

BT's use of Cancel Other

**Consultation on draft Direction concerning BT's use of Cancel Other
and a draft Determination to resolve a dispute between BT and various
communications providers concerning BT's use of Cancel Other**

Consultation document

Issued: 22 November 2004

Closing date for responses: 23 December 2004

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NOTIFICATION UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003

Proposals for the withdrawal and the giving of a Direction under SMP Condition AA1(a) imposed on British Telecommunications plc ("BT") as a result of the market power determinations made by the Director General of Telecommunications that BT has significant market power

1. OFCOM hereby make, in accordance with section 49(4) of the Act, the following proposal for the withdrawal and the giving of a Direction to BT under SMP Services Conditions AA1(a) in Schedule 1 to the Notification of the market review as a result of which BT was designated as having Significant Market Power in, inter alia, the markets for wholesale residential analogue exchange line services, and wholesale call origination on fixed public narrowband networks.
2. The draft Direction is set out in the Schedule to this notification.
3. The effect of the draft Direction, and the reasons for making the proposal, are set out in the accompanying explanatory statement.
4. In making the proposals set out in this Notification, OFCOM have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
5. Representations may be made to OFCOM about the proposed draft Direction by 23 December 2004.
6. In accordance with section 50 of the Act, copies of this notification have been sent to the Secretary of State, the European Commission and to the regulatory authorities of every other Member State.

Heather Clayton

Director of Investigations

A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002
19 November 2004

Schedule

Draft Direction under section 49 of the Communications Act 2003 ("the Act") and Condition AA1(a) imposed on British Telecommunications plc ("BT") as a result of the market power determinations made by the Director General of Telecommunications that BT has significant market power

WHEREAS:

- (A) as a result of a market analysis carried out by the Director General of Telecommunications ("**the Director**"), he proposed on 17 March 2003 and on 26 August 2003, in accordance with section 80 of the Communications Act 2003 ("**the Act**") that British Telecommunications plc ("**BT**") has significant market power in the markets for, inter alia, wholesale residential analogue exchange line services, and wholesale call origination on fixed public narrowband networks;
- (B) the Director having considered every representation duly made, and thereafter on 28 November 2003 pursuant to sections 48(1) and 79 of the Act by way of publication of a Notification, identified the relevant markets, made a market power determination to the effect referred to in recital (A) above and set certain significant market power ("**SMP**") conditions on BT to take effect on 28 November 2003, such as Condition AA1(a);
- (C) by virtue of section 408 of the Act and Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 ("**the Transitional Provisions**") the Director was able to exercise powers under the Act for an interim period;
- (D) this Direction concerns matters to which Condition AA1(a) relates;
- (E) for the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that, in accordance with section 49(2) of the Act, this Direction is:
 - (i) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (ii) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (iii) proportionate to what it is intended to achieve; and
 - (iv) in relation to what it is intended to achieve, transparent.
- (F) for the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with the six Community requirements set out in section 4 of the Act and their duties in section 3 of the Act;

- (G) on 22 November 2004, Ofcom published a notification of the proposed Direction in accordance with section 49 of the Act;
- (H) by virtue of section 49(9) of the Act, OFCOM may give effect to the proposal set out in the Notification, with or without modification, only if –
 - (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and
 - (b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- (I) OFCOM has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose; and

Therefore, pursuant to section 49 of the Act and Condition AA1(a) in Schedule 1 to the Notification, Ofcom gives the following Direction:

- 1. BT shall only be permitted to use Cancel Other in the following circumstances:
 - (a) where a request for CPS and/or WLR has been made without the Customer's express knowledge and consent ("**Slamming**"), that is, in the following circumstances:
 - (i) where the Customer has never been contacted by the communications provider responsible for submitting the request;
 - (ii) where a Customer has been contacted by the communications provider responsible for submitting the request, but has not given that communications provider authorisation to transfer his telephone calls and/or line rental to that communications provider;
 - (iii) where the Customer has agreed to purchase a product or service from the communications provider responsible for submitting the request and that communications provider has submitted a request for a different product or service which the Customer has not agreed to purchase; or
 - (iv) where the Customer has agreed to transfer his telephone calls and/or line rental from the communications provider responsible for submitting the request having understood, as a result of a deliberate attempt by that communications provider to mislead, that he is making an agreement with another communications provider.
 - (b) at a Customer's request, where the communications provider responsible for submitting the request has repeatedly failed to cancel

the request after being directed by the Customer to do so (**“Failure to Cancel”**);

(c) where the telephone line is ceased during the Transfer Period (**“Line Cease”**);

(d) for other reasons not related to a Customer's request to BT to cancel a transfer;

2. Before using Cancel Other in cases of Slamming and Failure to Cancel, BT shall take reasonable steps to ensure that Slamming or Failure to Cancel has actually taken place;
3. After using Cancel Other BT shall confirm the cancellation of the CPS and/or WLR order in writing to the Customer, unless this is not possible;
4. Where a Customer is the subject of Cancel Other, BT shall keep a record of all contact made with that Customer during the Transfer Period and shall retain such records for a period of at least six months.
5. Subject to paragraph 4 above, BT shall provide, on request, to the communications provider responsible for submitting the request for CPS and/or WLR the following information (in relation to that Communications Provider):
 - a representative sample, covering a period of one month, of the records of contact made with a Customer in situations where BT has used Cancel Other in cases of Slamming or Failure to Cancel. Such records shall include recordings of Customer-initiated calls to BT where available; and
 - all records of any contact made by BT with an individual Customer in situations where BT has used Cancel Other in cases of Slamming or Failure to Cancel. Such records shall include recordings of Customer-initiated calls to BT where available.

Save in exceptional circumstances, such information shall be provided by BT within 15 working days of a request.

6. BT shall record its reason for using Cancel Other in each case, according to categories (a) to (d) set out at Paragraph 1 above, and shall:
 - within a reasonable period, pass this information to the communications provider responsible for placing the order for CPS and/or WLR; and
 - on a monthly basis pass this information to the communications provider responsible for submitting the request for CPS and/or WLR.

7. The Direction published on 27 November 2003 and concerning Cancel Other is withdrawn.
8. For the purpose of interpreting this Direction, the following definitions shall apply:
 - (a) “**Act**” means the Communications Act 2003;
 - (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
 - (c) “**Cancel Other**” means a functionality, which pursuant to this Direction, allows BT to cancel an order for CPS or for WLR during the Transfer Period;
 - (d) “**CPS**” means Carrier Pre-Selection as defined in Schedule 1 to the Notification;
 - (e) “**Customer**” means the retail end user;
 - (f) “**Notification**” means the Notification referred to in recital (B) of this Direction above;
 - (g) “**Ofcom**” means the Office of Communications as established under section 1 of the Communications Act 2003;
 - (h) “**Transfer Period**” means the period of ten working days starting from the date on which an order for CPS and/or WLR is accepted by BT and ending when the transfer is completed;
 - (i) “**Transitional Provisions**” means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;
 - (j) “**WLR**” means Wholesale Analogue Line Rental as defined in Schedule 1 to the Notification;
9. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Direction and otherwise any word or expression shall have the same meaning as it has in the Notification, or, if the context so permits, in Schedule 1 thereto, as appropriate.
10. For the purpose of interpreting this Direction:

(a) headings and titles shall be disregarded; and

(b) the Interpretation Act 1978 (c.30) shall apply as if this Direction were an Act of Parliament.

11. This Direction shall take effect one month after the day it is published.

[]

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

[] 2005

Draft Determination under Sections 188 and 190 of the Communications Act 2003 for resolving a dispute between British Telecommunications Plc ("BT") and various communications providers concerning BT's use of Cancel Other

WHEREAS:

(A) Section 188(2) of the Communications Act 2003 (the "Act") provides that where there is a dispute between different communications providers relating to the provision of network access, and OFCOM has decided pursuant to section 186(2) of the Act that it is appropriate for it to handle the dispute, OFCOM must consider the dispute and make a determination for resolving it. The determination that OFCOM makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the Act, together with a full statement of the reasons on which the determination is based. Section 190 of the Act sets out the scope of OFCOM's powers for resolving a dispute which may include, in accordance with section 190(2) of the Act, a direction imposing an obligation on the parties to give a direction fixing the terms or conditions of transactions between the parties to the dispute;

(B) On 24 August 2004, the communications providers listed at Schedule 1 to this determination ("**the Referring Parties**") wrote to Ofcom asking them to resolve a dispute between the referring parties and BT relating to the process for managing customer complaints and cancellations during the CPS and WLR transfer process;

(C) On 22 September 2004, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for them to handle the dispute and informed the parties of this decision;

(D) In order to resolve this dispute, Ofcom have considered, among other things, the information provided by the parties and their relevant duties set out in sections 3 and 4 of the Act;

(E) Ofcom issued a draft of the Determination and the explanatory statement on 22 November 2004 and responses were invited by close of business on 23 December 2004;

(F) An explanation of the background to the dispute and Ofcom's reasons for making this Determination are set out in the explanatory statement accompanying this Determination;

NOW, THEREFORE, PURSUANT TO SECTIONS 188 AND 190 OF THE ACT, OFCOM MAKES THE FOLLOWING DETERMINATION:

1. BT shall act towards the Referring Parties in accordance with the Direction made by Ofcom under Section 49 of the Act and SMP Services Condition AA1(a) and published on [] 2005.

2. Words or expressions used in this Determination shall have the same meaning as in the Act, except as otherwise stated in this Determination.

3. For the purpose of interpreting this Determination the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.
4. This Determination shall take effect one month after the day it is published.
5. This Determination is binding on BT and the Referring Parties in accordance with section 190(8) of the Act.

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

[] 2005

SCHEDULE 1

PARTIES REFERRING THE DISPUTE TO OFCOM

Company name	Registered Company Number
Broadsystem Ventures Ltd	02927001
Caudwell Communications Ltd	04063120
Centrica plc	03033654
MCI Worldcom Ltd	02776038
Opal Telecom Ltd	03849133
Telco Global Communications Ltd	04222886
THUS plc	SC192666
Your Communications Ltd	03842309

Explanatory memorandum

Section 1

Summary

- 1.1 "Cancel Other" is a functionality that enables BT to cancel wholesale orders that have been placed by alternative communications providers for Carrier Pre-Selection ("CPS") and Wholesale Analogue Line Rental ("WLR").
- 1.2 A number of communications providers (together "the referring parties"), made a submission to Ofcom asking it to resolve a dispute about BT's use of Cancel Other, after negotiations between BT and the rest of the industry failed to lead to agreement of a new process for managing customer complaints and cancellations when alternative providers attempt to transfer a customer away from BT.
- 1.3 Ofcom's proposed resolution of this dispute aims to strike a balance between allowing BT to retain its ability to use Cancel Other when it plays a useful role as a consumer protection mechanism, and the need to place restrictions on BT's use of Cancel Other in order to promote competition by facilitating consumer transfers to alternative providers.
- 1.4 Ofcom's main proposals are that BT should:
 - continue to be permitted to use Cancel Other in cases of slamming, which is where a request for CPS and/or WLR has been made without the customer's express knowledge and consent; and
 - be required to provide more information to alternative communications providers on its use of Cancel Other, providing greater transparency and allowing alternative providers to monitor BT's use of Cancel Other and to address allegations of slamming.
- 1.5 In addition, Ofcom has provided further guidance on the definition of slamming and clarified the types of behaviour covered by the definition. This clarification is expected to lead to a reduction in the number of cases in which BT uses Cancel Other.
- 1.6 In its codes of practice consultation, published at the same time as this proposed dispute resolution, Ofcom has proposed that there should be a requirement on service providers to establish, and comply with, codes of practice for sales of marketing of fixed-line telecoms services. Ofcom has proposed that this requirement should be time-bounded, lapsing after two years.
- 1.7 Since Ofcom considers that the main justification for BT's use of Cancel Other is to safeguard consumers against slamming, Ofcom intends to review BT's use of Cancel Other before the obligation on service providers to establish, and comply with, codes of practice falls away. In the event that slamming no longer appears to be a problem, Ofcom considers that the role of Cancel Other as a consumer protection mechanism may be considerably reduced, and may be minded to remove BT's ability to use Cancel Other.

- 1.8 Ofcom invites comments on its proposals by close of business on 23 December 2004. The process for making comments is set out in section 6.

Section 2

Background and history of the dispute

CPS and WLR

- 2.1 CPS is a service that enables customers to choose for some or all of their fixed-line telephone calls to be carried by an alternative communications provider, without having to dial an access code or use any additional equipment. The customer continues to pay his existing communications provider (i.e. BT) for line rental and for any calls he has not chosen to have routed via the alternative communications provider. This means that he receives two bills.
- 2.2 CPS was introduced in the UK from the end of 2000. The option for customers to choose for all of their calls to be carried by an alternative communications provider using CPS was introduced from the end of 2001. Since its introduction, takeup of CPS has grown to 4,292,615 lines as at 30 October 2004.
- 2.3 WLR is a service that enables customers to choose for their telephone calls and line rental to be transferred to an alternative communications provider. The customer no longer has a relationship with his existing communications provider, and pays the alternative communications provider for line rental and call charges. WLR was introduced in the UK in April 2004. The number of analogue lines taken over by alternative communications providers using WLR¹ was 515,602 as at 29 October 2004.
- 2.4 In order to offer services based on CPS to retail customers, alternative network providers interconnect with BT's network at the wholesale level. In order to offer services based on WLR, the alternative network provider in effect leases the customer's exchange line from BT.
- 2.5 In the residential sector, the customer's relationship is frequently with an alternative communications provider that does not have its own network, but has made arrangements with one or more alternative network providers (the communications provider responsible for placing the order, for the purposes of Ofcom's draft Direction) to offer retail services based on CPS and WLR. An alternative communications provider without its own network is known in this context as a "service provider" (the communications provider responsible for submitting the request for CPS and/or WLR, for the purposes of Ofcom's draft Direction).
- 2.6 Some alternative network providers have both a wholesale relationship with BT and a retail relationship with the customer (so that an alternative network provider is in effect its own service provider). These providers may have different brands for their wholesale and retail businesses, so that the name of their customer-facing business is not the same as the name of the network provider which interconnects with BT.
- 2.7 When a customer places an order with a service provider, the service provider then submits an order to BT for the underlying CPS or WLR

¹ The proposals set out in this document do not apply to wholesale digital line rental, which is expected to be launched early in 2005.

wholesale service, either directly, or via the alternative network provider with which it has a relationship.

- 2.8 The transfer process takes ten working days, starting from the date that the BT systems accept the order for CPS or WLR. This period is known as the “transfer period”. If the customer changes his mind, he has the right to cancel the order and can do so by contacting the service provider at any point during the transfer period.
- 2.9 During the transfer period, both the losing provider (in this context, usually BT) and the gaining provider (the alternative provider) send out letters confirming the order. The BT letter is an additional consumer protection mechanism, as it alerts customers that an order has been placed in cases of slamming (when an attempt is made to transfer a customer's calls and/or line rental without his express knowledge and consent), where they would not otherwise be aware that an order had been placed.

The market reviews

- 2.10 On 23 November 2003 the Director published his review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets (the “wholesale fixed narrowband market review”²).
- 2.11 The wholesale fixed narrowband market review concluded that BT has significant market power (“SMP”) in a number of wholesale markets in the UK excluding the Hull area and imposed a number of SMP conditions on BT, including:
- a requirement to provide network access on reasonable request (SMP Condition AA1(a);
 - a requirement to provide CPS (SMP Condition AA8); and
 - a requirement to provide wholesale analogue line rental (SMP Condition AA10).
- 2.12 The wholesale fixed narrowband market review, at Annex C, made a further Direction setting out the circumstances in which BT is permitted to use Cancel Other. This mirrored the provisions of the original Cancel Other Direction described in the following section of this document.
- 2.13 On the same date, the Director published his review of the fixed narrowband retail services markets (the “retail fixed narrowband market review”³).

² *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets: identification and analysis of markets, determination of market power and the setting of SMP conditions. Final Explanatory Statement and Notification*, published at: www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/nwe/?a=87101

³ *Fixed narrowband retail services markets: identification and analysis of markets, determination of market power and the setting of SMP conditions. Final Explanatory Statement and Notification*, published at: www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/nwe/?a=87101

- 2.14 The retail fixed narrowband market review concluded that BT has SMP in a number of retail markets for line rental and various different call types in the UK excluding the Hull area.

Cancel Other

- 2.15 Cancel Other is the industry term for a functionality that enables BT to cancel orders for CPS or WLR during the transfer period.
- 2.16 On 8 July 2003, following an own initiative investigation prompted by industry concern surrounding BT's use of Cancel Other, the Director General of Telecommunications (the "Director"⁴) published a Direction (the "Cancel Other Direction"⁵) specifying in what circumstances BT is permitted to use Cancel Other to cancel orders for CPS.
- 2.17 The Cancel Other Direction states that BT is permitted to use Cancel Other to cancel orders for CPS only in the following circumstances:
- where a request for CPS has been made without a customer's express knowledge and consent ("slamming");
 - where a request for CPS has been made by a person other than the authorised decision-maker ("internal customer miscommunication"); and
 - where the telephone line is ceased during the transfer period ("line cease").
- 2.18 The Cancel Other Direction imposes a number of further conditions on BT's use of Cancel Other to cancel orders for CPS, as follows:
- in cases of slamming and internal customer miscommunication, BT must take reasonable steps to ensure that slamming or internal customer miscommunication has occurred before it uses Cancel Other;
 - BT must take reasonable steps to ensure that it is talking to the authorised decision maker in the organisation or household;
 - each time it uses Cancel Other, BT must confirm this to the customer in writing;
 - BT must record each use of Cancel Other against one of the three specified categories (slamming, internal customer miscommunication and line cease) and provide this information to the network provider that placed the order; and
 - BT must keep a record of all contact with the customer during the transfer period (including recordings of calls) for at least six months after the use of Cancel Other, and must provide the network provider that placed the order with an audit trail of events leading up to the use of Cancel Other on reasonable request.
- 2.19 The Cancel Other Direction was made prior to the introduction of WLR, and applies to CPS only. Ofcom understands that BT and the rest of the industry

⁴ The Director's powers were assumed by Ofcom as of 29 December 2003.

⁵ *Carrier pre-selection 'save' and 'cancel other' activity*, 8 July 2003, published at: www.ofcom.org.uk/static/archive/oftel/publications/carrier/2003/cps0703.htm.

have designed the equivalent processes for WLR to be consistent with the existing processes for CPS.

- 2.20 BT is permitted to use Cancel Other in cases of line cease, which is where the BT line is ceased during the transfer period. When BT places an order to cease a line, a consequence of this is that any pending CPS or WLR orders relating to that line are cancelled automatically. Such cancellations are recorded as Cancel Other.
- 2.21 BT uses Cancel Other, largely at the wholesale level, in other situations where there is no interaction between the customer and a BT operative relating to the CPS or WLR order. One example is the cancellation of orders by BT Wholesale at the request of a service provider, for example where a systems failure has prevented the service provider from cancelling its own order.

History of the current dispute

- 2.22 Following the publication of the Cancel Other Direction, BT and the industry discussed, at BT's initiative, the possible introduction of a new process for managing customer complaints and cancellations during the transfer period which, it was envisaged, would eventually replace the current process, including BT's ability to use Cancel Other. These discussions led to the development of a proposed alternative process, known as the "CEO initiative process".
- 2.23 The industry, including BT, considered that the current process could be improved. BT's competitors considered that the current process, and specifically Cancel Other, enables BT to cancel their CPS and WLR orders inappropriately. They also argued that the current process does not enable them to address allegations of slamming, because customers who believe they have been slammed can simply ask BT to cancel the order, and do not have to contact the service provider directly.
- 2.24 On 29 January 2004, BT stated at a meeting of the CPS Commercial Group that, in the context of ongoing high numbers of allegations from their customers about mis-selling of fixed-line telecoms services, it did not consider it appropriate to continue negotiations on the development and implementation of the CEO initiative process. BT reiterated this position at the CPS Commercial Group meeting of 6 July 2004⁶.
- 2.25 On 26 August 2004, the referring parties asked Ofcom to resolve a dispute about the process for managing customer complaints during the CPS and WLR transfer process. The referring parties' proposed solution is discussed in more detail in section 5.
- 2.26 Ofcom considered, in line with sections 185 and 186 of the Act, that the parties were in dispute and that it was appropriate for Ofcom to resolve the dispute. On 22 September 2004 Ofcom informed the parties of this decision

⁶ The CPS Commercial Group was responsible for discussing operational and commercial issue relating to CPS. Members included BT and alternative network providers, and meetings of the Group were attended by Ofcom. In July 2004, the CPS Commercial Group was subsumed into Ofcom's CPS and WLR Service Provider Forum (SPF).

and published details of the dispute in its online *Competition Bulletin*⁷. Ofcom invited comments from interested parties on the scope of the dispute. The parties' views, and comments received by Ofcom on the scope of the dispute, are discussed in section 3 below.

- 2.27 Ofcom sought information from BT, alternative network operators and CPS and WLR service providers, which it has considered in formulating its proposals for resolving the dispute.
- 2.28 Ofcom's proposals for resolving the dispute are set out in section 4 below.

The broader context: mis-selling

- 2.29 The Cancel Other Direction permits BT to use Cancel Other to cancel orders for CPS in cases of slamming, which Ofcom considers to be a specific type of mis-selling.
- 2.30 On 29 April 2004 Ofcom published the consultation document *Protecting citizen-consumers from mis-selling of fixed-line telecoms services* ("the mis-selling consultation").
- 2.31 The mis-selling consultation sought stakeholders' views on whether the current safeguards designed to protect consumers from mis-selling of fixed-line telecoms services were sufficient, or whether it was appropriate for Ofcom to secure new enforcement powers.
- 2.32 On 22 November 2004, Ofcom published a statement and further consultation document with the same title ("the codes of practice consultation") which sets out Ofcom's conclusion that current safeguards against mis-selling of fixed-line telecoms services are inadequate, and that there should be a requirement upon communications providers to establish codes of practice for sales and marketing which are consistent with guidelines published by Ofcom, and to comply with the provisions of those codes. The codes of practice consultation invites comments on Ofcom's guidelines by 3 January 2005.

⁷www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_786/?a=87101

Section 3

Ofcom's investigation

- 3.1 As discussed in section 2 above, on 26 August 2004 the referring parties asked Ofcom to resolve a dispute about the process for managing customer complaints during the CPS and WLR transfer process. Ofcom considered that it was appropriate for them to resolve the dispute and, on 22 September 2004, informed the parties of this decision and published details of the dispute in its online *Competition Bulletin*.
- 3.2 The referring parties are:
- Broadsystem Ventures Ltd
 - Caudwell Communications Ltd
 - Centrica plc
 - MCI Worldcom Ltd
 - Opal Telecom Ltd
 - Telco Global Communications Ltd
 - THUS plc
 - Your Communications Ltd
- 3.3 The referring parties are alternative network providers and CPS and WLR service providers and rely on wholesale inputs provided by BT to offer services based on CPS and WLR to their retail customers.
- 3.4 The referring parties' submission is also supported by Energis, Global Crossing, Tele2, and Uniworld Communications.
- 3.5 Following publication of the scope of the dispute by Ofcom, Toucan has expressed support for the referring parties' submission and proposed solution.

The referring parties' submission

- 3.6 This section summarises the referring parties' submission and their arguments for the introduction of a new process for handling consumer complaints and cancellations during the CPS and WLR transfer period. The alternative process proposed by the referring parties is discussed in more detail at section 5 below.
- 3.7 The referring parties argue that they need a fair and efficient process for customer transfers, and note that the majority of transfers are currently from BT to other service providers.
- 3.8 They state that BT's competitors are concerned that the Cancel Other process, as it stands, may enable BT to inappropriately cancel transfers, and

that it limits their ability to address allegations of slamming, because a customer who believes he has been slammed is not required to contact the service provider that placed the transfer request.

- 3.9 The referring parties therefore asked Ofcom to mandate implementation of the most recent version of the proposed CEO initiative process ("the revised interim solution").
- 3.10 The revised interim solution would require customers who wished to cancel a transfer to contact the gaining provider (i.e. the service provider that placed the transfer request) in the first instance, but would retain a safety net enabling the losing provider (i.e. the customer's existing communications provider) to cancel transfers in certain circumstances.
- 3.11 The revised interim solution would, potentially, apply equally to all communications providers, and could therefore be extended to cover situations where a customer wished to transfer between two alternative communications providers, rather than from BT to an alternative communications provider. The current requirements defining appropriate use of Cancel Other apply only to BT's use of Cancel Other to cancel orders for CPS.
- 3.12 The referring parties asked Ofcom to enable them to recover any losses which they may have incurred as a result of BT's failure to agree to implementation of the revised interim solution.
- 3.13 The referring parties state that mis-selling more broadly is not within the scope of this dispute.

BT's UFT reports

- 3.14 The referring parties refer, in their submission, to the interaction between the Cancel Other process and BT's UFT reports⁸. This section explains the relevance of BT's UFT reports to Ofcom's consideration of the current dispute.
- 3.15 BT operatives record allegations of mis-selling (including slamming) made by customers as unfair trading incidents (UFTs). BT collates these allegations and provides them to the relevant alternative provider as "UFT reports".
- 3.16 BT does not generate a UFT every time it uses Cancel Other.
- 3.17 BT is not under any regulatory obligation to record UFTs, or to compile UFT reports, but has undertaken to do so at its own initiative.
- 3.18 The referring parties argue that BT's UFT reports do not enable them to fully understand why BT has used Cancel Other in a high proportion of cases, and that this makes it more difficult for them to address alleged mis-selling by their sales agents.

⁸ UFT reports were previously known as UTI (Unfair Trading Incident) reports.

The scope of the dispute

- 3.19 Ofcom considers that the scope of this dispute is to determine whether the existing processes governing BT's use of Cancel Other remain appropriate; and if not to determine under what circumstances BT may use Cancel Other and in particular:
- the circumstances in which BT may use 'Cancel Other' when the relevant consumer has not contacted the gaining provider; and
 - the information on the use of Cancel Other that BT is obliged to provide to other providers.
- 3.20 The scope of this dispute does not include addressing broader issues surrounding the mis-selling of fixed-line telecoms services, but is limited to process issues related to the provision of network access.
- 3.21 On 22 September 2004, Ofcom published details of the dispute in its online *Competition Bulletin* and invited comments on the scope of the dispute.

BT's view

- 3.22 Commenting on the published scope of the dispute, BT stated that it did not believe that mis-selling, and its underlying causes, could be separated from the scope of this dispute, and that they should be considered as part of Ofcom's analysis.
- 3.23 BT stated that its decision not to participate further in negotiations on a new process for managing consumer complaints and cancellations during the CPS and WLR transfer process was informed by the high number of allegations of mis-selling that it continued to receive from its customers. BT considered, in the circumstances, that the introduction of a new process would not improve the customer experience.
- 3.24 BT recommended that Ofcom consider the dispute in the context of its work on mis-selling, notably the mis-selling consultation.
- 3.25 Ofcom remained of the view that a broader consideration of mis-selling should not itself fall within the scope of this dispute, but is best dealt with in its other work on mis-selling. Ofcom did not therefore amend the scope following BT's comments and the scope of the dispute remains as set out at paragraphs 3.19 and 3.20 above.

Ofcom's investigation

- 3.26 In addition to the referring parties' submission, Ofcom sought information from alternative network providers and CPS and WLR service providers about their sales processes and procedures for obtaining customers' consent, their perceptions of BT's use of Cancel Other, and the effect that they consider BT's ability to cancel their orders and its current use of Cancel Other has on their business.
- 3.27 Ofcom requested from BT a sample of audit trails for cases in which it had generated a UFT and used Cancel Other during August 2004. Cases were selected using a random stratified sampling approach. The total population of

cases was sorted by provider. Random samples were then taken from each sub-group, ensuring that smaller service providers were represented and that the sample was not skewed towards larger service providers.

- 3.28 BT supplied a recording of the customer-initiated call relating to CPS or WLR which resulted in use of Cancel Other by BT, plus the accompanying UFT report prepared by BT, in 444 cases.
- 3.29 Ofcom listened to each call and noted whether BT's use of Cancel Other in each case appeared to be the result of slamming or internal customer miscommunication⁹.
- 3.30 In listening to the call recordings provided by BT, Ofcom was able to understand the processes followed by BT when it generates and records UFTs and when it uses Cancel Other. The exercise enabled Ofcom to understand the various different reasons why customers ask BT to cancel transfers, and to identify a number of different types of alleged behaviour by service providers that, Ofcom considers, all constitute slamming (i.e. an attempt to transfer a customer's telephone service without his express knowledge and consent). These are set out from paragraph 4.24 below.
- 3.31 BT explained to Ofcom the circumstances in which BT Retail and BT Wholesale use Cancel Other, and in what circumstances a cancellation is generated automatically and reported as Cancel Other, as opposed to the cases in which a Cancel Other is manually actioned by a BT operator.

⁹ As set out in paragraph 2.20 above, BT's use of Cancel Other in cases of line cease is not the result of a customer-initiated call about CPS and WLR, and call recordings therefore relate only to slamming and internal customer miscommunication.

Section 4

Ofcom's proposals for resolving the dispute

Ofcom's analysis

- 4.1 In reaching a proportionate resolution of this dispute, Ofcom has had regard to the need to strike a balance between allowing BT to retain the use of Cancel Other when it plays a useful role as a consumer protection mechanism, and the need to place restrictions on BT's use of Cancel Other in order to promote competition by facilitating consumer transfers to alternative providers.
- 4.2 The following section first sets out the factors that, in the interests of promoting competition, weigh in favour of imposing restrictions on BT's use of Cancel Other and, second, the role of Cancel Other as a consumer protection mechanism.

BT's position in the market

- 4.3 As discussed at paragraphs 2.10-2.14 above, BT has been designated as having SMP in a number of wholesale markets. As a result, BT is subject to a number of remedies, including a requirement to provide network access on reasonable request (SMP Condition AA1(a)). BT's obligations relating to its use of Cancel Other are set out in Annex C to the wholesale fixed narrowband market review ("Annex C"), which is made under SMP Condition AA1(a).
- 4.4 BT's competitors depend on wholesale inputs from BT in order to compete with BT in the relevant retail markets. The markets for retail fixed-line telecoms services based on CPS and, in particular, on WLR, are still developing. Restrictions on the provision of wholesale inputs may impact adversely on the development of competition in the relevant retail markets.
- 4.5 In using Cancel Other to cancel CPS and WLR orders, BT may be denying those service providers access or restricting their access as set out in SMP Condition AA1(a). Resolution of this dispute, in effect, sets out the circumstances in which it is permissible for BT to refuse a request for access, i.e. the circumstances in which it may be appropriate for BT to cancel a wholesale order for CPS or WLR.
- 4.6 The majority of orders are for transfers from BT to a service provider. Were BT to misuse Cancel Other, the effect would be a lower number of customers transferring to alternative providers of fixed-line telecoms services than otherwise.
- 4.7 From November 2003 to October 2004, the number of BT lines with CPS applied increased by 1.8 million. Over the same period, BT used Cancel Other on over 250,000 occasions. These figures illustrate the potential for any misuse of Cancel Other to restrict the transfer of customers from BT to competing providers. Ofcom has a duty to promote competition under sections 3 and 4 of the Act, and is of the view that any unreasonable

restriction on the transfer of customers may damage competition. These factors weigh in favour of restricting BT's use of Cancel Other.

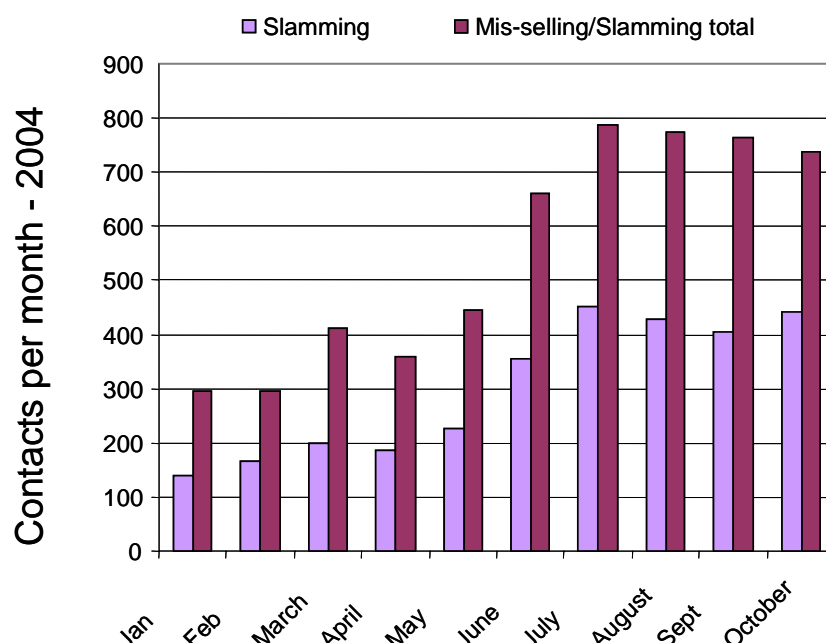
- 4.8 BT has expressed the view that since other service providers have some ability to cancel orders placed by their competitors (for example where they think one of their customers has been slammed by a competitor) by sending a manual request to BT at the wholesale level¹⁰ any restrictions placed on BT's use of Cancel Other should apply equally to service providers.
- 4.9 Unlike BT, no service provider has been designated as having SMP and service providers are not, therefore, required to meet all reasonable requests for access. The majority of transfers (over 80%) continue to be from BT to a service provider, rather than between non-BT providers.
- 4.10 It would therefore be disproportionate to set restrictions on BT's use of Cancel Other to refuse requests from service providers cancelling orders placed by their competitors ("SP-to-SP transfers"). The greatest potential for preventing switching, and thereby impacting on the development of competition, arises from BT's use of Cancel Other and not from cancellation of SP-to-SP transfers.

Protecting consumers from mis-selling of fixed-line telecoms services

- 4.11 Based on the sample of customer-initiated calls to BT that Ofcom listened to (see paragraphs 3.27 and 3.28 above) Ofcom believes that in around 70% of cases in which Cancel Other is used by BT following contact with the customer about a CPS or WLR order, the customer claims to have been slammed. Fewer than 5% of cases related to internal customer miscommunication.
- 4.12 In the remaining cases (around 25%), Ofcom considered that its interpretation depended on what is understood by the term "slamming". Further consideration of the appropriate definition of slamming is set out at paragraphs 4.24-4.25 below.
- 4.13 As set out in Figure 1 below and discussed in Ofcom's codes of practice consultation, there is evidence that mis-selling, including slamming, is growing as a problem. There has been a steady increase in the number of cases about mis-selling and slamming that Ofcom's Contact Centre has dealt with since the beginning of this year.

¹⁰ This is a manual process, whereas Cancel Other is an automated process available only to BT, which enables BT to cancel its competitors' orders immediately, without needing to approach BT Wholesale as an intermediary each time it wishes to do so.

Figure 1: slamming and mis-selling cases handled by Ofcom Contact Centre



Source: Ofcom contact centre. Figures are for CPS and WLR..

- 4.14 Customers who are transferring their calls and/or line rental to an alternative provider receive a letter from BT (the so-called “anti-slamming letter”) notifying them that it has received a transfer request. A customer who has not consented to the transfer will often call BT when he receives this letter and ask BT to cancel the transfer. BT can then use Cancel Other to prevent the transfer from going through.
- 4.15 Evidence that slamming is a significant problem points in favour of allowing BT to retain its ability to use Cancel Other where a request for a transfer has been made without the customer’s express knowledge and consent.

Ofcom’s proposals

Proposal: BT will retain its ability to use Cancel Other in cases of slamming

- 4.16 The alternative to permitting BT to use Cancel Other in cases of slamming is to require the customer to contact the relevant gaining service provider in order to cancel the transfer. This is one of the proposals put forward by the referring parties, as discussed in section 5 below.
- 4.17 Ofcom does not consider that it is appropriate to require the customer to contact a service provider that has submitted a transfer request without that customer’s express knowledge and consent. A customer may have had no contact with the service provider responsible for placing the order and may not therefore know the service provider’s identity.

Ofcom's definition of "slamming"

- 4.18 As noted in paragraph 4.12 above, there is currently scope for interpretation in considering what behaviour falls within the definition of slamming. Ofcom considers that a more detailed definition of slamming will benefit both BT and alternative providers.
- 4.19 The Cancel Other Direction defined slamming as "where a request for CPS has been made without the customer's full knowledge or consent". The Director stated in the explanatory memorandum accompanying the Cancel Other Direction that:
- "‘full knowledge and consent’ refers to the customer being aware of and consenting to the transfer process itself, and not the fine details, for example, of call pricing."
- 4.20 For clarity, in resolving this dispute, and in the codes of practice consultation, Ofcom has adopted the more recent definition used by the Director in his *Notification to BT of Contravention of General Condition 1.2 under Section 94 of the Communications Act 2003*, published on 7 November 2003 ("the CPS Save Notification"), which defined slamming as:
- an attempt to transfer a customer calls and/or his telephone line without that customer's "express knowledge and consent".
- 4.21 Ofcom considers that this definition of slamming also refers to a customer's knowledge and consent of the transfer process itself. Failure to provide a consumer with the details of a product, for example the price of a certain type of call, does not constitute slamming.
- 4.22 BT must take reasonable steps to ensure that slamming has actually taken place. BT is not permitted to use Cancel Other where a customer has placed the order, but wants to change his mind, for example because the information he has received from the service provider does not seem consistent with what he was told at the time of the sale, or because he felt pressured by the sales agent into placing an order.
- 4.23 BT's inability to use Cancel Other in cases of high pressure selling and misinformation does not mean that consumers will not be protected from mis-selling more broadly. Ofcom's proposals to require service providers to establish and comply with, codes of practice enforceable by Ofcom, address all types of mis-selling.
- 4.24 In its analysis of the sample of customer-initiated calls provided by BT (see paragraph 3.30), Ofcom has been able to identify a number of different types of behaviour which constitute slamming according to the definition set out above, as follows:
- a) where a customer does not recall any contact from a service provider and could not therefore have known about, or consented to, the transfer;
 - b) where a customer has been contacted by a service provider but has not given that service provider authorisation to transfer his telephone calls (and, in the case of WLR, his telephone line) to that service provider;

- c) where a customer has agreed to purchase a product or service, but the service provider has submitted an order for a different product or service which the customer has not agreed to purchase. An example would be where a customer buys a mobile phone and an order is submitted for CPS; or
 - d) where a customer has agreed to purchase his telephone calls and/or access from a service provider having understood, as a result of deliberate attempt by that service provider to mislead him, that he is placing an order with a different service provider ("passing off").
- 4.25 Passing off constitutes slamming because the customer has no knowledge of, and has not consented to, a transfer to the service provider which placed the order. He may believe, for example, that he has ordered a new service or payment method from his existing telecoms provider. Ofcom considers that this is qualitatively different from other types of mis-selling where the service provider correctly identifies itself, but gives misleading information about the products or services that it is providing.

Proposal: BT will no longer be able to use Cancel Other in cases of internal customer miscommunication

- 4.26 BT is currently permitted to use Cancel Other to cancel orders for CPS in cases of so-called "internal customer miscommunication", defined in the Cancel Other Direction as a situation:
- "where a request for CPS has been made by a person other than the authorised decision-maker, which would be the person named on the BT account or, in the case of an organisation, the person within the organisation responsible for managing the account".
- 4.27 In the explanatory memorandum that accompanied the Cancel Other Direction, the Director noted that, in many cases where a customer contacts BT following internal customer miscommunication, it will appear to the customer that slamming has occurred. The Director therefore required BT to investigate the possibility that such apparent slams were, in fact, the result of internal customer miscommunication, by asking questions, for example whether anyone else in the household or organisation could have placed the order. The Director considered that this process would be likely to reduce the number of cases incorrectly categorised as slams following internal customer miscommunication.
- 4.28 BT's ability to use Cancel Other in cases of internal customer miscommunication enables it to cancel orders that have been made by someone who is not the authorised decision maker. The "authorised decision maker" is defined in the Cancel Other Direction as the BT account holder (the person named on the 'blue bill'), for residential customers, or the person within an organisation responsible for managing an account, for business customers.
- 4.29 Ofcom considers that the BT account holder may not be the only authorised decision maker in a household, where decisions about fixed-line telecoms services are often made jointly.

- 4.30 BT has provided details of its verification process for ensuring that decisions on the BT account are only made by an authorised decision maker. BT, when it talks to its customers, recognises that there may be authorised decision makers other than the BT account holder. It enables individuals other than the BT account holder to make decisions on an account, subject to a verification process which requires those individuals to provide information that would only be available to an authorised decision maker.
- 4.31 Ofcom considers that CPS and WLR service providers should also be able to do business with individuals who identify themselves as authorised decision makers, but who may not be the BT account holder. However, the current Cancel Other Direction in effect requires CPS and WLR service providers to deal only with BT account holders.
- 4.32 If a self-identified decision maker arranges a transfer with a service provider, and the BT account holder disagrees with this decision, it is up to those individuals, and not BT, to resolve the situation. Similarly, in businesses, Ofcom considers that if an individual takes a decision he is not authorised to make, this is a matter for the organisation concerned, and should not be for BT to resolve. Where internal customer miscommunication has occurred, the customer can cancel the transfer by contacting the service provider within the ten-day transfer period, if the household or organisation has decided it does not want it.
- 4.33 Ofcom therefore proposes that BT should no longer be able to use Cancel Other in cases of apparent internal customer miscommunication.
- 4.34 Ofcom notes that its codes of practice consultation refers to situations where it may be inappropriate to take instructions from a particular individual, for example where he is vulnerable in some way or is below the required legal age for entering into a contract.

Proposal: BT will be able to use Cancel Other in the event of failure by a service provider to cancel a transfer

- 4.35 BT is not currently permitted to use Cancel Other when a customer states that the service provider has failed to cancel the transfer at the customer's request.
- 4.36 In listening to the sample of call recordings supplied by BT (see paragraphs 3.27 and 3.28 above), Ofcom found that a number of customers appeared to have had problems contacting service providers. Others were concerned that service providers did not appear to have actioned their requests to cancel transfers.
- 4.37 The guidelines set out in Ofcom's codes of practice consultation state that service providers should enable consumers to cancel orders and terminate contracts. However, Ofcom considers that consumers may also need a 'safety net' mechanism that enables them to cancel a transfer when a service provider has failed to do so.
- 4.38 Ofcom therefore proposes that BT should be permitted to use Cancel Other in cases of failure to cancel, i.e. where a service provider has failed to cancel a transfer after the customer has requested this.

- 4.39 BT must, however, use Cancel Other only where it has taken reasonable steps to ensure that failure to cancel has occurred. When a customer asks a service provider to cancel a transfer, the wholesale cancellation order may not be submitted to BT immediately. The service provider submits a request to the alternative network provider with which it has an agreement, and the alternative network provider then submits the wholesale request to BT.
- 4.40 BT's operators must take this possible time lag into account. If they do not, it may appear that a service provider has failed to cancel a transfer, whereas in fact it has taken the necessary steps to get the transfer cancelled. Ofcom's analysis suggests that customers often contact BT "just to check" that a service provider has actioned a cancellation request. In using its proposed ability to cancel transfers in cases of failure to cancel, BT must be assured that, unless it uses Cancel Other, no order to cancel will be placed by day nine of the transfer period.

Proposal: BT will retain its ability to use Cancel Other in cases of line cease and other cases not related to slamming or failure to cancel

- 4.41 Unlike the two categories discussed above (slamming and internal customer miscommunication), BT's use of Cancel Other in cases of line cease does not follow a conversation with a customer about a CPS or WLR order. When BT places an order to cease a line, a consequence of this is that any pending CPS or WLR orders relating to that line are cancelled automatically. Such cancellations are recorded as Cancel Other.
- 4.42 Ofcom considers that BT's ability to use Cancel Other where the line has been ceased is a necessary administrative mechanism, and proposes that BT should retain this ability.
- 4.43 As discussed at paragraph 2.21, BT also uses Cancel Other, largely at the wholesale level, in situations other than line cease where there is no interaction between the customer and a BT operative relating specifically to the CPS or WLR order. One example is the cancellation of orders by BT Wholesale at the request of a service provider, for example where a systems failure has prevented the service provider from cancelling its own order. The draft Direction (at paragraph 1(d)) provides for BT's use of Cancel Other in these situations.
- 4.44 Ofcom proposes that BT should continue to be permitted to use Cancel Other in such situations, which can be described as administrative or process reasons.
- 4.45 To give customers certainty and transparency, Ofcom proposes that BT should be required to confirm the cancellation of a CPS or WLR order wherever it uses Cancel Other, unless this is not possible.

Proposal: BT should be required to provide more information to alternative communications providers on its use of Cancel Other

- 4.46 In their submission to Ofcom, the referring parties stated that the information they currently receive from BT relating to BT's use of Cancel Other is inadequate in two ways:

- it does not enable them to address allegations of slamming, because they generally receive only BT's account of a contact as recorded in the UFT, and have limited visibility of the account that the customer has given to BT; and
 - it does not enable them to monitor BT's use of Cancel Other, which has led to a belief that BT is using Cancel Other inappropriately in a high proportion of cases.
- 4.47 The referring parties argue that BT does not, currently, provide them either with UFT reports or with information about its use of Cancel Other sufficiently quickly to enable them to respond to allegations of mis-selling.
- 4.48 BT is currently required to provide a full audit trail leading up to its use of Cancel Other for CPS orders at the reasonable request of the relevant communications provider. BT is also required to categorise each such use of Cancel Other as either slamming, internal customer miscommunication or line cease, and to pass this information to the alternative network provider that placed the order.
- 4.49 Ofcom considers that there are arguments for strengthening these requirements and is minded to impose additional requirements on BT:
- BT must provide information to alternative providers that enables them to understand why it has used Cancel Other; and
 - BT must provide an audit trail to alternative providers including, on request, a sample of the call recordings between BT and the customer.
- 4.50 Ofcom's proposals to strengthen the reporting requirements on BT, set out in paragraphs 4.52-4.61 below, will provide greater transparency around BT's use of Cancel Other, restoring trust between BT and the industry by enabling alternative communications providers to assess whether BT is using Cancel Other appropriately and, if they believe that it is not, to pursue the issue in the way that they choose.
- 4.51 In the past, BT has not known the identity of the service provider responsible for making a transfer request, and BT's contact has been with the alternative network provider that placed the wholesale order. However, Ofcom understands that the industry has undertaken a large part of the work necessary to enable BT to identify the service provider responsible for an order in each case. Ofcom expects BT and the industry to complete this work, so that BT will be able to convey information about its use of Cancel Other to the appropriate service provider.

Proposal: BT must provide an audit trail to alternative providers including, on request, a sample of the call recordings between BT and the customer

- 4.52 BT is currently required to keep a record of all contact with the customer during the transfer period and to retain this record for a period of at least six months. Ofcom proposes to retain this requirement.
- 4.53 Ofcom proposes that BT should also be required, on request from the communications provider responsible for submitting the transfer request (the service provider, rather than the alternative network operator) a representative sample, covering a period of one month, of records of

customer-initiated contact with BT about CPS and WLR relating to cases in which BT has used Cancel Other in cases of slamming or failure to cancel, to include recordings of customer-initiated calls to BT where available. Apart from in exceptional circumstances, BT should make this information available to service providers within 15 working days of the request being made.

- 4.54 Ofcom proposes that BT should be required, on request from a service provider, to provide records of contact with any specified customers, to include recordings of customer-initiated calls to BT where available, within 15 working days of a request from a service provider.

Proposal: BT must provide information to alternative communications providers that enables them to understand why it has used Cancel Other

- 4.55 BT is currently required to record each use of Cancel Other against permitted categories (currently slamming, internal customer miscommunication and line cease) and make this information available to the relevant alternative network provider. Ofcom proposes to retain this requirement.
- 4.56 Ofcom proposes that BT should be required to record why it uses Cancel Other in each case, and to make this information available to the relevant alternative network provider on a per-occasion basis, and to the relevant service provider on a monthly basis.
- 4.57 Ofcom understands that BT and the industry have worked to develop a set of reason codes which enable alternative communications providers to understand why Cancel Other has been used in a particular case. Ofcom understands that these reason codes will be implemented shortly and that, once the new system is in place, BT will be in a position to meet this proposed requirement.
- 4.58 Ofcom specifically requests comments on what information service providers require, how frequently service providers require this information and the practical implications of the above proposals on the provision of an audit trail, including call recordings, and the categorisation of BT's use of Cancel Other. Ofcom also particularly welcomes comments on the proposed 15-day timescale for the provision of information (set out in paragraphs 4.53 and 4.54 above) and also on the number of requests for call recordings that any one service provider would require. For example, is it reasonable and proportionate to limit the number of requests for samples of call recordings that a service provider can make?
- 4.59 After considering respondents' comments, Ofcom will set out a final view on the content, form and frequency of the reports and the timescales for BT meeting requests for further information from service providers.
- 4.60 Ofcom expects that BT may need to make certain changes to its systems and processes in order to implement the proposals described in paragraphs 4.52-4.61 above. Ofcom therefore proposes that the Direction on BT will take effect one month after it is published. Ofcom invites comments on whether this is an appropriate period or whether a shorter (two weeks) or longer (six weeks) period may be appropriate.
- 4.61 After considering respondents' comments, Ofcom will set out a final view on the date from which the Direction will become effective.

Ofcom's draft Determination for resolving the dispute and draft Direction regarding BT's use of Cancel Other.

- 4.62 Ofcom has published a draft Determination for resolving this dispute. In order to implement its proposals for resolving this dispute, Ofcom proposes to withdraw the existing Direction concerning BT's use of Cancel Other and issue a new Direction setting out BT's obligations regarding its use of Cancel Other. Ofcom has therefore made a Notification, also set out above, to the effect that it intends to withdraw the existing Direction concerning BT's use of Cancel Other and to make a new Direction replacing it. Ofcom's draft Determination therefore makes the appropriate reference to Ofcom's proposals for BT's use of Cancel Other as set out in the draft Direction.
- 4.63 Ofcom's proposed Direction will apply both to CPS and WLR. Ofcom considers that it would also have been possible for it to make separate Directions under SMP Conditions AA8 (requirement to provide CPS) and AA10 (requirement to provide wholesale analogue line rental). However, SMP Condition AA8 and AA10 are without prejudice to the provisions of SMP Condition AA1(a) and Ofcom therefore considers that it is preferable to adopt a single solution covering both CPS and WLR transfers, particularly as simultaneous orders may be placed on the same line for CPS and WLR.

Promoting competition and protecting consumers

- 4.64 In making its proposals for resolving this dispute, and in its draft Direction, Ofcom has had regard to its duty under section 3 of the Act to further the interests of consumers in relevant markets, where appropriate by promoting competition. Ofcom considers that its proposed solution will retain appropriate consumer safeguards, while at the same time supporting the development of competition in the markets for fixed-line telecoms services by promoting transparency and enabling service providers to more easily address allegations of slamming by their sales agents.
- 4.65 In making its proposals for resolving this dispute, and in its draft Direction, Ofcom has had regard to its Community duties set out at section 4 of the Act. Ofcom considers that its proposals promote competition in the markets for fixed-line telecoms services, as required by the first Community requirement to protect competition. Ofcom considers that its proposals, by retaining appropriate consumer safeguards against slamming, promote the interests of all persons who are citizens of the European Union, in line with the third Community requirement.
- 4.66 Ofcom considers that, while there is evidence that slamming in the telecommunications industry remains an issue, BT's use of Cancel Other is justified on the basis that it serves a useful function in allowing consumers to prevent a transfer to another provider when the consumer has not agreed to this transfer.
- 4.67 In its codes of practice consultation, Ofcom has proposed that the requirement on service providers to establish, and comply with, codes of practice for sales of marketing of fixed-line telecoms services should be time-bounded, lapsing after two years. As stated in the codes of practice consultation, Ofcom considers that it is over this period that the majority of problems are likely to occur.

- 4.68 Ofcom therefore intends to review BT's use of Cancel Other again before the obligation on service providers to establish, and comply with, codes of practice falls away. In the event that slamming no longer appears to be a problem, Ofcom considers that the role of Cancel Other as a consumer protection mechanism may be considerably reduced, and may be minded to remove altogether BT's ability to use Cancel Other (see paragraph 2.21).
- 4.69 Ofcom considers that, in accordance with section 49(2) of the Act its proposals, as set out in the draft Direction:
- are objectively justifiable, as they are necessary to ensure that consumers are protected from slamming of CPS and WLR services;
 - do not discriminate unduly, as they flow from BT's position SMP in the underlying markets and ensure that BT's use of Cancel Other is consistent with the resultant SMP conditions that apply to BT;
 - are proportionate, as they strike a necessary balance between the role of Cancel Other as a consumer safeguard and ensuring that consumers are able to transfer easily between providers; and
 - are transparent, as its reasons for proposing the draft Determination and draft Direction are clearly explained in this explanatory memorandum.

Section 5

Alternatives considered

- 5.1 The scope of this dispute relates to a discrete area of process, and Ofcom's proposals for resolving it do not represent a significant change in existing obligations or in Ofcom's policy¹¹. Ofcom has not therefore carried out a Regulatory Impact Assessment (RIA). Ofcom has, however, considered other possible solutions, as set out below.

Direct notification and third party verification

- 5.2 "Direct notification" describes a system where the losing provider (i.e. the customer's existing provider) will not generate a transfer order until it has received confirmation from the customer that he intends to transfer service.
- 5.3 "Third party verification", which is used in other countries including the USA, is where a third party verifies orders with customers before notifying the losing provider to generate a transfer order.
- 5.4 Direct notification and third party verification represent the highest possible level of consumer protection, as the consumer is required to positively state that he intends to transfer service away from his existing provider, as well as making an agreement with his new provider.
- 5.5 In the UK, the initial introduction of a form of direct notification – the "reply card system", which existed until 29 July 2002 and required customers to sign a form which they had to send to BT before a transfer could be processed – discouraged switching. The average net growth under the reply card system was 37,659 CPS lines per month. For the 12 months following the end of the reply card system (August 2002 to July 2003) the average net growth was 123,291 CPS lines per month, and for the 12 months after that it was 174,446 CPS lines per month.
- 5.6 Ofcom therefore considers that a direct notification solution would be unlikely to promote the development of competition in retail markets for telecoms services and that it is possible, and preferable, to rely on other consumer protection mechanisms that enable competition to develop, for example Ofcom's proposed requirement to establish and comply with codes of practice.
- 5.7 A process based on third party verification would require the appointment or establishment of a third party, independent of the industry, to act as a verification agent. This would be a costly solution. Given Ofcom's proposals to require service providers to establish and comply with codes of practice for sales and marketing of fixed-line telecoms services, and its expectation that effective enforcement of these codes of practice will lead to a reduced risk of

¹¹ Ofcom considers that the changes proposed in this document do not, therefore constitute a major change in Ofcom's activities. Ofcom does not consider that the changes proposed represent a significant change to existing policy, to the extent that they will not have a significant impact on businesses operating in the markets Ofcom regulates. Since the proposals are designed to maintain existing consumer safeguards, Ofcom does not consider that they will have a significant impact on the general public.

mis-selling, Ofcom considers that the investment required to establish a third party verification regime would soon become redundant. Ofcom does not therefore consider that third party verification is a proportionate response for resolving this dispute.

Removing BT's ability to use Cancel Other

- 5.8 As set out in section 2 above, Ofcom BT has SMP in wholesale markets for the provision of fixed-line telecoms services. In principle, a mechanism that gives an SMP provider control over the switching of customers to its competitors by enabling it to cancel their orders does not support the development of competition. This is why BT's use of Cancel Other is restricted, enabling it to use Cancel Other only where it is absolutely necessary to maintain safeguards for consumers, or for administrative reasons.
- 5.9 As set out at paragraph 4.68 above, Ofcom proposes to review Cancel Other before the proposed obligation on service providers to establish, and comply with, codes of practice falls away. If Ofcom finds that Cancel Other is no longer required as a consumer protection mechanism, it may be minded to remove altogether BT's ability to use Cancel Other as a result of contact with a customer relating to a CPS or WLR order.
- 5.10 However, as discussed in section 4 above, Ofcom considers that the evidence suggests mis-selling, including slamming, does occur, and is growing as a problem (see Figure 1 above). Were Ofcom to remove BT's ability to use Cancel Other immediately, in the interests of promoting competition, consumers might be at risk from slamming. In the longer term, experience of slamming would reduce consumers' confidence in alternative providers of fixed-line telecoms services, would deter them from switching, with a resulting impact on competition.

The referring parties' proposed solution

- 5.11 The referring parties' preferred solution is for Ofcom to mandate implementation of the proposed revised interim solution.
- 5.12 The revised interim solution represents the most up-to-date version of the alternative process discussed by BT and the industry (see section 2 above). The referring parties provided the proposed revised interim solution to Ofcom on 18 October 2004.
- 5.13 The underlying principle of the revised interim solution is that customers should raise any complaints with the gaining provider, and should contact the gaining provider if they want to cancel the transfer. The losing provider would be permitted to use Cancel Other only where the customer was unable, or unwilling, to contact the gaining provider. The revised interim solution sets out procedures for a number of possible scenarios, based on this underlying principle.
- 5.14 Ofcom considers that it is inappropriate to ask a customer to contact a service provider that they consider has attempted to transfer his fixed-line telecoms service without his express knowledge and consent. For this reason, Ofcom does not consider that it is appropriate to mandate implementation of the revised interim solution.

- 5.15 Under the revised interim solution, a customer willing to contact the gaining provider following an apparent slam would, if that gaining provider failed to cancel the order, find himself referred back to the losing provider. This could mean that he would have to make three calls instead of one to resolve the problem. Ofcom considers that introducing the revised interim solution would be unlikely to improve the customer's experience where slamming has occurred. This has the same long-term implications for competition as the option of removing Cancel Other altogether, as described in paragraph 5.10 above.
- 5.16 The revised interim solution also sets out guidance for losing providers on the appropriate content of scripts and communication with customers, and guidance for gaining providers on contact with customers and best practice for complaint handling.
- 5.17 The referring parties consider that the losing provider's script would form part of the audit trail for investigating whether a losing provider had used Cancel Other appropriately. Ofcom considers that strengthening the requirements on BT to provide an audit trail for its use of Cancel Other (see paragraph 4.52 – 4.54 above) makes this proposal redundant.
- 5.18 Ofcom notes that its proposed guidelines, as set out in the codes of practice consultation, include provisions for service providers' contact with customers and handling of customer complaints. Ofcom therefore considers that the revised interim solution is, in this respect, superseded by Ofcom's proposals to require service providers to establish and comply with codes of practice.

Providing the means for the referring parties to claim compensation for BT's failure to implement the proposed alternative process

- 5.19 The referring parties asked Ofcom to enable them to recover any losses which they may have incurred as a result of BT's failure to agree an alternative solution for managing customer complaints and cancellations during the CPS and WLR transfer period.
- 5.20 Ofcom's powers to resolve disputes, as set out in section 190 of the Act, do not include any provision for it to enable the parties to recoup alleged losses in this manner. Ofcom notes that although the power specified at section 190(2)(d) relates to the payment of sums already owing to one party as a result of a dispute, it does not confer on Ofcom any ability to award damages.

Section 6

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 23 December 2004**.

We strongly prefer to receive responses by e-mail, 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 send your response to louise.marriage@ofcom.org.uk.

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

Louise Marriage
Competition & Markets
Third floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

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

It would be helpful if your response could 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 Louise Marriage member on 020 7783 4333.

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, 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.

Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.

Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

Next steps

Following the end of the consultation period, Ofcom will make a determination for resolving the dispute and will publish its decision early in 2005.

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.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations. The consultation period for this consultation is less than ten weeks as it makes proposals for resolving a dispute.

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. 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 Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3585
Fax: 020 7981 3333
E-mail: philip.rutnam@ofcom.org.uk

Annex 1

Ofcom's consultation principles

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

Before the consultation

1. 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

2. We will be clear about who we are consulting, why, on what questions and for how long.
3. 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.
4. We will normally allow ten weeks for responses, other than on dispute resolution.
5. 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.
6. 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

7. 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 2

Consultation response cover sheet

- A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, 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, unless we are asked not to.
- A2.2 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.
- A2.3 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 confirm on the response cover sheet that Ofcom can publish their responses upon receipt.
- A2.4 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.
- A2.5 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, 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:

To (Ofcom contact):

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)?

Yes

☐

No

☐

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 all intellectual property rights in the response vest with Ofcom. If I have sent my response by email, Ofcom can disregard any standard email text about not disclosing email contents and attachments.

Ofcom can publish my response: on receipt

☐

once the consultation ends

☐

Name

Signed (if hard copy)

Annex 3

Consultation questions

Ofcom invites comments on all aspects of the proposals set out in this document. In particular, Ofcom asks respondents for their view on the following:

- Respondents are asked to comment on Ofcom's proposal, set out in paragraphs 4.35-4.40 above, to enable BT to use Cancel Other where a service provider has failed to cancel a transfer, provided that it is assured that unless it does so no order to cancel will be placed by day nine of the transfer period.
- Respondents are asked to comment on Ofcom's proposals, set out in paragraphs 4.46-4.61 above, to require BT to provide more information to alternative communications providers on its use of Cancel Other. What information do service providers need to enable them to investigate allegations of slamming and to assess whether BT is using Cancel Other appropriately? How often do service providers need this information? What are the practical implications of these proposals?
- Respondents are asked to comment on the proposed 15-day timescale for the provision of information (set out in paragraphs 4.53 and 4.54 above) and also on the number of requests for call recordings that any one service provider would require. Is it reasonable and proportionate to limit the number of requests for samples of call recordings that a service provider can make?
- Ofcom expects that BT may need to make certain changes to its systems and processes in order to implement the proposals described in paragraphs 4.52-4.61 above. Ofcom therefore proposes that the Direction on BT will take effect one month after it is published. Ofcom invites comments on whether this is an appropriate period or whether a shorter (two weeks) or longer (six weeks) period may be appropriate.