

**Cover sheet for response to an Ofcom consultation**  
**BASIC DETAILS**

Consultation title: Changes to General Conditions and Universal Service Conditions – Implementing the revised EU Framework

To (Ofcom contact): Selina Chadha (email: [GCUSC.condoc@ofcom.org.uk](mailto:GCUSC.condoc@ofcom.org.uk))

Name of respondent: **Hutchison 3G UK Limited t/a Three**

Representing (self or organisation/s): **Hutchison 3G UK Limited t/a Three**

Address (if not received by email): **Star House, 20 Grenfell Road, Maidenhead, Berks, SL6 1EH**

**CONFIDENTIALITY**

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input checked="" type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

**Three has provided a Confidential and a Non-Confidential version of its response. This is the NON-CONFIDENTIAL VERSION OF THE RESPONSE. Redactions indicated by: [§<]**

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name: Michelle Bick, Legal Counsel      Signed (if hard copy)

## **A.1 Introduction**

- A.1 Hutchison 3G UK Limited (“Three”) welcomes the opportunity to respond to Ofcom’s Consultation (the “Consultation”) regarding the Changes to the General Conditions (“GCs”) and the Universal Service Conditions (“USCs”) to implement the revised EU communications framework (the “revised Framework”). We have set out below a few general comments regarding the implementation of the revised Framework, before going on to consider and respond to each of Ofcom’s specific questions in turn.
- A.2 Of course, we would be happy to meet with Ofcom to discuss our comments, and the wider programme for implementation of the revised Framework, should you feel that that would be helpful.

## **B. General Comments**

### *Timeframes for adoption and implementation*

- B.1 The consultation closes on 7 April, leaving only a six week window for Ofcom to publish its final statement before the changes must be implemented by the UK on 25 May 2011. Given that some of the new obligations require substantive action from operators (e.g. the setting up of a porting compensation scheme), these timescales are clearly very tight.
- B.2 In some instances (highlighted below), the Consultation does not provide the level of detail or guidance that we had been led to expect, and so we are concerned that Ofcom has not fully considered the ramifications of its implementation proposals. In particular, Ofcom must ensure that the changes are workable and proportionate for industry.
- B.3 Additionally, to our knowledge, the legislation making the necessary amendments to the Communications Act 2003 (the “2003 Act”) to ensure the UK’s compliance with the revised Framework has not yet been tabled, although the implementation deadline is next month. In future, we urge Ofcom and the Government to act more expeditiously when implementing EU Directives, to ensure that stakeholders affected by the proposed changes are given more time to act.

### *Minimising the risk of “gold-plating”*

- B.4 We agree that it is important that the UK Government fully implements the revised Framework. However, it is also imperative that the new requirements are not “gold-plated”, especially given the current economic climate and the economic challenges facing UK businesses and consumers. The Government has already highlighted the risks of gold-plating and the Coalition Government’s programme has promised to “end the so-called ‘gold-plating’ of EU rules, so that British businesses are not disadvantaged relative to their European competitors.”<sup>1</sup>
- B.5 Ofcom needs to be mindful of this promise and not unnecessarily increase the regulatory and compliance burden on UK communications providers, and so potentially place them at a commercial and competitive disadvantage compared to their European counterparts. This is particularly the case where Ofcom has an

---

<sup>1</sup> Page 10, The Coalition: our programme for government, published May 2010  
[www.cabinetoffice.gov.uk/media/409088/pfg\\_coalition.pdf](http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf)

element of discretion regarding implementation of the revised Framework and/or plans to issue guidance which, though non-binding, adds detail to the revisions to the GCs.

## **Consultation Questions & Three's Response**

### **Q.1 Do you agree with our proposed approach to definitions?**

- 1.1 Three welcomes Ofcom's new approach to definitions within the GCs and USCs, i.e. to refer out to the corresponding definitions in the 2003 Act rather than re-defining the same terms within the GCs and USCs. We agree that this approach will, in the majority of cases, result in technical, non-material changes. We note that it should also reduce duplication of definitions, and minimise the potential for ambiguities or inconsistencies between the GCs and USCs and the 2003 Act.
- 1.2 We also have no objections to Ofcom's proposals for additional material definitional changes, to the extent that they are required by the revised Framework.

### **Q.2 Do you agree with our proposal to add CEPT to the list of standardisation bodies?**

- 2.1 Three has no objections to Ofcom's proposal to include CEPT in the list of standardisation bodies, given that this is now a requirement of Article 17(2) of the revised Framework Directive.

### **Q.3 Do you agree with our proposals to extend the requirements of GC3 beyond 'fixed locations' and to require CPs to 'take all necessary measures' to maintain their networks and services and access to emergency services?**

- 3.1 Firstly, as we described in our response to BIS's previous consultation and as Ofcom has now recognised, resilience within the telecoms sector has traditionally been very strong, with the demands of our customer base driving high availability of services. Therefore, we strongly believe that a balance can and must be struck between ensuring compliance with the revised Framework requirements relating to security and integrity, and keeping the compliance burden on industry to a minimum, especially given the current economic climate.
- 3.2 Three agrees that Article 23 of the revised Universal Service Directive ("USD") requires the amendments that Ofcom is proposing to make to GC3, including extending the requirements beyond fixed locations and requiring a change from an obligation to "take all reasonably practicable steps" to "all necessary measures". However, we are concerned that the meaning of "all necessary measures": a) remains ambiguous; b) places a potentially very high burden on operators; and, c) without additional qualification, may require investment above and beyond what would normally be within operators' commercial interests, and the expectations of their consumers.
- 3.3 Clearly, the European Commission's intent was not to require operators to make disproportionate and excessive investment to maintain fully the integrity of a network even in the event of a remote force majeure [3]. And, as the Government previously recognised at paragraph 91 of the BIS consultation, "each electronic communications service and network provider faces different risks to security and

availability of networks and/or services and will employ different and varied ways of mitigating against such risk.”<sup>2</sup>

3.4 Therefore, we strongly welcome Ofcom’s approach of applying a proportionality test to the requirement to “take all necessary measures”, and we look forward to working with Ofcom going forward to understand better their expectations.

3.5 Incidentally, the fact that there is a pragmatic balance to be struck is reinforced by the wording of Article 13a of the Framework Directive, which states that:

“1. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services take appropriate technical and organisational measures to appropriately manage the risks posed to security of networks and services. Having regard to the state of the art, these measures shall ensure a level of security appropriate to the risk presented. In particular, measures shall be taken to prevent and minimise the impact of security incidents on users and interconnected networks.

2. Member States shall ensure that undertakings providing public communications networks take all appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks.”

**Q.4 Do you agree with our proposals for emergency call numbers – which includes amending the definition of CP and requiring that location information is provided free of charge, as soon as the call reaches the emergency organisations and is accurate and reliable (in line with our proposed high level criteria)?**

4.1 We welcome Ofcom’s proposal to consult in more detail regarding the accuracy and reliability criteria that it plans to apply when assessing compliance with GC4. We agree that the technical feasibility of providing location information relating to overseas mobile customers roaming in the UK “as soon as” the call reaches the emergency authority should form part of this Consultation. We look forward to engaging further with Ofcom on these issues during that consultation process, in due course.

4.2 In the meantime, our only comment on the proposed changes to GC4 relates to the definition of “Mobile Network” in the new GC4.4. Ofcom has proposed the following definition:

““Mobile Network” means either the GSM (Global System for Mobile communications as defined by the European Telecommunications Standards Institute) or UMTS (Universal Mobile Telecommunications System as defined by the European Telecommunications Standards Institute) networks;”

4.3 Three is concerned that the definition, as currently drafted, only captures 2G and 3G operators, meaning that operators offering “mobile-type” services, (e.g. LTE or “over-the-top” (OTT) services) may inadvertently, be outside the scope of the obligation in new GC4.3(b). To resolve this problem, we suggest that, at the very least, Ofcom mirrors in GC4.4 the wording in the new definition of “Mobile SMS Access” in GC15.10, which, in essence, future-proofs the definition by referring not only to 2G and 3G standards, but also to “any other standard for mobile

---

<sup>2</sup> <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/i/10-1132-implementing-revised-electronic-communications-framework-consultation.pdf>

communications that is, or may be, adopted in the UK". In addition, we urge Ofcom to consider whether OTT operators ought to be caught within the definition of "Mobile Network" in GC 4.4 and consequently the obligations under GC4.3(b), in order to ensure full implementation of the revised Framework.

**Q.5 Do you agree with our proposed approach to contract related requirements relating to the provision of additional information, the length of contracts and the conditions for termination?**

**Material Detriment**

- 5.1 Three agrees with Ofcom's approach to retain a "material detriment" requirement in respect of notification of contract modifications to consumers. However, Three notes Ofcom's comment at paragraph 7.18 of the Consultation that Ofcom does not believe it is appropriate for there to be a stricter test for residential consumers than for business – Three notes that this is, in fact, the current position under national law as consumers are afforded more protection than business customers in the form of the additional protection for consumers under the UTCCRs.

**24 Month Limit on Consumer Contracts**

- 5.2 Whilst Three notes the 24 month initial commitment period restriction for consumer contracts in Article 30(5) of the USD, Three does not agree with Ofcom's view (set out in paragraph 7.26 and footnote 39 of the Consultation) that this part of the Directive should have retrospective effect.

[3<]

- 5.3 In respect of the Directive, it is not specifically expressed to have retrospective effect. As the Directive that the General Conditions are seeking to implement does not expressly state that it is intended to have retrospective effect, to endow the General Conditions with retrospective effect would contravene the principle of fairness and the general presumption against laws and regulations having retrospective effect.

[3<]

- 5.4 In addition, we note Ofcom's duties under section 47 of the 2003 Act - we do not believe that Ofcom's proposal to implement the 24 month limit for consumer contracts retrospectively via its modifications to the GCs is in accordance with the proper exercise of Ofcom's duties under section 47 as we do not believe it is proportionate, particularly given Ofcom's flawed impact assessment of this part of its proposal.

[3<]

**Disincentives for End-Users Switching Providers**

- 5.5 We note that Ofcom is already considering certain types of disincentives as part of existing projects (such as its Consumer Switching Review). Three would refer Ofcom to its previous response to Ofcom's Consumer Switching Consultation, particularly our concerns regarding the current barriers to switching which are

inherent in a donor-led process, such as the current UK mobile number porting (“MNP”) process, but not in a recipient-led process<sup>3</sup>.

**Q6. Do you agree with our proposals to ensure equivalent access to the emergency services for disabled users and to mandate the provision of Emergency SMS?**

6.1 Three agrees that it is appropriate for CPs to offer a service that provides as equivalent access to the emergency services for disabled users, as is possible, to that enjoyed by other end-users. Accordingly Three has participated in the voluntary Emergency SMS scheme since mid-2009.

6.2 However, Three is disappointed that Ofcom feels that it is necessary to transpose a successful voluntary scheme into formal regulation. We believe that such a move undermines the self regulatory regime, and is likely to discourage self regulatory initiatives going forward.

6.3 The new proposed GC15.7 does not restrict the requirement to provide emergency SMS to customers with hearing and/or speech impairments, or customers who are otherwise disabled. The other existing requirements of GC15 are limited to end-users with disabilities and we suggest that the proposed new GC15.7 should be amended accordingly, for example, by the inclusion of the following wording after “End-Users:” “... *who have hearing or speech impairments or are otherwise disabled, ...*” The Emergency SMS service should not be seen as a service that is open to all end-users, nor should it be a service that we are required to publicise as being suitable to all end-users (as per GC15.8) as it is recognised by all stakeholders that for the majority of consumers, voice will remain the most effective method of handling an emergency call.

6.4 The Summary of Costs table on page 37 of the Consultation states that the capital costs for setting up the mandated Emergency SMS scheme will be approximately £80,000 (which will be re-charged to the MVNOs on a pro-rata basis). The Consultation does not provide any detail as to how this cost has been calculated and Three would welcome a more detailed breakdown of costs that shows how the sum of £80,000 has been calculated.

6.5 With regard to the observations made in paragraph 8.19 of the Consultation regarding MVNOs, the way in which emergency SMSs are routed and charged for will depend on whether an MVNO has its own Short Message Service Centre (‘SMSC’) infrastructure. There are currently some MVNOs that do not use their host networks’ equipment, but send their SMSs independently. Ofcom needs to be clear that in these instances it is the MVNO’s responsibility to set up its own arrangements to support the Emergency SMS service and potentially pick up a proportion of the cost.

**Q7. Do you agree that given the existing measures that are in place to help disabled users to access 116XX services, it is not necessary to make further changes to GC15 in this respect?**

7.1 Yes. Three agrees that the existing measures mandated by GC15 in order to help disabled end-users to access 116XXX are sufficient.

---

<sup>3</sup> See: <http://stakeholders.ofcom.org.uk/consultations/consumer-switching/?showResponses=true>

7.2 Ofcom should, however, encourage CPs to investigate the cost of SMS routing to 116 numbers. If the costs are reasonable, a voluntary scheme should be encouraged.

**Q8. Do you agree with our proposals on conditions for transferring the rights of use of telephone numbers and also for granting their use for a limited period of time?**

8.1 Three broadly agrees with Ofcom's proposals for amending GC17, primarily because the changes reflect the requirements of the revised Framework. We have no specific comments at this stage.

**Q9. Do you agree with our proposals on the one working day requirements in relation to bulk mobile ports and in relation to fixed porting? If not, please explain why?**

9.1 We note Ofcom's comments regarding the application of the one working day requirement to bulk mobile ports, however, as Ofcom has recognised, it is likely to be extremely rare for a customer to request a bulk port within one working day, given the additional complexities involved in processing such a port. As Ofcom appears to acknowledge in the Consultation, this is likely to mean that any such requirement will be difficult to implement and enforce in practice. Given, however, that Three does not have a bulk porting process, these obligations are unlikely to impact on Three, in any event.

9.2 More directly concerning for us is Ofcom's assumption that the changes to GC18 in respect of MNP that take effect on 11 April 2011 fully ensure the UK's compliance with the new provisions of Article 30(4) of the USD. We disagree with Ofcom's statement that these changes are "in line with the revised USD".

9.3 The revised USD requires that EU Member States offer porting within the shortest possible time, and in any event, within one working day. However, the changes to GC18 neither achieve one working day porting nor allow for porting within the shortest possible time. In fact, of the four options which Ofcom previously identified as "possible" and likely to produce a positive economic case over time, Ofcom chose to adopt the slowest option. Moreover Ofcom failed even to consider the option that would have resulted in the fastest porting experience for the customer.

9.4 The provisions in the USD are designed to protect consumers, and improve the customer experience of switching supplier. However, Ofcom is now compounding the consumer harm caused by the donor-led MNP process by proposing to defer consideration of any further changes to the MNP process until late 2012 at the earliest, after it has looked at fixed and broadband<sup>4</sup>. In our view, different processes, including a move to a recipient-led MNP process, must be considered as a matter of urgency, to ensure the UK's full compliance with the revised USD.

9.5 Finally, in footnote 70 of the Consultation, Ofcom notes that it considers "working day" and "business day" to be synonymous. Notwithstanding this, for consistency we suggest that all references in the GCs should be to either business day or working day, rather than swapping between the two terms. For example, GC18.3 refers to "business day", whereas new GC18.9 refers to "working day". We urge Ofcom to address this issue in the final version of the changes to the GCs.

---

<sup>4</sup> See Ofcom's *Strategic review of consumer switching – A consultation on switching processes in the UK communications sector*, published on 10 September 2010

**Q10. Do you agree with our proposed approach to the porting compensation scheme requirement?**

- 10.1 We recognise that the changes to the USD require appropriate sanctions to be put in place, including to compensate subscribers, where there is a delay or fault in porting. However, Ofcom's amendments to GC18 should be proportionate and not prescribe any further obligations which are not contemplated in the amended USD.
- 10.2 Therefore, we welcome Ofcom's decision not to set out full details of the compensation scheme parameters, but rather to allow operators to design a scheme which is most suited to their business. This reflects the Government's objective to avoid gold-plating EU legislative requirements, and should also avoid unnecessary wasted costs of implementing a very prescribed scheme.
- 10.3 However, [3<] Three has several concerns regarding Ofcom's proposed guidance which is intended to accompany the porting compensation scheme requirement.

**Ofcom's failure to address the real harm caused by donor-led MNP process**

- 10.4 We are particularly concerned that the scheme proposed by Ofcom will not address many of the elements of consumer harm that are present in the current UK MNP system. Ofcom must look to the purpose and intent of the European Commission when implementing the requirements in the revised Framework regarding a porting compensation scheme.
- 10.5 The UK is alone in Europe in having a donor-led MNP system that requires consumers to first ask permission of their old operator before being able to move their number. The UK's implementation of the porting compensation scheme must be informed by this. In particular, any scheme must address the consumer harm caused by delays in the first stage of the UK MNP process, namely the provision of porting authorisation codes (PAC). As we have reported extensively to Ofcom in the past (see, for example, our response to Ofcom's MNP Consultations published in August 2009 and April 2010), it is this first stage of the donor-led MNP process which is open to abuse by donor operators, and where action is required to protect consumers from harm.
- 10.6 Our understanding is that, currently, Ofcom's proposed porting compensation scheme will not cover delays or failures associated with this first stage of the MNP process. We strongly believe that this is a significant oversight by Ofcom, and severely restricts the effectiveness of Ofcom's attempts to implement the requirements of the revised USD.

**Ofcom's assumption that a delay in porting equals a delay in service provision**

- 10.7 We disagree with Ofcom's assertion in paragraph 10.56 of the Consultation that a delay or fault in porting is analogous to a delay or fault in service provision. In our view, it is also too simplistic to apply the compensation schemes for loss of service currently offered by fixed line providers to the mobile environment.
- 10.8 There are significant differences between the way account transfer happens in a mobile context, compared to a fixed voice or broadband context. As we have highlighted to Ofcom on previous occasions (see paragraph 11 of Three's response to the Consumer Switching Consultation), at least in a mobile context, that switching and porting are not interchangeable terms because they describe



different processes. Apart from MNP, no other “co-ordination” is needed between operators for customers to be able to switch because of the wireless nature of mobile technology.

- 10.9 As a result, it is rare for a mobile customer to experience any loss of service as a result of a delay in porting. Unlike in a switch between fixed operators – where customers will lose service, if a mobile port is delayed, a mobile customer could still have service, albeit on both their old and new networks. Therefore, it is incorrect for Ofcom to simply read across the provisions of fixed line compensation schemes which compensate for a loss of service, to a mobile context (as Ofcom suggests at paragraph 10.57 of the Consultation).

#### **Which entity is liable to pay compensation?**

- 10.10 As discussed above, under the current donor-led MNP process, it is the donor operator that is most likely to cause delays in the porting process (primarily by failing to provide a PAC). However, Ofcom appears to envisage that the porting compensation scheme will be administered by the recipient operator. It is inequitable for the recipient operator to be expected to recompense their new customer for delays in porting caused by a third party (e.g. the donor operator or Syniverse). Ofcom does not fully address this issue in the draft guidance.

#### **Establishing the “loss” sustained by the customer**

- 10.11 The term used in the Directive is “compensation”, implying recovery of a loss actually suffered (i.e. the indemnity principle). Therefore, compensation should only be required to be paid where the customer actually sustains a loss (e.g. loss of service). The Commission cannot have intended this compensation scheme to be a licence for windfalls, but rather a scheme that compensates for losses sustained as a result of a delay or fault in porting. In our view, in the Consultation Ofcom has failed to fully consider the implications of such a scheme in its guidance, particularly insofar as it relates to mobile operators.

#### **Q.11 Do you agree with our proposed approach on requirements relating to ensuring access to all numbers within the Community, the charging of ETNS numbers and calling the hotline for missing children on 116000?**

- 11.1 We have no objections to Ofcom’s proposals for amending GC20, to the extent that they are required by the revised Framework.

- 11.2 We would like to note that, when read together, GC20.1 and GC20.3 appear to suggest that only Ofcom can request that operators block access to telephone numbers or services in the event of fraud or misuse. However, it is far more likely in practice that operators themselves will use their own monitoring systems to detect such fraud and misuse. Where this activity is suspected, operators must be entitled to block access to such number ranges and services to protect their commercial interests. We assume that the caveat in GC20.1 restricting the obligation to “where technically and economically feasible” is intended to cover this type of scenario, however, we would welcome further clarity from Ofcom on this point in its final statement.

#### **Q.12 Do you agree with this proposed obligation on universal service providers to notify us when they are disposing of part or all their local access networks assets?**

12.1 Given that Three is not affected directly by this proposal, we have no specific comments at this stage.