

## **Swiftnet Limited**

### **Response to Consultation Question 3.1**

#### **Mobile Call Termination Market Review 2018-21**

1. Swiftnet Limited (“Swiftnet”) holds Mobile Number Ranges from Ofcom. It is named as one of the 80 people to whom SMP Conditions will continue to apply following the current review 2018-21.
2. Swiftnet in particular has strong relations with markets outside of the EU and a number of Swiftnet’s customers are frequently called by those outside of the EU.
3. At the moment, Swiftnet takes advantage of the view expressed by Ofcom in a letter sent to it in 2015 (copy attached) which effectively states that the relevant market in respect of MTRs excludes calls from countries outside of the EEA. The letter suggests there may be a review of this following consideration of the subject by BEREC, although it is understood that no such review has taken place on which Ofcom relies and certainly none is referred to in the MTR Consultation document.
4. Swiftnet wants to make representations about the extent of the relevant market and also specifically another aspect of the market in relation to what conditions should apply in order to remedy any problems emanating the way in which the market is presently being operated.

#### **Section A – Geographic extent of the market**

5. It must be trite EU Law that Articles 101 and 102 of the European Treaty dealing with competition matters apply only where there is an appreciable effect on trade between Member States. There is significant Case Law on the subject. Although there can sometimes be “surprise” effects on trade between Member States caused by transactions made between Member States and the rest of the world those are, by and large, unusual situations. The general rule, one might expect, in examining an interpretation of the Competition Laws of the EU as applied to MTRs is that calls that originate outside of the EU but are terminated in the EU (i.e. in the UK) are not going to have an appreciable effect on the trade between Member States. Neither are they are going to have an appreciable effect on intra-state trade.
6. Whereas one might argue that the source of regulation in respect of MTRs comes from the powers that are proposed in the Framework Directives related to telecoms as opposed to the European Treaty itself given that the concepts involved are the same it seems to be very odd that Competition Law as set out in the Treaty itself would not bite in a situation where sector specific regulation, adopting the same principles, would bite.
7. It is Swiftnet’s view that what is proposed by Ofcom is both disproportionate and very probably unlawful.
8. The present position permits Swiftnet to participate in the prices that are charged by those non-EEA networks originate calls to the Swiftnet number range. This mechanism provides part of the checks and balances that the systems of originating operators do not make super profits out of calls to the network. This allows Swiftnet to benefit from that which is charged by the originating network. There will be more on that below.

9. Given the dubious legal basis for the proposal and the fact that no appreciable proportion of benefit can accrue from the proposal Swiftnet proposes it be abandoned and the previous position maintained. The revenue from non-EEA countries enables Swiftnet to provide targeted and specific services for particular UK communities and does provide a water-bed effect.

### **Consumer Harm caused by MTRs**

10. It is orthodoxy in parts of the UK industry and its regulator that there is no dominance in the Retail Origination Market in mobile in the UK. That is very probably belied by the fact that there is, in Swiftnet's estimation at the present time, not one but two retail origination markets. The position of no dominance relates to in-bundle minutes and that is a market where it is more difficult to oppose the imposition of SMP Conditions relating to charge control on MTR.
11. The second market, however, is out of bundle minute charging provisions. It is clear that for the last considerable time in which there has been SMP control over MTR rates there has been no progress whatsoever dealing with periodic, but sometimes extremely obvious, abuses in the out of bundle minutes market. That there is abuse is clearly seen from the way in which operators are able to act. They may, in effect, charge what they like. What this means is that a new service which needs to persuade customers of an existing network trying to contact its customers is faced with exorbitant and indeed super high charges to call its numbers. There is no let or hindrance on this and any suggestion that any consumer makes buying decisions on the basis of anything that inclusive data and minutes is cloud cuckoo land.
12. This all, however, has a significant deleterious effect on smaller operators. Their services often put out of bundle so that their end-users when calling a smaller more novel service are faced with bill shock and surprise from what seems like a perfectly normal range for UK mobile where they are charged 10, 20 or even 100 times the expected charge. Calling parties will often remark to those they call that they will not call against and pay exorbitant rates.
13. Yet the operators of the new smaller service does not share in the super amounts being taken off the retail customer. This leads to an abuse in the market, particularly as it is also clear from large amounts of evidence that the larger operators seem to have extreme difficulty communicating to customers exactly what charges are for certain number ranges. There have been examples recently of search engines to identify in and out of bundle mobile ranges being entirely wrong and led to a significant bill shock.
14. In the circumstances, in order to benefit the consumer it should where the originating operator does not include the terminating operator's network as an in-bundle minute be a mechanism whereby an incentive is placed on the originating operator to reduce what is charged. That could be done through a perfectly lawful mechanism of appropriate ladder pricing. The terminating operator in those circumstances should be permitted under the SMP rules to prevent distortions and, more importantly, the destruction of new competitive services to receive greater than MTR.
15. In a situation where clearly Ofcom is trying to look at the adaptation of these rules to provide consumer benefit, an area which is more than worthy of consideration and where action should be taken to prevent both the customer being charged more and a disincentive to call new services being imposed whilst no benefit from the overall size of the call charge is passed on.