Changes to General Conditions and Universal Service Conditions
Implementing the revised EU Framework

Response by Everything Everywhere
7th April 2011

[NON CONFIDENTIAL VERSION]

Introduction and Summary

- *Everything Everywhere appreciates that Ofcom has sought to take a pragmatic approach to implementing the new EU communications regulatory framework, particularly in view of the looming EU transposition deadline of 25 May 2011.*

- *However, there is a danger that the condensed timescales could lead to hastily constructed General Conditions, which could have a detrimental impact on our business and, ultimately, for consumers. Ofcom is still duty bound to adhere to proper decision-making and consultation processes despite any external time constraints.*

- *Everything Everywhere is particularly concerned about Ofcom's interpretation of Article 30.5 of the Universal Service Directive. While Ofcom has, by and large, lifted the EU text into the General Conditions, Ofcom interprets the meaning of the text in a way which could have serious commercial and consumer impacts, and which in our view does not fully reflect the EU's intentions. For instance, we disagree with the suggestion that the 24 month contractual limit should apply retrospectively, or that 24 month limit prevents consumers from agreeing to sign up to a further 24 month contract during their current contract in order to benefit from a new tariff/handset over the remainder of their existing contract term.*

- *We also believe the practical impacts of the changes being made have not been fully considered. For instance, the proposed compensation scheme for delayed ports and level of work required to make any changes to consumer contracts have been dismissed as incurring "limited costs" without a full impact assessment or appreciation of the complexity of the task.*

- *While we understand the revised Framework needs to be transposed into UK law by the 25 May date, some of the new requirements will involve significant changes for CPs which will take time to implement. We hope that Ofcom will confirm that it will take a flexible approach to enforcement whilst CPs make the necessary changes within a reasonable timeframe.*

- *Ofcom has said for a number of years that it intends to undertake a more wide-ranging review of the General Conditions. This work has not progressed owing to resource issues as well as the expected changes to the European Framework. Given the extent of the changes which the revised Framework now introduces we believe that it would be appropriate for Ofcom to reprioritise this work stream. The existing set of GCs are growing increasingly complex and unmanageable and require rationalisation. Conditions are being added without consideration of their cohesive impact. CPs require regulatory certainty in order to invest in the market and a clear and consistent set of regulatory requirements achieved through a fundamental review of the General Conditions would help ensure this.*

- *Finally, we note that DCMS has yet to publish a final statement on the implementation of the revised Framework so our comments are necessarily subject to confirmation of the Government's detailed approach to transposition.*

Response

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

Everything Everywhere has two concerns regarding Ofcom's approach regarding definitions:

- *Ofcom's proposed removal of any Act-based definitions from the General Conditions is contrary to the requirements of transparency and good governance; and*
- *Ofcom overlooks that the proposed change of approach inevitably results in some significant alterations in the substance of regulation.*

A. Reliance on definitions in the Act

Everything Everywhere understands Ofcom's rationale for relying on the definitions contained in the Act. However, its proposal to provide no definitions within the General Conditions overlooks that nowhere in the Act are the definitions Ofcom proposes to rely on set out as such. Furthermore, not only are the definitions not clearly set out together in the Act, but in many instances they are difficult to identify.

In the case of most General Conditions, their scope is only apparent once a chain of interlinked definitions has been researched for a number of defined terms. Without these definitions being easily available, this becomes extremely difficult. Consequently, Ofcom's proposed approach will result in regulatees being presented with a set of General Conditions the underlying meaning and extent of which is difficult to identify.

This is not only irrational, but is bad regulatory practice – notably because it is hugely corrosive of the transparency of regulation. Everything Everywhere therefore proposes that Ofcom should (subject to (B) below) (i) continue to rely on the definitions in the Act, but (ii) reiterate these within a definitions section as part of the General Conditions.

We note that some definitions in the Act may change as a result of Government's transposition of the revised Framework (3.7). This opens the door to further uncertainty if definitions are not firmly rooted in the General Conditions as well. We appreciate that this may require more work for Ofcom in the short term (in terms of further changes that may be needed to the GCs) and timescales are short, but this is the appropriate way of ensuring clear definitions.

B. Unintended consequences of a change in approach

In adopting only those terms defined in the Act, together with such changes as are necessary in light of the Directive, a number of defined terms currently relied on in the present General Conditions will be lost.

In some cases, the impact of this may go further than the simple redefinition of a given term. This is the case for General Condition 12 – Itemised Bills.

While Ofcom is not in fact consulting on any changes to this condition, the new definitions to be adopted alter the scope of its application: the requirement for itemised bills will no longer apply to Public Telephony Networks only (and the PTN definition is limited to the provision of PATS services) but to public electronic communications services/networks also (i.e. data services). While Ofcom makes

no mention of this change as far as GC 12 is concerned, it is significant: Ofcom's proposed approach will extend the itemisation requirement to broadband services.

This is significant for two reasons:

i) It will require a significant change to billing systems

In almost all cases, fixed and mobile broadband services are not provided or charged on a per item/volume basis: there are no separate charges each time a browser session is started/Windows update downloaded/email received etc. Instead, these services are either inclusive within a wider package, provided for a monthly fee (subject to a fair use policy (FUP)), or (in the case of pay as you go services (PAYG)) provided for a fixed access fee. These general monthly or daily access charges are already billed clearly, and relate to the whole of the service provided (i.e. a month/day's internet access).

From both a consumer and provider perspective, there is therefore no meaningful itemisation beyond what is already provided. However, the changes to General Condition 12 suggest that each session or megabyte should be itemised as part of a bill.

ii) It will create no proportionate benefit to consumers

As noted above, access charges are already clearly billed. Further itemisation will add no benefit since the relevant charges are already broken down to the extent relevant to the consumer as regards the service they are purchasing.

Indeed, further itemisation will be harmful as (a) it will result in additional costs and (b) it will reduce transparency since it will result in consumers being provided with pages of irrelevant information regarding each time their phone/PC etc connected to the internet in any way whatsoever.

In informal discussions with Ofcom, Ofcom has said that the intention was not to extend the requirement to data services, particularly as this was not envisaged by the EU Directives. We would welcome a clarification to this effect in the amended GC, or in the accompanying Statement.

On a more general point, as Ofcom recognises that the changes in definitions could broaden the scope of the affected GCs, some of which are not the subject of consultation (3.18), we consider that Ofcom should clarify and provide additional guidance as to the intended scope of the new requirements.

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

We agree with the proposal to add CEPT to the list of standardisation bodies.

- ***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?***

We note that Ofcom has simply sought to replicate the wording used in Article 23 of the revised USD and would agree with the extension of GC 3 beyond "fixed locations" and to require CPs to "take all necessary measures" to maintain their networks and services and access to emergency services on this basis.

We do note, though, that Article 23 of the amended USD applies to the "availability of publicly available telephone services provided over public communications networks" only. However, Ofcom's use of definitions in amended GC3 would extend it to cover all networks – voice and data. For instance:

- *The newly amended GC3.1a) applies to "the proper and effective functioning of the PECN" without any limitation to PATS;*
- *New GC3.1b) similarly applies to "the fullest possible availability pf the Public Electronic Communications Network and Publicly Available Telephone Services provided by it"; and*
- *The definition of a Communications Providers in the GC is not limited to the provision of PATS services.*

These new requirements go beyond the requirements of Article 23. We note that Ofcom has not considered the impact this extension of scope would have on stakeholders and therefore we assume that it is a drafting error rather than a desire to include non-PATS networks in remit. We would therefore request that Ofcom limit the scope of GC23 to reflect the requirements of Article 23 of the USD. If the aim was to include non-PATS networks, Ofcom needs to clarify its intentions and justify the extension of the Directive, including a cost benefit analysis.

A. Clarity of meaning of "all necessary measures"

Ofcom has not set out what it means by "all necessary measures" and "fullest possible" availability. On the one hand, this reflects Ofcom's view that we already have commercial incentives to ensure the level of availability we maintain is in line with customer expectations and that no further regulation is required. On the other hand, it leaves some uncertainty if further explanation is not provided. We believe that Ofcom should clarify that existing processes and mechanisms to ensure the proper and effective functioning of the network at all times as well as uninterrupted access to the emergency services already meet these tests. Any subsequent guidance provided by Ofcom on this GC should consider the steps already taken by CPs to ensure their networks are robust and the burden that any additional requirement could place on industry if further extended.

Similarly, the revised Framework Directive includes new provisions relating to the security and integrity of networks and services (article 13 (a) and (b). Whilst Government is still considering the implementation of these provisions, we consider that GC3 goes some way to ensure compliance with these requirements already and this should be recognised by Ofcom.

We have summarised below the existing measures undertaken in this area already to support our position that no further regulation is needed in this area.

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We also note that there is some overlap between GCs 3 and 4, both of which deal with access to Emergency Services. In the interests of simplification, it may make sense going forwards to review this.

- ***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)?***

Everything Everywhere broadly agrees with Ofcom's proposals for emergency call numbers. We fully support the new requirement on resellers to collect and pass on caller location information (CLI), rather than the obligation falling on mobile network operators. [✂][✂]

We have two comments relating to Ofcom's reference to "technical feasibility" and the "high level criteria" for ensuring accuracy and reliability.

A. Providing location information to the extent technically feasible

Everything Everywhere accepts Ofcom's interpretation of the continued exception to the obligation to provide location information where this is not technically feasible. However, Everything Everywhere believes that Ofcom's explanations at paragraphs 6.9, 6.10, 6.12 and 6.13 then miss this very point: while Ofcom attempts to be helpful in providing guidance about how it would interpret whether particular types of service may be caught by the obligation or not, it overlooks that this issue is in many respects technology neutral: just as in some instances it will not be possible to identify the location of a nomadic VoIP user, it may not be technically feasible to identify the location of a Femtocell.

In particular, Ofcom's assertion that where a service is being "provided at a principally fixed location" inherently recognises, yet overrules, the fact that even in these circumstances such a service may be used by the consumer at another location to that assumed. This also seems to contradict the EU's use of "network-independent undertakings" to describe those services which may have technical issues with providing the same level of CLI: the EU's definition is not location specific (Recital 40 of the amended USD).

Everything Everywhere therefore believes that Ofcom should not provide technology specific guidance on application and enforcement since this is inherently liable to create both false carve outs and unfulfillable obligations. While Everything Everywhere agrees that it may generally not be technically feasible to provide location information in the case of nomadic VoIP services, Ofcom should neither assume that this is uniformly the case, nor that it is technically feasible for other novel services to provide this in all instances. The obligation to provide location information should apply uniformly to the extent that it is technically feasible, consistent with the meaning of the underlying obligation - it should not be distorted and fixed by a regulatory statement of what industry can and cannot technically achieve, particularly where this and the services provided are evolving rapidly.

B. Criteria for ensuring accuracy and reliability.

Everything Everywhere agrees with the high level criteria for ensuring accuracy and reliability of CLI for fixed and mobile networks. We note Ofcom's suggestion at 6.31 that a more detailed set of accuracy and reliability criteria will be set out in due course. We would expect this to build upon the high level criteria, because this is how CLI is already effectively provided. However, we note the suggestion that CLI using GPS co-ordinates would also be considered at this stage. This is of concern for two reasons. First, there is no evidence that the existing solution for mobile is not sufficiently robust and causing consumer harm. Whilst this does not in itself mean that new technologies should not be investigated, it does raise a proportionality question and Ofcom will have to conduct a full and thorough cost benefit analysis before proceeding. Second, and relating to the above, we note that Ofcom only recently instructed Mott McDonald to carry out research on the provision of location information using GPS, and the recommendation was to not pursue the GPS solution further at this stage. We think it is premature to re-open this issue less than a year after that report was published. For example, the report concluded:

> *"Given that the requirement for enhanced location information does not have a high priority within the emergency organisations consulted, and that the costs of implementing a higher accuracy system would be high it has not been possible to demonstrate a clear cost-benefit justification for significantly modifying the existing regulatory arrangements. It should be noted that both the USA and Japan justified their changes purely on public safety and not on a direct cost-benefit case"* [1].

- ***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?***

While we appreciate that Ofcom has sought to replicate wording from the USD as far as possible, we are concerned that Ofcom's interpretation of the EU's intentions is incorrect, which could have a significant impact on our commercial interests and ultimately affect the services provided to consumers. We have considered the questions in detail from a legal and practical perspective and have provided comments on each of the new sections below.

1. ***Length of Contracts***

   A. ***Application of 24 month term to existing contracts***

Everything Everywhere is concerned that Ofcom's suggested implementation of the requirement that contracts do not exceed 24 months would apply to existing contracts.

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We consider that the proposed amendments to General Condition 9 should make it clear that the 24 month limit will only apply to contracts concluded after the implementation of the new General Conditions.

[1] *http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/754519/mobile-location-assessment.pdf*

First, as a matter of principle, the retrospective application of new legal requirements is highly contentious. It is a fundamental tenet of a fair and just society that the law and its application are predictable and objective, known in advance, and therefore enable persons acting under the law to understand beforehand what costs, consequences, benefits or privileges their behaviour may realise. Retrospective application of new laws is highly destructive of this. Article 7 of the European Convention on Human Rights prohibits the retrospective application of criminal laws which, while not directly relevant here, is significant given the punitive sanctions attached to breach of the General Conditions.

Generally there are only two sets of circumstances in which retroactive legislation is considered to be justified: (i) Indemnity Acts (legalising action which, at the time it was taken, was illegal (i.e. at times of war or emergency) and (ii) where a loophole is deliberately exploited in conscious disregard of the spirit, although perhaps not the letter, of the law (i.e. tax avoidance). It is manifestly not the case that either the consultation or existing retail tariffs are within the terms of these two exceptions.

Furthermore, it is against the legitimate expectations of both providers and consumers that Ofcom retrospectively amend the terms of an agreement entered in to by them, freely and in compliance with applicable law. This is of particular concern given Ofcom's enforcement powers and the consequences of failing to comply with the General Conditions: implementation of the nature proposed by Ofcom raises the prospect that operators that do not revoke a consumer's contract will be found to be in breach. Regardless of its sympathies for the arguments of providers, Ofcom surely cannot intend to place consumers in a position where they find themselves being told by their providers that their contracts cannot be honoured because of an Ofcom requirement that has no basis in the Directive (see below) and an interpretation contrary to general legal principles.

Second, even should the above be disregarded, Everything Everywhere sees no reason why, on the basis of the wording, spirit or intent of this amendment to the Universal Services Directive (USD), Ofcom should consider that this restriction should apply to existing contracts. The wording of the USD does not indicate any intent on the part of the Commission to require that existing contracts are modified to account for the new provisions. In fact, the use of the reference to "contracts concluded between consumers and undertakings...." instead of other possible references, such as to "contracts between consumers and undertakings" per se, suggests that the restriction is only intended to apply to contracts which are subsequently concluded between consumers and undertakings, and not to those which are already in existence. Furthermore, Article 4 of the USD Amending Directive (relating to transposition) makes it clear that national transposition is not required until 25 May 2011 – but makes no distinction between this and the date of publication in the Official Journal – namely 18 December 2009. There is therefore no basis to require that the 24 month limit should be applied retrospectively to a date earlier than 25 May 2011.

Third, and more generally, there is nothing in the recitals to suggest that the current framework is enabling or creating consumer harm. Indeed, as Ofcom itself recognises, longer contracts are part of a commercial model that enables the provision of more expensive handsets to consumers. It is therefore not clear on what basis it would be necessary and/or proportionate to compromise the sanctity of contracts under which communications providers have given consumers contractual benefits over and above those that would have been given in return for shorter contractual commitments and to amend retrospectively the terms of freely entered into agreements to the uncompensated detriment of the affected communications provider.

In these circumstances, Everything Everywhere believes that Ofcom's assessment of the application of the section 47 criteria of the Act is flawed. In particular, we would note that:

- *it is unclear that Ofcom's proposals are in fact non-discriminatory, since, as Ofcom is well aware, different operators have different customer profiles. Accordingly, the implication of any changes affecting contractual terms will vary among operators.*

- *[✂] [✂]; and*

- *it is unclear that the proposed changes are proportionate, to the extent that the destructive nature of any retrospective application to contracts entered in to before implementation is not balanced by any identified and greater benefit.*

B. Ofcom interpretation of "initial" contracts

As a general point, Everything Everywhere believes that Ofcom is extending the meaning of "initial" in Article 30.5 of the USD beyond the intentions of the EU lawmakers. A plain English reading of the Article would be that the EU is differentiating between an initial contract and any subsequent contract which the customer may choose to enter into. Ofcom, on the other hand, removes this distinction and applies the term to each contract as it is renewed, which seems somewhat incongruous and a contradiction in terms.

Everything Everywhere is concerned by Ofcom's "clarification" at paragraph 7.26 that "Ofcom considers that ***such an obligation will still apply*** *where the consumer, while remaining with the same provider,* ***enters into a new initial contract because they have a new phone or have changed their price plan.***"*

Everything Everywhere does not believe that this clarification is in fact clarificatory, since it could be interpreted as stating either that:

a) *any subsequent contract cannot extend the 24 month cap applicable to that customer's obligations; or*

b) any subsequent contract is subject to a fresh 24 month cap on the customer's obligations.

In the case of the former, Everything Everywhere has not been able to identify any basis for such a limitation within the terms of the USD. Should (a) be Ofcom's intention then its proposed implementation goes beyond what is required. If (a) is not Ofcom's intention, then it should make this apparent.

For its part Everything Everywhere considers that (b) is the appropriate interpretation of the provisions of the USD, notably given the context of the desire to ensure a functioning market for switching. The Commission's aim is not to prevent a consumer staying with the same provider for more than 24 months, only to ensure that a consumer is not prevented from changing providers if he or she chooses to. It is therefore appropriate that happy customers be able to repeatedly extend their contracts, including during the existing term (i.e. where they upgrade/change tariff/add new services etc part way through their initial term), up to 24 months at a time, while ensuring that unhappy customers are protected from being tied to the same provider for longer than their initial contractual commitment.

Everything Everywhere therefore believes that Ofcom needs to make it clear that implementation is to prevent any new contractual obligation being greater than 24 months, but not to preclude a contractual relationship being variously amended and extended with the effect that a customer may, within a continuous contractual relationship, remain with the same provider for more than 24 months.

That is to say, we believe that Ofcom should clarify that it does not intend to prevent the consumer benefits that will flow from allowing communications providers to, for example, offer a customer, who still has 3 months left to run on their initial contract, an immediate and early handset upgrade to a new 24 month contract, so long as the customer agrees at that point in time to enter into a subsequent contract. Ofcom should not require a customer to wait until the expiry of their initial contract before they can enjoy the upgrade. Customers may of course choose to upgrade to a contract of less than 24 months in length at this stage (and we would not prevent that), but they should not be precluded from subscribing to a subsequent 24 month contract at this point if they choose to take advantage of the better value packages that may be available with this contract length (and which may not be available at a similar price point with a shorter contract length). Of course, neither the initial contract, nor the subsequent contract, would ever be longer than 24 months in length.

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C. Provision of Additional Information

Consistent with the above, Everything Everywhere similarly believes that Ofcom's position with regard to the provision of additional information in contracts must also apply on a forward looking basis only.

It is not appropriate to require that contracting parties amend existing terms to provide additional information. This is both for the reasons above and because there has been no assessment of how the insertion of new terms (providing the additional information) will affect existing terms, drafted with no view to the subsequent revision Ofcom now effectively proposes. For example, without reconciliation, provisions on Fair Use Policy will not interlink properly with the unforeseen clauses providing information on traffic management etc.

It follows that amending contracts in the manner suggested is highly irresponsible because it will create a large number of unforeseen legal complications, undermining the clarity of consumer contractual rights, and provider obligations etc. Again, this is relevant to the assessment of Ofcom's obligations under section 47 of the Act.

Furthermore, such retroactive application is not foreseen by the Directive, which provides that this information shall be provided to consumers "when subscribing to services" (article 20.1): the tense of the article clearly does not include the past tense, but relates to the present tense as of the time of implementation. Hence, the Directive foresees a new (enhanced) obligation to apply at the point of sale as of 25 May 2011. Ofcom's proposed wording provides for a potentially wider scope and therefore goes beyond the terms of the underlying basis of its proposals. This is supported by Ofcom's explanation at 7.5, "CPs should include the additional information set out in their contracts (both old and new)" – the clarification "both old and new" is not in the EU Directives. In this scenario it is unclear that Ofcom has properly assessed the application of section 47(2) of the Act, since the proposed requirement is neither objectively justifiable nor proportionate in the circumstances.

That being said, we would not oppose having to provide this information for enquiring customers; we just do not agree that this information is best conveyed via contractual changes. For example, we can provide this information on website FAQs. Indeed, it is our view that this information may be more accessible to the average customer if provided via our "Help and Support" portals.

Everything Everywhere is also very concerned that the changes required under proposed GC 9.2 are expected to be implemented by 25 May 2011. This is an unrealistic timeframe and Ofcom must not ignore the complexities of executing changes to terms and conditions to a customer base of almost 30 million customers. To assume that this can be achieved in one month (assuming Ofcom's statement is published at the end of April) is entirely unrealistic. This process would normally take at least 6 months. Ofcom must bear in mind that it is not a simple matter of changing the words or insert new ones – we must also design and execute a communications plan to our entire customer base so that they know to review the new terms. In view of the large number of customers and other communications which may have to be socialised over this period, these changes may have to be notified in batches. Ofcom also needs to remember that we will not only have to change the terms on our website, but we will also have to ensure all printed terms and conditions are updated and dispatched to all 700 Orange/T-Mobile stores, with old stock identified and removed. We will also have to allow time for our indirect partners to introduce these new terms into their collateral. We will also have to assist in implementation requirements for MVNOs as appropriate.

We therefore entirely disagree with Ofcom's cursory assessment that there are "limited impacts" (7.7) for CPs in providing this additional information in existing contracts. We are concerned the process could actually be costly and disruptive. If Ofcom wishes to go beyond the intentions clearly set out in the EU Directives, it needs to conduct a proper cost benefit analysis on the impact of extending the requirement.

D. Conditions for Termination – Ofcom implementation of additional provisions on switching

Ofcom proposes to amend GC 9 to provide that "Without prejudice to any minimum contractual period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider" (proposed GC 9.3).

While this is clearly a direct reflection of the terms of Article 30.6 of the USD, it is unclear to Everything Everywhere that the implementation of this additional obligation is either necessary or appropriate, and that it is therefore proportionate and objectively justifiable:

- ***necessary:*** *Terms providing for these conditions and procedures are already set out in General Conditions 18 and 22. Beyond these, industry has a set of porting codes/manuals which are subject to Ofcom review and which include restrictions on port-reject codes (for example, PACs cannot be rejected on the basis of outstanding contractual payments). Ofcom has recently reviewed the mobile switching process and is in the process of reviewing the fixed switching processes. As such, these "conditions or procedures" are already subject to regulation and continued review. It follows that the current switching regime is already regulated by Ofcom both in form and substance, and that providers cannot (and do not) impose "conditions or procedures" that would infringe the proposed additional obligation, or would justify its imposition.*
- ***appropriate:*** *as noted above, the current conditions and procedures are already directly regulated by, and compliant with, the General Conditions. In addition to the terms of the existing GCs, Ofcom also has powers to investigate and prosecute unreasonable terms under the Unfair Terms in Consumer Contract Regulations (UTCCRs). It follows that, with a variety of present powers, the replication of existing obligations and powers, through the provision of a fourth legal mechanism, is inappropriate, not only because it is unnecessary but because it creates further complication to the existing regime and undermines transparency by the needless increase in and replication of regulation.*
- ***proportionate and objectively justifiable:*** *in light of the above, Everything Everywhere believes that the proposed insertion of GC9.3 is neither proportionate nor objectively justifiable. Ofcom should therefore remove the proposed wording. Should Ofcom consider that the terms of the existing General Conditions do not meet the requirements of USD 30.6, then it should review the terms of GCs 18 and 22. There is no reason to distinguish between the implementation of USD 30.6 and other requirements of the new framework, and therefore no basis to justify the copy/paste of the former, as opposed to the more nuanced review and amendment of other General Conditions similarly concerned by the revised framework.*

E. Contract change notifications

Everything Everywhere fully supports Ofcom's conclusion that a reference to "material detriment" should be maintained, with regard to when a customer can invoke their right to terminate, to ensure proportionality, clarity and consistency with UK Consumer legislation.

Ofcom states in 7.14 that notifications should at least be in a form which subscribers can reasonably be expected to read and for these to be expressed clearly and intelligibly and given due prominence. We agree that these principles should be adhered to. We also agree that Ofcom should not prescribe the precise form of these notifications as customer communication is a key market differentiator and CP marketing teams are the experts in communicating complex information to our customers.

However, in 7.15, Ofcom goes on to explain the types and format of communications that Ofcom would deem appropriate for the notifications. We would suggest that Ofcom either deletes these examples, or clarifies that alternative and new forms of communication can also be used (e.g. SMS). Ofcom should avoid issuing guidance which stifles innovation in customer communications formats. Precisely how changes are communicated (e.g. via letter, email or SMS) should be the domain of the CP.

- ***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?***

Everything Everywhere is fully committed to ensuring equivalent access to our services and takes an inclusive approach to service provision. We therefore support the intention of Ofcom's proposals.

As Ofcom is aware, however, we are disappointed at the approach Ofcom has taken in mandating the provision of Emergency SMS. We absolutely support the provision of this service and had already committed to continuing to provide it voluntarily. We were therefore disappointed to see that, owing to the success of this self regulatory initiative, Ofcom felt the need to mandate the service under GC 15, especially as this was not discussed with industry beforehand. We believe this has sent a negative message to industry about the purpose and validity of self-regulation.

In terms of the wording of the regulation, we agree that the 999 SMS measure should sit within GC 15, which relates to the provision of services to citizens with disabilities, rather than GC4 relating to access to emergency services more generally. However, Ofcom's proposed amendment employs the "End Users" definition without qualification. As such, although Ofcom states that (para 8.1) the provision of an emergency SMS service is "in order to help promote equivalent access for disabled end-users", the effect of Ofcom's proposal would be to require the provision of 999 SMS to all users. This would be a significant extension to the requirements of the Directive and to Ofcom's own stated intention, and therefore appears to be unnecessary and disproportionate. Also, it is not clear that the Emergency Services have been consulted on such a proposed scope nor that they would welcome the extension of this service beyond those for whom it was deemed necessary.

Everything Everywhere therefore believes that Ofcom should amend the proposed scope of the 999 SMS requirement in order to ensure that it relates only to those customers for whom the service is relevant (customers registered to the service with hearing or speech difficulties). This would be consistent with the other requirements in GC 15, for example, the requirement to provide free Directory Enquiries applies to End-Users who are visually impaired or otherwise disabled as to be unable to use a printed Directory.

Everything Everywhere would also suggest that Ofcom consider the impact of mandating 112 SMS before proceeding with this requirement. This service is a UK-based standard. It can only be provided on a UK SIM, as a UK number is required for registration and because it is not available through international roaming agreements (8.10). While we appreciate Ofcom's duty to promote 112 access, the text service is designed for use in the UK only, is not promoted or available abroad, and is still a relatively new service. Moreover, as this is still a new service, 112 SMS should be kept under review rather than mandated for the time being.

Everything Everywhere understands that this is the first of several reviews of GC 15 expected over the course of this year. We look forward to engaging in these discussions, to ensure that the regulated services we offer for customers with disabilities are still fit for purpose. Any new requirements, particularly where they prescribe technology specific solutions, should only be mandated where there is a clear equivalence gap that mass market services are unable to satisfy. Everything Everywhere puts inclusiveness at the heart of our business and it is important that we review GC15 in light of the amendments to the revised European Framework and changes in technology and customer behaviours.

- ***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?***

Everything Everywhere agrees with the conclusion that, given the existing measures that are in place, it is not necessary to make further changes to GC15 to help disabled users to access 116XXX services at this time.

- ***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?***

Everything Everywhere agrees with the proposed changes to GC 17. The changes reflect current working practice and there does not appear to be any material difference to the number allocation process. We would just note that, the withdrawal of telephone numbers at the end of the limited time period should not be made without consideration of the needs and representations of range holders (e.g. requests to extensions in allocation periods). In other words, Ofcom must carefully assess the impact on and preferences of allocatees first. This is necessary for market and investment certainty.

- ***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?***

As Everything Everywhere has stressed in the past, individual consumers and businesses alike value a seamless and smooth port process over a faster one. This is also supported by Ofcom's own evidence, which shows that consumers are generally happy with port lead times and indeed already think they are faster than they are in practice. In the corporate world, however, a smooth and co-ordinated porting process is even more important.

We agree that the requirement to issue PACs immediately over the phone or via SMS within 2 hours should not apply to bulk ports (10.33). It would be detrimental to the interests of business subscribers to require immediate PAC issuance as account holder verification is essential.

[✂][✂]

Our frustration lies in the fact that this staggered approach to changes to GC 18 in quick succession has led to additional costs being incurred by Everything Everywhere. This potential outcome was flagged to Ofcom at the time of the initial consultation. [✂] [✂]Indeed, the Directive could not have been entirely clear if Ofcom did not feel it could include bulk porting in scope in July 2010 alongside changes to consumer porting.

[✂] [✂].

Ofcom suggests at 10.32 that bulk ports should occur within one day of a PAC being provided to the Recipient Provider over the telephone. While we understand that the porting process should happen within one day of agreement between the Recipient and subscriber, we do not believe that it is proportionate to require that PAC requests be accepted over the telephone. This is particularly important for the business environment where logistical requirements may be complex and where certainty is required that the requestor is indeed the account holder. Recipient Providers should continue to be permitted to ask that porting requests be submitted in writing.

We also note there is a typo in new draft condition 18.4. This states that the requirement is subject to paragraph 18.2; it should instead refer to 18.3.

We do not disagree with the approach taken to reflect the one day porting requirement for fixed line porting, but we do note Ofcom's admission that a donor led porting process is inherently faster than a recipient led process. At 10.42, Ofcom notes that a recipient led process may be slower, because the authentication and verification of the customer happens AFTER the porting process has commenced. More generally, we are encouraged by Ofcom's recognition that the one day porting obligation must necessarily commence after the consumer protection/verification measures have been completed. This is an important consideration which Ofcom has otherwise carelessly omitted when assessing changes to porting/switching processes.

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

Everything Everywhere has concerns that Ofcom has not properly considered how a compensation scheme might work in practice. This means that each CP may implement their own scheme, only to discover in 6-12 month's time that a lack of consistency means that further change is needed though Ofcom intervention. Having to implement yet another scheme within a year would be expensive and an inappropriate use of valuable resources.

We understand that Ofcom is seeking to implement a simple scheme, which fits smoothly into the existing consumer complaints process. While, we support these principles, we believe that Ofcom needs to issue further guidance on how this scheme would work fairly for stakeholders in practice. Simply assuming that the CP who is found to have caused the loss of service or who has most incentive to appease the customer (e.g. the recipient) will compensate any customer who complains is unsatisfactory. The risk is that the more customer friendly and proactive providers will foot the bill on behalf of industry by always seeking to resolve the issue with the customer through compensation whether or not they were at fault.

We also believe that guidance is necessary, because there are a number of potential complexities involved in determining who is responsible for any delay in porting, especially where more than two CPs are involved in the process. There are currently 2 ADR schemes in operation in the UK. It is therefore entirely possible that the two or more CPs involved in any given scenario may belong to different ADR schemes. How do the ADR schemes decide who has jurisdiction over a particular case? How does the consumer know where to go if the CPs cannot agree where the fault lies? What if the issues lies with a third party (e.g. Syniverse)? Indeed, how can CISAS/Otelo impose a decision on a non member scheme? Who would be responsible for paying the CISAS case fee (for example, if EE is deemed not to have been at fault by CISAS, we would still be required to pay the substantial CISAS case fee)? These are all fundamental questions which need to be addressed before the compensation scheme can be rolled out. We do not believe that Ofcom can impose a scheme before discussing and resolving these questions with stakeholders and the ADR schemes.

We also believe that the scope of the compensation scheme has not been sufficiently defined. From the information contained within the consultation, it is not clear precisely what is covered by the scheme and what is not as the term "abuse" has not been defined. Ofcom must be clearer that the compensation scheme aims to compensate consumers for delays in and abuses of the porting process which result in a customer losing service. In the case of mobile, where the switching and porting process can and do happen separately, it is rare that a customer suffers a loss of service during the transfer. Therefore, compensation should only be payable where there is a delay in number portability 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 inconvenience caused to consumers 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 owing to a failed port and not consequential losses.

We are also concerned that Ofcom has not fully considered how such a compensation scheme might work in a business context, particularly in view of the fact that such matters are likely to already be covered in business contracts. There may therefore be a conflict between the compensation scheme and existing arrangements contained in service level agreements. This could cause confusion and unnecessary duplication. Where provisions are included in service agreements already, this additional requirement need not apply.

It should also be clear from our comments above, that we do not believe a one month timescale is feasible to implement this scheme. Even if it were just a matter of adapting the existing ADR schemes to incorporate porting compensation and the publication of this arrangement on our website, this would still be entirely unrealistic given the time needed to draft the policy and to

ensure all relevant agents are informed of the process so as to be able to apply it. The ADR schemes would also need to be involved in the implementation process and we would need to ensure they were comfortable with any final defined process.

- ***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?***

Everything Everywhere has some concerns that Ofcom's implementation could lead to unintended consequences and/or could be more clearly drafted. Also, there are areas where Ofcom is unnecessarily trying to do too much too quickly, for example in relation to draft GC 20. 3.

A. Access to other numbers in the EU

Everything Everywhere is concerned that the intentions of the EU Directives are not properly reflected in the current wording of the re-drafted GC 20 - namely ensuring access to numbers in the numbering plans of other EU Member States.

Recital 46 to Directive 2009/136/EC makes it clear that the purpose of Article 28 of the USD continues to be about cross-border access to numbers and services:

> *"A single market implies that end-users are able to access all numbers included in the* ***national numbering plans of other Member States*** *and to access services using non-geographic numbers within the Community, including, among others, freephone and premium rate numbers. End-users should also be able to access numbers from the European Telephone Numbering Space (ETNS) and Universal International Freephone Numbers (UIFN).* ***Cross-border access to numbering resources and associated services should not be prevented****, except in objectively justified cases, for example to combat fraud or abuse (e.g. in connection with certain premium-rate services), when the number is defined as having a national scope only (e.g. a national short code) or when it is technically or economically unfeasible. Users should be fully informed in advance and in a clear manner of any charges applicable to freephone numbers, such as international call charges for numbers accessible through standard international dialling codes."* **(emphasis added)**

We therefore believe that the words "outside of the United Kingdom" which are currently contained in GC 20.1 continue to be appropriate to be included in this GC and that other contextual amendments need to be made to GC 20.1 in order to retain its intended cross-border application (e.g. changing the reference to the National Telephone Numbering Plan, which is a defined term in GC 1, to a lower-case reference to "national telephone numbering plans").

We further note that the words "regardless of the technological devices used by the operator" add an undesirable level of ambiguity as to which "operator" is being referred to. We believe that removing these words from GC 20.1(b) makes the obligation clearer, without suggesting any technological restrictions.

We also note that, as they appear in Article 28, the words used in GC 20.2 are in fact a limiting qualification on the obligations in GC20.1. We therefore consider that confusion regarding this interrelationship may be created by giving this

wording effect as a separate obligation in GC 20.2 and consider it preferable for these words to be included in GC 20.1

Accordingly, we would recommend that GC 20.1 is amended to read as follows:

> *"20.1 The Communications Provider shall ensure, where technically and economically feasible, **and except where a called Subscriber has chosen for commercial reasons to limit access by calling End-Users located in specific geographical areas**, that:*
>
> *(a) End-Users in any part of the European Community **outside of the United Kingdom** are able to access and use those Non-geographic Numbers which the Communications Provider Adopts; and*
>
> *(b) **End-Users of the Communications Provider's Electronic Communications Service** are able to access all Telephone Numbers **outside of the United Kingdom** provided in the European Community, including those in **national telephone numbering plans outside of the United Kingdom**, those from the European Telephone Numbering Space (ETNS) and Universal International Freephone Numbers (UIFN).*

B. Blocking numbers on the basis of fraud or misuse

Everything Everywhere has no objections to adhering to requests for numbers and services to be blocked on a case –by-case basis – insofar as this is technically[2] feasible – but we would suggest that Ofcom reconsiders the suggested implementation of this provision, which we are concerned is not legally robust.

We note that the concern of Article 28(2) of the USD is for Member States to ensure that their relevant authorities (e.g. Ofcom) are 'empowered' to require undertakings to take the actions referred to in that Article. Importantly, there is no further obligation referred to in this Article actually requiring the relevant authorities to exercise this power (at all or in any particular manner).

On our review of the Communications Act 2003 (and in particular sections 56 to 63 regarding General Conditions on telephone numbers), it would seem that BIS will need to give Ofcom additional powers to those currently contained in the Communications Act 2003 before Ofcom would become empowered to act as a "relevant authority" under Article 28(2) of the USD.

On the basis of the above:

a. *We do note believe that transposition of Article 28(2) of the USD into UK law makes it necessary for Ofcom to exercise any powers ultimately conferred on it under this Article (e.g. by issuing a GC to oblige Communications Providers to act in any particular manner); and*

b. *We believe that it is premature for Ofcom to propose to seek views on the manner in which it will exercise any such powers (e.g. in the proposed GC 20.3), before the scope of these powers has been defined by BIS and the powers actually conferred by BIS.*

[2] *The blocking of numbers may not be possible for roamers, for example.*

We further note that, even if BIS does take the view that Ofcom is already empowered to act as a "relevant authority" under Article 28(2) of the USD, this again still does not mean that the transposition of Article 28(2) into UK law obliges Ofcom to exercise these powers by 25 May 2011. That is to say, even in this scenario, we believe that Ofcom can (and for the reasons set out below, should) take some further time to consider the relevant issues before it decides whether and if so how to exercise these powers.

In particular in this regard we note, as Ofcom has itself noted at §11.11 of the Consultation, that the BEREC draft report on Article 28(2) of the USD identifies a number of issues that NRAs such as Ofcom will need to grapple with before these obligations can be imposed on operators under national legislation. These unresolved issues include:

- *Definition of "misuse" and "fraud" for the purpose of Article 28(2) of the USD;*
- *A contact list of the "relevant authorities" for the purposes of Article 28(2);*
- *A minimum set of responsibilities that should be given to "relevant authorities";*
- *Provision of information by undertakings to relevant national authorities in the context of compliance actions;*
- *A minimum and common set of enforcement actions should be defined by MS;*
- *Practical cooperation mechanisms between "relevant authorities"*[3]

We also note in this regard that Ofcom has advised at §11.17 of the Consultation that it plans to "develop a set of guidelines on the criteria for determining fraud or misuse in relation to numbers and services, how …[Ofcom] would issue written requests to block access and withhold revenue and how… [Ofcom] would expect CPs to respond to such requests."

Furthermore, we would question whether Ofcom needs to put this requirement in the GCs, because such co-operation already happens in practice. We already adhere to PhonepayPlus directions, for example.

In light of the above, we do not believe that Ofcom is justified to seek to issue GC 20.3 at the present point in time, before its legal powers to issue such a GC have been clarified, and before due time has been taken by Ofcom to liaise with other NRAs and to consult with the industry on the appropriate manner for it to exercise these powers. We therefore recommend that GC 20.3 is deleted at this time. We would, of course, continue to adhere to relevant Directions from PhonepayPlus and would work closely with Ofcom as required, even in the absence of an explicit requirement in the GCs.

We would also stress that Communications Providers already assess the risk of fraud and block access to ranges and services where they consider risk is significant and to protect their customers. The introduction of the proposed GC20.3 should not preclude CPs from undertaking own intervention.

C. ETNS

*We note Ofcom's comments at §11.18 that the European Telephone Numbering Space (**ETNS**) is not currently in use, with the +3883 code having been reclaimed*

[3] BEREC, *Draft Report on Cross-Border Issues Under Article 28 USD* p. 51

by the International Telecommunications Union (ITU) on 31 December 2010, after Directive 2009/136/EC came into effect on 18 December 2010. We accordingly query the objective justification for imposing an obligation to provide access to a numbering range which does not currently exist. However, on the basis that the provision of such access will necessarily fall into the "technical infeasibility" exception while ever there is no ETNS, we do not have a strong objection to including the reference in GC 20.1.

It is very difficult to assess the potential impact of the obligation to charge for ETNS at rates similar to those applied for calls to and from other parts of the European Community (draft GC 20.4), given that, as noted above and in the Consultation, the ETNS is not currently in use and the +3883 code has been reclaimed by the ITU. We therefore have difficulty in agreeing with Ofcom's conclusions at §11.33 of the Consultation that this obligation is transparent, proportionate and not unduly discriminatory in compliance with the requirements of section 47(2) of the Communications Act 2003".

D. Access obligation for the 116000 hotline for missing children

Everything Everywhere is committed to doing all it can to provide access to this important service, which is already live on our network in the UK. We have done this even though our costs are not covered and we failed to reach a suitable commercial agreement with BT. While BT did not feel compelled to do its part to ensure access to this socially important service, Everything Everywhere decided on this occasion that it was in the best interests of citizens and consumers to open the range.

As Ofcom notes in the Consultation, Article 27a(4) of the USD gives Member States some discretion as to how they make "every effort" to ensure that citizens have access to a 116000 hotline to report cases of missing children. Our concern is that Ofcom has not made sufficient effort to ensure that the costs of providing the service are covered, which is what has led to the access issues this amended GC is aimed at fixing and has led to a disproportionate impact on mobile originating providers.

At the very least, we believe that any access obligation which is included as a General Condition, needs to take into account the economic and technical feasibility of the requirement. In other words, we should not be obliged to provide access where it is not technically or economically viable to do so. We do take some comfort from Ofcom's comments at §11.31 and footnote 89 in the Consultation, which suggest that access would not be required to be provided in the absence of an agreed interconnection arrangement setting out the agreed commercial interconnection rates to be paid to cover the Communications Provider's costs of originating such calls. However, this needs to be reflected in the wording of the General Conditions.

We therefore recommend that GC 20.5 is amended so that it reads as follows:

> *"The Communications Provider shall, **where technically and economically feasible**, ensure that any End-User **of its Electronic Communications Services** can access a hotline for missing children by using the number '116000'".*

Any queries in relation to this response should be to:

Clare Seabourne, Head of Consumer and Content Regulation,
clare.seabourne@everythingeverywhere.com