

**O2 (UK) LIMITED RESPONSE TO OFCOM CONSULTATION: PROTECTING
CONSUMERS FROM MIS-SELLING OF MOBILE TELECOMMUNICATIONS
SERVICES**

MAY 2008

O2 (UK) LIMITED RESPONSE TO OFCOM CONSULTATION: PROTECTING CONSUMERS FROM MIS-SELLING OF MOBILE TELECOMMUNICATIONS SERVICES

INTRODUCTION

1. O2 (UK) Limited (O2) welcomes the opportunity to respond to Ofcom's consultation on protecting consumers from mis-selling of mobile telecommunications services (the Consultation).

EXECUTIVE SUMMARY

2. O2 is committed to protecting its customers from the unscrupulous sales practices of the minority in the market and so we want to see a regulatory regime which is fit for purpose.
3. O2 is a great believer in using industry led solutions wherever possible rather than formal regulation. As such we have been a firm supporter of the mobile industry's Code of Practice for the sales and marketing of subscriptions to mobile networks (the Code), launched in July 2007¹.
4. We believe that the right regulatory regime is one that is tough on the unscrupulous but not burdensome on those that already trade responsibly - we believe that Ofcom's Enterprise Act powers are the right tool to use - allied with the industry code of practice - rather than the introduction of a General Condition.
5. We recognise that in light of reports by Ofcom regarding the unevenness of policing and compliance with the Code, then the introduction of a General Condition (that Ofcom could then pursue third parties) may, in some respects, present an attractive "quick fix" response for Ofcom. Indeed, of all the other interventions over and above continuing with the Code and relying on its Enterprise Act consumer protection powers, it is certainly one of the less intrusive options which Ofcom considers.
6. However, notwithstanding any perceived attractiveness of a General Condition option, after careful consideration we have concluded that the case for such intervention is not sufficiently robust:
 - i. It is by no means certain that the industry Code is "not working" - nor that a General Condition would be any more effective (indeed, in our view, the

¹ <http://www.ofcom.org.uk/telecoms/loi/mbp/cop.pdf>

evidence in relation to the introduction of a fixed General Condition is unconvincing in this respect).

- ii. Ofcom already has firm powers to pursue offenders under its Enterprise Act powers. Ofcom was clearly granted these powers with the intent that it should rely on them. It is a minority in the industry causing problems and in the main it would be neither "inefficient" nor "ineffective" to pursue them. This would send a clear signal from Ofcom (or OFT) and would dovetail with the due diligence processes in the Code.
 - iii. In respect of the limitations Ofcom identifies with its Enterprise Act powers, we do not see that the General Condition itself plugs the gap any more so than the Code. Furthermore, if Ofcom is saying that its Enterprise Act powers are not "fit for purpose" to support its consumer/ SME protection remit, then that is a far broader issue and needs to be debated.
 - iv. As to the "unevenness" of policing of the Code, we believe Ofcom could help support the Code by publishing complaints statistics in greater detail to highlight those that are causing most complaints. Where companies have invested heavily in their brands, such publicity can be an effective "punishment" mechanism of a self regulatory regime².
 - v. In terms of providing adequate redress for consumers, O2 provides its customers with a clear route for redress. The Enterprise Act also provides for action against traders that continually "rip customers off"³. In respect of cashback, Ofcom is well aware of the potential counter productive effect of indirectly underwriting third party cashback offers.
7. We are not convinced that the introduction of the proposed General Condition is a justified and proportionate intervention when assessed under the general principles of "better regulation" and Ofcom's own avowed commitment to only regulating where necessary. Ofcom should crack-down on bad sales practices on a targeted basis, being prepared to name and shame organisations which do not measure up to the required standard. O2 believes that such an approach would see a rapid decline in malpractice. By contrast, empirical evidence from the implementation of a similar General Condition in the fixed telecoms market provides plenty of evidence that General Conditions are not a panacea to the issue of poor sales practices⁴. Indeed, the previous experience of the effectiveness of General Conditions in the

² Initial assessments of when to adopt self or co-regulation, Ofcom Consultation, 27 March 2008.

³ <http://www.berr.gov.uk/consumers/fact-sheets/page38118.html>

⁴ Indeed, Ofcom has announced that it is extending its investigation into mis-selling in the fixed line market. http://www.ofcom.org.uk/media/news/2008/03/nr_20080331b

fixed market suggests that Ofcom is at risk of being unable to deliver the outcome that it has promised to stakeholders⁵.

8. We also have a number of comments and concerns regarding the drafting of the proposed General Condition. These are set out in Annex 1. For the sake of completeness, we also respond to the specific questions raised in the Consultation (see Annex 2).
9. We would be happy to discuss our response in greater detail with Ofcom.

⁵ For example; "*Proposals for new rules to stamp out misleading sales and marketing practices in the mobile market were announced by Ofcom today.*"
http://www.ofcom.org.uk/media/news/2008/03/nr_20080318

HAS THE INDUSTRY CODE FAILED?

Ofcom's conclusion

10. It is O2's view that it is by no means certain that the industry Code is "not working" - nor that a General Condition would be any more effective (indeed, in our view, the evidence in relation to the introduction of a fixed General Condition is quite damning in this latter respect).
11. O2 has been a firm supporter of the industry Code and so we are disappointed to read that Ofcom reports "unevenness" across the industry in policing compliance with the Code:
 - i. We embedded the Code and its obligations into our terms of business with our consumer channel and we encourage customers who have been subjected to slamming to call us. We have a process that enables us to capture such information and, where there is evidence of third parties misleading our customers, we will take action.
 - ii. Overall, we have seen a clear reduction in the level of complaints made to O2 in relation to O2 and our independent channels regarding mis-selling and cashback. Annex 3 refers. We know from Ofcom's figures that other operators generate on average around 10-15 times more cashback complaints per net connection than O2.
 - iii. We have a history of pursuing those that "slam" our customers⁶.
12. Of course, unevenness of implementation can be dealt with in a variety of ways. Indeed, unevenness of itself is not necessarily the issue from a consumer perspective - the issue is whether such behaviour is driving complaints. A General Condition is not the only tool at Ofcom's disposal.

Ofcom's aggregated complaints statistics are informative - but they don't tell the whole picture

13. We welcome the details of the complaints data Ofcom has provided in the Consultation. We understand that Ofcom is concerned that the data does not

⁶ For example, last year O2 took legal action against two companies who were guilty of 'slamming'. In January 2007, settlement was reached with Landmark Communications who paid O2 £500,000 compensation. In July 2007 Communications Direct Ltd entered into a settlement agreement with O2 admitting liability for trade mark infringement and passing off relating to the mis-selling of mobile phone contracts. They agreed to pay O2's legal costs and damages.

appear to show a significant reduction in complaints and that this indicates that the Code is not working (although, in respect of cashback, Ofcom notes that the level of complains may indeed be a sign that the steps operators are taking may indeed be because the Code is biting).

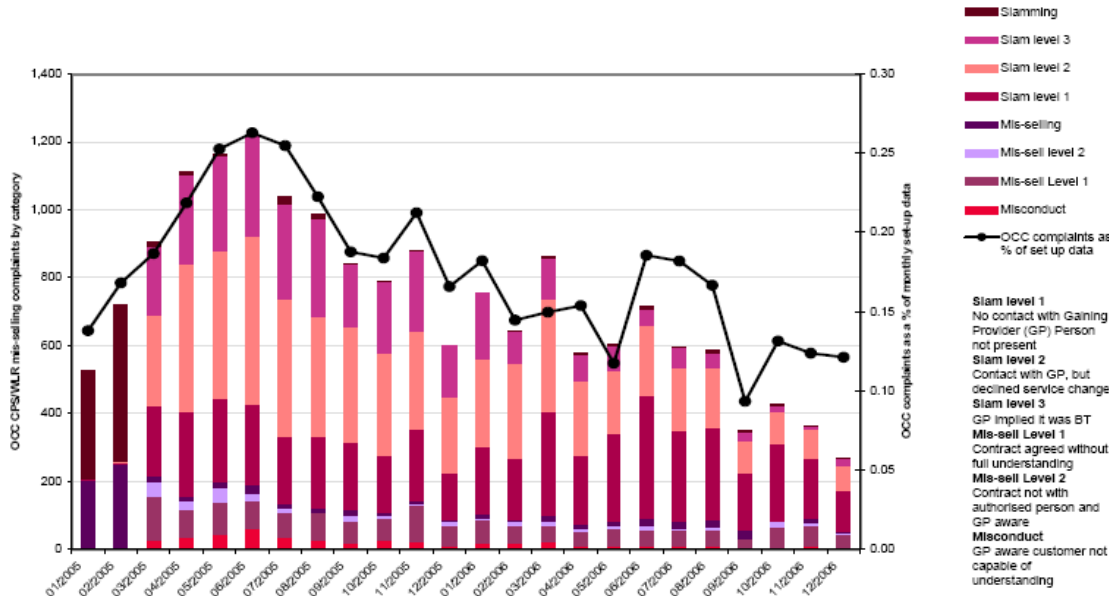
14. Whilst the published complaints data is informative to a degree, it does not provide the whole picture. Indeed, for the reasons we discuss below, we believe that it is unreasonable to conclude from the aggregated data that the industry Code has failed - and that intervention via a General Condition is now justified.

It is premature to judge the mobile industry approach a failure based on 6 months worth of complaints data

15. Whilst in absolute terms, the level of mobile complaints in the first six months is clearly of concern (complaints per connection must also be considered), we believe it does not necessarily follow that this is an indication that the Code is not working. Ofcom itself points out that "*From July 2007 onwards, complaints numbers have been broadly steady*" (paragraph 4.23). Given the trend prior to the introduction of the Code, we would suggest that whilst there may not have been a significant reduction in absolute numbers of complaints there has been a significant arrest to the growth in the complaints. There has clearly been a "flattening off" of complaints following the introduction of the Code and we would suggest this is a positive indication.
16. We believe that it is also instructive to look at the experience in relation to the introduction of a General Condition in the fixed market⁷. Looking at the fixed experience, we believe it is premature to judge that the mobile industry Code is a failure and will not work. Accordingly, we are concerned that, objectively, it is premature to write off self-regulation at this stage.
17. The revised fixed General Condition had the effect that codes of practice for sales and marketing were enforceable, and gave Ofcom the power to take enforcement action against those providers who breach the provisions of their code, including ultimately imposing a financial penalty on the relevant Provider for non-compliance.
18. We note that in respect of the introduction of the General Condition in the fixed environment, complaints figures reported by Ofcom are:

⁷ <http://www.ofcom.org.uk/consult/condocs/missellingprotection/misselling.pdf>

Figure 1: fixed-line telecommunications mis-selling complaints received by Ofcom as a proportion of monthly transfers



4.8 The figure above shows that there has been a steady improvement in the number of mis-selling complaints being received by Ofcom since the new obligations came into force. This is the case for both absolute volumes where levels have dropped fallen from 1,163 in May 2005 to 267 in December 2006 but also when considered as a proportion of successful monthly set-up orders from 0.25% in May 2005 to 0.12% in December 2006. Ofcom notes, however, that in looking at December complaints data a degree of caution should be applied as there is typically a 'seasonal trend' factor to be taken into account where the drop of complaints may differ from trends observed in previous months.

Source: <http://www.ofcom.org.uk/consult/condocs/mis-sellingprotection/mis-selling.pdf>

The fixed market experience of a General Condition demonstrates that General Conditions are not a panacea

19. These complaint statistics suggest that despite Ofcom's enforcement programme (including fining providers), a General Condition does not deliver demonstrably better results than the mobile experience under self regulation:

- i. Ofcom complaints data shows that as at November 2005 - some 6 months after the introduction of the General Condition- there were around 800-900 mis-selling complaints per month. In the mobile market (several times larger than the fixed), the introduction of the Code has arrested the rise in mobile complaints at a plateau of 200 -250 per month within the first six months. Furthermore, as the experience in fixed demonstrates, from month to month there are peaks and troughs in levels.

- ii. At the end of 2006 - some 18 months after the introduction of the fixed General Condition - the level of fixed complaints (300 - 400 per month) was still in excess of the 200 -250 per month mobile complaints Ofcom reports. On a "per port" basis, we do not believe that some 18 months of a General Condition regime for the fixed market has delivered better results than the mobile Code.
 - iii. Ofcom reported that prior to the introduction of the General Condition, the level of complaints reported to Ofcom as a % of total set up orders was between 0.01% and 0.05%⁸ . As the above graph shows, OCC complaints as a % of monthly set-up data remains above this range for every month following introduction of the fixed General Condition (reducing from 0.25% to 0.12%).
20. Against this backdrop we believe that it is unreasonable for Ofcom to expect to see significant reductions in complaints within 6 months of the introduction of the mobile voluntary Code.⁹ As such we believe it is premature to judge that the voluntary industry approach in mobile is a failure.

Mobile complaints data must be viewed in the context of the market

21. We are concerned that Ofcom has made no analysis of the complaints data in the context of the mobile market. This is inconsistent with Ofcom's previous assessments regarding mobile mis-selling complaints levels¹⁰, wherein Ofcom has emphasised the importance of taking any absolute figures in context:

"In terms of other sources of mis-selling complaints, there continues to be a steady level of complaints related to broadband and mobile services. These complaint levels should, however, be considered in the context of the market ... Reported mis-selling arising from these two sectors is low as a percentage of customers who have been sold service." (Para 4.13)

Source:

<http://www.ofcom.org.uk/consult/condocs/missellingprotection/misselling.pdf>

⁸ http://www.ofcom.org.uk/consult/condocs/mis_selling/mis_selling_pe/section4/

⁹ *"The levels of [mis-selling] complaints have not changed significantly and moreover, in January and February 2008 they were at a higher level than in July 2007.....We would have expected to see complaints about general mis-selling to have fallen quickly and sharply when the code was introduced, if it was being effective"*

¹⁰ Protecting consumers from mis-selling of telecommunications products, Ofcom Consultation, 8 February 2007.

22. Furthermore, at the same time, Ofcom observes:

"...there is little evidence that mis-selling is a problem for these services at the present time, and complaints levels, particularly when viewed as a proportion of transfer going through each month, remains significantly below those of fixed line telecommunications services;" (Para 5.6)

Source:

<http://www.ofcom.org.uk/consult/condocs/mis-sellingprotection/mis-selling.pdf>

23. We recognise that at the time of these statement, February 2007, mobile mis-selling complaints were around 100 -175 per month according to Figure 2 of Ofcom's current consultation and that in the six month period after the launch of the voluntary code, complaints reported are broadly between 200 and 250 per month. Whilst, these absolute figures might be argued to show a "headline grabbing" doubling of complaints, an analysis of mis-selling complaints per gross connection shows a far more tempered story - indeed, complaints on a per connection basis initially reduced following the introduction of the Code.

O2's own data on mis-selling complaints

24. O2's own data in relation to the level of complaints it receives from customers about mis-selling shows that there has been a steady reduction in the absolute numbers of complaints received in respect of O2 retail and other O2 channels. See Annex 3.

Mobile Cashback Complaints

25. We believe that it is too early to draw the conclusion that the Code is not working in respect of cashback. Ofcom itself accepts that in relation to cashback there may be a time lag before positive effects can be seen and, indeed, that some of the actions taken under the code may themselves drive complaints:

"In Autumn 2007, following the introduction of the voluntary code, complaint numbers peaked as a result of independent retailers going out of business. These peaks are likely to be on account of MNOs putting in place much tighter controls to govern the activities of their independent retailers as a consequence of the voluntary code."

26. O2 believes that it would thus be wrong to rely on the cashback complaints data to argue that the Code is not working to drive out "problematic cashback offers" - and that what is needed is a General Condition. As Ofcom admits, the Code is very much working to drive out poor practice - and this may have had an effect on a

number of retailers' ability to honour cashback - hence generating complaints. It is reasonable to presume that a General Condition introduced at the time would have had a similar effect on the complaints statistics.

OFCOM'S ASSESSMENT OF THE EFFECTIVENESS OF ITS EXISTING CONSUMER PROTECTION ENTERPRISE ACT POWERS

Ofcom's conclusion

27. Ofcom identifies that its existing Enterprise Act enforcement powers are limited. The implication being that a General Condition will plug any such gaps. Below we discuss the limitations Ofcom has highlighted - and why we do not see that it naturally flows that a General Condition will plug any gaps highlighted. As a matter of principle, O2 believes that wherever possible Ofcom should use existing powers. We believe that this is entirely consistent with "better regulation" principles.

Consumer remedies

28. Ofcom identifies that: *"...the remedies available to Ofcom under the Enterprise Act do not allow us - once an infringement has been established - to require the contravening party to compensate consumers." (Paragraph 4.46 of the Consultation)*. Whilst this may be the case in respect of cashback (but see the extract from BERR's website regarding consumer remedy below), but neither can a General Condition reasonably require compensation in respect of cash back be paid to customers in the event of insolvency, or indeed more generally.
29. As regards general consumer protection, the image of a toothless regime without consumer remedy is not one that the BERR website portrays¹¹:

"Q2. What is the impact of Part 8 on consumer protection?

Part 8 of the Act improved consumer protection by giving enforcers greater powers to obtain court orders against businesses that do not comply with their legal obligations to consumers.

Part 8 establishes a consistent enforcement regime, with a more refined and efficient procedure. This regime enables injunctive action to be taken against businesses infringing a wide range of consumer protection legislation."

Q5. Will I be able to get my money back if the trader receives an Enforcement Order?

¹¹ <http://www.berr.gov.uk/consumers/fact-sheets/page38118.html>

The Part 8 enforcement mechanism is not a means of pursuing individual redress. However it does enable Trading Standards and other enforcers to stop the activities of businesses who continually rip off customers. Whether or not the trader is the subject of an Order, consumers can still exercise their rights to obtain individual redress, for example by suing the trader through the Small Claims Procedure in the County Court. Your local Citizen's Advice Bureau, a Solicitor or in some cases Trading Standards Department can advise you whether to do this."

The 'fragmented' nature of the mobile sales channel

30. Ofcom also raises concern that the fragmented nature of the sales channel makes:

" ... effective targeting very difficult in this sector as it would require a disproportionately high level of finite resources."

31. Whilst we do not have sight of Ofcom complaints statistics per service provider, from our experience in relation to slamming by third parties against our customers, the majority of problems are caused by a minority of readily identifiable organisations. Is Ofcom really saying that it would be inefficient and ineffective to take clear targeted action against those that are generating the largest levels of complaints? We believe such action would send a clear signal. Furthermore, in reality Ofcom's proposals are inefficient in themselves since those subject to General Conditions are paying (though general taxation) for the enforcement of general consumer law, they are paying for Ofcom to then enforce the General Condition and they are also paying for the costs of enforcing the General Condition against their channels.
32. Accordingly, we believe that it is disproportionate to seek to transfer enforcement costs in this manner to the vast majority of the market which is trading responsibly.

The generic nature of the issue Ofcom identifies

33. Furthermore, Ofcom appears to be identifying a generic problem with its powers under the Enterprise Act in relation to the telecommunications market. Ofcom was clearly given Enterprise Act powers with the intent that it should use them. If Ofcom considers that its powers are insufficient and not fit for purpose, then we believe this is a far wider matter - and not simply something to be plugged on an add hoc basis as matters arise.

Protection for SMEs

34. Ofcom also raises concern that the scope of its Enterprise Act powers does not cover small business customers (and Ofcom notes that it has seen complaints in

respect of small business customers). Ofcom remarks that the incidence of complaints in relation to SME customers is increasing. However, it provides no data in relation to this and so we are not in a position to assess the degree to which - in context - the number of complaints are significant. O2 believes that it is importance that SMEs should have confidence in the regulatory regime and so we would urge Ofcom to share this data with industry. It appears to us that Ofcom has provided insufficient evidence that the level of complaints is sufficient to warrant the introduction of a General Condition.

35. In summary, we believe that Ofcom and trading standards authorities should be tough on those that trade irresponsibly but not burdensome on those that are trading responsibly. We believe Ofcom should pursue those that trade irresponsibly and unlawfully through their existing Enterprise Act powers - an approach entirely consistent with the principles of Better Regulation and Ofcom's own principles for intervention¹². We would urge Ofcom to consider this more fully.

WILL A GENERAL CONDITION BE MORE EFFECTIVE AND EFFICIENT THAN A THE VOLUNTARY CODE?

Ofcom's conclusion

36. Ofcom concludes that in light of the continuing high levels of complaints, the varying levels of monitoring and enforcement of the code by mobile service providers and the extent of potential consumer harm (in respect of cashback) involved, reliance on the voluntary code does not provide adequate protection for consumers (paragraph 1.12 of the Consultation).
37. As discussed in the preceding section of our response, we believe that a comparison between the mobile voluntary solution and the fixed general condition solution shows that is too early to write off the self regulatory approach.

¹² *Better Policy Making – Ofcom's approach to Impact Assessments* (February 2005), explains:

*"It should be borne in mind, however, that Ofcom's bias against intervention means that a **high standard of proof must be satisfied**. In other words, there must be a clear case for regulation, and the prospective benefits [of regulation] must exceed the costs. If a case for regulation can be made, we will choose the least intrusive means of achieving our objective."*⁴⁰ (emphasis added) ...

38. We are not clear if Ofcom's analysis of consumer harm of cashback has taken into account the effect of rescue packages in its assessment. Such an assessment must be included.

What will a General Condition deliver that the Code cannot?

39. Ofcom concludes that it is unlikely that implementation of the General Condition will create additional significant costs for mobile service providers and independent retailers already complying with the voluntary code. Although, Ofcom does not substantiate this comment, we presume Ofcom reached this conclusion because (with a few exceptions) the General Condition is heavily based on the voluntary code.
40. This begs the question, so why will a General Condition be more effective than the voluntary code? Ofcom's consultation does not assess this in any great detail (other than to suggest that Ofcom will have greater power to intervene and that providers can be fined for breach).
41. We are not convinced that the hypothesis that a General Condition provides greater "bite" than the voluntary Code holds true. As discussed earlier, the experience in relation to the introduction of the General Condition in the fixed world is instructive here.
42. Ofcom points out that a General Condition will help future proof protection. We see no reason why the existing voluntary Code cannot itself be considered future proofed - or capable of being future proofed. In any event, a General Condition is no guarantee that issues may not arise in the future - Ofcom has recently announce a further investigation into mis-selling in the fixed market.

http://www.ofcom.org.uk/media/news/2008/03/nr_20080331b

43. The empirical evidence from the implementation of a similar General Condition in the fixed telecoms market provides plenty of evidence that General Conditions are not a panacea to the issue of poor sales practices¹³. The previous experience of the effectiveness of General Conditions in the fixed market suggests that Ofcom is at risk of being unable to deliver the outcome that it has promised to stakeholders¹⁴.

¹³ Indeed, Ofcom has announced that it is extending its investigation into mis-selling in the fixed line market. http://www.ofcom.org.uk/media/news/2008/03/nr_20080331b

¹⁴ For example, "... instances of insolvencies due to unsustainable cashback offers and the consequent harm to consumers should be reduced over time."; and "Proposals for new rules to stamp out misleading sales and marketing practices in the mobile market were announced by Ofcom today." http://www.ofcom.org.uk/media/news/2008/03/nr_20080318

CONCLUDING COMMENTS

44. It is our view that Ofcom should seek to take a much more targeted approach on this issue. Ofcom/ OFT should be tough on the minority of offenders - but not burdensome on those that are trading responsibly. Accordingly, we think Ofcom/ OFT should pursue those that trade irresponsibly and unlawfully through existing legal avenues - an approach entirely consistent with the principles of Better Regulation Ofcom's own regulatory principles - and should support the industry in seeking to held stamp out the practice via its voluntary code by publishing Ofcom's complaints statistics in respect of persistent offenders. In short we recommend a three point plan:

- i. Continue to rely on the existing voluntary code - but seek to address the issues Ofcom has identified. Publish complaints statistics in respect of persistent offenders and work with industry to seek to iron out any unevenness in the implementation of the Code
- ii. Ofcom to pursue persistent offenders directly via its Consumer Protection enforcement action (it is our perception that it is a relatively small number of offenders)
- iii. Continue to monitor the effectiveness of the Code - but set some reasonable and appropriate metrics and timelines.

O2 (UK) Limited
May 2008

ANNEX 1

THE PROPOSED GENERAL CONDITION

1. Ofcom suggests that the General Condition will not place any significantly greater compliance burden on operators beyond that which they are already subject in relation to ensuring compliance with the industry voluntary code. We do not share this view. Clearly, it would be less intrusive on those responsible providers for Ofcom/ OFT to pursue the irresponsible directly through existing measures.
2. O2 has a number of comments regarding the proposed General Condition.
3. Ofcom must recognise that the obligations the General Condition seeks to place on operators must be compatible with competition law obligations. An operator cannot be put in the position of "double jeopardy" whereby an action to comply with the General Condition (for example, in respect of due diligence through independent channels) would infringe competition law prohibitions.

Inclusion of SMEs in scope. (23.1)

4. To date, we have seen no evidence that mis-selling or cashback issues are a specific problem for the SME community.
5. See our comments in Annex 2 regarding implementation timescales.

The specific mis-selling prohibition (23.2)

6. We understand this to simply duplicate the Unfair Trading Regulations regime (which implements the Unfair Commercial Practices (UCP) Directive), which includes the Business Protection from Misleading Marketing Regulations. As such we believe it should be deleted from any General Condition. It is not consistent with Better Regulation principles to duplicate separate stand alone rules. O2's view is that offenders should be pursued directly under non sector specific legislation.

*"The UCP Directive seeks to stamp out unfair selling and marketing methods in a simpler and more effective way than the current sector specific laws,"...
"It will put in place a comprehensive framework for dealing with sharp practices and rogue traders who deliberately set out to exploit the loopholes in existing legislation."*

Source: <http://www.berr.gov.uk/consultations/page39674.html>

Obligations with regards to mobile service retailers (23.4)

7. We believe that is disproportionate to place a "best" endeavours requirement on operators. We would suggest that this is replaced with a requirement that an operator's contractual terms with its channels require compliance with relevant rules (both here and throughout the proposed General Condition).
8. We believe any requirement to monitor should be on a proportionate and risk based approach - for example complaints driven etc. We see no value in mobile operators checking the marketing material and activities of responsible channels. This could involve a significant time and cost. One only has to do the maths of "number of distributors x frequency x time to check" to see that the costs will be significant in legal time alone.
9. Ofcom proposes that any breaches are "appropriately" sanctioned. We support this as it provides flexibility to deal with breaches depending on their nature, seriousness and harm caused as well as the track record of the channel itself. Of course, such flexibility is built into the Code - yet there, Ofcom expresses concern about the unevenness of enforcement.

Mobile Service - Information at Point of Sale

10. We believe that is disproportionate to place a "best" endeavours requirement on operators. We would suggest that this is replaced with a requirement that an operator's contractual terms with its channels require compliance with relevant rules (both here and throughout the proposed General Condition).
11. There is considerable duplication of existing regulations. This should be avoided - Ofcom should rely on its Enterprise Act powers.

Records Retention (23.6)

12. Does Ofcom mean "date of the contract" or "date of the contact"?

Training (23.7)

13. We believe that is disproportionate to place a "best" endeavours requirement on operators. We would suggest that this is replaced with a requirement that an operator's contractual terms with its channels require compliance with relevant rules (both here and throughout the proposed General Condition).

14. This appears to require the mobile operator to ensure that it (appropriately) trains its channels to comply with the Code. A training programme of such nature would require considerable resource.
15. We believe that the proposed General Condition should be replaced with an obligation which requires the mobile operator to ensure that a provision is included in its contractual arrangements with its channels that staff are appropriately trained.

Due Diligence (23.8)

16. In respect of 23.8 (e) - has Ofcom made any specific reporting arrangements with OFT?
17. We believe that is disproportionate and unjustified to require operators to "verify" that all retailers' terms and conditions are compliant with both the proposed General Condition and applicable consumer protection laws. Ofcom requires such verification to be made before connection of a new retailer (so, in effect, a new retailer cannot be signed unless it has presented its consumer/ SME terms to O2 for verification). In respect of existing channels, such verification must be conducted within 12 months of the proposed General Condition.
18. Ofcom is effectively asking O2's legal department to clear the terms and conditions of all its channels. This is a significant piece of work which we believe is not only unjustified and disproportionate but also it is entirely inappropriate for a General Condition to make O2 responsible for providing professional advice to others. Ofcom cannot make O2's legal department responsible for advising others in the channel. Third parties must be responsible for their own legal advice.
19. Any proposed General Condition should be amended to reflect the Code of practice, i.e., operators must ensure that they have the right to request copies of retailers' terms and conditions.

Sales Incentives - Information at Point of Sale (23.9)

20. We believe that is disproportionate to place a "best" endeavours requirement on operators. We would suggest that this is replaced with a requirement that an operator's contractual terms with its channels require compliance with relevant rules (both here and throughout the proposed General Condition).
21. There is considerable duplication of existing regulations. This should be avoided - Ofcom should rely on its Enterprise Act powers.

22. Ofcom points out that a General Condition will help future proof protection. We see no reason why the existing voluntary Code cannot itself be considered future proofed - or capable of being future proofed. In any event, a General Condition is no guarantee that issues may not arise in the future - Ofcom has recently announce a further investigation into mis-selling in the fixed market.

http://www.ofcom.org.uk/media/news/2008/03/nr_20080331b

ANNEX 2

O2 (UK) Limited Response to Ofcom Consultation: Protecting consumers from mis-selling of mobile telecommunications services

QUESTIONS RAISED IN THE CONSULTATION

Q1: Do you consider there are other options to tackle mis-selling in the mobile market we have not identified in our review?

Ofcom has helpfully sought to set out a wide range of potential options. However, an additional action which we believe should be considered is to augment Ofcom's option 1 (continuing to rely on the voluntary code) with publication of Ofcom complaints data in greater granularity: identifying numbers of complaints (absolute numbers and per gross connection) per service provider. We discuss this in more detail below.

Q2 Do you agree with our preferred option to tackle mis-selling? If not, please explain your preferred approach and reasons for it.

It is our view that Ofcom should seek to take a much more targeted approach on this issue. Ofcom/ OFT should be tough on the minority of offenders - but not burdensome on those that are trading responsibly. Accordingly, we think Ofcom/ OFT should pursue those that trade irresponsibly and unlawfully through general consumer protection enforcement powers - an approach entirely consistent with the principles of Better Regulation and Ofcom's own principles - and should support the industry in seeking to stamp out the practice via its voluntary Code by publishing Ofcom's complaints statistics in respect of persistent offenders. In short we recommend a three point plan:

- Continue to rely on the existing voluntary code - but seek to address the issues Ofcom has identified. Ofcom to be transparent about persistent offenders and to work with industry to seek to iron out any unevenness in the implementation of the Code;
- Ofcom to pursue those offenders directly via its Consumer Protection enforcement action (it is our perception that it is a relatively small number of offenders);
- Continue to monitor the effectiveness of the Code - but set some reasonable and appropriate timelines.

Q3: Do you consider there are other options to tackle issues with onerous/ misleading cashback terms and conditions we have not identified in our review?

See above.

Q4: Do you agree with our preferred option to tackle onerous/ misleading cashback terms and conditions? If not, please explain your preferred approach and reasons for it.

See above

Q5: Do you consider there are other options to tackle issues with retailer insolvency we have not identified in our review?

See above

Q6: Do you agree with our preferred option to tackle retailer insolvency? If not, please explain your preferred approach and reasons for it.

See above.

Q5: We would like to have your views on the proposals set out in Section 9:

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

See our response to Ofcom's Information Request.

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

If such an approach was beneficial (and that is an "if") then there is no reason why it could not be included as an approach in the self regulatory framework.

- *What kind of information do you think such a letter should contain for it to be effective?*

As above.

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

See our response to Ofcom's Information Request.

- *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?*

In the time available, we have been unable to undertake an impact analysis. We believe Ofcom must accept a pragmatic, risk orientated approach here. Implementation timescales will depend upon whether O2 is required to "ensure" compliance or rather to "communicate" the rules. Timescales for changes to IT systems (for example, in respect of record retention requirements) will need to be considered separately.

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

In the time available, we have been unable to undertake an impact analysis, however, we anticipate that no less than 3 months should be allowed to enable communication of requirements in respect of new channels. Implementation timescales will depend upon whether O2 is required to "ensure" compliance or rather to "communicate" the rules. Timescales for changes to IT systems (for example, in respect of record retention requirements) will need to be considered separately.