

Consultation: Quick, easy and reliable switching

Non-Confidential Response of Gamma Telecom Holdings Limited

Introduction

1. Gamma Telecom Holdings Limited (“**Gamma**”) and its subsidiaries are wholesale and retail providers to the business market. Gamma owns and operates a Public Electronic Communications Network, providing wholesale fixed and mobile telephone and data services to around 1,200 channel partners, of which two are wholly owned subsidiaries.

Consultation response

2. This is Gamma’s response to Ofcom’s consultation of 28 September 2021 (“**the Consultation**”). In the Consultation, Ofcom set out its decision to mandate the adoption of the ‘One Touch Switch’ process (“**OTS**”) for switching of telecoms services by 3 April 2023 and to instruct the Office of the Telecommunications Adjudicator (the “**OTA**”) to convene an industry working group to implement that process.¹
3. Gamma wishes to raise four concerns in relation to the Consultation:
 - (I) the decisions contained in the Consultation to limit OTS to residential customers and not to consider the burden of adopting OTS on communications providers serving business customers (“**business providers**”) are unlawful. [REDACTED]
[REDACTED]
[REDACTED];
 - (II) that in any event, the OTA is not currently the proper forum for facilitating OTS implementation;
 - (III) that Ofcom failed to adequately consider the possibility that the costs estimates provided to it were unreliable; and
 - (IV) the cost-benefit analysis conducted by Ofcom is flawed given it is already evident that business providers will be unable to avoid OTS.

¹ Ofcom, “Quick, easy and reliable switching: Statement and consultation on a new landline and broadband switching process and improved information for mobile switching” (28 September 2021).

I. [Unlawful decisions contained in the Consultation](#)

4. Please consider this consultation response [REDACTED] in the following respects:

- a. The Consultation sets out decisively, for the first time, Ofcom's opaque, illogical and inadequately-reasoned decision to limit OTS to residential customers only.
- b. The Consultation irrationally fails to consider the costs to business providers of adopting OTS in the light of the practical necessity for business providers to adopt that process, due to:
 - i. the porous nature of the residential and business customer categories; the commercial reality is that those categories cannot be conceived as two separate 'walled gardens'; and
 - ii. the interrelation between (a) the new general rules applicable to most CPs (including business providers) and (b) the OTS conditions applicable in respect of residential customers only, which overlap extensively with – and can even be considered a specification of – the general rules.

5. The Consultation does not adequately provide Ofcom's response to matters Gamma raised in February that relate to the provision of OTS to residential customers. Accordingly, Gamma invites Ofcom to (re)consider paragraphs 30 to 49 of its response to the prior consultation.

6. [REDACTED] Ofcom complete its planned revision of the OTA terms of reference prior to it commencing work on the OTS implementation.

II. [OTA is not, in its current form, the proper venue for OTS implementation](#)

7. In the Consultation, Ofcom takes the view that that OTA is "best placed to kick start appropriate industry discussions" to develop proposals for implementation arrangements.²

² At paras 5.55-5.56.

8. Above and beyond Gamma's concerns about the decisions taken thus far, Gamma also considers that the OTA is not the proper venue at which discussions to implement OTS should be taken forward at this time. The fact that Ofcom considers it to be "best placed" because of its historic endeavours is admirable (albeit that it may reflect, in part, the lack of alternative bodies available to Ofcom). Nevertheless, we suggest the OTA is not currently well-placed for such a task. It is a body established by private bilateral arrangements, which creates a moral hazard with the potential to create outcomes that privilege the interests of the large retail providers who form its membership. The implementation of Ofcom's new requirements is an important industry-wide issue. The solutions identified by the OTA are likely to be biased towards the priorities, costs, and concerns of the larger market participants, and to fail to recognise adequately the needs of smaller, wholesale and business providers.
9. The OTA has a long history of facilitating working groups, and in the past (in certain circumstances) industry has reached consensus. However, Gamma's concern is that as matters stand, it is inappropriate to ask the OTA to facilitate a working group concerned with implementation of EU law, to which Ofcom has added a complex process decision, across the entire sector. The OTA's unsuitability for the current task is evident from the following:
 - a. The OTA's governance structure privileges 'scheme members'. All of those scheme members appear to be large, vertically and horizontally integrated providers.
 - b. The OTA has certain structural weaknesses. It lacks a statutory remit, lacks a decision making and arbitration power and also lacks adequate engagement by Ofcom in its activities. These deficiencies are likely to be magnified in a project such as the design and implementation of OTS. By way of example, Gamma has previously referred to its concern that Ofcom must engage in 'delegation not dumping' in relation to the OTA. We are concerned that the current instruction and approach from Ofcom will not result in real progress. This is especially relevant because Ofcom's original intervention with OTS was necessary because the industry (via the OTA)

was unable to agree something as simple as what constitutes a truly 'gaining provider led' process.

- c. We query whether the OTA is currently suitably resourced and equipped to convene and moderate a dialogue that fairly represents the interests of the 1,000 plus stakeholders (as is required in relation to OTS implementation).
- d. The current review being undertaken by Ofcom, as to the OTA's terms of reference demonstrates that those involved recognise a need to modernise the OTA's framework of operation. The OTA is plainly not in an appropriate structural state, despite the capabilities of its people (or willingness of some stakeholders), to carry out the work entrusted to it at the current time.

10. Each of these points is elaborated on further below.

A. The outdated governance structure of the OTA

11. The OTA is constituted by a Memorandum of Understanding ("**MOU**"), which takes the form of individual contracts between BT Telecommunications plc ("**BT**") and other scheme members. The OTA's executive members are divided into those who have entered into the MOU (a small number of large, vertically and horizontally integrated providers) ("**Scheme Members**") and "Guests" (including Gamma) who have not.³ The OTA has no adjudicatory powers, but is limited to assisting Scheme Members and making "non-binding recommendations" on issues within its purview.⁴ The task of policy development is reserved for Ofcom.⁵
12. The substantive provisions of the MOU create a two-tiered system by which large providers, who have entered into the bilateral arrangement with BT are, on paper at least, given disproportionate influence, and "Guest" providers have a second-class status. To its credit, we consider that the OTA has previously worked hard to

³ "MOU" members: BT, Openreach, Everything Everywhere, O2 (Telefónica UK), Sky UK, TalkTalk Group (signed as Carphone Warehouse, who are themselves a separate legal entity), Vodafone; "Guest" members: Century Link, Exponential-e, Gamma, Neos Networks, OVO, Virgin Media. See "Membership and meetings" section of the OTA website, available at <http://www.offta.org.uk/memberships-meetings> .

⁴ MOU, Annex 3, para 2.1.

⁵ MOU, Annex 3, para 2.2.

ensure that the interests of different stakeholders are protected. However, there are no mechanisms or safeguards to guarantee that this will be the case in the future. The moral hazard arising is evident from the following:

- a. The provisions of the MOU define the OTA's facilitation role as creating an environment in which Scheme Members (and not other communications providers) reach substantial agreement.⁶
- b. The factors (non-exhaustively) listed as those the OTA shall take into account when exercising its facilitation function make no express provision for consideration of "Guest" or other communications providers and include:
 - i. "reasonable resource constraints (including training requirements) of Scheme Members and the ability of Scheme Members to increase resources";⁷ and
 - ii. "efficiently-incurred and reasonable costs, and the need to avoid wasteful expenditure by Scheme Members".⁸
- c. Of the OTA's ten facilitation activities, eight are solely concerned with Scheme Members and none mentions "Guest" members or other communications providers.⁹
- d. The OTA "may also consult other Communications Providers, *as he sees fit* and may as appropriate take account of their views".¹⁰ However, it is not subject to any obligation, on the part of non-Scheme Member providers, to be consulted or taken into account.
- e. While the OTA is funded by Ofcom, Ofcom reclaims 50% of its costs from BT (and BT may recover such costs via product or service charges to the extent permitted by regulation rules).¹¹

B. The OTS project is inconsistent with the intended purpose and current resourcing of the OTA

⁶ MOU, Annex 3, paras 1.2 and 3.5.

⁷ MOU, Annex 3, para 3.3.1.

⁸ MOU, Annex 3, para 3.3.2.

⁹ MOU, Annex 3, para 3.6.

¹⁰ MOU, Annex 3, para 3.4.

¹¹ MOU, Annex 2, para 3.2.

13. The OTA does not have sufficient experience in the field of successfully facilitating an industry-wide dialogue about the governance around the implementation of a third-party system, with significant costs, against a backdrop of likely substantive disagreement between stakeholders. The current task is a departure from the usual exercises performed by the OTA, which focus on the consumption of regulated products by stakeholders from BT and on industry-best practice in number portability, which, ultimately is the preserve of bi-lateral contracts in any event.
14. The OTA was first established in July 2004 to facilitate implementation of the processes required to enable competitors to access BT's local loop on an equivalent basis to BT's own businesses.¹² In April 2007, due to the perceived success of the scheme, the OTA2 was formed and the remit of the OTA was modified to monitoring and facilitating improvements in all three Openreach products (local loop, wholesale line rental and number portability). The OTA publishes monthly updates on progress for those three products.¹³
15. The centrality of these three products to the OTA's functions is clear from the MOU: section 1.1 of Annex 3, setting out the vision for the OTA scheme, refers to its functions in relation to these products in four of the six provisions. The remaining two provisions (concerning its role in championing end user issues and allowing widespread participation in the scheme) are of course welcome, but also appear to be contradictory to the clauses that reserve different status to different stakeholders within the scheme.
16. Monitoring the progress of these products is a fundamentally different task to the OTS implementation project. Further, the concerns as to the OTA's partial governance structure discussed above are considerably less acute in other aspects of the OTA's work. Fixed number portability, for example, is currently subject to the contractual relationship between parties. OTA's other work streams include its role as a convening authority in 'collective-bargaining' on matters pertaining to BT Openreach's contractual relationship with its customers for the consumption of its products (where Ofcom has determined BT to have Significant Market Power).

¹² Oxera Consulting Ltd, "Vertical functional separation in the electronic communications sector: What are its implications for the Portuguese market?" (July 2009), p 100.

¹³ *Id.*, p 111.

17. These functions are quite distinct from the process of OTS design. OTS will require the establishment of new frameworks and interrelationships between all providers on the market (and likely also a third-party provider). Gamma is deeply concerned that the current direction of travel in relation to OTS suggests that OTS itself might become a major barrier to entry (by way of analogy, Gamma has made representations to Ofcom previously about how the mobile number portability regime represents just such a barrier to entry in that market). This is because the major market incumbents have the potential to dictate the terms upon which smaller third parties or entrants participate with the established incumbents by virtue of their pre-existing supply chains.
18. Gamma would like to re-iterate that the OTA is a capable convening authority, with good and knowledgeable staff, that has had a positive impact in the areas originally envisaged to be within its remit. Of the areas where the OTA has failed to make progress, many of these can be explained either by Ofcom's lack of effective delegation and continuing engagement with its projects, or a lack of any form of decision making or arbitration power vested in the OTA. With 450+ Public Electronic Communications Networks known to Ofcom, and at least 1,200 providers of Public Electronic Communications Services ("PECS"), we do not consider that it is appropriate for Ofcom to expect a body such as the OTA, with no actual adjudication, arbitration or decision-making power, to achieve unanimous agreement on a matter as complex and contentious as OTS. This problem is exacerbated in this case by Ofcom's failure to mandate a role for business providers in the OTS process. [REDACTED] Ofcom's failure to mandate a role for business providers is an error in itself. But this failure is particularly serious in light of the weaknesses in the OTA structures outlined above.

C. The opaque and unpublicised scope and processes of the OTA

19. The OTA's unsuitability for convening a project with wider sectoral impact (including impact on individual residential customers) is further evidenced by the omission of important details of the OTA's processes, structure and scope from the public record.

20. *First*, as to the OTS implementation process currently underway, it is imperative that the OTA expediently publish, in the public domain, meaningful (unredacted) minutes of meetings and ensure that due notice is given to the entire industry of upcoming events in the OTS workstream. The OTA, in our experience, currently relies on distribution lists for circulating material which are not necessarily suitable for the task at hand and Ofcom should, as the sector regulator, with potentially more reliable contact details to hand, take the lead on ensuring all potential stakeholders are identified and engaged with the OTA.
21. *Second*, the MOU has recently been removed from the public domain by the OTA and is also not available on Ofcom’s website. As such, the average customer seeking to understand the process by which their legal switching rights will be implemented would have no way to understand the institution convening that process, nor to obtain any information as to the meetings concerning it.
22. *Third*, and compounding the above, even basic information on the OTA’s website is incomplete. The sections entitled “Vision of the OTA2” and “Scope of the OTA2” – both of which, again, may be of interest to the average customer seeking to understand the process for and progress of implementation of OTS – state only that: “This section is currently under review.”¹⁴

D. The prematurity of delegation to the OTA

23. Gamma understands that Ofcom and the OTA are currently reviewing the MOU and the OTA’s terms of reference. In light of this, and the issues raised above, Ofcom’s instruction to the OTA to convene industry groups on OTS implementation is premature. Ofcom should either: (i) pause that process until the OTA is reconstituted in a manner which addresses the above concerns; or (ii) retain for itself the function of facilitating industry discussions.

III. The inadequacy, and likely unreliability, of the data used for cost-benefit analysis

24. Gamma considers that Ofcom erred in not using its statutory information gathering powers to underpin its cost-benefit analysis as set out in the Consultation. While we

¹⁴ “About us” section of the OTA website, available at <http://www.offta.org.uk/about-us>.

recognise that Ofcom does not have a statutory duty to exercise those powers, whenever it might do so, we consider it ill-advised, considering the criticisms Ofcom received in *Vodafone Limited v Office of Communications* [2008] CAT 22 to have elected not to do so.

25. In taking the approach (save in relation to one outlier) to use only informal information gathered by the OTA, Ofcom has enabled stakeholders' cognitive biases to influence its decision-making process (for example, assuming costings of a new system to be applied against all).
26. It is Gamma's understanding that Ofcom's cost-benefit analysis has its genesis in financial projections produced by working parties for (as then referred to) Option X and Option Y. The members of those groups were self-selecting based on an underlying vested interest in one or other of the two proposed processes. It should be no surprise to Ofcom that one was favoured by those that are active in the market for content provision and that their favoured process would be beneficial to their business model.
27. The lack of use of Ofcom's power in section 135 of the Communications Act 2003 (the "**Act**") also means the costs were produced without the rigour and diligence that would ordinarily be demanded by Ofcom. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
28. Additionally, Gamma is an active member of both the trade associations that Ofcom states provided costs (see Annex 6 of the Consultation). Gamma was surprised to discover this. If any costs were provided it was either not in accordance with the

governance protocols of those associations, or extrapolated in an opaque way yet still credited to them in a manner which does not reflect the true source of the costs concerned.

29. The above issues can be remedied by a simple statutory information request of those that have submitted cost information, to affirm (under penalty of contravention of section 135 of the Act) its accuracy.

IV. The inability of business providers to avoid the costs of OTS

30. Ofcom states in the Consultation that providers should take their own view as to whether they wish to participate in the process that is put in place for residential customers for business switches.¹⁶ This statement shows a lack of understanding from Ofcom of the complex supply chain in the business market.
31. Business wholesale aggregators such as Gamma purchase their access products from national network providers such as [REDACTED]. These providers also provide wholesale and retail residential products and as such will be consuming the OTS process. It is extremely unlikely that [REDACTED] will wish to develop and maintain two separate switching systems for business and residential wholesalers and therefore their customers will have to consume a single switching system regardless of the end user classification. It follows that if Gamma is forced to consume the OTS by its access providers then Gamma's channel partners, in turn [REDACTED] will have to do the same.
32. It should also be borne in mind that Openreach cannot effectively differentiate between a business and residential broadband service. This raises the question of how assets will then be identified and marked within Openreach if they cannot be classified by end user type.
33. In addition, and away from the Openreach network, providers such as CityFibre have stated in an OTA meeting¹⁸ that they will not develop two distinct systems for

¹⁶ §4.15 of the Consultation

¹⁷ It should also be emphasised that by no means do all providers of PECS use Gamma and nor do all of Gamma's channel partners consume solely from Gamma, which means that their costs could be magnified by exercising choice of wholesale providers.

¹⁸ Switching and Porting Governance All Hands meeting held on the 14th October 2021

business and residential. Thus, a business only provider buying access products from CityFibre will have to consume OTS.

34. The above clearly indicates that any system and process designs for OTS will have to consider the needs of business switching and that the participation in OTS by business providers may not be an option in many cases.
35. Notwithstanding the above, Ofcom has stated that participation in the system will be 'optional'. On that basis, the OTA may conclude that business providers will have to participate in OTS (as a question of fact) while also focussing all of its attention on systems and processes to enact residential switching.
36. That outcome would be irrational and unfair yet would appear to be consistent with Ofcom's intention that business costs should not be included in Ofcom's assessment on the (claimed) ability of business providers to choose to opt in or out of OTS.
37. Gamma currently only consumes access products provided on the Openreach network. Since June 2015 we have employed the Gaining Provider Led ("**GPL**") process, co-incidentally a process referred to by Ofcom as the 'one touch' process.¹⁹
38. The consumption of the GPL process was, for all practical intents and purposes, essential because of a) our suppliers' adoption and subsequent availability of a single switching solution provided to Gamma, and b) our inability reliably to differentiate between processes based on number of employees of an end customer with whom we did not have a direct relationship. Therefore, since 2015, the GPL process has been baked into our business-as-usual switching systems and processes. Additionally, our partners and direct customers have enjoyed the benefit of seamless switching for several years on the Openreach network supplied products.
39. The removal of a seamless switching mechanism will render our existing processes and systems ineffective if we choose not to adopt OTS. In effect, we will have to treat a migration within products on the Openreach network in the same way that we would manage a move from a non-Openreach network; that is, utilising a 'provide and cease' process. Not only can this result in the end user having to pay for a new line and overlapping rentals but it also extends the lead time for provision

¹⁹ <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2015/easier-bb-switching>

- due to the need for a new installation of a circuit. Surely the purpose of making switching easier is to reduce cost and disruption to the end user, not to increase it. Gamma is concerned that it will have the opposite effect in relation to its customers.
40. The change to existing processes and systems to consume the same access products will result in significant development and training costs throughout the supply chain.
 41. Thus, business providers will incur significant and unavoidable costs whether they consume the OTS or not. Ofcom's assertion that business providers can avoid these costs through inaction is incorrect.

V. Conclusion

42. For the reasons set out above [REDACTED], Gamma considers the Consultation to contain unlawful decisions, which are based on cost-benefit analysis conducted using unreliable data; to propose to implement those decisions in an inappropriate way, through the OTA in its current guise; and resting on the false premise that business providers have an option as to whether to consume OTS.
43. In the circumstances, the right way forward is for Ofcom, as a matter of urgency, to direct the OTA to invite business providers (including Gamma) to participate in the governance structure and in all working groups concerning OTS on an equal basis (and to ensure that the process of implementation does not discriminate in favour of any stakeholder).