuracy and reliability criteria in relation to location information. Sky will engage separately with Ofcom in this process. At this stage we consider that it would be useful to point out that Ofcom should use the consultation to clarify whether it supports the use of the Royal Mail's 'Postcode Address File' (PAF) as industry's source for location information. It would also be helpful if Ofcom could acknowledge that CPs' databases rely to a large extent on accurate information being provided by the customer. There will be circumstances where a sale goes through and the customer is connected but where the location information may be incorrect.

For example, if a customer called up a CP's sales team and inadvertently provided an incorrect address (i.e. the customer states that they lived at 12 Sky Lane (when, in fact, the correct address is number 10) or the address was mistyped during an online sales process a CP would register the service as being at 12 Sky Lane in the ES database. Despite this incorrect address information, the sales process would not fail because:

- a) 12 Sky Lane is a valid address – but for the purposes of GC 4 it would be an incorrect address (i.e. 12 Sky Lane is on the PAF database);
- b) 020 8123 4567 is the correct (WLR based) telephone number (so Openreach would accept the order to migrate the service to MPF); and
- c) SW3 1AB is the correct postcode for both 12 and 10 Sky Lane (i.e. registered on PAF and on the Openreach database).

If the customer had opted to receive online bills then they would never necessarily see that they had mis-registered their address. The CP would have no reason to believe that the customer did not live at 12 Sky Lane but would fall foul of GC4 as 12 Sky Lane does not accurately reflect where the CP's service had been installed.

Sky is supportive of an accurate and reliable database and we welcome further discussion on this important issue during the separate consultation.

#### **General Condition 9**

Sky notes that the requirements of Article 20 of the revised USD apply to undertakings providing “*public communications network and/or publicly available electronic communications services*” and that Ofcom seeks to reflect this in the revised GC9 with the introduction of a wider definition of CP. This broadens the scope of the current requirements. Sky repeats its comments in relation to the definition of PECN above and would request confirmation from Ofcom that the application of GC9 will be similarly limited.

The revised USD has not only broadened the definition of CP but the requirements of GC 9 now also extend to a variety of “consumers”. GC 9 refers to “consumers”, “subscribers”, “end users” and “users”. Sky considers that this could benefit from further clarification as these multiple references are likely to cause confusion.

Sky considers that it would be beneficial for Ofcom to provide stakeholders with additional guidance on the scope and nature of the new requirements under GC9.

#### GC9.2

Sky acknowledges that Ofcom has little discretion in implementing the revised USD and in the main has copied the additional requirements as set out by Article 20. However, we note that GC9.2 does not fully reflect Article 20 and does not include the wording “*when subscribing*”. In paragraph 7.5 of the Consultation Ofcom states that “*CPs should include the additional information set out below in their contracts (both current and new)*” [emphasis added]. Sky considers that Ofcom should include the USD drafting “*when subscribing*”. The omission of this wording has the effect of requiring CPs to re-issue all contracts to current customers. Ofcom considers this obligation to be of “limited impact” - Sky disagrees and considers it to be burdensome.

Sky acknowledges that Ofcom has indicated that CPs may wish to write, e-mail or text customers to advise them of the changes to their terms and conditions or direct customers to their website. However, we would welcome clarification on what Ofcom means by “*actively communicate*”. Is Ofcom expecting CPs to send out a specific communication to customers to advise them of the additional requirements or would CPs be able to communicate the changes in a clear and transparent way at the same time as communicating other messages to customers? The cost of communicating changes to our customers is not insignificant and Sky is eager to ensure that the costs of the USD implementation are kept to a minimum.

Sky is also concerned by the end of May 2011 implementation date for the changes required under GC9.2. In practice, this is an unrealistic timeframe and Sky requests that Ofcom clarify how they anticipate the changes to be implemented and to confirm that they will adopt a flexible approach to enforcement whilst CPs make the necessary changes within a reasonable timeframe.

When considering the impact of the changes to GC9.2 Ofcom states that it believes the impact is limited although it notes that information on traffic management and security or integrity incidents are not normally included in CPs’ contracts or terms and conditions. This suggests that Ofcom is envisaging that traffic management polices and similar customer information should be included within the contract terms. There are a number of new requirements which CPs would not normally include in their contracts or terms and conditions but which would usually be found on the website, for example on a “Help” or customer services page.

Sky seeks clarification from Ofcom that it is acceptable that the contract terms refer to such policies but that policies may be separate from the contract terms. To require CPs to include such polices within the terms and conditions would be incredibly burdensome and it is questionable whether this proposal would fulfil transparency requirements - consumers are more likely to be able to find information in dedicated polices/web pages than they are if this information is added to increasingly lengthy terms and conditions. Equally, for the same reason that tariff guides are separate documents so that when prices change it is not necessary to amend the contracts, it may also necessary to keep traffic management and other matters subject to periodic change outside of the contract. Including all information in terms and conditions is not an efficient or proportionate requirement.

### GC9.3

Sky does not consider that GC9.3 is necessary. The USD states that “*without prejudice to any minimum contractual period, **Member States** [emphasis added] shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider*”. The UK already has legislation in place to ensure that CPs do not disincentivise consumers from switching provider. In addition to the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)<sup>1</sup> and Consumer Protection from Unfair Trading Regulations 2008 (CPRs)<sup>2</sup>, GC22 provides protection for customers moving their broadband service and as Ofcom notes it is also currently conducting its Strategic Review of Switching to ensure that changing providers is easier for consumers together with a consultation on Automatically Renewable Contracts. In addition, Ofcom has provided Guidance on early termination charges (ETCs) under its Additional Charges Enforcement Programme to ensure that consumers are only charged fair ETCs.

Sky considers that GC9.3 should be deleted. UK legislation already satisfies this requirement and to add a new GC is unjustified and disproportionate. Sky notes that Ofcom has acted proportionately with regard to the implementation of Article 20(2) by retaining the “*material detriment*” qualification citing the application of the UTCCRs “*significant imbalance*” test. Sky considers that this test should also be applied to the implementation of Article 30(6) and Ofcom should rely on the powers it has under existing legislation rather than unnecessarily extending its powers with the inclusion of a new GC.

### GC9.4

Whilst Sky acknowledges that Ofcom has copied the USD word for word, we would like to highlight that GC9.4 is inconsistent with Article 23a of the draft Consumer Rights Directive (“CRD”) which currently states: “*Without prejudice of the provisions of this Directive on unfair terms, contracts concluded between consumers and traders shall not stipulate an initial commitment period of more than 12 months.*” We understand that Ofcom’s position is that where there is conflict, sector-specific legislation (i.e. the USD) will outweigh any changes to general consumer law introduced in the CRD but that it is keen to understand any ways in which the CRD may impact its powers and Ofcom’s duty to further the interests of consumers in the communications market. Sky would be grateful for confirmation of Ofcom’s view in order to provide regulatory certainty with regard to minimum contract periods.

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<sup>1</sup> The UTCCRs provide protection for consumers against contract terms which have not been individually negotiated by rendering such terms unenforceable if found unfair. A term will be unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. In addition, the transparency requirement under regulation 7 ensures that CPs must express written terms of a contract in plain, intelligible language.

<sup>2</sup> The CPRs provide protection for consumers against unfair commercial practices, including misleading acts and omissions which materially distort, or are likely to materially distort the economic behaviour of the average consumer.

### **General Condition 17**

Sky is generally supportive of measures to improve the efficiency of number allocation. As Ofcom is aware, Sky recently responded to Ofcom's separate consultation on "Geographic Telephone Numbers" which closed in February 2011 calling for Ofcom to improve its number allocation processes.

Sky considers that proposals designed to improve the process and transparency of sub-allocation are likely to be beneficial and may serve to address some of Ofcom's number scarcity concerns. In addition, the new measures to grant rights of use for a limited period also have the potential to improve number management and therefore are a positive step.

### **General Condition 18**

Sky recognises that the ability of a customer to retain their existing telephone number may be an important factor in a consumer's decision to switch communications provider. As Ofcom is aware, Sky is participating with industry in an effort to improve the fixed line porting processes as well as seeking to develop improved porting arrangements with other CPs.

In relation to the application of the requirements of Article 30 of the revised USD to fixed line porting, Sky agrees with Ofcom's reasonable interpretation that the "one working day" ECF requirement must commence after the consumer protection/verification measures have been completed and any necessary line provisioning has taken place. It is only at this point that the customer will be "ready for service" such that the number port can take place. We consider that Ofcom's proposal to trigger the "one working day" requirement from the moment the gaining provider requests the line activation from the losing provider following completion of the customer verification steps and technical porting requirements to be a proportionate approach to implementing the requirements of Article 30 of the USD to fixed line porting.

### *Compensation Scheme*

Sky is concerned by the requirement on CPs to have in place a compensation scheme for delays, or abuses with fixed line porting by 25 May 2011. This deadline is unrealistic. The process of thoroughly training contact centre agents on more complex regulatory requirements takes significant time. Agents must be taken off-line to receive training and, therefore, it must take place in stages across the service estate to avoid a negative impact on service levels. There is only a certain amount of training that can be conducted without impacting service and, therefore, Sky plans its training programme months in advance. This deadline does not allow sufficient time for Sky to implement the training needed to roll out a compensation scheme, let alone the time needed to develop the compensation scheme itself.

The tight timetable is exacerbated by the potential complexity in applying a compensation scheme. In addition, it is not clear how the scheme will work in practice and also which CP will be responsible for providing compensation. There are many issues, for example:

(i) It may not be clear, either to the gaining provider (GP) or the losing provider (LP) or the affected subscriber, which CP is the cause of a porting fault or delay. Therefore, a subscriber is unlikely to know which CP to lodge a complaint with, which could mean a subscriber is asked to re-direct their complaint to the other CP.

(ii) Once the complaint is lodged, it could take some time for the CP to identify the cause of the problem. Indeed, currently there is an absence of systems to measure the time taken by a range holder to respond to porting requests.

(iii) Where the cause of a porting fault or delay lies with the range holder, in circumstances where the range holder is not the GP or the LP, the subscriber will not have a contractual relationship with the range holder.

Given the short time frames and these complexities, Sky considers that industry agreed processes are needed to ensure that porting complaints are efficiently resolved. These processes need to outline (i) which CP is responsible to a subscriber for complaints of porting faults or delays and with which CP a subscriber should lodge a complaint, (ii) how delays or faults in porting are to be measured, and (iii) responsibility on the CP that causes a delay or fault in porting to compensate the innocent CP (e.g. the range holder or LP that causes the delay compensates the GP for that delay). In the interest of time, Ofcom should provide guidance on how such processes are to be agreed.

Sky also considers that further industry consultation by Ofcom is needed on the appropriate levels of compensation to be applied by CPs, including, the appropriate level of compensation to be given for a delayed port versus a port that fails and results in a loss of service.

In respect of the proposed wording of GC 18.9, Sky considers that the meaning of “abuse of porting” is unclear and requires clarification.

Sky notes that Ofcom proposes that CPs publish the terms of their compensation scheme in their terms and conditions. Sky’s customer contracts do not currently include pricing or compensation information and it is impractical to do so as any change would necessitate an amendment to the contract. We assume that it would be sufficient to meet this requirement if our terms and conditions cross-referred to where on our website our compensation policy is published.

### **General Condition 20**

Sky is concerned by the potential implications of the revised requirements of GC20.1. The requirements of Article 28(1)(a) of the revised USD require Ofcom to ensure access to all numbers provided in the Community. Ofcom has stated that this extends the current obligations to cover all numbers in national telephone numbering plans (NTNP) (including geographic numbers) with limited scope for CPs to block access to numbers. The revised wording of GC20.1 reflects this approach and would suggest that CPs shall ensure “*where technically and economically feasible*” access to non-geographic and all numbers in the NTNP.

Given the previous requirements of GC20 were limited to non-geographic numbers and to end-users located outside of the UK this amendment considerably extends the scope of the existing obligations. Given this impact and the limited scope for a CP to deny access, Sky considers it is important for Ofcom to provide additional clarification as to the circumstances when a CP can legitimately deny access. In particular, Sky requests clarification as to the interpretation of the words “technically and economically feasible”. For example, would it be reasonable for a CP to deny access if the proposed termination rate for the particular number or NTS service was unreasonable? Sky considers that there is a strong commercial incentive to ensure access and end-to-end connectivity to customers but there may be limited circumstances where it is



not commercially viable to provide customers with access to certain numbers. Sky considers that it is essential for Ofcom to adopt a proportionate and pragmatic approach to this requirement.

### ***Implementation***

Sky considers that the changes to the GCs and USCs will increase the compliance burden on CPs. This is of particular concern in relation to the requirements of GC9, GC18 (in relation to compensation provisions) and GC20 in terms of the requirement for CPs to provide access to all numbers in the NTNP. Whilst Sky notes that the requirements of the revised ECF need to be transposed into UK law by 25 May 2011, it is not clear whether all measures need to be in place by that date and what level of discretion is available to Ofcom/Government.

Sky considers that a reasonable period should be provided to CPs to implement the required changes. As long as the necessary framework is in place, the GCs and USCs have been amended and other necessary changes to enabling legislation have been made by the transposition date, Sky considers that Ofcom can exercise its discretion to provide CPs with a reasonable time to implement the changes. It is clear that some of the transparency requirements under GC9 will require an extensive review of customer facing documents and this will require a reasonable period of time to ensure correct implementation. Similarly, to put in place a number porting compensation scheme will take time, especially as this will require systems changes to allow for compensation processes to be developed.

Ofcom only published the Consultation at the end of February despite having had well over a year since the revised ECF was adopted in November 2009 to develop its proposals. During this time, it was also notable that Ofcom failed to engage with industry on the nature of the new requirements. In addition, the outcome of the Government consultation on implementing the revised ECF, which will provide additional clarity on some of these obligations, is not yet known (although expected shortly). Sky considers that Ofcom must adopt a flexible and proportionate approach to implementation and enforcement to allow CPs sufficient time to implement the new requirements in a manner that best serves the interests of their customers.

**Sky**

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