



Non-Confidential Version

**RESPONSE FROM BRITISH SKY BROADCASTING GROUP PLC TO
OFCOM'S CONSULTATION ON MIS-SELLING OF FIXED-LINE
TELECOMMUNICATIONS SERVICES**

1 EXECUTIVE SUMMARY

- 1.1 This comprises British Sky Broadcasting Group plc's ("Sky") written response to Ofcom's consultation of 17 March 2009 on protecting consumers from mis-selling of fixed line telecommunications services.
- 1.2 Sky believes that a smooth, gaining provider-led switching process is essential if consumers are to benefit from competition in fixed line telephony.
- 1.3 Sky also agrees that slamming and mis-selling can result in significant harm both to those who are individually affected, and more widely to the industry's reputation and to consumers' willingness to switch fixed telephony providers.
- 1.4 Consequently, Sky supports Ofcom's objective to make incremental changes to the switching process to reduce mis-selling. However, the evidence Ofcom has provided suggests that mis-selling is both: (a) low across the industry; and (b) disproportionately concentrated in a small number of providers. It is therefore essential that Ofcom prioritises: (i) taking effective enforcement against rogue, and often small, providers; and (ii) that any changes made are proportionate.¹
- 1.5 Sky does not consider that all the changes proposed by Ofcom are proportionate. Therefore, whilst we support Ofcom's proposals to clarify and simplify existing regulation (and we have provided detailed comments at section 3 on areas we consider could be further simplified) and to improve its capability to take more effective enforcement action against CPs it believes are mis-selling, we consider

¹ Figure 1 suggests that the large majority of CPs prompt only occasional complaints (less than 10 complaints over a period of 12 months) and it is only a small minority of CPs which are generating complaints in excess of 500 a year. Figure 4 is also unhelpful as it does not include information about how the complaints were spread across CPs nor how many of the complaints were actually up-held as incidences of mis-selling. Figure 5 is also inconclusive on levels of mis-selling as Ofcom's own research has shown, over half of cancel others listed as "slams" could not be categorised with confidence as cases of "slamming" and were instead due to customer issues.

some of Ofcom's proposals, for example on record-keeping and the revocation of the Code of Practice approach, to be disproportionate. This is because, for the reasons discussed below, such proposals will be costly, ineffectual, or have undesirable side-effects.

- 1.6 In particular, Sky is concerned about Ofcom's proposal to require gaining providers to include generic statements in sales calls and in the gaining provider letter about potential contractual liabilities on switching. Sky agrees that, for the gaining provider led process to work effectively, it is critical for consumers to have specific information about any potential contractual liabilities they may incur on switching provider. However, the obligation to provide that information in the NoT letter should be placed on the losing rather than the gaining provider as the losing provider alone has the information needed to assess such liabilities precisely and thus to provide customers with such information as the customer needs to assess the costs associated with proceeding with the switch.

2. IMPORTANCE OF A GAINING PROVIDER LED SWITCHING PROCESS TO SECURE THE BENEFITS OF COMPETITION FOR CONSUMERS IN VOICE MARKETS

- 2.1 Sky strongly supports a gaining provider-led process for fixed line telephony, which we consider is critical for consumers to benefit from the effects of competition. In this section we make the following points:

- Fixed line telephony markets are exceptional in their need for a 'process' for switching;
- Customer switching is the process by which competition exerts a discipline on suppliers, allowing all customers to benefit from lower prices, whether they themselves switch or not;
- This process has been highly effective in delivering lower prices;
- In fixed telephony services, a gaining-provider led process is central to these benefits being realised by **all** customers; and
- A gaining-provider led process is easier and more convenient for customers, and creates the right incentives on suppliers to make the experience as smooth as possible.

Fixed line telephony markets are exceptional in their need for a 'process' for switching

- 2.2 Fixed line telephony is a relatively exceptional market in requiring a 'process' for switching at all. For most services, customers cancel the service from their old supplier, and, should they wish to, contact a new supplier for a new service. The position in the fixed line telephony market is different. There are several reasons for this.

- Fixed line telephony is an essential service, so there needs to be no interruption in supply between the old and the new supplier.

- Switching takes place *within* a platform. So there needs to be a process for handing over the line from one supplier to another.
- If a switch goes smoothly, the customer should notice nothing at all. And because fixed-line telephony is generally post-paid, all that a customer should notice is that the bill comes from a different supplier. This is clearly of benefit to the customer in terms of convenience, but it does mean that the process needs to be managed tightly to avoid the risk of slamming.
- The fixed line telephony market has a strong, ex-monopoly incumbent. The whole success of liberalising the fixed-line telephony markets depends upon customers realising that they can switch and that it is easy to do so. Nonetheless, there is a very significant rump of customers who never have, and are never likely to switch away from BT.

Customer switching is the process by which competition exerts a discipline on suppliers, allowing all customers to benefit from lower prices, whether they themselves switch or not.

- 2.3 In fixed telephony, almost every household who is going to have a fixed voice service already does so. So competitive pressure on retail prices does not come from suppliers advertising headline prices designed to appeal to new customers and so grow the market, but from attracting customers from other, existing suppliers.
- 2.4 If a losing provider-led process was the norm, it is more likely that lower (i.e. discounted) prices would be offered primarily to those customers who are more likely to switch, to the detriment of those customers who are never likely to switch. This is especially true for BT, whose customer base is made up of a significant number of customers who have never switched, and are unlikely to do so even if their prices increase. These concerns about BT would increase in the event that, as it has proposed to do in the Narrowband Retail Service Market Consultation Document of 19 March 2009 ("Narrowband Consultation"), Ofcom removes BT's obligations of non-discrimination, affording BT greater freedom to offer discounts to customers indicating that they intend to switch. In contrast, other suppliers' customers have, at some point, switched to get a better deal and so could be considered comparatively more price sensitive.
- 2.5 To maximise consumer benefits, *any* switching process should be designed to ensure as much as possible that *all* customers benefit from lower prices as a result of competition – not just those who do actually switch. In fixed telephony this is best achieved through a gaining provider-led process.

The process to date has been highly effective in delivering lower prices

- 2.6 Ofcom's 2008 Communications Market report showed how competition in fixed line telephony had resulted in a basket of local, international

and national calls reducing in price from £8.42 per month in 2002 to £4.91 per month in 2007 – a 42% reduction in four years.² Throughout this period, the switching process has been gaining provider led.

- 2.7 Whatever changes are brought into the switching process, it is central to Ofcom's duties to ensure that this engine for benefitting consumers through lower prices is not compromised.

In fixed telephony services, a gaining provider-led process is central to these benefits being realised by **all** customers

- 2.8 As described above, fixed voice services have particular characteristics: they are relatively low cost, an essential service, and display the legacy of monopoly utility provision. The combination of these mean that a very significant proportion of customers are either unaware of the possibility of switching, or wish to avoid the (perceived) inconvenience of switching providers where possible. These customers therefore rely on the switching activities of more active, more price sensitive customers to bring them the benefits from competition.
- 2.9 A losing provider-led process allows CPs to target price reductions at the most active customers as they must contact their existing provider before they can switch their services. Customers who, because of the market characteristics described above, do not attempt to switch their services remain on their existing products and do not receive these discounts. This creates a two tiered market where non-active customers no longer benefit from the activities of more price sensitive customers and the benefits of competition are not shared by all.
- 2.10 In contrast, in fixed line telephony a gaining provider-led process can be expected to encourage greater competition on price (and other terms and conditions). Rather than encourage CPs to focus on discounts to be offered in a covert manner to customers threatening to switch to another CP, competition pressures would be led by (i.e. in effect initiated by) the gaining provider, through their headline pricing aimed at encouraging switching. As a result of such greater prominence and transparency of their pricing, it would be significantly harder for CPs, in such circumstances, to maintain two tiers of customers effectively on different price points.

A gaining provider-led process is easier and more convenient for customers, and creates the right incentives on suppliers to make the experience as smooth as possible

- 2.11 To switch providers in a gaining provider-led process requires a consumer to make one telephone call to the gaining provider to switch, who then organises the transfer of their service within 10 working days. This is compared with a MAC-led process, for example, where a customer must contact their existing provider to request a MAC, wait for the MAC to be sent to them and then contact their new provider to switch their service – a process which can take up to a month.

² Ofcom Communications Market Report, August 2008, page 328

- 2.12 What is more, the incentives are well-aligned. The process is initiated by, and the customer is in contact with, the company who is motivated to make the switch happen, and to happen as smoothly as possible – which is also what the customer wants.
- 2.13 For all of these reasons, we agree with Ofcom that to the extent that changes can be made which are proportional and which will improve the gaining provider-led process, these changes should be made. Switching instead to a losing provider-led process would lead consumers to lose many of the benefits of competition that they have enjoyed in recent years.

3. PROVISION OF ADDITIONAL INFORMATION ON THE CONSEQUENCES OF SWITCHING

- 3.1 Ofcom has proposed that additional information should be provided to customers on the potential consequences of switching in both the losing and the gaining providers' NoT.
- 3.2 Sky does not agree that Ofcom's preferred proposal is the appropriate response to the problem Ofcom has identified. In particular, we strongly disagree that gaining CPs should be required to refer to the possibility of the customer incurring contractual liabilities from their losing provider if they switch.
- 3.3 We agree with Ofcom and consumer stakeholders that for an effective switching process to exist, it is critical that consumers are properly informed about the consequences of switching provider. We also agree with Ofcom that a key piece of information is the potential contractual liabilities a consumer may incur on switching. However, we are concerned that the proposal Ofcom has put forward - for a generic statement to be included during the sales call and in the gaining provider NoT - does not address the potential harm Ofcom is seeking to address. In addition, Ofcom's proposal may even cause unfounded concern for consumers, resulting in them being deterred from switching for no good reason.
- 3.4 In order for a consumer to make a properly informed decision as to whether or not to switch providers, they need to know: (i) whether or not they will be liable for any charges if they end the contract with their existing provider; and (ii) if they will be liable, what the level of those charges will be. Ofcom has acknowledged that it is impractical for gaining CPs to provide detailed information to the customer about the quantum of any potential liability which may arise, not least because of the large number of CPs, variety of packages, prices, offers and terms which are available in the market at any one time, and the consequential risk of inaccurate information being provided which would cause further consumer confusion. In fact, it is only the losing provider who has the information – that is, whether the customer is in a minimum term, the customer's package and price and the terms of their particular contract - which is necessary to determine whether or not

the customer would be liable for early termination charges and, if so, how much they would be.

- 3.5 Generic statements – such as a statement that the early termination charges might apply, or that other products such as broadband may be affected - do not provide a customer with any tangible information upon which to base their decision about whether or not to proceed with a transfer. However, such statements can raise a concern in customers' minds about whether or not they will incur charges on switching, which either cause customers to contact their gaining provider to cancel the switch or, alternatively, to contact their losing provider to find out more information, thereby providing the losing provider with a prime opportunity to win-back the customer.
- 3.6 Ofcom's proposal to require gaining providers to include a generic statement on the sales call about potential liabilities which the customer might incur on leaving their existing provider is of equal concern. Gaining providers will be unable to provide consumers with any meaningful information about their contractual liabilities, but even if they could it would be inappropriate for gaining providers' sales advisors to be effectively providing legal advice to potential customers on a sales call. Including a generic statement on the call will inevitably lead consumers to either delay their decision to switch until they have had the opportunity to call their existing provider – again providing the losing provider with a prime win-back opportunity – or otherwise will make the decision to stay with their current provider rather than carry out further investigations about their contractual position.
- 3.7 Ofcom's proposal if implemented, will create a process which is heavily to the advantage of the losing provider, and in particular those CPs who tie customers into lengthy initial minimum or renewable term contracts with high early termination charges payable in the event of breach. It will also deter switching for the large number of customers who are outside of their minimum term obligations and who will not incur any termination charges if they decide to switch provider. As such, it is in direct contradiction of Ofcom's stated policy objective to promote switching and competition within the fixed-line telephony market.
- 3.8 Instead losing providers should be required to provide specific details about a customer's contractual liabilities on switching, including the exact quantum of any early termination charges for which the customer would be liable if they proceed with the switch. Losing providers' NoT letters are often confusing and over-long and do not contain the specific information a customer needs to assess the benefits to them of switching provider. Ofcom should therefore amend the regulations to: (i) require losing providers to include information specific to that customer, about the early termination charges they will incur on switching; and (ii) to expressly prohibit losing providers from including generic statements about potential contractual liabilities in NoT letters and other correspondence where the customer in question is outside of their minimum contract term and therefore can switch without incurring any charges at all from their losing provider.

- 3.9 Ofcom also raised concerns in the consultation document about the effectiveness of NoT letters given that some customers may not read or understand the implications of the letters or that on some occasions letters may not be received. Ofcom is also concerned that consumers are not aware of their minimum contract obligations and believes this is a particular issue in relation to fixed line telephony as opposed to other communication services.
- 3.10 Aside from the fact that a sample of 100 complaints is a very small number on which to base its conclusions, Ofcom has not taken into account in its analysis the recent Guidance which it has issued as a result of its consultation of additional charges in consumer contracts. One of the primary issues addressed in that consultation was consumer awareness of minimum terms and early termination charges and Ofcom placed particular emphasis in its guidance on CPs including clear information about minimum term obligations and early termination charges not only in contractual documentation and correspondence but in marketing and point of sale material.
- 3.11 It is not clear why Ofcom has not taken its recent Guidance into account in its analysis. However, given the detailed nature of the requirements within the Guidance and also the stringent enforcement programme Ofcom has initiated in the wake of its publication, Ofcom should at least wait to assess whether or not it has an effect on consumer awareness of minimum contract terms and early termination charges before imposing further regulation on CPs. As set out above, the proposed additional regulation could be extremely detrimental not only to the effective working of the gaining provider led process, but also to consumers, who will be presented with additional but uninformative information which may prevent them from switching to obtain a better deal due to unfounded concerns about charges for which they may very well not be liable.
- 3.12 Ofcom's concerns about letters not being received in sufficient time for customers to cancel their order are already addressed in proposed General Condition 24, which requires losing providers to send letters within 3 working days of receiving notification of a transfer. Given that customers are able to cancel their order up at any point during the switching period, this should provide sufficient time for customers to cancel if they decide not to switch after receiving the detailed information about their contractual liabilities. In relation to Ofcom's concerns about customers not receiving letters from a losing provider at all, Ofcom will have the ability to take enforcement measures against CPs who consistently fail to send out NoTs to consumers for breach of General Condition 24. Imposing a requirement on gaining CPs to include generic statements in a sales call and in a gaining provider letter to compensate for non-compliant losing providers ends up rewarding those losing providers who fail to comply with their regulatory obligations and penalising those gaining CPs who do.
- 3.13 As a final point, we are concerned about Ofcom using customer failure to read letters as a justification for further regulation. Reasonable

customers will read the information they are sent by suppliers and retain it for future reference. Businesses should not be expected to bear the brunt of additional regulatory requirements due to the refusal or disinclination of a customer to read information provided to them for their own protection. Providing a CP has complied with the requirements of consumer legislation and regulation to provide customers with all relevant information in a clear and transparent way, a customer should have all the information they need to be aware of their contractual obligations and liabilities. Businesses should not be expected to go further and protect customers against their own unreasonable behaviour should they decide to ignore the information provided to them. Ofcom's additional suggestion that letters are less effective for fixed-line telephony services than they are for broadband and mobile services is also illogical. The likelihood that letters have an increased efficacy for some services as opposed to others is extremely unlikely. It is also contradicts Ofcom's insistence on CPs sending NoTs to customers in the form of white mail as opposed to email.

4. REPLACING THE CODE OF PRACTICE WITH A MIS-SELLING PROHIBITION

- 4.1 Sky supports Ofcom's aim to clarify and simplify the regulations and is also sympathetic to Ofcom's concerns about the current two-stage enforcement process. However, we do not believe that Ofcom's proposal to revoke the current General Condition 14.5 and its Annex in its entirety, and replace it with new regulation, is either an appropriate or proportionate response to the issues identified.
- 4.2 Ofcom's primary reason for removing the Code of Practice approach is that it has the potential to hinder effective enforcement action against those CPs which have failed to implement a Code of Practice. Whilst Sky agrees that it is critical for Ofcom to have the ability to take effective enforcement action against non-compliant CPs, there are alternative and more proportionate solutions than those proposed by Ofcom.
- 4.3 One alternative would be for Ofcom to retain the Code of Practice approach, but produce its own Code of Practice to which CPs could be held if they failed to produce a Code of Practice of their own.
- 4.4 Another solution would be for Ofcom to use its existing powers under the Consumer Protection from Unfair Trading Regulations 2008 (the "Regulations"). A CP engaging in mis-selling activity would almost certainly fall within the remit of the Regulations, which make it an offence to engage in unfair commercial practices which including misleading by action or omission or engaging in aggressive commercial practices.
- 4.5 It is not clear why Ofcom has not mentioned these Regulations in the consultation document. If it is because the Regulations have not been in force long enough for Ofcom to come to any meaningful conclusions about their effectiveness in addressing mis-selling, it would seem sensible for Ofcom to allow itself more time to test their efficacy before

introducing new and over-lapping regulation. This is particularly pertinent given that one of the justifications given for the introduction of the Unfair Commercial Practices Directive (which the Regulations implement) was to simplify existing consumer legislation and to increase the ability of regulators to enforce its provisions against dishonest traders. If, however, it is the case that Ofcom does not consider that the Regulations are an effective tool against mis-selling practices in fixed line telephony, it would be helpful for Ofcom to set out what it considers the short-comings of the Regulations to be and why a prohibition under the General Conditions would be more effective.

- 4.6 If it is the case that Ofcom is concerned that the sanctions available to it under the Regulations do not go as far as those it would have available to it for breach of a General Condition, another alternative to the mis-selling prohibition would be for Ofcom to amend the General Conditions to cross refer to CPs' existing obligations under the Regulations. Whilst this does produce the rather unsatisfactory situation of CPs being subject to more onerous sanctions than suppliers in other industries, it does offer some simplification in that CPs will only be subject to one set of regulation in respect of mis-selling. This is particularly the case for CPs who are selling fixed-line telephony alongside other services such as broadband and digital television who would otherwise be subject to similar but not identical prohibitions for one service but not the others.
- 4.7 Ofcom's second objective was to clarify and simplify the existing regulations. Again, it is not necessary for Ofcom to entirely replace the existing General Condition to achieve this objective. We agree that aspects of the existing regulations are not clear, in particular in relation to the obligations of gaining and losing providers to provide post-sales information, and changes which would clarify these requirements are very welcome. However Ofcom could achieve this by amending specific aspects of the existing regulation. Instead, Ofcom has moved all the detailed requirements of the existing regulation into the proposed regulation (aside from some specific requirements in paragraph 4.3 of the Annex) and has added to these, either in the form of new requirements or more prescriptive versions of existing requirements (for example at paragraphs A8.9 and A8.10 of the Guidance).
- 4.8 Consequently, whilst providing clarification in some respects, the proposal does not meet Ofcom's objective of simplifying the regulation. More importantly, the changes will result in costs for compliant CPs who will either need to replace their Code of Practice with equivalent internal documents in order to comply with the detailed training and monitoring requirements set out in the proposed General Condition 24 or retain their current Codes of Practice after review and amendment to ensure that they comply with the proposed regulation but also the new requirements Ofcom has introduced. These changes will then need to be trained out across the entire sales estate which will incur costs for CPs.

4.9 As mentioned above, Sky strongly supports Ofcom's objective to reduce mis-selling in the fixed-line telephony industry. However, to strengthen its own enforcement position and to mitigate the costs for CPs of its current proposal, Sky urges Ofcom to consider the following:

- (i) using its existing powers under the CPRs to take action against CPs who it believes are mis-selling;
- (ii) cross-referring to the CPRs in the General Conditions to avoid duplication of regulation particularly for CPs selling bundled services;
- (iii) simplifying its proposed changes by retaining the current regulation but amending it where necessary to clarify existing requirements and delete unnecessarily prescriptive elements.

5. SPECIFIC ISSUES CONCERNING THE PROPOSED GENERAL CONDITION 24

5.1 Ofcom asked for comment on where it could clarify and simplify the existing regulation. Our comments in this respect are set out below.

Cancellation rights

5.2 There is a difference between the wording used in the proposed General Condition 24 and the Guidance in relation to customers' cancellation rights. The wording in the proposed General Condition 24.9 states that CPs must allow customers to cancel within 10 working days of entering into a "contract" without charge or any form of compensation being required. However paragraph A8.25 of the Guidance refers to "no cost cancellation" for customers where they change their mind within the ten working day switchover period. The current position as set out in paragraph 6.3 of Annex 3 is that customers can cancel an order for fixed line telephony services within the 10 day switching period.

5.3 Ofcom appears to assume that the 10 day switching period will, in all cases, commence simultaneously with the customer entering into a "contract". However, depending on a CP's precise processes, this may not be the case in all instances. Accordingly, there is a possible discrepancy between 24.9 and the Guidance which should be rectified. As Ofcom has stated its intention is to clarify the regulations rather than to amend them, General Condition 24.9 should be amended to refer to the 10 day switching period rather than to a 10 day period from the date of entering into the contract.

Electronic correspondence

5.4 The proposed General Condition 24.8 requires that NoTs must be sent by letter via the normal post unless the customer has explicitly agreed to receive correspondence electronically. The Guidance expands on this requirement at A8.24 which states that the letter may be sent electronically where the customer has initiated contact by applying on-

line and have confirmed by means of an opt-in process, that they wish to receive information electronically. If the customer has not applied on-line, the customer must positively request by written correspondence that they are sent NoTs electronically.

- 5.5 The specific requirement for customers who order their service on-line to “opt-in” to receive NoTs by electronic means is a new requirement. The requirement for customers who do not order their service on-line to positively request by written correspondence to receive information electronically is an existing requirement, but is one which Sky considers to be unnecessarily onerous and contrary to Ofcom’s intention to move away from prescriptive regulation.
- 5.6 Many CPs during the course of the sales process will ask customers to provide them with an email address. At the point of collection, the CP would be expected to provide information to the customer on how that address would be used which would include notifying them, for example during the sales calls via a mandatory statement or on a customer check-list underneath the space where an email address could be provided, that it would be used to send NoTs. If, after receiving this information, the customer agreed to provide their email address to the CP, the customer should not be expected to send a subsequent written request to the CP confirming that they are happy to receive NoTs by email in respect of their fixed line telephony service.
- 5.7 In an age of on-line monthly bills and statements, it does not seem unreasonable to encourage the move to paperless means of communication. In addition, corresponding electronically means quicker communication, which must be an advantage given the short timescales of the switching period. Sky therefore urges Ofcom to reconsider this overly prescriptive proposal and to replace it with a requirement on CPs to only send NoTs to customers by email where the customer has been given clear and prominent information about their NoTs being sent by email and, after that information has been given, still chose to provide their email address.

CP information

- 5.8 The proposed General Condition 24.6(i) requires that CPs provide customers with the identity of the legal entity the customer is contracting with, its address and telephone or fax or email contact details on every sales call. Whilst Sky is aware that this is a current requirement, Sky believes that this is another example of overly prescriptive regulation.
- 5.9 In many cases, a customer will be making the call to the CP to order their service and therefore it can be assumed that the customer will have found the contact details they need and therefore do not need that information to be provided to them again on the call particularly as within days the customer will receive this information in the letter they receive from their gaining provider. We agree that where customers are being out-bound called by a CP, the CP should make their identity known and provide the customer with contact information. However,

the requirement to provide such information is already covered by existing legislation and there is no need to duplicate the requirements in the General Conditions.

- 5.10 The amount of information which CPs are required to provide to customers during a sales call to comply with both the General Conditions and existing consumer legislation is already significant. Requiring CPs to include additional information which the customer may already have or does not require, means that sales call will be unnecessarily prolonged. This may not only cause the customer to “switch off” from the information being provided – some of which may be considerably more important to the customer than the CP’s address or fax number – but results in additional costs being incurred by CPs, and, in some cases, customers (through additional phone charges where they are not calling a free phone number).
- 5.11 Sky suspects that if Ofcom does have genuine concerns in relation to the contact information that customers receive during a sales call, these concerns are likely to relate to a minority of CPs and not to the majority of compliant CPs who will have made their contact details available to customers on web-sites, in marketing material, in phone books and through directory enquiries as well as in specific correspondence with the customer. In order to avoid addressing the failings of the few by placing unnecessary regulatory burdens on the many, Sky suggests that Ofcom delete the prescriptive requirements set out in General 24.6(i) and, if it feels it necessary, replace it with a general requirement on CPs to ensure that customers are provided with necessary information during the sales process to identify the CP and to contact them if necessary. This will provide Ofcom with the comfort that customers will be properly informed of the identity and contact details of the CP they are contracting with, but also removes the very prescriptive, costly and unnecessary regulatory burden of having to provide all this information at a certain point during the sales call.

ID requirements

- 5.12 Ofcom has suggested in its Guidance at paragraph A8.20 that CPs ask customers for evidence of their identity to ensure that they are authorised to take out a contract; for example, evidence of identity, age, address (e.g. through showing a passport, utility bills or a driving licence). This suggestion would result in significant additional time and expense for Sky and thus it is extremely onerous, especially when it is considered that sales may be made on the telephone, online, or in a shop or venue stand. The reality is that the requirement to produce such ID will annoy many prospective customers, who will not, in many circumstances, have this information readily available. The requirement to produce such ID may even deter customers from placing an order, and therefore fetter switching. In the majority of cases, customers will be asked at the point of sale to provide payment details for the service they are ordering and this should be sufficient to ensure that customers are who they say they are. Requirements over and above this are disproportionate and unnecessary.

Provision of information

- 5.13 General Condition 24.12 states that gaining providers must provide records to Ofcom on request. This is cast very widely. Whilst Sky agrees that Ofcom should have the powers necessary to investigate complaints, Ofcom also needs to recognise that there is a cost to businesses in extracting and providing information. Sky would therefore find it helpful for Ofcom to provide guidance on when it will expect to use this power and the type and volume of information it would expect to receive from CPs.

6. CANCEL OTHER

- 6.1 Sky agrees with Ofcom that Cancel Other should be used primarily in response to a customer allegation of slamming by the gaining provider. Given the increased use of Cancel Other by CPs other than BT, Sky also supports Ofcom's proposal to incorporate requirements on the use of Cancel Other into the General Conditions.
- 6.2 Sky also agrees with Ofcom that it would not be practicable or proportionate to impose on all CPs the same information sharing requirements imposed on BT under the 2005 Direction. In particular, it is not clear how CPs would benefit from the ability to request Cancel Other information from other CPs, as there will be no visibility as to which CP has used Cancel Other. Sky would, however, find it helpful to receive further clarity from Ofcom as to how it intends to monitor the use by CPs of Cancel Other and how it will identify those CPs who are mis-using Cancel Other given that, presumably, Ofcom will have the same lack of visibility over which CP has used Cancel Other. In particular, Sky is keen to receive assurance from Ofcom that it will be able to police use of Cancel Other effectively without issuing disproportionate information requests about the use of Cancel Other to all CPs irrespective of their compliance record in respect of its use.
- 6.3 Ofcom's last proposal in the Consultation Document in respect of Cancel Other is the removal of the 2005 Direction applying to BT. As Ofcom is aware, the 2005 Directions was imposed on BT on the basis of it having significant market power ("SMP") in the market for call origination on fixed public narrowband networks in the UK (excluding Hull). Ofcom is currently reviewing that SMP finding in the Narrowband Retail Service Market Consultation Document of 19 March 2009 ("Narrowband Consultation"), to which Sky has provided a response under separate cover. It is not clear to Sky what Ofcom has chosen to entirely separate the market review from its proposals in relation to Cancel Other, as the two appear to be inextricably linked.
- 6.4 For the reasons set out in Sky's response to the Narrowband Consultation, Sky considers that Ofcom's proposed finding in the Narrowband Consultation, that BT no longer has SMP in relation to retail narrowband markets, is flawed. As set out in Sky's response, a range of factors would indicate that, in fact, the market is insufficiently competitive to conclude that BT no longer has SMP. If Ofcom finds that

BT does still have SMP in the relevant market but nevertheless decides to remove the 2005 Direction, it needs to do so on the basis of clear evidence that the Direction is no longer required in order to counter such market power.

- 6.5 Ofcom appears to be justifying its proposal to remove the 2005 Directive on the basis that BT is no longer the majority user of Cancel Other, rather than through a conclusion based on a review undertaken in accordance with section 84 of the Communications Act, as it is required to do. In any case, Sky submits that Ofcom has only shown that BT now uses Cancel Other less than the remainder of CPs **combined**: the data which Ofcom has provided at figure 7 does show that over the last 12 months BT's use of Cancel Other is less than the aggregated use of Cancel Other by all other CPs. However, it is almost certainly the case that BT uses Cancel Other far more (in terms of numbers) than any other CP, a fact that is not surprising given BT's high market share. In order to come to any meaningful conclusion about the use of Cancel Other data between CPs (including BT), Ofcom would need to provide more granular data which breaks down use of Cancel Other between individual CPs. Such data might then be fed into a review carried out in accordance with section 84 of the Communications Act. Until Ofcom has properly carried out such a review, it should not, and cannot, remove the 2005 Direction.

7. RECORD-KEEPING

- 7.1 We support Ofcom's objective to improve its capability to successfully investigate allegations of mis-selling. We also acknowledge that the success of an investigation will depend in some circumstances, on the quality of the record-keeping by the CP under investigation. However given as discussed above, the evidence shows that a large proportion of mis-selling complaints are concentrated in small providers, Sky is concerned about the proportionality of including such prescriptive requirements about the way CPs maintain records and in particular, the requirement for 100% of sales calls to be recorded which, Sky considers (even with 10% tolerance) to be extremely onerous.
- 7.2 An alternative suggestion would be to impose more detailed requirements on CPs about record-keeping as set out in the proposed guidance at A8.28 which should improve consistency of record-keeping across CPs. These requirements could include a reasonable endeavours obligation to record sales calls but would allow CPs the discretion, where it was not practical or cost effective to install recording equipment, to comply with the record-keeping requirements by making and retaining contemporaneous notes of the sales call. As it is in CPs' interests to make and retain accurate records of sales not only to support their position in the event of a mis-selling allegation but also as a matter of good business practice, we would anticipate that further clarity over Ofcom's expectations of CPs' record-keeping should be enough for the majority of CPs to ensure that the quality of their record-keeping is sufficiently improved to meet Ofcom's objectives.

- 7.3 In relation to the small number of non-compliant CPs, it is questionable whether introducing further regulation will provide any more of an incentive to comply with record-keeping obligations than the current regulation. In order to deal with these CPs, Ofcom needs to ensure that it has effective powers to take action where there are consistent allegations of mis-selling irrespective of whether or not the CP has records to corroborate the allegations. If Ofcom has gathered sufficient evidence to support the allegation, the mere fact that the CP has no records to rebut those allegations, should not mean that Ofcom is unable to proceed with the complaint. For consistent offenders, Ofcom needs to consider alternative means of investigation such as mystery-shopping.
- 7.4 It is not clear what the Guidance is proposing in relation to record-keeping for on-line sales. If the requirement is for CPs to keep a copy of the email sent to customers to confirm a sale, this does not appear to be an onerous new obligation. However, if Ofcom is suggesting that a copy of the final page of the on-line sales process is to be recorded and stored, this may require considerable system development on the behalf of CPs and cost which is neither proportionate nor necessary.
- 7.5 During an on-line sales process in the absence of a system failure, the customer is in control of what products and services they order and therefore the customer record of that transaction can only include the information or options s/he has chosen. This is quite different from a sales call or face to face contact, where, as a result of confusion or miscommunication in the conversation between the customer and the agent, the order placed by the sales agent and therefore the CP's record, may differ from the order the customer believes they have placed. By contract, in an on-line sale, providing the confirmation email is automatically generated when the customer places their on-line order, there is no reason aside from system failures, for the confirmation email to reflect anything other than the order the placed by the customer from the selection of products and services available on the CP's web-site. Therefore, it should be sufficient for Ofcom's purposes to be provided with a copy of the confirmation email. Any requirements over and above this, are not justifiable.

8. IMPLEMENTATION PERIODS

If Ofcom's proposals as set out in the consultation document remain unchanged, we agree that an implementation period of 12 months is appropriate. If Ofcom were to amend some of its proposals as suggested in Sky's response, it may be appropriate to consider a shorter implementation period.

**Sky
2009**

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