



Internet Telephony Services Providers' Association

ITSPA response to European Electronic Communications Regulatory Framework: Post-Implementation Review Questionnaire

About ITSPA

The Internet Telephony Services Providers' Association (ITSPA) represents over 80 UK businesses involved with the supply of next generation communication services over data networks to industry and residential customers within the UK. Our traditional core members are VoIP providers. ITSPA pays close attention to both market and regulatory framework developments on a worldwide basis in order to ensure that the UK internet telephony industry is as competitive as it can be within both national and international markets.

A full list of ITSPA members can be found at <http://www.itspa.org.uk/>

Introduction

The Internet Telephony Service Providers' Association (ITSPA) welcomes the opportunity to respond to the EU Electronic Communications Regulatory Framework Post-Implementation Review Questionnaire. As a trade association which represents over 80 members operating next generation communications services over data networks, we have responded to highlight one specific point related to the transposition of Article 30 of the Universal Service Directive rather than answering each question as these are of limited relevance to our members. Please find below our submission to Ofcom on the subject of Number Portability.

Number Portability – Issues of Concern

Dear Chris

As part of the Internet Telephony Service Providers' Association's ("**ITSPA's**") submissions to the Office of Communications ("Ofcom") on the Strategic Review of Digital Communications ("**Strategic Review**"), we mentioned in our bi-lateral meeting of 12th May 2015 that we would respond in more detail on the subject of Number Portability, which is a major issue of concern amongst our membership. Here follows that submission and we hope this can form the basis of a constructive dialogue with you and your colleagues to help resolve the ongoing problems around this complex area. Our wider submission on other issues concerning the Strategic Review will follow.

Rates and Charges

ITSPA notes that the substantive issue of the economic model used to calculate the Average Porting Conveyance Charge ("**APCC**") levied by the Donor Communications Provider ("**DCP**") to the Recipient Communications Provider ("**RCP**") was dealt with by Ofcom in "*Porting charges under General Condition 18: Guidance on the setting of porting charges in compliance with GC18 and consultation on a new mobile donor conveyance charges Direction*" published on 29th September 2014. ITSPA welcomed this guidance at the time. We also note that the interpretation of this has been challenged by Gamma Telecom Holdings Limited ("**Gamma**") and Vodafone Limited in an ongoing dispute under Section 185



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of the Communications Act 2003.¹ To that end, there is little point in regurgitating the merits of the dispute and the issues at stake as they are well known and being dealt with accordingly.

Legislative Background

Before we discuss the issues that ITSPA members face in establishing Number Portability, we feel it would be beneficial to outline our interpretation of the regulatory background.

Number Portability is the right for an end user to change provider (i.e. the entity with which they have contracted to for the provision of a communications service) and retain the telephone numbers which they have been sub-allocated from the National Telephone Numbering Plan.

This right is clearly enshrined in Article 30 of Directive 2002/22/EC of the European Parliament and of the Council of 7th March 2002 on universal service and end users' rights relating to electronic communications and services [as amended] (the "**Universal Service Directive**")

Article 30 of the Universal Service Directive states;

- 1 Member States shall ensure that all subscribers with numbers from the national telephone numbering plan who so request can retain their number(s) independently of the undertaking [..]

[..]

- 4 Porting of numbers and their subsequent activation shall be carried out within the shortest possible time. In any case, subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within one working day. [..] Member States shall ensure that appropriate sanctions on undertakings are provided for, including an obligation to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf.

Ofcom is, for the purposes of the Universal Service Directive, the competent national regulatory authority established by our Member State; the relevant legislative instrument in the United Kingdom is the Communications Act 2003 (the "**Act**"). Section 45 of the Act grants Ofcom the power to set General Conditions of Entitlement ("**GCs**") of which GC18 relates to Number Portability, ostensibly as Article 30 of the Universal Service Directive is considered by Ofcom to meet the test in Section 51 of the Act;

- (1) Subject to sections 52 to 64, the only conditions that may be set under section 45 as general conditions are conditions falling within one or more of the following paragraphs—
 - (a) conditions making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services;

¹ CW/01161/07/15 "Dispute brought by Gamma against BT in relation to BT's average porting conveyance charges".



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(b) conditions making such provision as OFCOM consider appropriate for securing service interoperability and for securing, or otherwise relating to, network access;

[..]

Section 94-104 of the Act provide for Ofcom's powers to impose sanctions pursuant to Article 30(4) of the Universal Service Directive on entities which are not in compliance with GC18; this is a well understood procedure which we do not propose to examine in minute detail save to say that *in extremis*, Ofcom can suspend that entity's authorisation to operate a telecommunications service and fine them up to 10% of their relevant turnover.

What we see here is a very broad canvas by which Ofcom can intervene in the market to ensure that end users can change provider and retain their telephone number. The Act appears to delegate the responsibilities of this part of the Universal Service Directive through to Ofcom with little or fettering of limitation of its discretion by domestic legislation, save for the test in Section 47 of the Act which we say is no more than a limited paraphrasing of the overarching and senior requirements of Ofcom in Article 8 of Directive 2002/21/EC of the European Parliament and of the Council of 7th March 2002 on a common regulatory framework for electronic communications networks and services [as amended].

In fact, Article 30(4) goes further and states; "[..] *competent national authorities may establish the global process of porting of numbers [..]*". Given that the European co-legislators have no power over the majority of the world, the ordinary and natural meaning of "global" has to be taken as "encompassing the whole of something", in this context, on a national level.

To that end, providing that any intervention in the market does not contravene Ofcom's Article 8 Objectives in the Framework Directive, we say that Ofcom has the power to lay down highly stringent and particular rules for Number Portability, including detailed processes where it deems necessary.

Unfortunately, despite the wide ranging powers we discuss above, what we have from Ofcom is GC18 which has little or no guidance relating to the establishment of Number Portability and a regime which our members say is ambiguous and abused regularly. The process elements of Number Portability appear to have been delegated by Ofcom to the Office of the Telecommunications Adjudicators' ("**OTA's**") Number Portability Process and Commercial Working Group ("**NPPCG**") whereby there is an expectation from the regulator that the industry will sort things out itself.

ITSPA supports the notion that there are many problems the industry should be able to sort out itself; in fact, we note the jurisprudence makes reference to this, notably in paragraph 408 of [2011] CAT 24 *British Telecommunications plc and Everything Everywhere Limited vs Office of Communications* where Marcus Smith QC says, in relation to complex charging, "We consider that these difficulties are precisely the sort of difficulties that the parties should be able to resolve between themselves". This attitude is also taken by Ofcom in its approach to considering whether or not a party is in dispute for the purposes of Section 185 (or a complainant has a case pursuant to Section 94) of the Act.

Where it fails is where the industry is unable to reach agreement or make progress on matters in a reasonable timeframe and in that regard we say that the OTA NPPCG requires explicit guidance (be it delivered informally, or with statutory intervention or both) from Ofcom to resolve many of the issues we will allude to herein.



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ITSPA notes that such a "statutory backstop" has been brought in for other OTA groups working on Wholesale Line Rental by virtue of the most recent Fixed Access Market Review and we see echoes of the same logic for Ethernet in the current Business Connectivity Market Review.

If Ofcom have recognised that the OTA's forums are incapable of delivering without reinforcement in those areas, it should not be a substantial leap for Ofcom to realise that it needs the same in Number Portability; we are not aware of an ITSPA member that would class the OTA NPPCG as "effective".

Finally, we note that each of our members allocated ranges from the National Telephone Numbering Plan has been found to have Significant Market Power ("**SMP**") in relation to those ranges; in other words it has a monopoly on call termination to calls to numbers in those ranges and was considered by Ofcom to warrant such a remedy. We also note in the forthcoming wholesale narrowband market review, given previous feedback given to Ofcom by the European Commission and the construction of the recent mobile call termination charge control, that this will evolve into a fixed charge control for all such members. It begs a very simple question; if I am considered to have a monopoly in call termination to a number range, how can I not be considered to have a monopoly in the provision of Number Portability in that range and why do I not have SMP remedies? If the European Commission judge call termination to be a market warranting *ex-ante* measures as a default, how is it that the three criteria test for SMP in the market for Number Portability isn't used? Whilst we rarely wish to invite invasive regulation on our members, this point should be noted when we suggest Ofcom should issue guidance later.

We shall now discuss some specific examples of where regulatory intervention is warranted.

Establishing Number Portability

GC18.1 provides for the end user that;

The Communications Provider shall provide Number Portability within the shortest possible time, including subsequent activation, on reasonable terms and conditions, including charges, to any of its Subscribers who so request.

And GC18.5 provides the equivalent for the network operator;

The Communications Provider shall, pursuant to a request from another Communications Provider, provide Portability as soon as is reasonably practicable in relation to that request on reasonable terms [..].

APCCs and conveyance charges are dealt with further in GC18.5, however, as noted above, there is substantial guidance on this matter from Ofcom, the interpretation of which is essentially *sub judice*.

What has no clarity whatsoever is what is considered to be reasonable insofar as other terms may be offered or the timescales involved.

- In the case of a request for Number Portability from a Subscriber, what is considered to be the shortest possible time (even a benchmark time) for the purposes of GC18.1? Does this vary for a single line or a large block? In theory, with appropriate investment in systems, that time could be measured in seconds, whereas the fixed process currently is measured in weeks. This timeframe is in no small part because of historic underinvestment by British



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Telecommunications plc ("BT") in systems and their constant delays of implementing next generation technology. Given the 2013 Wholesale Narrowband Market Review removed the exclusive view of BT's Time Division Multiplexing ("TDM") network as the hypothetical reference operator it is no longer tolerable for the old timescales to stand. There is no formal Ofcom guidance on this, there is only the OTA NPPCG "manual" on Number Portability which has no status in regulation, law or, for that matter, most contracts for Number Portability.

- The last paragraph was written assuming that the DCP and RCP already have agreed terms for the provision of Number Portability, however, if they have not, what is considered "*as soon as is reasonably practicable*" for the purposes of GC18.5? Is corresponding only by Royal Mail in negotiations considered as such?² Is the industry standard contract, which we note only one for "transit" is published, *de facto* fair and reasonable, even though it is TDM heavy due to its genesis? Can a DCP or RCP insist on an Internet Protocol or TDM interconnect regardless of the consequence for the counter party? Can either insist on a direct interconnect over a transit operator? Can the RCP or DCP remove unused capacity or datafill after a period of time thus rendering a contract useless despite it not being terminated?
- If a number range (i.e. a block from the national telephone numbering plan) is hosted on a different network to that of the Original Range Holder, who is responsible for Number Portability? This is very much a live issue with the BT IPExchange product presently and Ofcom may be familiar with the so-called Scenario 7 issue, which ITSPA understands may soon be subject to a complaint under Section 94 of the Act, by one or more networks.
- BT is currently noted for its ability to "forget" it has exported a number and to drop the porting prefix, essentially returning the number to stock – and in some cases allocating it to a third party. Is this fair and reasonable behaviour for the purposes of GC18.1 and GC18.5? Is a lack of resilience i.e. not implementing transit as second choice to a resilient interconnect, or refusing to implement resilience in direct interconnects fair and reasonable? What happens if a route starts to overflow and causes the end user's new service to be deteriorated?

These are just some of the major areas of ambiguity that our members encounter on a daily basis, at considerable expense to their businesses and ultimately exploited by other operators to the detriment of an end user that is denied the ability to switch providers in a timescale they desire

Reseller Rights

Ofcom will recall correspondence and conversations between itself and the Federation of Communications Services in relation to David Stewart's letter 7th December 2012 which some members still say does not reflect the statutory position noting Section 51(1)(b) of the Act and Article 8 of the Framework Directive both being readily interpreted as offering the ability to protect wholesale competition as a means to ultimately protect the interests of end users.

For clarity, such a potentially large exercise we do not say should be considered on commensurate terms as a single line geographic number due to the volume of additional work and due diligence that is reasonably required in such an undertaking. What some of our members say is that some form of

² One ITSPA member experienced this with one potential RCP for a period of many months, for example.



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regulatory-backed *right* to change wholesale provider (which may or may not be based in the existing GC18), such as it would be, should be established to protect competition and the interests of end-users.³

It would seem opportune, if Ofcom were to take our advice herein to consult on guidance in relation to GC18, to also consider this issue properly, in conjunction with the wider industry.

Streaming Switching

Some members have noted that there appears to be a drive in the OTA NPPCG to make the order process, including validation, more streamlined. Clearly there are tangible benefits to consumers in having a more fluid market for telecommunications and reducing barriers to change, however, this can only occur if the changes protect them from fraud. There are an increasing number of examples, which, whether causation or mere correlation, following the adoption of "pre order validation" by the industry, of numbers being "stolen" through valid Number Portability processes and then used for the purposes of defrauding individuals. It is absolutely essential that these two tensions are resolved and we would suggest in its ongoing work on consumer switching (or in the guidance we ask for above) that Ofcom consider what is reasonable to identify the legitimacy of a porting request.

Direct Routing

Ofcom will be familiar with the history of top-down, regulator driven intervention in the market for Number Portability which resulted in the overturning of a 2007 Statement by Vodafone, supported by BT, at the Competition Appeal Tribunal in 2008. Since then, the industry has attempted twice to implement some form of fixed line central database and has failed.

We are aware of moves afoot to try and implement direct routing of ported calls on a bilateral basis; essentially the market is finding a way to do it itself and we would say it should be left alone on direct routing at least.

However, the porting process is inefficient and cumbersome. The UK was once the world leader in this field and is now, frankly, somewhat of an embarrassment on the world stage. Given the multi-million pound integration of systems that currently exists set against the background of massive consolidation in the market that would be brought about by the proposed BT/EE and O2/Three mergers, there will be no tolerance for a regulatory-driven, top down, big bang approach to change, nor is there currently an incentive for the larger operators to invest in making it easier for our members to win their business. The only way that change can be driven is for industry to realise it needs to change and to implement it itself. Fixed and mobile convergence will drive some change by virtue of how far advanced mobile portability is relative to fixed; however, the regulator needs to provide a gradual incentive to the fixed line industry to upgrade better systems and processes – the only way this can happen is a gradual change in the regulator dictated timescales and outcomes for Number Portability.

This incentive is well known to Ofcom; it's merely a variant of the device currently used to incentivise service improvement in BT Openreach regarding lead times and should be given serious thought and

³ Some Communications Providers have extrapolated Ofcom's position to take the stance that it should not be allowed even if the End User in question wants their reseller to change their network providing their service for their own benefit



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weight as a non-invasive means of bringing about the much needed and desired change. Ultimately, we say this is the only way a fixed-line "central database" has a chance of existing in the UK.

Conclusion

In the long term, ITSPA members still believe the porting system needs a complete overhaul in line with other countries who have developed a far superior system in both managing numbers and routing calls. We should still work to this objective and would encourage Ofcom to consider these options within its strategic review.

In the interim, there are currently serious and clear problems that are creating significant harm which urgently need to be resolved. Despite our comments herein, our members say that, where the parties in Number Portability are sensible and co-operative and follow the process, even though it is extremely inefficient and cumbersome, it "kind of works", providing everyone does their job correctly. Unfortunately, too often this doesn't happen. The problems stem from where the processes, or the regulation (or even the spirit of the regulation) are not followed – be that because technology evolves and the industry working group lags behind, or because of outright abuses. Clarity on some simple phrases in the current GC18 in the form of guidance, with more support in enforcement where it is not followed, would go a long way to fixing many of the issues our members face.

Next Steps

As part of the Strategic Review, we feel that Ofcom should consult on guidance in relation to what is considered "as soon as is reasonably practicable" and "shortest possible time" for all common scenarios for the purposes of GC18, which would include guidance on some aspects of interoperability such as transit, resilience, capacity, effective validation and many more esoteric issues we have not raised here but would be happy to elaborate on if needed.

For too long the ambiguity has been used by some entities to further their own interests at the expense of citizen-consumers and many of our members feel that Ofcom, from both a competition policy and investigations perspective, have not been active enough in ensuring the correct regulatory framework exists and transgressions are sanctioned.

ITSPA would also welcome further consideration by Ofcom around a more long term solution to Number Portability that would bring the UK up to speed with other countries around the world.

As ever, representatives of ITSPA are more than happy to discuss the issues raised herein.

A handwritten signature in black ink, appearing to read 'Peter J Farmer', written over a light grey horizontal line.

Peter J Farmer, MA MSc MBA

Director, Council Member and Chair, Industry Developments Group, ITSPA