

## Ofcom consultation 28<sup>th</sup> February 2008 – Consultation Questions

***Question 1: Do you agree that it is helpful and appropriate for Ofcom to issue guidance on the application of the Regulations to consumer contracts for communications services?***

Yes. There is a need for guidance, and potentially more stringent requirements, to ensure that providers do not take advantage of the low level of understanding by consumers and the ability of the providers to impose additional charges and enforce their demands for additional charges. The guidance should however be reviewed and revised so as to be more effective.

***Question 2: Do you agree with Ofcom's proposed guidance regarding core terms and transparency?***

***Question 3: Do you agree with Ofcom's proposed guidance (including any administrative thresholds we have set) on non-core terms to which we apply the test of fairness?***

No. The proposed guidance is inadequate, does not reflect the concerns of consumers and others expressed in July 2006 and does not constitute effective regulation.

In particular, the general approach of the consultation, that a non-core term liable to review for fairness can be dealt with by the two devices of "transparency" in the sense of clearer statement of charges and "conversion" in to a core term not so liable, is misplaced, and will have no effect to control or limit charging activity by Providers. Rather, it endorses a dangerous trend by Providers to introduce ever more charges for so-called "customer facing" services in order to offset the effects of pricing competition in relation to landline, telephony, broadband etc.

Further, the policy underlying this whole section of the consultation should be reviewed by Ofcom in the light of the recent decision of the High Court in *Office of Fair Trading v Abbey National PLC and others* (April 2008)

***Question 4: Are there any other issues that are covered by the Regulations which Ofcom should give guidance on?***

Yes. Ofcom should give guidance to ensure that any charges are levied in a manner that stands up to scrutiny in the way set out in para 3.112 of the Consultation document. Ofcom should also rule that any charge which is challenged and does not immediately and easily pass a test of fairness or reasonableness should be withdrawn until it does pass such a test.

***Question 5: Do you agree that three months is an appropriate period during which suppliers can adjust their terms and marketing practices to ensure they are in line with Ofcom Guidance?***

Yes.

## Ofcom Review of additional charges 2008

### Response document

- 1 This document seeks to respond, with particular reference to the levying of charges by communications and broadband etc service providers (“Providers”) of non-Direct Debit payment and late payment charges, to the consultation document (“Consultation”) issued by Ofcom on 28<sup>th</sup> February 2008. Reference is made to the *Unfair Terms in Consumer Contracts Regulations 1999* (“Regulations”).
- 2 The low level of understanding of these charges by consumers as set out in the Consultation is noted as well as the lack of transparency in presenting them to consumers. However, the Consultation fails to recognise that consumers by and large do not have the information and the expertise to be able to address the sort of complex issues that Ofcom policy here and elsewhere (e.g. in its Regulatory Statement dated July 2006 on the lapse of Retail Price controls on BT) describe.
- 3 The charges the subject of this response have one thing in common; they involve the introduction of additional charging for part of the cost base of doing business that previously was included in the charges made by Providers for the provision of the overall service of landline, telephone calls, broadband etc. These charges are part of a trend by Providers to offset competition in the market for services such as telephone calls, broadband etc by introducing charges for any part of the Providers’ cost base that has or can be claimed to have a customer-facing element. To allow these charges, especially in the absence of price controls, sets a precedent that can be exploited by Providers in other areas.
- 4 Throughout this response, the example is used of certain charges levied by BT, as being the Provider over which a high proportion of the complaints to Ofcom relate (*Consultation para 3.113*) but the responses are intended to be of general application. In relation to the specific of BT, it is noted that in July 2006 Retail Price Controls were allowed to lapse in reliance on undertakings relating to primarily the intra-industry market. However, the Regulatory Statement by Ofcom in July 2006 shows that BT still has dominance in the residential fixed line market (Annex 3) and the introduction by BT of the charges the subject of

this response shows that such undertakings have no effect on the direct relationship as between BT as a Provider and the consumer.

### **Non-Direct Debit payment charges**

- 5 Taking BT as the example, these charges were introduced by BT as an existing Provider at the same time as it was forced by market conditions to reduce the price of a “core” service, landline and broadband. In a letter to the respondent dated 21<sup>st</sup> March 2008 BT stated:

*“On May 1<sup>st</sup> [2007] we reduced the price of monthly line rental by £1.00 and broadband by £1.00 for customers who don’t pay by Direct Debit. At the same time, a separate payment processing fee of £1.50 a month was introduced. This is not a penalty charge but a separate fee for methods of payment which cost us more to process*

*So the net effect is only 50p a month more for anyone who just has a phone line with us, but anyone who takes broadband as well will be 50p a month better off”*

This approach was introduced pursuant to a unilateral power reserved to the Provider to amend its prices terms and conditions. Irrespective of the issue (relevant to “fairness” under the Regulations) of whether the charges were introduced at the time of making a contract or pursuant to such a power during the contract, the introduction of such charges involves several issues.

- 6 As a side issue, the reduction in line rental/broadband cost was not stated by BT to have been offered to customers who do pay by Direct Debit. If it was so offered, the statement is deliberately misleading and meaningless and if it was not so offered, then the statement suggests differential pricing methods in respect of “core” services for customers who do/do not pay by Direct Debit.
- 7 As to the main issues, firstly, the bundling of the introduction of a separate charge with a reduction (presumably driven by market competition) in the charge for “core” services is an attempt to disguise the fact that a price increase was being implemented, certainly (as the Provider concedes) to anyone who only takes a basic landline from the Provider. In effect, it is a price increase for a landline consumer and a reduced price decrease for a broadband consumer. As noted

in para 3 above, these charges are part of a trend by Providers to offset competition in the market causing a reduction in charges for services such as telephone calls, broadband etc by introducing new charges for any part of the Providers' cost base that has - or can be claimed to have - a customer-facing element. **This is an anti-competitive practice and trend by Providers that could be exploited in other areas and should not be endorsed by Ofcom as part of the discharge of its regulatory powers.**

- 8 Additionally, the introduction of any such charge by the use of a unilateral power, post-contract, to amend terms and conditions is in effect a reclassification of services and an abuse of the power which cannot in fairness be used to achieve that objective. **In any event such introduction does not comply with the Regulations.**
- 9 In a wider sense, no effort has been made by the Provider (in this case BT, but also others) to justify a separate charge in principle. Notwithstanding the comment made in para 7 above, Ofcom proposes to accept that a charge for such services should be allowed but has not addressed the justification for reclassifying so as to levy a charge in principle for what is a pre-existing service and heading of cost (i.e. accepting payment by non-Direct Debit means), nor the potentially dangerous precedent that it would set. In effect, Providers would be allowed by Ofcom to reclassify items at will so as to move items to or from one heading of "core" or "non-core" as suits them from time to time. In many cases, such classification would be a transparent attempt to move a charge for non-Direct Debit payment in to a category where it is said by Ofcom that Ofcom cannot review it under the Regulations (see *Consultation paras 3.101 and 3.103*). **Ofcom's proposal to endorse this approach in principle is inappropriate.**
- 10 Additionally, no effort has been made by the Provider (in this case BT, but also others) to justify the amount of a separate charge. The costings underlying the charges (which as identified above are in the case of existing Providers such as BT existing costs, not additional costs) submitted to Ofcom are hidden behind a layer of confidentiality such that consumers will never be given access to them. Moreover, the Consultation identifies certain costs that should be excluded from any additional charge. In practice, consumers will have no way of evaluating the amount of such charge and the proposal of Ofcom, even assuming all other points were accepted, must result in Ofcom simply assuring consumers that they should

not worry, either in overall terms or in terms of excluded items, as Ofcom have looked at the method of calculation of the charge and it is fair. **Even assuming all other points were accepted, in order to assure consumers in the context of Providers' claims to commercial confidentiality on costs, Ofcom would have to give an express assurance to consumers on the issue of the amount of such charges, Provider by Provider, and to do so in anticipation of reliance on it by consumers. As to the specific case of BT, this would run directly contrary to the decision by Ofcom in July 2006 that any form of price control by Ofcom at the retail level was not required, and would be a reversal of policy.**

11 Additionally, as to calculation of the separate charge by BT or any other Provider for non-Direct Debit payment:

- any charge based on a monthly sum (e.g. £1.50 per month) does not reflect the costs of providing the service to the consumer but is some notional allocation of some (in many cases) unclear costs - see *Consultation paras 3.78 and 3.79*. It can only be purely a notional allocation across consumers of unproven costs allegedly incurred across the Provider's customer base or a part of it;
- any charge which does not allow for the fact of one payment covering more than one account (e.g. one cheque covering several bills for several lines) is charging more than once for what is only one service provision (e.g. the receipt, cashing etc of one cheque) and cannot be fair in that context

**The proposals by Ofcom do not address these issues but simply endorse the approach of overall allocation by Providers of "their own cost allocation figures" (*Consultation para 3.79*). This proposal is inappropriate.**

12 The Consultation takes no account of the fact that, in certain circumstances, a Provider may be a monopoly provider of a service or some important element of a service or at least in a dominant position, such as in the provision of a basic landline. The availability of a (BT) landline is a precondition, for example, to the supply of telephony services by some other Providers and which in many ways is an essential service. In *para 3.113* of the Consultation Ofcom record their previous conclusion that there is competition in the provision of telephony services (despite the continuing dominance of BT of the residential fixed line

market as set out in Annex 3 of the Ofcom July 2006 Regulatory Statement on retail Price Controls) but do not reflect the fact that a Provider may - in relation to a consumer at the level of the consumer/Provider relationship - be a monopolist, or in a dominant position, as to the landline through which such telephony service is delivered. In these circumstances there is no real competition at the consumer level which can be relied upon to control or otherwise limit the Provider's scope for charges in so far as they relate to such landline, and the Provider is able to enforce his payment requirements through the threat of loss of line and hence of any service at all. In so far as such circumstances exist, they would materially and adversely impact the stated justification for charging (*Consultation para 3.77*) that charges depend on the market conditions (i.e. what is charged by the competition) and the likelihood of the consumer going elsewhere somewhat irrelevant. **The proposal in the Consultation to ignore the effect of this monopoly or dominant position at the level of the consumer/Provider relationship is inappropriate.**

- 13 The approach of Ofcom in its Consultation is to address all these issues through the primary mechanisms of "transparency" and moving the charge in to "core" service which Ofcom could not then review. As to transparency, *Para 3.88* of the Consultation proposes that charges such as non-Direct Debit charges should be made more clear and that provided this is done, Ofcom would not intervene in pricing. In substance, Ofcom suggest that the pricing of this sort of item be moved back in to the area of "core" service so as not to be subject to the terms of fairness (*para 3.101 and para 3.115*). For the rest, Ofcom would leave it all to a competitive market (*para 3.115 third bullet point*).
- 14 This approach does not address any issues of substance such as raised above in paras 2 to 12 of this submission. Rather it simply proposes a procedural method of sidestepping all of those issues by (i) making the existence of payment method and related charge more easily read by consumers and (ii) moving them in to part of "core" service issues in which Ofcom would not interfere and would not be able to review (*Consultation paras 3.101 and 3.103*), whilst at the same time not allowing consumers to have the information to assess "fairness", but merely to understand that the charge exists and how much it is. **This is an inappropriate approach by Ofcom to addressing the issue and effectively constitutes an abandonment by Ofcom of any responsibility to ensure the terms of business in this respect are fair to consumers. In so far as this approach may have the**

effect (or be desired by Providers to have the effect) of precluding an investigation of an individual Provider's charges such as set out in *Consultation para 3.112* either by Ofcom or by The Office of Fair Trading, it is equally inappropriate.

15 As a policy matter, Ofcom's proposal refers throughout to "transparency" of the charge but on examination this means only transparency of the presentation of the charge's existence and possibly its amount, not of its justification or its calculation or any element of fairness in relation to either such aspect. As identified above, a non-Direct Debit charge will therefore be capable of being justified to consumers -

- in principle, simply on the general basis that Providers say that they incur extra cost (notwithstanding that they may be merely charging for some of their existing cost base and using the charge to counteract the competitive effect of lower charges on the basic services of landline, telephony or broadband); and
- as to amount, simply on the basis that it is derived from costings that the consumer is not allowed to see but is (or is not) or may be (or may not be) assured by Ofcom is a fair charge (see para 10 above) and/or does not include any of the elements that Ofcom's Guidance will say (see *Consultation para 3.108* for example) should be excluded from the charge.

**In substance, it enables a Provider to make a charge by the simple process of saying he has a cost and wants to charge. This is a dangerous precedent the endorsement of which by Ofcom would be inappropriate as a matter of regulatory policy.** This approach, in the extreme, could be used to justify any charge for any element of a Provider's service that has or can be claimed to have any customer-facing element by presenting it as part of the "core" service and, given the absence of costing information, to levy that charge at any amount he would say is appropriate (say, instead of £1.50 per month for BT, £3.00 per month or maybe even £4.50 per month).

16 If adopted the Ofcom proposal will enable consumers, at best, only to review charges from Providers and compare them relative to each other and in any event it will only enable this if all charges and services by all Providers are required to be presented in a rigid common and coherent form. **This is not therefore an**

issue of “fairness” of terms in a consumer contract, merely one of presentation and classification. Whatever Guidance Notes may say, this proposal does not constitute effective regulation.

- 17 Additionally, it is the tendency of commonality of charging as part of a service that has given rise to problems in the context of other types of service provision, notably banking charges as reflected in the recent case in the High Court in *Office of Fair Trading v Abbey National PLC and others* (April 2008). This decision has decided many issues which are relevant here (e.g. over “adequacy of price”) and left some open (for example the issue of timing of entering in to a contract). In any event, the general approach of Ofcom on the issue of non-Direct Debit charges as reflected in the Consultation should be reconsidered in the light of the decision in *Office of Fair Trading v Abbey National PLC and others* and the outstanding issues still to be decided.

#### Late payment charges

- 18 Any charge such as a late payment charge which is imposed must reflect the fact that it is a payment sought on a breach of contract by the consumer in not paying by the due date for payment, however the charge be expressed. As such, it must not be a penalty in any form, and *Office of Fair Trading v Abbey National PLC and others* decided that some of the charges in question there could not be a penalty in law because there was no breach of any obligation on a bank’s customer. In the case of late payment to a Provider here, there is by definition a breach of an obligation to pay (*Consultation Guidance para A5.47*). Hence, a Provider must therefore in law justify any late payment charge as being a genuine pre-estimate of the loss to it arising from that particular breach of contract by the consumer, irrespective of any issue of “fairness” under the Regulations.
- 19 It is commonly accepted that any invoicer such as a Provider should be entitled to charge interest on late payment of his bills. However, it is equally the case that interest is regarded as the sole compensation for late payment, plus court fees and costs on recovery etc if proceedings are commenced. Any late payment charge on its own in lieu of interest, and any additional charge over and above a charge to interest, would not be justified and the *Consultation Guidance para A5.50* is inappropriate in so far as it suggests that such a charge would be



justified, especially - but not exclusively - when levied in addition to interest for late payment.

- 20 *Consultation Paras 4.40 and 4.49* partially approach this issue **but in general this issue of penalty payments on a breach is not addressed by the Consultation.**
- 21 Additionally, although *Consultation para 4.44* says charges should be set fairly and reflect costs only, it says nothing about how such costs will be calculated and it may well be that (as for non-direct Debit payment charges) Ofcom is proposing to endorse the approach of overall allocation by Providers of “their own cost allocation figures” (see *Consultation para 3.79*). Additionally, the best practice Guidance states that “... .. *Ofcom also considers it is important that suppliers make it very clear to consumers what the late payment charge is in advance of the consumer incurring the charge (i.e. at the point where the consumer can still avoid the charge). For example, we would expect any red bill, or reminder call, to provide this information.*”

This talks of the charge being identified “at the point where the consumer can still avoid the charge”. **This proposal does not deal with the issue of how costs will be calculated and does allow for charges to be set out at a time post-contract. Neither of these issues complies with the requirement of “fairness” to the consumer as required by the Regulations.**

- 22 Additionally, the approach suffers from the same issues as identified in paras 2 to 16 above. **The approach of Ofcom on this issue is therefore equally inappropriate.**
- 23 **Additionally, in view of the decision in *Office of Fair Trading v Abbey National PLC and others*, the approach of Ofcom on this matter should be reconsidered.**

## Summary

- 24 These two types of charges are part of a trend by Providers to offset competition in the market for services such as line rental, telephone calls, broadband etc by introducing charges for any part of the Providers’ cost base that has - or can be

claimed to have - a customer-facing element. Ofcom's proposal to allow these charges, especially in the absence of price controls, sets a precedent that can be exploited by Providers in other areas. **This is not appropriate as a matter of regulatory policy.**

25 Additionally, Ofcom's proposal in its Consultation effectively to deal with the issues solely through "transparency" of presentation and putting them in to "core" services so as to be beyond Ofcom's reach as summarised in para 14 above is an inappropriate discharge of Ofcom's responsibilities to consumers. **This is not effective regulation.**

26 The proposal of Ofcom to dealing with the two types of charge addressed in this response is therefore inappropriate for the reasons identified above. In particular, and without limiting the above, the approach adopted by Ofcom of "transparency" of charges is one of presentation or notification of charges without evidence or substantive support and does nothing to enable even a reasonably intelligent and informed consumer to understand and evaluate the fairness of any charges. **This does not address the issue of "fairness" to the consumer in his relationship with his Provider.** Nor does the approach address issues of penalty in law or the issues arising from the recent decision in *Office of Fair Trading v Abbey National PLC and others*. **The proposals set out by Ofcom should be reconsidered in any event**

27 If this proposal by Ofcom is adopted on these two types of charge, it leaves consumers at the mercy of Providers who will be able –

- to say that a charge is both due and fair because the Providers say so and to give no justification; and
- to do so even if the charges are a multiple of those currently being sought by Providers; and
- to enforce their requirements for payment in many cases by threatening withdrawal of service; and
- to do so where Providers may be in a monopoly or dominant position in relation to some aspect of what is a supply of an essential service (such as basic line provision) where there is little competition or even the consumer has no alternative.

This leaves the consumer in a position where, unless the Office of Fair Trading is both able and willing to challenge Providers individually or collectively, the consumer has no protection against such charges. **This is not effective regulation**

28 In its Regulatory Statement of July 2006, Ofcom noted the comment by the majority of consumers that they did not agree with the proposal to let Retail Price Control on BT lapse, being concerned that it would enable BT to increase prices for services for which they (i.e. BT) asserted consumers had no choice, such as line rental. Ofcom also noted that Post Office Ltd commented that appropriate safeguards needed to be put in place and monitored to prevent market distortion by BT through abuse of its dominant position. **The two types of charge addressed in this response demonstrate the validity of those two comments and the proposal of Ofcom in its Consultation ignores them. This is not effective regulation.**

29 **Ofcom should reconsider the position set out in its Consultation and propose measures that will not have the effect set out in para 27 above, including in particular a detailed addressing of the issues raised in this response so as to demonstrate that Ofcom is regulating effectively and not leaving consumers to deal unprotected with the consequences of the fears expressed by consumers and Post Office Limited in July 2006.**