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Dear Jasminder

Sky's response to Ofcom's Consultation: Consumer Switching – Further proposals to reform switching of mobile services

Please accept this letter as Sky's response to Ofcom's Consultation: Consumer Switching – further proposals to reform switching of mobile services ("the Consultation").

As Ofcom is aware, Sky has made a significant investment to enter the mobile market this year and is excited to be able to offer customers a new choice of mobile service provider. Sky has made this investment on the basis of the current PAC process and developed its systems accordingly. In our response, dated 27 May 2016, to Ofcom's March 2016 consultation on proposals to reform switching of mobile communications services (the "March Consultation"), Sky did not comment on the specific proposals for changes to mobile switching processes except to emphasise that if Ofcom were to mandate a fundamental change by introducing a GPL process, such a change would be extremely disruptive and costly and would require Sky to divert its focus and resources away from serving new customers, to implementing significant changes to our systems.

Notice periods with simultaneous transfers

Where a customer transfers their number between providers based on the current PAC process there is a simultaneous technological transfer of services implemented via a regulated process (the old service ceases simultaneously with the new service starting). The old service cannot be used after the port date¹ and there is only ever one supplier of mobile services. It is for this reason that Sky believes charges should not be imposed during the period after the port date. Sky therefore supports Ofcom's proposals where a simultaneous technological transfer of services (or port), via an automated process, is involved.

However, as set out below, Sky's position is different where there is no simultaneous technological transfer of services or the transfer takes place outside any regulated switching process.

¹ Noted by Ofcom at para. 3.40 the Consultation



Notice periods without simultaneous transfers

As Ofcom is aware, currently, when a customer switches their mobile services via cease and reprovide ("C&R") there is no simultaneous technological transfer. This gives rise to three possible scenarios, depending on how the customer chooses to manage the process:

1. The old service ceases prior to the new service starting (break in service);
2. The old service continues to be supplied for a period after the new service has commenced (service overlap); or
3. The old service ceases and new service starts on the same date (continuous service, without overlap (other than the minimum period of one day on the day of the change)).

Ofcom's assumptions and weaknesses in data

Whilst Ofcom's proposals² are clearly targeted at ensuring scenario 3 above arises in all cases where a customer switches from one provider to another, Ofcom appears to assume that, of the customers wishing to switch provider but not transfer their number, 100% wish to do so by way of simultaneous technological transfer.³ This is despite the fact Ofcom's own research clearly shows some customers actively seek service (and contract) overlap.⁴

Ofcom has therefore entirely ignored, in both the Consultation and the March Consultation, the fact that there may be very rational reasons why a consumer might want to switch their mobile service but operate the old and new services in conjunction with each other for a period of time and would be happy to pay for both during this period – for example, a customer who is not porting their number, or is delaying a number port, may wish to maintain their old service so they can still use the phone number for a period of time (to both make and receive calls). Whilst call forwarding options are available to achieve this, Sky notes that these are not necessarily provided free of charge in all cases⁵ and significant costs could be incurred by consumers as a result of setting up call forwarding on a long-term, or permanent, basis.

Sky notes that, when asking customers to recall the reasons why they experienced contract overlap, Ofcom did not include any options for respondents relating to a specific desire to run two services concurrently, other than 'to ensure continuous service' (for example, 'so people could still contact me via my old number for a period of time'). We consider this a significant gap in Ofcom's research and its results.

Also, at footnote 34 of the Consultation Ofcom has stated "...among the 24% of C&R switchers who said they wanted contract overlap, the most popular reason was to ensure a continuous mobile service..." However, this statement is incorrect – the most popular reason stated by C&R switchers in Ofcom's BDRC consumer research was "to get the handset I wanted as soon as possible".⁶

Consultation Question 2 – different customer harms

Question 2 in the Consultation asks *"What is your view regarding the extent to which consumer harm might differ for consumers using the PAC process or C&R arrangements to switch?"*

It is unclear to Sky whether this question relates to the current switching arrangements (in which case, Sky would have expected this question to be included in the March Consultation, which was focussed on changes to mobile switching processes, rather than the Consultation,

² 'Automated PAC' or 'Gaining Provider Led' in the March 2016 Consultation and now 'Enhanced automated PAC' and 'Enhanced GPL' in the Consultation.

³ For example, see para. 3.40.

⁴ Ofcom's BRDC 2015 consumer research indicated that 38% of PAC switchers and 24% of C&R switchers who recalled contract overlap reported that this was wanted. (BDRC research slide 54)

⁵ For example, when forwarding calls between networks.

⁶ 32% vs 25%, BDRC research slide 55.

which focusses on the specific issue of notice periods in the context of switching services⁷) or the position under any new processes implemented by Ofcom as a result of the March Consultation.

Dealing with the latter case first, as referred to above, Sky sees little, if any, difference in the potential harm for customers using the PAC process or C&R. In both cases switching would be completed as a simultaneous technological transfer via the new regulated switching process. There would only ever be one supplier of mobile services.

However, Sky's assessment would be very different if Ofcom's question 2 relates to the current switching arrangements or if Ofcom decided not to implement either of its proposals (and the existing processes remained), or excluded C&R from any new process, but nevertheless applied the rationale set out in the Consultation to customers using C&R such that operators could not impose and enforce (charge for) a contractually agreed notice period.

For customers switching via C&R it would not necessarily always be the case that the old service would automatically deactivate at the same time as the new service starting. There could be a period of overlap. Irrespective of whether overlap actually arises, the potential harm would therefore be fundamentally different in the two scenarios. As noted above and by Ofcom, under the PAC process, if a customer is charged for a notice period after their port has been actioned they are being charged for a service which is no longer supplied. Whereas, C&R switchers can (if they choose) use both services at the same time,⁸ whether via a single or separate devices. Sky cannot see any potential harm in a scenario where a customer pays the agreed price for the service they agreed to purchase and knowingly continue to receive. If a customer does not wish to continue to receive the old service they would switch via the PAC process, unless they specifically did not wish to retain their number in which case they would manage the C&R process accordingly and Sky considers it entirely reasonable to expect customers to manage their affairs in the manner most appropriate to them.

If Ofcom is minded to extend the scope of any regulatory intervention on mobile switching and notice periods to circumstances where there is no simultaneous technological transfer of services, Sky would have significant concerns with this. Sky cannot see any reason to justify such a step, which would both undermine contractual commitments and interfere with the principle of 'freedom of contract' (a fundamental principle of English contract law) in respect of the mobile service the customer is leaving.

Recital 47 of the Universal Services Directive says that switching procedures should "*not preclude the imposition of reasonable minimum contractual periods in consumer contracts*". If Ofcom sought to extend the scope of regulatory intervention to contractual notice periods where there is no simultaneous technological transfer, Ofcom would be imposing the principles of a regulated switching process where they are not relevant (in particular, Ofcom's apparent view that any transfer period should "trump" any contractual notice period agreed with the customer⁹). This approach would be precisely the reverse of what the USD envisages. The USD is clear that aspects of the switching process such as the transfer period should be subject to ("*not preclude*") contractual periods, not determinative of them.

As Ofcom is aware, in accordance with its obligations under s.3(3) of the Communications Act 2003, any regulatory intervention must be proportionate. A proportionate regulatory intervention must: (1) be effective to achieve the legitimate aim in question (appropriate), (2)

⁷ Without considering this question in the context of the March 2016 Consultation, and giving all interested parties an opportunity to comment on this question in that context, Sky considers this a critical flaw in Ofcom's analysis of the March 2016 Consultation and associated responses. It is impossible for Ofcom to come to a balanced and considered view on whether there is a case for extending formal switching processes to incorporate C&R customers or non-porters.

⁸ As correctly noted by Ofcom at para. 3.20 of the Consultation.

⁹ This view contradicts Ofcom's own statement in the Consultation that "*The consumer should generally expect, for example, to be bound by fair contract terms and the obligations they create*" (para 2.15).

be no more onerous than is required to achieve that aim (necessary), (3) be the least onerous, if there is a choice of equally effective measures, and (4) in any event, not produce adverse effects which are disproportionate to the aim pursued.¹⁰ To this end, Sky considers targeting any regulatory intervention *only* at circumstances where there is a simultaneous technological transfer of services as achieving these requirements.¹¹ Whereas any new process that applies the principles of the Consultation to circumstances where there is no such simultaneous technological transfer (whether or not the services are, in fact, ended and started simultaneously) would go further than is necessary and fall outside these parameters (being neither necessary or appropriate).

Sky notes that in the Consultation Ofcom says “*We are not seeking to prohibit the application of notice period charges in all circumstances in the mobile industry.*”¹² and Sky would urge Ofcom to ensure it adheres to this in any decision it reaches.¹³

Contractual notice periods are permitted

Furthermore, Sky would like to take this opportunity to remind Ofcom that contractual notice periods can be enforceable in consumer contracts and are commonplace in the communications sector and elsewhere. Such notice periods need to be reasonable in order to be ‘fair’. Sky considers that notice periods of up to one month are reasonable in cases other than where there is a simultaneous technological transfer of services (such that the old services are no longer supplied or available) – a position supported by Ofcom previously¹⁴ and by other regulators.¹⁵ There are several reasons for this, including:

- To give customers a proper opportunity to receive, read and understand the implications of ending their contract, including the impact on any loan agreement and the implication of not transferring their phone number;
- To enable providers to smooth the necessary administration of contract termination and final billing (including out of plan expenditure, such as roaming charges which may take some time to be recorded); and
- To give customers a reasonable opportunity to try the new service without losing the old one and smooth the transition, which is particularly important where they have actively chosen not to transfer their number.

Clarifying the scope of Ofcom’s proposals

¹⁰ *Tesco v Competition Commission* [2009] CAT 6, para 137

¹¹ It appears Ofcom intends to target any intervention in this manner where it says, for example, “*we suggested that aligning the notice period to the switching window (i.e. one business day), such that consumers would no longer be required to pay the LP **once their old service has been deactivated**, might be an effective remedy.*” (emphasis added) (Consultation, para. 2.7)

¹² Para. 3.39 of the Consultation.

¹³ Sky would also urge Ofcom to ensure that in assessing the options for notice periods in the context of mobile switching (and assessing the two options for mobile switching processes) it fulfils its duty under Section 3(3) of the Communications Act 2003 (“the Act”) and applies its stated general regulatory principles of: (a) “*operating with a bias against intervention, (but with a willingness to intervene firmly, promptly and effectively where required); (b) ensuring that our interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; (c) always seeking the least intrusive regulatory mechanisms to achieve our policy objectives; and (d) intervening where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve.*”

¹⁴ Ofcom Additional Charges statement, paras 8.33-8.34. Further, at paragraph 2.15 of the Consultation Ofcom also acknowledges that “*there are sometimes ties between the consumer and their provider which...can be legitimate. The consumer should generally expect, for example, to be bound by fair contract terms and the obligations they create. These give the provider appropriate protection in respect of the contractual bargain.*” Fair contractual notice periods fall within this category.

¹⁵ CMA guidance on unfair contract terms, Annex A, Group 8 (examples of terms that were amended by the OFT includes shortening a 3 month notice period to 1 month)

Finally, Sky has some concerns that it is not always made clear by Ofcom in the Consultation that its position on notice periods only applies in respect of customers switching outside their minimum contract period.¹⁶ Sky expects Ofcom will ensure there is no ambiguity in this respect in any final decision it reaches and new rules it implements.

In summary, Sky broadly supports Ofcom's position in the Consultation in the specific circumstances set out by Ofcom. However, Sky cannot emphasise strongly enough its belief that any regulatory intervention must be narrowly targeted at the specific scenario giving rise to the specific consumer harm Ofcom has identified, namely consumers paying for a service that is not supplied. Sky would have significant concerns if Ofcom sought to extend its intervention to instances where the old service could continue to be supplied to and used by the customer.

Yours sincerely



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¹⁶ Compare Ofcom's statements in the Consultation at para's 1.4, 1.6 and 3.39 with those at para's 2.12 and 4.22.