



Anne Hoytink
Consumer Policy
Riverside House
2A Southwark Bridge Road
London SE1 9HA

02 May 2008

Dear Anne,

Protecting consumers from mis-selling of mobile telecommunications services

I have pleasure in attaching Hutchison 3G UK Ltd's ("3") response to Ofcom's consultation on options to prevent problems with mis-selling and cashback issues in the mobile retail market.

As Ofcom is aware 3 has, for some time, been concerned to address instances of mis-selling in the mobile market. Since 2006, 3 has been at the forefront of developing policies to address mis-selling through the application of detailed and stringent minimum business terms for retailers trading on behalf of 3.

Whilst 3 has strong reservations about the proposals outlined in the consultation, we very much welcome Ofcom's approach to developing policy proposals in this area, which we believe is an example of good practice in the development of regulatory policy and which we hope Ofcom will adopt in future workstreams.

3 would be happy to meet to discuss our submission prior to Ofcom issuing a final statement. In the meantime please do not hesitate to contact me if you have any questions or points of clarification.

Yours sincerely,

Julie Minns
Head of Regulatory and Public Policy



Protecting consumers from mis-selling of mobile telecommunications services

Response by Hutchison 3G UK Ltd (“3”)

1. 3 was the UK’s first 3G network offering national coverage for calls and texts, and has over 90% population coverage for 3G services. As we consolidate our radio access network with T-Mobile we expect to reach almost complete UK population coverage for 3G by the end of 2008. 3 has over 3 million active customers in the UK and over 16 million worldwide.
2. 3 was licensed by the UK government in 2000 specifically to stimulate competition in the mobile market. As the new entrant with no established retail base, 3’s services were, until recently, predominantly sold through independent retailers. During 2007 3 embarked on the most ambitious retail expansion ever seen in the UK telecoms market opening an average of 15 retail stores a month, and enabling 3 to reach customers directly.
3. 3 welcomes Ofcom’s approach to developing policy in this area. It is clear from the thorough consideration of the options that Ofcom’s understanding of the sale and marketing of mobile services has been assisted by pre-consultation discussion with stakeholders and by detailed discussions individually and collectively with the UK mobile operators (“MO”).
4. In particular we welcome Ofcom’s rejection of specific proposals such as a requirement on MOs to pay the cashback directly to the customer and deduct it from the commission to the retailer, and for MOs to release customers from their contracts or to honour cashback payments that retailers fail to honour. Both proposals would do nothing to tackle mis-selling, and in requiring MOs to compensate consumers, may have served only to encourage the continuation of malpractice by some less scrupulous retailers. We also welcome the rejection of the proposal for an approved independent retailer scheme. 3 believes it is best placed to evaluate who it does business with, not an independent body.
5. 3 is however disappointed that the consultation does not clearly state that it is the retailer’s responsibility to ensure that the sale and marketing of mobile services is conducted in a responsible manner. Furthermore there is a danger that in some instances the proposed regulation absolves the retailer of their legal and regulatory obligations by placing a



- requirement on the MO to ensure the retailer is compliant and imposing sanctions on the MO in respect of matters for which the retailer is legally responsible in its own right. In addition, 3 is also disappointed that other regulatory bodies who have direct enforcement powers in relation to retailer's failures to comply with their legal responsibilities do not appear to have effectively exercised these existing enforcement powers in relation to mis-selling activities that they are aware that retailers are conducting. It is disappointing that the OFT and Trading Standards, whilst acknowledging potential consumer harm, are not effectively using their existing enforcement powers to prevent such activities, whilst expecting the MOs to take on such enforcement activities.
6. 3 has developed market leading minimum business terms for retailers trading on behalf of 3. In April 2007 Ofcom outlined to the MOs its expectations as to what their minimum business terms should be, and 3 notes that these were broadly based on the minimum terms supplied by 3 to Ofcom in October 2006 which Ofcom sought permission to share with interested third parties such as Trading Standards.
 7. 3 and the other UK MOs responded positively to Ofcom's request to develop a voluntary code of practice for the sales and marketing of mobile services in March 2007, which culminated in the publication of the "Voluntary Code of Practice for the sales and marketing of subscriptions to mobile networks" (VC) in July 2007. It is extremely disappointing that Ofcom only allowed the VC fourteen weeks operation before determining that the voluntary approach had failed, and commenced a formal review. It was further disappointing that Ofcom chose to undertake the review by means of a formal information request, rather than as a consultation which had been Ofcom's approach when considering the regulation of sales and marketing for fixed line services.
 8. Whilst 3 welcomes Ofcom stated aim of creating a level playing for all MOs and retailers, we do not believe this can only be achieved through the introduction of statutory regulation. 3 would instead like Ofcom to utilise the provisions of the VC (8.22 & 8.23) which requires MOs to share information with Ofcom on the operation of and compliance with the voluntary code. This combined with Ofcom using its Enterprise Act powers in relation to those MOs it felt were not compliant with the VC could ensure mobile mis-selling was tackled without the need for statutory regulation. In addition, as noted above, other regulatory bodies who also hold existing enforcement powers (such as the OFT or Trading Standards) could use those powers very effectively against retailers who are mis-selling.
 9. Ofcom argue that tackling this issue using existing legislation and enforcement bodies would be inefficient and too resource intensive and



that such legislation does not offer protection for small business customers. However Ofcom do not produce evidence to show what efforts have been made to tackle mis-selling and bad cashback using Trading Standards investigations and do not estimate the cost of such an approach when making this assertion. It is therefore impossible to compare the cost and impact of the proposed regulation under GC23 with alternative solutions. Legislation already exists, such as the Misrepresentation Act 1968, Unfair Contract Terms Act 1977, Supply of Goods & Services Act 1982, Sale of Goods Act 1979 (as amended) which offer small business customer protection/direct rights in relation to mis-selling in addition to the Trade Descriptions Act 1968, the Consumer Protection Act 1987 (Part 3), the Unsolicited Goods and Services Act 1971, the Control of Misleading Advertisements Regulations 1988, the Consumer Protection from Unfair Trading Regulations 2008 (due to come into force on 26 May 2008) and the ASA Cap Code on Advertising which provide for existing enforcement powers to the regulatory bodies which, if used effectively, could be used to target mis-selling against the actual retailers perpetrating such activities. As such, statutory regulation is not necessary if the existing legislation is effectively utilised.

10. It is 3's view that in proposing to introduce a new General Condition 23 ("GC23") Ofcom is failing its duties under the Communications Act 2003 ("The Act"). Namely that:
- the proposal is not proportionate, targeted nor consistent as required under Part 1, section 3 (3)(a) of The Act. (This is explained in further detail in 3's responses to the consultation questions);
 - the proposal fails to take adequate account of whether the furthering of the consumer interest is and will be achieved by self regulation as required by Part 1, section 6 (2) (a&b). (This is explained in further detail in 3's responses to the consultation questions);
 - the proposal is predicated on the basis of their being minimal additional impact on MOs from the introduction of GC23. However the Impact Assessment (IA) undertaken on the proposal is, in our view, flawed and therefore Ofcom has failed in its duty under Part 1, section 7 (3)(a) of The Act. (This is explained in further detail below);
 - in proposing to introduce specific regulation for the sale and marketing of mobile services (including mobile broadband services) but not for fixed line services, that Ofcom has failed in it's obligations under Article 8 of the framework directive to regulate without favouring one form of electronic communications network over another.

It is our understanding that Ofcom's proposal will extend to Pay as you go (PAYG) mobile services, and mobile broadband services (MB) and yet the consultation does not provide any evidence to suggest either of these services are currently being mis-sold. 3 therefore believe Ofcom



has failed to adhere to its own regulatory principles namely “to ensure its interventions will be evidence-based”.

11.3 wishes to raise specific concerns about the practicality of applying the proposed regulation to PAYG services.

▪ *Under GC23.4*

The Mobile Service Provider must use best endeavours to ensure, where it, or any person acting on its behalf, contracts with or appoints a Mobile Service Retailer in order to sell or market the Mobile Service Provider’s Mobile Services, that:

the Mobile Service Retailer is aware of this General Condition;

provisions are in place which require the Mobile Service Retailer:

not to engage in dishonest, misleading or deceptive conduct;

not to engage in aggressive conduct ;

not to contact the Customer in an inappropriate manner

PAYG services are sold in a wide variety of retail outlets, many with limited interaction with the customer. It would not for example be possible for 3 to confirm that every supermarket checkout assistant was aware of their conduct requirements under GC23.

▪ *Under GC23.5*

The Mobile Service Provider must use best endeavours to ensure that the Customer before entering into or amending a contract for a Mobile Service:

(a) is authorised to do so;

(b) understands and intends to enter into this contract; and

(c) is provided with the information set out below in a clear, comprehensible and accurate manner in paper or another Durable Medium which is available or accessible to the Customer or, where the Customer enters into or amends the contract during a sales call, by telephone:

(i) the identity of the legal entity the Customer is contracting with; its address; and telephone, fax and/or e-mail contact details;

(ii) a description of the Mobile Service; the cost of charges, including minimum contract charges, and any early termination charges, if applicable; payment terms; the existence of any right of cancellation, including procedures to exercise such a cancellation right; the likely date of provision of the Mobile Service; and any minimum period of contract.

3 would urge Ofcom to consider the practicalities associated with ensuring supermarket check out assistants are trained to confirm with



the customer that they understand and intend to enter into a contract with an MO prior to processing the sale.

3 would welcome clarification as to how a the same assistant could be trained so as to provide the customer with a description of the cost of charges, voucher terms and conditions and provide telephone, fax/e-mail contact details for the supermarket.

3 would welcome clarification as to how a PAYG customer can confirm they are authorised to make the purchase when there is no registration process for PAYG sales.

▪ *Under 23.6*

From the first point of contact with the Customer the Mobile Service Provider must retain records validating contracts regarding the sale of its Mobile Services for a period of not less than twelve months. Such records must include the date of the contact with the Customer, the means through which the contract was entered into, the place where the contract was entered into, and be such as to allow subsequent identification of the person(s) involved in selling and marketing the Mobile Services, including the person who made the initial Customer contact.

3 would urge Ofcom to consider the practicalities associated with ensuring supermarkets and other non dedicated retailers are able to maintain these records.

3 would also welcome clarification as to how, for example, a supermarket could identify the check out assistant who sold the handset.

▪ *Under 23.9*

The Mobile Service Provider must use best endeavours to ensure that where a Mobile Service Retailer offers to the Customer a sales incentive, that the terms and conditions of such an offer must not be unduly restrictive and that the Customer is provided with the following information in a clear, comprehensible and accurate manner in paper or another Durable Medium, or, where the sales incentive offer is made during a sales call, by telephone:

(i) the identity of the legal entity which makes the sales incentive offer and undertakes to meet the obligation(s) tied to this offer; its address; and telephone, fax and/or e-mail contact details;

(j) a description of the sales incentive itself; and

(k) the terms and conditions of the sales incentive, including a detailed and clear explanation as to the process the Customer has to follow to obtain the sales incentive.



3 would welcome clarification as to how Ofcom believes MOs could fulfil this requirement for PAYG sales in general retail stores where the customer is possibly buying several retail items.

Should Ofcom proceed with the introduction of GC23, it would urge Ofcom to clarify the definition of mobile services so as to exclude PAYG and Mobile Broadband services from the scope of the regulatory requirement.

12. If Ofcom proceeds with the introduction of GC23, greater clarity and guidance will be required as to how Ofcom evaluates the compliance by MOs. 3 is concerned that Ofcom's proposals are driven principally by complaint levels and do not believe this is an accurate measure as to whether an MO is compliant. It is perfectly possible that a MO might not strictly enforce or monitor their minimum business terms but instead choose to compensate complainants to avoid the complaints being escalated to Ofcom and other regulatory bodies. This might falsely portray that MO as being compliant, when in reality their actions would be doing little to tackle mis-selling as the regulation would require.

3 therefore strongly recommends that Ofcom measure compliance on evidence from MOs that their minimum business terms require retailers to sell responsibly in line with the regulations and on evidence that MOs have put in place monitoring procedures and compliance plans, and not on complaint levels. Greater clarity will be required in the guidance as to Ofcom's definition of 'ensure' and 'monitor'.

13. Ofcom define mis-selling as being "*where a contract is agreed without the consumers' full understanding, or where the customer has been deliberately misled*". However this definition hides many examples of how the customer might not understand specific aspects of their contract and there are a multitude of ways in which the consumer could allege they were misled (indeed Ofcom go on to give five different examples of mis-selling). It is not therefore as straightforward as Ofcom suggest to define or tackle mis-selling. Where as cashback complaints centred on a minority of retailers, mis-selling occurs across the entire market and can often be only one or two complaints a month. This makes it problematic to define and address the problem and to target individual retailers, but under statutory regulation would leave MOs at risk of non compliance with their conditions of entitlement.



Impact assessment

14. 3's general concern about the Impact Assessment is its assumption that because mobile operators introduced a voluntary code of practice the additional impact of any formal regulatory obligation is minimal. 3 strongly object to this approach. If Ofcom persists in this view there is a real risk that communications providers will be discouraged from developing self-regulation for fear that this will count against them in any assessment by Ofcom of the need for statutory regulation.
15. In addition, the impact of formal regulation and the imposition of sanctions on the MOs for retailer's failures to comply with their own legal/regulatory responsibilities (and the fact that distributors will no longer be ultimately responsible for managing their stockists) may potentially result in MOs reducing the number of distributors and/or retailers they deal with in order for the MOs to be able to meet the imposition of the proposed statutory regulation. This would result in a potential reduction of competition and consequently consumer choice.
16. Ofcom seems to hold that the existence of self regulation reduces the impact of statutory regulation, and statutory regulation is therefore justified. However the Act actually places the opposite obligation on Ofcom in instances where self regulation exists. Under the Act Ofcom is required to *"have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by OFCOM"*¹.
17. The Impact Assessment deliberately down plays the impact of the introduction of new regulation by arguing that mobile operators are already performing the majority of the obligations proposed in GC23². However elsewhere in the consultation Ofcom argues that the voluntary code has failed to address mis-selling and therefore statutory regulation is required. Either the voluntary code is being complied with by the mobile operators in which case there is insufficient evidence that statutory regulation is required; or the mobile operators are not complying with the voluntary code in which case the impact of statutory regulation will be significant. The Impact Assessment argues two contradictory points and is consequently flawed.

¹ The Communications Act 2003, Part 1, Section 6 (1&2)

² Section A5.49 'Protecting consumers from mis-selling of mobile telecommunications services'



Responses to consultation questions

Question 1: Do you consider there are other options to tackle mis-selling in the mobile market we have not identified in our review?

3 believe that section 6 of the consultation document should have identified the use of existing laws and regulatory tools as an option to tackle mis-selling. Primary responsibility for ensuring the sale of mobile services is lawful lies with the retailer. Any consultation as to how the regulator can safeguard the consumer from mis-selling should therefore consider in some detail how existing legislation might be utilised before proposals are brought forward for new and additional regulation.

The consultation assesses the use of existing legislation in section 5 and concludes that mis-selling “*could be addressed by Ofcom under existing legislation only with the deployment of a disproportionate amount of resources, currently not available to us*”.

However this is not sufficient justification to exclude it as an option for consideration in section 6. Indeed the inclusion of this option would have enabled stakeholders to consider whether additional resource should be made available to Ofcom to enable it, and other relevant regulatory authorities (who are also able to enforce such legislation as detailed in paragraph 9), to tackle mis-selling using existing legislation.

Furthermore excluding this option from consideration without evaluating what the required resource would be also denies stakeholders the opportunity to accurately evaluate the cost effectiveness of the proposed regulation. The cost to mobile operators that arise from the obligations under GC23 will be considerable but at present mobile operators are unable to evaluate whether this cost is more or less than the estimated cost of Ofcom utilising existing legislation.

For these reasons we believe Ofcom should have identified and provided detailed evaluation of the use of existing laws and regulation to tackle mis-selling.

Question 2: Do you agree with our preferred option to tackle mis-selling? If not, please explain your preferred approach and reasons.

3 is concerned that the proposed regulation will place an obligation on mobile operators to regulate the sale of their goods and services, despite this already being governed by existing law and regulation (please refer to detail in paragraph 9 above). 3 therefore believe Ofcom has failed in its stated principle



to “*always seek the least intrusive regulatory mechanisms to achieve its policy objectives*”.

3 recognises that mobile operators have a responsibility for ensuring that their services are sold lawfully, however we believe this could be achieved through a voluntary approach in line with the commitments undertaken by the mobile operators in the self regulatory code. Such an approach would be entirely consistent with Ofcom’s duties under the Act to ensure that regulation by Ofcom “*does not involve... the imposition of burdens which are unnecessary*” and that Ofcom has “*regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation*”.

3 therefore consider that whilst the proposals are consistent with Ofcom’s duty to further the interests of UK consumers, they are not consistent with Ofcom’s obligations under section 6 of the Act.

Furthermore 3 do not believe that Ofcom has been consistent in its regulatory approach to the regulation of mis-selling in the communications market as required by section 3 of the Act³. Mis-selling in the fixed line market is regulated by means of a statutory code of practice rather than regulatory obligations as set out in the proposed GC23 which Ofcom intends to impose on mobile operators.

3 also believe Ofcom has been inconsistent in evaluating the effectiveness of self regulation in both the fixed and mobile markets. A voluntary code for the sales and marketing of fixed line services was introduced in July 2003. This code was reviewed nine months later as part of a consultation in April 2004. Proposals for the introduction of a statutory code of practice were consulted on thirteen months later in April 2005, with formal regulation coming into effect at the end of May 2005. In all fixed line providers were given almost two years to demonstrate whether their self regulatory code could work. This is in stark contrast to Ofcom’s approach to the mobile sector. The mobile operators introduced the self regulatory code at the end of July 2007. Fourteen weeks later Ofcom announced that it was to commence a formal review of the self regulatory code. However rather than open a consultation as it had when reviewing the fixed line code, Ofcom issued a section 135 request requiring mobile operators submit detailed information on the sales and marketing of their services. The current consultation was published on the 18 March and we understand that, should Ofcom determine to proceed with the new General Condition that this will come into force in July this year, only one year since the voluntary code was introduced.

³ Communications Act Part 1, Section 3,(3)(a) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—
(a) the principles under which regulatory activities should be..... consistent.



3 does not therefore agree with Ofcom's preferred option as we do not believe Ofcom has given sufficient opportunity to evaluate the effectiveness of the self regulatory code for the sales and marketing of mobile services. In effect Ofcom deemed the self regulatory code to have failed only fourteen weeks after it was introduced, and has proposed formal regulation contrary to its duties under the Act.

Question 3: Do you consider there are other options to tackle issues with onerous/misleading cashback terms and conditions we have not identified in our review?

For these reasons given in answer to question 1, we believe Ofcom should have identified and provided detailed evaluation of the use of existing laws and regulation to tackle onerous/misleading cashback.

Question 4: Do you agree with our preferred option to tackle onerous/misleading cashback terms and conditions? If not, please explain your preferred approach and reasons.

3 does not agree with Ofcom's preferred option for the same reasons provided in answer to Question 2, namely that Ofcom's proposals fail to meet the duties placed upon Ofcom in the Act and that Ofcom has not given sufficient time to evaluate the effectiveness of the self regulatory code in tackling onerous/misleading cashback terms.

Contrary to Ofcom's assertion that the voluntary code "*has not yet addressed this problem⁴*", 3's experience is that following revisions in its minimum business terms in October 2006 and again in September 2007, 3 has seen a decrease in the number of cashback complaints. We would therefore prefer that Ofcom rely on the existing voluntary code to tackle onerous/misleading cashback.

We had understood from previous discussions that Ofcom regarded 3's minimum business terms as examples of good practice. Indeed Ofcom will recall that it sought permission from 3 to share 3's minimum business terms with other audiences in autumn 2006; and in an e-mail to the MBG dated 30 March 2007, Ofcom detailed what Mobile Operators should require of retailers in their minimum business terms and these requirements were based on 3's minimum business terms. We are therefore disappointed that despite acknowledging 3's terms as an example of good practice, Ofcom has apparently ignored our experience in successfully tackling onerous/misleading cashback when evaluating whether a voluntary approach could be successful.

⁴ Section 7.6 'Protecting consumers from mis-selling of mobile telecommunications services'.



3 has previously presented evidence to Ofcom to demonstrate that in response to 3's minimum business terms, retailers have moved away from offering cashback on 3 contracts. This is supported by the Which? report in December 2007 which could not find cashback being offered on 3 contracts⁵.

In addition Ofcom's own research would suggest that the voluntary code has been successful in reducing complaints about onerous/misleading cashback. Figure 3 in the consultation shows that whilst cashback complaints had risen from 280 to 380 between the introduction of the voluntary code in July 2007 and February 2008, the number of complaints arising from cashback being refused has actually fallen as a percentage of the total complaints. The increase in complaints during this period is almost entirely as a result of retailers going into liquidation, and the increase in the number of retailers entering liquidation may be driven by mobile operators imposing the same sanctions on retailers Ofcom will require under the proposed GC23. Ofcom's preferred option is therefore unnecessary as evidence would suggest that the incidences of onerous/misleading cashback are falling as a proportion of cashback complaints.

3 is therefore of the view that the evidence to date supports the continuation of a voluntary approach, rather than the introduction of formal regulation; and indicates that mobile operators are already imposing appropriate sanctions on retailers who persist in operating onerous/misleading cashback without being required to do so by formal regulation. The interests of the consumer are therefore already secured or furthered by self regulation and as a consequence should Ofcom proceed to introduce GC23 it would be failing in its duties under Part 1 section 6, 2 a) of the Act.

Question 5: Do you consider there are other options to tackle issues with retailer insolvency we have not identified in our review?

3 consider Ofcom's assessment of the options in this regard to be thorough and have no further suggestions.

Question 6: Do you agree with our preferred option to tackle retailer insolvency? If not, please explain your preferred approach and reasons.

3 does not agree with Ofcom's preferred option for the same reasons provided in answer to Question 2, namely that Ofcom's proposals fail to meet the duties placed upon Ofcom in the Act and that Ofcom has not given sufficient time to evaluate the effectiveness of the self regulatory code in tackling onerous/misleading cashback terms.

⁵ Which? report "Ban the mobile phone cashback rip-off" 20 December 2007



3 believe that Ofcom has failed to analyse the underlying reasons for the increase in the number of retailers going into insolvency. As previously indicated 3 believes that the increased numbers of retailers going into liquidation has arisen as a result of mobile operators imposing financial sanctions on retailers for non compliance with the voluntary code. The requirements under proposed GC23 on 'Due Diligence' would do little to remove the likelihood of a retailer going into liquidation as a direct result of having financial sanctions imposed upon it for contractual breaches. Indeed if mobile operators are to prove their compliance with 23.4(d) of the proposed condition, then there is an increased likelihood of more financial sanctions being imposed on retailers and more retailers being placed at risk of insolvency as a result.

3 are further concerned by the specific requirements of 23.8 of the proposed condition:

- 23.8 (f) would require mobile operators to carry out checks on directors to ascertain whether they had had previously filed for bankruptcy or gone into administration "*owing money to a Communications Provider's customer*". Other than by permitting mobile operators to have access to the customer records of their competitors, 3 does not see how it would know whether at the point a retailer went into administration the retailer owed money to one or more customers of Vodafone, Orange, O2 or T mobile. It would not therefore be possible for a mobile operator to be compliant with this regulatory requirement. We would therefore urge Ofcom to delete "*owing money to a Communications Provider's Customer*" from the General Condition should Ofcom decide to proceed with formal regulation;
- 23.8 (h) would require that the mobile operator assume liability for the compliance by retailers with the general law. There is no precedent for such a requirement either in law or regulation and such a requirement would be disproportionate to the stated policy objective. We would therefore urge Ofcom to delete "*and applicable consumer protection laws*" from the General Condition should Ofcom decide to proceed with formal regulation.
- Although not detailed in the wording of the proposed condition, the associated guidance suggests that mobile operators would, under 23.8, be required to verify the viability of the retailer's business model. However such verification could only be undertaken if the mobile operator was privy to commercially sensitive information, including knowledge of the commission paid to the retailer by competitor networks. Given the commercial and competition issues that would consequently arise, 3 do not believe operators could meet such an obligation and as a result 23.8 would be unworkable. We would therefore urge Ofcom to delete the reference to viable business models



from the guidance to the General Condition should Ofcom decide to proceed with formal regulation.

As part of its existing procedures 3 would already undertake due diligence broadly in line with the remainder of 23.8 both in line with good business practice and its requirements under the voluntary code. 3 therefore believe reliance on the voluntary code would meet Ofcom's stated policy objective with regard to retailer insolvency.

Question 7: We would like to have your views on the proposals set out in Section 9:

- i) **Could you give an indication of the costs of keeping records for an additional 6 months?**

Confidential

- ii) **Do you think a confirmation letter would help in tackling mis-selling and cashback issues?**

3 notes that the market research undertaken by Ofcom into cashback found that only 13% of mobile contracts were sold on cashback offers and of these 79% of customers understood the process for claiming cashback. Given that Ofcom's own research estimates the number of customers who are unclear about their cashback offer to be less than 350,000 out of over 70 million mobile customers, 3 questions whether the introduction of formal regulation requiring letters to be sent following the sale of every mobile phone (including PAYG) by telephone, is proportionate.

The consultation argues that the voluntary code has been ineffective in addressing the problem of mis-selling and that formal regulation is therefore justified. 3 has repeatedly explained to Ofcom tackling mis-selling is not straightforward given the numerous forms mis-selling can take and the spread of instances of mis-selling across a large retailer base, and the consultation document fails to explain how formal regulation will be more effective in addressing mis-selling. Whilst the totality of complaints may suggest that there is widespread and possibly deliberate mis-selling, the reality is that the complaints tend to be spread across the retailer base with most retailers prompting one or two complaints every six months and others who are making larger volumes of connections prompting complaints of less than ten each month. 3 already investigate complaints of mis-selling and impose sanctions on the retailer, by means of clawing back the commission, where a contract is found to have been mis-sold. Given this, it is unclear to 3 how sanctions would be more effectively deployed under formal regulation.



3 are also unclear as to how a confirmation letter would pre-empt and prevent mis-selling. We understand that the letter would give the customer early sight of the terms of their contract, however it would not in itself be evidence that the contract had been mis-sold.

3 can however see some merit in requiring retailers to ensure the customer understands the terms of their contract(s) and has accepted them, by sending the customer written confirmation following the telesale. However such a requirement does not require formal regulation and could be agreed as an enhancement to the self regulatory code with the mobile operators. 3 would be happy to discuss this further with Ofcom.

iii) • What kind of information do you think such a letter should contain for it to be effective?

Although it is now difficult to find cashback offers on 3 contracts we are aware, and have provided evidence to Ofcom, of cashback continuing to be included in the advertised monthly line rentals for contracts on other mobile operators. The risk of such advertising is to perpetuate a belief by the customer that the offer is part of the contract with their mobile operator. In order to address this the letter would need to clearly separate the tariff, minimum contract term, handset model and details of any add ons purchased at the point of sale (section b), which form their contract with the mobile operator and the offer (and associated conditions) being made by the retailer (section a).

3 does not believe it would be helpful to consumers to provide additional information on terms and conditions of the contract as existing regulation already requires that the customer be appraised of such terms prior to entering into a contract. Elsewhere Ofcom is engaged in discussions with mobile operators on the transparency of information at the point of sale and in marketing communications and we trust that Ofcom will seek to avoid duplicating any future requirements on the provision of information to consumers. Furthermore 3 notes, and welcomes, the finding of the Better Regulation Executive/NCC report⁶, that “*Consumers rejected much of the information because there was too much of it and because it was presented in a complex and unappealing format*”. Including information about key contract terms and conditions therefore runs the risk of the consumer ignoring the letter and its contents.

3 supports the NCC report’s recommendation that Regulators apply the following question to any proposal “*To what extent does the information fit with the wider system and simplify choices for consumers?*”, and further that “*All significant future regulated information provision requirements should be tested*

⁶ final report by the Better Regulation Executive and National Consumer Council on Maximising the positive impact of regulated information for consumers and markets November 2007



in a semi-final format with consumers before implementation”, and we trust that Ofcom will apply this test should it proceed with the introduction of formal regulation.

- iv) • For retailers selling services via telesales could you give us an indication of costs and time to implement this proposal?**

Confidential

- v) • Could you give an indication of costs and the feasibility of the due diligence requirements, including the requirement where we propose all current independent retailers to be checked within 12 months from the GC coming into force?**

3 has expressed reservations about some of the specific requirements in GC23.8 and associated guidance (see answer to Question 6). Provided these specific requirements were amended in line with 3’s suggestions, then 3 does not anticipate any significant increase in the costs associated with the due diligence requirements as these are broadly in line with 3’s existing procedures. Nor do 3 believe a requirement to carry out retrospective checks to give rise to any feasibility issues.

However as we have previously intimated given that these procedures are already in place under 3’s minimum business terms and the voluntary code, 3 questions whether the introduction of a formal regulatory requirement is consistent with Ofcom’s duties under Part 1 section 6(2)(a) of the Communications Act 2003⁷.

- vi) • Could you give us your views on the proposed transition period of 2 months to implement the provisions of the GC?**

3 has provided comments on Ofcom’s Impact Assessment above, however our general concern is the assumption that because mobile operators introduced a voluntary code of practice the additional impact of any formal regulatory obligation is minimal. It is this assumption that presumably underpins the proposal for a transition period of only two months. However the assumption is flawed for reasons given previously.

It cannot be the case that a shift from self to statutory regulation does not result in additional compliance and monitoring requirements. Compliance with the General Conditions is required before a Communications Provider is permitted to operate under the Act. Compliance with a self regulatory code carries with it

⁷ In reviewing their functions under this section it shall be the duty of OFCOM—
(a) to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation.



no such condition and as a consequence the due diligence and compliance requirements of the General Condition are significantly greater.

This therefore means that should Ofcom proceed with the introduction of GC23 3 would need to revise and introduce a number of procedures and practices, including:

- The additional employee monitoring obligations would require organisations to ensure such practices are compliant with the Data Protection Act 1998, the Lawful Business Practice (Interception of Communications) Regulations 2000, and the Employment Code of Practice issued by the Information Commissioners Office.
- The practices would also need to be reflected in company employee monitoring policy and employment contracts.
- Briefing and potentially retraining 2000 own retail staff.
- Communication to 2500 Multiple Retailer outlets and 800 Independent retailers.
- Revised training for outlets to ensure understanding of obligations under new GC23
- Communication and training to 12+ distributors.
- Introduction of a formalised monitoring programme to demonstrate compliance.
- Recruitment of additional staff to monitor, audit and manage sanctions process in order to demonstrate compliance.
- Revision to Sprint⁸ to enable system to record additional information about the sale and the customer's understanding as required under 23.5
- System enhancements to enable records to be stored and maintained for the additional six months.
- Agreement with industry and trading standards/OFCOM to agree and publish a Code of Practice on Information Sharing as per requirement of the ICO.
- Development of capability for retail stores and other outlets to write and print out information about one off, time limited or otherwise targeted or specific sales incentives at the point of sale as required under 23.9

This is by no means an exhaustive list of the work that 3 would have to undertake in order to satisfy itself that it was compliant with its statutory obligations. Our initial estimate is that a transition period of eight months would be required in order to satisfy our shareholder that 3 UK had the systems and procedures in place to demonstrate its compliance with the General Condition and was not risking its authorisation under the Act.

⁸ Sprint is 3's sales system



Annex 1

Confidential