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Ofcom's consultation on Protecting consumers from mobile mis-selling mobile telecoms services – response from the Mobile Broadband Group

1. The Mobile Broadband Group ("MBG", whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to Ofcom's consultation on 'Protecting consumers from mis-selling of mobile telecommunications services'.

2. The MBG understands that individual mobile network operators have prepared their own responses to the consultation, addressing the detailed impact they expect the new General Condition to have on their respective businesses. This response focuses on the broad principles and the most significant concerns, including disappointment that self-regulation was not given longer to prove itself.

3. The MBG welcomes the thoroughness of the review. It has provided a good body of research and provides stakeholders with a well-informed and balanced appraisal of the independent channel, the size and nature of the problem being addressed and the regulatory options available going forward.

4. It also implicitly emphasises the importance of the independent channel. Customers appreciate being able to chose from a selection of networks under one roof. The independent channel is part of the competitive landscape and the MBG shares Ofcom's view that it is worth maintaining.

5. The MBG also shares Ofcom's view that customers are entitled to be treated properly and fairly when they purchase mobile airtime services. And it is important to emphasise that the vast majority of independent dealers, including those that offer cash back (as the research clearly shows), do treat their customers reasonably.

6. This appraisal has firmly rejected some of the more extreme options that would undoubtedly have been extremely damaging to the viability of the independent retail channel.

7. For example, Ofcom has rejected the idea of trying to ban cash back. This would have been very onerous and complicated to do. Moreover it would have certainly resulted in independent dealers offering some other form of promotion. Ofcom's research indicates 13% of customers had taken out a contract with a cash back element (equating to about 1.75m customers in total but with no indication over what period).

8. The MBG estimates that between one and two million customers sign a contract with an independent dealer each year. This would indicate that a very significant proportion of contracts offered through the independent channel contain an element of cash back. It is very popular with customers and, according to Ofcom research, roughly 80% of customers have no issues with it.

9. While supporting Ofcom's rejection of some more drastic options, the MBG nevertheless has some serious concerns with some aspects to the review's overall approach and with the final proposals.

General consumer law

10. Our first concern is that nowhere in the document does Ofcom firmly state that it is primarily the duty of the management of each independent business to ensure that they and their staff obey the general law and treat customers fairly. Moreover, no reference has been made to the fact that all companies (mobile operators included) should be free to make contracts in good faith with an expectation that their counter party is law abiding (and that those who are not would be prosecuted by law enforcement agencies).

11. Instead, the starting point is that it is the primarily the duty of the mobile operator to police other organisations, including large publicly listed companies, where the commercial leverage of the 'enforcee' can be far greater than that of the prospective enforcer. This is not right.

12. Furthermore, Ofcom firmly rejects the idea that it should use its direct general powers under the Enterprise Act on the grounds that there are a very large number of individual, independent retailers in the market selling mobile services and associated goods. "This makes effective targeting very difficult in this sector."

13. It is not clear why Ofcom consider that 'effective targeting' is going to be any easier for the mobile operators. With about two to three thousand 'mis-selling' complaints per annum, spread across thousands of dealers and millions of transactions, effective targeting against any particular behaviour is very difficult.

14. In settling for the General Condition approach, it has decided that it is preferable to exercise its power indirectly through the commercial leverage of the mobile operators rather than leverage its own power directly or that of Trading Standards through general consumer legislation (including the soon to be implemented Consumer Protection Regulations).

15. First, this is inequitable. Mobile operators contribute enormously to the Consolidated Fund through general taxation and spectrum fees and should be entitled to rely on law enforcement agencies to exercise their powers against miscreant traders.

16. Secondly the current (and proposed) situation is very inefficient. Most dealers act for multiple operators, which means that each dealer is subject to the due diligence and compliance processes of multiple operators. As, rightly, operators are not allowed to co-ordinate this activity, there will inevitably be differences in the way that rules are enforced. It would be much more efficient for any

necessary enforcement against a miscreant trader to be taken by a single enforcement body.

17. Thirdly, it seems structurally wrong. Many of the aspects of GC23 are effectively requiring the mobile operator to enforce the law. Compare the text of GC23.4 (b)…"*require the Mobile Service Retailer not to engage in dishonest, misleading or deceptive conduct..."*

18. …as against the text of the Consumer Protection Regulations, Article 3…*"Unfair commercial practices are prohibited…A commercial practice is unfair if it is a misleading action…a misleading omission…..it is aggressive…."*

19. These measures would appear to be in all material respects equivalent. It is one thing for a commercial company to decide not to deal with another because they do not trust them to act legally. It is a very different matter for a regulator to require a commercial company to enforce the law on another, particularly when they and other agents of the state have the powers to do so directly.

20. Thirdly, this form of indirect regulation (i.e. regulating company X in order to influence the behaviour of Company Y) introduces a contingent liability for mobile operators (and others in the chain) that cannot fail to increase its risk profile and costs. Until the general condition has been in force for a while, it will not be possible to assess exactly what these risks and costs are.

21. It is almost certain, though, that it will make it less viable to do business with the smaller independent outlets, as the costs of monitoring entailed in GC23 will exceed any potential business benefit. The general condition could end up penalising the vast majority of smaller dealers that trade fairly and reasonably.

22. Furthermore, the mobile operators, being both suppliers and competitors in the retail market, are always trying to manage the tension between their responsibilities to ensure the customer is treated fairly with their ethical and legal responsibilities under competition law. This is very difficult.

23. Indeed, the MBG requests that Ofcom remove any suggestion that mobile operators will be able to have access to their distributors' business models (see paragraph A7.27). Not only would this give operators inappropriate commercial information about the distributor but also other mobile operators.

24. In addition, at A7.35, the guidelines suggest that MSPs should put in place "contractual provisions" governing sales incentives offered by third parties. The MBG seeks further clarity as to Ofcom's expectation in this regard so that mobile operators can be confident that such requirements are compatible with MSPs' obligations under EC and UK competition law.

25. Mobile operators will also have to pass its obligations under GC23 onto distributors, so that they in turn can enforce compliance on their dealers and sub-dealers. Ofcom will thus end up regulating at one, two or more stages removed from the customer facing organisations, introducing further cost and risk at each stage.

26. **In conclusion on this point, while the mobile operators will comply with GC23, it will also be necessary for Trading Standards and Ofcom to exercise their general consumer powers.**

27. Not only are the mobile operators, as taxpayers, entitled to rely on enforcement agencies taking action against law breaking traders, but it will also ensure that benchmarks for fair treatment of miscreant dealers will be set outside the commercial arena.

28. Without this sort of guidance, the mobile operators are always going to be balancing the risk of failing to comply with GC23 with the risk of being accused of acting unreasonably or anti-competitively. For example, if an operator receives 10 complaints of mis-selling in relation to one dealer and fails to terminate the contract, it could fall foul of GC23. On the other hand, if it does terminate the contract, the operator could be sued for breach of contract by the dealer, in the event that such action is deemed unreasonable by a court. This double jeopardy will be hard to manage from a risk point of view and, as the impact assessment fails to acknowledge, will entail additional risk management and compliance costs that are not present with a self-regulatory model.

29. The behaviours described in condition 23.2 and 23.4 (b) (i) – (iii) are essentially illegal under consumer protection legislation, in particular the upcoming the Consumer Protection Regulations. There should be no requirement for a General Condition to include the need to comply with the law. Nor should there be any requirement for one commercial party to enforce the law against another. That is the role of law enforcement. In view of the number of mis-selling complaints in proportion to the total number of transactions, it is not proportionate to require it either. These elements should be struck from GC23.

Self-regulation

30. The second general point that the MBG would like to make is in relation to the mobile operators' self-regulatory Code. We were very disappointed that it was given such a short time to prove its worth. Under the Communications Act 2003, Ofcom must have regard to *"the desirability of promoting….the use of effective forms of self-regulation."*

31. While self-regulation does exist in the communications sector (e.g. the CAP Code for advertising, the Internet Watch Foundation's Code and the mobile operators' content code), as far as the MBG is aware, this was the first self-regulatory code of any significance in an area that is within the direct remit of Ofcom.

32. The Code was published in July 2007 and Ofcom announced its review in October 2007, even though they acknowledged that there would be a lag in the time that it would take for the measures described in the code to take effect. Once the review had been announced, the self-regulatory option was then finished. This is in stark contrast to the measures brought into the fixed market in 2005, which, through the sunset clause, were given a full two years to take effect and where complaints took at least six months to fall significantly (after which they rose again).

33. This not only seems inequitable but also does not provide much encouragement to any of Ofcom's industry stakeholders that Ofcom will seriously encourage or promote self-regulation in areas within its remit in the future.

34. The MBG believes that Ofcom could have worked with mobile operators for longer to sort out any unevenness in the way that they perceived the Code being applied. It was very new. It would not have been inappropriate for operators to give each other guidance on how to apply it consistently and more perseverance from Ofcom in this regard would have been worthwhile.

35. The MBG acknowledges that was there was considerable public interest in the 'cash back' schemes, in particular some high profile bankruptcies. Nevertheless, the fact remains that no more complaints were being generated in the mobile sector than in the formally regulated fixed mobile sector, despite the mobile sector being far more competitive and having a customer base nearly three times the size.

36. As it is, GC23, as Ofcom acknowledge, introduces new costs, risks and inefficiencies into the distribution channel that might have been avoided if self-regulation had been given a proper chance.

General Condition 23

37. The additional costs and risks mostly arise from the requirements and the uncertainties introduced by the terms of General Condition 23. The MBG acknowledges that Ofcom have made an effort to explain what they require. Nevertheless, as these requirements relate to future uncertain events, neither the current Ofcom executive nor the mobile operators will know what the terms actually mean unless or until Ofcom exercises its power under the General Condition.

38. For example, what does "*must use best endeavours to ensure that the Customer before entering into or amending a contract for a Mobile Service ……….understands and intends to enter into this contract"* mean?

39. Self-evidently, it does not mean that the mobile operator has to be a party to the actual conversation in question – the only way that it could be absolutely certain of meeting the obligation. Surely the only way that the clause can practically be met is for the mobile operator to require the measure through contractual means.

40. The GC23 should be amended so that all sections where the term 'best endeavours to ensure' is used are amended with the term 'require'. This would in some measure improve the clarity of what is being asked of the mobile operator, even though it (and other participants in the value chain) would still be exposed to some risk in the event that Ofcom felt that any party had not made sufficient efforts to check compliance with the contract or invoke appropriate sanctions.

41. There also needs to be explicit recognition that the GC is targeted appropriately, in accordance with risk. For example there is no evidence that any of the recent complaints relate to mobile broadband data cards or Pay As You Go services. The MSPs must be allowed a sufficiently adaptable compliance regime to take account of the different circumstances prevailing in each market segment.

Convergence

42. Finally, Ofcom's consultation does not address one potential practical problem that is arising from market development. As Ofcom will know, many service providers now offer 'triple-play' or even 'four-play' packages of Internet, mobile, fixed telephony and TV.

43. The MBG foresees that difficulties will arise for those dealers that are required to abide by the GC23 and the code of practice required for the selling of fixed services. The MBG has not done an exhaustive comparison of what actual confusion might arise, because the General Condition approach and the Code of Practice approach (whereby each operator has its own CoP) do not lend themselves easily to comparison.

44. Nevertheless, it is messy and Ofcom should consider converging their approach so that dealers selling fixed and mobile services in one package are regulated by a single instrument and the network operators are treated in a platform neutral manner.