

# OFCOM CONSULTATION: REVIEW OF GENERAL CONDITIONS OF ENTITLEMENT - CONSULTATION ON THE GENERAL CONDITIONS RELATING TO CONSUMER PROTECTION

## RESPONSE BY SKY

### EXECUTIVE SUMMARY

- 1.1 This submission provides Sky's response to Ofcom's consultation entitled 'Review of the General Conditions of Entitlement' published on 20 December 2016 ("**Consultation**").<sup>1</sup>
- 1.2 Ofcom's consultation proposes significant changes to the consumer protection aspects of the current general conditions of entitlement ("**General Conditions**" or "**GCs**"), culminating in a proposal to replace the General Conditions with a new set of conditions as set out in Annex 12 of the Consultation (the "**Revised GCs**").
- 1.3 Sky welcomes many of Ofcom's stated intentions for the review of the General Conditions including making the rules clearer, making it easier for providers to comply, removing any redundant rules, and ensuring they remain fit for purpose for both consumers and providers.
- 1.4 Sky is concerned that Ofcom's proposals in some cases fail to achieve its desired outcome and Ofcom is proposing changes which, far from making the rules clearer, would increase regulatory uncertainty, complexity and costs. Ofcom has considered opportunities for deregulation but come to the view that most of the consumer protection conditions are "*not good candidates for significant deregulation*". At the same time, Ofcom is currently proposing a significant extension to regulation in the policy areas of switching and automatic compensation which, taken together with the changes proposed in this Consultation, represent a significant overall increase in regulation.
- 1.5 It is important that the references to deregulation, clarity and simplicity in the Consultation, which are given such prominence, do not obscure what is actually happening at this time which is a series of proposals that will significantly increase the scope and complexity of regulation.
- 1.6 Ofcom's proposals are wide-reaching and constitute a number of significant modifications to the GCs and the introduction of new conditions. In respect of a number of these proposals Sky is concerned that Ofcom has failed to fulfil its duties under section 3(3) of the Communications Act 2003 (the "**Act**"), to satisfy the test under section 47(2) of the Act and to apply its stated general regulatory principles of "*(a) operating with a bias against intervention, (but with a willingness to intervene firmly, promptly and effectively where required); (b) ensuring that our interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; (c) always seeking the least intrusive regulatory mechanisms to achieve our policy objectives; and (d) intervening where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve.*"
- 1.7 Other than in respect of its proposals relating to complaints handling and ADR, Ofcom has not presented any specific evidence of consumer harm relating to changes proposed in the Consultation, nor demonstrated to a satisfactory level that the changes are objectively justifiable, proportionate, consistent or transparent. Instead, Ofcom simply relies on high-level generic statements at the end of each section, such as an assertion that the changes are transparent as they are set out in the Consultation (a circular argument) and the effects are clear from the wording of the Revised GCs themselves (seemingly relying on a grasp of the English language to achieve transparency).

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<sup>1</sup> All references to paragraphs, figures, annexes and footnotes are to those in the Consultation unless stated otherwise.

**OFCOM CONSULTATION: REVIEW OF GENERAL CONDITIONS OF ENTITLEMENT -  
CONSULTATION ON THE GENERAL CONDITIONS RELATING TO CONSUMER PROTECTION**

**SECTION 1: INTRODUCTION**

1.1 Sky's response to the Consultation comprises the following sections:

Section 2: Extension of General Conditions to services other than fixed line or mobile voice and data services

Section 3: Contract Requirements

Section 4: Calling Line Identification Facilities

Section 5: Switching – Removal of Ban on Reactive Save

1.2 In this submission Sky addresses a number of specific concerns it has with the proposed Revised General Conditions:

- (a) the proposed extension of the scope of the General Conditions to services other than fixed or mobile voice and fixed broadband services;
- (b) removing the current guidance on General Condition 9.6; and
- (c) Ofcom's proposals to remove the ban on reactive save activity but not to reflect this change in other relevant Revised General Conditions.

## SECTION 2: EXTENSION OF GENERAL CONDITIONS TO SERVICES OTHER THAN FIXED LINE OR MOBILE VOICE AND DATA SERVICES

- 2.1 Sky is concerned by Ofcom's proposal to "extend certain conditions which currently apply only to call services to other forms of electronic communications services"<sup>2</sup>. It is wholly unclear from the Consultation what other services Ofcom has in mind. This is an unsatisfactory position. Contrary to Ofcom's stated aim of clarifying the General Conditions and making it clear on the face of each condition which services that condition applies to, Ofcom's approach results in complete uncertainty about the scope of the proposed General Conditions as well as a fail to adhere to its duty under section 3(3) of the Act and its stated general regulatory principles of regulating transparently. Further, Ofcom's proposal is insufficiently articulated to allow stakeholders a reasonable opportunity to assess the impact of Ofcom's proposed changes and comment on them.
- 2.2 Sky infers from Ofcom's consultation on triple play switching in 2016 (the "**Switching Consultation**")<sup>3</sup> that Ofcom intends to extend the General Conditions to include pay TV services. If this is indeed Ofcom's intention, Ofcom's proposal is not compatible with either the common European regulatory framework for electronic communications services ("**ECS**") and networks ("**CRF**") or the implementing domestic legislation.

### The inclusion of pay TV would be inconsistent with the CRF

- 2.3 Ofcom states in the Consultation that:
- "The terms "electronic communications network" and "electronic communications services" are defined in the Framework Directive (Article 2) as interpreted in subsequent case-law."*<sup>4</sup>
- 2.4 Contorting the interpretation of "electronic communications services" to include all pay TV services would not be compatible with the definition in the Framework Directive or the relevant case law.
- 2.5 The CRF sets out a regulatory framework for electronic communications services. It seeks to harmonise the regulatory regime across Member States and establishes limits on national regulatory authorities' powers (once implemented into domestic law). Ofcom's powers to regulate electronic communications services are derived from, and limited by, the CRF.
- 2.6 It is wholly incompatible with the CRF for Ofcom to extend the application of the General Conditions to include all pay TV services. Neither the Framework Directive nor any subsequent case-law indicates that the definition of electronic communications services extends to all pay TV services.
- 2.7 Article 2 of the Framework Directive states the following as regards electronic communications networks and electronic communications services:

*"electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio,*

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<sup>2</sup> Paragraph 1.12 of the Consultation.

<sup>3</sup> See paragraph 2.28 of Ofcom's consultation "Making switching easier and more reliable for consumers. Proposals to reform landline, broadband and pay TV switching between different platforms." [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0030/58845/making-switching-easier.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0030/58845/making-switching-easier.pdf).

<sup>4</sup> Footnote 17 of the Consultation.

*optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;*<sup>5</sup>

*“electronic communications service’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;”<sup>6</sup>  
[emphasis added]*

2.8 There is clear differentiation in the CRF between the regulation of transmission and the regulation of content services<sup>7</sup>. To stress this distinction, the CRF identifies services falling outside the scope of the CRF, which include broadcasting content and web-based content<sup>8</sup>.

2.9 This distinction is evident in each of the Directives that make up the CRF and is most clearly set out in the Access Directive:

*“services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.”<sup>9</sup>*

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<sup>5</sup> Article 2(a) Framework Directive

<sup>6</sup> Article 2(c) Framework Directive

<sup>7</sup> Recital 5, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the “Framework Directive”). See also recital 2, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”) and recital 20, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (the “Authorisation Directive”). *“The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives [...] It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”* (emphasis added). (Recital 5, Framework Directive).

<sup>8</sup> *“The definition of ‘information society service’ in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content”* (emphasis added). (Recital 10, Framework Directive).

<sup>9</sup> Recital 2, Access Directive.

2.10 The Act, which transposes the CRF, echoes this distinction between transmission and content, defining an ECS as:

*“a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.”<sup>10</sup> (emphasis added.)*

2.11 In order for a service to be deemed an ECS, and therefore within Ofcom’s power to regulate, Ofcom must be able to answer one of two questions affirmatively:

- (a) Does the service consist entirely in the conveyance of signals by means of an electronic communications network? or
- (b) Does the service have as its principal feature the conveyance of signals by means of an electronic communications network?

2.12 Ofcom must also be able to answer one further question in the negative:

- (a) Is the service in question a content service?

2.13 Ofcom has not sought to undertake this analysis in respect of any of the additional services over which it asserts it has jurisdiction to impose General Conditions<sup>11</sup>.

### **Ofcom’s position is not supported by the case law**

2.14 There is nothing in the applicable case law that changes the legal test. In fact, the case law simply provides further guidance as to how to apply the test.

2.15 In the 2013 *Hilversum*<sup>12</sup> case cited by Ofcom in the Switching Consultation<sup>13</sup>, the question raised was whether Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of free to air radio and television channels via a basic cable package falls within the definition of an ECS.

2.16 In considering the question before it, the Court of Justice of the European Union (“**CJEU**”) noted the definitions set out in Articles 2(a) and 2(c) of the Framework Directive, the fact that Recital 5 specifies that the regulation of transmission should be separated from the regulation of content, and that the CRF does not cover the content of services delivered over electronic communications networks using an ECS, such as broadcasting content.

2.17 The CJEU noted that a basic cable package would fall within the definition of ECS only in so far as that service includes the conveyance of signals on the cable network<sup>14</sup>. However, in its final conclusion, and the operative part of the judgment, the CJEU notes that the service in question would only fall within the scope of an ECS in so far as that service entailed primarily the transmission of television content on a cable distribution network to

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<sup>10</sup> Section 32(2) Communications Act 2003. “Content service” is subsequently defined by section 32(7) as “so much of any service as consists in one or both of the following – (a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network; (b) the exercise of editorial control over the contents of signals conveyed by means of such a network”.

<sup>11</sup> Ofcom states that the analysis in the Consultation constitutes Ofcom’s impact assessment (paragraph 2.35) but there is no such analysis in the Consultation relating to the extension of the definition of ECS.

<sup>12</sup> Case C-518/11 *UPC Nederland BV v Gemeente Hilversum*, Judgment of 7 November 2013 (“*Hilversum*”).

<sup>13</sup> Paragraph 2.28 of the Switching Consultation.

<sup>14</sup> See paragraph 44, *Hilversum*.

the receiving terminal of the final consumer<sup>15</sup>. Accordingly, if the primary purpose of the service in question had been anything other than the transmission of television content (i.e. the conveyance of signals), it would not have been an ECS.

### **Sky's Pay TV content service is not an Electronic Communications Service**

2.18 For General Conditions to be applicable to pay TV services as an ECS, Ofcom must satisfy itself of the following:

- (a) that the service in question is not a content service. Both the CRF and the Act are clear – where a pay TV service is a content service, it is not an ECS. According to the case law, where a service includes content produced by the service provider and/or content over which the service provider has editorial responsibility that service is a content service, and is therefore excluded from the definition of an ECS<sup>16</sup>;
- (b) that the service is wholly or mainly an ECS. Where a number of services (some of which are an ECS and some of which are neither an ECS nor a content service) are combined, Ofcom must satisfy itself that the ECS element of the service is the principal feature of that service. If not, the overall service cannot be deemed an ECS.

2.19 It is clear, therefore, from the legislation and the case law that the status of each relevant service (as an ECS or otherwise) must be determined on a case by case basis. Ofcom has, however, made no attempt to conduct such an assessment. Had Ofcom undertaken such an analysis, it would become readily apparent that content services like Sky's pay TV service do not fall within the scope of the definition of an ECS. Ofcom does not therefore have the power to regulate such services in the way proposed. Until Ofcom undertakes this analysis as regards every service provided by communications providers and to whom it wishes to extend the General Conditions, under the current proposals those providers will have no certainty as to whether the General Conditions are applicable to their services or not.

### **Impact of Ofcom's position**

2.20 Quite aside from the question of legal interpretation, Ofcom's proposed changes to the scope of services covered by the General Conditions would not achieve its objective of clarifying the General Conditions. Ofcom's stated intention was to make it clear on the face of each condition which services that specific condition applies to. However, the consequence of Ofcom's approach to the definition of ECS would be to remove all legal certainty for communications providers.

2.21 Rather than clarify the services to which the General Conditions apply, if implemented, Ofcom's proposals would create further confusion. The definition of "Communications Provider" in the General Conditions is dependent on the definition of ECS; however, Ofcom has made no attempt at specifying which services it considers fall within that definition.

2.22 If Ofcom intends to extend the scope of the General Conditions to other services (as appears to be the case from paragraph 1.2 of the Consultation), Ofcom should consult on this. In particular, it is for Ofcom to set out which services it considers to be caught by the definition of ECS and why.

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<sup>15</sup> See paragraph 47, *Ibid*.

<sup>16</sup> See further the Advocate General's opinion at paragraph 35 in Case C-475/12 – *UPC DTH Sarl v Nemzeti Media – es Hirkozlesku Hatosag Elnokhelyettese*.

## SECTION 3: CONTRACT REQUIREMENTS

3.1 Sky does not agree with Ofcom’s proposal to incorporate a specific aspect of its guidance on ‘material detriment’ and the application of GC9.6 to mid-contract price rises (“**Guidance**”) into the Revised GCs (C1.7) and subsequently withdraw the rest<sup>17</sup>. Further, Sky is concerned that in making its proposal Ofcom has deviated from the language of the Guidance and is seemingly seeking to extend the scope of the Revised GC to apply to a broader category of charges without providing any evidence of harm or consulting on this specific issue, which could have an adverse impact on a provider’s ability to improve its services.

### Withdrawing guidance

3.2 Ofcom says that revising the general condition and removing the Guidance will make “it easier for communications providers to set out processes for compliance, and to ensure compliance.”<sup>18</sup>

3.3 Whilst the Guidance provides clarity and certainty for industry and consumers on Ofcom’s interpretation of GC9.6 and its expectations with regards to:

- (a) the format and content of price change notifications, and
- (b) the processes and procedures of communications providers (“**CPs**”) in implementing them,

by virtue of not being incorporated into the General Conditions themselves it remains a versatile framework for CPs to work with.

3.4 Given the consequences of non-compliance, incorporating any aspect of guidance into the general conditions is a significant step and should only be done where Ofcom has (i) consulted fully on the implications, (ii) complied with its duties under section 3(3) of the Act and its stated general regulatory principles, and (iii) satisfied the test under section 47 of the Act.

3.5 Sky notes that Ofcom states in the Consultation that it is not proposing to change its existing policy towards mid-contract price rises.<sup>19</sup> In light of this, if Ofcom implements its proposals stakeholders will be left in the uncertain, and wholly unsatisfactory, position whereby Ofcom has removed the Guidance but said its interpretation of the requirements of the GC remains the same. If Ofcom’s policy is not changing, the Guidance should remain in place.

3.6 It is hard to see how Ofcom’s proposals achieve its stated aim of making “it easier for communications providers to set out processes for compliance, and to ensure compliance.”<sup>20</sup>. Instead of making it easier for CPs to comply, and therefore Ofcom to take enforcement action for non-compliance, the absence of the Guidance will make it harder for all stakeholders to know where they stand. For example, it is unclear what provision of the Revised GC would be breached if a provider, contrary to the Guidance, did not include reference to the right to terminate within the main body of the notification and instead placed this information behind a link.

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<sup>17</sup> Paragraph 4.17 of the Consultation.

<sup>18</sup> Paragraph 4.20 of the Consultation.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

## Extending the scope of the Guidance/Revised GC

- 3.7 Furthermore, Ofcom has transposed the wording of the Guidance into its Revised GC (C1.7) in a manner which significantly extends its scope. The Guidance states that it applies to *“any increase to the agreed core subscription price”*<sup>21</sup>. However, the proposed C1.7 applies to *“any increase to the sum that the Subscriber must pay to the Regulated provider at monthly or other regular intervals...”*
- 3.8 The concept of ‘core subscription price’ is clearly targeted at the regular (typically, monthly) subscription fee the customer pays to their CP for an inclusive package of services or features. This is supported by Ofcom’s statements in the Guidance about such price being *“one of the most important factors in the subscriber’s choice of contract”* and *“the most important aspect of one of the key terms of the contract”*<sup>22</sup>. However, *“any increase to the sum that the Subscriber must pay to the Regulated provider at monthly or other regular intervals...”* is a much broader concept. This could include the price a customer pays on a monthly or regular basis for an optional service or feature they have chosen to add to their ‘core subscription’ either for a fixed period of time or on an ongoing monthly rolling basis (for example, a monthly charge for a voicemail service).
- 3.9 This significant extension is at odds with Ofcom’s stated intentions to make the rules clearer, make it easier for providers to comply and deregulate where appropriate. Despite its statutory duty and stated general regulatory principles, Ofcom has not presented any evidence of consumer harm relating to changes to charges outside the ‘core subscription price’, has not consulted on this change nor demonstrated that it is objectively justifiable, proportionate, consistent or transparent.
- 3.10 Sky assumes this extension is unintended and, if Ofcom were minded to implement its proposal, would strongly urge Ofcom to revert to the original language of the Guidance.

## Extension to all subscribers

- 3.11 Sky notes that Ofcom proposes extending the scope of GC9.6/C1.7 to apply to all subscribers instead of just consumers and small business, therefore bringing within scope all contracts with all medium and large businesses<sup>23</sup>.
- 3.12 Sky strongly objects to this proposed extension and Ofcom has, again, failed to present any evidence of harm justifying this regulatory interference, nor has it demonstrated that such interference would be proportionate. Furthermore, Ofcom’s 2014 consultation in respect of the Guidance was focussed solely on consumers and small business customers. Other categories of customer were not included in the scope of that consultation and providers were therefore not given the opportunity to scrutinise or comment on the proposals which led to the Guidance being issued and which would now result in the introduction of a Revised GC.
- 3.13 As Ofcom notes at paragraph 4.19, larger businesses often have strong bargaining powers and enter into contracts on a negotiated basis. This is the premise for UK legislators not applying a number of consumer protection measures to this group of customers<sup>24</sup> and

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<sup>21</sup> Paragraph A1.10 of the Guidance.

<sup>22</sup> *Ibid.*

<sup>23</sup> Paragraph 4.19 of the Consultation.

<sup>24</sup> For example, the ‘fairness’ requirements set out in the Consumer Rights Act 2015, implementing Directive 2001/83/EU of the European Parliament and of the Council of 25 October 2011 the Consumer Rights on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

Ofcom has failed to demonstrate why it considers this regulatory interference with the fundamental legal principle of 'freedom of contract' is needed or justified.

- 3.14 Ofcom appears to attempt to address these concerns in the Consultation by saying *"In considering cases under this proposed condition and whether subscribers have experienced material detriment, we will take into account the circumstances in which a larger business has entered into a contract and the nature of the contract ..."*<sup>25</sup> However, this statement provides no certainty for stakeholders. If Ofcom intends to extend the scope of GC9.6/C1.6 and the Guidance to large businesses it should consult fully on this specific proposal in order to give stakeholders the opportunity to assess Ofcom's evidence of harm and related cost-benefit analysis justifying such a regulatory extension. Conversely, if, by making this statement in the Consultation, Ofcom is indicating that it does not intend to enforce GC9.6/C1.7 against such large business customers in practice Sky would urge Ofcom to make this clear in any final statement it issues. The statements at paragraph 4.19 are vague and contradictory. Yet again, they do not make the rules clearer or make it easier for providers to comply.
- 3.15 Furthermore, Sky is concerned about Ofcom's inconsistent interpretation of the proposed definition of 'Subscriber' in order to achieve its objective. As Ofcom has not proposed any changes to the definition of 'Subscriber' in respect of this GC/Revised GC, it is unclear to Sky on what basis Ofcom considers it has the power to extend this GC in the manner proposed.
- 3.16 'Subscriber' is defined as *"any **person** who is party to a contract with a provider of Public Electronic Communications Services..."* (emphasis added) The term 'person' is undefined within both the General Conditions and Revised General Conditions but is assumed to reflect the ordinary dictionary definition (a human being rather than corporate body). If, by virtue of its comments at paragraph 4.19 of the Consultation, Ofcom is now interpreting the definition of 'Subscriber' to include any person or corporate body that subscribes to public electronic communications services it is unclear to Sky how this would differ from the definition of 'Customer' in the Revised GCs<sup>26</sup>.
- 3.17 If Ofcom is seeking to extend the definition of 'Subscriber' it must make this clear in the Revised GCs and conduct a case-by-case assessment of every use of that term to ensure it is not inadvertently extending the scope of regulation to a new category of end users. If necessary, alternative definitions should be introduced to encompass the concepts of a consumer, small business, large business and all end users/customers.

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<sup>25</sup> Paragraph 4.19 of the Consultation.

<sup>26</sup> 'Customer' is defined as *"in relation to a Communications Provider, means the following (including any of them whose use or potential use of the network or service is for the purposes of, or in connection with, a business):*

- a) *the persons to whom the network or service is provided in the course of any business carried on as such by the Communications Provider;*
- b) *the persons to whom the Communications Provider is seeking to secure that the network or service is so provided;*
- c) *the persons who wish to be so provided with the network or service, or who are likely to seek to become persons to whom the network or service is so provided;"*

## SECTION 4: CALLING LINE IDENTIFICATION FACILITIES

- 4.1 Under Revised GC C7.5, Ofcom proposes to regulate retail prices in respect of charges for calling line identification facilities.
- 4.2 Sky fundamentally objects to the principle of Ofcom taking such an interventionist measure, other than where absolutely necessary to address a specific and identified consumer harm arising from such charges and where markets for those services are not effectively competitive. Whilst Ofcom has explained its rationale as to why it still considers it important that all customers have access to calling line identification facilities it does not follow that such access must be free of charge.
- 4.3 As Ofcom notes, many operators already do not impose additional charges for the provision of calling line identification facilities<sup>27</sup> and Sky considers that, in the absence of any regulatory ban on such charges, competition would continue to dictate that additional charges for such facilities remain low (or are gradually eradicated).
- 4.4 Conversely, if Ofcom wishes to impose a ban on retail charges for the provision of calling line identification facilities Sky would strongly urge Ofcom to apply this principle first to the wholesale provision of such services and impose a ban on those charges<sup>28</sup>. Failing to do so will simply allow wholesale providers to profit from the provision of a service that Ofcom considers is vital for all end users without allowing retail communications providers the option of passing these charges onto their customers.
- 4.5 Due the inevitable increased take-up of such services that would follow any regulated removal of retail charges if Ofcom's proposals are implemented, this revenue gap would increase and it is highly likely that this would result in consumers suffering the impact through higher overall bills as a result of these wholesale costs being passed on through their monthly subscription prices.

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<sup>27</sup> Paragraph 10.34 of the Consultation.

<sup>28</sup> For example, BT Openreach applies an annual rental charge per line with active caller ID.

## SECTION 5: SWITCHING - REMOVAL OF BAN ON REACTIVE SAVE

- 5.1 Sky welcomes Ofcom’s proposal to remove the ban on reactive save currently in GC 22.15 and Ofcom’s recognition of the value of reactive save activity to consumers.
- 5.2 However, as Ofcom notes<sup>29</sup>, GC1.2 requires CPs to treat any information obtained in confidence before, during or after negotiations for network access as confidential and to use such information solely for the purpose for which it was acquired. Ofcom acknowledges in the Consultation that this has been found by the UK courts to be sufficiently broad as to apply to certain switching scenarios where customer information is passed from the GP to the LP, and expressly accepts this could include reactive save activity generally<sup>30</sup>.
- 5.3 Ofcom indicates in the Consultation that it intends not to make enforcement of General Condition 1.2 an administrative priority<sup>31</sup>. However, the principles of administrative law mean that Ofcom cannot fetter its discretion by indicating that it will not enforce a General Condition<sup>32</sup>; for as long as GC1.2 is unchanged, Ofcom must be prepared to assess individual cases on their merits. Accordingly, despite Ofcom’s statement, a provider’s failure to comply with GC1.2 will remain liable to legal challenge and it is not clear to Sky that it would be open to Ofcom to refuse to accept a dispute on this issue<sup>33</sup>.
- 5.4 This statement provides no certainty for stakeholders (Ofcom’s enforcement priorities can change at any time, without consultation or notice) and fundamentally undermines Ofcom’s proposal in respect of GC22.15 and its ultimate aims of making the General Conditions clearer, more practical and easier for communications providers to comply with them.

**Sky**

**March 2017**

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<sup>29</sup> Paragraph 11.31 of the Consultation.

<sup>30</sup> At paragraph 11.32 of the consultation Ofcom says “*However, insofar as it [GC1.2] does apply to reactive save activity generally...*”

<sup>31</sup> Paragraph 11.32 of the Consultation.

<sup>32</sup> *Lavender v Minister of Housing and Local Government* [1970] 1 WLR 1231; *British Oxygen v Minister of Technology* [1971] AC 610.

<sup>33</sup> A refusal to accept a dispute could itself be challenged. Section 186 of the Act sets out the narrow circumstances in which Ofcom can refuse to accept a dispute.