

# Migrations, switching and mis-selling

This consultation document seeks your comments on proposals for the establishment of common principles on migrations, switching and mis-selling across transferable products

Consultation

Publication date: 16 February 2006

Closing Date for Responses: 28 April 2006



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## Section 1

# Summary

## Introduction

- 1.1 Ofcom is the independent regulator for the UK communications industries. Our role is to look after television, radio, telecommunications ('telecoms') and wireless communication services.
- 1.2 This document looks at the ways in which customers (i.e. customers of telecoms and internet services, both at home or in business) are able to move between companies for the provision of their services to help inform our thinking as to whether competition is being effective in delivering benefits to customers. This requires that customers can move easily between companies and/or products, and feel confident to do so. It also requires that customers are adequately protected from dishonest sales and marketing behaviour including 'mis-selling', where providers fail to give true and complete information about their services, or 'slamming', where customers are simply switched to another company without their express knowledge or consent.
- 1.3 This document therefore reviews current approaches to migrations, switching and mis-selling across transferable voice and broadband products, and whether these approaches are consistent with Ofcom's principal duty, as set out in section (3)(1) of the Communications Act 2003 ('the Act'); namely:

*"(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".*
- 1.4 This is particularly important because there are now various ways to get the best deals, sometimes buying a 'bundle' of several products together or by buying separate products from different companies. Ofcom welcomes this development which should lead to greater competition which, in turn, should mean improved prices, choice, quality as well as encouraging new ideas. However, competition doesn't automatically lead to benefits; in Ofcom's view, there are two key elements which will need to be in place to get the best from a competitive market.
- 1.5 The first is information. It is important that customers have all the facts in front of them so that they are confident in shopping around and knowing what's out there. For this to happen, customers need to know the choices on offer, explained in a way which they understand so that they can assess the benefits of new products, services and ideas for themselves.
- 1.6 The second is that there should be no obstacles in the way of customers who choose to move between companies and/or products. The process for switching behind the scenes should be swift and efficient, and enable customers to move from one company and/or product to another with no interruptions or problems.
- 1.7 It is this second issue which is the primary focus of this document. The first, concerning information, is dealt with as part of a separate consultation, called Ofcom's Consumer Policy, which was published on 8 February 2006. It is available on the Ofcom website at: [http://www.ofcom.org.uk/consult/condocs/ocp/ocp\\_web.pdf](http://www.ofcom.org.uk/consult/condocs/ocp/ocp_web.pdf)

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- 1.8 In looking at switching processes, Ofcom will need to look at the likely impact in relation to protection from dishonest sales and marketing behaviour. It is important that Ofcom balances facilitating easier switching with any potential adverse effect on customers' interests.
- 1.9 Ofcom is consulting on these issues now given current discussions around the development of Next Generation Networks ('NGNs') as well as ongoing work related to the implementation of BT's Enterprise Act Undertakings of 22 September 2005 following on from Ofcom's Strategic Review of Telecommunications ('the Telecoms Review'). Ofcom believes that these developments are likely to influence changes to switching processes and, in particular, a shift towards common processes. It is therefore a good time for Ofcom to hear the views of interested parties on these issues in order to develop our thinking and provide increased regulatory certainty going forward.

## Background

- 1.10 A well functioning market should make switching between companies and/or products as straightforward as possible by taking away any artificial barriers. Where switching is not easy, customers are less likely to want to switch. The fact is, however, that switching isn't always simple because different processes have evolved over time for different products. As a result, switching can become very complicated, particularly as more and more people want to transfer a 'bundle' of different products together. Because of this, it is likely that the customer experience of trying to switch between companies and/or products is likely to be different depending on the product(s) involved. For example, there are likely to be variations in:
- checks and authorisations used;
  - how long a process takes;
  - how well customers are protected;
  - how well customers are kept informed;
  - the steps a company may take to try to keep its customers (known as 'save' activity');
  - how complicated it is; and
  - what customers are charged.
- 1.11 In addition, for certain types of switching (such as where there may be more than one company and/or product involved), there may be no process in place at all. Where this happens, customers will have to cancel one service completely, and then order another one separately. This is likely to be very disruptive, and can prove to be a barrier in deciding whether or not to switch.

## Scope

- 1.12 The intended scope of the discussions in this document focuses on the following scenarios:
- switching between companies and/or products where there is a direct customer impact; and

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- where there is no direct customer impact and the change only happens behind the scenes – for example, changes from one technology to another. Under this scenario, there will typically be no real difference in the service provided.
- 1.13 This document does not directly cover developing trends such as where customers may wish to switch between three or four services (including their television and mobile services). While Ofcom recognises that these developments raise important issues, these may be considered as part of a future consultation.

## **Developing Ofcom's policy objectives**

- 1.14 In order to help the consultation, Ofcom is proposing four policy objectives which it considers relevant in order to further the interests of customers in relation to migrations, switching and mis-selling. These are as follows:
- a good customer experience;
  - proper protection against dishonest sales and marketing activity such as mis-selling and slamming;
  - well informed customers; and
  - supporting competition in retail and wholesale markets to the benefit of customers.
- 1.15 Ideally, all these objectives would be fully achieved. However, Ofcom accepts that there may need to be compromises, depending on the state of competition, and how well it's working.

## **Ofcom's approach**

- 1.16 This document is primarily focused on questions and issues raised by the practical application of these four objectives to help inform our thinking in two ways. First, whether both customers and the telecoms companies would be better served by moving to standard processes. To help the consultation, Ofcom has identified the possible impact of various options for moving towards standard processes. Second, whether Ofcom should have a role in encouraging or requiring changes towards those processes.
- 1.17 It is also necessary to assess whether the relevant markets are working properly. If they are not, then it is important to consider whether leaving them to normal market forces will fix the problem. If not, then it is important that we judge whether there are steps we should take.
- 1.18 Ofcom intends to carry out a further consultation on these issues later in the year which will set out our thinking in more detail in light of the responses to this document. This will include a fuller impact assessment of the options identified in the document.

## **Moving towards common processes**

- 1.19 Ofcom's initial view is that there may be good reasons for moving to a single switching process no matter what the service or product may be. This is because:
- at the moment, customers don't know how they will be switched from one company or product to another;
  - there's a rising number of complicated bundles of products being put through systems designed for single products only; and

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- what we have now is inefficient and complicated, both for existing companies and new businesses coming into the market, and this is likely to get worse.
- 1.20 At the same time, Ofcom recognises that introducing new processes can cause serious disruption and add costs which may, in the long run, be passed on to customers. Ofcom therefore wants to know how, if a new single process is a good idea, disruption and costs could be kept to a minimum.
- 1.21 Ofcom would also like to hear the views of interested parties on the three processes that could be used to achieve a single process. These are:

### **Letter Facilitation process**

- 1.22 The 'Letter Facilitation' process is used when customers want to make a change to their fixed-line telecoms service. It is designed to make sure that customers are fully informed before any switch is made. Under this process there is an opportunity to stop the process – where customers simply change their mind or are the victim of slamming - as there is a ten working day pause before the switch happens. During this time, customers will typically receive letters from both the company they're leaving as well as the company they're moving to.
- 1.23 Under this process, all fixed-line telecoms providers have to create, and abide by, codes of practice for the way they sell their products and services.

### **MAC Process**

- 1.24 If a move involves broadband products, customers will need a 'Migrations Authorisation Code' ('MAC'). Customers are required to obtain this code from the company they're leaving in order to give to the company they're joining. The MAC therefore is essentially a 'passport' to move to a new broadband service. This process works alongside a voluntary code of practice developed by the industry in order to make sure that everything is fair and reasonable, for both customers and the industry.

### **Single Code process**

- 1.25 The 'Single Code' process runs on similar lines to the system used by electricity and gas companies.
- 1.26 Here, customers would hold the key to the process. It could only be started when the customer personally gives the code to the company to which they're moving to. It's therefore similar to the MAC process, with the key difference being that customers don't need to contact the company they're leaving to start the switch.
- 1.27 For this to work for customers, the process would need to make sure that the code is readily available at the point at which the customer wants to switch - on a bill, perhaps, or some other simple solution.

## **Ofcom's role – what should it be?**

- 1.28 The views Ofcom's receives in response to this consultation will help us to decide what action – if any – we should take. It could be that we should encourage a move towards a single switching process for all products, services, customers and companies. Or, perhaps we should use our powers to make it compulsory. Alternatively, the best action may be to 'leave well alone' – or even to withdraw from regulating this particular issue altogether.

1.29 At the moment, we're looking at the following possible scenarios:

### ***No reasonable expectation of a future problem to justify intervention in the relevant markets today***

1.30 It may turn out that the growing numbers of bundled products being switched do not pose the problems that some imagine. If this is the case, Ofcom may decide to leave things as they are, and perhaps step back from certain areas we currently regulate. This could happen if it looks likely that the issues raised in this consultation could be solved by the telecoms companies negotiating together.

### ***Reasonable expectation of problems to justify intervention in the relevant markets today***

1.31 It could be that Ofcom will find that the market is failing, or likely to fail, with no prospect of the problems fixing themselves. In this case, Ofcom may develop a new framework to bring in the regulation we think the market needs. We would do this by:

- looking at the issues caused by the various switching processes on a case-by-case basis;
- bringing in minimum standards in some areas, but on a case-by-case basis in others; or
- insisting on setting minimum standards across the board in all cases.

## **Stopping unfair tactics from the losing provider**

1.32 The company which customers are leaving is known as the 'losing provider'. During the switching process, it is possible that some losing providers may gain information that gives them an unfair advantage over their competitors. They are not allowed to use this information but it's easy to see how this can cause mistrust and lead to abuses. Ofcom is therefore inviting views on what safeguards should be introduced. These could cover, among other things:

- ***current service characteristics***: as part of the switching process, it is necessary for the new company to know details of the products and services that a customer has with their losing provider. They can then assess whether a customer's new service is available or compatible; and
- ***unique identification of line***: as part of the switching process, and for the switch to take the place, both the customer's old and new companies must be able to identify, and agree on, the precise line to be transferred.

1.33 There is also a concern that losing providers may use specific information for purposes other than just arranging the transfer. This includes:

- ***'save' activity***: losing providers may use the information they've been given to try to persuade their customers to stay. This is not allowed – information should only be used to help arrange the switching process;
- ***'cancel other' functionality***: This enables losing providers to cancel orders in certain circumstances, for example, where slamming is suspected. However, it can be open to abuse unless there are rules governing its use.

## **Stopping unfair tactics from the gaining provider**

### ***Third Party validation of orders***



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- 1.34 The company which customers are joining is known as the gaining provider. In order to get customers to switch to them, Ofcom is concerned that there may be a possible lack of adequate incentives on gaining providers not to engage in irresponsible sales and marketing practice, including mis-selling and slamming. To stop this and other abuses, Ofcom is asking for views on third party validation. This is where an order is validated by an independent, separate body before the switch take place such as, for example, sending a notification letter to all customers in advance of the switchover. This might be useful in warning customers against the possibility of slamming. On the downside, however, it might also add costs and another layer of complexity to the transfer process.

### **Bulk migrations**

- 1.35 Ofcom always looks for ways to stimulate competition, with the aim of delivering more choice and lower prices to customers. It is therefore important that, behind the scenes, the wholesale part of the telecoms industry can process customer switches in bulk, with the same ease as transferring a single customer. Ofcom therefore believes that processes need to be as simple and efficient as possible, and designed around fairness, value and healthy competition. Where appropriate, therefore, Ofcom would expect that the processes should be no different for bulk migrations than where there is a single customer switch.

### **Initial proposals**

- 1.36 From what Ofcom has seen so far, our initial view is that there may be good reasons to move away from specific processes for particular products, and replace them with a single, uniform process for switching. Of the various approaches set out in this document, Ofcom believes that the Single Code process would appear to have the greatest benefits, although this will depend on the way in which the code is managed. In particular, Ofcom believes that a single code process would best address the current lack of incentives for providers to behave responsibly and, specifically:
- the lack of incentives for losing providers to give their full support to helping their customers switch; and
  - the lack of incentives for gaining providers not to engage in mis-selling and slamming.
- 1.37 Ofcom therefore sees that the benefits of a single code process would include:
- putting control of the process into the hands of the customer rather than the losing provider; and
  - giving protection against mis-selling and slamming because the potential for the transfer to happen without the customer's agreement is minimised.
- 1.38 However, Ofcom needs to think about how a single code would work in practice; in particular, the need to make sure that the process makes it easy for customers to find the code at the point at which they need to switch between companies but still providing protection against mis-selling and slamming.

### **Ofcom's proposed principles**

- 1.39 In Annex 5, Ofcom outlines certain principles which it believes would provide a useful framework to guide future discussions on the whole area of migrations, switching and mis-selling. In particular, the principles focus on the need to achieve smooth end-to-end processes for switching with proper safeguards to make sure that customers are

well-informed and well protected. Ofcom would be glad to hear the views of interested parties on whether they can be applied both to switching now, and to new processes developed in the future.

### Getting our priorities right

- 1.40 The scale of the issue is shown by the fact that BT has identified some 160 possible switching processes. Although it would be possible to work through all of them in a systematic approach, Ofcom believes that it makes sense to identify the most important ones, and focus on them first. We would like views on how we decide which processes should take priority, and the best way to move forward.

### Next steps

- 1.41 Ofcom's document raises a number of issues - some extremely detailed and complex – which need to be debated as Ofcom develops its policy in this area. Ofcom believes that it is essential to have the full participation of both customers and the industry in taking this work forward, and sees this document as a first step in engaging with stakeholders in an open and transparent manner.
- 1.42 Ofcom intends to build on this with active discussions with all the interested parties, and looks forward to a wide range of responses to this consultation. We plan to publish a Statement during summer 2006, summarising those responses and explaining how we intend to take this work forward.
- 1.43 Gavin Daykin is leading this consultation. Please send your responses to [gavin.daykin@ofcom.org.uk](mailto:gavin.daykin@ofcom.org.uk)
- 1.44 The closing date for responses is **28 April 2006**.

## Section 2

# Background

## Introduction

- 2.1 The purpose of this document is to consider the current industry processes that enable customers to move between Communications Providers ('providers') to help inform our thinking as to whether competition is being effective in delivering benefits to customers. This requires that customers are able to engage effectively in the competitive process, and be protected from dishonest sales and marketing behaviour; namely mis-selling and slamming.
- 2.2 This document therefore reviews current approaches to migrations, switching and mis-selling across transferable products (namely narrowband, broadband, LLU and number portability) in order to understand whether current approaches are consistent with Ofcom's principal duty, as set out in section (3)(1) of the Communications Act; namely:

*"(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".*
- 2.3 An important part of the discussion will be to consider how easily customers are able to switch between providers and/or products as they need to have confidence in the switching process if competition is to be effective. In Ofcom's view, switching costs might be unnecessarily high if migration processes are inefficient. However, that does not mean that switching costs are not a legitimate feature for at least some of the products/processes under consideration. In considering switching processes, Ofcom will need to consider the likely impact in relation to consumer protection issues more generally. This is because of the risk that by lowering the barriers to switching there may be a subsequent increase in the potential for customers to be slammed.
- 2.4 This is becoming increasingly important as there are now various ways for customers to get the best deal, either bundling narrowband and broadband products or splitting services between providers to take advantage of deals e.g. WLR (with CPS) + broadband to fully unbundled local loops ('LLU MPF') with number portability.
- 2.5 Ofcom welcomes this development which should provide significant customer benefits as a result of more effective competition including, among other things, competitive prices, quality, innovation and choice. However, competition does not automatically mean benefits. In Ofcom's view, two important elements need to be in place for customers to obtain the best possible outcome from the market.
- 2.6 First, customers need to be empowered such that they are equipped with the information, skills, and confidence to engage effectively in the competitive process. This requires that customers are aware of the choices available to them, and are aware of the features and capabilities of new services and technologies so that they can assess their potential benefits.
- 2.7 Second, there should be no unnecessary barriers to switching for customers, and migrations processes should be efficient and of a high quality. These processes

should enable customers to switch seamlessly between providers and/or products, regardless of the nature of the service migration or the underlying technologies.

- 2.8 It is the second of these two elements which is the primary focus of this document. The first, concerning information, is dealt with as part of a separate consultation, *Ofcom's Consumer Policy*, which was published on 8 February 2006. It is available on the Ofcom website at: [http://www.ofcom.org.uk/consult/condocs/ocp/ocp\\_web.pdf](http://www.ofcom.org.uk/consult/condocs/ocp/ocp_web.pdf)
- 2.9 Ofcom is consulting on these issues now given current discussions around the development of NGNs as well as ongoing work relating to implementation of BT's Enterprise Act Undertakings of 22 September 2005. Ofcom considers that these developments are likely to influence changes to migrations processes and, in particular, a shift towards common processes. Consequently, Ofcom is keen to engage with stakeholders on issues relating to migrations, switching and mis-selling in order to develop policy thinking and provide regulatory certainty going forward.
- 2.10 This is consistent with the general principle set out in the Telecoms Review Phase 2 that Ofcom should:

*“promote a favourable climate for efficient and timely investment and stimulate innovation, in particular, by ensuring a consistent and transparent regulatory approach”.*

### Scope

- 2.11 The intended scope of the discussion in this consultation document is transferable voice and broadband products and/or services. These comprise the following:

**Figure 1: Transferable products covered by the document**

Products
Broadband (Data Stream/IP Stream)
Local Loop Unbundling (shared and full metallic path facility(SMPF/MPF)
Wholesale Line Rental (WLR)
Carrier-Pre Selection (CPS)
Number Portability (Geographic/Non-Geographic)

- 2.12 The intended scope of the document includes the following scenarios:
- migrations that involve a change of product(s) and/or service(s) where there is a direct customer impact (e.g. WLR to LLU MPF or vice versa); and
  - migrations where there is no direct impact upon the customer such as changes from one technology to another (e.g. IPStream to DataStream) or bulk migrations where there may have been a change in the upstream supplier (e.g. where a CPS reseller changes its CPS Operator). In this scenario, there will be no perceived change in the service being received by the customer.
- 2.13 Migration processes become particularly complex when they are required to cover multiple geographic sites in a coordinated manner, as well as multiple products. This has been a concern in the past when large companies have attempted to migrate Virtual Private Network ('VPN') services from one provider to another, and is now a concern in relation to the migration from voice VPNs to IP VPNs. Such migrations require highly effective project management if an acceptable level of service is to be provided during the migration process, and may also require some form of

interworking between the old and new VPN service. These are complex issues, and not amenable to simple regulatory intervention. Ofcom would nevertheless welcome comments as to how such migrations might be facilitated

- 2.14 This document does not directly cover developing trends such as the where customers may wish to switch between three or four services (including their television and mobile services). While Ofcom recognises that these developments raise important issues, these may be considered as part of a future consultation.

*Question 1: Do you agree with the scope as described above? Are there any additional products and/or services which you would like to see included in the scope?*

*Question 2: How might complex multi-site migrations, such as those involving VPN services, be facilitated?*

## Overview

- 2.15 A well functioning market should make switching as straightforward as possible for customers by minimising unnecessary switching barriers as customers are less likely to switch where transfer barriers may have been artificially inflated. Customers should be able to migrate seamlessly between provider(s) and/or product(s) regardless of the nature of the service migration or the underlying technologies.
- 2.16 This may not be the case at present on account of the fact that, historically, different processes for different transferable products have been developed. As a result, switching can become very complicated, particularly as more and more people want to transfer a 'bundle' of different products together. Because, of this, it is likely that the customer experience of trying to switch between providers and/or products is likely to be different depending on the product(s) involved. For example, there are likely to be variations in:
- checks and authorisations used;
  - how long a process takes;
  - how well customers are protected;
  - how well customers are kept informed;
  - the steps a company may take to try to keep its customers (known as 'save' activity');
  - how complicated it is; and
  - what customers are charged.
- 2.17 Figure 2 summarises current approaches to migrations, switching and mis-selling across certain transferable voice and broadband products.

**Figure 2: Current approaches to migrations across transferable products**

Product	Lead-time	Order authentication method	EU notification/ protection
Number Portability			
Geographic	4 working days ('wd') for single numbers/ lines. Up to 20 wd for large multi-line installation.	CLI & Account Number (+address for some multi-line)	Losing Provider (LP) contact with end-user (EU)
Non-Geographic	5 wd	CLI & Account Number (+address for some multi-line)	LP contact with EU
CPS	10 wd	CLI & Postcode (billing or Installation)	Gaining Provider (GP) /LP mandatory notification of transfer letters
WLR	10 wd	CLI & Postcode (billing or Installation) or BT account no.	GP/LP mandatory 'notification of transfer' letters
Broadband IPStream	5 wd	MAC Code Or if SP not supporting MAC	EU contacts LP for MAC CLI
LLU SMPF (shared MPF)	6 wd	MAC Code Or if SP not supporting MAC	EU contacts LP for MAC CLI
LLU MPF (full MPF)	8 wd from firm order	CLI & Postcode (billing or Installation) or BT account no.	GP confirms to BT that they have notified EU that all existing services, including BB, will be ceased.

2.18 For some complex migration types (i.e. from or to more than one provider and/or product), there may be no migrations process in place, and the customer will have to cancel one service completely and then order the new service separately. This is likely to be very disruptive, and can prove to be a barrier in deciding whether or not to switch.

## Ofcom's Strategic Review of Telecommunications

2.19 The issue of reducing switching costs and making it easier for customers to switch readily and easily between providers was considered as part of the Telecoms Review. In relation to switching, Ofcom noted that while competition may be a means to delivering the kinds of outcomes that customers want, it cannot be effective unless

customers are able to make informed choices and switch easily between providers. However, it also noted that this did not necessarily mean that switching should be 'costless' to customers. This is because it typically costs providers to switch customers, and if they are unable to charge customers to switch, it may prove necessary to recover this cost through higher prices elsewhere. Therefore, where switching is free, it could encourage a level of switching which is inefficient.

- 2.20 Ofcom's analysis, as set out in Ofcom's statement, *Final Statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002*, published on 22 September 2005, suggested that switching behaviour differs between fixed voice, mobile and broadband markets. It is in the fixed voice telephony market where the switching process is the easiest, having received the most regulatory attention. Yet it is in the fixed market where customers seem to have the greatest disinclination to switch.

### What are migrations?

- 2.21 In order to properly consider migrations, it is necessary to understand what the term 'migrations' encompasses. As described above, there are various ways of categorising migrations. These include:

- **singleton customer migrations:** where a customer merely wants to switch from one provider and/or product to another; or
- **bulk migrations:** where there is no change in the customer/provider relationship albeit there may be a change in the relationship between the provider and their upstream supplier.

- 2.22 Additionally, any definition would also need to encompass both simple and complex migrations.

- **simple migrations:** for example, may be where the switch is voice-only to voice-only or broadband internet only to broadband internet-only; and
- **complex migrations:** may involve customers purchasing both voice and broadband internet and subsequently switching providers for one or the other.

- 2.23 Ofcom adopted the following definition for migrations processes for the purpose of taking forward the Telecoms Review undertakings<sup>1</sup>:

*"Migration Process" means a process by which:*

*(i) a Communications Provider transfers from using one product or service to another product or service;*

*(ii) an End-User transfers from using one product or service to another product or service;*

*(iii) an End-User transfers from using a product or service supplied by a Communications Provider to the same product or service supplied by another Communications Provider."*

- 2.24 Ofcom would welcome comments on the proposed definition and, in particular, whether it adequately captures the range of scenarios involved, or whether there is an alternative definition which would offer a better definition.

<sup>1</sup> <http://www.ofcom.org.uk/telecoms/btundertakings/btundertakings.pdf>



Question 3: Does Ofcom's definition of a 'migration process' adequately capture the range of scenarios involved? If not, can you suggest a better definition?

## What is mis-selling?

2.25 The term 'mis-selling' covers a range of sales and marketing activity that can work against the interests of both customers and competition and undermines confidence in the industry as a whole. Ofcom defined mis-selling in its Explanatory Statement and Notification, *Protecting citizens and consumers from mis-selling of fixed-line telecoms services*, published on 13 April 2005<sup>2</sup>, as follows:

*"It can include:*

- o the provision of false and/or misleading information (for example, about potential savings or promising offers or gifts which do not actually exist);*
- o applying unacceptable pressure to change Providers, such as refusing to leave until the customer signs, or using threatening or otherwise intimidating behaviour; and*
- o 'slamming', an extreme form of mis-selling, where customers are simply switched from one company to another without their express knowledge and consent. Forms of slamming can include, for example, passing off (i.e. where representatives claim to represent a different company from the company they are actually working for), customers being told they are merely signing for information and then being switched from one provider to another, or forging of customers' signatures on contracts without the customer being aware".*

## The regulatory framework

2.26 A new regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe, and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.

2.27 Section 3(1) of the the Act states that *"it shall be the principal duty of Ofcom, in carrying out their functions –*

*(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."*

2.28 In particular, section 3(3) of the Act states that *"in performing their duties under sub-section 1 of the Act, Ofcom must have regard, in all cases, to-*

*(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and*

*(b) any other principles appearing to Ofcom to represent the best regulatory practice."*

<sup>2</sup> <http://www.ofcom.org.uk/consult/condocs/mis-selling/statement.pdf>



- 2.29 Section 4 of the Act requires Ofcom to act in accordance with the six European Community requirements for regulation, including, in particular, to:
- promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;
  - contribute to the development of the European internal market;
  - promote the interests of all persons who are citizens of the European Union; and
  - not favour one form of, or means of, providing electronic communications networks or services, i.e. to be technologically neutral.
- 2.30 Accordingly, in making regulatory decisions, Ofcom is required to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by encouraging competition. This needs to be balanced by the application of Ofcom's regulatory principles and, in particular, the requirement of issues of proportionality, 'bias against intervention' and the obligation to make the 'least intrusive' form of regulation<sup>3</sup>.

<sup>3</sup> as set out in Ofcom's Annual Plan 2005/6 consultation document.

## Section 3

# Developing Ofcom's policy objectives

## Introduction

- 3.1 This section considers Ofcom's proposed policy objectives for migrations, switching and mis-selling. In deciding upon its objectives, Ofcom will need to consider how best to apply these as part of its assessment of whether they are being met through current approaches or, if not, the reasons for this.
- 3.2 This document is primarily focused on questions and issues raised by the practical application of these four objectives, and the aim of the consultation is to explore those issues in more detail to help inform our thinking.

## Objectives

- 3.3 As already set out above, under the Act, Ofcom's principal 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.
- 3.4 Furthermore, as discussed in the Telecoms Review, Ofcom believes that customers must be able to switch easily and that, without this ability, competition will prove to be less effective than it ought to be in delivering benefits to customers. However, as already mentioned, this is not to say that switching should be 'costless' to customers, and there may be legitimate costs which should not be removed. The objective, therefore, is to remove artificial barriers to switching, i.e. unnecessary costs of switching which result in switching costs being artificially high.
- 3.5 In order to provide a framework for discussion, Ofcom is proposing four policy objectives which it considers relevant in order to further the interests of customers in relation to migrations, switching and mis-selling. These are as follows:
- a good customer experience;
  - proper protection against dishonest sales and marketing activity;
  - well-informed customers; and
  - supporting competition in retail and wholesale markets to the benefit of customers.
- 3.6 These objectives are discussed in more detail below. Ofcom would welcome comments on whether these are the right policy objectives or whether there are other policy objectives which have not been identified.
- 3.7 Ofcom accepts that, these objectives, when taken together, represent an idealised market state, and that there will inevitably be trade-offs as to the extent to which each of these can be pursued. Ofcom also considers that these trade-offs will be different depending on the particular dynamics of the market being looked at. For example, the trade-off between good customer experience (e.g. ease of switching) and proper protection from dishonest sales and marketing activity is likely to be different in markets where there could be competition issues stemming from significant market power at the retail level relative to markets where there is effective competition.

## A good customer experience

- 3.8 Ofcom believes that a good customer experience is vital to the competitive process as competition can only work if customers are confident in the switching and transfer process. Where this is not the case, customers will be unwilling to engage effectively in the competitive process.
- 3.9 Accordingly, this objective would therefore seek to ensure that customers who choose to switch between provider(s) and/or product(s) should be able to do so simply and without undue complexity and disruption.
- 3.10 In order for this objective to be realised, there are various characteristics that will need to be met. Amongst others, these include:
- the customer should control the process and be well-informed throughout;
  - where possible, a consistent approach should be used across products and/or services – to make switching easier for customers and competitive providers;
  - the customer should be subject to minimal hassle;
  - the process should be predictable and reliable;
  - there should be adequate opportunity for the customer to change their mind;
  - the switchover period should be as quick as possible (albeit will need to ensure adequate protection from the risks of mis-selling/slamming); and
  - there should be minimal customer disruption, including no interruption to service.

## Proper protection against dishonest sales and marketing activity

- 3.11 As already stated, effective competition delivers choice and lower prices to customers as well as opportunities for new providers and services. However, customers may need protection from irresponsible behaviour where it arises. Ofcom is firmly committed to preventing problems related to mis-selling and slamming which work against the interests of customers, both directly through harm and distress caused by such practice, but also by undermining confidence in the development of competition and in the industry as a whole.
- 3.12 This objective therefore seeks to ensure that there is proper protection for customers from the risks of dishonest sales and marketing activity, namely mis-selling and slamming.
- 3.13 Ofcom considers that there are various aspects of detriment arising from irresponsible sales and marketing activity. These include, amongst others:
- where customers find themselves switched to different providers without their express knowledge and consent. This will typically cause significant distress and anxiety to the customer, as well the inconvenience involved in any remedial action necessary in order to resolve the situation;
  - the risk of adverse publicity relating to dishonest sales and marketing activity discouraging switching because of 'reputational effects' that may influence customer perceptions of the sales techniques of sales agents. This has the effect of discouraging customers from switching, thereby restricting them from making any savings by moving between providers and/or products or both. By making competition less effective, it may limit the benefits to customers as a whole that accrue from well-functioning markets; and

- if switching is discouraged then this could potentially raise supply side barriers, where new entrants are deterred from entering in the knowledge that it will be difficult to persuade customers to switch from their existing provider, or indeed for customers to enter the market for the first time. Again, this will diminish the effectiveness of competition and therefore limit the benefits that customers would otherwise derive from it.

### Well informed customers

- 3.14 Ofcom's overall view of the importance of well informed customers was set out in the Telecoms Review. This reaffirmed Ofcom's view that effective markets require well-informed customers who are able to discipline providers by making informed and considered choices between alternative providers, based on timely, objective and reliable information. For small businesses and residential customers, this therefore requires adequate, accurate comparable and easy to understand information about the nature, price and quality of services. As markets innovate and new products and services become available the need for such information grows.
- 3.15 In Ofcom's view, buying telecoms services presents several practical and unique features which results in various challenges to achieving the objective of well-informed customers including, amongst others, complex bundles of services, a lack of price transparency at the point of purchase as well as a requirement for providers to co-operate in ways that are not required in other markets.
- 3.16 In the context of customers switching between providers, Ofcom considers that the following information, amongst others, should be provided:
- essential information including the identity of the company, its address, telephone, fax and e-mail contact details, as appropriate;
  - a description of the service sufficient to enable the customer to understand the option that they have chosen, and how it works;
  - information about the major elements of the service, including the cost of any standing charges, the payment terms, line rental, key call types and details of "protected or special support" arrangements;
  - what the impact will be upon services currently being used, including a clear understanding of which services will be affected/unaffected;
  - the arrangements for provision of the service, including the order process and, as accurately as possible, the likely date of provision. Where there may be significant delay in the likely date of provision, the customer should be informed;
  - the existence of a right of cancellation and the process for exercising it;
  - the period for which the charges remain valid; and
  - the minimum period of contract, and minimum contract charges, if any.

### Supporting competition in retail markets to the benefit of customers

- 3.17 As already mentioned, Ofcom considers that there should be no artificially inflated barriers to switching which may deter customers from switching, and thereby potentially have a material anti-competitive effect. The objective of supporting competition in retail markets to the benefit of customers therefore seeks to ensure that retail switching costs borne by the customers who switch – whether financial or not - are kept to the minimum necessary. This objective is dependent on many factors. These include the following:

## Migrations, switching and mis-selling

- avoiding ‘unnecessary’ switching barriers for customers;
- ensuring that providers, including prospective new entrants, can access efficient, symmetrical and high quality migration processes to support migrations of customers, through efficient back office operations; and
- avoiding distortion to the competitive process through preventing unfair behaviour by providers during the transfer process

3.18 These are discussed in more detail below.

### ***Avoiding ‘unnecessary’ switching barriers for customers***

3.19 As already noted, switching between providers can be a very complex business, and there is a premium on ensuring smooth end-to-end processes for switching. Where unnecessary switching barriers exist, this is likely to deter customers from switching between providers and/or products, and this will damage the competitive process and the benefits that flow from the existence of effective competition.

3.20 The Telecoms Review noted that, to a considerable extent, this has already been achieved in fixed and mobile, albeit there remain concerns relating to migration processes, particularly in respect of CPS and WLR. The Telecoms Review also noted that a number of respondents had commented that migration between broadband offerings were difficult, and that there were no smooth end-to-end processes of the kind that had been introduced for both fixed-line and mobile switching. From the responses received, it is evident that the industry-agreed voluntary code for broadband migrations is not perceived to have addressed all the problems associated with switching between broadband providers, including that it is not mandatory and therefore not universal.

3.21 In seeking to facilitate easier switching, it is also important to make a distinction between those barriers which may arise from legitimate commercial customer retention strategies and those that arise due to market failure. As discussed previously, where switching is free, it could encourage a level of switching which is actually inefficient. Where the provider has incurred upfront costs (e.g. where the customer acquisition costs may include the provision of equipment), then there are costs attached to switching and it is legitimate for a provider to be entitled to recover those costs. Therefore some charges for switching could be viewed as part of the competitive process.

3.22 In addition, where markets are competitive and where customers are well-informed about the terms and conditions of a service upfront (e.g. minimum contract length) before subscribing to it, then there should, in theory, be a limit to the barriers which providers can impose. This is because customers would then be in a position to reject terms and conditions which they did not like such as where there may be excessive lock-in periods.

### ***Ensuring that providers, including prospective new entrants, can access efficient, symmetrical and high quality migration processes to support migrations of customers, through efficient back office operations***

3.23 Migration processes should be carried out in as cost-efficient a manner as possible. Where this is not the case, it is likely that competition will be damaged as providers will be disinclined to compete for customers, as it may not be commercially viable for them to do so. Those providers that choose to compete may ultimately pass any

costs onto customers, and this may result in customers being deterred from switching. Relevant factors include:

- the costs involved;
- the time taken for the switch to take place;
- the complexity of the actual switching process itself; and
- the ability of providers to easily access the information necessary for the migration (e.g. technical specification of the customer's current service/line characteristics).

3.24 In order for this objective to be achieved, there are various characteristics that will need to be present. Amongst others, these include that:

- processes should be efficient and cost effective to operate, including technically simple;
- processes are highly automated, with the need for manual intervention minimised;
- validation processes are not unnecessarily burdensome so that high rejection/error rates are minimised;
- the gaining provider is able to access service/line characteristics so that it is able to manage the relationship with the customer if there are aspects of the service that cannot be supported;
- that processes allow for simultaneity/synchronicity of multiple orders, including understanding of product dependencies; and
- that processes allow for proper notification to all relevant parties i.e. losing and gaining provider(s).

3.25 An additional aspect of this objective is the need to recover migration costs according to a charging mechanism that leads to migration charges that are objectively justifiable, proportionate, non-discriminatory and transparent, and that are likely to contribute to efficient migration processes and effective competition.

3.26 While this document does not cover the issue of migration costs in detail, Ofcom believes that competition is stimulated when migration costs are recovered according to the principles outlined above, and a charging mechanism derived by applying six cost recovery principles to the cost stack; namely, cost-causation, effective competition, distribution of benefits, cost minimisation, reciprocity and practicability.

3.27 In Annex 5, Ofcom sets out its proposed principles relating to migrations, switching and mis-selling. One of those principles relates to charging mechanisms aimed at recovering the costs generated by migration activities. Ofcom would welcome comments on this, and intends to revisit this issue in more detail as part of its subsequent document.

### ***Avoiding distortion to the competitive process through preventing unfair behaviour by providers during the transfer process***

3.28 Ofcom believes that migration processes should not distort the competitive process, and that the opportunity for unfair behaviour by providers during the transfer process should be minimised. This will require the following, in particular:

### *Symmetry*

- 3.29 The migration process should be available on equal and non-discriminatory terms to all providers, and should not systematically favour one market player over another. One example would be if the barriers to switching for one player were significantly higher than another for no justifiable reason.

### *Safeguards against anti- competitive behaviour*

- 3.30 It is likely that during the migration process providers may have access to commercial information or capabilities that could potentially be abused for competitive advantage, and to the detriment of their competitors and ultimately, therefore, customers. It is therefore important that the process should include safeguards to prevent the potential for such abuse. Particular examples of potentially 'unfair' competitive behaviour include the following, amongst others:
- the use of commercial information obtained through the migration process by the losing provider in order to target marketing at a competitors customers such as through the use of 'save' activity. 'Save' activity is marketing activity which is undertaken by the losing provider during the switchover period in an attempt to persuade that customer not to switch, and is contrary to General Condition 1.2;
  - abuse of 'cancel other' functionality resulting in orders being cancelled by the losing provider with little justification for doing so;
  - lack of co-operation between losing and gaining providers, resulting in, amongst other things, information necessary for customers to switch not being readily shared with the gaining provider; and
  - processes which allow the existing provider to effectively block a transfer by forcing the customer to contact them in order to be provided with information necessary for them to switch.

### **Ensuring efficient processes for migration between wholesale inputs**

- 3.31 In order to support competition in wholesale and retail markets, it is necessary for providers to be able to undertake singleton or bulk wholesale migrations efficiently (since a wholesale product migration may result from a change of service provider).
- 3.32 The purpose of bulk wholesale migrations is to allow providers to migrate to the most efficient and effective wholesale product for their needs, and/or to switch their wholesale supplier. The following scenarios will apply:
- where a provider migrates a number of their customers from one wholesale products to another (e.g. IPStream to DataStream); and
  - where a provider changes its wholesale supplier but uses the same wholesale product (e.g. a CPS reseller switches from one CPS operator to another).
- 3.33 Ofcom considers that the processes should be no different from those where there is a singleton customer migration and that the same characteristics identified above will need to present, including that processes should simple, efficient, high quality and appropriately priced as well as being non-discriminatory and pro-competitive.

## Migrations, switching and mis-selling

*Question 4: Ofcom has identified four proposed policy objectives for migrations, switching and mis-selling; namely:*

- *a good customer experience;*
- *proper protection from dishonest sales and marketing activity;*
- *well-informed customers; and*
- *supporting competition in retail markets to the benefit of customers*

*Do you agree that these are the right policy objectives? Are there further objectives which Ofcom should consider?*



## Section 4

# Moving towards common processes

## Introduction

- 4.1 This section examines a range of potential policy options in the context of Ofcom's proposed policy objectives for migrations, switching and mis-selling, outlined in section 3. In particular, this section discusses whether or not the interests of both customers and industry would be better served by moving to common processes.
- 4.2 As already explained, Ofcom is considering these issues now given current discussions around the development of NGNs as well as ongoing work relating to implementation of BT's Enterprise Act Undertakings of 22 September 2005. Ofcom considers that these developments are likely to influence changes to migrations processes and, in particular, a shift towards more uniform processes. Consequently, Ofcom is keen to engage with stakeholders on issues relating to migrations, switching and mis-selling in order to develop policy thinking and provide regulatory certainty going forward.
- 4.3 Ofcom's initial view is that there may be valid reasons to support moving away from current product-specific migrations processes towards uniform processes. The reasons for this are as follows:
- multiple and inconsistent approaches resulting in the customer experience for switching across transferable products being different depending on the product and service being migrated;
  - the increasing volume of multiple (and complex) migrations which will result in even greater demand being placed on migration processes originally developed independently for single product migrations; and
  - increased difficulty and inefficiency for both existing providers and new entrants who will have to manage multiple but separate migration processes in order to acquire an individual customer bundling narrowband and broadband offerings based on a diverse set of wholesale processes.
- 4.4 Ofcom is inviting comments on the discussion as to whether the interests of both customers and the industry would be better served by moving to common processes for transferable voice and broadband products.

*Question 5: Do you agree that the interests of both customers and the industry would be better served by moving to uniform processes for migrations, switching and mis-selling across transferable voice and broadband products?*

## Options for common processes for migrations, switching and mis-selling

- 4.5 As part of this consultation, and to better inform future discussions, Ofcom is seeking comments on the various processes which could be used to achieve a common process across the transferable products. These are:
- the Letter Facilitation process;
  - the MAC process; and
  - the Single Code process.

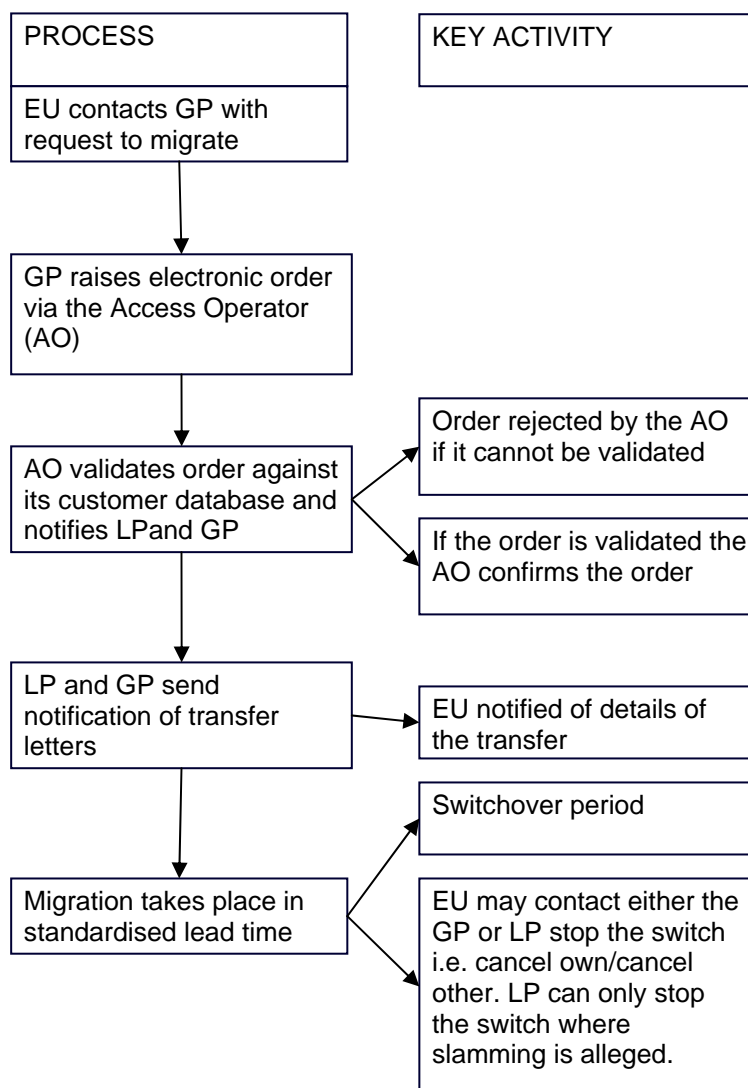
## **Migrations, switching and mis-selling**

- 4.6 The analysis set out in this section represents an ‘initial’ impact assessment (‘IA’) insofar it sets out some high level pros and cons of the three options, and is aimed primarily at getting industry and consumer groups to start thinking through some of the issues involved. This will then feed into a fuller impact assessment of options which will be consulted on as part of a future consultation.
- 4.7 IAs 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 and are commonly used by other regulators. This is reflected in section 7 of the Act, which means generally we have to carry out IAs 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. In producing the initial IA in this document, Ofcom has had regard to its own guidance on carrying out impact assessments.

### **Letter Facilitation process**

- 4.8 The process for migrations across, or from, narrowband products (namely CPS and WLR) is largely based on the customer being notified through ‘notification of transfer’ letters. This process, for fixed-line telecoms, works alongside rules which require all providers engaged in sales and marketing to establish, and comply with, sales and marketing codes of practice, which are consistent with published guidelines. More details can be found on Ofcom’s website at:  
<http://www.ofcom.org.uk/consult/condocs/mis-selling/statement.pdf>
- 4.9 These rules were introduced by Ofcom, following public consultation, in light of growing problems caused by mis-selling and slamming. A brief overview of the Letter Facilitation process is set out in Figure 3 below.

**Figure 3: Letter Facilitation process**



- 4.10 This Letter Facilitation process therefore works on the basis that customers are well-informed about the transfer before the switchover, and that there is sufficient opportunity for them to stop the order going ahead where they simply change their mind or in cases of slamming. What tends to happen, as set out above, is that the customer will typically receive letters from both the losing and gaining provider. This notification is typically associated with a switchover period during which the migration is suspended for a number of days. This therefore limits the consumer harm arising from potential slamming by ensuring that customers are promptly notified of any changes to their account.
- 4.11 An alternative to the approach outlined above may be that the gaining provider, in certain circumstances, be allowed to proceed with the migration at their own risk, with the implication that they will bear the cost of the aborted migration should the customer decide to stop the transfer within the statutory cooling-off period.

## Migrations, switching and mis-selling

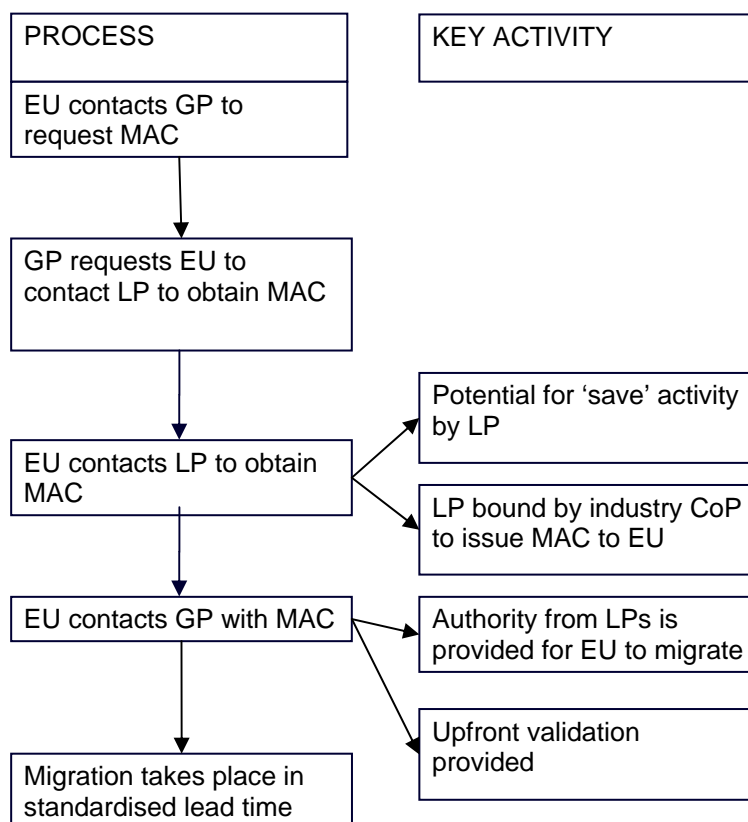
- 4.12 The advantages of the Letter Facilitation process is that switching is simple as there is limited customer involvement as, in order to effect a switch, the customer need only contact the provider of their choice.
- 4.13 However, it is evident that unless strong measures are introduced to tackle the problem of mis-selling and slamming, there is increased potential for irresponsible sales and marketing activity given that upfront validation is reduced under this approach. In the fixed-line telecoms sector, for example, Ofcom experienced high volumes of complaints about mis-selling and slamming practices. In order to address this Ofcom introduced mandatory sales and marketing codes of practice enforceable by Ofcom. Ofcom is concerned that without such measures gaining providers may lack the necessary incentives not to engage in such activity.

*Question 6: What are your views on the Letter Facilitation process? What safeguards could be introduced to protect customers from the potential for irresponsible sales and marketing activity?*

## MAC process

- 4.14 The process for migrations across, or from, broadband products, works by means of a MAC which customers are required to obtain from their existing provider in order to give to their new provider. This process works alongside a voluntary code of practice developed by industry to secure agreement between providers and to facilitate the migration of customers from one supplier to another in a fair and reasonable way. A brief overview of the MAC process is set out in Figure 4 below.

Figure 4: The MAC process



- 4.15 Accordingly, under the MAC process, the migration process cannot be initiated without prior authorisation by the losing provider given that the MAC can only be obtained by an account holder request to the losing provider. The issuing of a MAC by the losing provider constitutes the losing provider's agreement that the customer is entitled to request and have their broadband service(s) migrated to another provider.
- 4.16 While such a process, therefore, would have some benefit by reducing the opportunity for gaining providers to engage in irresponsible sales and marketing activity, given the degree of control and responsibility held by the losing provider, there is a concern that losing providers may lack the necessary incentives to fully support the switching process in a neutral and independent way. Therefore, in Ofcom's view, the risk of this approach may be that it introduces additional (and unnecessary) friction to the switching process which would be contrary to some of Ofcom's objectives including ensuring a good customer experience and supporting competition in the retail markets to the benefit of customers.
- 4.17 This can be seen through the volume of complaints into Ofcom which are about issues to do with moving between broadband providers. One such example is that of "Tag-on-the-line", which is where customers are unable to order broadband because their chosen provider's system shows that there is already another provider

providing service on that line even where the previous service has been ceased. This particular issue has resulted in a significant volume of complaints into Ofcom, and is currently accounting for 30 per cent of all complaints logged by Ofcom relating to telecoms issues. Ofcom is currently working with the industry to identify, and resolve, the causes.

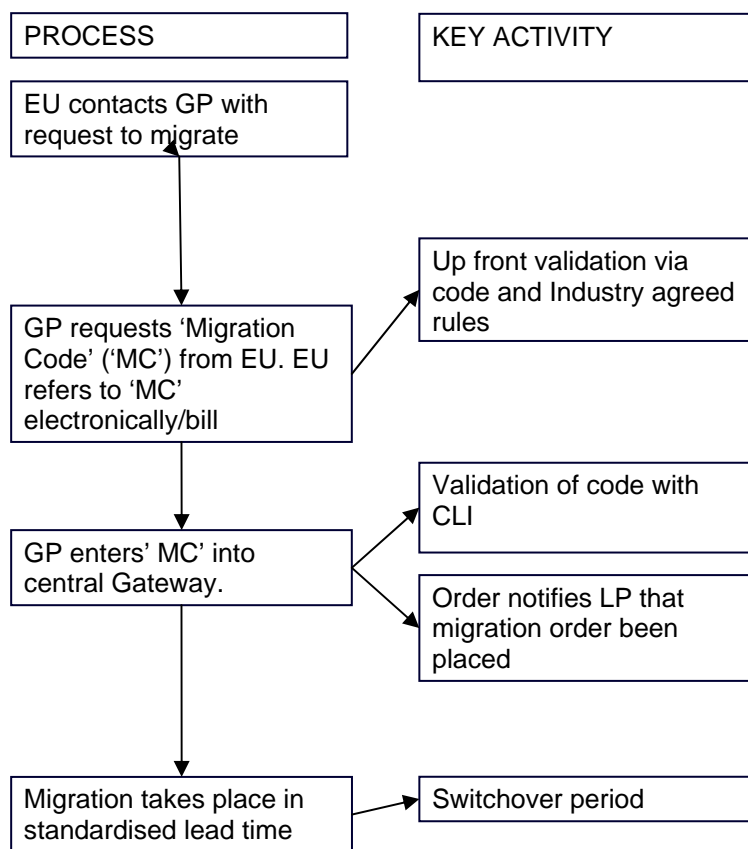
- 4.18 In addition, there is a concern that the MAC process would also provide an opportunity for providers to engage in 'save' activity which, as already mentioned, when undertaken on the basis of customer specific information provided to it by other providers in connection with the transfer process, is in contravention of General Condition 1.2.
- 4.19 The MAC process also suffers from the need for a high degree of customer interaction. Once the customer has agreed with the gaining provider that they wish to transfer, they have to contact the losing provider for a MAC and then to contact the gaining provider again to secure a transfer. This high need for customer interaction raises the opportunity cost of switching, detracts from the customer experience, and therefore may make switching less likely. Although increased customer involvement in the switching process has some attractions, the evidence from the CPS reply card process, where customers were required to complete and return a reply card to their losing provider in order to switch, shows that consumers may be unwilling to engage in the switching process if it is too burdensome. This view was set out in an industry prepared document, CPS Process Improvement Group paper on Reply Slip replacement, dated 17 October 2001.

*Question 7: What are your views on the MAC process? What safeguards could be introduced to ensure that providers support the switching process in a neutral and independent way?*

### Single Code process

- 4.20 The Single Code process is similar to the current process for validation currently adopted in the energy sector – known as the Meter Point Reference Number (M-number) in gas and the Meter Point Administration Number (MPAN) in electricity. In the energy sector, these processes work alongside licence conditions. A brief overview of the Single Code process is set out in Figure 5 below.

Figure 5: The Single Code process



- 4.21 Accordingly, under the Single Code process, the migration process cannot be initiated without prior authorisation by the customer given that authorisation can only be obtained by the account holder providing details of their code to the gaining provider. This process, therefore, is similar to the MAC process, with the key difference being that the customer is not required to contact their current provider to request the code in order to switch.
- 4.22 The way in which the Single Code process works in the energy sector is that when submitting a customer transfer order, the gaining provider is required to populate a number of mandatory fields relating to the customer, including the postcode and the M-number. If the M-number and the postcode do not match on the order, or either is missing, the order will reject.
- 4.23 All gas bills and statements must include the M-number and it must be clearly displayed. Where no bill or statement is issued, the number must be provided annually. This is a licence requirement for all gas suppliers. The gaining provider is also able to obtain the M-number either directly from the energy bill at the time of the customer sale, or if it is not available, can obtain it via other means on behalf of the customer in order to facilitate the transfer.
- 4.24 Under the Single Code process, it is important that consumers are able to gain easy access to the code at the point at which they wish to switch providers, but that there

are sufficient safeguards in place to protect consumers from the potential of slamming. Where this is not possible alternative routes may need to be considered.

*Question 8: What are your views on the Single Code process?*

- 4.25 Ofcom recognises that any move to new processes is likely to be disruptive and create additional costs for providers. These costs may ultimately be passed on to customers as part of the normal competitive process. Ofcom would therefore welcome comments from stakeholders on how any transition might be managed in order to minimise disruption and any additional cost burden.

*Question 9: How would you best manage transition costs in order to minimise disruption and any additional cost burden?*

### Ensuring adequate safeguards against losing providers engaging in unfair competitive behaviour

- 4.26 Depending on the process chosen, it is likely that during the migration process providers may have access to certain commercial information or capabilities that could potentially be abused for competitive advantage, and to the detriment of their competitors. This can become a source of contention, resulting in potential for abuse and mistrust between the parties involved. Ofcom would welcome views on current safeguards or what safeguards should be introduced to prevent the potential for such abuse. These could cover, among other things:

- current service characteristics;
- unique identification of line;
- 'save' activity; and
- 'cancel other' functionality.

- 4.27 These are discussed in more detail below.

#### Current service characteristics

- 4.28 As part of the transfer process, it may be necessary for the gaining provider to know details of the customer's current product(s)/service(s) in order that they know whether the service being migrated is available or compatible. This happens in banking. However, there are sensitivities involved in sharing of information, and there is a risk that if any information was released in an uncontrolled way, it may impact upon the competitive process. This is because information about the services to which the customer is subscribed may have some commercial value, and could therefore likewise be abused by gaining providers. Competitors could use this information, for example, to target marketing or even to shape their own business strategy. It is therefore evident that there will need to be safeguards to guard against the risk of prospecting.

*Question 10: What are your views on identifying the characteristics of the current service?*

#### Unique identification of lines

- 4.29 In order to enable a switch to take place, it is necessary for the relevant gaining and losing provider to identify, and agree, on the line to be transferred. Historically, this



has given rise to certain contention given the trade-off between the need to ensure that validation is not too burdensome and the need to ensure that there are safeguards to protect against erroneous transfer.

- 4.30 Under the current approach for CPS and WLR, gaining providers are essentially required to submit independent address information to the losing provider for validation. A failure of the information to match the losing providers database then causes the order to be rejected. Although this requires the least level of co-operation between providers and hence is straightforward to implement, it has tended to result in high level of rejections, and hence can create significant costs and delays. Alternative mechanisms may include, for example, the establishment of a code of practice that governs the responsibilities and behaviour of the different parties involved or a single industry-wide reference database of circuits.

*Question 11: What are your views on how best to secure unique identification of lines?*

- 4.31 In addition, depending on the process chosen, an additional concern is that certain information which is provided to the losing provider to effect the transfer, may also be abused, and used for a purpose other than which it was provided. This includes the following, amongst others:

### **‘Save’ activity**

- 4.32 ‘Save’ activity is marketing activity which is undertaken by the losing provider during the switchover period in an attempt to persuade the customer not to switch to a new provider. All ‘save’ activity which is undertaken on the basis of customer specific information provided to it by other providers in connection with the transfer process is in contravention of General Condition 1.2 as it involves the use of such information for a purpose other than for which it was intended and could provide a competitive advantage. Ofcom has issued various Notifications on BT and other Communications Providers on effectively prohibiting ‘save’ activity for CPS and WLR.
- 4.33 However, where the transfer process requires the customer to contact their losing provider to switch, this may inadvertently provide an opportunity for the losing provider to engage in ‘save’ activity in order to retain their customer. One way to address this particular concern is to remove the requirement for the customer to contact their losing provider as part of the migration process. However, this is not currently the case in broadband, in particular, where the customer must contact their existing provider in order to switch.

*Question 12: What are your views on protecting against ‘save’ activity?*

### **‘Cancel Other’**

- 4.34 Where customers have been ‘slammed’ in CPS and WLR, and contact their existing provider during the switchover period, providers are able to use Cancel Other, which is a functionality which enables providers to cancel orders in certain defined circumstances, primarily where slamming has occurred. Ofcom considers that this plays a useful role as a consumer protection mechanism.
- 4.35 Ofcom published a final Direction specifying when BT is permitted to use Cancel Other and what information BT must provide to its competitors about its use of Cancel Other on 21 January 2005. Ofcom’s Direction and Determination permitted BT to use Cancel Other in cases of slamming as well as other certain specified

cases. In the Direction, Ofcom provided further detail on the definition of slamming and clarified the types of behaviour covered by the definition.

- 4.36 The Direction and Determination is available for viewing on the Ofcom's website at: <http://www.ofcom.org.uk/consult/condocs/cancel-other/codir/>
- 4.37 Ofcom would welcome comments on the use of Cancel Other and, in particular, 'cancellation' rights – and specifically the ability of losing providers to cancel orders under specified circumstances. There are various different approaches, including how it is initiated, the process for notification to relevant parties, the reason codes used, the need for audit trails, access to these and what timescales are involved.
- 4.38 Ofcom would also welcome comments on the application of Cancel Other where there are multiple transfers involved and potentially more than one losing provider (and gaining provider) involved in the transfer, and whether, in such a situation, all providers should have equal rights or whether the rights should be restricted in some way.

*Question 13: What are your views on the use of Cancel other and cancellation rights, more generally?*

### Ensuring adequate safeguards against gaining providers engaging in dishonest sales and marketing activity

- 4.39 Ofcom is concerned that there may be a possible lack of adequate incentives on gaining providers not to engage in dishonest sales and marketing activity and, in particular, mis-selling and slamming.
- 4.40 Ofcom is committed to preventing problems with mis-selling and slamming becoming a feature of the telecoms market. Such instances can be distressing to customers, particularly where they are vulnerable, and can result in a loss of customer confidence in the switching process which will work against the interests of customers and undermine confidence in the industry as a whole.
- 4.41 One approach to tackling the problem of mis-selling and slamming could be to consider Third party validation of orders. This is discussed below.

#### Third Party validation of orders

- 4.42 The use of third party validation of orders is commonplace in other countries, including the USA, Ireland and Switzerland. In the USA, for example, providers are required to use a formal validation process before customers can be switched. In Ireland, customers are required to sign a customer authority form ('CAF') or use an independent third party verification ('TPV') process. The telephone call between the customer and the TPV body is recorded and must be produced within 2 days if the transfer is challenged. If the CAF or TPV record cannot be produced the customer cannot be switched.
- 4.43 This approach could potentially provide strong up-front protection for customers against the risks of mis-selling and slamming without the problems associated with increased customer involvement or losing provider incentives. An example may be that the third party could send out notification letters which prompt the customer to contact the third party if they have been subject to slamming. One potential drawback, however, depending on the design and scope of the chosen approach, may be that the costs of implementation and additional complexity to the switching

process may be significant. Accordingly, this may adversely impact competition by increasing the costs to providers and introducing additional steps for customers.

*Question 14: What are your views on Third party Validation of Orders?*

### Bulk migrations

- 4.44 In order to support competition in wholesale and retail markets, it is necessary for providers to be able to undertake efficiently bulk wholesale migrations as well as singleton migrations. Bulk migrations can occur where a provider changes its upstream supplier and/or wholesale product. Ofcom considers that these will need to be as efficient as possible in order to ensure benefits to customers through effective competition by allowing competing providers to use the most efficient combination of wholesale inputs, therefore minimising their costs and supporting competition at the deepest level.
- 4.45 The purpose of bulk wholesale migrations is to allow suppliers to migrate to the most efficient and effective wholesale product for their needs, and/or to switch their wholesale supplier. The following scenarios will apply:
- where a provider migrates a number of their customers from one wholesale product to another (e.g. IPStream to DataStream); and
  - where a provider changes its wholesale supplier but uses the same wholesale product (e.g. a CPS reseller switches from one CPS operator to another).
- 4.46 Where appropriate, Ofcom would expect that the processes (and principles) should be no different for bulk migrations from those where there is a singleton customer migration, including that processes should be simple, efficient, high quality and appropriately priced as well as being non-discriminatory and pro-competitive.

*Question 15: Do you agree that the principles set out in relation to singleton customer migrations should apply equally to bulk migrations?*

## Section 5

# Developing an economic approach for regulatory intervention

### Overview

- 5.1 In section 4, Ofcom examined various policy options relating to migrations, switching and mis-selling in the context of Ofcom's proposed objectives discussed in section 3. This section sets out how Ofcom will, through consultation, develop an economic approach going forward for determining whether Ofcom should have a role in mandating or encouraging change to migration processes, and for determining where regulatory withdrawal may be appropriate.
- 5.2 In order to assist with the process of consultation, this section will identify how the framework could develop based on analysis of the markets to be considered by Ofcom that may support the continuation of the current status quo, or alternatively may suggest a role for Ofcom in changing those processes or, where appropriate, for withdrawing from regulation.
- 5.3 Ofcom actions will differ depending on whether the evidence and analysis suggests that that there is:
- no reasonable expectation of a future problem to justify intervention in the relevant markets today; or
  - reasonable expectation of future problems to justify intervention in the relevant markets today.
- 5.4 These are discussed in more detail below.

### An economic rationale for intervention

- 5.5 An economic rationale for regulatory intervention can be developed around a market failure framework and would be based on assessing whether market failure exists and, if so, whether market forces are, or can be, expected to self-correct any market failure.
- 5.6 In order to assist the consultation, Ofcom discusses a proposed framework for assessing market failure in Annex 4 in order to determine whether there are characteristics of the telecoms markets such that the market itself might not function properly. This is not to suggest that that there cannot be other non-economic objectives which provide a rationale for intervention in the relevant telecoms market.
- 5.7 Ofcom would welcome comments on this proposed framework.

*Question 16: Do you agree with Ofcom's proposed framework for assessing whether there is market failure in respect of migrations, switching and mis-selling sufficient to warrant regulatory intervention?*

- 5.8 Where market failure exists, and it is not likely to be self-correcting, an economic approach would suggest assessing the costs and benefits of regulatory intervention, including switching costs and benefits of new migration systems borne by different groups (such as customers and providers), and the risk of regulatory failure.

- 5.9 The benefit of mitigating market failure would be the growth in successful multiple product transfers that would be generated. This could result from a reduction in the rejection rates on transfers or simply an increase in 'hassle free' transfers which results in a seamless and positive customer switching experience.

**No reasonable expectation of a future problem to justify intervention in the relevant markets today**

- 5.10 In the event that Ofcom did not consider that there were reasonable expectations of problems arising from the potential for increased volumes of bundled service transfers using existing migration processes, Ofcom may consider that the most appropriate approach would be to maintain the status quo, or to withdraw from particular areas of existing regulation.
- 5.11 Ofcom may choose to retain the status quo, or withdraw from regulation, where the evidence and analysis suggested that there was:
- no market failure in the relevant markets; or
  - market failure but there are self correcting forces at work; or
  - market failure, no self-correcting forces at work but the costs of intervention outweigh the benefits.
- 5.12 At present, there are various approaches which Ofcom follows depending on the relevant market being considered. These include, among others, the following:
- certain migration options and obligations which are written into the Directives directly;
  - certain migration options and obligations which are imposed as SMP obligations (e.g. CPS/WLR);
  - some are not imposed as obligations at all, but are the product of consensual industry co-regulatory processes (e.g. broadband migrations); and
  - in certain cases, failure to allow migration or conduct which prevents competitors from acquiring customers can be seen as anti-competitive conduct.
- 5.13 These various approaches are detailed at Annex 6.
- 5.14 There are, however, regulatory risks of retaining the status quo option. This is because of the apparent changes in the market, including the trend toward purchasing product bundles and the possible difficulties this could make for transfer of bundled products. If present migration processes are not aligned between different products (at both the wholesale and retail levels) then higher future volumes of migration traffic – particularly related to bundled products – could make it increasingly more difficult for customers to switch between provider(s) and/or product(s).
- 5.15 Ofcom will need to weigh the risk of possible future problems against the regulatory risks of intervening in the market.

**Reasonable expectation of problems to justify intervention in the relevant markets today**

- 5.16 However, in the event that Ofcom found that there was market failure, and that this market failure did not appear to be self-correcting and the benefits of intervention

exceeded the costs involved, Ofcom would look to develop a framework for regulatory intervention. This framework could develop as follows:

- Option 1: consideration of migration issues on a case by case basis;
- Option 2: setting minimum standards in some cases but on a case by case basis in others; or
- Option 3: setting minimum standards in all cases

5.17 These are discussed in more detail below.

### ***Option 1: Consideration of migration issues on a case by case basis***

5.18 As part of its analysis of the evidence Ofcom may conclude that intervention is justified in one, some or all relevant markets, and potentially in respect of one, some or all aspects of migration processes relevant to these markets. Ofcom considers that even closely related markets may require different responses, depending on maturity of those markets, the dynamic process of competition and the nature of migration processes related to that market.

5.19 Ofcom could consider migration processes on a case by case basis by, for example, allowing the market to develop without interference. Where migration outcomes result in disputes, a dispute resolution body (for example) could be charged with making decisions. These decisions could be ad hoc or be used to establish general guidance on relevant rights and obligations of parties to the migration process. This guidance could also include guidance on cost recovery, where appropriate. Alternative mechanisms are equally possible.

5.20 Ofcom could also consider migration issues on a case by case basis through hearing representations from undertakings on migration issues as they arise. Ofcom could then consider migration issues on a case by case basis initiated by complaints or Ofcom's own investigative work, with resolution of the issue through consultation with stakeholders. For example, arising out of this consultation process, we may wish to assess migrations but only in certain markets, or in relation to certain aspects of the migrations process.

### ***Option 2: Setting minimum standards in some cases but on a case by case basis in others***

5.21 In the event that regulatory intervention was justified, another approach could be to set minimum standards for some aspects of the migrations process, leaving possible modification of other aspects of the process to case by case considerations (as proposed above). This approach could reflect a view that all customers, regardless of the relevant telecoms markets, require minimum standards in relation to certain aspects of the migration process, whereas other additional elements would need to be considered on a market by market basis.

5.22 For example, where there was a degree of market failure in the form of market power in upstream markets and migration processes at this level of the supply chain (and all the other necessary criteria for justifying intervention are met), it may be possible that a set of minimum standards could be determined to ensure competitors had equal and non discriminatory access to transfer systems and processes. On the other hand, Ofcom could consider that, in retail markets, there could be a case by case response. For example, if it was found that market failure existed in the form of information asymmetry at the retail end of the supply chain for consumers in some

markets but not others (and all the other necessary criteria for justifying intervention are met), Ofcom could consider policy options on a case by case basis such as improving information of customers in some but not all markets. In this way, it would be the case that two complementary options would be useful in tackling migrations issues.

***Option 3: Setting minimum standards in all cases***

- 5.23 In the event that regulatory intervention was justified, then another approach could be to set minimum standards for all relevant aspects of the migrations process. This would be the most prescriptive approach to responding to the justified intervention, and would only be likely to be justified where market failure was pervasive across markets and there were clear net benefits of undertaking this approach.
- 5.24 As part of its analysis, Ofcom would, of course, gather appropriate evidence and carry out the necessary analysis before pursuing any particular course of action.

*Question 17: Do you agree with the proposed way forward for developing the framework for determining whether Ofcom has a role to intervene in markets? Please provide an explanation for your answer.*

## Section 6

# Initial proposals, prioritisation and next steps

## Overview

- 6.1 Ofcom is keen to engage stakeholders on the areas of migrations, switching and mis-selling in light of current discussions around the development of NGNs as well as ongoing work relating to BT's Enterprise Act Undertakings of 22 September 2005. It is likely that these developments are likely to lead to a shift towards uniform migrations processes. Consequently, Ofcom is keen to develop policy thinking and to help provide increased regulatory certainty going forward.
- 6.2 Ofcom is keen to ensure that the transfer and switching process properly addresses the interests of customers. Among other things, this requires that:
- the competitive process is not inappropriately constrained, including removing the potential for either the losing or gaining provider to distort or abuse the transfer process;
  - customers can switch between providers and/or products easily; and
  - customers are adequately protected from dishonest sales and marketing activity.
- 6.3 Ofcom considers that inappropriate barriers to switching should be addressed. However, as already discussed, that is not to say that switching should be 'costless' to customers given Ofcom's view where switching is free, it could encourage a level of switching which is actually inefficient. However, where switching barriers do exist, and where these are artificially inflated, this is likely to deter customers from switching between provider(s) and/or product(s), and damage the competitive process and the customer benefits that flow from the existence of effective competition.
- 6.4 However, measures aimed at promoting competition by reducing the barriers to supplier entry and customer switching will need to be combined with robust measures that address the potential lack of incentives upon gaining providers not to engage in irresponsible sales and marketing activity, including one or both of the following:
- greater incentives placed upon gaining providers not to engage in mis-selling or slamming; and/or
  - reduced opportunity for the gaining provider to engage in mis-selling through setting appropriate validations mechanisms.

## Establishment of a single process across all products

- 6.5 There is currently no uniform process for migrations, switching and mis-selling across transferable voice and broadband products. Migrations processes which have developed have tended to be product specific. This will become increasingly problematic as customers increasingly look to build retail packages bundling narrowband and broadband offerings based on a diverse set of wholesale processes. It is likely that the current processes will be tested to the limit as migrations become



increasingly multiple and complex over time. There is therefore a requirement to move to processes that will better support this development.

- 6.6 Accordingly, Ofcom's initial view is that there may be valid reasons to support moving away from current product-specific migrations towards uniform processes. As part of this consultation, Ofcom is seeking comments on whether the interests of both customers and industry would be better served by such a move.
- 6.7 Of the various approaches set out in section 4, Ofcom currently considers that the Single Code process would appear to have the greatest benefits, although, this will depend on the way in which the code is managed. In particular, Ofcom considers that the Single Code process best addresses the issue of inadequate incentives upon providers, including the lack of incentives upon losing providers to fully support the switching process and the lack of incentives upon gaining providers not to engage in dishonest sales and marketing activity.
- 6.8 Ofcom therefore considers that the benefits of the 'Single Code' process would include the following:
- it places control of the process in the hands of the customer rather than the losing provider;
  - it provides protection from dishonest sales and marketing behaviour as it provides for a single unique identifier which is used to authenticate the transfer;
  - it provides protection against 'save activity' as there is no need for the customer to contact their losing provider; and
  - it provides a simpler set of requirements for ongoing (and future) systems developments such as, for example, NGN's.
- 6.9 There are, however, various practical issues which would need to be addressed, in order to be able to fully assess how the Single Code process would work in practice. These include, amongst others, the following:
- how easily customers are able to access the code? This may be a particularly critical issue where bills are quarterly or where there is no billing. Ofcom's concern is that, for certain sales models, the level of customer interaction (to obtain the code) may be too high to ensure switching occurs. In these instances, a fallback process may be necessary.
  - however, where this is the case, Ofcom would wish to be satisfied that sufficient safeguards exist to ensure that customers were adequately protected from making it too easy to access the code.
  - how would code security work? Once the code is used it would need to expire to prevent re-use by potentially conflicting/competing orders. There are various approaches to adopt such as, for example, 'use once' codes which are tied to an order type and supplier.
  - how would code security work where a code is used to validate pre-sales (i.e. release of information) and post-sales (i.e. order validation)? For example, if the same code was used, how would this prevent mis-selling/slamming where the customer decides not to go ahead with the transfer? If there are different codes, how quickly can a new code be generated, and how easily would consumers access the new code (link to bullet point 1)?

## Migrations, switching and mis-selling

- how long should the switchover period need to be where customer protection is upfront? Arguably where the protection is upfront then the provision/delivery can be as fast as possible?
- could any flexibility be built into the system? For example, what is the scope for two processes, i.e. near immediate provisioning where the customer provides the code upfront but a more stringent process where fallback is used or near immediate provisioning where a particular provider may have 'gold-plated' status (i.e. no history of mis-selling) as opposed to a provider with a track record of abuse?
- how best to inform customers of the impending transfers? Where this is through 'notification of transfer' letters whether it is necessary for all losing/gaining providers to notify or whether this could be carried out through an independent body so that only a single letter is generated?
- Cancel Other – how would this work in the case of multiple gaining/losing providers? Do all providers have identical rights or whether rights or could rights be restricted in certain circumstances?
- who manages the switching process, and whether a "central Gateway" that is controlled by a party that is sufficiently de-linked from the parties involved may have some attraction? Also, where this may be the case, who should have responsibility for administering the system (3rd party, Openreach)?

*Question 18: How could the Single Code process work in practice?*

## Proposed key principles for migrations, switching and mis-selling

- 6.10 In Annex 5, Ofcom outlines certain principles which it considers would provide a useful framework to guide future discussions on the area of migrations, switching and mis-selling and, the need to achieve smooth end-to-end processes for switching as well as adequate safeguards to ensure that customers are well informed and well protected. Ofcom would welcome stakeholder comments on the proposed key principles, and whether these adequately capture the necessary characteristics. Ofcom would also welcome comments on whether these may, to some extent, be applied to guide current migrations processes as well as new processes to be developed in the future.

*Question 19: Do you agree with Ofcom's proposed key principles for migrations, switching and mis-selling? Are there further principles which Ofcom should consider?*

*Question 20: What are your views on whether these could be applied to guide current as well as new processes to be developed in the future?*

## Getting our priorities right

- 6.11 BT has identified some 160 possible migration processes. It may be possible to deal with this through a systematic approach. However, more likely there will be a need to find a way to prioritise the most important migration types. Ofcom would therefore welcome views on the best means to achieve this, and how best to develop criteria for prioritisation. This may include one or more of the following:
- where competition and the interests of customers are most clearly being held back by poor transfer processes;

## Migrations, switching and mis-selling

- where a particular transfer process is important to help the development of the market e.g. WLR/CPS + IPStream to LLU MPF;
  - where switching seems particularly important to the up-and-coming transition to competitive NGNs;
  - where there is a high risk of customers being consumer harmed through dishonest sales and marketing behaviour and other abuses; or
  - where Ofcom's existing powers make action more straightforward and less of a disruption.
- 6.12 Once there is established criteria, it will be necessary to consider how best to apply the defined criteria to the target list of migrations. Ofcom would welcome views on this.

*Question 21: Which migrations processes do you consider should be prioritised?*

*Question 22: What criteria should Ofcom use in deciding how best to prioritise migrations processes?*

## Next steps

- 6.13 This document has raised a number of issues, some of which are extremely detailed and complex, and these will need to be addressed in order to develop policy thinking on migrations, switching and mis-selling. Ofcom believes that effective industry engagement will be critical to taking this work forward, and considers that this consultation document is the first step in engaging with stakeholders in an open and transparent manner.
- 6.14 Accordingly, over the coming months Ofcom will look to engage proactively with representatives from industry and consumer bodies to ensure that there is regular and constructive dialogue on the various issues raised in this document.
- 6.15 Ofcom intends to carry out a further consultation on these issues later in the year which will set out our thinking in more detail in light of the responses to this document. This will include a fuller impact assessment of the options identified in the document.

## Annex 1

# Responding to this consultation

## How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 28 April 2006**.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first [gavin.daykin@ofcom.org.uk](mailto:gavin.daykin@ofcom.org.uk).

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Gavin Daykin  
6th Floor  
Strategy & Market Development  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Fax: 020 7981 3406

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

## Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Gavin Daykin on 020 7981 3859.

## Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

## Migrations, switching and mis-selling

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at [www.ofcom.org.uk/about\\_ofcom/gov\\_accountability/disclaimer](http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer).

## Next steps

Following the end of the consultation period, Ofcom intends to carry out a further consultation on these issues later in the year which will set out our thinking in more detail in light of the responses to this document. This will include a fuller impact assessment of the options identified in the document.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

## Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director for Scotland, who is Ofcom's Consultation Champion:

Vicki Nash  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
Tel: 0141 229 7401  
Fax: 0141 229 7433  
E-mail: [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title: Migrations, Switching and Mis-selling

To (Ofcom contact): Gavin Daykin

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)



## Annex 4

# The economic rationale for regulatory intervention

## Defining the issue and identifying the citizen or consumer interest

- A4.1 In Section 3 Ofcom proposed four policy objectives for migrations, switching and mis-selling. Against this background Ofcom now considers the economic justification for intervening in markets to deliver these objectives.
- A4.2 Ofcom has a duty to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. It is in this context that Ofcom is presently developing an approach for considering whether there is a case for regulatory intervention in the areas of migrations, switching and mis-selling. This will depend on whether Ofcom is satisfied that intervention will result in an improved outcome for consumers in relation to these areas than would be the case were the market were left to its own devices.
- A4.3 The main economic rationale that would justify intervention by a regulator to improve the operation of the market would be market failure. This is not to suggest that there cannot be other non-economic objectives, however, which provide a rationale for intervention in the market. One such non-economic objective, for example, would be equity objectives, in order to share the benefits of competition between providers and customers.

## Proposed framework for assessing market failure

- A4.4 As the term market failure suggests, economic regulatory intervention could be considered appropriate if there are characteristics of the market such that the market itself might not function properly. Where market failure occurs, governments or regulators may be required to intervene to ensure a more socially optimal outcome. There are four main types of market failure. These are:
- **market power:** e.g. where firms have the power to raise market prices;
  - **information asymmetry:** where buyers have less information than sellers;
  - **externalities:** where one person's consumption of a good or service imposes costs or benefits on other consumers; and
  - **public goods:** are goods which are non-excludable and non-rivalrous in consumption i.e. it is difficult to prevent people benefiting once a good is provided and the consumption of one individual does not reduce the availability of the good to others.
- A4.5 In determining whether there is a case for economic regulatory intervention, Ofcom may need to consider the following:
- whether there is currently market failure in the context of migrations, switching and mis-selling and, if so, the nature of the market failure;
  - whether, in the event that there is market failure, suppliers have inadequate incentives to:

- co-ordinate an alignment of migration processes and facilitate future multiple migration paths for the benefit of consumers; and
  - not engage in dishonest sales and marketing practice, including mis-selling and slamming.
  - whether the market, left to its own devices, could be expected to self-correct over time, and deliver an optimal outcome which will benefit consumers; and
  - if it is established that there is market failure, and that markets are unlikely to self-correct over time, whether the benefits of regulatory intervention outweigh the costs.
- A4.6 It is worth first understanding the conditions that prevail in a perfectly competitive market. A market is said to be one with perfect competition if the following conditions hold:
- first, there should be a large number of small producers and consumers in a given market, such that none of the producers or consumers can influence the market price on their own - all individual agents are price takers. The economic significance of this is that individual suppliers therefore face a horizontal demand curve at which they can sell any quantity desired at the market price, but cannot sell anything above the market price;
  - second, there is full information. All firms and consumers know the prices set by all firms;
  - third goods and services are perfect substitutes, i.e. they are homogeneous;
  - fourth, transaction costs are zero;
  - fifth, the price is determined at the level that equates supply and demand, and moves instantaneously to equilibrium; and
  - sixth, there is free entry and exit. Any firm may enter or exit the market as it wishes.
- A4.7 In general, few, if any of the conditions listed above will apply in real world markets. For example, firms will never have perfect information about each other, and there will always be some transaction costs.
- A4.8 In some cases, markets may fail to allocate resources efficiently. The two main reasons that markets fail are sub-optimal market structures and the non-internalization of costs or benefits into prices and thus into microeconomic decision-making in markets (i.e. situations where real world markets deviate significantly from the conditions for perfect competition).
- A4.9 These are discussed below.

### **Market Power**

- A4.10 Market power can be an issue in communications markets. The economic characteristics of communications markets are such that a number of markets can be characterised by a small number of competitors and could be described as oligopolistic. The presence of large fixed/sunk costs and low marginal costs also tends to mean that economies of scale will tend to be important. For example, economies of scale are prevalent in many communications markets including at the wholesale level, narrowband and broadband markets and network infrastructure markets. Fixed or sunk costs and the resulting economies of scale that arise tend to

create barriers to entry, expansion and exit. These barriers can confer market power to incumbent firms by reducing competitive constraints that new entry could otherwise have placed on the incumbent firm or firms.

- A4.11 Collective dominance can arise where links between the parties in the market enable them to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers. This is also referred to as tacit collusion.
- A4.12 One outcome of a situation in which a firm has market power is that the level of output in the relevant market is less than in a competitive market. This represents a sub-optimal outcome. Firms with market power may also be in a position to exploit consumers in respect of the terms and conditions they offer. If there are issues around market power, then intervention could be justified to address the negative effects and to put in place measures which would prevent the abuse of that market power.
- A4.13 In the case of telecommunications, as a result of a series of Market Reviews, there are a number of instances in which operators have been identified as having Significant Market Power in retail markets. In other instances, and in relation to television and other broadcasting markets, the analysis of market power is carried out on a case by case basis.

### Information asymmetry

- A4.14 Market failure can also arise when one party to a transaction has more or better information than the other party. In this case the market failure is known as asymmetric information. Typically, it is the seller that knows more about the product than the buyer although it is possible for the reverse to be true, i.e. where the buyer knows more than the seller.
- A4.15 In a number of markets in the communications sector, services could be characterised in terms of experience goods, i.e. where it is difficult for consumers to make informed judgements about a product prior to consumption of that product. This can exacerbate information asymmetries. However, it may be the case that the problem of experience goods is less prevalent in telecommunications markets. First, many products such as fixed line telephony, narrowband and broadband services are subscription based, and therefore represent 'repeated purchases' (and not 'one off' purchases which are typical of many experience goods). As such, customers who initially take up the service and who are dissatisfied with their service can eventually transfer to another supplier. Accordingly if reputational effects are important then this might mean that the potential for poor service and/or dishonest sales and marketing behaviour would be less frequent.
- A4.16 It is possible that switching between suppliers could present challenges to consumers if, for example, it was found that there was limited consumer information available at the retail level of these markets. This could relate to the difficulty consumers experience when comparing competing communications services offers. This is particularly the case where the services are bundled. Ofcom would need to take this into account in better understanding the difficulties customers experience in making price comparisons (where different pricing structures exist between offers) in making any assessment of information asymmetry. Consumers may even be unaware that contracts entered into with retail providers may preclude the consumer from switching to another supplier in the future, or restrict the consumers

ability to switch for a defined period of time (e.g. by requiring a termination fee if the customer switches during their contractual period).

- A4.17 Information asymmetries could also arise upstream at the wholesale level in respect of migration processes. For example, existing and new suppliers in the market who operate within one market may not be fully aware of differences that exist between migrations processes in related markets. Given these products are becoming increasingly sold within bundles, a lack of knowledge of these processes could put suppliers at a competitive disadvantage in the market, making it difficult for them to acquire share and minimum efficient scale.
- A4.18 Arguably, at the wholesale level, wholesale market power represents a more likely source of market failure in telecommunications markets than information asymmetry. This is particularly the case at the wholesale level, for example, where it seems reasonable to expect that suppliers could relatively easily overcome information asymmetries than consumers.
- A4.19 However, there is also a possible linkage between market power and information asymmetries in wholesale telecommunications markets. For example one could argue that in the case of a vertically integrated firm that is subject to upstream pricing constraints, there may be incentives to act on non-price terms which could produce information asymmetries to the disadvantage of other competitors.

### **Externalities**

- A4.20 In relation to consumer behaviour, externalities occur when the actions of one consumer affect the well being of another consumer with whom there is no direct business relationship. Externalities can be positive or negative.
- A4.21 Where the producers of externalities do not have an incentive to take into account the effect of their actions on others, the outcome will be inefficient. There will be too much activity that causes negative externalities (pollution is often cited as an example of a negative externality), and not enough activity that creates positive externalities, relative to an optimal outcome.
- A4.22 In telecommunications markets, positive externalities in consumption may arise through new connections to a telecommunications network. There is an additional value to other users of the network who are now able to call the marginal customer who is new to the network. The marginal consumer does not consider this additional benefit to others when making a decision whether or not to connect to the network and hence too few customers connect to the network leading to allocative inefficiency. Similarly, switching may produce positive externalities that arise from facilitating new connections to a telecommunications network. Markets with positive externalities in consumption can, however, be self correcting without regulatory intervention (e.g. suppliers may offer incentives to new customers through promotional or introductory offers).

### **Public Goods**

- A4.23 Another form of market failure is public goods. However, the markets discussed in this document (e.g narrowband, broadband, LLU and markets in which number portability issues arise) are not typically characterised by this form of market failure and therefore public goods are not discussed further in this document.

A4.24 Of these forms of market failure, public goods would appear least relevant to the communications markets in which intervention is to be considered, whereas information asymmetries and market power would appear most relevant.

**Is there potential for market failure in telecommunications markets?**

A4.25 The following section considers how market power, information asymmetries and externalities may manifest themselves in telecommunications markets.

A4.26 In respect of market power, there are two key possible explanations as to why the market may not be relied on to deliver better migration processes outcomes for consumers.

A4.27 Particular operators have market power in upstream markets and therefore little incentive to make switching easier.

A4.28 It can be argued that vertically integrated operators with upstream market power have incentives to promote efficient downstream supply, since this will enable upstream monopoly profits to be maximised. The idea here is that the monopolist can only extract monopoly rents once along the supply chain – to extract rents at more than one point along the supply chain could potentially result in a ‘double marginalisation’ of cost, thereby lowering overall profit along the chain. If the downstream market is competitive then there may be more limited incentives to leverage upstream market power. Under this scenario, it could be argued that BT as a vertically integrated operator would have incentives to ensure migration processes facilitate switching and growth in the market.

A4.29 However, there are a restrictive set of assumptions that are necessary for this result, including that there is:

- perfect competition downstream
- inputs are used in fixed proportions
- market power upstream<sup>1</sup>

A4.30 When these conditions are relaxed, discrimination is not just possible but also potentially profit maximising for vertically integrated firms that may extend their market power into associated markets.

A4.31 The key result is that a vertically integrated operator will choose to maximise its own sales downstream market, to the exclusion of other suppliers. This has direct consequences for the incentives for the operator with market power to co-operate/coordinate with others to develop migration processes to facilitate switching and market growth.

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<sup>1</sup> There are also increased incentives for non-price discrimination including (a) if the price regulation of the upstream input is tight, (b) the higher the downstream profit opportunity; (c) the higher the degree of substitutability between the vertically integrated and the competitors’ downstream products; and (d) the more efficient and the less capacity constrained the vertically integrated firms downstream division is. See Notice under Section 155(1) of the Enterprise Act 2002 Consultation on undertakings offered by British Telecommunications plc in lieu of a reference under Part 4 of the Enterprise Act 2002 Annex F.32-F38.

- A4.32 Once the above assumptions are relaxed, it becomes profit maximising to distort competition in the downstream, suggesting weak incentives for the operator to participate in a market-based solution to improve migration processes for those markets.
- A4.33 As a recognition of incentives that exist for BT to discriminate against customers at the wholesale level, BT has accepted undertakings that define a number of current products to which equivalence of input must be applied, and contain provisions for equivalence of input to be applied to certain types of product in future as NGN's are rolled out. The current products to which such equivalence is to be applied include SMPF and MPF, WLR, backhaul extension service (BES), WAN extension service (WES) and IPStream<sup>2</sup>.
- A4.34 Where suppliers are of equal share in a market and have an expectation of similar churn, there may be incentives for suppliers to co-operate to reduce customer switching costs, e.g. by agreeing a consistent industry wide process such as in the narrowband internet access markets. However, when market shares are not equal, expectations of churn may not be symmetrical and this could alter firms incentives to co-operate to reduce customer switching costs. For instance, where there is an incumbent firm with a high market share, it is likely that the incumbent will always be the net loser of customers through migration to new entrants, and this may discourage an incumbent from reducing switching barriers.
- A4.35 In respect of information asymmetries, there are two main possible explanations for why the market may not be able to deliver better migration outcomes.

#### **Information asymmetries at end consumer level**

- A4.36 Consumers who are increasingly being attracted towards bundled telecoms packages may be unaware of the optimum trade-off between having a contract for supply of a range of communications against the backdrop of increasingly competitive markets and technological change, both of which drive price reductions and improvements in service quality. Customers lacking information regarding general market trends or who exhibit inertia may find that they have made a sub-optimal trade off where they are locked into service contracts which do not necessarily represent best value for money in the market. It may also be the case that consumers are not aware of their ability to switch supplier, or, where they are, are unaware of hidden charges such as cancellation charges which may ultimately deter them from switching between suppliers.
- A4.37 However, market solutions can emerge to address such information asymmetries. For example, there are internet-based companies who provide price comparison information to assist consumers make informed decisions, including whether to enter a contract with a supplier. These services could equally provide information on how difficult it is to switch supplier once a contract has been entered into.
- A4.38 As already stated, the problem of experience goods appears to be less prevalent in telecommunications markets. First, many products such as fixed line telephony, narrowband and broadband services are subscription based, and therefore

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<sup>2</sup> Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002 Statement, September 2005, paragraph 7.6, page 34.

represent 'repeated purchases' (and not 'one off' purchases which are typical of most experience goods). As such, customers who initially take up the service and who are dissatisfied with their service can eventually transfer to another supplier. Accordingly strong reputation effects should ensure that the potential for poor service and/or dishonest sales and marketing behaviour is less frequent.

### Information asymmetries at level of processes at wholesale level

- A4.39 Information asymmetries may arise in wholesale markets by virtue of market power which is exercised by a vertically integrated firm. Ofcom has previously stated that it considers that, under most circumstances, a vertically integrated firm with upstream market power has an incentive to discriminate against its downstream competitors, and were it to act on this incentive, it is likely that non-price discrimination would be an anti-competitive and welfare-reducing activity.
- A4.40 Ofcom is aware that at times non-price discrimination might occur without an explicit intent to harm or hamper competitors. However, Ofcom believes that even when discriminatory behaviour does not originate from intentional behaviour, it has the effect of hampering downstream competitors' ability<sup>3</sup>. Ofcom considers this could contribute to information asymmetries at the wholesale level.

### Externalities

- A4.41 Externalities are also likely to exist in the relevant communications markets, although there is less potential for externalities than information asymmetries and market power.
- A4.42 If the switching process generates poor outcomes in relation to bundled/multiple migrations (unsuccessful transfers, hassle, need to make follow-up phone calls, or take too long) this could also discourage consumers from actively participating in the market. Reputational effects arising from poor transfer outcomes could materially affect the overall operation of the market.
- A4.43 The negative externality represents a reduction in both consumer and producer surplus. Consumers who do not switch to the products/supplier bundle and who would otherwise do so lose by the amount of savings that could have been realised through switching. Suppliers who do not gain customers lose the profit margin that would otherwise have been earned on those customers. The combined total reflects the deadweight welfare loss from reputation affects constraining switching decisions.
- A4.44 However, it is difficult to estimate the extent of discouraged switchers and therefore the benefit of aligning and streamlining migration processes. It is possible that, in some markets, a reduction in successful transfers will cause greater harm to competition than in others.

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<sup>3</sup> Ofcom's Notice under Section 155(1) of the Enterprise Act 2002 "Consultation on undertakings offered by British Telecommunications plc in lieu of a reference under Part 4 of the Enterprise Act 2002 Annexes (A-L) at <http://www.ofcom.org.uk/consult/condocs/sec155/sec155annexes.pdf>

## Summary

A4.45 The preceding discussion has established that there could be a number of forms of market failure which could provide an economic rationale for intervention. In order to assess whether those market failures are present the next step would be to analyse and assess the operation of competition in the relevant market.

- First, Ofcom would consider whether or not market failure existed in the relevant market, and whether or not the market could self correct thereby eliminating market failure without intervention. This is an empirical question that can only be answered by an economic analysis of the market in question.
- Second, Ofcom would evaluate the costs and benefits of intervening in these markets, having due regard to the potential for regulatory failure.

A4.46 The benefit of mitigating market failure would be the growth in successful multiple product transfers that would be generated. This could result from a reduction in the rejection rates on transfers or simply an increase in 'hassle free' transfers which results in a seamless and positive customer switching experience.



## Annex 5

# Developing key principles for migrations, switching and mis-selling

A5.1 The following sets out key principles which Ofcom proposes should be followed for migrations, switching and mis-selling.

### **(1) the process maximises customer satisfaction/minimises confusion**

A5.2 This is consistent with Ofcom's objectives on ensuring a good customer experience and that customers are well-informed. Ofcom proposes the following principles:

- customers should have control of the process;
- customer involvement should be minimised in order to ensure that the burden of switching for is not artificially inflated;
- the transfer should be seamless and invisible to the customer;
- customers should have complete and accurate information about the transfer process, and be provided with the information set out in paragraph 3.16 of this document, as a minimum;
- the period between the actual sale and the switchover should be minimised, in the interests of good customer service (subject to statutory cooling-off safeguards); and
- customers should be able to change their mind during the switchover period, and be exempt from penalty charges (as is currently the case with CPS and WLR).

### **(2) the process ensures proper protection against dishonest sales and marketing activity**

A5.3 This is consistent with Ofcom's objective about protection from dishonest sales and marketing activity. There are also links to the objectives relating to ensuring a good customer experience and that customers are well-informed. Ofcom proposes the following principles:

- where possible, there should be evidence of a customer's decision to switch;
- the length of the switchover period should be driven by customer protection requirements and not time taken for system provisions/ delivery;
- where alternative mechanisms cannot be found, the switchover period should provide sufficient opportunity for customers to stop the transfer order in cases of slamming or where they simply wish to change their mind;
- there should be uniform and high standards of conduct by all providers enshrined through uniform and, where appropriate, binding sales and marketing codes of practice;
- there should be clarity about customer's key rights and choices;
- customer's legal rights must be protected; and

- customers should have complete and accurate information about the transfer process, and be provided with the information set out in paragraph 3.16 of this document, as a minimum.

### **(3) the process is efficient, symmetrical, and high quality**

A5.4 This is consistent with Ofcom's objective on supporting competition in retail markets to the benefit of customers. Ofcom proposes the following principles:

- the process is cost effective to operate, including technically simple;
- there are high levels of automation, where appropriate. Any dependency on manual intervention should be minimised;
- rejection and error rates are minimised;
- the gaining provider has access to all data required for the transfer such as validation codes where applicable, and where sufficient evidence has been provided of the customer's decision to switch;
- the gaining provider has access to all relevant line and service information so that they can manage the relationship with the customer if there are aspects of the services that cannot be supported;
- the process is non-discriminatory and does not systematically favour one provider over another. Wherever the principles of equivalence and symmetry can be reasonably applied they should be;
- there are clear rules relating to protection against 'save' activity and 'Cancel Other' activity;
- where customers change their mind, they should be required to contact the gaining provider to cancel the order; losing providers should not be able to cancel the order without the gaining providers agreement where there is a change of mind;
- lead times should be harmonised across all products i.e. all deliveries (where more than one) will need to complete at the same time as the longest one;
- there is simultaneity/synchronicity for multiple orders, including good understanding of product dependencies; and
- there is proper notification to all relevant parties (i.e. losing provider(s)/ gaining provider(s)).

### **(4) the process minimise disruption to existing processes**

A5.5 This is consistent with Ofcom's objective on supporting competition in retail markets to the benefit of customers. Ofcom proposes the following principles:

- the process should be transparent, predictable and carefully managed so that all providers can control the risks associated with new and existing investments;
- the transition should minimise the total costs to all parties, including BT and other providers. For example, it should clearly take into account the costs of parallel running as well as the costs imposed on competing operators of an early migration;

- the transition should minimise any negative impact on customer experience, including no loss of service. Wholesale products must be migrated in a manner that is, as far as is practical, invisible to customers;
- the transition should minimise the impact on investments based on existing regulated products, particularly investments which are sunk; and
- the transition must be forward thinking and cover migrations to NGN's.

### **(5) the charging mechanism should follow clear principles relating to cost recovery**

A5.6 This is consistent with Ofcom's objectives of supporting competition in retail market to the benefit of customers and ensuring good a customer experience. To a lesser extent it may also support Ofcom's objective of well-informed customers.

A5.7 Ofcom proposes the following principles to guide the setting up of any charging mechanism aimed at recovering the costs generated by migration activities:

- transparency; the costs are identified and discussed in a manner that makes it clear and visible to all parties involved;
- proportionality: only the costs generated by migration should be included; the appropriate cost standard is LRIC plus a mark-up for common costs;
- cost causality: cost are to be recovered from those whose actions cause the costs to be incurred at the margin: these might be the gaining and/or losing providers depending on the context. This should be the starting point for cost recovery because it is economically efficient to recover costs from those who cause the costs;
- effective competition: the cost recovery mechanism should not undermine or weaken the pressure for competition among different providers and for different groups of consumers – this includes focussing on efficiently incurred costs and dismissing inefficiently actually incurred costs;
- distribution of benefits: the costs should be recovered from the beneficiaries, especially when there are externalities – since migrations are about stimulating competition, the costs might be recovered from all customers, whether migrating or not, and potentially also from customers using substitute services;
- cost minimisation: the mechanism should ensure that there are strong incentives to minimise costs;
- reciprocity: where services are provided reciprocally, charges should also be reciprocal; and
- practicality: the mechanism for cost recovery needs to be practical and relatively easy to implement.

## Annex 6

## How Ofcom currently regulates

- A6.1 This Annex outlines the regulatory framework that governs migration processes in communications markets. The forms of regulation include SMP licence conditions and Directions imposed on BT<sup>4</sup>, general conditions under the Act applying to all communications providers (including network operators and resellers), self regulation and dispute resolution processes.
- A6.2 The Annex describes how these regulatory approaches govern migration processes for carrier pre-selection, wholesale line rental, number portability, broadband and LLU.

**Carrier Pre-selection (CPS) and Wholesale Line Rental (WLR) (SMP conditions)**

- A6.3 Wholesale migration processes in CPS<sup>5</sup> and WLR<sup>6</sup> are currently regulated through SMP services conditions imposed on BT plc (SMP services conditions AA8 and AA10, respectively). Specifically, the SMP services conditions state:

“The Dominant Provider shall provide Carrier Pre-selection as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to any of its Subscribers upon request.”<sup>7</sup>

and

“Pursuant to a request under paragraph AA8.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to the Pre-selected Provider. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as the Director may from time to time direct.”<sup>8</sup>

and

“The Dominant Provider shall ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Carrier Pre-selection.”<sup>9</sup>

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<sup>4</sup> SMP conditions also apply to Kingston Communications UK plc in the Hull area.

<sup>5</sup> CPS is the service which allows customers to pre-select a carrier(s) to deliver certain categories of calls and to be billed directly by that carrier.

<sup>6</sup> WLR is a PSTN Service Provider (SP) product, which enables SPs to offer their own branded telephony service to their End-User using the BT network. BT will provide, repair and maintain these lines. BT will provide a consolidated bill to the SPs for all of the services the SP takes. The SP sets its prices to End Users, bills End Users and has the contractual relationship with End Users.

<sup>7</sup> SMP condition AA8.1

<sup>8</sup> SMP condition AA8.2

<sup>9</sup> SMP condition AA8.3

- A6.4 The SMP services conditions also require charges to be based on long run incremental costs. These conditions are broadly replicated in relation to WLR:

“The Dominant Provider shall provide Wholesale Analogue Line Rental as soon as it is reasonably practicable on reasonable terms to every Third Party who reasonably requests such Wholesale Analogue Line Rental. The Dominant Provider shall also provide such Wholesale Analogue Line Rental as the Director may from time to time direct.”<sup>10</sup>

and

“ Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall provide:

(a) Wholesale Business ISDN2 Line Rental; and

(b) Wholesale ISDN30 Line Rental,

in accordance with the Wholesale ISDN Line Rental Functional Specification as soon as it is reasonably practicable on reasonable terms to every Third Party who reasonably requests Wholesale Business ISDN2 Line Rental and/or Wholesale ISDN30 Line Rental. The Dominant Provider shall also provide such Wholesale Business ISDN2 Line Rental and/or Wholesale ISDN30 Line Rental as the Director may from time to time direct.”<sup>11</sup>

- A6.5 Again, there is a requirement that subject to reasonableness, charges should reflect long run incremental costs.
- A6.6 The SMP services conditions also refer to functional specifications which are imposed by Ofcom by means of a Direction in respect of CPS and WLR. The Directions set out at a high level how migrations processes should work. For example, the functional specification sets out the 8XXX routing codes traffic protocol which BT must adopt.<sup>12</sup>
- A6.7 The hierarchy of requirements extends to a third, more detailed level known as the CPS and WLR end-to-end process description. The description includes, for example, the validation rules for CPS Set-up Orders and WLR CPS Set-up orders (i.e. post code based validation) and includes Cancel Other reason codes that underpin the migration of customers from one product/supplier to another product/supplier.
- A6.8 The description is agreed by industry and is referred to in the functional specification.
- A6.9 The WLR process has analogues requirements. A key section of the description includes processes which define order handling for transfer, new, change, and 'change of address' order types.

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<sup>10</sup> SMP condition AA10.1

<sup>11</sup> SMP condition AA10.2

<sup>12</sup> In practice, this process is achieved by BT through an automated switch technology to route calls to other operators' networks.

## Number Portability (General condition under the Communications Act)

A6.10 General Condition 18 under the Communications Act sets out Ofcom's powers to make general requirements on Communications providers. The condition states:

"The Communications Provider shall provide Number Portability as soon as it is reasonably practicable on reasonable terms, including charges, to any of its Subscribers who so requests."<sup>13</sup>

A6.11 The condition requires communications providers to provide number portability on reasonable terms and conditions in accordance with the functional specification made under the Act.

## IPStream/DataStream/LLU (voluntary code of conduct)

A6.12 Broadband product migrations are self-regulated through a voluntary code of practice (the "Broadband Service Provider Migration Code of Practice"). Product migrations include same broadband product migrations (e.g. IPStream to IPStream and DataStream to DataStream), and different product migrations (e.g. IPStream to DataStream or IPStream to LLU). The code states that:

"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 consumers."

A6.13 The code sets out:

- migration authorisation processes (including when a losing provider may refuse or may not refuse the issuing of a 'MAC', and specifying how customers can contact a losing provider to obtain a MAC;
- migrations processes (including MAC validity periods and revocation and cancellation of MAC); and
- marketing and external communications (including publicising the code and publishing agreed text on their website).

A6.14 The voluntary code of practice arose from the dispute brought to Oftel by Thus against BT and the provision of access to BT's ATM network. A Direction was also issued which placed a SMP condition on BT to provide Broadband Access Migration Services to every third party who reasonably requests it in writing.

## LLU

A6.15 BT has effectively undertaken to facilitate migrations in LLU through BT's Enterprise Act undertakings of 22 September 2005. In its undertaking, BT states:

To the extent that the Migration Processes are either internal to BT or are otherwise within BT's control, BT shall apply Equivalence of Inputs to BT's migration processes for products for which BT must apply Equivalence of Inputs.

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<sup>13</sup> Notification Under Section 48(1) Of The Communications Act 2003, Notification setting general conditions under section 45 of the Communications Act 2003, Condition 18.1

## **Migrations, switching and mis-selling**

- A6.16 Since migration processes for LLU are within BT's control, the effect of this undertaking is, for example, to facilitate (bulk) migration of customers to LLU.

## Annex 7

## Consultation questions

*Question 1) Do you agree with the scope of the document? Are there any additional products and/or services which you would like to see included in the scope?*

*Question 2) How might complex multi-site migrations, such as those involving VPN services, be facilitated?*

*Question 3) Does Ofcom's definition of a 'migration process' adequately capture the range of scenarios involved? If not, can you suggest a better definition?*

*Question 4) Ofcom has identified four policy objectives for migrations, switching and mis-selling, namely:*

- *a good customer experience;*
- *adequate protection from irresponsible sales and marketing activity;*
- *well informed customers; and*
- *supporting competition in retail markets to the benefit of customers*

*Do you agree that these are the right policy objectives? Are there further objectives which Ofcom should consider?*

*Question 5) Do you agree that the interests of both customers and industry would be better served by moving to uniform processes for migrations, switching and mis-selling across transferable voice and broadband products?*

*Question 6) What are your views on the Letter Facilitation process? What safeguards could be introduced to protect customers from the potential for irresponsible sales and marketing activity?*

*Question 7) What are your views on the MAC process? What safeguards could be introduced to ensure that providers support the switching process in a neutral and independent way?*

*Question 8) What are your views on the Single Code process?*

*Question 9) How would you best manage transition costs in order to minimise disruption and any additional cost burden?*

*Question 10) What are your views on identifying the characteristics of the current service?*

*Question 11) What are your views on how best to secure unique identification of lines?*

*Question 12) What are your views on protecting against 'save' activity?*



*Question 13) What are your views on the use of Cancel other and cancellation rights, more generally?*

*Question 14) What are your views on Third party Validation of Orders?*

*Question 15) Do you agree that the principles set out in relation to singleton customer migrations should apply equally to bulk migrations?*

*Question 16) Do you agree with Ofcom's proposed framework for assessing whether there is market failure in respect of migrations, switching and mis-selling sufficient to warrant regulatory intervention?*

*Question 17) Do you agree with the proposed way forward for developing the framework for determining whether Ofcom has a role to intervene in markets? Please provide an explanation for your answer.*

*Question 18) How could the Single Code process work in practice?*

*Question 19) Do you agree with Ofcom's key principles for migrations, switching and mis-selling? Are there further principles which Ofcom should consider?*

*Question 20) What are your views on whether these could be applied to guide current as well as new processes to be developed in the future?*

*Question 21) Which migrations processes do you consider should be prioritised?*

*Question 22) What criteria should Ofcom use in deciding how best to prioritise migrations processes?*

## Annex 8

# Glossary

**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.

**Bundling:** Linking the purchase of one product or service to another, either by selling only as a package, or through the use of discounts for joint purchasing.

**Carrier Pre-Selection (CPS):** The facility offered to customers which allows them to opt for certain defined classes of call to be carried by an operator selected in advance (and having a contract with the customer) without having to dial a routing prefix, use a dialler box, or follow any other different procedure to invoke such routing.

**Communications Act:** The Communications Act 2003, which came into force in July 2003.

**Communications provider:** A person who provides an Electronic Communications Network or provides an Electronic Communications Service.

**Internet:** A global network of networks, using a common set of standards (e.g. the Internet Protocol), accessed by users with a computer via a service provider.

**IP:** Internet Protocol. The packet data protocol used for routing and carriage of messages across the internet and similar networks.

**ISP:** A company that provides access to the internet.

**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 operators other than the incumbent to use the local loop to provide services

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

**Metallic Path Facilities:** The provision of access to the copper wires from the customer premises to a BT MDF that covers the full available frequency range, including both narrowband and broadband channels, allowing a competing provider to provide the customer with both voice and/or data services over such copper wires.

**Narrowband:** A service or connection allowing only low data transfer speeds.

**NGN:** Next generation network.

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

**PSTN:** Public Switched Telephone Network

**Shared metallic path facility (SMPF)/shared access:** The provision of access to the copper wires from the customer's premises to a BT MDF that allows a competing provider to provide the customer with broadband services, while the dominant provider continues to provide the customer with conventional narrowband communications.

**SMP:** Significant Market Power. This test is set out in the EU Framework Directive, and is aligned with the competition law definition of 'dominance'. It is used by Ofcom to identify those operators who may be required to meet additional regulatory obligations.

**Vertical integration:** Mergers, or co-ownership between, producers that are active in different stages in the value chain for a particular good or service.

**VPN:** Virtual Private Network. A technology allowing users to make inter-site connections over a public telecommunications network that is software-partitioned to emulate the service offered by a physically distinct private network.

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