

Anne Hoitink  
Consumer Policy  
Office of Communications  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Head Office  
Inveralmond House  
200 Dunkeld Road  
Perth  
PH1 3AQ

Our Reference:  
Your Reference:

Telephone: 01738 456401  
Facsimile: 01738 456415  
Email:

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Dear Anne

### **Protecting consumers from mis-selling of mobile services**

I am writing to provide SSE's comments on the above consultation. SSE provides retail communications services in the fixed-line part of the market and is familiar with the measures that Ofcom has introduced and maintained with a view to minimising the incidence of mis-selling of fixed line telephone services. We are therefore interested in how Ofcom proposes to address similar issues in the mobile telephony market. Our general comments are set out below, with more detailed comments on the wording of the proposed general condition and its associated guidance set out in an appendix.

#### General Comments

Given the issues and problems that Ofcom has researched and described in the market for retail provision of mobile telephone services, we agree that some specific regulatory action is justified. We support Ofcom's proposed approach of a General Condition (GC) covering the high-level obligations on mobile service providers (MSPs) not to engage in mis-selling and to take responsibility for any retail agents working on their behalf. We strongly support the development of true "guidelines" to clarify and set out Ofcom's expectation on detailed matters without mandatory force rather than incorporating detailed prescriptive measures in annexes to GCs themselves, as is currently the case in GC 14, for example.

In fact, we believe that Ofcom could go further along this path within the structure that has been proposed for GC 23. There are still some places where the proposed GC wording is very prescriptive upon the MSP and where we believe the same effect could be obtained by shorter, more general obligations – perhaps supplemented by additional guidance. The areas we have in mind are in relation to MSP responsibility for the actions of retail agents acting on their behalf and in the due diligence obligations proposed. We discuss these in more detail in our appendix but, at high level, we would point out that prescriptive obligations create regulatory burdens

across all operators, when in actual fact it may be that only a few operators are giving cause for concern with respect to mis-selling and/or control of retail agents.

We believe it would be more in keeping with the aim of proportionate regulation for the proposed GC to avoid prescriptive detail altogether or, if the concerns about operators in this market are currently widespread, for such detailed obligations to be subject to a “sunset clause” of no longer than 2 years. In our view, the more general framework we advocate together with the guidance document would allow Ofcom to target its enforcement activity at operators who are demonstrably not fulfilling their high level obligations to control mis-selling and the behaviour of retail agents, without imposing compliance risks and costs across the whole market.

Another feature of the proposed GC wording is the continual use of the phrase “best endeavours” with respect to an MSP’s obligations. We do not consider that it is appropriate or proportionate to give a regulatory obligation to use “best endeavours”, which has a specific contractual meaning, as this would entail super-normal amounts of effort and engagement with agencies in this context. It is also inconsistent with Ofcom’s approach in GC 14 on the related matter of fixed line mis-selling obligations. In the energy industry, a form of words that has been adopted in supply licences to describe an appropriate amount of effort to secure a particular outcome is that a licensee “shall take all reasonable steps to ensure that” and we recommend that this or a similar form of words replaces any instances of “best endeavours” in the proposed GC and guidance document.

Finally, we note Ofcom’s discussion of links to other Ofcom workstreams at section 9 of the document - these being: mobile number portability; mobile sector assessment and the work to establish a single switching process across all transferable retail communications products. We believe the last of these is of fundamental importance to developing and maintaining a high quality and consistent experience for retail end-customers as they seek to shop around and switch their communication services between competing suppliers of those services. The link between this general objective and the mis-selling issues, in our view, is the potential for an “erroneous transfer mechanism” to be developed within the industry switching arrangements. Such a mechanism would allow for a customer, who considers he has been mis-sold to or who did not agree to transfer to another telecoms supplier, to be rapidly transferred back in order to minimise any inconvenience or expense he might otherwise suffer. The development of such a mechanism would require the underlying industry switching processes to be prompt and efficient and we believe that if this is achieved, it would do much to reduce the scale of any customer detriment associated with potential mis-selling.

We hope these comments and the attached appendix of detailed comments are useful and would be happy to discuss any of them further.

Yours sincerely

Aileen Boyd  
Regulation Manager

Detailed Comments on proposed new GC 23 and Guidance

We have set out some further detailed comments on the proposed wording of the GC and the guidance below.

Proposed General Condition 23

23.2 As discussed in our cover letter, we believe that the general obligation on MSPs in this paragraph could readily be extended to incorporate most of the requirements of paragraph 23.4.

In the existing requirements (at Annex 3 to GC 14) for control of mis-selling for fixed line telephony, a single sentence (at paragraph 4.7) makes clear that “the Provider” (who is the party to whom the obligations in the annex apply) is also responsible for “representatives, and any sales agency acting on their behalf”. Similarly, in the marketing condition of the energy supply licences, there is a brief obligation to “take all reasonable steps to ensure that each agent and sub-contractor of the licensee sets up procedures and takes steps equivalent to” those prescribed for the licensee. We suggest that a similar form of words could very simply ensure that the MSPs are also held accountable for the actions of any of their agents, whatever the structure of their channels to market, in dealing with end customers. As soon as this responsibility is recognised by the MSPs, such that any customer issues or complaints generated by any of their agents are deemed to be their responsibility, we believe that the MSPs will naturally enforce their own obligations through their chain of retail agencies.

We suggest a sentence along the following lines at the end of paragraph 23.2: *“Where other companies act as agents for it, the Mobile Service Provider must take all reasonable steps to ensure that any company dealing with a Customer on its behalf also abides by these requirements”*. This would allow paragraph 23.4 to be reduced in length by removing the wording similar to that in this paragraph.

23.3 It would appear more appropriate, useful to customers and consistent with the consumer-related obligations of other GCs if the obligation to provide a copy free of charge on reasonable request related to the “comprehensive summary” of obligations under GC 23, which this paragraph requires the MSP to produce, rather than to a copy of the GC itself.

23.4 This paragraph, as well as 23.5, 23.7 and 23.9 use the phrase “must use best endeavours” with respect to a requirement on the MSP to require his retail agents to do something. We believe this is far too strong an obligation, as discussed in our cover letter, and should be globally replaced with *“shall take all reasonable steps to ensure that”*.

As discussed above, most of the provisions of sub-paragraph (b) can be covered by amendment to 23.2 leaving the substantive requirements as paragraph (a), (b)(iv), (c) and (d). In fact, in keeping with our comments in a

number of contexts in this response, we believe that the remaining obligations in this paragraph all relate to things that an MSP would naturally do once his primary responsibility for the performance of his retail agents is established via this GC. As such, it becomes unnecessary to state them explicitly and if, in any event, Ofcom decides to retain these obligations within the GC, we believe they should be subject to a sunset clause such that they fall away unless Ofcom has determined that there is still an ongoing issue with MSPs' control of their retail agents' practices.

With respect to sub-paragraph (b)(iv) on retaining records, we believe that a MSP, or their agent, should be able to produce electronic records to validate a contract and any associated sales incentives, if applicable, that a customer has entered into for the length of the contract term. It does not therefore seem unreasonable that an MSP or its agents should be required to retain records of the specified information for not less than 12 months but only in cases where a customer enters into a contract.

- 23.5 See comments above on use of the phrase “best endeavours”, which is used twice in this paragraph. In this context, we also note that the similar requirements at paragraph 6.1 of Annex 3 to GC 14 on fixed line mis-selling obligations contains the phrase “All reasonable steps to be taken to ensure ...” which, in our view, is a more reasonable obligation and similar to that discussed above.
- 23.6 This paragraph deals with record retention by the MSP, as distinct from its agents. Following the principle discussed in our cover letter and in our comments on 23.2 above, we believe it may be possible to combine this paragraph with the detail in 23.4 (b)(iv). For the MSP itself, it might be that sales are made by internet, in which case some of the specified detail may not be relevant. This could be dealt with by including the phrase “*where applicable*” at the end of the paragraph.
- 23.7 As discussed in our cover letter, we believe that an MSP would naturally seek to ensure that retail agents working on its behalf were appropriately trained once it is clearly the case that shortcomings in the performance of those agents are seen as the responsibility of the MSP. As such, we believe that this obligation could be removed, or subject to a sunset clause. See also comments above on use of the phrase “best endeavours”, which is used in this paragraph.
- 23.8 Similarly, the above reasoning would also suggest that MSPs will naturally have a strong incentive to control and check the parties involved in any chain of parties they use as agents to obtain contracts with final end customers as soon as their primary obligation not to mis-sell takes effect. Such a prescriptive set of obligations as set out in this paragraph also reduces an MSPs flexibility, in addressing agent compliance programmes, to reduce compliance checks on agents whose performance is satisfactory. If, in any event, Ofcom decides to retain these obligations within the GC, we believe they should be subject to a sunset clause such that they fall away unless Ofcom has determined that there is still an ongoing issue with retailer insolvency.

On a minor point, the sub paragraphs do not appear to have the correct starting point in this paragraph and 23.9.

23.9 Again, we believe MSPs will naturally have a strong incentive to ensure that end-user terms and conditions for sales incentives used by its agents are reasonable and clear as soon as their primary obligation not to mis-sell takes effect. If, in any event, Ofcom decides to retain these obligations within the GC, we believe they should be subject to a sunset clause such that they fall away unless Ofcom has determined that there is still an ongoing issue with onerous/misleading cashback terms and conditions. See also comments above on use of the phrase “best endeavours”, which is used twice in this paragraph.

23.10 We have a minor comment in relation to the definitions. We note that the definition of “Domestic and Small Business Customer” is referenced back to the Communications Act. In GC 14, the definition is set out in full and we wonder if it might be helpful to refer to that definition or reproduce it in this GC.

#### Proposed Guidelines in respect of GC 23

A7.3 We believe this paragraph should refer specifically to GC 23.

A7.6 We strongly support the paragraphs setting out the purpose and scope of the guidelines and, in particular, believe it important that this paragraph clarifying that the guidelines are not part of the GC itself is retained.

Several of the paragraphs in the guidelines refer to “best endeavours” which we have argued is too strong an obligation and we believe that these should be worded differently as discussed above in relation to the GC itself.