



Broadband migrations: enabling consumer choice

This statement includes a notification of a new
General Condition 22: Service Migrations

Statement and
notification

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Section 1

Summary

The UK Broadband market

- 1.1 Broadband has had a profound effect on the way that many people live their lives in the UK today. The ways in which we communicate and the ways we access information and entertainment services have been transformed by ‘always-on’ connections to the internet. The availability of increasingly low-cost, high-speed broadband has been a particular spur to mass market takeup of online services. Latest figures indicate that around 11.5 million UK households subscribe to broadband services, and this number continues to grow at a rapid pace.
- 1.2 New regulatory and industry initiatives – for example, the unbundling of the local loop – have created a competitive market in broadband, resulting in the availability of cheaper, better and faster services. However, if consumers are to continue to see the benefits of competition, they must be able to shop around – and, once they have found a good deal, to switch broadband providers without undue effort, disruption or anxiety.
- 1.3 Where consumers don’t have access to processes that let them switch easily, they may suffer inconvenience and distress. If consumers start to think that switching providers carries this kind of risk, the competitive process can be dampened in a way that means all consumers will suffer. Competition is only effective where customers can punish “bad” providers by taking their custom elsewhere, and reward “good” providers by staying where they are. If switching is difficult, competition may, over time, fail to ensure that consumers receive the benefits they should be able to expect.

Broadband migrations

- 1.4 Ofcom considers that it is vital to support consumers’ ability to migrate between products and providers – so that customers can consider available options and change their broadband service or provider when they want to.
- 1.5 The majority of broadband service changes go through seamlessly and with relatively little effort from the customer.
- 1.6 However, evidence suggests that many consumers have found it difficult to switch between broadband suppliers or to move home without experiencing problems. Some have lost their broadband for several weeks, or been given confusing and contradictory information about what they need to do to migrate.
- 1.7 Customers are continuing to subscribe to broadband services for the first time, and increasing numbers are now likely to be reaching the end of their initial contracts. With the ever-increasing range of new packages and better deals, this means that more and more customers will want to be able to switch provider if they find a better deal. This, in turn, points to a risk that more and more customers may face difficulty when seeking to change broadband suppliers. Broadband customers may even decide not to switch rather than risk disruption to their service.

- 1.8 During 2005, Ofcom saw a steady increase in the number of customers complaining about problems related to broadband migrations. Ofcom considered that this trend warranted urgent investigation and action and launched the Broadband Migrations Review (“BMR”) in April 2006 to understand the situation further and consider whether action could be taken.
- 1.9 On 17 August 2006, Ofcom published the consultation document *Broadband migrations: enabling consumer choice* (“the consultation”), which set out the findings of the BMR and proposed new regulation, in the form of a new General Condition, to address some of the problems associated with broadband migrations.
- 1.10 After considering stakeholders’ responses to the consultation and further developments in the market, Ofcom has concluded that it is appropriate for it to take action in two ways:
- the introduction of General Condition 22: Service Migrations, which will come into force in two months (**14 February 2007**); and
 - continued co-regulatory work on outstanding process issues, with a further consultation on additional broadband migrations processes – in particular, an alternative mechanism for the release of Migration Authorisation Codes (“MACs”) – likely to follow after General Condition 22 comes into force.
- 1.11 This statement explains why Ofcom has reached this decision and how it expects General Condition 22 and further co-regulatory work to address consumer harm associated with broadband migrations.

General Condition 22: Service Migrations

- 1.12 General Condition 22 consists of two elements:
- a requirement on all Communications Providers to comply with the MAC process; and
 - where the MAC process does not apply, a requirement on all Communications Providers to comply with a number of high-level obligations designed to address consumer harm associated with broadband migrations.
- 1.13 Broadband service providers will now be required to follow the MAC process for all migrations to which it applies.
- 1.14 This means that broadband service providers who are losing a customer will be required to provide MACs on request in most cases. They will not be able to withhold MACs where the customer owes them money (“debt blocking”) or charge for MACs. At the same time, however, customers need to make themselves aware of their responsibilities under the contract that they have with their broadband provider – which may for example require them to pay an early termination charge if they wish to leave their contract before the agreed date.
- 1.15 Broadband service providers who are gaining a customer must, when presented with a valid MAC, use the MAC process to ensure a seamless transfer. This does not mean that broadband service providers must take on any customer. They are entitled to refuse to provide service, for example, to someone who they consider to be a bad

debt risk. However, where they are content to take on a customer they must use the MAC process where it applies.

- 1.16 General Condition 22 will also impose new obligations on some wholesale broadband providers. Currently, consumers may suffer harm where their broadband service provider is unable to supply MACs because its wholesale provider is refusing to issue it with MACs. When General Condition 22 comes into force, however, wholesale providers will also be required to supply MACs to *their* customers – broadband service providers and resellers – on request.
- 1.17 Where the MAC process does not apply (for example, for migrations to and from connections based on MPF, for home moves, or where there is no live broadband connection), the high-level obligations in General Condition 22.2 will require broadband providers to:
 - a) facilitate the migration (or where applicable, connection) of the Broadband Service in a manner that is fair and reasonable;
 - b) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out within a reasonable period;
 - c) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out with minimal loss of the Broadband Service; and
 - d) assist with, and facilitate requests for, the migration (or where applicable, connection) of a Broadband Service provided by another Communications Provider, in instances where the other Communications Provider has failed to, or refused to, comply with the MAC Broadband Migrations Process, in a manner that is fair and reasonable.
- 1.18 Because General Condition 22 will be a regulatory requirement, Ofcom will have the power to formally investigate potential breaches and, where appropriate, to take enforcement action against broadband providers who have failed to fulfil their obligations.
- 1.19 This means that General Condition 22 will enable Ofcom to address the operational problems not related to the MAC process that we discussed in the consultation.
- 1.20 For example, Ofcom will be able to investigate a possible breach:
 - where it is clear that a particular provider could have taken action to address weaknesses in its processes or systems that currently lead to problems for consumers with broadband migrations (e.g. tag on line) but has failed to do so;
 - where the industry has agreed a process to support broadband migrations, and a particular service provider is failing to use it;
 - where a wholesale broadband provider has not acted reasonably and proportionately to help consumers following the failure of a retail provider or in the event of a dispute – for example where it could have issued MACs without incurring significant costs but did not do so.
- 1.21 The high-level obligations in General Condition 22.2 require broadband providers to do what is fair and reasonable in a particular case. Ofcom will therefore consider any of the possible breaches listed in the preceding paragraph on a case-by-case basis.

Further work by industry

- 1.22 While General Condition 22 will address many of the problems associated with broadband migrations, it will not solve all of them.
- 1.23 Where a problem requires further input from the industry to design, test and implement new processes, it may not be appropriate to rely on regulation alone to deliver results.
- 1.24 In particular, Ofcom will work with the industry to design an appropriate process for the provision of MACs by an alternative source if the customer's broadband service provider fails, or refuses, to provide them. Ofcom does not at this stage have a view about what such a process would look like, and considers that there may be a number of possible alternatives. Ofcom plans to discuss plans for appropriate co-regulatory arrangements with the industry early in 2007.
- 1.25 Following further work by the industry, Ofcom expects to consult again in due course to bring a process for the provision of MACs by an alternative source within the scope of formal regulation. However, Ofcom recognises that the introduction of General Condition 22, combined with further work undertaken by the industry, may, over that six-month period, bring consumer harm associated with broadband migrations down to a level where further regulation is not appropriate. Ofcom will therefore only undertake a further consultation if it remains of the view that further regulation is a necessary and proportionate consumer protection measure.

Section 2

Background

Migrations, switching and mis-selling

- 2.1 In order to benefit from competition and innovation, consumers must be able to move easily between service providers and between products, and must be adequately protected from dishonest sales and marketing behaviour by communications providers.
- 2.2 On 16 February 2006 Ofcom published the consultation document *Migrations, switching and mis-selling* (the “Migrations Consultation”)¹. The Migrations Consultation reviewed current approaches to migrations, switching and mis-selling across transferable voice and broadband products.
- 2.3 Ofcom’s initial view, as set out in the Migrations Consultation, was that there may be good reasons for moving towards a single switching process applying to all transferable voice and broadband products. The Migrations Consultation invited respondents’ views on three possible forms of the single process, including a process based on the Migrations Authorisation Code (“MAC”) process that the industry has developed for broadband migrations.²
- 2.4 In response to Ofcom’s proposals, the industry set up a dedicated Migrations Industry Working Group (the “migrations IWG”) to consider different possible long-term arrangements. The migrations IWG reported back in October 2006, proposing three possible options.
- 2.5 Ofcom is in the process of commissioning consultants to better inform its consideration of the options proposed by the migrations IWG.
- 2.6 Ofcom intends to publish a further statement and consultation next spring, setting out its findings to date and consulting on next steps. This project will also review the scope of the Migrations, Switching and Mis-selling project in light of respondents’ comments to the earlier consultation and industry developments. In particular, it will consider whether it is appropriate for migrations to and from cable broadband to be brought within the scope of future arrangements currently under discussion.

Broadband moves and consumer harm

- 2.7 Over the course of 2005 Ofcom started to see an increase in the number of consumers contacting the Ofcom Contact Centre (“OCC”) about issues related to migration between broadband services.

¹ *Migrations, switching and mis-selling*, published at:

<http://www.ofcom.org.uk/consult/condocs/migrations/migrations.pdf>.

² The MAC process is a process that enables customers to switch easily between broadband providers with minimal disruption to their service. A MAC is a unique code that the customer obtains from his existing provider and gives to his new provider to arrange for the migration of the same underlying service to the new provider. The MAC process was developed by the industry and is currently set out in a voluntary code of practice which is followed by the majority of broadband SPs (see Section 4 of the consultation and Annex 4 of this document where a copy of the code is reproduced).

- 2.8 The largest source of complaints to OCC overall relating to broadband in 2005, and for much of 2006, was tag on line. "Tag on line" is a term used by Ofcom and the industry to describe a situation where a consumer cannot order broadband because there is (or appears to be) another broadband service provider already providing broadband on that line, or there is an incompatible product on the line. Tag on line affects people moving house, customers who want to switch broadband service providers but have not used the MAC process, and even customers ordering broadband for the first time. Although problems with tag on line are not always the result of an attempted broadband migration, they seem to have their source in the underlying processes so Ofcom considers that it is appropriate to consider them together.
- 2.9 Tag on line became a significant issue for Ofcom in early 2005. The number of consumers contacting OCC about tag on line rose steadily over the course of last year and, by November 2005, represented the most significant issue that OCC was dealing with by call volume.
- 2.10 The next biggest source of OCC cases related to broadband migrations over the period was the MAC process. The most frequent complaint about the MAC process was that a broadband service provider had failed or refused (for various reasons, including refusal to issue because the customer is still in contract, or because the customer owes it money) to issue a MAC at the customer's request.
- 2.11 The MAC process is set out in a voluntary code of practice, the Broadband Service Provider Migration Code of Practice (referred to in this document as the "voluntary code") developed by the industry.³ Consumers have, until now, relied on the goodwill of broadband service providers for the provision of MACs. Although it has been widely adopted, there has been no formal obligation on broadband service providers to sign up to, or to comply with, the voluntary code, and Ofcom has no power to investigate or take action against alleged breaches of the voluntary code.
- 2.12 The only place a customer can obtain a MAC is from their current broadband service provider. This can lead to difficulties where the customer's broadband service provider (or in some cases the retail broadband service provider's supplier) fails, or refuses, to issue MACs.
- 2.13 As the market has changed, problems relating specifically to migrations involving connections based on SMPF or MPF have started to appear as a distinct category.⁴ This means that some customers are having problems because of the underlying technology used to deliver their service, which would otherwise be invisible (and irrelevant) to the customer. One recent example is difficulty migrating away from an SMPF connection – due to a combination of problems with underlying processes and conflicting information being given to consumers.

³ Published at: http://www.ofcom.org.uk/advice/codes/bbm_cop/ and reproduced at Annex 4 of this statement.

⁴ SMPF (shared metallic path facility) is a product offered by Openreach that allows a competing provider to use BT's copper wires to provide end customers with broadband services. MPF (metallic path facility), also known as "full LLU", is a product offered by Openreach that allows a competing provider to provide the customer with both voice and data services over BT's copper wires.

The Broadband Migrations Review and the consultation

- 2.14 Alongside the longer-term Migrations, Switching and Mis-selling project, Ofcom considered that there was a more immediate need to look at broadband migrations processes, with the aim of addressing consumer harm in the short term.
- 2.15 In April 2006 Ofcom initiated a new project, the Broadband Migrations Review (“BMR”) to assess the effectiveness of industry-wide processes for customers signing up to, and switching between, broadband service providers⁵.
- 2.16 Ofcom set out the findings of this project, and proposals for additional regulation to specifically address problems with broadband migrations, in the consultation document *Broadband migrations: enabling consumer choice* (referred to in this statement as “the consultation”), published on 17 August 2006.
- 2.17 The consultation proposed a new General Condition 22 on Service Migrations with two main components:
- i) a set of high-level principles requiring broadband providers to:
 - a) facilitate the migration (or where applicable, connection) of the Broadband Service in a manner that is fair and reasonable;
 - b) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out within a reasonable period;
 - c) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out with minimal loss of the Broadband Service; and
 - d) assist with, and facilitate requests for, the migration (or where applicable, connection) of a Broadband Service provided by another Communications Provider, in instances where the other Communications Provider has failed to, or refused to, comply with the MAC Broadband Migrations Process, in a manner that is fair and reasonable; and
 - ii) a compulsory codified version of the MAC process, building on the existing voluntary code and including some responsibilities for wholesale broadband providers as well as retail broadband service providers.
- 2.18 Ofcom invited stakeholders to submit comment on its proposals by 5 October 2006. Ofcom received 165 responses to the consultation. Stakeholders’ comments are discussed in detail in Section 4.

Ofcom’s conclusion and outline of this statement

- 2.19 After considering stakeholders’ responses to the consultation and further developments in the market, Ofcom has concluded that it is appropriate for it to take action in two ways:

⁵ http://www.ofcom.org.uk/media/news/2006/04/nr_20060413.

- the introduction of General Condition 22: Service Migrations, set out at Annex 1, which will come into force in two months after the publication of this statement (14 February 2007); and
 - continued co-regulatory work on outstanding process issues, with a further consultation on additional broadband migrations processes – in particular, an alternative mechanism for the release of MACs – likely to follow after General Condition 22 comes into force.
- 2.20 Section 3 summarises a number of developments in broadband migrations that were not considered in the consultation and sets out a number of current concerns about potential consumer harm associated with broadband migrations.
- 2.21 Section 4 discusses responses to the consultation.
- 2.22 Section 5 explains the basis for our decision to introduce new regulation; how Ofcom expects General Condition 22 to operate in practice; how it intends to enforce General Condition 22, and the types of conduct that General Condition 22 is expected to capture.
- 2.23 General Condition 22 will apply only to broadband provided over BT copper loops using DSL technology, including broadband connections based on:
- SMPF and MPF provided by Openreach;
 - wholesale bitstream products, such as IPStream and DataStream, provided by BT Wholesale and other wholesale broadband providers.
- 2.24 As discussed at paragraphs 2.24 and 2.25 of the consultation, migrations to and from cable broadband are not within the scope of this exercise and nor are complex migrations and bundled services. However, Ofcom recognises the importance of adopting a common approach to all types of broadband migrations as far as is possible, and (as noted at paragraph 2.6 above) is currently considering whether cable broadband should be brought within the scope of its Migrations, Switching and Mis-selling project.

Section 3

Broadband migrations: current issues

- 3.1 This section outlines a number of developments since the consultation was published in August that are relevant to the actions that Ofcom will take to address problems with broadband migrations.

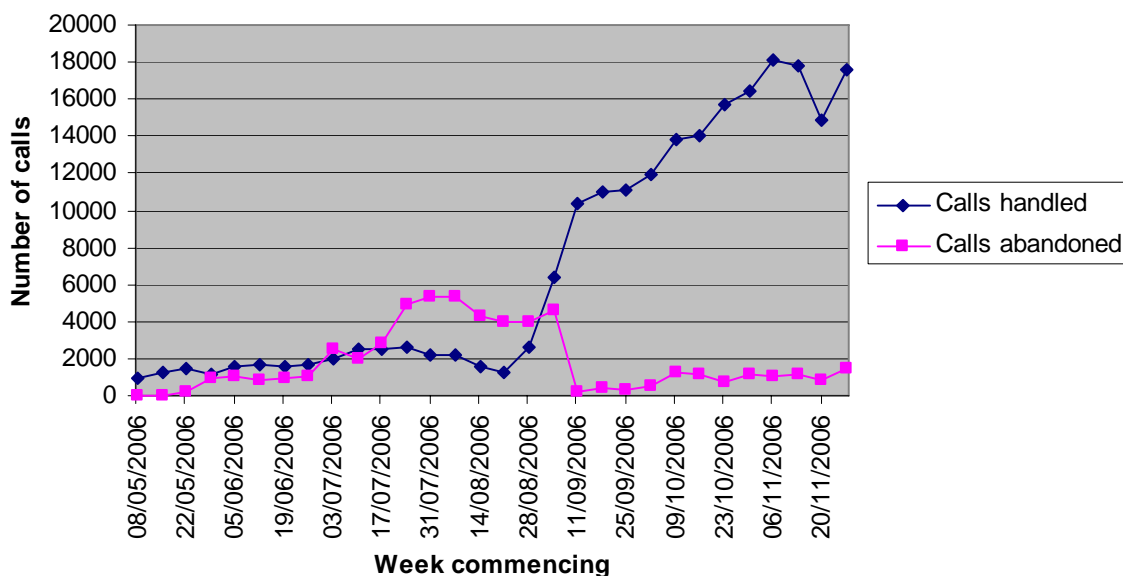
Tag on line developments

BT helpdesk trends

- 3.2 BT's tag on line helpdesk first started taking calls from consumers in January 2006. Since then, BT has introduced a number of developments to the way the helpdesk operates and the data it collects.
- 3.3 In April 2006 BT changed the process, enabling consumers to access the helpdesk directly (after obtaining the number from Ofcom's website or from their own service providers) instead of having to go through Ofcom Contact Centre ("OCC").
- 3.4 In May 2006 BT introduced a new process enabling broadband service providers to contact the helpdesk on their customers' behalf. This process is supported by a code of practice published by BT (which forms part of BT's Terms and Conditions of Service for electronic provision of data from the helpdesk), which requires participating service providers to obtain appropriate validation from their customers and to commit to using the information responsibly.
- 3.5 Customers can still contact the helpdesk directly, regardless of whether their chosen broadband service provider is participating in the code of practice.⁶
- 3.6 Figure 1 below shows numbers of calls handled each week by the BT helpdesk since May 2006 (which is when the helpdesk started to report figures on a weekly basis). These figures include calls direct from consumers and calls made to the helpdesk by broadband service providers on their customers' behalf.
- 3.7 As Figure 1 suggests, tag on line continues to be a problem for many consumers.
- 3.8 While calls volumes have risen sharply, the harm caused to individual consumers has fallen, as the helpdesk provides a single point of contact for consumers to get tags removed.

⁶ Advice for customers affected by tag on line is published on Ofcom's website at:
<http://www.ofcom.org.uk/complain/internet/tagmarker/>

Figure 1: Calls handled by BT tag helpdesk (weekly), May-November 2006



Source: BT

- 3.9 Even though the burden of addressing consumers' problems with tag on line has now shifted from OCC to BT, OCC continues to receive large numbers of complaints about tag on line.

OCC trends since the consultation

- 3.10 Section 4 of the consultation set out Ofcom's evidence for consumer harm associated with broadband migrations. Paragraph 4.5 of the consultation noted that OCC had seen an increase in cases relating to broadband migrations throughout 2005. Between 1 May 2005 and 30 April 2006 OCC logged 27,398 cases related to broadband migrations (including 15,728 about tag on line) and 713 further cases related to LLU (SMPF and MPF) migrations.
- 3.11 OCC continues to receive large numbers of complaints from consumers about broadband migrations. Using the same categories that we used to calculate the figures in the preceding paragraph, OCC logged 13,687 cases related to broadband migrations (including 9,768 about tag on line) and 1,535 cases related to LLU (SMPF and MPF) migrations between 1 May 2006 and 30 September 2006.
- 3.12 In October 2006, OCC adopted a new system for recording customer complaints. Between 1 October and 30 November 2006, OCC recorded 1,627 complaints about the MAC process and 2,402 complaints about tag on line in the wider broadband category.
- 3.13 It is clear that broadband migrations continue to represent the largest telecoms issue for OCC. There appear to be several trends that are relevant in light of the proposals Ofcom made in the consultation.
- 3.14 As noted at paragraph 3.12 above, the MAC process continues to generate large numbers of complaints. Anecdotally, a large proportion of those appear to be generated by inadequacies in the underlying processes for migrating away from SMPF connections and confusion driven by those inadequacies. Complaints have

typically been from customers who had understood they needed a MAC to change provider, only to be told that they could not have a MAC because their current connection was based on SMPF (or, in a smaller number of cases, who had managed to obtain an SMPF MAC from their current provider only for it to be rejected by their chosen provider).

- 3.15 In addition, large numbers of complaints appear to be driven by the withdrawal of retail broadband service providers from the market, or as a result of contractual disputes between wholesale and retail broadband providers that leave end users without service and/or unable to obtain MACs.

BT systems developments

- 3.16 BT is currently implementing two systems developments that are expected to address tag on line and reduce the number of calls to the helpdesk.
- 3.17 On 6 November 2006, BT rolled out an “online visibility checker” that enables broadband service providers to check the status of the line without contacting BT, thereby enabling them to self-diagnose a large proportion of tags and advise their end users accordingly, without generating calls into the helpdesk. For example, broadband service providers are now in a position to advise consumers that the problem is an incompatible product on the line, or that there is a pending cease order on the line. The online visibility checker will address, in particular, tags caused by an existing service on the line. When there is already a service on the line, BT provides the name of the provider supplying that service. When there is a provision order in progress, BT provides details of the supplier that placed the order, and the date that the provision is due to complete. When there is a cease order in progress, BT provides details of when the cease is due to complete.
- 3.18 BT has recently implemented a further change to its ordering systems, known as “Provide on pending cease”, which will enable broadband service providers to place orders for service even where there is an open cease order on the line.
- 3.19 Currently, if there is a cease order in progress, broadband service providers will see a tag on the line, and will not be able to place an order until the line has cleared. There is no way of “queuing up” an order automatically, meaning that the broadband service provider and/or the end customer has to make a repeat call in order to place an order.
- 3.20 “Provide on pending cease” will mean that broadband service providers will not see a tag on the line and will be able to place an order immediately whether there is a cease in progress or not. “Provide on pending cease” will not significantly reduce the time taken to effect a transfer in the majority of cases, because the new order will not be processed until the cease has completed. However, it will reduce the potential for confusion and customer inconvenience that currently drives large numbers of calls into the BT helpdesk.

Further work on broadband migrations

- 3.21 While tag on line may until now have been largely a “BT problem” (as a number of respondents commented – see Section 4), an increasing proportion of broadband connections are based on SMPF and MPF provided by Openreach. BT Wholesale (the operational unit of BT responsible for the tag helpdesk), quite legitimately, has

no visibility of Openreach's systems and cannot therefore introduce solutions to help LLU (SMPF and MPF) customers affected by tag on line.

- 3.22 In addition, solutions to the tag on line problem – whether they are the responsibility of BT Wholesale or Openreach – are unlikely to have their desired impact without the co-operation and support of the rest of the industry. A good example of this is the tag visibility checker introduced by BT Wholesale, which will only have an impact if broadband service providers correctly use the information that BT is supplying – BT believes that many of the calls currently coming into the helpdesk could be handled by broadband service providers at source, and that with the co-operation of industry these volumes will fall.
- 3.23 While Ofcom believes that the introduction of General Condition 22 will provide an incentive for the industry to make progress on migrations problems, it considers that additional further work is needed to drive progress towards long-term solutions. Taking the example of tag, an early priority for attention is for the industry to address potential causes of tag on line in Openreach's underlying systems for LLU (SMPF and MPF) in order to prevent the problem reaching the scale we have seen in "traditional" broadband connections.
- 3.24 Recently, the Office of the Telecommunications Adjudicator ("OTA") has taken on responsibility for progressing industry work on broadband migrations. An example of work already undertaken by OTA and industry is a document called the "customer advice matrix" which brings together information on all possible broadband migration combinations, what processes apply, and what advice customers should be given if they contact their broadband service provider with a problem. Broadband service providers will use this resource when advising their customers, bringing consistency to the messages that customers are getting about broadband migrations and limiting confusion. Ofcom will shortly publish complementary guidance for consumers on its website.
- 3.25 Ofcom considers that this co-regulatory approach has already seen significant results in relation to facilitating effective process improvement, focusing attention on the processes that are available, and developing a best practice approach for advice to consumers. Ofcom proposes that a similar co-regulatory approach – bringing together BT, Openreach, LLU operators and broadband service providers in a single forum – is the best way of driving forward further work on implementation and development of longer-term solutions to broadband migration processes. Ofcom plans to discuss plans for appropriate co-regulatory arrangements with the industry early in 2007.

Other process developments

- 3.26 On 22 November 2006 BT announced the launch of a new process called "provide with MAC" which will support "reverse" migrations from SMPF to IPStream/DataStream. BT has stated that "provide with MAC" will be available to all customers to use from 21 December 2006.
- 3.27 As noted above, OCC has received a number of complaints from consumers who have been unable to migrate from SMPF connections without significant downtime, and we therefore welcome this development.
- 3.28 As set out in paragraph 5.41, General Condition 22 will require broadband service providers (and wholesale broadband providers) to use the MAC process for

migrations from SMPF to IPStream and DataStream once “provide with MAC” is fully available.

Section 4

Responses to the consultation

Introduction

- 4.1 Ofcom asked respondents for their views on the eight questions listed at Annex 4 of the consultation:

Question 1 : do respondents agree that the evidence from cases logged by OCC suggests that there is a need for regulation?

Question 2: do respondents agree that given the problems caused by tag on line there is a need for further regulation?

Question 3: do respondents agree that given the problems experienced by consumers where a broadband service provider fails or refuses to issue MACs, it is appropriate to introduce a process that enables customers to obtain MACs from another party? How do respondents see such a process working?

Question 4: do respondents agree that Ofcom's proposed high-level obligations would effectively address the problems described in this document?

Question 5: do respondents agree that a mandatory version of the MAC process is appropriate?

Question 6: do respondents agree that six months is an appropriate timescale for development of these further proposals? If not, what alternative period do respondents suggest, and why?

Question 7: do respondents agree that it is appropriate to make arrangements for provision of MACs by a third party mandatory?

Question 8: do respondents agree that it is appropriate to make arrangements for other migration processes, such as reverse migrations mandatory?

Responses received

- 4.2 Ofcom received a total of 168 responses to the consultation:
- 151 webform responses from individuals, small businesses and community organisations;
 - 12 responses from industry stakeholders; and
 - five responses from other stakeholder groups.
- 4.3 Non-confidential responses are published on Ofcom's website at <http://www.ofcom.org.uk/consult/condocs/migration/responses/>.
- 4.4 The remainder of this section considers webform responses, industry responses and responses from other stakeholder groups in turn.

Responses received from consumers

- 4.5 Ofcom received a total of 151 responses from individuals, small businesses (nine responses) and community organisations via the webform that was published with the consultation on Ofcom's website and by e-mail.
- 4.6 57 respondents asked Ofcom to keep nothing in their responses confidential or to keep only their e-mail address confidential. These responses have been published in full on Ofcom's website.
- 4.7 70 respondents asked Ofcom to keep their name, contact details, job title and/or organisation confidential. Their responses have been published on Ofcom's website as "name withheld" respondents.
- 4.8 10 respondents asked Ofcom to keep their entire responses confidential. These responses have been taken into account in preparing this statement and Ofcom has, in some cases, paraphrased respondents' comments. These responses have not been published on Ofcom's website.
- 4.9 The remaining 14 respondents did not state whether any part of their response was confidential. These responses have been taken into account in preparing this statement and Ofcom has, in some cases, paraphrased respondents' comments. These responses have not been published on Ofcom's website.
- 4.10 Comments made by individuals, small businesses and community organisations (referred to collectively as "consumers") are set out below.

Question 1: do respondents agree that the evidence from cases logged by OCC suggests that there is a need for regulation?

- 4.11 All but one of the consumers that responded to this question agreed.

Question 2: do respondents agree that given the problems caused by tag on line there is a need for further regulation?

- 4.12 All but one of the consumers that responded to this question agreed.

Question 3: do respondents agree that given the problems experienced by consumers where a broadband service provider fails or refuses to issue MACs, it is appropriate to introduce a process that enables customers to obtain MACs from another party? How do respondents see such a process working?

- 4.13 Most of the consumers that responded to this question agreed that it was appropriate to introduce arrangements for an alternative source of MACs.
- 4.14 However, 13 respondents disagreed, with 10 of those suggesting it was better to concentrate on requiring losing providers to issue MACs in the first place (six of those who did agree with the need for an alternative source made the same point).
- 4.15 A number of consumers made suggestions about how they saw the alternative arrangement working. Seven suggested that MACs could be provided on opening the account and/or on all bills (as is the case in the energy sector), while 17 suggested that customers should be able to generate MACs themselves online.

Question 4: do respondents agree that Ofcom's proposed high-level obligations would effectively address the problems described in this document?

- 4.16 Most of the consumers that responded to this question agreed that the proposed high-level obligations would address the problem, although a number of respondents (36) were cautious, saying that they were unconvinced, or that they "hoped" the high-level obligations would address the problem, or that it would depend on effective enforcement of the obligations by Ofcom. Four consumers disagreed.

Question 5: do respondents agree that a mandatory version of the MAC process is appropriate?

- 4.17 All but one of the consumers that responded to this question agreed.

Question 6: do respondents agree that six months is an appropriate timescale for development of these further proposals? If not, what alternative period do respondents suggest, and why?

- 4.18 A number of the consumers that responded to this question thought that six months was too long. 35 felt that the changes should be implemented as soon as possible or immediately, while 32 felt that three months was adequate. Four suggested periods of less than three months.
- 4.19 Six of the SMEs that responded to this question thought that six months was too long, with three suggesting three months. However, one SME thought it was not long enough.
- 4.20 However, it was not clear that all of these respondents were commenting specifically on the development of proposals for an alternative source of MACs (as opposed to the implementation of General Condition 22).

Question 7: do respondents agree that it is appropriate to make arrangements for provision of MACs by a third party mandatory?

- 4.21 Most of the consumers that responded to this question agreed that Ofcom should make arrangements for the provision of MACs by an alternative source mandatory, although nine disagreed, and three others commented that such an arrangement would not be necessary if the requirement on broadband service providers to issue MACs was adequately enforced. Five of the SMEs that responded to this question disagreed with the proposal, while four thought such an arrangement would not be necessary if the requirement on service providers to issue MACs was adequately enforced.

Question 8: do respondents agree that it is appropriate to make arrangements for other migration processes, such as reverse migrations mandatory?

- 4.22 Most of the consumers that responded to this question (and all but one of the SMEs that responded) agreed that reverse migrations should be in scope. However six consumers thought it should not be, while four did not know what reverse migrations were (see footnote 20 of the consultation) or did not feel they knew enough to comment.

Other comments made by consumers

- 4.23 A number of consumers provided details of their own experiences as examples of the problems Ofcom identified in the consultation, and commented on the inadequacy of the current voluntary arrangement:

“The problem with this system is that the company which has the most to lose is put in control of the transaction”.

“I was totally amazed to discover that issuing of MAC codes is (effectively) voluntary”.

“The behaviour of a few unfortunately makes such regulation essential”.

- 4.24 E7even/NetServices in particular were singled out by 13 consumers:

“There is absolutely NO protection for the consumer in an event like this. Wholesale providers can very easily set up new “quasi suppliers” that are supposedly nothing to do with them.”

“As someone who was without broadband for five weeks due to the E7even situation...I would not be blackmailed into giving an inferior service my business”.

“As an ex-E7 customer, I have experienced the dark side of the current UK broadband market in all its glory. I am not aware of any other industry in the UK that could treat its customers so badly and get away with it”.

“It is very hard to vote with your feet when someone won’t let go of your legs.”

- 4.25 Problems (or potential problems) with migrations involving LLU (SMPF and MPF) were mentioned by four consumers, with some noting that the MAC process does not apply to migrations to MPF:

“Customers generally don’t have any idea who provides their connection at the exchange...This in itself isn’t an issue. It becomes an issue when a customer is no longer happy with the service or simply wants to move to get a better deal and try to migrate only to find that they can no longer do that”.

- 4.26 Four consumers said that they thought MACs should be issued free of charge. Ofcom clarifies that General Condition 22 does not permit Communications Providers to charge for issuing MACs (although other charges may apply depending on the customer’s contract with the broadband provider), see further discussion at paragraphs 5.36-5.37 below.

- 4.27 Two consumers mentioned the restrictions that could be caused by the fact that customers are unable to port their e-mail address when they change broadband provider. Ofcom notes these respondents’ concerns, but considers that e-mail address portability is outside the scope of this piece of work.

- 4.28 One consumer asked whether the proposals apply to Kingston Communications in Hull ("Kingston"). Kingston is a Communications Provider and is therefore required to comply with General Condition 22 to the extent that it is relevant. However, Ofcom understands that no other broadband provider currently chooses to offer a DSL-based service in the Hull area. Since this means there are no migrations between DSL-based connections in the Hull area, the MAC process does not apply to Kingston in practice.
- 4.29 One customer noted that the acronym MAC can also mean "Media Access Control" or MAC address, which is a unique identifier code printed on networking equipment such as modems, and suggested that this was a potential source of confusion. Ofcom believes however that this is unlikely to be a potential source of confusion as it will be clear from the context which type of MAC is meant.

Responses received from industry stakeholders

- 4.30 Ofcom received 12 responses from retail broadband service providers, wholesale broadband providers and other industry representatives as follows:
- BT Group plc ("BT");
 - Cable & Wireless ("C&W");
 - Entanet International Ltd ("Entanet");
 - Gemserv Limited ("Gemserv");
 - Scottish and Southern Energy plc ("Scottish and Southern");
 - THUS plc ("THUS");
 - Tiscali UK Ltd ("Tiscali")
 - one anonymous respondent (whose response has been published on Ofcom's website); and
 - four confidential responses (which have not been published on Ofcom's website).
- 4.31 This section summarises industry responses to the specific questions posed by Ofcom before addressing additional comments made by industry stakeholders.

Question 1: do respondents agree that the evidence from cases logged by OCC suggests that there is a need for regulation?

Stakeholder comments

- 4.32 Most respondents agreed that the evidence from cases logged by OCC (as set out in paragraphs 4.1-4.30 of the consultation), suggests that there is a need for regulation.
- 4.33 Two confidential respondents commented on the evidence base presented in the consultation. One of those confidential respondents thought that the evidence presented by Ofcom did not give a clear idea of the scale of the problem and suggested that it would be useful if Ofcom were to publish more detailed information on refusals and failures to provide MACs.

- 4.34 Tiscali agreed that the evidence presented by Ofcom suggested a need for action, but thought that action taken should be in proportion to the number of consumers affected. Tiscali also commented that Ofcom should not introduce new requirements dependent on processes and systems that do not currently exist.
- 4.35 BT did not think that the evidence suggested that further regulation was needed to tackle “operational” problems (as opposed to current problems associated with the MAC process).

Ofcom’s response

- 4.36 Ofcom agrees with Tiscali that any action taken should be proportionate to the scale of the problem, and (as set out in the Impact Assessment at Annex 2) considers that its proposals are a proportionate response to the problems described in the consultation, for two reasons.
- 4.37 First, Ofcom’s proposals are a proportionate response given the severity of the problem for those individual consumers affected. As Ofcom acknowledged at paragraph 4.6 of the consultation, the vast majority of migrations appear to go smoothly. Where they do not, however, consumers suffer considerable inconvenience and distress. Ofcom currently has no formal power to help them, and doubts that these problems will dissipate in the absence of formal regulation.
- 4.38 Second, the number of consumers affected is, in any case, far from negligible. As set out in the consultation (see paragraph 4.5 of the consultation and paragraphs 3.10-3.15 above) many thousands of consumers have contacted Ofcom to report problems, and the number of complaints to OCC in all likelihood underestimates the scale of the problem since not all consumers affected will contact OCC. Since the consultation document was published, the number of tag cases handled by the BT helpdesk has risen sharply (see Figure 1 above).
- 4.39 In response to the comments made by the two confidential respondents about the validity of the evidence presented in the consultation document, Ofcom considers that the parameters of the consumer complaints evidence are clearly set out at paragraphs 4.7-4.9 of the consultation, while Ofcom states at paragraph 4.10 why it did not consider it appropriate to break the results down to show which broadband providers were named in connection with the problems experienced by consumers in the cases we assessed.
- 4.40 Ofcom agrees with Tiscali’s comment that new regulation should not have the effect of requiring broadband providers to comply with systems and processes that do not yet exist. Further guidance as to how General Condition 22 will work in practice is provided in Section 5.
- 4.41 BT’s comments on this question are address in Ofcom’s response on question 2 below.

Question 2: do respondents agree that given the problems caused by tag on line there is a need for further regulation?

Stakeholder comments

- 4.42 C&W and Scottish and Southern agreed that there was a need for further regulation to address the problems caused by tag on line, as did the respondent who wished to remain anonymous and two of the confidential respondents.
- 4.43 Gemserv considered that the most appropriate solution to the tag problem was an industry-wide process for the swift removal of tags, noting that the BT helpdesk does not address the root cause of tags.
- 4.44 C&W noted that tag on line was to some extent a result of deficiencies in BT's systems, while the anonymous respondent commented that lack of regulation had led to the introduction of poor processes at the wholesale level, "with the management of the information within the wholesale systems being mediocre at best".
- 4.45 One of the confidential respondents noted that it believed delay by Openreach and under-resourcing of BT's tag helpdesk had contributed to the tag on line problem, and suggested that these issues should be addressed first before moving to regulation. Entanet considered that further regulation was not appropriate, arguing that it is up to BT to resolve the tag on line problem. THUS noted that BT was already taking action to address the problem, and commented that Ofcom should not consider further regulation unless evidence suggested that BT was failing to fix the problem.
- 4.46 BT acknowledged that in relation to "operational issues" such as tag on line:
- "we recognise that progress has been slower than we would have liked and that the solutions identified to date have had only a limited impact".
- 4.47 Nevertheless, BT disagreed that there was a need for further regulation to address operational issues including tag on line. In its response, BT stated that it had "committed to stepping up the effort in this area", and that it had engaged with other industry members to tackle outstanding issues. BT stated that it was going to set up an initial workshop to progress these issues, with the support of BT Wholesale's CEO. BT therefore proposed that, alongside the introduction of the mandatory MAC process, work on other process issues (home movers, tag on line and the withdrawal of broadband service providers from the market) should be progressed by BT, with a review of both the mandatory MAC process and the BT-led work after six months.
- 4.48 BT noted that further regulation would not address tag on line in certain cases, for example where tags are left by consumers not telling service providers they are moving house, or "due to process pipelines".
- 4.49 BT mentioned that it was working on various initiatives ("provide on pending cease" and the tag visibility checker) to address tag on line.
- 4.50 Tiscali agreed that tag on line had caused severe problems that warranted the introduction of the BT helpdesk. Tiscali did not however appear to agree that further regulation was needed to address the problem, and noted (as in its response to

question 1) that any regulation imposed should not have the effect of requiring broadband providers to comply with systems and processes that do not yet exist.

- 4.51 C&W noted that problems such as tag on line may have been exacerbated by Communications Providers' need to comply with relevant data protection legislation which may, for example, prevent them from dealing with anyone but the original account holder in the case of home moves.

Ofcom's response

- 4.52 Ofcom acknowledges that, as noted by Entanet and others, BT will play a crucial role in resolving the tag on line problem. As discussed at paragraph 4.39 of the consultation, the problem appears to be strongly associated with BT's underlying systems. Ofcom therefore welcomes the steps that BT is now taking to address the problem, two of which – the “tag visibility checker” and “provide on pending cease” – are considered in more detail in Section 3 above.
- 4.53 However, Ofcom remains of the view that additional regulation is needed to address tag on line, as BT alone cannot resolve the problem.
- 4.54 As calls to OCC suggest (see paragraph 3.14 above), tag on line is also a problem where the tag relates to a connection provided using SMPF or MPF. BT Wholesale (the operational unit of BT responsible for the tag helpdesk) is not in a position to address this category of cases, as it does not provide SMPF or MPF, which are only provided by Openreach. BT Wholesale has access to limited diagnostic data that may enable it to refer some customers affected by SMPF and MPF tags to the appropriate broadband service provider, but it is unable to take action to remove SMPF and MPF tags. Ofcom considers that it is essential that work undertaken by BT Wholesale is mirrored by Openreach, and this should be a priority for further co-regulation work. In addition, BT Wholesale is no longer the only supplier of wholesale bitstream products, with other wholesale broadband providers offering their own equivalents of BT IPStream and DataStream. It is not clear what implications this may have for tag on line, but again this suggests that all relevant stakeholders need to be involved in addressing the problem.
- 4.55 In addition, the success of any solutions introduced by BT (and, in the future, Openreach) will depend to varying extents on their adoption by downstream providers. The “visibility checker”, for example (see paragraph 3.17 above) can only be effective if broadband service providers use the information they get from BT to advise consumers.
- 4.56 Ofcom also considers that an option for formal intervention is needed to enable Ofcom to respond promptly to such operational problems in future, particularly if current progress stalls. The work currently being undertaken by BT follows considerable informal pressure by Ofcom over a 12-month period of engagement, and Ofcom considers that obligations of this kind would have provided an incentive for action that would have produced results sooner.
- 4.57 Ofcom notes BT's comment (see paragraph 4.48 above) that regulation alone will not address tag on line, because some cases are a result of consumer behaviour (for example, where someone moves house and cancels his PSTN, but doesn't realise he needs to cancel his broadband as well). However, in these circumstances, we would expect the industry to develop a process that allows the new occupier to obtain broadband even where the previous occupier has failed to cancel before moving.

- 4.58 Ofcom acknowledges that data protection issues may play a role in some tag on the line cases and this will be one of the many relevant factors to consider when looking at what processes may be appropriate.

Question 3: do respondents agree that given the problems experienced by consumers where a broadband service provider fails or refuses to issue MACs, it is appropriate to introduce a process that enables customers to obtain MACs from another party? How do respondents see such a process working?

Stakeholder comments

- 4.59 BT, Entanet and three confidential respondents disagreed overall with this proposal.
- 4.60 C&W, Gemserv, Scottish and Southern and one confidential respondent agreed overall. Gemserv commented that there are examples from other markets where the switching process is handled by a third party and that such a method may be preferable to reliance on a mandatory MAC process. C&W stressed that the timetable for introduction of such a solution should be flexible, in particular as downstream wholesalers may be dependent on the processes of upstream suppliers in order to comply.
- 4.61 Other stakeholders were uncomfortable with this proposal for a variety of reasons.
- 4.62 BT, THUS and two confidential respondents were concerned with potential abuse of the process by service providers that could lead to consumer detriment. THUS was also concerned that such a mechanism would introduce additional costs for the industry.
- 4.63 BT, Entanet and one anonymous respondent suggested that such an alternative mechanism would not be necessary in addition to a mandatory MAC process (properly enforced by Ofcom). BT noted that broadband service providers would have a commercial incentive to ensure that they had a process in place that would ensure they could get MACs from their wholesale suppliers.
- 4.64 BT, THUS and one confidential respondent thought that such a development should not be considered until the impact of making the MAC process compulsory could be monitored, and that only if this step failed to address consumer harm should Ofcom entertain the notion of making MACs available from an alternative source. The same confidential respondent thought that it would be counterintuitive for Ofcom to introduce both a mandatory version of the MAC process and a requirement to develop an alternative mechanism for the provision of MACs.
- 4.65 THUS and one confidential respondent commented that the provision of MACs by someone other than the customer's retail broadband service provider should be reserved as a "fallback" measure, only for use in certain circumstances for example where a broadband service provider goes out of business and is no longer able to support migrations (other scenarios suggested by THUS were "persistent, serious non-compliance" with the MAC process and "temporary system or process failures within the SP"). The same confidential respondent thought that there was a risk of consumer confusion and mis-selling/slamming if the alternative mechanism was not limited in this way (citing existing confusion arising from different processes for different migrations paths).

- 4.66 Another confidential respondent suggested that any such process would have to ensure that a consumer had already tried to obtain a MAC from his losing provider and that the losing provider had failed to provide a MAC without giving a valid reason, and noted that it was important to retain the requirement for the customer to contact his losing provider in order to safeguard against slamming/mis-selling.
- 4.67 BT considered that a “Third Party Verification and/or Validation solution” would lead to an unacceptable level of cost and complexity.
- 4.68 Gemserv cited “third party validation” as a possible mechanism for the provision of MACs, but thought that further discussion was needed.
- 4.69 One confidential respondent thought that such an alternative mechanism should not enable customers to self-generate MACs (e.g. online) without an opportunity for the losing provider to attempt to retain the customer.
- 4.70 BT and Tiscali did not consider that it was appropriate for a retail broadband service provider’s wholesale broadband provider to act as an alternative source of MACs.
- 4.71 While BT expressed sympathy with consumers affected by the withdrawal of broadband service providers from the marketplace, it thought that introducing an alternative process for the provision of MACs was “not feasible from a contractual and legal perspective and appears disproportionate to the scope of the problem”. BT went on to explain that in such circumstances any intervention by a party other than the retail broadband service provider would lead to a breach of the contract between the wholesale and retail providers.
- 4.72 Tiscali commented that:
- “These scenarios are not going to disappear; SPs may try to interpret the [MAC process] to their own purposes and SPs may go out of business. This does not mean that wholesale providers of broadband access should be held responsible for failures on the part of their SP customers or that onerous or unfeasible process obligations should be placed upon them to attempt to compensate for such scenarios”.
- 4.73 Tiscali noted that, as it stands, the MAC process “cannot be operated by wholesale providers for large batches of end users that are not being served by their SP”. Tiscali suggested BT as a possible source of MACs in such scenarios.
- 4.74 BT, C&W, Tiscali and one confidential respondent commented that this proposal needed further thought before such a mechanism could be implemented.

Ofcom’s response

- 4.75 A number of respondents said they did not think that it was necessary to consider an alternative source for MACs provided Ofcom enforces the MAC process (which communications providers will now be required to follow, as Annex 1 to General Condition 22).
- 4.76 Ofcom agrees that the introduction of General Condition 22 should in itself act to reduce current levels of consumer harm associated with refusal and failure to provide MACs, since Communications Providers will have an increased incentive to comply with the MAC process.

- 4.77 Once General Condition 22 comes into force, Ofcom will investigate any suspected or alleged failure by Communications Providers to comply with the MAC process in line with its complaint handling guidelines⁷, and may, where appropriate, take enforcement action as set out in sections 94-96 of the Communications Act 2003. Ofcom has imposed a target of four months for the completion of investigations (which means it aims to issue either a closure statement or a notification that a condition has been breached) into complaints about alleged breaches of the General Conditions, or six months for the completion of own-initiative investigations, which may include investigations prompted by high levels of concern from consumers such as large numbers of calls to OCC about a particular issue. While Ofcom will pursue alleged breaches of General Condition 22 promptly, any enforcement action is likely to be some months off, and will not therefore help consumers who have suffered harm as a result of any breach. Ofcom therefore remains of the view that an alternative source of MACs is needed to enable consumers affected by non-compliance to exercise their right to switch, whether or not an investigation by Ofcom is ongoing.
- 4.78 A number of respondents commented that further work was needed to establish the appropriate form of an alternative source for MACs. Ofcom is aware that further work is needed. The consultation therefore proposed an additional six months for an appropriate mechanism to be developed and implemented.
- 4.79 Ofcom acknowledges stakeholders' concerns that an alternative process for the provision of MAC codes could introduce the potential for slamming and mis-selling of broadband services. However, Ofcom does not accept that this concern is a valid reason for not developing an alternative process for the provision of MACs. As noted at paragraph 3.10 of the consultation, protection against slamming is one of the advantages of the current MAC process, and Ofcom would expect this principle to be carried across into any alternative process for the provision of MACs by someone other than the customer's broadband service provider. Ofcom will require any process that is introduced to meet certain criteria, and would certainly not accept the adoption of any process that did not offer consumers adequate protection against slamming and mis-selling.
- 4.80 Ofcom acknowledges that further work following the introduction of General Condition 22 may in fact lead to the conclusion that further intervention is not, in fact, necessary, or that it would not be possible to introduce an alternative mechanism for the provision of MACs that did not meet these criteria. Nevertheless, at the time of publication, Ofcom believes that an alternative source of MACs is a necessary consumer protection measure and that it is therefore appropriate to undertake this work to explore the practicalities.
- 4.81 Ofcom notes stakeholders' comments that an alternative source of MACs should only be an option in certain situations, for example market exit by broadband service providers, and considers that market exit by broadband service providers is likely to be one scenario where an alternative source of MACs would come into play.
- 4.82 However, Ofcom's current view is that it is not appropriate to limit the role of the alternative source in this way. As the E7even case illustrates, a company may go on trading even while it is failing to provide service to its customers or enabling them to switch, leaving customers with no alternative source of MACs. Intervention and

⁷ http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf

enforcement action by Ofcom may not, in some circumstances, lead to any speedy improvement for customers in this situation. Ofcom considers that requiring a customer to prove that he has been refused a MAC by his broadband service provider before he can obtain one from the alternative source is unlikely to offer consumers a good migration experience.

- 4.83 Ofcom does not, however, intend the alternative source of MACs to supplant the customer's existing broadband provider as the primary source of MACs. The existence of an alternative source of MACs will create an added incentive on broadband service providers to improve their customer service so that consumers have no need to look elsewhere.
- 4.84 Ofcom notes, in response to the comments of BT and Gemserv, that it is not, at this stage, advocating a Third Party Verification system, and has an open mind about what kind of solution could apply. The same applies to BT's and Tiscali's comments about the potential role of wholesale broadband providers as an alternative source of MACs. Ofcom expects the industry to consider the various possible alternatives in order to assess the pros and cons of each and arrive at an optimal solution.

Question 4: do respondents agree that Ofcom's proposed high-level obligations would effectively address the problems described in this document?

Stakeholder comments

- 4.85 C&W, Entanet, THUS, one confidential respondent and the respondent who wished to remain anonymous agreed that Ofcom's proposed high level obligations would effectively address the problems described in the consultation. Entanet noted that broadband service providers were in some cases dependent on Openreach to ensure migrations happen in time. The anonymous respondent suggested that the high level obligations needed specifically to address tag on line and home movers, which both drive large numbers of complaints.
- 4.86 Scottish and Southern thought that the high level obligations were a "useful starting point" but that it was not convinced that, on their own, they would address all the problems identified in the consultation.
- 4.87 Gemserv and Tiscali disagreed. Tiscali considered that the while the proposed high level obligations "would not do any harm", they were "vague and unenforceable", while Gemserv argued that the wording of the proposed obligations was "generic" and "subjective", and that they should be "underpinned by a set of specific and measurable service levels" in order to avoid the potential for discriminatory treatment of complaints.
- 4.88 As also discussed in relation to question 2 above (see paragraph 4.47 above), BT did not consider that the proposed high level obligations were necessary, arguing that
- "the best way to address the operational issues raised in the consultation is to carry out an in depth analysis of the issues across the industry and BT Wholesale has committed to set up industry workshops for this purpose."

- 4.89 BT was also concerned that the proposed high level obligations left considerable room for interpretation, for example about what would constitute a “positive experience” for customers.
- 4.90 BT noted that:
- “the definition of broadband migrations in the consultation is too broad and that only a transfer of service by an end user between two Service Providers is a migration as understood by BT and the rest of industry.”
- 4.91 BT did not consider that the high level obligations should, at this stage, apply to the Home Movers process offered by BT Wholesale.
- 4.92 One of the confidential respondents, while it supported the proposed high level obligations, was concerned that broadband service providers were dependent on BT or Openreach to fulfil some elements of the proposed obligations, e.g. to ensure that migrations are carried out within a reasonable period and with minimal loss of service.

Ofcom’s response

- 4.93 The high-level obligations are drafted to ensure that they capture as many types of consumer harm as possible. Section 5 explains how the high-level obligations are expected to operate in relation to the specific types of consumer harm listed at paragraph 5.19 of the consultation. However, the high-level obligations will also address, to the extent necessary and insofar as they are proportionate, new problems that may appear in future (for example teething troubles around the further rollout of SMPF and MPF) in relation to migration processes. Ofcom notes, in response to BT’s comment, that General Condition 22 does not require Communications Providers to ensure that their consumers have a “positive experience” of broadband migrations – while this is certainly Ofcom’s intention, the high-level obligations are rather more specific.
- 4.94 As noted in response to question 2 above, Ofcom does not consider that it is within BT’s power to resolve all the “operational issues” that currently affect broadband migrations, and remains of the view that an option for formal intervention is needed to enable Ofcom to respond promptly to such operational problems in future, particularly if current progress stalls.
- 4.95 In response to BT’s comment that Ofcom’s definition of migrations is “too broad”, the consultation clearly attempted to address a range of problems including, but not limited to, migration between broadband service providers (see paragraph 2.21 of the consultation). The definitions in General Condition 22 clearly define what scenarios are covered. In addition, Ofcom does not believe that BT is correct in saying that the term “migrations” is commonly understood to apply only to switching between retail service providers – the term “bulk migrations”, for example, is a commonly understood term that refers to migrations between wholesale products, initiated by service providers, which should ideally be invisible to end users.
- 4.96 Both BT’s comment that the BT Home Movers process and the confidential respondent’s concern that broadband service providers depend on BT to fulfil the obligation will be addressed by the “fair and reasonable” qualification that attaches to each of the high-level obligations. For example, Ofcom would not apply the high-level

obligations in a way that required broadband providers to comply with processes that are not fit-for-purpose (because, for example, they have an unacceptably high failure rate, they are unnecessarily complex and difficult to use, and are not consumer-friendly) since this would not be fair and reasonable. This currently applies to the BT Home Movers process which, as noted at paragraphs 3.43 – 3.50 of the consultation, is not being widely used because it is not considered fit for purpose.

Question 5: do respondents agree that a mandatory version of the MAC process is appropriate?

Stakeholder comments

General

- 4.97 All the industry respondents agreed that a mandatory version of the MAC process is appropriate (although C&W and one confidential respondent noted that, while they supported the introduction of a mandatory MAC process as set out in the consultation, they did not necessarily consider the MAC process to be the appropriate long-term solution).
- 4.98 BT and one confidential respondent noted that the current MAC process is already widely understood and that it provides effective consumer protection against slamming and mis-selling. The same confidential respondent welcomed the basis of Ofcom's intervention, i.e. to build on an existing self-regulatory solution, but noted that absent a regulatory requirement broadband service providers had limited incentive to comply.
- 4.99 One confidential respondent noted that the current voluntary nature of the MAC process can place those broadband service providers who choose to comply at a competitive disadvantage, as they facilitate outbound migrations without being able to expect the same commitment from their competitors in relation to inbound migrations. In a similar vein, the anonymous respondent commented that a mandatory MAC process would help to ensure a "level playing field" for broadband providers. Another confidential respondent asked Ofcom to confirm that the proposed mandatory process would apply both to the losing provider and the gaining provider.
- 4.100 Scottish and Southern, while it agreed with Ofcom's proposal, considered that the matter would be better dealt with via self- or co-regulation, perhaps with the relevant General Condition mandating membership of self- or co-regulatory arrangements, and that Ofcom should withdraw General Condition 22 once the industry had developed suitable co-regulation solutions.

Recovery of bad debt and charging for MACs

- 4.101 Two confidential respondents argued that communications providers should be entitled to withhold MACs in cases where the end user is in bad debt.
- 4.102 One of those respondents suggested that requiring communications providers to issue MACs even where end users owe them money would mean that they would pass on "problem customers" to others in the industry, and that it would also leave broadband service providers unable to recover bad debt. It suggested that the industry should agree a mechanism to enabling losing providers to communicate with gaining providers about bad debt.

- 4.103 The other confidential respondent questioned Ofcom's ability to impose such a legal obligation on providers, suggesting that such a requirement would interfere in its contractual relationships with end users. It argued that providers should also be entitled to withhold MACs where a customer attempts to migrate within the term of his initial contract. It also noted that the Mobile Number Portability process (which it considers analogous to the MAC process) entitles mobile operators to withhold Port Authorisation Codes ("PACs") if consumers request them during the initial contract term, until the customer has paid the charges associated for the remaining term of his contract.⁸ It also argued that it would be better for consumers to be refused a MAC than to be pursued by alternative means (i.e. through the courts) for the recovery of bad debt.
- 4.104 The same respondent argued that broadband service providers should be entitled to impose a reasonable charge for the provision of MACs.
- 4.105 The respondent that asked to remain anonymous asked Ofcom to make it clear that, independently of any obligations imposed on communications providers under General Condition 22, customers are still subject to the requirements of the contract they have entered into, even where they wish to migrate during the initial contract term. The same point was made by one of the confidential respondents.

Larger business customers

- 4.106 THUS commented that:

"there does not appear to be any need for regulation to cover migrations by businesses from one service provider to another (other than very small businesses)."

- 4.107 THUS noted that Ofcom had already provided it with informal confirmation that Ofcom did not intend General Condition 22 to capture migrations where the customer is a larger business, but asked Ofcom to confirm this. A similar comment was made by C&W, who noted that General Condition 22 as drafted appeared to apply only to consumers and small businesses (up to 10 employees).

Application to wholesale providers

- 4.108 BT did not consider that it was appropriate for the new regulation to "mandate the provision of MAC codes by the wholesale broadband Service Provider", as ongoing work being undertaken by BT (see paragraph 4.88 above) would address the problems this provision was intended to resolve.
- 4.109 THUS did not consider that there was any need for new regulation to cover:
- "Resellers migrating customers en masse from one wholesaler to another (except to the extent that there is a direct impact on residential end users)".
- 4.110 THUS commented that the proposed regulation would "unnecessarily interfere in the commercial relationship between SPs and reseller customers", and that if, as Ofcom

⁸ http://www.ofcom.org.uk/telecoms/ioi/numbers/num_port_info/mob_num_portab/

had suggested, the intention of such a proposal was to address consumer harm, that the proposed regulation be redrafted to make this clear (e.g. by amending General Condition 22 A1.1(b) as originally drafted, to restrict the obligation to situations where the reseller makes the request to its wholesaler as the result of a request from one of its end users).

- 4.111 THUS noted that wholesale broadband suppliers face a risk of bad debt where resellers will run up large debts with their wholesale suppliers and then migrate en masse to a different wholesale supplier (or, alternatively, to attempt a mass migration of their end users between two resellers under the same ownership/control). THUS proposed that the requirement to issue MACs in such circumstances should be restricted to requests originating from end users, in which case the reseller would need to demonstrate to the wholesaler that such a request had been made.

Comments on the detail of the proposed mandatory process

- 4.112 BT argued that it was appropriate to allow Communications Providers six months (rather than two months) to become compliant once General Condition 22 entered into force. BT stated that its advisors currently provide MACs by telephone only and do not have access to e-mail, and that introducing systems to enable the provision of MACs in writing would take six months.
- 4.113 BT commented that General Condition 22 should not limit the number of ways in which broadband service providers can communicate with their end users – provision of MACs by SMS is one example which is not currently included. BT suggested that General Condition 22 be amended to accommodate SMS and other possible methods.
- 4.114 BT suggested that there may be circumstances where a customer who has provided a MAC to a gaining provider may subsequently wish to cancel his order (for example because he “is within a statutory cooling-off period or [has] been mis-sold”). BT noted that General Condition 22 as drafted makes provision for *customers* to cancel transfers, but suggested that Ofcom also consider whether it might be appropriate for the *losing provider* to cancel transfers in some cases.
- 4.115 As part of its response BT proposed an amended version of General Condition 22, Annex 1 as initially drafted. BT explained that it had:
- “removed the references to the high level obligations;
 - generally restricted the obligations to retail Service Providers; and
 - clarified some aspects of the General Condition.”
- 4.116 One confidential respondent was also concerned by Ofcom’s proposal that one form of contact with the customer for the provision of MACs must be in writing, arguing that provision of MACs in writing may not provide losing providers with adequate opportunity to attempt to retain customers.
- 4.117 THUS commented that, as initially drafted, the mandatory MAC process appears to require gaining service providers to accept requests for inbound migrations, and that it assumed it was not Ofcom’s intention to required broadband service providers to accept all comers (there may be legitimate reasons for not wanting to do so, for example failing credit checks or previous misuse).

Other issues

- 4.118 Tiscali commented that the MAC process should only be made mandatory if it were to be made clear that the MAC process does not currently cover all possible migration scenarios, notably migrations to and from MPF, and that further work is needed to address these outstanding areas of development.
- 4.119 One confidential respondent suggested that there should be a limit on the total number of MACs that can be issued to an individual end user.

Ofcom's response

- 4.120 Given the overwhelming response in favour of this proposal, and in light of the analysis set out in the Impact Assessment at Annex 2, Ofcom has concluded that the voluntary code should become compulsory as proposed in the consultation. Ofcom's current thinking on what this will mean in practice is set out at Section 5 below. The new MAC process obligations are set out at General Condition 22.1 and Annex 1.

Debt blocking and charging for MACs

- 4.121 Ofcom considers that, while broadband service providers are entitled to recover from end users the costs that they incur in providing them with a broadband service, they should not attempt to achieve this by using the MAC process. The purpose of the MAC process is to enable customers to obtain broadband with the provider of their choice and not to assist broadband service providers in recovering their costs.
- 4.122 General Condition 22.1 formalises current voluntary arrangements, as set out in the voluntary code, paragraph 4 of which states that:

“4. For avoidance of doubt, the LSP **may not refuse** to issue a MAC if:

- a) The account holder has not paid any charges due before the migration date (whether service charges, disconnection charges, charges for remaining minimum term contract period or any migration charge); such charges should be included in a final broadband service bill, which will be settled according to the terms of the contract.
- b) The account holder is in bad debt but is still receiving the broadband service at the time the request is received.
- c) The account holder is within a minimum term contract on the broadband service that is needed to recover a subsidy on the broadband service equipment or setup costs;
- d) The broadband service that is to be migrated has already been suspended for reasons of bad debt at the time the request is received.”

- 4.123 Ofcom considers (as noted at paragraph 3.19 of the consultation) that the MAC process is a good example of successful self-regulation, and General Condition 22 builds on this foundation. Ofcom does not see any reason to change this provision, and notes that the majority of respondents have not raised any objections to it.

- 4.124 Ofcom acknowledges that the PAC process enables mobile providers to withhold PACs if a customer is still within the initial contract term. This provision is designed to enable mobile operators to recover their investment in handset subsidies. However, the voluntary code took a different approach, in that it expressly provided that

“the LSP may not refuse to issue a MAC if...

c) The account holder is within a minimum term contract on the broadband service that is needed to recover a subsidy on the broadband service equipment or setup costs.”

- 4.125 Ofcom further notes that there are other types of broadband migrations for which there is no provision for broadband service providers to prevent the transfer of customers who wish to migrate within the initial contract term. For example, when customers migrate to MPF, the losing provider is not involved in the process.
- 4.126 The PAC process does not (as one of the confidential respondents suggested) enable mobile operators to withhold PACs on the grounds of bad debt (i.e. additional cost incurred by the mobile operator *after* the handset subsidy has been recovered).
- 4.127 It is up to individual broadband service providers to determine the best policy to adopt in relation to bad debt, and the most appropriate way of recovering their costs given the possible risk that consumers will not pay what they owe. There are already established mechanisms that broadband providers can use to enforce the contracts of consumers that run up bad debt or migrate during an initial contract term.
- 4.128 Ofcom notes that neither of the two respondents who believe “debt blocking” is acceptable has provided evidence of the additional cost that they would expect to incur as a result of this provision, or evidence that this would have a detrimental impact on their business.
- 4.129 Ofcom agrees, in response to the anonymous respondent’s comments, that customers need to be aware of the implications of switching on any contractual obligations they may be under (as noted at paragraph 2.3 of the consultation), and that they are responsible for fulfilling any contractual obligations that arise as a result of migrating away from the provider while they are still within the initial contract term.
- 4.130 Ofcom acknowledges that broadband service providers may wish to include penalties for early termination of service in their contracts with end customers. However, Ofcom notes that broadband service providers should be aware of Schedule 2, paragraph 1 to the Unfair Terms in Consumer Contracts Regulations 1999, which states that terms in consumer contracts may be unfair if they have the object or effect of *“requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.”*
- 4.131 On the issue of charging for the provision of MACs, Ofcom remains of the view that it is not acceptable for broadband service providers to charge for providing MACs. The purpose of the MAC process is to enable customers to migrate easily between providers. Any cost to service providers can legitimately be recovered over the period of the contract, but to impose it at the point of migration would represent, in Ofcom’s view, an impediment to smooth migrations. The Mobile Number Portability process is silent on whether mobile operators can charge an administration fee for the provision of PACs but in practice most mobile providers choose not to do this as a matter of policy.

Larger business customers

- 4.132 Ofcom confirms that the obligations in General Condition 22 are intended to apply only in relation to migration requests from domestic and small business customers (i.e. customers with up to 10 employees, whether working in a paid or voluntary capacity), and not larger corporate customers. This definition is consistent with the definitions used in relation to General Condition 14, which requires providers to have codes of practice about sales and marketing and dispute resolution applicable to domestic and small business customers.

Application to wholesale providers

- 4.133 Ofcom confirms that, as understood by THUS, the extension of certain provisions to wholesale broadband suppliers is designed as a consumer protection measure.
- 4.134 In a number of cases, Ofcom has seen consumer harm resulting from disputes between wholesalers and their service provider customers, where the wholesaler has deliberately restricted the ability of its customer's end users to switch in an attempt to mitigate the effect of bad debt that has been incurred by the reseller responsible (for example the response of NetServices and Tiscali to the failure of E7even described at paragraphs 4.47 *et seq* of the consultation).
- 4.135 Ofcom therefore considers that it is necessary for the mandatory MAC process to encompass this specific scenario. This is achieved by the requirement on wholesalers to issue MACs to their customers on request, the requirement on those customers to issue MACs to end users on request, and the relationship between the two (see Section 5).
- 4.136 Ofcom does not consider that it is acceptable for wholesalers to attempt, in effect, to recover debt incurred by their reseller customers from those resellers' end users. Ofcom acknowledges that wholesale broadband suppliers are vulnerable to the kind of rogue behaviour that THUS describes. However, wholesale providers must exercise due diligence in their relationships with resellers, and must make other arrangements to mitigate that risk – they cannot pass it on to the end customers of their resellers. Ofcom does not consider that THUS's alternative proposal – that wholesalers should only be required to provide MACs where the request originates with an end-user – offers adequate consumer protection, given the potential for disputes between wholesale and retail providers.
- 4.137 Ofcom recognises that mass migrations may be entirely legitimate and take place with the full co-operation of both the losing and gaining wholesaler. In such cases, the regulation will not impose any additional burden on wholesale providers. To make THUS's proposed amendment to General Condition 22A1.1(b) (see paragraph 4.110 above) would, however, limit the responsibility on wholesale providers to supply MACs to their resellers to situations where the request had been initiated by an end user – thereby preventing legitimate mass migrations.

Other issues raised by respondents

- 4.138 Ofcom acknowledges BT's comment that it does not currently provide MACs in writing and that to do so would require considerable changes to its systems. Ofcom notes that the current voluntary code does not require the provision of MACs in writing where a MAC has been provided by telephone. The purpose of Ofcom's proposed amendment to this arrangement was to limit the potential for confusion

where orders fail because MACs have been provided over the phone and the customer has written the MAC down incorrectly. However, responses to the consultation (together with other evidence such as complaints to OCC and conversations with broadband service providers) suggest that this is not a significant problem and, in light of BT's comments, General Condition 22 reflects the current voluntary code and will not require the provision of MACs in writing in cases where MACs have been provided over the telephone (see General Condition 22, Annex 1 A1.5).

- 4.139 Ofcom acknowledges BT's comment that General Condition 22 should not limit the number of ways in which broadband service providers can supply MACs to their customers (and that SMS may be another possibility). There may well be other acceptable methods not currently specified in General Condition 22. Ofcom has left the wording of General Condition 22 open-ended in this respect, rather than attempting to craft an exhaustive list of all possible mechanisms that could apply.
- 4.140 Ofcom does not agree with BT's comment that the MAC process should enable the losing provider to cancel attempted transfers in certain circumstances. This would represent a fundamental change to the existing MAC process, which is a customer-initiated process – unlike the letter facilitation process for fixed line transfers, where the kind of provision that BT mentions exists. Ofcom has not therefore introduced such a provision.
- 4.141 Ofcom clarifies, in response to THUS, that the requirement on Communications Providers to use the MAC process as set out at Annex 1 to General Condition 22 does **not** require Communications Providers to accept any customer that presents them with a MAC, i.e. to provide service to any end user that requests it. The obligation requires Communications Providers to use the MAC process for all migrations paths to which it applies. They must not, for example, require a customer to go back to his losing provider to request a termination of his broadband service ("cease and reprovide") where he has provided a valid MAC.

Question 6: do respondents agree that six months is an appropriate timescale for development of these further proposals? If not, what alternative period do respondents suggest, and why?

Stakeholder comments

- 4.142 C&W, Gemserv, Scottish and Southern, Tiscali and two confidential respondents agreed. C&W noted that this six-month timeframe would be appropriate for developing, but not necessarily implementing, proposals for future work, as implementation would involve many companies (and not just BT and Openreach). THUS thought that six months was an appropriate target, but should not be a hard deadline.
- 4.143 Entanet and the respondent that asked to remain anonymous agreed that six months was an adequate period for implementation of the compulsory MAC process.
- 4.144 BT thought that six months was an adequate period for considering the outputs of the Migrations Industry Working Group and the further BT-led work (discussed in relation to question 2 above).

Ofcom's response

- 4.145 As set out at paragraph 5.11 of the consultation, Ofcom proposed two separate developments to the current regulatory framework:
- the immediate introduction of a new General Condition 22 on Service Migrations, taking effect two months after the publication of the final statement; and
 - a further consultation on changes to the proposed General Condition 22 requiring Communications Providers to comply with processes for broadband migrations that have not been fully realised at this time, for example a mechanism for provision of MACs by someone other than the customer's broadband service provider.
- 4.146 Ofcom aims to set a six-month timeframe for development of new processes for broadband migrations, particularly a mechanism for provision of MACs by an alternative source.
- 4.147 Ofcom welcomes respondents' support for these developments, and sets out at paragraph 3.25 above how it intends to progress this work with industry, with the intention of issuing a further consultation in due course to bring any new processes that have been developed within the scope of formal regulation.
- 4.148 Ofcom notes in response to BT's comments that the Migrations Industry Working Group did not consider the issues addressed in the consultation. Conversely, the further consultation on broadband migrations processes that Ofcom intends to undertake next year will not address the issues that the IWG looked at (e.g. voice migrations).

Question 7: do respondents agree that it is appropriate to make arrangements for provision of MACs by a third party mandatory?

- 4.149 Question 3 asked respondents whether alternative arrangements for provision of MACs were necessary. Question 7 asked whether it was appropriate for Ofcom to bring such arrangements within the scope of formal regulation.
- 4.150 Respondents' comments on question 7 were broadly consistent with their responses to question 3. Those that agreed such arrangements were necessary were supportive of the proposal that they should be brought within the remit of formal regulation, while those that did not believe there was a need for such a process were not. THUS reiterated its comment in response to question 3 that such arrangements should not be made mandatory at least until there had been an opportunity to evaluate the impact of General Condition 22.
- 4.151 Tiscali commented that while it was appropriate to investigate the alternatives, it would not be appropriate to make any such process mandatory at this stage. Tiscali felt that the "next in chain" model proposed by Ofcom as one possible option (see paragraph 5.42 of the consultation) would be unduly burdensome on wholesale broadband providers, and suggested BT as a "last resort" supplier of MACs.
- 4.152 Gemserv supported the proposal, noting that cost should not be a deterrent since any cost could be pooled across the industry to offer individual providers value for money.

- 4.153 Ofcom considers that respondents' comments on question 7 are addressed by Ofcom's response on question 3 (see paragraphs 4.75 *et seq* above).

Question 8: do respondents agree that it is appropriate to make arrangements for other migration processes, such as reverse migrations mandatory?

Stakeholder comments

- 4.154 All but one of the industry respondents that responded to this question agreed with Ofcom's proposal.
- 4.155 THUS did not think that reverse migrations should be brought into scope at this time, as underlying processes are still incomplete.
- 4.156 C&W and one confidential respondent, while they agreed with the proposal, noted that Communications Providers' ability to offer reverse migrations to their customers is dependent on further work by the industry to make the necessary underlying processes fit for purpose.
- 4.157 BT agreed that "migration processes should be mandated for all broadband products as and when they are available, and this includes reverse migrations", and provided a table showing the status of all relevant migrations paths as at the end of September 2006.
- 4.158 The anonymous respondent provided a list of all possible migrations paths that they thought should be covered by General Condition 22.

Ofcom's response

- 4.159 Ofcom clarifies, in response to THUS's comment, that its intention is not to impose a requirement on Communications Providers to comply with processes that are not yet fit for purpose.
- 4.160 The MAC process – an established and tested process which works for the vast majority of broadband (IPStream/DataStream) migrations – will be brought within the scope of formal regulation immediately. Where processes are less developed, however, Ofcom expects further co-regulatory work to ensure that gaps are filled as quickly as possible and that new processes are brought within the scope of formal regulation in due course as appropriate.
- 4.161 Ofcom agrees, in response to the comments made by C&W and the confidential respondent, that BT Wholesale and Openreach will play a key role in developing underlying processes. However, as noted in relation to tag on line above, progress will depend on the involvement and co-operation of the industry as a whole.
- 4.162 Ofcom sets out at Section 5 below how it expects General Condition 22 to work in practice. This discussion clarifies the aspects of General Condition 22 that will apply immediately to migrations to and from SMPF and MPF-based connections.

Other comments made by industry stakeholders

Technology neutrality and cable migrations

- 4.163 Scottish and Southern and one confidential respondent asked Ofcom to clarify its position on technology neutrality and whether the new regulation will apply to migrations to and from cable broadband. One confidential respondent noted that the general principles proposed by Ofcom should apply irrespective of the underlying technology, in line with Ofcom's stated position of technology neutrality, and expressed concern that there is as yet no process for migration between DSL and cable.
- 4.164 As noted at paragraph 2.24 of the consultation, these proposals will not apply to migrations to and from cable broadband, which are provided over a different physical infrastructure. General Condition 22 currently relates solely to DSL-based broadband connections.
- 4.165 However, Ofcom recognises the need for migrations to and from cable to be brought within the scope of its work on migrations, and is therefore considering whether it is appropriate to extend the remit of the Migrations, Switching and Mis-selling project to encompass broadband migrations to and from cable, along with other fixed broadband technologies such as wireless.

Rationale for intervention

- 4.166 One confidential respondent asked Ofcom to clarify the rationale for its intervention and to identify the perceived market failure that Ofcom's proposals will address.
- 4.167 In the absence of formal regulation, incentives on the industry to address consumer harm associated with broadband migrations appear to be limited, as demonstrated by the evidence set out at Section 4 of the consultation and Section 3 above. The perceived market failure that Ofcom is attempting to address is therefore the harm caused to retail broadband customers.
- 4.168 While the majority of connections are accounted for by signatories to the voluntary code who are, by and large, complying with the voluntary arrangements, some broadband service providers have not agreed to follow the voluntary arrangements or are failing to comply with them.
- 4.169 This could be due to the desire of these providers to create barriers to switching, which can be considered the relevant core market failure. This effectively renders many customers captive, since switching to a new broadband service provider may not be worth the hassle and downtime for these customers. As the evidence suggests, even this minority of service providers has the potential to cause widespread, significant and avoidable consumer detriment (see, for example, the E7even case study and other evidence set out in Section 4 of the consultation).
- 4.170 In addition to the direct consumer harm caused by the behaviour of non-signatories (and non-compliant signatories), the erection of unnatural barriers to switching has the effect of muting the degree of competition in the market, to the ultimate detriment of all consumers in the form of higher prices, and less quality and choice. Ofcom therefore considers (as set out further in the Impact Assessment at Annex 2 below), that formal regulation is a more reliable and effective means than the current arrangements through which to limit the prevalence of these outcomes. Put another

way, if Ofcom was confident that, going forward, all broadband service providers would comply with the voluntary arrangements in the absence of regulation, Ofcom would consider that introducing a layer of regulation would not be proportionate. However, on the balance of the evidence, Ofcom considers that such a confidence would be misplaced.

“Save” activity

- 4.171 One confidential respondent welcomed Ofcom’s statement, at paragraph 3.10 of the consultation that “save” activity may be consistent with the competitive process and consumer welfare. However, another confidential respondent thought that the consultation suggested a prejudice against save activity.
- 4.172 In response to these comments, Ofcom reiterates its statement at paragraph 3.10 of the consultation that save activity may not always be a negative feature in competition terms – although Ofcom considers that save activity may sometimes raise regulatory concerns, for example, if customers are inappropriately discouraged from switching.

Terminology

- 4.173 C&W commented that it was not always clear in the consultation whether references to “LLU” meant shared SMPF, MPF or both, noting that migrations processes could be quite different depending on which underlying technology was being used. C&W asked Ofcom to make this distinction clear in the final statement to ensure that broadband providers could fully understand their obligations under the new regulation.
- 4.174 To clarify (as noted at footnote 4 of the consultation) the consultation used the term “LLU” to refer to MPF and/or SMPF connections. Ofcom recognises that when talking about particular processes there is a need to make the distinction between SMPF and MPF and has done so in this document (see footnote 4).

General Condition 14.3

- 4.175 BT proposed that General Condition 14.3 be extended to cover broadband migrations.
- 4.176 Ofcom understands that BT is referring to the requirement on Communications Providers to adopt Codes of Practice for sales and marketing of fixed line telecommunications services (which is in fact General Condition 14.5 as recently amended). Ofcom does not consider that extending General Condition 14 is within the scope of this exercise. However, it intends to review the scope of this obligation in 2007, in light of the “sunset clause” that was put in place when it was introduced.⁹

Home moves

- 4.177 BT noted that it had facilitated industry discussions on the Home Movers process offered by BT Wholesale and that this had led to a number of changes to the existing

⁹ See *Protecting citizens and consumers from mis-selling of fixed-line telecommunications services* (<http://www.ofcom.org.uk/consult/condocs/misselling/statement.pdf>), at paragraph 3.91.

process, with further developments planned for October. BT said it could not therefore see how a regulatory obligation would expedite things further.

- 4.178 Ofcom welcomes these developments and encourages further progress. As set out in Section 5 below, Ofcom does not intend to rely solely on General Condition 22 to drive progress on the Home Movers process. Indeed this may be one area for consideration as part of ongoing co-regulatory work.

Impact assessment

- 4.179 BT made a number of comments on the impact assessment set out at Annex 5 of the consultation.
- 4.180 BT commented that it was concerned about the incremental costs that might arise from the application of General Condition 22 as originally drafted.
- 4.181 BT commented that it was disproportionate to extend the scope of General Condition 22 to wholesale providers, given that the costs of failure or refusal to supply MACs should be borne by the Communications Providers responsible, i.e. retail service providers. BT also noted that General Condition 22, as drafted, did not make it clear in what circumstances wholesale broadband providers would be required to provide MACs, creating legal uncertainty and exposing wholesale broadband providers to “subsequent enforcement actions that would increase their costs”.
- 4.182 Ofcom acknowledges that the implementation of General Condition 22 (and further co-regulatory work) is likely to impose certain costs on stakeholders, and notes that it specifically invited respondents to provide quantitative data to support any concerns about the potential cost of implementing the proposed regulation. Ofcom did not receive any detailed representations on cost from BT or other stakeholders and has not therefore made the amendments to General Condition 22 that BT has proposed to address its concerns (see paragraph 4.115 above).
- 4.183 Section 5 includes a discussion of the circumstances in which wholesale broadband providers will be required to issue MACs, and to whom, and (in relation to the high-level obligations at General Condition 22.2) the approach it will take to determining whether a Communications Provider has acted fairly and reasonably.

Responses received from other stakeholder groups

- 4.184 Ofcom received responses from five other stakeholder groups as follows:
- BABT (British Approvals Board for Telecommunications);
 - Citizens Advice;
 - National Consumer Federation;
 - Scottish Executive; and
 - Telecommunications Ombudsman Service.

BABT

- 4.185 BABT broadly agreed with Ofcom's proposals, and suggested that one way of approaching the problem (and ensuring compliance with proposed regulation) would be for Ofcom to audit broadband service providers' processes, possibly using an expert agency such as BABT to carry out the work. BABT suggested that Ofcom consider modifying the Metering and Billing Direction to include data service, in order to bring broadband service providers within BABT's formal remit.
- 4.186 While reviewing the Metering and Billing Direction is not within the scope of this exercise, Ofcom is reviewing it as part of a separate project and will bear in mind BABT's comments.

Citizens Advice

- 4.187 Citizens Advice supported Ofcom's proposals, agreeing that "robust regulation" is needed to tackle the problems described in the consultation.
- 4.188 Citizens Advice noted that its members are also being contacted by consumers for advice on cases involving broadband migrations and related customer service issues, and provided a number of detailed examples.
- 4.189 Citizens Advice noted that:
- "the majority of cases dealt with by CABx also reveal the very poor customer service offered by broadband providers. Under normal circumstances, such customers would be advised to switch provider to receive a better service but in the cases outlined below the customers were unable to do so. They are trapped by their unsatisfactory provider and end up paying for a poor or non-existent service with deplorable standards of service".
- 4.190 Ofcom welcomes Citizens Advice's comments and considers that the evidence provided by Citizens Advice relating to consumer concerns around broadband migrations is consistent with that presented by Ofcom in Section 4 of the consultation and supports Ofcom's proposals for new regulation.

National Consumer Federation ("NCF")

- 4.191 NCF broadly agreed with Ofcom's proposals. However, it felt that Ofcom's proposals could go further, and suggested that broadband migrations should work like the energy sector, where no MAC or equivalent is needed to switch.
- 4.192 NCF did not consider that Ofcom's proposal to make the MAC process mandatory went far enough, although it noted that in the event that Ofcom went ahead with this proposal it was essential General Condition 22 is enforced. NCF thought that the proposed high-level obligations would be "still too complex and slow".
- 4.193 NCF thought that the BT tag helpdesk is "not well publicised".
- 4.194 Ofcom welcomes NCF's comments and acknowledges the need for strong enforcement to support the new regulation once it comes into force. Ofcom discusses the enforcement of General Condition 22 in Section 5 below.

- 4.195 Ofcom notes NCF's comments about arrangements in the energy industry. Ofcom has considered arrangements in the energy industry as part of its longer term Migrations, Switching and Mis-Selling work (see, for example, paragraph 4.20 of the Migrations Consultation).
- 4.196 Details of the BT tag helpdesk are published on Ofcom's website at: <http://www.ofcom.org.uk/complain/internet/tagmarker/>. Ofcom notes that customers are not necessarily required to contact the helpdesk directly, as BT has put in place arrangements for broadband service providers to contract the helpdesk on their customers' behalf, meaning that in many cases customers are able to resolve their problem with a single call. Ofcom considers that as BT continues to introduce solutions for tag on line, it is essential that other industry players use the new processes that are introduced. This is discussed further in Section 5 below.

Scottish Executive

- 4.197 The Scottish Executive broadly agreed with Ofcom's proposals and strongly agreed with the proposal to make the MAC process mandatory.
- 4.198 The Scottish Executive noted in response to question 8 (reverse migrations) that:
- “being mindful of the (technology- and) supplier-neutrality stance....we feel that the migration of customers from one LLU operator to another, which is not covered in this consultation, should also be given immediate and thorough attention by the regulator”
- 4.199 Ofcom clarifies, in response to the Scottish Executive's comments, that General Condition 22 will cover the migration of customers between SMPF and MPF-based broadband providers. The MAC process at Annex 1 to General Condition 22 will apply to migrations from SMPF connections to IPStream and DataStream, while the high-level obligations will apply to migrations of connections based on MPF (where the MAC process does not apply).

Telecommunications Ombudsman Service

- 4.200 The Telecommunications Ombudsman Service (“Otelo”) broadly agreed with Ofcom's proposals and noted that its own work supports Ofcom's findings. Otelo noted that Ofcom's proposal to develop an alternative source for MACs would require careful handling of contractual issues.

Section 5

Ofcom's decision and notification of General Condition 22

Introduction

- 5.1 After considering respondents' comments, and on the basis of the reasoning set out in the Impact Assessment (see Annex 2), Ofcom has concluded that new regulation is necessary to protect consumers from harm associated with broadband migrations.
- 5.2 Ofcom is therefore taking action in two ways as follows:
- the introduction of General Condition 22: Service Migrations, which will come into force in two months (14 February 2007); and
 - continued co-regulatory work on outstanding process issues, with a further consultation on additional broadband migrations processes – in particular, an alternative mechanism for the release of Migration Authorisation Codes ("MACs") – likely to follow after General Condition 22 comes into force.

Legal background

- 5.3 When setting a general condition Ofcom is required to meet various tests set out in the Communications Act 2003 ("the Act"). These tests and Ofcom's assessment of how these are met in connection with General Condition 22: Service Migrations are set out below.

Section 3 – Ofcom's general duties

- 5.4 Section 3(1) of the Act sets out the principal duty of Ofcom. Ofcom is required by this section to carry out its functions in line with this duty. That duty is:
- a) to further the interests of citizens in relation to communications matters; and
 - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 5.5 Ofcom has also considered when carrying out its functions, amongst other things, the requirements in section 3 (2) of the Act to secure the availability throughout the UK of a wide range of electronic communications services, and section 3 (4) of the Act, namely that in performing its duties Ofcom must also have regard to such of the following as appears to be relevant in the circumstances, in particular:
- the desirability of promoting competition in relevant markets;
 - the desirability of encouraging investment and innovation in relevant markets;
 - the needs of persons with disabilities, of the elderly and of those on low incomes; and

- the opinions of consumers in relevant markets and of members of the public generally.
- 5.6 Ofcom considers that General Condition 22: Service Migrations, which makes the voluntary code mandatory for all broadband service providers will further the interests of broadband consumers and promote competition for consumer broadband services. In instances where the MAC process does not apply or is not followed, the high level obligations in 22.2 require broadband service providers to act in a fair and reasonable manner to assist, facilitate and ensure that broadband migrations are performed with minimal service disruption. General Condition 22 will continue to protect customers against the risks of slamming and mis-selling by ensuring that customers are involved in a decision to move their service to another provider.
- 5.7 A further consideration for Ofcom is the desirability of encouraging the availability and use of high-speed data transfer services throughout the United Kingdom.
- 5.8 In addition to the factors set out above, when performing its duties under the Act, Ofcom is required to have regard to the desirability of promoting and facilitating the development and use of effective forms of self-regulation. Ofcom considers that the progress achieved by industry in creating the MAC process may be undermined by the actions of those broadband service providers who do not comply with the voluntary code. Making compliance with the MAC process a general obligation will enable Ofcom to investigate allegations of non-compliance by broadband service providers and, where appropriate, to take enforcement action to ensure compliance.
- 5.9 An essential characteristic of a competitive broadband market is the ability of consumers to move between broadband service providers. Ofcom considers that mandating the voluntary code, which has already been adopted by a large proportion of the industry, will facilitate a better migration experience for customers because all providers will be required to comply with the process.
- 5.10 Mandating the existing voluntary code will also benefit broadband service providers. A large proportion of the industry has invested time and resources to be in a position to comply with the MAC Code, and the entire industry suffers reputationally where some broadband service providers do not comply.

Section 4 – European Community requirements for regulation

- 5.11 Section 4 of the Act requires Ofcom to act in accordance with the six European Community requirements for regulation, including the requirement to promote the interests of all persons who are citizens of the European Union and to promote competition in relation to the provision of communications services.
- 5.12 Ofcom considers that the measures outlined above promote the interests of all persons who are citizens of the European Union by enabling consumers to benefit from easily from competition and greater choice. Improved and consistent migration processes enhance competition and promote consumer confidence in the underlying services.

Section 47 – Test for setting or modifying conditions

- 5.13 As set out under section 47(1) of the Act, in setting or modifying a condition, Ofcom must be satisfied that the test set out under section 47(2) has been met. The test is that the modification of the condition is:

- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- b) not unduly discriminatory against particular persons or against a particular description of persons;
- c) proportionate to what it is intended to achieve; and
- d) transparent in relation to what it is intended to achieve.

General Condition 22.1(a) and Annex 1: the MAC process

- 5.14 After considering the responses to the consultation and in light of evidence on migration problems, Ofcom has taken the provisions of the current voluntary code and made compliance with it compulsory by incorporating the elements of the MAC process as Annex 1 of General Condition 22. This will require all broadband service providers to follow the existing processes and enable Ofcom to take action when broadband service providers are not acting in accordance with the obligations in Annex 1.
- 5.15 As discussed in Section 5 of this document, the voluntary code has been redrafted to make it suitable for incorporation as a General Condition. As a result some elements are no longer necessary and have been removed. A few minor additions to the provisions of the Code have been included in General Condition 22. Detail of the changes made since the consultation are discussed in Section 5 and the tables in Annex 3 provide a comparison of the provisions of the voluntary code with the obligations in General Condition 22 and Annex 1.
- 5.16 Ofcom considers that the mandating compliance with the MAC process meets the tests set out in section 47(2) of the Act being:
- a) **objectively justifiable** because the evidence from customer complaints indicates that in a large proportion of cases, a failure by broadband service providers to comply with the MAC processes results in a poor customer experience and serves to undermine a migrations process that is regarded by industry as being a largely successful process. If Ofcom does not impose this obligation it risks undermining the work already undertaken by a significant proportion of the industry to develop the Code to where it is today;
 - b) **not unduly discriminatory against particular persons or against a particular description of persons**, although there will be a greater impact on broadband service providers who have not already signed up to voluntary code. Some broadband service providers have in fact undertaken the necessary developments to adopt the MAC process without actually being a signatory to the voluntary code. The application to all broadband service providers and wholesale broadband providers uniformly will mean that all broadband service providers stand to benefit from the acceptance and utilisation of a common process for broadband migrations;
 - c) **proportionate** to what it is intended to achieve, which is an improved experience for customers in the short term. For broadband service providers already complying with existing processes there will be little impact as they are already following the best practice on a voluntary basis. Ofcom believes that requiring all broadband service providers to comply with the MAC process is a proportionate

response to counteract the problems that continue to arise with migrations. Ofcom has evidence that some broadband service providers are not assisting in customer migrations by refusing to issue MACs, which impacts on individual customers and discredits the industry and those broadband service providers who are actively participating in the MAC process; and

- d) **transparent** in relation to what it is intended to achieve insofar as the nature and obligations are clearly set out in this document.

General Condition 22.1(b) and 22.2: high level obligations on Communications Providers in relation to broadband migrations

- 5.17 Having considered the responses to the consultation and on the basis of further evidence of problems with broadband migrations, Ofcom has decided to implement General Condition 22.1(b) and 22.2, which contain high level obligations that apply in instances where the broadband service provider does not have specific obligations under the MAC process, or where the MAC process does not apply. Ofcom considers that these high-level obligations are required to cover situations where the MAC process does not apply but migrations problems still arise.
- 5.18 As explained in this document Ofcom considers it extremely important that industry continues to work together to develop migration processes to ensure there can be smooth transitions between all types of broadband services, particularly those provided on the same underlying network.
- 5.19 The obligations in General Condition 22.1(b) and 22.2 meet the tests set out in section 47(2) of the Act being:
 - a) **objectively justifiable** because there is clear evidence that the experiences of some customers when dealing with Communications Providers offering broadband services have been far from satisfactory. In some instances it will not be apparent to a customer which broadband service provider is at fault in the migrations process. A high-level obligation applying to all broadband service providers involved in a migration process will mean that they will have a requirement to act reasonably when dealing with customers where specific migration processes do not apply, or where the MAC process has broken down with respect to another broadband service provider;
 - b) **not unduly discriminatory against particular persons or against a particular description of persons** as the obligation applies to all broadband service providers to behave reasonably by taking actions to minimise service disruption and to facilitate requests by customers to migrate broadband services. Broadband service providers will be required to ensure as far as reasonably practicable that consumers will receive equivalent treatment whatever the wholesale basis of the broadband service they are migrating from so that SMPF or MPF customers will be no worse off should they wish to move to or from a non-SMPF/MPF service or to or from another LLU service;
 - c) **proportionate** to what it is intended to achieve, which is an improved broadband migration experience for customers. The intention of imposing the proposed high level obligation is to acknowledge that broadband migration processes are still at an early stage. The high-level obligations are designed to operate as principles until such time that specific processes are developed for each of the migration options, while acknowledging the importance for providers to do all that is

reasonable to facilitate migrations so that competition is promoted and the interests of consumers will be furthered. Broadband service providers and wholesale broadband providers are required to act in a way that is reasonable and therefore Ofcom does not intend to be overly prescriptive with respect to the obligations. Ensuring that customers have minimal service disruption and that their requests to move to another provider are not unreasonably denied should be a fundamental element of customer service, whether the provider is on the gaining or losing end of the transaction; and

- d) **transparent** in relation to what it is intended to achieve insofar as the nature and obligations are clearly set out in this document for broadband service providers and wholesale broadband providers depending on their role in a given broadband migration scenario.

General Condition 22: Service Migrations

- 5.20 General Condition 22, which appears at Annex 1 of this statement, will come into force two months following the publication of this statement (on 14 February 2007).
- 5.21 Ofcom considers that this is a reasonable period for implementation, because the majority of Communications Providers that will be affected by the introduction of General Condition 22 already follow the MAC process under current voluntary arrangements, while the high level obligations at General Condition 22.2 are subject to a fair and reasonable threshold, which means that most Communications Providers will not be required to immediately introduce substantial changes to their current practices in order to ensure compliance. Ofcom has made some amendments as a result of considering responses about the substantial changes that some providers may have needed to make to their systems to introduce additional ways of communicating with their customers. Annex 1 therefore closely reflects the processes in the voluntary code. The term “Communications Provider” has been defined for the purposes of General Condition 22 to include all broadband service providers, both wholesale and retail.
- 5.22 General Condition 22 consists of two elements:
- a requirement on all Communications Providers to comply with the MAC process specified at General Condition 22, Annex 1.
 - where the MAC process does not apply, a requirement on all Communications Providers to comply with the obligations set out at General Condition 22.2.
- 5.23 Where specific migration processes have been developed and implemented, Communications Providers will be expected to follow them. The MAC process, which has been operational for some time, has therefore now been codified as a series of obligations set out in Annex 1 to General Condition 22. General Condition 22.1(a) requires providers to comply with the provisions of Annex 1, i.e. the MAC process.
- 5.24 However, where a process other than the MAC process applies, where processes are still in development, or where there are gaps in these processes, General Condition 22.2 will apply. In other words, where the MAC process does not apply, the high level obligations in General Condition 22.2 will require Communications Providers to:

- a) facilitate the migration (or where applicable, connection) of the Broadband Service in a manner that is fair and reasonable;
- b) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out within a reasonable period;
- c) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out with minimal loss of the Broadband Service; and
- d) assist with, and facilitate requests for, the migration (or where applicable, connection) of a Broadband Service provided by another Communications Provider, in instances where the other Communications Provider has failed to, or refused to, comply with the MAC Broadband Migrations Process, in a manner that is fair and reasonable.

5.25 In the consultation (see paragraph 5.19), Ofcom identified a number of sources of consumer harm that General Condition 22 was drafted to address:

- the MAC process;
- tag on line;
- home movers;
- LLU (SMPF and MPF) migrations; and
- potential problems emerging in the future.

5.26 The impact of General Condition 22 in these areas is considered in the following paragraphs. This discussion is intended to offer Communications Providers some guidance as to how General Condition 22 will function in practice, but does not necessarily indicate the approach we will take in a particular case and does not fetter Ofcom's discretion to deal with problems that arise in the most appropriate manner.

General Condition 22.1 and Annex 1: the MAC Broadband Migrations Process

5.27 The current voluntary arrangement leads to consumer harm in two distinct ways:

- failure to sign up to and/or to comply with the voluntary code leads to difficulty for consumers who want to switch; and
- the fact that the only source of MACs is currently the customer's service provider can lead to problems, particularly where there is a dispute between different parties in the chain of supply (including the withdrawal of broadband service providers from the retail market).

5.28 General Condition 22 will, to a large extent, address the first of these problems, as broadband service providers will, in most cases, be required to issue MACs to their customers on request. To ensure that retail providers are able to meet this obligation, wholesale broadband providers will also be required to issue MACs to *their* customers (i.e. retail providers) on request. Ofcom will be able to investigate apparent breaches of these requirements and where appropriate to take enforcement action.

- 5.29 As noted in the previous paragraph, General Condition 22 will require wholesale providers to issue MACs to their reseller customers on request, which also means that customers are less likely to be affected by upstream disputes (e.g. where a wholesale provider refuses to issue MACs to its resellers so that they are unable to issue them to end customers). This may help to reduce the potential for current arrangements to lead to consumer harm. However, it will not address the source of the problem – the fact that the only place a customer can currently obtain a MAC is from his broadband service provider – which is why Ofcom will push forward co-regulatory work to progress options for an alternative source for the provision of MACs (see paragraph 3.25 above).
- 5.30 The MAC process, as discussed in Section 3 of the consultation, is built around a consumer's request to switch a broadband service away from one provider to another. It relies on the customer making the first move to initiate the planned migration from one provider to another (see A1.1(a)).
- 5.31 As noted at Section 3 of the consultation and paragraph 4.79 above, one of the advantages of the MAC process is that it minimises the risk of “slamming”, because the customer is required to verify his entitlement to receive a MAC before one can be issued. It provides an opportunity for the customer's existing provider to understand why a customer wants to migrate and modify its practices accordingly (for example, if the customer cites poor customer service as his reason for leaving, the losing provider will have a greater incentive to improve overall service levels and avoid losing other customers). In addition, it gives losing providers an opportunity to explain to consumers the consequences of departing early from an agreed term contract (for example, customers may be required to pay the charges for the remaining contract term if they leave early).
- 5.32 However, there are also strong incentives for providers to use the contact with the consumer as an opportunity to dissuade the customer from leaving, and if not successful, to seek to withhold MACs in order to increase the likelihood of recovering any outstanding debt before the supply relationship is terminated.
- 5.33 Despite some flaws that are not addressable without substantial changes to the underlying processes (i.e. the fact that MACs are currently only available from the customer's existing broadband service provider), the consensus among stakeholders that have commented on Ofcom's proposals appears to be that, where there is compliance with the voluntary code, the MAC process generally works as a smooth migration option.
- 5.34 As discussed in detail in Section 4 of the consultation, a large proportion of the consumer complaints considered in detail by Ofcom appear to be associated with non-compliance by one or more parties (including signatories to the current voluntary code) with the MAC process. This has seriously undermined the value of current voluntary arrangements and the efforts of those providers that have complied with the Broadband Service Provider Migrations Code of Practice. Making the MAC process mandatory for all Communications Providers will provide a strong incentive to comply, which Ofcom anticipates will lead to an immediate fall in consumer harm arising from non-compliance. Where there is evidence of non-compliance, Ofcom will be able to formally investigate (either in response to complaints or on its own initiative) and, where appropriate, take enforcement action. Where a Communications Provider fails to comply with an enforcement notification against it, Ofcom may impose financial penalties.

- 5.35 Ofcom is therefore going ahead with the introduction of enforceable obligations in Annex 1 to General Condition 22 that will in most situations require Communications Providers to issue MACs to customers on request and at no charge, regardless of whether debt remains and whether the customer is subject to other contractual obligations. General Condition 22, Annex 1, paragraph A1.11 sets out an exhaustive list of the specific circumstances in which a provider may legitimately refuse to supply a MAC to an End-User.

Debt blocking and charging for MACs

- 5.36 Ofcom considers that migration arrangements are distinct from the underlying contract between a particular broadband supplier and a particular end user for supply of the broadband service. The MAC process is not intended to be used by broadband providers as a tool for enforcing contract terms. The migration process exists because the same underlying infrastructure needs to be used by the customer's new provider of choice to enter into a new and distinct contract of supply. Any obligations arising from the customer's contract with his existing or former supplier should be addressed in other ways, for example through the courts.
- 5.37 Similarly, Ofcom does not believe it is appropriate for broadband service providers to charge for the provision of MACs. Ofcom believes that broadband service providers are entitled to recover from end users the costs that they incur in providing them with a broadband service. However, the appropriate way of recovering those costs is not through the MAC process. The purpose of the MAC process is to enable customers to obtain broadband with the provider of their choice and not to assist broadband service providers in recovering their costs. Any cost to service providers can legitimately be recovered over the period of the contract, but to impose it at the point of migration would represent, in Ofcom's view, an impediment to smooth migrations.

Application to wholesale broadband providers

- 5.38 Annex 1, paragraph A1.1(b) imposes an obligation on wholesale broadband providers to supply MACs to *their* customers on request. Ofcom notes that the voluntary code was always intended to function in the same way regardless of the number of providers in the supply chain, otherwise it would be rendered ineffective. The introduction of the voluntary code notes that:

"Where there is a chain of resellers such that the SP contracting with BT for the wholesale service is different from the SP contracting with the customer for the retail service, the terms LSP and GSP refer to whichever party(s) in the chain is responsible or to the parties collectively as appropriate."

- 5.39 In some circumstances, wholesale broadband providers are unwilling to release MACs on request to their reseller customers, for example where a customer has failed to honour contractual provisions with the wholesale provider. However, Ofcom does not consider that it is acceptable for wholesale broadband providers to, in effect, deny End-Users the ability to transfer their service as a result of a contractual dispute that has arisen further up the supply chain. In the absence of this obligation on wholesale providers, consumers acquiring broadband services through a reseller could be disadvantaged when they attempted to switch as their reseller could be denied MACs by its wholesale provider and rely on the failure by the wholesale provider to issue the MAC as the reason for refusing to issue a MAC.

- 5.40 MACs are also used to process bulk service migrations not driven by End-User requests, for example, when a reseller is changing its wholesale supplier. General Condition 22 means that wholesale providers will be required to provide MACs to resellers on request in such situations.

Application to migrations from SMPF

- 5.41 For the avoidance of doubt, once the “provide with MAC” process goes live, migrations from SMPF to IPStream and DataStream will fall within the ambit of General Condition 22.1 and Annex 1. In other words, Ofcom will expect broadband service providers to issue MACs for SMPF connections to their customers on request in most circumstances, and to accept MACs for inbound migrations from SMPF to IPStream and DataStream (and, where relevant, will expect wholesale providers of SMPF-based broadband connections to issue MACs to their reseller customers on request).

Comparison of General Condition 22.1 and Annex 1 and existing voluntary arrangements

- 5.42 As explained in the consultation, Ofcom considers that the existing voluntary code already includes a number of provisions that should be carried forward in their current form or as slightly modified requirements:
- broadband service providers may refuse to issue a MAC only in limited and specified circumstances (see A1.12). The current voluntary code, for example, cites four legitimate reasons for refusal to issue a MAC;
 - broadband service providers may not refuse to issue MACs because customers owe them money (“debt blocking”). For the reasons outlined in paragraph 4.121 *et seq* above Ofcom does not believe that it is appropriate for broadband service providers to use migrations processes as a tool for recovering upfront investment or as a means of minimising bad debt, since alternative provisions (e.g. the enforcement by broadband service providers of consumer contracts) already exist. As discussed at paragraphs 4.124 *et seq* above, the PAC process for Mobile Number Portability does not entitle providers to withhold PACs on account of unpaid debt. General Condition 22 will therefore require broadband service providers to issue a MAC on request, in all circumstances other than those specified as exceptions, for all the migration paths to which the MAC process can apply (which as noted above does not include migrations that are managed using the “letter facilitation process” see General Condition 22 paragraphs A1.1(a)-(b) and A1.3);
 - broadband service providers must not disconnect the broadband service when a customer requests a MAC. Broadband service providers must make an effort to understand what their customers are requesting – if they do not specify that they require a MAC, broadband service providers must ascertain whether they want to cease broadband completely, or transfer to another supplier (see A1.13);
 - broadband service providers must give customers at least two different options for contacting them, e.g. by e-mail, telephone or in writing (see A1.4). For the avoidance of doubt, Annex 1 does not restrict the number of ways in which a broadband service provider can provide a MAC to its customers, and broadband service providers will therefore be able to take advantage of alternative mechanisms (SMS was mentioned by BT as a possible way of providing MACs)

as long as they fulfil the other criteria. In the consultation, Ofcom proposed an enhancement to the voluntary code that would have required providers to ensure that MACs were communicated in writing even where the customer had requested and received the MAC by telephone, to minimise the chances of transposition errors. Having considered this issue further and in light of consultation responses, Ofcom acknowledges the additional burden this could create on providers. General Condition 22 has therefore been slightly amended from the consultation to reflect the provisions of the voluntary code, which does not additionally require providers to communicate the MAC in writing if the MAC has been provided to a customer during a telephone conversation (see General Condition 22, Annex 1 paragraphs A1.5-A1.6). Providers are still required to offer their customers two or more methods to contact them for the purposes of obtaining MACs (A1.4), whereas under the voluntary code three methods were specified as a minimum. Broadband service providers must adhere to standard timescales for provision of MACs, and customers must be made aware of the standard validity period (30 calendar days) and be reminded of the MAC during that period on request (see A1.9);

- broadband service providers must make information available to consumers about the MAC process and what they need to do to switch broadband service providers (see A1.20).

5.43 Ofcom has also included some minor changes to the drafting of the provisions in the interpretation section of General Condition 22 (relative to the drafting in the consultation) and in Annex 1:

- a) in the definition of “Broadband Migrations”, the word “using” has been deleted from each of the four examples in (a) – (d) as it is irrelevant whether the broadband service is being *used* – General Condition 22 only has effect where a broadband service is being *migrated*;
- b) Ofcom has amended part (ii) of the definition of End-User to reflect the fact that the person other than the Account Holder is someone authorised to “transfer” the service, rather than “using” the service, and to clarify that requests by corporate End Users do not fall within the ambit of the MAC process (see paragraphs 4.106-4.107, and 4.132); and
- c) the word “not” was originally included in the draft version of General Condition 22.2(d) that appeared in the consultation as the result of a drafting error, and is clearly inconsistent with the intention of that provision – Ofcom has therefore removed it from the final version.

5.44 Additional wording changes are discussed in paragraphs 5.76 – 5.79.

5.45 As explained in the consultation, not all elements of the voluntary code have been adopted in Annex 1 of General Condition 22, as some are not necessary once compliance with the processes is obligatory. For example, the introductory sections about code signatories, application and enforcement, and changes to the code do not need to be incorporated. Further, some of the provisions will depend on the individual terms and conditions in customer contracts and Ofcom does not therefore consider them suitable to include in the General Condition obligations.

5.46 Some minor enhancements and clarifications have been included in General Condition 22 Annex 1. For example, the current voluntary code is silent on whether

broadband service providers are permitted to charge for issuing MACs to their customers, but this is set out as a requirement in General Condition 22, paragraph A1.10. As previously explained in the consultation, broadband service providers may, depending on their contract with the customer, be entitled to ask the customer to pay certain charges at the point of migration, for example where the customer is liable for charges for any term remaining. However, Ofcom does not consider that it is permissible for broadband service providers to impose a specific charge for issuing the MAC, which is part of a migration process and unrelated to the contractual obligations attaching to the broadband service.

- 5.47 The table that appeared at Annex 8 of the consultation has been reproduced for ease of reference at Annex 3 of this document. It explains which of the provisions of the voluntary code of practice Ofcom has carried over as obligation in Annex 1 to General Condition 22 (either as they are or in an amended form), which of those provisions have not been included, and the reasons why.

Monitoring and Enforcement

- 5.48 Ofcom's powers to enforce conditions, including the General Conditions, are set out at sections 94-104 of the Act. Ofcom has published guidelines setting out its procedures for investigating alleged breaches of the General Conditions¹⁰ and will investigate any alleged or apparent breach of General Condition 22 in line with those published guidelines.
- 5.49 In enforcing the obligations in Annex 1 of General Condition 22, Ofcom will focus on the party responsible for non-compliance with the relevant part of the process. For example, the obligation to verify End-Users rests with the customer-facing provider (the reseller). A wholesale broadband provider issuing MACs to a reseller customer is not going to be held responsible for the conduct of the reseller in failing to verify an End-User's identity. Conversely, if a reseller wishes to fulfil its obligation to issue MACs to its End-Users on request, but is being denied MACs by its wholesale supplier, then Ofcom will focus on the actions of the wholesale supplier.
- 5.50 Ofcom might be prompted to investigate the conduct of retail broadband providers by complaints from consumers to OCC, or by complaints from other Communications Providers, for example that customers have been coming to them requesting service having been denied MACs by their existing supplier. As well as refusal or failure to provide MACs, Ofcom may be concerned by other conduct specifically covered by General Condition 22: Annex 1 such as debt blocking and charging for MACs.
- 5.51 Ofcom might, in future, investigate the actions of a wholesale broadband provider under General Condition 22: Annex 1 if its failure to provide MACs to a reseller seemed to be leading to consumer harm – for example, if a wholesale provider refused to issue MACs for the reseller to pass on to its customers, restricting the ability of those customers to migrate to another broadband provider of their choice.

¹⁰ *Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives*, published at: http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf. Note that Ofcom has recently consulted on new draft guidelines (see <http://www.ofcom.org.uk/consult/condocs/enforcement/summary/>).

- 5.52 Once General Condition 22 comes into force, wholesale broadband providers will be required to issue MACs to their reseller customers on request. Ofcom recognises that this may require changes to existing contracts.
- 5.53 In many cases, the introduction of General Condition 22 will not impose any additional obligations on Communications Providers. For the avoidance of doubt, Ofcom would not currently be minded to expect a wholesale broadband provider in this position to enter into any relationship with its reseller's end customers, as it recognises that there are genuine practical difficulties and costs involved. However, such an arrangement is one option that Ofcom would expect to see considered as part of ongoing co-regulatory work (see paragraph 3.25 above).
- 5.54 Ofcom recognises that General Condition 22: Annex 1 will not necessarily enable it to address every case of failure to supply MACs.
- 5.55 As BT noted in its response to the consultation, for example, MACs can, technically, only be supplied where a connection is still "live". Where a connection has already been terminated, any investigation and eventual enforcement would be under General Condition 22.2 rather than General Condition 22.1 and Annex 1.
- 5.56 Similarly, if a wholesale provider were to terminate service to one of its resellers without notice – before that reseller or its customers had had an opportunity to request MACs – any investigation and enforcement by Ofcom would come under General Condition 22.2 rather than those provisions specific to the MAC process. For example, Ofcom may consider that it has grounds to investigate a potential breach of General Condition 22.2(a) where a wholesale broadband supplier cuts off supply to a reseller without offering to provide it with MACs for the use of its end customers, because failing to consider an alternative process with no downtime would not support the objective of smooth migrations.
- 5.57 Ofcom will make such assessments on a case-by-case basis and will take into account, for example, any additional cost incurred by a wholesale provider in maintaining connections to give customers an opportunity to migrate away using MACs, rather than cutting them off without notice.

General Condition 22.2: high-level obligations

- 5.58 The other elements of General Condition 22 are the high-level obligations in General Condition 22.2. Ofcom considers, in light of responses to this consultation, that it is appropriate for it to introduce these obligations and the discussion below includes some guidance on how Ofcom anticipates the conditions would operate in practice.
- 5.59 Ofcom's powers to investigate and enforce alleged breaches of the high-level obligations, and its investigation procedures, are the same as for alleged failure to comply with the MAC process (see paragraph 5.48 above).
- 5.60 A number of submissions expressed concerns about whether the high level obligations were sufficiently specific to address the range of situations where consumer harm has arisen from broadband migrations not proceeding smoothly.
- 5.61 The high-level obligations were deliberately drafted to be flexible enough to capture as many scenarios as possible, including those which have not arisen to date.
- 5.62 The obligations are designed to take effect in cases where the MAC process does not cater for the situation. Examples we are aware of today (as mentioned at

paragraph 5.19 of the consultation) include tag on line, home moves and migrations to and from MPF.

- 5.63 What these problems have in common is that they are all associated with weaknesses in underlying processes and/or failure by Communications Providers to use those processes correctly and advise their customers accordingly.
- 5.64 Some of the underlying process issues we considered in the consultation are now on the way to being addressed. For example, Communications Providers will be required to use the MAC process, rather than cease and reprovide, for migrations from SMPF to IPStream and DataStream once “provide with MAC” goes live (see paragraph 3.26 above) – migrations from SMPF to IPStream and DataStream will therefore fall within the ambit of General Condition 22.1 rather than the high-level obligations. Providers who fail to use “provide with MAC” may therefore be in breach of General Condition 22.1.
- 5.65 Ofcom considers that the high-level obligations are likely to be most effective in responding to alleged failure by specific Communications Providers to comply with specific industry-agreed processes and protocols. Examples include failure by a broadband service provider to give customers accurate information (for example by using the customers advice matrix described at paragraph 3.24 above), or service providers referring customers to the BT tag on line helpdesk inappropriately.
- 5.66 In some cases, the high-level obligations may enable Ofcom to address failure on the part of a specific Communications Provider to carry out action that would have helped to address underlying process issues when it would have been proportionate, fair and reasonable for it to do so. In such cases, Ofcom would need to identify the Communications Provider responsible, and to have clear evidence of that Communications Provider’s failure to take such reasonable and proportionate actions in order to address a particular problem.
- 5.67 Ofcom does not expect to rely on the high-level obligations in cases where there are many parties involved in developing necessarily complex processes, a lack of clarity over the precise nature of the problem, and no clear evidence that parties involved have not acted fairly and reasonably to address the problem. Ofcom considers that the best way to address this category of problems is through co-regulatory action, which will be an essential complement to compliance with, and enforcement of, General Condition 22 in helping to address harm associated with broadband migrations.
- 5.68 The following paragraphs explain how Ofcom expects General Condition 22 to address the specific sources of consumer harm listed at paragraph 5.19 of the consultation. Ofcom’s proposed co-regulatory work described in paragraph 3.25 above will provide guidance to broadband providers on how they are expected to comply with General Condition 22 – which may, if appropriate, include the publication of written guidance.

Tag on line

- 5.69 General Condition 22 will help to address tag on line, as the obligation to follow the MAC process where it is available will mean fewer migrations are managed using cease and reprovide. However, tags will not be completely eliminated by faithful adherence to the MAC process as there are still going to be instances where tags

remain, for instance in home move situations where customers have not cancelled their broadband service as they leave the premises.

- 5.70 In such cases, the high-level obligations at General Condition 22.2 will require the losing and/or gaining Communications Provider(s) to do what can be reasonably expected of them. This may consist of dealing with the BT tags helpdesk on the customer's behalf, so that the customer only has to make a single call. It may, for losing providers supplying a connection based on SMPF, mean making all reasonable effort (subject to Data Protection restrictions) to cancel a connection "left behind" by a previous tenant. It may mean using the customer advice matrix (see paragraph 3.24 above) to ensure that customers are not inadvertently subjected to tag on line because they are advised to use an inappropriate migration process.
- 5.71 In BT's case, it is likely to mean continued operation of the tag on line helpdesk. Ofcom welcomes BT's assurances that the helpdesk will continue to operate for the foreseeable future. Nevertheless, if Ofcom receives complaints that BT has failed to respond to requests to assist with tags (although as discussed at paragraph 4.54 above the helpdesk is operated by BT Wholesale and cannot therefore remove SMPF or MPF tags) then this may raise the question of whether BT has acted fairly and reasonably to assist with and facilitate migrations, prompting further investigation by Ofcom. If it appears that BT is not doing everything that could be reasonably expected to diagnose the causes of tag on line and find solutions, then Ofcom may consider a possible breach under General Condition 22.2. In addition, Ofcom may consider that there are grounds for investigating a possible breach if BT introduces new processes to address tag on line, but other broadband providers fail to use them.

Home moves

- 5.72 General Condition 22 is unlikely to lead to an immediate improvement of the customer experience for home movers. Where complaints about home moves identify the actions of particular providers, Ofcom will consider whether there are grounds for an investigation. As noted above, it may be fair and reasonable for losing providers supplying a connection based on SMPF to make reasonable effort to cancel a connection "left behind" by a previous tenant. It may mean both gaining and losing provider using the customer advice matrix (see paragraph 3.24 above) to ensure that customers are not inadvertently subjected to tag on line because they are advised to use an inappropriate migration process.
- 5.73 For the avoidance of doubt, in light of comments made by broadband service providers during information-gathering meetings (see paragraphs 2.27 and 3.48 of the consultation), Ofcom does not consider that it would be reasonable for it to require Communications Providers to use BT's existing Home Movers process at this time. Ofcom does not therefore intend to interpret General Condition 22 in such a way that it would consider it to be fair and reasonable for broadband service providers to be required to use the Home Movers process.
- 5.74 In the longer term, Ofcom considers that the difficulties associated with home moves are best addressed through co-regulatory action (which may include the further work that BT refers to in its response to the consultation). If, once the industry has made significant progress in developing and implementing a better process for managing home moves, a broadband provider opts not to follow that process, Ofcom may consider that that provider is not acting in a manner that is fair and reasonable, as by using the improved process they would be facilitating migrations with the minimal

amount of disruption and loss of service. If particular providers are shown to be an obstacle to developing new processes, Ofcom may consider that it is appropriate to investigate a potential breach of General Condition 22.2.

Migrations to and from SMPF and MPF

- 5.75 As discussed at paragraph 3.26 above, Ofcom welcomes progress on the introduction of a fit-for-purpose “provide with MAC” process, which is expected to address some of the current problems with the MAC process for SMPF customers. Once provide with MAC is operational, migrations from SMPF to IPStream and DataStream (although not migrations to and from MPF) will be covered by General Condition 22.1 Annex 1.

Final wording of General Condition 22

- 5.76 Some minor changes have been made to the wording of General Condition 22 amending the original drafting included in the consultation. In large part, these changes are designed to give effect to the intentions that were expressed in the consultation (see paragraph 5.19 of the consultation):
- a) deletion of the words, “Within two months of this Condition entering into force” in 22.1;
 - b) inclusion of the words, “a Customer” in 22.1;
 - c) deletion of the words “pursuant to a request from an End-User and/or a Customer for a Broadband Migration” in 22.2;
 - d) inclusion of the words “(or where applicable, connect)” and “(or where applicable, connection)” after the words “the migration” in 22.1 and 22.2 (a) through (d) respectively;
 - e) deletion of the words “in relation to a Communications Provider” in the definition of “Customer” in 22.3;
 - f) broadening of the definition of “Customer” in 22.3 to include “a person seeking to become an End-User of a Communications Provider”; and
 - g) deletion of the words “in relation to a Broadband Service” in the definition of End-User in 22.3
- 5.77 Most of the points above are clarification changes to the drafting. Points (a) is no longer necessary as the General Condition will enter into force on 14 February 2007. Points (b) and (c) above make it clearer that obligations operate on Communications Providers pursuant to requests to migrate a service coming from an End-User, a Customer or another Communications Provider. Points (e) and (g) are clarification changes to delete unnecessary wording.
- 5.78 The amendment Ofcom has made to the definition of “Customer” in point (f) above is intended to capture consumers who are proposing to acquire a Broadband Service for the first time and therefore have no existing supply relationship with any provider. Such consumers may currently be affected by underlying broadband migrations processes, notably where a relationship between a different consumer and a broadband service provider has led to a tag on the line.

- 5.79 The change in point (d) above to the wording in 22.1 and 22.2 (a) – (d) is to include the words “(or where applicable, connection or connect)”. This is linked to the situation described above where a connection is inhibited because a previous broadband migration has not been carried out properly. Ofcom recognises that in some cases, this will not be due to the actions of Communications Providers but rather the failure by a previous occupant to take an action to close down the Broadband Service. The MAC process is unlikely to apply in this situation and the high level obligations will only apply if the actions by Communications Providers in relation to release of the former service and management of the new service are not fair and reasonable. Ofcom considers that this change clarifies its position, as set out at paragraph 5.19 of the consultation that these proposals are designed to cover a broader set of “migrations” which also includes customers obtaining broadband for the first time (see also paragraph 4.95 above).

Further work

- 5.80 While General Condition 22 will address many of the problems associated with broadband migrations, it will not solve all of them.
- 5.81 Where a problem requires further input from the industry to design, test and implement new processes, it may not be appropriate to rely on regulation alone to deliver results.
- 5.82 In particular, Ofcom will work with the industry to design an appropriate process for the provision of MACs by an alternative source if the customer's broadband service provider fails, or refuses, to provide them. Ofcom does not at this stage have a view about what such a process would look like, and considers that there may be a number of possible alternatives.
- 5.83 As discussed at paragraphs 3.24-3.25 above, recent engagement by OTA has led to positive results, and Ofcom considers that a similar co-regulatory approach is the best way of tackling further work. Ofcom plans to discuss plans for appropriate co-regulatory arrangements with the industry early in 2007.
- 5.84 Following further work by the industry, Ofcom expects to consult again in due course to bring a process for the provision of MACs by an alternative source within the scope of formal regulation. However, Ofcom recognises that the introduction of General Condition 22, combined with further work undertaken by the industry, may, over the coming months, bring consumer harm associated with broadband migrations down to a level where further regulation is not appropriate. Ofcom will therefore only undertake a further consultation if it remains of the view that further regulation is a necessary and proportionate consumer protection measure.
- 5.85 As more migration processes are developed and adopted by the industry Ofcom will consider whether it is appropriate to expand the obligations in General Condition 22, Annex 1 to reflect new processes.
- 5.86 Over the same period, Ofcom will continue to gather evidence of consumer harm arising from shortcomings in broadband migration processes and to consider the different options for developing existing broadband migrations processes. If co-regulatory work does not make sufficient progress, Ofcom may consider whether it is appropriate to investigate a potential breach of General Condition 22, and may undertake its own analysis before consulting on what it considers to be the most appropriate process.

Annex 1

Notification

NOTIFICATION OF THE SETTING OF A NEW CONDITION UNDER SECTION 48(1) OF THE COMMUNICATIONS ACT 2003

The modification of the General Conditions to introduce General Condition 22: Service Migrations for the purposes of imposing requirements upon all Communications Providers who provide Broadband Services to follow specific processes for the migration of these services and where specific processes do not apply to act in a manner that is fair and reasonable to assist and facilitate the migration of these services.

WHEREAS

- A. The Director General of Telecommunications (the “Director”) issued on 22 July 2003 the General Conditions Notification, which took effect on 25 July 2003 by way of publication of a notification pursuant to section 48(1) of the Act;
- B. OFCOM issued a notification pursuant to section 48(2) of the Act on 17 August 2006 setting out their proposals for the insertion of a new General Condition 22 (the “First Notification”);
- C. A copy of the First Notification was sent to the Secretary of State in accordance with section 50(1)(a) of the Act;
- D. In the First Notification and accompanying explanatory statement, OFCOM invited representations about any of the proposals set out therein by 5pm on **5 October 2006**;
- E. By virtue of section 48(5) of the Act, OFCOM may give effect to any proposals to set conditions as set out in the First Notification, with or without modification, where:
 - (i) they have considered every representation about the proposals made to them within the period specified in the First Notification; and
 - (ii) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- F. OFCOM received 168 responses to the First Notification and have considered every such representation made to them in respect of the proposals set out in the First Notification and the accompanying explanatory statement; and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose:

THEREFORE, OFCOM makes the following modification

1. OFCOM in accordance with section 48(1) of the Act hereby make the following modification to the General Conditions Notification to insert new General Condition 22 on Service Migrations as set out in the Schedule to this Notification;

2. The effect of, and OFCOM's reasons for making, the modification referred to in paragraph 1 above is set out in the accompanying explanatory statement to this Notification;
3. OFCOM considers that the modification referred to in paragraph 1 above complies with the requirements of sections 45 to 50 of the Act, as appropriate and relevant to each of the modifications;
4. In making the modification set out in this Notification, Ofcom has considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act;
5. The modification shall enter into force on **14 February 2007**;
6. Copies of this Notification and the accompanying statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act;
7. In this Notification:
 - i) "the Act" means the Communications Act 2003; and
 - ii) "OFCOM" means the Office of Communications;
8. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
9. For the purpose of interpreting this Notification:
 - i) headings and titles shall be disregarded; and
 - ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
10. The Schedule to this Notification shall form part of this Notification.

CLAUDIO POLLACK

A person authorised by OFCOM under paragraph 18 of the Schedule to the Office of Communications Act 2002

13 December 2006

Schedule

Insertion of General Condition 22: Service Migrations which is set out in the Schedule to the Notification under section 48(1) of the Communications Act 2003 published by the Director General of Telecommunications on 22 July 2003

1. General Condition 22 on Service Migrations shall be inserted at the end of General Condition 21 as follows:

22. SERVICE MIGRATIONS

Broadband Migrations

22.1 All Communications Providers pursuant to a request by an End-User, a Customer or another Communications Provider to migrate (or where applicable, connect) a Broadband Service, shall:

- a) comply with the provisions of the MAC Broadband Migrations Process set out at Annex 1 to this Condition; and
- b) where the provisions of the MAC Broadband Migrations Process do not apply to the Communications Provider in relation to the Broadband Service, comply with the provisions referred to in Conditions 22.2.

22.2 The Communications Provider shall:

- a) facilitate the migration (or where applicable, connection) of the Broadband Service in a manner that is fair and reasonable;
- b) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out within a reasonable period;
- c) ensure that the migration (or where applicable, connection) of the Broadband Service is carried out with minimal loss of the Broadband Service; and
- d) assist with, and facilitate requests for, the migration (or where applicable, connection) of a Broadband Service provided by another Communications Provider, in instances where the other Communications Provider has failed to, or refused to, comply with the MAC Broadband Migrations Process, in a manner that is fair and reasonable.

22.3 In this Condition:

- a) “**Account holder**” means a person, other than a Communications Provider, who is party to a contract with the Communications Provider for the provision of Broadband Services.
- b) “**Broadband Migration**” means one or more of the following processes by which:
 - i) the Communications Provider transfers from one Broadband Service to another Broadband Service;
 - ii) an End-User or Customer transfers from one Broadband Service to another Broadband Service;

- iii) an End-User or Customer transfers from a Broadband Service supplied by a Communications Provider to a Broadband Service supplied by another Communications Provider;
 - iv) an End-User or Customer transfers from a Broadband Service supplied by a Communications Provider at one location to a Broadband Service supplied by the same Communications Provider at a different location.
- c) **"Broadband Services"** means all high speed DSL services that allow for the transfer of high volumes of data at high speeds.
- d) **"Broadband Network Communications Provider"** means a Communications Provider that provides Broadband Network Services.
- e) **"Broadband Network Services"** means services that:
 - i) generate a MAC in relation to a Broadband Service provided by the Communications Provider to an End-User or to another Communications Provider;
 - ii) effect a transfer of a Broadband Service from one Communications Provider to another Communications Provider using the MAC issued in relation to that Broadband Service; and
 - iii) effect the cease of a Broadband Service from the Communications Provider at the request of the Communications Provider.
- f) **"Cease Request"** means a direction given by a Communications Provider to a Broadband Network Communications Provider in relation to a Broadband Service, with the intention being to terminate provision of that Broadband Service.
- g) **"Communications Provider"** means a person who provides Broadband Services.
- h) **"Customer"** means a person who is an End-User of a Broadband Service provided by a different Communications Provider or a person who is seeking to become an End-User of a Communications Provider.
- i) **"Default Migration Date"** means five Working Days after the MAC is provided by a Communications Provider to a Broadband Network Communications Provider.
- j) **"DSL (Digital Subscriber Line)"** means a family of technologies generically referred to as DSL, or xDSL, capable of transforming ordinary phone lines (also known as "twisted copper pairs") into high speed digital lines
- k) **"End-User"** means:
 - i) an Account holder; or
 - ii) a person who may be authorised, by a person falling within paragraph (i) above, so as to transfer the Broadband Service;

who is not a person who is acquiring the Broadband Service in respect of an undertaking carried on by him for which more than ten individuals work (whether as an employee or volunteer or otherwise).

- l) **“Fixed-line Telephone Services”** means narrowband calls and lines services provided to an End-User or Customer that allow for the transfer of speech communications, and other forms of communications such as facsimile and data.
- m) **“MAC”** means Migration Authorisation Code, which is a unique code used to identify a Broadband Service that is intended to be transferred from one Communications Provider to another Communications Provider.
- n) **“MAC Broadband Migrations Process”** means the obligations and processes set out in Annex 1 to this Condition.
- o) **“MAC validity period”** means a period extending up to 17.00 on the thirtieth calendar day from issue (either verbally or in writing, whichever is first) by the Communications Provider.
- p) **“Migration Date”** means the date on which the transfer of the Broadband Service will be effected, at which point the End-User’s Broadband Service will commence being provided to the End-User by a different Communications Provider.
- q) **“Working Day”** means the hours between 09.00 – 17.00 on Monday to Friday, with the exception of Bank Holidays.

General Condition 22: Annex 1

Migrations Authorisation Code (MAC) Broadband Migrations Process

A1.1 The Communications Provider shall, at the request of:

- a) an End-User of the Communications Provider; or
- b) another Communications Provider who acquires a Broadband Service from the Communications Provider

issue a MAC for a Broadband Service where the Broadband Service is a service to which the MAC Broadband Migrations Process applies.

A1.2 The MAC Broadband Migrations Process applies to the supply by the Communications Provider of all DSL services, with the exception of those DSL services that are required to be migrated by means of a process that relates to the supply of a Fixed Line Telephone Service supplied in conjunction with the DSL service.

A1.3 The Communications Provider shall take reasonable steps to validate the identify of an End-User who has contacted the Communications Provider to request a MAC for a Broadband Service, before issuing a MAC to the End-User.

A1.4 The Communications Provider shall provide its End-Users with two or more of the following contact methods:

- a) telephone numbers;
- b) e-mail address; and
- c) postal address,

for the purposes of an End-User contacting the Communications Provider to obtain a MAC.

Issuing MACs to End-Users

A1.5 The Communications Provider shall communicate the MAC to the End-User in writing by letter and/or by e-mail within five working days of receipt of the End-User's request save for A1.6.

A1.6 Where the Communications Provider has issued the MAC to the End-User over the telephone (including details about the MAC validity period and expiry date and the Broadband Service to which the MAC relates), the Communications Provider is not required to communicate the MAC to the End-User in writing.

A1.7 The written response (e-mail or letter) to the End-User containing the MAC shall clearly indicate:

- a) the MAC (or MACs);
- b) the MAC validity period and expiry date; and
- c) the Broadband Service(s) to which the MAC(s) applies.

- A1.8 At any time prior to the expiry of the MAC validity period, the Communications Provider shall remind the End-User of the MAC if requested by the End-User.
- A1.9 Where a MAC has already been requested and provided, the Communications Provider shall not impose any limits on the number of additional times an End-User may request the provision of a new MAC in relation to the Broadband Service, following the expiry of any other MACs.
- A1.10 The Communications Provider shall issue a MAC to the End-User free of charge.

Refusal to issue a MAC

- A1.11 The Communications Provider shall only refuse to issue a MAC to their End-User if:
- a) the Communications Provider has, by taking reasonable steps, been unable to validate the identity of the person requesting the MAC as the End-User;
 - b) the Broadband Service contract has already been terminated;
 - c) a MAC which is still within its MAC validity period has already been requested and issued by the Communications Provider in relation to the Broadband Service; and
 - d) the Communications Provider has already submitted a Cease Request for the Broadband Service; and
 - e) the Communications Provider is unable to obtain a MAC from a Broadband Network Communications Provider.
- A1.12 Where the Communications Provider is unable to, or refuses to, provide a MAC to the End-User, the Communications Provider shall provide the End-User with a clear explanation of why the MAC has not been provided.

Cease requests and notice to terminate a Broadband Service

- A1.13 The Communications Provider shall not issue a Cease Request for the Broadband Service unless the Communications Provider has established that the End-User does not wish to transfer the Broadband Service to another Communications Provider.
- A1.14 The Communications Provider shall, when issuing a MAC, confirm to the End-User that any previous termination by the End-User has been revoked, and shall ensure that any current or pending termination actions are cancelled.

MAC validity and migration dates

- A1.15 The Communications Provider shall not terminate the Broadband Service on account of the MAC validity period expiring unless the Communications Provider has received notification that the End-User's Broadband Service has been migrated to another Communications Provider.
- A1.16 Where a Customer provides a MAC within its validity period, together with a request to effect a transfer of the Broadband Service to the Communications Provider, the Communications Provider shall proceed with the migration and inform the Customer of the Default Migration Date.

- A1.17 The Communications Provider shall, at the request of a Customer up until one Working Day prior to the Default Migration Date:
- a) accept a request to extend the Default Migration Date to a later Migration Date ("Requested Migration Date"), provided the MAC validity period has not expired within five days of the Requested Migration Date; or
 - b) cancel the Default Migration Date or Requested Migration Date.

Erroneous MAC migrations

- A1.18 The Communications Provider shall provide a recovery process so that in the event of an erroneous migration effected by way of a MAC, the End-User's Broadband Service can be restored to the original Communications Provider with minimum disruption.

Information about the MAC Broadband Migrations Process

- A1.19 The Communications Provider shall publicise the availability of the MAC Broadband Migrations Process to End-Users, including providing the following information:
- a) an explanation of how the MAC is used to facilitate the transfer of a Broadband Service to another Communications Provider;
 - b) details of how an End-User may request a MAC from the Communications Provider, such as telephone, email and postal contact details;
 - c) reasons why the Communications Provider may not be able to issue a MAC;
 - d) details of the complaints handling process for complaints about a failure by the Communications Provider to issue a MAC;
 - e) alternative migration options for an End-User if the Communications Provider cannot issue a MAC for the Broadband Service;
 - f) the default Migration Date that applies when a MAC is provided to the Communications Provider by a Customer for the purposes of transferring the Broadband Service to the Communications Provider; and
 - g) any options available to the End-User to request a Migration Date later than the Default Migration Date.
- A1.20 Publication of the information set out in A1.19 above shall be effected by publishing the information on the Communications Provider's website, and by sending a copy of the information if so requested by an End-User.

Complaints about the MAC Broadband Migrations Process

- A1.21 The Communications Provider shall handle complaints from End-Users in relation to a decision to refuse, or a failure by, the Communications Provider to issue a MAC, as part of its existing complaints handling processes.

Broadband Network Services

A1.22 Where the Communications Provider provides Broadband Network Services, the Communications Provider shall also ensure that it:

- a) effects the transfer of a Broadband Service on the Default Migration Date, unless a later Migration Date has been requested by the Communications Provider for the transfer to be effected;
- b) notifies the Communications Provider who formerly provided the Broadband Service of the date that the transfer has been effected to another Communications Provider; and
- c) has a process that enables an erroneous service migration effected using a MAC to be reversed, so that the Broadband Service can be restored to the original Communications Provider who requested the MAC.

Annex 2

Impact assessment

Introduction

- A2.1 The analysis presented in this annex, when read in conjunction with the rest of this statement, represents an impact assessment, as defined in section 7 of the Communications Act 2003 (the Act).
- A2.2 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, *Better policy-making: Ofcom's approach to Impact Assessment*, which are on our website:
http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

The citizen and/or consumer interest

- A2.3 As discussed in Section 2, this project was prompted by a concern that consumers were not having good experiences when trying to switch broadband providers.
- A2.4 On investigating this possibility further, Ofcom concluded that there was evidence (as set out in Section 4 of the consultation) – in the form of cases logged by OCC, and particular issues causing harm to consumers – that consumers were indeed suffering harm from broadband migrations processes.
- A2.5 Ofcom has considered its proposals in light of stakeholders' responses to the consultation (see Section 4 above) and market developments (see Section 3 above).
- A2.6 Ofcom's conclusion (see Section 5 above), is that additional regulation is required to minimise the potential for consumer harm associated with broadband migrations by ensuring that broadband service providers follow common processes, develop new processes that support consumer choice, and give Ofcom powers to enforce when it seems that they are not doing what they should be.

Ofcom's policy objective

- A2.7 The objectives of the new regulation described in Section 5 are:
- to improve consumer outcomes in broadband migrations by ensuring that broadband service providers comply with existing processes;
 - to improve underlying broadband migrations processes, so that consumer outcomes continue to improve; and

- to give Ofcom specific powers to enforce non-compliance – as non-compliance will have a direct impact on consumers in terms of their ability to move easily.

A2.8 Two options are considered in this impact assessment:

- do nothing (no additional formal regulation), which forms the counterfactual benchmark against which the costs and benefits of other options are compared; and
- General Condition 22: Service Migrations (see Annex 1).

Analysis of the different options

Do nothing (no additional formal regulation)

A2.9 Even in the absence of formal regulation, work to address consumer problems associated with broadband migrations has continued since the consultation and is ongoing. Section 3 above describes recent developments in broadband migrations and the role of OTA in continued informal engagement to drive progress while Section 5 above considers the complementary roles of formal regulation and informal engagement.

A2.10 In addition, the current voluntary code of practice will continue to apply until General Condition 22 comes into force (and would have continued to apply had Ofcom concluded that additional regulation was not appropriate).

Impact on consumers – benefits and costs

A2.11 As set out in Section 3 above, the experience for consumers affected by tag on line has improved somewhat as a result of the BT tag on line helpdesk. BT expects to continue to provide this service to consumers independently of any formal regulatory requirement, and it will not be impacted by any change to the regulatory framework.

A2.12 Other ongoing work which may benefit consumers, for example the continued work by industry on the “provide with MAC” process and OTA’s consumer advice matrix (see Section 3), are also independent of formal regulation, and are intended to represent an improvement on current arrangements that will ensure migrations happen smoothly and with minimal disruption to the consumer.

A2.13 However, this work may not lead to an immediate downturn in the number of consumers affected by broadband migrations problems. As set out in Section 3, consumers continue to contact Ofcom to report problems, and numbers affected by problems may in fact grow in the short term in line with overall broadband volumes, increased churn, and increases in the number of customers using connections based on SMPF or MPF (in light of the potential for specific difficulties for those consumers migrating away from MPF).

A2.14 Nor will this work resolve the current problems with the MAC process – the largest cause of consumer harm after tag on line, as discussed in Section 3 of this statement and Section 4 of the consultation. Since the consultation, Ofcom has continued to see further evidence of failure to comply with the voluntary code (see Section 3), as well as a number of broadband service provider failures which, as in the E7even case described in detail in the consultation, have left consumers unable

to migrate smoothly to their broadband provider of choice. Ofcom has, again, been unable to formally intervene to prevent consumer harm in these cases.

Impact on other stakeholders

- A2.15 The “do nothing” option would not have required industry stakeholders to take any additional action and would not therefore have represented any additional direct cost to that group of stakeholders.
- A2.16 However, maintaining the status quo would have continued to impose indirect costs on broadband service providers complying with the voluntary code of practice (but not on non-signatories and those failing to comply). This would manifest itself in a situation of greater consumer inertia among customers of broadband service providers that do not comply with the code, compared to customers of those that do comply, who can switch away more easily.

Risks and possible unintended consequences

- A2.17 The principal risk of this option would have been that work currently being undertaken voluntarily will stall and that Ofcom will have no formal power to intervene. This will lead to increasing consumer harm and negative perceptions of broadband. Evidence suggests, for example, that failure to sign up to and/or comply with the current voluntary MAC process continues to be a source of consumer harm (see Section 3).
- A2.18 A further risk would have been that if Ofcom had not introduced formal regulation, the cost of ensuring a good consumer experience would have been disproportionately borne by those broadband service providers who comply with the current voluntary code, and those broadband service providers and wholesale broadband providers who contribute to ongoing industry work (for example those who are already participating in the trial of the “provide with MAC” process described in Section 3). This might in the longer term have reduced stakeholders’ incentives to sign up to and comply with the voluntary code of practice and to contribute to other work by industry – further increasing the burden on those who have made such a commitment.

Impact on competition

- A2.19 If consumer outcomes fail to improve, competition could be compromised as consumers will be less confident in switching to new broadband service providers. This could potentially stifle growth and entry opportunities for broadband service providers, which might in turn have a negative impact on the prices and services offered to consumers. Even in a static market, high switching costs for consumers increase customer inertia, which in turn has a dampening effect on the vigour of competition.
- A2.20 There is also the risk that SMPF- and MPF-based broadband service providers will be particularly affected by negative perceptions of consumers who have had a bad experience with migrating from SMPF- and MPF-based broadband, leading to an impact on competition in the emerging LLU (SMPF and MPF) sector. Some of the comments made by consumers (see Section 4) suggest that consumers are already to some extent sensitive to the distinction between different underlying wholesale products and the implications for the migrations experience.

- A2.21 Ofcom considers that, based on the evidence it has gathered so far, a decision not to introduce formal targeted regulation would not have fulfilled Ofcom's statutory duties to act in a way that further the interests of consumers and promotes competition.

Addressing the problem through ongoing work

- A2.22 An alternative to the "do nothing" option described in the preceding paragraphs which could also have been considered would have been for Ofcom to address the problems identified in this consultation document as part of its longer term ongoing work on migrations.
- A2.23 While Ofcom's Migrations, Switching and Mis-selling project is expected to lead to changes in migrations processes across all transferable voice and broadband products, this is a much longer term project and will not have an impact on consumers for some time to come.
- A2.24 In the short term, the impact of this option would therefore have been identical to the "do nothing" option set out above.

Option 2: General Condition 22: Service Migrations and further work

- A2.25 As discussed in Section 5, Ofcom is taking action in two ways as follows:
- the introduction of General Condition 22: Service Migrations, which will come into force in two months; and
 - continued engagement with the industry on outstanding process issues, with a further consultation on additional processes – in particular, an alternative mechanism for the release of MACs – to follow after General Condition 22 comes into force.
- A2.26 This section considers the impact of this regulation on relevant stakeholders and on competition by considering the benefits and costs of this option over the "do nothing" option.

Impact on consumers

Benefits

- A2.27 Fundamentally, the introduction of regulation must be justified on account of an identified market failure, while accounting for the risks of regulatory failure. In this case, the evidence (see Section 4 of the consultation and Section 3 of this statement) suggests that, absent regulation, the market is not performing optimally. In particular, there is evidence of widespread consumer harm, as well as consequent adverse effects on competition. The question for regulation is whether these outcomes are self-correcting or whether they reflect a likely persistent market failure.
- A2.28 Ofcom considers that, in general, it may be in most service providers' interests to provide MACs in the absence of regulation. However, as the evidence clearly suggests, some broadband service providers do not, for whatever reason, find it in their immediate interests to comply with the voluntary code. This may be in order to avoid the costs of putting systems in place to issue MACs, ongoing costs

associated with issuing MACs to individual customers, or because they believe that some customers will decide to remain with them, rather than switching for a better deal elsewhere, in order to avoid the inconvenience and downtime associated with alternatives to the MAC process. Therefore, the market left alone is not likely to deliver satisfactory outcomes, especially in regard to alleviation of direct and widespread consumer harm.

- A2.29 Consumers may see an immediate change once General Condition 22 comes into force next February. The requirement to comply with the MAC process (General Condition 22, Annex 1) will encourage compliance among all broadband service providers (and, where relevant, wholesale broadband providers), and should therefore lead to a reduction in types of behaviours prohibited by the current code (e.g. debt blocking, charging for MACs, refusal to supply MACs for reasons other than those specified in the current voluntary code). If Ofcom suspects a breach of General Condition 22 it will be able to investigate and, where appropriate, to take enforcement action. Ofcom considers that the possibility of investigation and resultant enforcement action will provide an incentive for Communications Providers to comply with General Condition 22.
- A2.30 While the voluntary code of practice already applies to broadband service providers providing services based on SMPF and MPF, the introduction of General Condition 22 will help to ensure that consumers on SMPF- and MPF-based broadband connections are no worse off in terms of their ability to switch. As set out at paragraph 4.96 above, this does not mean that Ofcom expects Communications Providers to comply with processes that have high failure rates, are not widely available, or are unnecessarily complex. However, it will mean, for example, that Communications Providers will be required to provide MACs for transfers from SMPF to IPStream and DataStream as soon as they can reasonably be expected to do so (i.e. once the “provide with MAC” process described at paragraph 3.26 above) is fully operational).
- A2.31 However, the immediate impact of General Condition 22 will be limited. As noted in the consultation, in the short term, numbers of consumers affected by the problems considered in this consultation are likely to continue to rise in line with overall broadband numbers.
- A2.32 In addition, as described in Section 5 above, General Condition 22 will not address every possible source of consumer harm associated with broadband migrations. Where Ofcom does investigate alleged non-compliance with General Condition 22, it will be required to follow the processes set out in the Act as appropriate – and will not, for example, be able to progress investigations any quicker in order to secure relief for those customers affected.

Costs

- A2.33 In respect of whether this regulation will impose costs on consumers compared with the “do nothing” option, Ofcom considers this is not likely to be the case to any material extent. In general, the extra costs of complying with any regulation may be passed on to consumers in the form of higher prices. However, Ofcom does not consider this to be a material outcome in this case, primarily because the majority of broadband service providers already comply with the existing voluntary arrangements.

Impact on other stakeholders

Benefits

- A2.34 As noted in Section 4 above in response to question 5, all the industry respondents agreed that a mandatory version of the MAC process is appropriate. This in itself is indicative of limited adverse impact and possible positive impact on industry of this regulatory option.
- A2.35 On the benefits side, the mandatory status of the condition will confer a benefit on those broadband service providers that comply with the existing voluntary arrangements. The non-compliant broadband service providers do not take into account in their actions the adverse effect that raising switching costs has on all other broadband service providers. This is known as a negative externality. This effect is manifested in the greater difficulty in switching caused by an unsatisfactory MAC process. There is also the wider reputational damage on the whole broadband market. A mandatory condition in relation to smooth migration will therefore confer particular benefits on those service providers that currently comply with the code and lessen any negative externalities arising from increased compliance with the MAC processes.

Costs

- A2.36 Those broadband service providers who have not signed up to the voluntary code of practice (or who fail to comply with it) may face additional costs associated with compliance. For example, the voluntary code prohibits debt blocking. Across the industry, the cost of absorbing bad debt may therefore increase as a result of General Condition 22. In the consultation, Ofcom invited respondents to provide evidence that would enable it to more accurately assess the likely impact of this particular provision on their businesses. While a number of respondents objected to the principle, however (see paragraph 4.101 *et seq* above), none of these provided evidence that such a provision would impose a disproportionate cost on their businesses. In any event, to the extent that General Condition 22 increases bad debt, this would not be an argument against this regulation, since the MAC process is not the correct channel through which to address bad debt.
- A2.37 Ofcom recognises that compliance with General Condition 22 may impose some additional cost on broadband service providers, for example in retraining front line staff to ensure that they are aware of the new requirement and are briefed to offer MACs proactively to any customer that wishes to switch. General Condition 22 may also impose additional costs on wholesale providers, for example to renegotiate contracts so that they are consistent with the requirement set out at General Condition 22, Annex 1 to provide MACs to their customers on request (although Ofcom considers that the cost of renegotiating contracts is one that is likely to be incurred in the normal course of business). Again, however, respondents to the consultation have not provided evidence that General Condition 22 will impose unreasonable costs on their businesses.
- A2.38 The majority of broadband service providers (even a number who are not also signatories to the voluntary code) appear to be using the MAC process for migrations between IPStream and DataStream, and have undertaken the necessary development work to integrate their systems with those of BT Wholesale. Most industry stakeholders will not therefore incur significant development costs as a

result of the requirement to use the MAC process for IPStream and DataStream transfers.

- A2.39 Further development work for individual broadband service providers is likely to be necessary to ensure that migrations processes are fully extended to migrations involving SMPF and MPF. However, Ofcom makes two observations about the associated cost. First, significant costs will be incurred by any service provider migrating some or all of its customer base to SMPF and/or MPF, and any incremental costs imposed by General Condition 22 are likely to be low as the impact on consumers will (or should) already have been factored into ongoing work. Second, there are also costs associated with the alternative. For example, as noted in the consultation, “cease and reprovide” incurs a significant charge whereas obtaining a MAC does not.

Impact on competition

- A2.40 In terms of the impact on competition of this option, as stated above many broadband service providers are already signed up to the voluntary code and the cost of making the code mandatory will have little effect on them and hence on their ability to compete.
- A2.41 However, there may be some (smaller) broadband service providers and wholesale broadband providers who are currently not signed up and for whom the cost of complying may be disproportionately high. The introduction of new formal regulatory measures may also have the effect of deterring smaller new entrants from entering in the future. However, it is not clear from the responses that these effects are particularly significant.
- A2.42 Ofcom emphasises that the main impact on competition in relevant markets of implementing General Condition 22 will be overwhelmingly positive. By facilitating a positive and smooth process for consumers switching between broadband service providers, this effect should result in increasing effective competition between broadband service providers, lowering prices, and increasing quality of service and choice. In the absence of this regulation, as discussed, the reality and perception of switching costs will remain unacceptably high, which has the effect of muting competition.

Risks and possible unintended consequences

- A2.43 A possible risk of Ofcom’s proposed development is that it will detract resource from ongoing work by the industry associated with broadband migrations, for example BT Wholesale’s proposed systems development and further work on migrations around MPF.
- A2.44 Ofcom considers that this risk is mitigated to some extent by the body convened to carry out the co-regulatory role described at paragraph 3.25 above which will help to ensure that different workstreams are clearly prioritised.

Conclusion

- A2.45 Having considered the evidence set out in this impact assessment, in the consultation and in Sections 3 and 4 above, Ofcom has concluded that introducing regulation in the form of General Condition 22 is appropriate and proportionate, taking account of the net benefits of this policy over and above the option of doing

nothing. Therefore, Ofcom has decided to implement General Condition 22: Service Migrations, which appears at Annex 1 of this document, with effect from 14 February 2007.

- A2.46 Ofcom currently considers that it is likely to undertake a further consultation in due course to bring additional processes – notably a process for the provision of MACs by an alternative source – once an appropriate co-regulatory forum has considered the different possible options. This consultation, if it goes ahead, will include a detailed impact assessment of the options identified during the course of discussions with industry.

Annex 3

Comparison of voluntary Code of Practice and General Condition 22

A3.1 The following table lists the provisions of the Broadband Service Providers Migration Code of Practice to be maintained in General Condition 22:

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
How migration process is initiated – customer to Losing Service Provider (LSP) LSP validation of status of account holder before issuing MAC	1	A1.3	Obligation for broadband service providers to take reasonable steps to validate the identity of the person requesting the MAC, before issuing the MAC. An explanation of how the migration process is initiated is captured in A1.1 – A1.2
Issue of MAC represents acknowledgement and agreement by LSP that its customer may be migrated to another broadband service provider Explains that MAC uniquely identifies to BT Wholesale the LSP and the broadband service on which migration is authorised to take place	2	A1.1 – A1.2	Explains the circumstances in which a MAC may be requested by a customer or other broadband service provider. Not necessary to have a separate provision explaining the MAC identification process in the General Condition.
Reasons why LSP may refuse to issue a MAC	3	A1.11	General Condition 22 includes a general obligation on broadband service providers to issue MACs on request. Broadband service providers can only refuse to issue MACs if one of the exceptions set out in A1.11 applies.

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
Reasons why LSP may not refuse to issue a MAC	4	N/a	As per A1.11, General Condition 22 includes a general obligation on broadband service providers to issue MACs on request, it is not necessary to set out specific instances where a MAC must be issued
How customers can contact LSP to request a MAC, process for issuing MAC. Requirement to remind customer of MAC if requested	5	A1.4, A1.5, A1.6, A1.8	<p>The Code of Practice includes a number of separate provisions, each of these are set out as individual obligations in the proposed General Condition.</p> <p>A1.4: Ofcom acknowledges that a number of broadband service providers have processes for issuing MACs over the telephone and has included that as one of the contact methods that providers can nominate customers to use for contacting them to request a MAC.</p> <p>A1.5 and A1.6 – the five day requirement to communicate the MAC to customers has been retained and where MACs are provided during a telephone conversation there is not a requirement to confirm the MAC in writing.</p> <p>A1.8: requirement for broadband service providers to remind customer of MAC if requested</p>

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
What must be identified in the communication to the customer. Where MAC refused, set out the reasons why the MAC has been refused.	6	A1.7 A1.12 (A1.11)	The distinct provisions are separated into two requirements for clarity. A1.7 sets out the detail required when communicating the MAC to a customer and A1.12 requires the broadband service provider to provide an explanation to the End-User about why the MAC has been refused. (A1.11 sets out the specific exceptions to the general obligation to issue MACs.)
Service providers must specify how customers can contact them to appeal against a decision not to issue a MAC, which can be part of the existing complaints handling process	7	A1.21	A1.21 makes it a requirement for broadband service providers to handle complaints by customers about a refusal to issue MACs as part of the broadband service providers existing complaints handling processes.
When MAC is valid	8	Defined in 22.3 and used where appropriate within Annex 1 1.22	The MAC validity period is defined as a period extending up to 17.00 on the thirtieth day from issue whether verbally or in writing, whichever is the earlier. There is an obligation on the network provider to process the MAC request within five working days of receiving the request from the Gaining Service Provider (GSP).

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
<p>Requirement for customer to provide GSP with a valid MAC for each service to be migrated.</p> <p>The default migration date taken to be five working days after the submission of the request by the GSP.</p> <p>Option for customer to request an alternative migration date, later than the default date</p>	9	A1.16, A1.17	<p>These requirements have been separated into two obligations:</p> <p>1) Broadband service provider to indicate the default migration date to the customer when given a MAC. (A1.16)</p> <p>2) Broadband service provider to accept extensions to default migration date or cancellation of the migration request, provided the request from customer is received up to one working day before the default migration date. (A1.17)</p>
<p>If GSP submits a valid MAC, there is no requirement to obtain any further authorisation from the LSP before proceeding with the migration</p> <p>If GSP submits the MAC after its expiry the request will be rejected.</p>	10	N/a	<p>The obligation for a broadband service provider to accept a valid MAC from a customer is captured in A1.16.</p> <p>There is no obligation on a broadband service provider to accept a MAC from a customer after it has expired.</p>

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
The customer's request for a MAC does not represent a request to terminate the service. The LSP should not therefore disconnect the service upon request for, or issue, of a MAC	11	A1.13	<p>This provision from the code is expressed as an obligation on the broadband service provider not to disconnect the service (i.e. issue a Cease Request), unless it has been established that the customer wants to cease supply, not migrate to another broadband service provider, in all other instances a MAC will need to be issued.</p> <p>See also A1.15, which requires that the service is not to be disconnected unless there the broadband service provider has been notified that a transfer has taken place to another broadband SP</p>
During the MAC validity period, the LSP may continue to apply normal processes including suspension of the service to manage bad debt prior to the service being migrated.	12	N/a	<p>The issue of a MAC and use of the MAC by the customer within its validity period is not intended to interfere with the contractual rights and obligations of the broadband service provider.</p> <p>Once the service has been migrated using the MAC, the service is no longer controlled by the original broadband service provider.</p>

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
The request by a customer for a MAC is taken to revoke previous notice given to the broadband service provider. The broadband service provider is required to confirm to the customer that any previous termination has been revoked and ensure that any current or pending termination actions are cancelled.	13	A1.14	<p>This obligation is intended to complement the one in A1.13, and requires the broadband service provider to confirm to the customer that any previous actions are revoked and to ensure that pending or current termination actions are cancelled. One of the reasons why a MAC may be refused is if a Cease Request has already been issued by the broadband service provider (A1.12(d)).</p> <p>A1.14 makes it clear that a MAC is the migration process to be used and that a Cease Request shall only be issued once the broadband service provider has established that the customer is seeking to end the service, not migrate to another broadband service provider.</p>
At any time prior to expiry of the MAC, the customer may ask the LSP to remind him of the MAC and its expiry date. The customer cannot ask the broadband service provider to cancel or re-issue a MAC that is still within its validity period.	14	A1.8	<p>The obligation on the broadband service provider is to remind the customer of the MAC and its expiry period if requested by the customer. There is no obligation on the broadband service provider to cancel or issue a new MAC to a customer while one is still within its validity period.</p>
The customer has the right to cancel or amend a migration request to the GSP at any time prior to the customer agreed date. However, only upward revisions of the migration date will be permitted,	15	A1.17	<p>The broadband service provider is required to accept requests for upward revisions to the migration date or a cancellation request.</p> <p>Default migration date is a defined term in GC 22 and used in Annex 1.</p>

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
When the LSP is notified that a migration has taken place, the customer's notice period (i.e. the date at which notice to discontinue service is taken for the purposes of calculating any outstanding subscription charges under the contract) will be taken to have commenced on the issue date of the MAC, or on the date of any prior notice to terminate, whichever is the earlier.	16	N/a A1.22	This provision is not included in proposed GC/Annex 1 as an obligation. The notice period will depend on the terms of a customer's contract with the broadband service provider as to when notice is taken to have been received and when subscription charges are no longer payable. It is assumed that customers would be required to pay subscription charges until the day the service is migrated to another broadband SP. There is a requirement on the network provider to notify the LSP that a migration has taken place using the MAC
If the MAC validity period is passed without the LSP receiving notification of a migration request, the LSP must not terminate the current subscription, unless specifically requested to do so by the customer.	17	A1.15	The broadband service provider is required to keep the service going and is not to disconnect unless the broadband service provider has been notified that a transfer has taken place to another broadband service provider
Requirement to publicise the provisions of the code to customers and put text on the website	18	A1.19, A1.20	Rather than an agreed text, Ofcom has specified guidance about the type of information that broadband service providers will be required to provide on their website about broadband migrations.

Process issue	Reference in voluntary code Paragraph	Reference in General Condition 22, Annex 1	Application to General Condition 22
Obligation on broadband service providers not to use difficulties or delays with the process as an opportunity to stay with the broadband service provider	19	N/a	Not necessary to set out as an obligation, broadband service providers are required to comply with the issue of MACs and many of the difficulties arising from the process have arisen from non-compliance with some or all parts of the code.
Prohibition on encouraging customers of other broadband service providers to disregard the terms of their existing contract	20	N/a	As above.
Recovery process for erroneous migrations, restoring customers with minimal disruption	21	A1.18, A1.22	This obligation has been retained from the current code

A3.2 The following table lists provisions not currently included in the Broadband Service Providers Migration Code of Practice that will be introduced in General Condition 22

Additional obligations not in the code of practice	Reference in voluntary code	Reference in General Condition 22, Annex 1	Application to General Condition 22
Requirement for broadband service providers to offer at least two forms of contact methods	N/a	A1.4	Noted above, the obligation to offer customers at least two forms of contact methods is to give customers greater flexibility to contact broadband service providers to request MACs.
Specification that customers can continue to ask for MACs	N/a	A1.9	Although not set out in the code of practice as a specific provision, this is implicit in the code and has been included as an obligation on broadband service providers to issue new MACs to a customer on request, after the expiry of any earlier MACs.
No charge to be imposed for issue of a MAC	N/a	A1.10	In practice most broadband service providers have not imposed a separate charge to issue a MAC, although it is not set out as a specific provision in the code. Issuing MACs for no charge is in keeping with the spirit of the code. The object of the code is to provide a smooth migration path, and should not provide broadband service providers with an opportunity to impose additional charges for using the MAC process. The requirement to issue MACs free of charge is now a clear obligation in A1.10.

Annex 4

Broadband Service Provider Migration Code Of Practice

A4.1 This is the current voluntary *Broadband Service Provider Migration Code of Practice*, which is published on Ofcom's website at http://www.ofcom.org.uk/advice/codes/bbm_cop/ along with a list of current signatories.

Broadband Service Provider Migration Code of Practice

Introduction

Broadband service providers and BT have worked together to define an outline process and associated commercial principles for migrating customers between service providers. The process and principles are intended to maximise the convenience for consumers wishing to migrate, and to minimise the risk that the process will be abused, either by service providers or by consumers.

This Code of Practice is intended to embody the commercial principles that have been agreed. The guiding principle behind this Code of Practice is that all service providers involved in the provision of broadband services over BT copper loops will do so in a fair, reasonable and responsible manner and in the best interests of consumers.

Scope

Consumers have no reason to be aware what wholesale product underlies their retail service. The CoP is therefore intended to apply to migrations of all retail DSL services provided over BT copper loops, whether based on BT wholesale DSL services or those of a local loop unbundling operator (LLUO). This includes same product migrations (eg IPStream to IPStream or DataStream to DataStream) and different product migrations (eg IPStream to DataStream or IPStream to LLUO). Technical issues that may arise in the case of different product migrations are outside the scope of the commercial principles and of this CoP.

The SP to SP migration process to which this CoP refers will be incorporated into a new IPStream-only SP to SP migration process, to replace the existing one. It will also be incorporated into the IPStream to DataStream, DataStream to IPStream, DataStream to DataStream and IPStream/DataStream to LLUO migration processes in line with the timescales of the BT roadmap.

Signatories will be expected to comply with this CoP from the date at which the relevant processes and systems have been made available by BT Wholesale.

Application and enforcement

The CoP will operate as follows:

- SPs will sign up to the CoP on a voluntary basis, by letter to Ofcom.
- SPs may withdraw from the CoP at any time by giving notice in writing to Ofcom and to other signatories.

- SPs will publicise to consumers the existence of the Code.
- Ofcom will publicise to consumers the existence of the CoP and the list of SPs that have signed up to it.

If an SP who has signed up to the CoP fails to comply with the terms or service levels of the CoP, the SP's customers or other SPs may escalate complaints to Ofcom. Ofcom may consider any such complaints and take appropriate steps, where it is necessary to do so. BT Wholesale will not be expected to deal with complaints or take enforcement action for non-compliance.

The existence of this CoP will not remove the need for broadband service providers to abide by other relevant legislation, including the Competition Act 1998, the Communications Act 2003 and general consumer protection legislation.

Changes to the CoP

The CoP will be published on Ofcom's website. Any signatory or Ofcom may propose a change to the CoP. If none of the signatories objects to the change within 28 days, the change will be deemed to have been accepted. If any signatory objects, the change may be made only by the majority decision of a specially convened working group open to all existing signatories. BT Wholesale should also be consulted on any changes in case there are systems or contractual implications.

The Code of Practice

Broadband service providers agree, in addition to their general obligations as communications service providers, to act in accordance with the following Code of Practice when migrating customers to or from their service:

Definition of Terms

GSP	Gaining Service Provider*
LSP	Losing Service Provider*
BTW	BT Wholesale
MAC	Migration Authorisation Code
Customer	The user of the broadband connection
Account holder	The person or entity with contractual responsibility for the broadband service
Migration	Transfer of a broadband customer between SPs, where both SPs provide service over the same BT copper loop
Working day	0900 - 1700 hours, Monday . Friday (exc local Bank Holidays)

**Where there is a chain of resellers such that the SP contracting with BT for the wholesale service is different from the SP contracting with the customer for the retail service, the terms LSP and GSP refer to whichever party(s) in the chain is responsible or to the parties collectively as appropriate.*

Migration authorisation

1. The migration process cannot be initiated without prior authorisation by the losing service provider (LSP). Authorisation shall always be obtained by an account holder request to the LSP. The LSP is entitled to validate the status of the customer before authorising the migration of any broadband service.
2. The issuing of a Migration Authorisation Code (MAC) by the LSP is their agreement that the customer is entitled to request and have their broadband service(s) migrated to another SP. The MAC uniquely identifies to BTW the LSP and the broadband service that has been authorised for migrating.
3. The only reasons why a LSP may refuse to issue a MAC are that:
 - a) The customer has failed standard checks to validate that he is the account holder
 - b) The broadband service contract has been terminated
 - c) The LSP has already submitted a cease request to BTW for the broadband service
 - d) The account holder is deceased
4. For avoidance of doubt, the LSP may not refuse to issue a MAC if:
 - a) The account holder has not paid any charges due before the migration date (whether service charges, disconnection charges, charges for remaining minimum term contract period or any migration charge); such charges should be included in a final broadband service bill, which will be settled according to the terms of the contract.
 - b) The account holder is in bad debt but is still receiving the broadband service at the time the request is received.
 - c) The account holder is within a minimum term contract on the broadband service that is needed to recover a subsidy on the broadband service equipment or setup costs;
 - d) The broadband service that is to be migrated has already been suspended for reasons of bad debt at the time the request is received.
5. The LSP must specify how customers can contact it to request a MAC (to include phone, email and letter as a minimum). If the customer contacts the LSP in an approved way, the LSP must respond in writing (letter or email) with the MAC, or reason for its non-issue, within 5 working days of receipt of the customer's request. If a MAC is issued, its validity period will start on the date of despatch of the written migration authorisation. Except that, if the customer contacts the LSP by phone, the MAC may be issued immediately, in which case the validity period starts at the time it is issued, and the LSP is not obliged to provide additional written confirmation. The LSP must remind the customer of the MAC if requested by the customer.
6. The written response (email or letter) to the migration authorisation request must clearly indicate the MAC (or MACs), the MAC validity period, and the broadband service(s) to which the MAC applies. In the event that a MAC is refused for any broadband services, these must clearly be distinguished, together with the reason(s) for the refusal of each broadband service.

7. SPs must specify how customers can appeal against a decision not to issue a MAC. This could be through the SP's normal complaint handling process.

Migration process

8. A MAC is valid from the date that it is issued (either verbally or in writing, whichever is first) for a period of 30 calendar days, including bank holidays. The MAC validity period extends up to 17.00 on the 30th calendar day from issue.
9. When the customer applies to a GSP to migrate their broadband service(s) they must supply the GSP with a valid MAC for each broadband service to be migrated. The default migration date will be taken to be 5 working days after the submission of the migration request by the GSP. The customer may request an alternative migration date that is later than the default date.
10. If a GSP submits a migration request to the BTW system within the validity period, BT will process the request without any further authorisation from the LSP. If a GSP submits a migration request to the BTW system after the MAC has expired, BTW will reject the request.
11. The customer's request to the LSP for an authorisation to migrate does not in itself represent a request to terminate service with the LSP. The LSP should not, therefore, disconnect the broadband service upon request for (or issue of) a MAC.
12. During the MAC validity period, the LSP may continue to apply its normal processes (including suspending availability of the service) to manage bad debt prior to the broadband service being migrated.
13. The customer's request to the LSP for a MAC is taken to revoke any previous notice to terminate service (except where the LSP has already submitted a .cease. order to BTW, in which case the MAC request will be refused). On issuing a MAC, the LSP must confirm to the customer that any previous termination has been revoked, and shall ensure that any current or pending termination actions are cancelled.
14. At any time prior to the expiry of an existing MAC, the customer may request the LSP to remind him of the MAC and its expiry date. The customer cannot ask the LSP to cancel an existing MAC or to reissue a new MAC while an existing MAC is still valid.
15. The customer has the right to cancel or amend a migration request to the GSP at any time prior to the customer agreed date. However, only upward revisions of the migration date will be permitted.
16. When the LSP is notified that a migration has taken place, the customer's notice period (ie the date at which notice to discontinue service is taken for the purposes of calculating any outstanding subscription charges under the contract) will be taken to have commenced on the issue date of the MAC, or on the date of any prior notice to terminate, whichever is the earlier.
17. If the MAC validity period is passed without the LSP receiving notification of a migration request, the LSP must not terminate the current subscription, unless specifically requested to do so by the customer.

Marketing and external communications

18. SPs will publicise the provisions of this CoP to their customers, including publishing an agreed text on their website.
19. SPs will ensure that all communications with customers regarding difficulties that may arise from time to time in the porting process stress that all parties are working to resolve the difficulties. In particular, the LSP shall not state to customers that the delay is a good reason for maintaining the existing service and cancelling the migration.
20. SPs will not in the course of their marketing or sales activity encourage the customers of another SP to disregard the terms of their existing contract. For the avoidance of doubt, there is no positive obligation to remind customers of their obligations under their existing contract (though SPs may choose to do this); the prohibition is against gaining SPs explicitly encouraging end users not to respect their existing contract.

Other

21. SPs and BTW will establish a recovery process so that in the event of erroneous migrations, customers can be restored to their original SP with minimum disruption.

Annex 5

Glossary

Broadband Migrations Review (BMR): the Ofcom policy project to assess the effectiveness of industry-wide processes for customers signing up to, and switching between, broadband service providers. This policy review led to the consultation document *Broadband migrations: enabling consumer choice*, published by Ofcom on 17 August 2006, and to this statement.

Broadband: a service or connection which is capable of supporting 'always-on' services which provide the end-user with high data transfer speeds.

BT: British Telecommunications plc.

Communications Act ("the Act"): the Communications Act 2003.

Communications Provider: a person who provides an Electronic Communications Network or provides an Electronic Communications Service, as defined in the Act.

CoP: Code of Practice

DataStream: a wholesale interconnection product offered by BT Wholesale to Communications Providers allowing them to utilise more of their own networks and compete with BT Wholesale in the provision of intermediate services such as IPStream

Digital Subscriber Line (DSL): DSL is a family of technologies generically referred to as DSL, or xDSL, capable of transforming ordinary phone lines (also known as "twisted copper pairs") into high speed digital lines.

EMP (Equivalence Management Platform): ordering system for service providers to purchase wholesale products from Openreach.

General Conditions of Entitlement: a set of regulations that apply to anyone who provides an electronic communication service or an electronic communications network.

GSP: Gaining Service Provider.

Integrated Services Digital Network (ISDN): a network evolved from the digital PSTN which provides digital exchange lines to customers and end to end digital connectivity between them.

IPStream: an intermediate broadband service sold by BT Wholesale to retail broadband service providers to sell on to consumers.

Local Loop Unbundling (LLU): a process by which a dominant provider's local loops are physically disconnected from its network and connected to a competing provider's networks. This enables Communications Providers other than the incumbent to use the local loop to provide services including broadband to end users.

Local loop: The access network connection between the customer's premises and the local serving exchange, usually comprised of two copper wires twisted together.

LSP: Losing Service Provider.

Metallic Path Facility (MPF): the provision of access to the copper wires from the customer premises to a BT exchange that allows a competing provider to provide the customer with both voice and data services over such copper wires.

Migration Authorisation Code (MAC): a unique code that a customer must give to a broadband service provider, that allows the service to be transferred from an existing service provider seamlessly and with little or no disruption of service.

Migrations Consultation: Ofcom's *Migrations, switching and mis-selling* consultation published on 16 February 2006. The Migrations Consultation reviewed current approaches to migrations, switching and mis-selling across transferable voice and broadband products.

Ofcom: Office of Communications. The regulator for the communications industries, created by the Act.

OCC (Ofcom Contact Centre): the team within Ofcom responsible for dealing with complaints and enquiries from members of the public

PSTN: Public Switched Telephone Network.

Shared metallic path facility (SMPF): the provision of access to the copper wires from the customer's premises to a BT exchange that allows a competing provider to provide the customer with broadband services.

Slamming: where a customer is switched from one provider to another without the express knowledge and consent of that customer.

Tag on line: where a customer tries to order broadband, but is told by his chosen supplier that he cannot have service because there is a "tag" or "marker" on the line – which may mean that the system indicates that another supplier is already providing service on that line.

Wholesale Line Rental (WLR): A service offered by BT to other service providers allowing them to offer their own branded telephony service.