



Vodafone's response to Ofcom's consultation on protecting customers from mis-selling of fixed line telecommunications services

Summary and conclusions

Vodafone welcome's the opportunity to respond to this consultation¹. We have direct experience of the present 'letter facilitation' process for fixed line migration which Ofcom is reviewing, as both a gaining and a losing provider. Vodafone's At Home service is a bundled proposition comprising fixed line and broadband, so we also have experience of the different processes that apply to broadband migrations involving Migration Authorisation Codes ('MAC's').

We endorse Ofcom's stated policy objective², namely a switching process that promotes switching and competition whilst protecting customers, in particular seeking to ensure:

- A good customer experience of switching;
- Protection against inappropriate sales and marketing activity;
- Well-informed consumers; and
- That competition is supported to the benefit of consumers, particularly by minimising obstacles to switching.

We also note, however, that Ofcom's proposals³ are directed at very specific and apparently persistent problems it has identified with the letter facilitation process which simply do not arise under the alternative MAC-based process. Although the consultation is billed as being about mis-selling, it appears that the problems Ofcom is seeking to tackle in fact range considerably wider. In particular, Ofcom is clearly concerned – rightly so in Vodafone's view - about consumers switching without appreciating contractual liabilities with their existing communications provider ('CP') given the potentially serious financial consequences. However, we query the extent to which this can really be characterised as a 'mis-selling' problem (as might be the case if a gaining CP mis-represented the terms of its own offer). Similarly, the genuine confusion Ofcom identifies among CPs of what is expected of them seems likely to be a product of the complexity and ambiguity of current arrangements rather than 'mis-selling' in any conventionally understood sense.

There is clearly a problem with 'slamming' under the letter facilitation process, which may indeed be an extreme form of mis-selling. 'Slamming' is not the only problem with the letter facilitation process, however. 'Blocking' migrations through inappropriate use of 'Cancel Other' is an altogether different kind of problem that has little to do with how the gaining provider goes about selling their service. What links slamming, blocking and customer confusion about termination liabilities is not so much mis-selling as the fact that they are products of the letter facilitation process itself, as Ofcom previously acknowledged in announcing the conclusions of an earlier consultation⁴:

¹ Protecting consumers from mis-selling of fixed line telecommunications services – a consultation on options to protect consumers from mis-selling of fixed line telecommunications service, Ofcom 17 March 2009

² See Ofcom's policy aims and objectives at 1.6 of the consultation document

³ See proposals outlined at 1.7-1.8

⁴ See <http://www.ofcom.org.uk/consult/condocs/misellingprotection/statement/>

1.11 The letter facilitation process minimises customer involvement in the switching process ensuring customers can switch between providers easily. However, conversely, it also increases the potential for irresponsible sales and marketing activity to take place, as seen in the fixed-line telecommunications market. For this reason, where the letter facilitation process is used, Ofcom believes that it is necessary to have strong measures in place to ensure that there are adequate disincentives for gaining Providers not to engage in irresponsible sales and marketing activity.

1.12 Ofcom has also decided that it is not appropriate to extend mis-selling obligations to broadband, mobile and cable services at this stage. We remain of the view that the process for switching between these services involves much greater levels of customer validation upfront (which minimises the potential for mis-selling and slamming to occur) than in the case of fixed narrowband service and full LLU.

Vodafone largely agrees with this assessment, although it is questionable how far the letter facilitation process can be said to 'ensure' customers can switch between providers easily since abuse of Cancel Other can have precisely the reverse effect. Minimal customer involvement may allow easy switching where all goes well, but also creates the conditions for abuse by removing customer control. There is a danger in equating customer convenience with minimal customer involvement, since it is the absence of *customer control* that results in slamming and blocking without reference to the customer. Vodafone believes Ofcom's aim should be to empower customers by ensuring they are in a position to make properly informed decisions and then have those decisions executed according to their wishes with the minimum of fuss. Current arrangements fall some way short of that ideal, however.

While it is, of course, to be hoped that Ofcom's proposals might, if confirmed, result in some modest improvement in customer outcomes within the constraints of the letter facilitation process, we remain concerned that it is the process itself which lies at the root of the persistent problems experienced, and we are not confident that the solutions Ofcom proposes will remedy the underlying problems and meet the declared policy aims. As the sale of bundled services increases, a process that from a wholesale perspective flags the transfer of a *single element* of a bundled service is problematic, and contributes to the confusion facing customers at a retail level as Ofcom itself has previously noted:⁵

"... switching difficulties are likely to increase as CPs continue to develop and expand their offerings to consumers by bundling different services together. While this mean [sic] that consumers will be able to benefit from an increasing range of services from a variety of CPs, Ofcom is concerned that the lack of consistent migration processes across communications services may contribute to the complexity and inconvenience experienced by some consumers in trying to switch providers. This could be a source of consumer harm in itself, and could also inhibit switching, thereby making the competitive process less effective."

Against this background, it is remarkable how little attention the consultation devotes to the increased prevalence of bundling and consequent issues for consumers which we previously understood to be one of Ofcom's principal concerns. This is a serious deficiency and one which should, we believe, prompt Ofcom re-think its present approach to patching up the unsatisfactory letter facilitation process.

In summary, we agree that Ofcom is right to be concerned about customers making decisions based on ignorance or misapprehension about termination liabilities, and support the aim of making sure that customers are better informed. However, it is striking how much more acute this problem is for fixed line migrations than for broadband and it seems highly likely that this difference stems from the structural differences between letter facilitation and MAC-based switching processes. We remain concerned, therefore, that the safeguards Ofcom proposes may not prove wholly effective in practice, and that even where they work as intended, the resulting customer experience may be more disjointed and unsatisfactory than it could be under a better designed process. We therefore urge Ofcom to reconsider its present approach in favour of a more fundamental review of what a fit-for-purpose unified process for fixed and broadband migrations might look like.

We have a few more specific comments and queries on Ofcom's proposals below.

⁵ See <http://www.ofcom.org.uk/telecoms/ioi/mbp/deloitte/>

Specific comments on Ofcom's proposals

At paragraph 1.6 of the consultation, Ofcom presents its diagnosis of the problem it is seeking to address as follows:

"Based on our analysis of the existing regulations, and our experience of enforcing against these, we have identified the following:

- *Genuine confusion by some CPs on what is expected of them;*
- *The Code of Practice approach may not be the most effective to secure compliance and to enable enforcement activities;*
- *Consumers switching without realising they had existing contractual liabilities with their existing CP e.g. an early termination charge (ETC) for ceasing service within a minimum contract period;*
- *Consumer harm arising from abuse of the Cancel Other process where it has been used to prevent customers from switching. Cancel Other allows a customer's existing CP to cancel a live order before a transfer takes place. However, it is only allowed to be used to prevent a transfer taking place where the customer alleges slamming; and*
- *Variability of sales records made, and retained, across the industry, meaning we have found it difficult, on occasion, to enforce the rules."*

In the light of this diagnosis, Ofcom sets out its preferred options at paragraph 1.7:

"In the light of this, we are consulting on the following as our preferred options:

- *Clarifying the regulations to aid understanding;*
- *Simplifying the regulations by moving away from an approach requiring all CPs to establish, and comply with Codes of Practice, to one of prohibiting inappropriate sales and marketing activity;*
- *Better information for consumers on the potential consequences of switching by requiring CPs to alert consumers at the point of sale, and through letters, that they may have existing contractual liabilities with their existing CP;*
- *Extending Cancel Other rules to cover all CPs providing fixed-line telecommunications services – at present the rules that are in place apply on to BT; and*
- *Clarifying existing general record-keeping requirements, together with a proposal requiring CPs to make, and retain voice recordings of all relevant telephone contact."*

We comment on these proposals and the diagnosis underpinning them in turn below, using the Ofcom headings immediately above.

Ofcom proposal 1 – "clarifying the regulations to aid understanding"

In principle, some clarification would be a good thing given the degree of genuine confusion Ofcom has identified. As a relatively recent entrant to fixed line phone and fixed broadband provision, we are still struggling to understand the intricacies of letter facilitation process. Equally, because we offer a bundled proposition we also have experience of the MAC-based process for broadband migrations. While we are aware of some teething problems during the

period when MACs were entirely voluntary⁶, we have generally found the MAC based process to work well and note that Ofcom's recent update note on its enforcement programme⁷ reports:

"In the past 12 months there has been a considerable decrease in the total number of MAC-related complaints received by Ofcom. Complaint numbers have declined substantially and are currently at their lowest levels since the introduction of the GC22 rules on broadband migrations."

Vodafone was not involved in the evolution of either the letter facilitation or MAC regime, but have found the MAC rules much simpler to understand and administer than those governing letter facilitation and Cancel Other. We note, however, that the relative simplicity and clarity of the MAC-based approach to broadband migration may become eroded where bundled services are involved, where there is presently a hotchpotch of different processes operating alongside one another⁸. Given the endemic problems Ofcom has identified with the letter facilitation process, we question the wisdom of allowing this process to supplant the simpler MAC-based approach which, in Vodafone's experience to date, has proved more effective and less prone to error and confusion.

It is clearly important that regulations are well designed and targeted if they are to be both proportionate and effective. While we hope that clarification may produce some modest improvement, our general concern is that the framework of rules Ofcom is proposing remains complex and potentially prone to failure and that the 'simplification' Ofcom seeks to portray is more apparent than real.

Ofcom proposal 2 – "simplifying the regulations by moving away from an approach requiring all CPs to establish, and comply with Codes of Practice, to one of prohibiting inappropriate sales and marketing activity"

In principle, we think genuine simplification would be a good thing. In practice, however, we query how far Ofcom's proposals under this heading actually live up to their billing as simplification and a move away from a 'process' to an 'outcome-based' approach.

Ofcom offers two different rationales for the change it proposes – one concerned with its apparent inability to enforce current rules, the other concerned with the overly prescriptive nature of current rules and the burden they place on compliant CPs. On the first point, we agree in principle that if the design of the obligation is at fault it should be re-thought. On the second point, we share Ofcom's concern that the present guidelines may be overly prescriptive and inflexible but query Ofcom's apparent claim that its new approach offers significantly less prescription.

In particular, we note that Ofcom proposes to interpret its new prohibition by reference to guidelines that appear to carry over many of the process-based features of the previous approach as regards training, monitoring and so forth as touchstones of compliance. The issue is not whether compliant CPs train staff or review procedures from time to time as a matter of good practice but whether what they do is effective in weeding out mis-selling.

If Ofcom is serious about focusing on outcomes, then a prohibition on mis-selling – coupled with appropriate guidance on what constitutes mis-selling – may be a reasonable approach. We fail to see the logic, however, in proclaiming a move from a process to an outcome-based approach and then issuing guidance that suggests compliance will be judged by reference to process - which is what the proposed guidelines still appear to do in places, for example as regards training and monitoring.

Ofcom proposal 3 – "better information for consumers on the potential consequences of switching by requiring CPs to alert consumers at the point of sale, and through letters, that they may have existing contractual liabilities with their existing CP"

⁶ Use of MACs only became a general condition requirement in February 2007

⁷ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_946/

⁸ See Ofcom's consumer advice pages at

<http://www.ofcom.org.uk/consumeradvice/internet/service/switch/switching/singlesupplier/>

Vodafone strongly agrees that this aspect of customers being well informed is potentially highly significant from a customer detriment point of view and therefore supports the development of a migration process that minimises the risk of nasty surprises. We do not agree, however, that this is necessarily or mainly a mis-selling issue⁹. Communications providers can only advise authoritatively about their own terms, so in the case of termination liabilities under *existing* contracts this is mainly a job for the losing provider.

Ofcom seems to be in two minds about the effectiveness of letters – which lie at the heart of the letter facilitation process. For example, at paragraph A5.33, Ofcom remarks:

“... Although the process is largely effective, a common criticism from some stakeholders is that letters may not always provide sufficient information, that consumers may not always read or understand the implications of the letter or that letters may not be [sic] always be sent. For this reason, it is argued that consumers may not be sufficiently warned of the full implications of the transfer, including the existence of ETCs. This can result in consumers incurring unexpected ETCs once the transfer has been completed and when it is too late to avoid the changes.”

Ofcom also notes that this problem of lack of awareness is far more pronounced in relation to fixed line migrations than broadband or mobile – with some 48 per cent of fixed line complainants having no awareness of their contract length and the possibility of charges being applied for leaving early, compared to 27 per cent and 21 per cent respectively for mobile and broadband¹⁰.

The relative magnitude of the problem for fixed line telecommunications tends to suggest that the letter facilitation process is *not* working particularly well currently.

Ofcom's proposed solution is a 'belt and braces' one, in that it proposes to place obligations on the gaining CP to refer to the *possibility* of early termination charges, both during a sales call and also in writing. Vodafone agrees that some customer warning may be better than none at all. However, we do have substantial reservations about the rationale outlined at paragraphs 6.18 to 6.21 and analysis contained in the impact assessment. While we agree that some form of customer alert about the possibility of termination liabilities may be better than nothing at all, it falls some way short of informing the customer as to the actual extent of the liabilities they face.

The problem, under the letter facilitation process, is the sequence. A customer first commits to a new provider, then potentially learns of their termination liability and, perhaps, changes their mind.¹¹ If they are lucky, this will be during the cooling off period. If they are unlucky, the mistake will be more difficult to unwind. Under any alternative process whereby the customer is informed by the losing provider of the liabilities they face *before* they commit irrevocably to the gaining provider, this difficulty could be avoided altogether.

Ofcom suggests that a prompt by the gaining provider about the mere possibility of a termination liability would enable the customer to revert to the losing provider to check before proceeding. But, if followed, this would convert a single contact with the gaining provider into a minimum of three CP contacts in total – first with the gaining CP to receive the prompt, second with the LP to advise on liability, and third with the gaining CP to either confirm or cancel the switch. This compares unfavourably in terms of customer convenience and confidence to a process that equips the customer with information about their likely actual liability *before* they commit to a new CP.

Ofcom's impact assessment suggests that even its favoured option 4¹² has a marginal (marginally negative) NPV, though Ofcom seems to suggest that a neutral or moderately negative welfare effect could still be worthwhile when

⁹ There could conceivably be a mis-selling element in certain circumstances – for example if a gaining provider's sales agent deliberately misrepresented to the customer that there is "no need to worry" about any contractual liability with a former provider. However, there must be a limit to how far one communications provider can be expected to advise and warn prospective customers about their individual contractual position with another supplier of which they will have no specific knowledge.

¹⁰ See paragraph 6.9 and Figure 6

¹¹ Under Ofcom's proposed rules it appears that the losing provider would generally be prohibited from acting on a customer's request to cancel in case of change of mind and must instead direct the customer back to the gaining provider – see A8.42.

¹² See Annex 5, in particular A5.51 to A5.55.

taken in combination with other proposed measures. This does not obviously follow since it is not clear how aggregating measures that are individually negative in their predicted welfare effects become cumulatively positive.

Vodafone also queries the mechanism by which Ofcom expects benefits to flow to customers. Ofcom acknowledges at A5.43 that:

"It is possible that consumers would get more value from more accurate information at the point of sale relating to whether or not they actually do have a contractual liability and, if so, the amount of such liability. ..."

However, it then goes on to dismiss this on the following basis:

"This is likely to require a comprehensive industry-wide common database solution which is accessible by all CPs, and we do not currently consider that it is likely to be proportionate to impose such requirements. As a result we have not considered this further."

Vodafone understands that the costs and other potential difficulties associated with a common database solution could prove prohibitive, but does not understand why Ofcom has limited its consideration to the art of the possible within a gaining provider led letter facilitation process. In particular, it is unclear why Ofcom has not apparently considered alternative process options which offer a better prospect of ensuring that the customer is suitably informed about the actual position on termination liabilities before it is too late to change their mind – whether or not this is actually at 'point of sale'. It is unlikely to be pure coincidence that fixed line telecommunications fares far worse as regards customer understanding of minimum term commitments and liabilities than mobile and broadband.

Ofcom proposal 4 – "extending Cancel Other rules to cover all CPs providing fixed-line telecommunications services – at present the rules that are in place apply only to BT"

We recognise that casual use of Cancel Other without any reference to the customer would represent an abuse, but we do have substantial reservations about the regime Ofcom is proposing should now apply formally to all CPs. The main practical difficulty is in distinguishing effectively between those cases where Ofcom considers Cancel Other to be legitimate and other cases where, even if the customer is clear about their wish to cancel, Ofcom considers that use of Cancel Other would constitute an abuse.

We can understand how the present rules applied to BT have grown up, against a background of BT's dominant position in fixed line telephony and proven ability to frustrate competitors by taking it upon itself to cancel their orders without any reference to them¹³. We presume that is why Ofcom distinguishes between 'slamming' – which it then attempts to codify in detail – and other lesser forms of alleged mis-selling short of slamming in determining when use of Cancel Other is and is not permitted. Whatever the theoretical merits of the nuanced distinctions Ofcom makes between subtly different cases, it is open to question whether such rules can be put into practice consistently and reliably industry-wide in a way that makes sense to customers and those handling their calls.

Under the rules Ofcom currently proposes, it appears that if a customer contacts the losing CP and requests the migration to be cancelled for any reason other than slamming, the losing CP would be prohibited from acting on the customer's instruction except in the special case where the customer has already tried and failed to contact the gaining CP, or the gaining CP has failed to act on a cancellation request, or the migration is so close at hand that no other option remains.

Intuitively, this does have the hallmark a customer friendly-process if it is respected. Given Ofcom's apparent concern that customers may find themselves bamboozled into switching supplier without fully understanding what they are letting themselves in for, it seems odd that Ofcom should require the customer to revert to the would-be gaining provider a second time in order to attempt to correct their inadvertent mistake. Apart from being onerous

¹³ See Ofcom's discussion on background and history of Cancel Other at 2.23 to 2.41.

for any customer, vulnerable customers who may have been mis-sold¹⁴ once would potentially be put through the same experience a second time.

There is also the additional problem for a losing CP of having to interpret what the customer has told them as to what they have or have not agreed to with another CP, on what basis, what steps they may or may not have taken to resolve the issue by alternative means etc. In practice, we suspect this may not always be as clear cut as Ofcom seems to assume.

Ofcom insists that Cancel Other is an essential customer protection against slamming but seems less ready to acknowledge that it is the nature of the letter facilitation process that gives rise to the potential for slamming in the first place. Cancel Other rules appear to be a response to the symptom rather than addressing the underlying cause.

Ofcom proposal 5 – “clarifying existing general record-keeping requirements, together with a proposal requiring CPs to make, and retain voice recordings of all relevant telephone contact”

We understand Ofcom’s basic concern that, given the scope for disagreement between gaining and losing CPs and/or customers over who has agreed what, with whom, and on what basis, it may be beneficial to have an objective record than can be referred to in case of dispute. Moreover, the knowledge that such record exists – or that adverse inferences may be drawn if it doesn’t – may, of itself, encourage a responsible approach by all parties.

While it is clear that Ofcom expects all calls to be recorded and retained for a minimum of six months, the actual costs associated with such a requirement are likely to depend on what sort of retrieval facility is required which is unclear currently. Ofcom’s proposal relates both to *sales calls made by gaining CPs* and *calls between customers and losing CPs relating to Cancel Other*. In relation to the former, it is unclear how Ofcom envisages gaining CPs would be able implement a requirement to somehow tag all customer contact in a way that allows easy retrieval on the off-chance that a sale may subsequently result. We query the practicability of such a requirement and whether it is really necessary to meet Ofcom’s concern about mis-selling. In relation to the latter, we note that Ofcom considers the costs of applying an obligation to Cancel Other are likely to be higher than those of recording sales calls, and estimates that the NPV over five years for Cancel Other ranges from -£1m to £4m suggesting the option is finely balanced in terms of net welfare benefit.

While we understand that it may be difficult to police any rules relating to Cancel Other without appropriate records, we would stress the need for proportionality. We note, but do not understand, Ofcom’s assertion in its impact assessment that “not all CPs in the industry use the Cancel Other facility, and would not, therefore, fall under our proposals”¹⁵. If, as we understand, Ofcom’s proposals apply to all CPs providing fixed line telecommunications, then any CP which chose never to use Cancel Other in any circumstances would presumably be unable to protect their customers against slamming, contrary to Ofcom’s insistence on the necessity of such protection.

We also note Ofcom’s confirmation that it will not request call records as a matter of routine, only in the event of an investigation¹⁶. What is not presently clear, however, is what Ofcom’s threshold for investigation would be. Would this be limited to complaints by customers, or extend to complaints from other CPs, for example? The history of the Cancel Other rules applied to BT suggests wide scope for disagreement and differing interpretation between CPs on whether any particular application of Cancel Other was appropriate or inappropriate. Given that Ofcom may wish to have recourse to call recordings to settle borderline cases as well as ‘clear’ breaches, it would be unsafe to assume that compliant CPs will not find themselves embroiled in investigations. This is not an argument against call recording in itself, which compliant CPs may need to demonstrate compliance. However, it does little to lessen our general concern about the complexity of the regime Ofcom is proposing and whether it will actually be effective in meeting Ofcom’s policy aims in practice.

¹⁴ But not ‘slammed’ within Ofcom’s definition of the term

¹⁵ Impact assessment, p117

¹⁶ Impact assessment, p111

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