



Protecting consumers from mis-selling of mobile telecommunications services

A consultation on options to prevent problems with
mis-selling and cashback issues in the mobile retail market

Consultation

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Section 1

Summary

- 1.1 Inappropriate and misleading sales and marketing behaviour can undermine consumer confidence in markets and cause individuals harm. Complaints to Ofcom about the mis-selling of mobile communications services have risen sharply since 2006. Problems experienced by consumers include being given false or misleading information when purchasing services and ‘slamming’ where consumers have found themselves with a new contract without their knowledge and consent.
- 1.2 An additional feature of mis-selling around certain ‘cashback’ schemes, being sold by independent retailers of mobile service providers’ services, became an increased cause for concern during 2007. Cashback is a commonly available offer, where an independent retailer undertakes to pay an amount of money to the customer when they take out a mobile phone contract from a mobile service provider. Problems have arisen where the consumer has been unable to obtain the cashback, typically either because the terms for claiming are too onerous or because the independent retailer has gone out of business.
- 1.3 Consumers who are mis-sold services can suffer significant anxiety, distress and inconvenience. Financial harm can also occur if consumers find themselves on inappropriate price or service packages. Where the consumer is unable to redeem the cashback deal, significant financial loss can occur, particularly if the consumer is still bound by the separate monthly contract for the mobile service.
- 1.4 Following an enquiry into sales and marketing practices, Ofcom worked with five of the mobile service providers (3, O2, Orange, T-Mobile and Vodafone) to develop and introduce in July 2007 an industry code of practice aimed at tackling misleading sales and marketing practices (‘the code’) including the fairness of the terms of cashback deals being offered. At the time of its introduction, Ofcom made clear that unless the code resulted in a significant and rapid reduction in consumer complaints we would consider the case for formal regulatory intervention.
- 1.5 By October 2007 there had been no significant change in the level of complaints to Ofcom and we began a review of sales and marketing practices in the mobile retail market to consider the case for further action.

Our review

- 1.6 The evidence we have collected indicates the introduction of the code has brought about some positive changes in practices by mobile service providers and retailers. However, these have not been uniformly applied and have not brought about an adequate reduction in consumer complaints or consumer harm.
- 1.7 Mobile service providers have reviewed their sales and marketing procedures, and those of the independent retailers, including the terms of cashback offers. The code appears to have been disseminated widely through the retail chain.
- 1.8 Some mobile service providers have ceased selling their services through certain independent retailers following compliance reviews. In addition, some retailers have ceased trading following the application of new rules under the code requiring the cashback terms to be fair.

- 1.9 However, we have found that the extent of monitoring and compliance activity varies between mobile service providers. And where monitoring and compliance activity has taken place, its main focus appears to have been to address cashback and slamming problems rather than more general mis-selling.
- 1.10 Complaints to Ofcom have continued at broadly the same high level as at the introduction of the code. The number of complaints in both January and February 2008 exceeded those in July 2007.
- 1.11 We have carried out research into consumers' experience of cashback. This shows that in most cases cashback deals work well, stimulating competition and providing benefits to consumers. Around 80% of cashback customers are happy with their offers and have found the process for claiming them relatively easy. However, a significant minority of customers have experienced problems with certain deals where making claims is complex or where the retailer has ceased trading. In many of these cases, the amount the customer has not been able to redeem has been large resulting in a significant level of overall harm.

Proposals

- 1.12 In light of the continuing high levels of complaints, the varying levels of monitoring and enforcement of the code by the mobile service providers and the extent of consumer harm involved, we are concerned that reliance on the 'voluntary' code does not appear to provide adequate protection for consumers.
- 1.13 We are therefore proposing to introduce a new General Condition on sales and marketing practices that will apply to all mobile service providers.
- 1.14 Amongst other things, the proposed condition requires mobile service providers:
- not to engage in dishonest, misleading or deceptive conduct and to ensure that those selling their products and services do not mis-sell;
 - to make sure the customer is authorised to, and intends to, enter into a contract;
 - to make sure customers get the information they need when they buy the product;
 - to ensure that the terms and conditions of all sales incentives offered by their retailers are not unduly restrictive; and
 - to carry out due diligence and a number of checks in respect of their retailers to ensure the soundness of the company and its directors.
- 1.15 While this proposal is an important intervention to protect consumers, we consider it is proportionate and should not create significant additional costs for those mobile service providers and independent retailers who are already complying with the code. It will, however, ensure that Ofcom can formally investigate the extent to which the rules are being followed and ultimately impose sanctions for breaches of the regulations. We will also be able to make sure that the rules are being applied consistently by all mobile service providers.
- 1.16 We consider that by requiring cashback offers to be provided on reasonable terms, independent retailers' businesses should be more commercially sustainable and

instances of insolvencies due to unsustainable cashback offers and the consequent harm to consumers should be reduced over time.

- 1.17 We have considered more interventionist options, including banning cashbacks or making mobile service providers responsible when independent retailers do not pay customers under a cashback scheme. However, we believe these options risk restricting consumer choice by affecting not just problematic cashback offers but also those (the majority) that work well. More intrusive interventions may result in mobile service providers reducing the number of retail outlets they use.
- 1.18 We are inviting comments on our proposals and on the other options we have considered by 29 April 2008.

Section 2

Introduction

- 2.1 It is Ofcom's principal duty to further the interests of citizens and consumers through a regulatory regime which, where appropriate, encourages competition. Effective competition delivers choice and lower prices to consumers as well as opportunities for new services and new entrants. However, competition alone may not always deliver appropriate results and consumers may need protection from inappropriate and unacceptable behaviour by certain market players that may undermine confidence in the market as well as cause individual detriment.
- 2.2 Examples of such unfair and unacceptable behaviour would be not telling the truth to customers about the terms of a contract, acting in a threatening or intimidating way, or entering customers into a new contract without their informed consent.
- 2.3 Given the evidence that mis-selling of mobile services continues to be a significant problem, we are considering whether to impose a regulatory rule requiring providers to adhere to certain standards of conduct. We outline a number of options, and our proposed approach. We welcome feedback on our views and options as part of this consultation.

Background

- 2.4 'Mis-selling' covers a range of sales and marketing activities including:
- the omission of relevant or the provision of false and/or misleading information (for example, about tariffs, potential savings or promising offers or gifts which do not materialise);
 - applying unacceptable pressure to change providers, such as using threatening or intimidating behaviour or refusing to leave until the customer signs a new contract; and
 - slamming, an extreme form of mis-selling, where customers find themselves with a service from a new company without their knowledge and consent. Forms of slamming can include, passing off (i.e. where representatives claim to represent a different company), customers being told they are merely signing up for information rather than entering into a new contract, or the forging of customers' signatures on contracts without the customer being aware.¹
- 2.5 Sales incentives, such as cashback schemes, are a form of promotion offered by independent retailers² to customers, where a customer signs up for a mobile network contract, and where the independent retailer promises an incentive to the customer for doing so. In the case of cashback, the customer is promised payment of a certain amount of money. A mobile handset is typically supplied to the customer at the same time, either for free or in return for a one-off payment.

¹ Slamming in the mobile sector is quite distinct from forms of slamming in the fixed-line telecoms sector as it does not necessarily involve being switched from one company to another but rather being entered into a new contract (with no change to the customer's existing contract).

² Throughout this document, 'independent retailer' refers to third party sales channels through which mobile service providers market and sell their services to end-users.

2.6 Ofcom has observed two different types of problems involving cashback schemes:

- Independent retailers refusing to honour cashback offers, purportedly on the basis that the customer has failed to comply with the terms of the offer (which may be set unreasonably and which may be designed to make it difficult or impossible to claim successfully); and
- Independent retailers going out of business and therefore being unable to honour the cashback offers.

2.7 Consumers' interests can be harmed as a result of irresponsible sales and marketing activities in a number of ways:

- Customers finding that they have taken out a new contract with a mobile service provider without their knowledge and consent could suffer inconvenience or anxiety. The customer may suffer financial harm if they are transferred onto a more expensive price plan or end up with multiple contracts.
- Distress, inconvenience and financial harm, where customers are unable to obtain sales incentives promised and, in the case of cashback, are still bound to pay the full monthly line rental to the mobile service provider for the duration of the minimum term of the contract, typically 12 or 18 months.
- The risk that adverse publicity relating to irresponsible sales and marketing activity could result in customers losing confidence in the mobile retail market. This could mean customers are discouraged from participating in the market and exercising the opportunity to choose or switch, making competition less effective and thus, potentially, limiting the benefits to customers.

2.8 Instances of consumer harm have been highlighted to us by consumer stakeholders, directly by consumers, through correspondence with MPs and in media coverage. Concerns over cashback deals were the subject of a parliamentary debate in Westminster Hall on 5 March 2008.³ The debate was initiated by Roger Godsiff, MP for Birmingham, Sparkbrook and Small Heath.

2.9 We have taken account of points raised by stakeholders in developing and setting our proposals in this document.

Ofcom's policy objectives

2.10 Ofcom's policy objectives are:

- To support and promote competition in retail mobile communications to the benefit of customers including, preserving, to the maximum extent possible, the commercial freedom of mobile service providers and independent retailers to compete in creating varied offers that may appeal to different groups of consumers.
- To ensure that consumer confidence in the market is not undermined.
- To ensure that consumers have adequate protection from irresponsible and inappropriate sales and marketing activities.

³ <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080305/halltext/80305h0001.htm#0803057600001>

- To ensure that terms and conditions around sales incentive offers are fair and consumers are able to redeem offers.
- To ensure any proposed solution is targeted at those undertaking mis-selling activity, and is a proportionate response in line with Ofcom's regulatory principles.

Code of practice for the sales and marketing of subscriptions to mobile networks

- 2.11 Following a rising trend in complaints about selling practices in the mobile market, Ofcom worked with the mobile industry in developing a self-regulatory initiative in the form of a voluntary code of practice for the sales and marketing of subscriptions to mobile networks, aimed at stamping out misleading sales and marketing practices. This code was adopted by the providers on 31 July 2007.
- 2.12 The code lays out best practice principles for selling and promoting mobile phone subscriptions and pre-pay deals through both direct and indirect sales channels. It also sets standards on sales incentives and due diligence on behalf of mobile operators.
- 2.13 We made clear at the time that we expected the code to have a quick and significant impact in reducing complaint numbers and that we would move swiftly to assess more formal regulatory options to protect consumers should the code not have the desired impact.⁴ By October 2007 there had not been any significant change in the level of complaints to Ofcom and we announced a review of selling practices in the mobile market.⁵ This consultation reports on that review and invites views on our conclusions and proposals.

Approach

- 2.14 To inform our review we have gathered evidence from different sources and stakeholders and used the following approach:
- Ofcom sent Mobile Network Operators ('MNOs') a statutory information request regarding selling practices in the mobile retail market. In addition, we had a number of meetings with the MNOs to discuss mis-selling and cashback in general and possible options to tackle problems. According to the Ofcom Advisory Team (OAT), most complaints surrounding mobile mis-selling and cashback problems in the mobile sector were regarding MNOs and their retailers, and only a very small part related to Mobile Virtual Network Operators ('MVNOs'). We therefore decided to send the information request to MNOs only;
 - The OAT records complaints on mis-selling and cashback. We have analysed complaints data in quantitative and qualitative terms. We have taken a sample of cashback complaints to get more detailed information such as the amounts of cashback offered to customers and the amounts they were able to redeem;
 - Other consumer facing organisations, such as Consumer Direct, a number of Trading Standards offices, LACORS (the Local Authorities Coordinators of Regulatory Services) and Citizen Advice Bureau ('CAB') shared their complaints data with us;

⁴ http://www.ofcom.org.uk/media/news/2007/07/nr_20070731 .

⁵ The review was announced at the Annual Lecture. The speech can be found at <http://www.ofcom.org.uk/media/speeches/2007/10/annuallecture>.

- We commissioned market research in order to gain insight into different aspects of the cashback market;
- We spoke to a number of large and small retailers and distributors to find out more about the mobile retail market in general. In particular we learnt about commissions, cashback offers and redemption rates (this is the proportion of cashback which consumers are able to claim successfully) and their experience with the voluntary code of practice.
- We assessed relevant existing legal provisions to deal with mis-selling;
- We developed an initial set of options to tackle mis-selling and shared our initial options with relevant stakeholders; and
- We refined and finalised our set of options and, based on the above, determined our preferred options.

Outline of this document

2.15 The remainder of this document is structured as follows:

- In Section 3 we give a more detailed overview of mobile mis-selling, including an overview of actions taken by Ofcom and by the industry to prevent mobile mis-selling.
- In Section 4 we set out the evidence gathered in respect of mobile mis-selling based on an analysis of complaints from different sources. In this section we also discuss the effectiveness of the voluntary code, and give an indication of the size of the cashback market, based on market research.
- Section 5 contains an overview of the relevant legal framework and an introduction to the options we have identified.
- In Sections 6, 7 and 8 we consider a number of options aimed at reducing mobile mis-selling, problems with sales incentives and retailer insolvency respectively, including our preferred options.
- Section 9 contains a summary of the preferred option and our conclusion.
- An impact assessment of each of the options is included in Annex 5.

2.16 Ofcom welcomes comments on its proposals by 5pm on 29 April. The process for responding is set out at Annex 1.

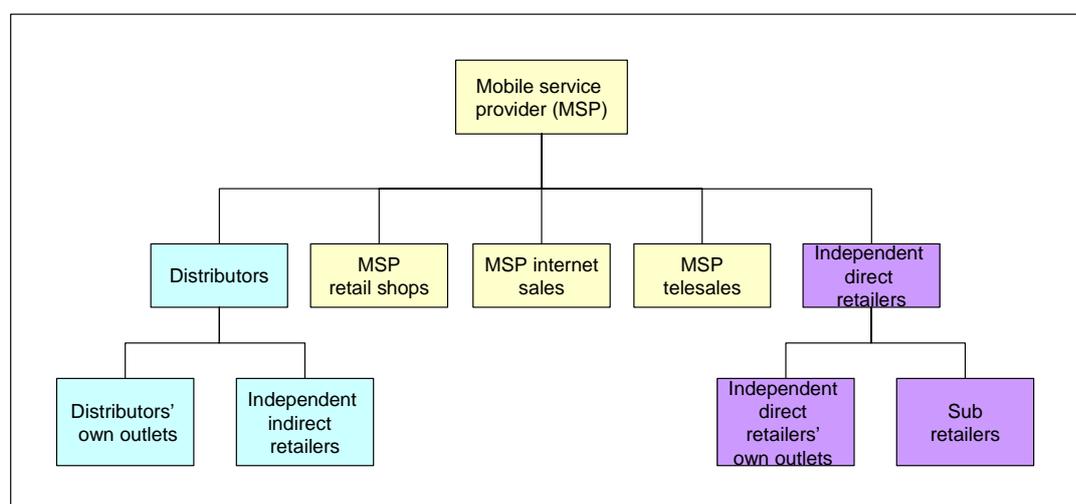
Section 3

Mis-selling and cashback in the mobile retail market

The structure of the mobile retail market

3.1 Based on meetings with MNOs, retailers and distributors, we understood that mobile service providers (both MNOs and MVNOs) may use a number of different channels to market, to promote and sell their products to end-users. Figure 1 below provides an example of the different channels used.

Figure 1: Typical channels to market used by the mobile service providers.



3.2 Each mobile service provider can have a number of own retail shops, dedicated to selling solely the mobile service provider's own products and services. The number of retail shops per mobile service provider varies between 270 and 470. In addition to this, most mobile service providers sell mobile phone subscriptions, accessories, handsets and SIM-cards that can be purchased online (through their own websites) and via their own telesales.

3.3 Mobile service providers may also use so called 'independent direct retailers', to promote and sell their services. These are independent third parties with whom a mobile service provider contracts directly to acquire customers. There are two types of independent direct retailers:

- The 'multiples', large independent retailers with multiple stores such as CarphoneWarehouse, Phones4U, the Link and Argos. The multiples can have their own retail outlets (including own telesales and internet sales) and can also use what we call 'sub- retailers' to promote their services.
- Smaller independent direct retailers, who typically don't use sub-retailers to sell their services.

3.4 A third channel to market used by mobile service providers is the 'distributor'. Distributors mainly fulfil an intermediary role between mobile service providers and independent indirect retailers, although distributors may also sell directly to end-users. Through distributors, mobile service providers can extend their reach while not

having to enter directly into individual contracts and relationships with every independent retailer. Distributors can use a large number of independent retailers. We understand that the number of independent retailers per distributor can be anything between 200 and 1000. Distributors typically supply handsets, and extend credit lines to their independent retailers. They receive commission from the mobile service providers, which they pass on to independent retailers (minus their margin). They are liable for commission clawbacks from the mobile service providers. Clawbacks normally apply if a customer defaults on their payments or changes their tariff plan (more on commissions and clawbacks can be found in Section 3.24).

- 3.5 The independent retailers have been an important channel for customer acquisition across all MNOs. Based on information provided to us by the MNOs, approximately 50-60% of the current customer base across all MNOs was acquired through independent retailers.
- 3.6 Where the MNOs acquire customers indirectly, they do not always have good visibility of the way their services are sold, or what kind of separate offers are made by the independent retailers. For example, a network operator will typically not know which indirectly acquired customers had a cashback offer as part of the deal.
- 3.7 Throughout this document where we use the term 'retailer', unless stated otherwise, we intend to refer to any sales channel through which mobile services are sold directly to end-users.

Mis-selling

- 3.8 There has been a significant increase in complaints to Ofcom about mis-selling of mobile services over the past year. Complaints vary widely, from the provision of false and/or misleading information to 'slamming', where customers find themselves with service from another company without their knowledge and consent.
- 3.9 The OAT has recorded mis-selling complaints which have come from both mobile service providers' own channels and their direct and their indirect independent retailers.

Mis-selling in the fixed line market

- 3.10 This is not the first time Ofcom has been confronted with mis-selling issues in the telecoms market. The greater use of direct selling techniques in the fixed telecoms market led to growing number of complaints about irresponsible sales and marketing activity during 2002/2003.
- 3.11 A voluntary sales and marketing code of practice was introduced in July 2003 which set out a range of measures aimed at the prevention of deceptive and misleading sales and marketing practices. We began a review during 2004 on whether the voluntary industry code of practice on sales and marketing was effective.
- 3.12 We concluded that the voluntary code was not reducing instances of mis-selling and slamming or providing adequate protection to consumers. Regulation through a new General Condition to combat mis-selling and slamming was therefore introduced in the fixed line telecoms market by Ofcom in May 2005.⁶ Since these new rules were introduced, Ofcom has conducted an industry-wide enforcement programme under

⁶ The statement related to this General Condition can be found at <http://www.ofcom.org.uk/consult/condocs/misellingprotection/statement/>.

this General Condition. This is ongoing, and has brought about a positive reduction in the volumes of mis-selling and instances of slamming in the fixed line market.

- 3.13 Ofcom undertook another review of the rules protecting consumers from mis-selling in the fixed telecoms market last year. The outcome of this was to extend mis-selling rules to those providers that offer voice and broadband services using full Local Loop Unbundling (LLU) technology. Ofcom's statement, 'Protecting consumers from mis-selling of telecommunications services', was published on 21 May 2007.^{7,8}
- 3.14 The problems in respect of fixed mis-selling were mainly about slamming, where customers were switched to a new provider without their knowledge and consent. Although Ofcom has seen instances of mobile slamming in 2006, more recently, mis-selling complaints in mobile telecoms are mainly around the provision of false or inaccurate information and around cashback.

What is cashback?

- 3.15 As set out in Section 2, cashback is a form of sales incentive, offered by independent retailers to customers, where a customer signs up for a mobile network contract, and where the customer is promised payment of a certain amount of money. There are a number of different types of cashback schemes in the market. The main differentiating factors are 1) when the cash is paid and 2) how the cash is paid.
- 3.16 The cash can be paid:
- i) in a lump sum at the start of the contract – approximately 25%⁹ of current cashback contracts; or
 - ii) in a lump sum at some predetermined point during the contract - approximately 33%⁹ of current cashback contracts; or
 - iii) staggered in several pre-determined stages during the contract (e.g. at 3, 6, 9 and 12 months) – approximately 43%⁹ of cashback contracts.
- 3.17 The cash payments are made either under a redemption mechanism where payment is triggered by the customer sending a cashback claim to the independent retailer; or automatically where the independent retailer routinely sends the cashback payment via cheque or bank transfer at the pre-specified time, without further action being required by the customer. Under the redemption model customers must typically provide proof that they are still 'live' on the original network contract associated with the cashback by providing a recent bill. Once the claim has been processed and verified the independent retailer then provides a cheque to the customer. Approximately 5%⁷ of customers forget to claim cashback under redemption models. We understand that some independent retailers offer larger amounts of cashback under redemption schemes on the basis that not all customers will claim.

Background on cashback schemes

- 3.18 In discussions with independent retailers, we were told that cashback schemes have been offered for approximately 5 years. Initially, the terms and conditions associated

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

⁸ In this document, Ofcom set out that at that point in time, it did not believe that additional obligations relating to mobile mis-selling were required.

⁹ Based on an Ofcom market research survey, the details of which are included in Annex 9.

with claiming cashback were not unduly onerous and customers were generally able to claim successfully.

- 3.19 By 2005 the number of active mobile connections exceeded the number of people (in 2005 there were 109.1 active mobile connections per 100 population, rising to 116.6 in 2006¹⁰). In time, growth in new connections slowed in relative terms and a greater proportion of new subscribers were being acquired from other networks. It was increasingly hard to attract new customers. In addition, mobile service providers were doing a larger share of business through their own channel and increasing the number of own retail outlets (in addition to phone and web sales). In a bid to attract customers in a highly competitive market place, some independent retailers began to offer larger cashback amounts.¹¹
- 3.20 We understand that some independent retailers had observed that some customers forgot to claim cashback and retailers may have used the lower **average** redemption rate to justify offering larger amounts of cash. However, as the amount of cash on offer for the individual customer increased, customers were willing to spend more time and effort to claim the cashback. As a result, the redemption rate increased.
- 3.21 In order to keep the redemption rate low (which was necessary to make certain cashback business models viable) we were told that some independent retailers began to introduce and enforce overly onerous contract terms and conditions, for example requiring receipt of the original bill within a short time frame. This made it harder for customers to claim cashback and complaints began to rise. In some cases it appears the cashback was refused when the customer had seemingly met the requirements in the terms and conditions.
- 3.22 For some independent retailers, who used an unviable business model, the cashback model proved unsustainable and this is likely to have resulted in a number of insolvencies. Customers, who signed up with these independent retailers, were still bound to pay the mobile service provider the monthly line rental without being able to redeem the cashback. These customers have a contract regarding the cashback deal with the independent retailer, and not with the mobile service provider. Therefore, affected customers may not be able to hold their mobile service provider directly legally liable for the cashback payments.
- 3.23 It is important to keep in mind that a significant number of customers **are** able to claim cashback. Ofcom market research suggests that 79% of people found claiming their cashback very or fairly easy. It seems therefore, that there is no fundamental flaw with cashback schemes if the offers are legitimate, i.e. where the amount offered is based on expected commission and the redemption rate is not artificially lowered by independent retailers. Cashback is one means by which independent retailers have innovated on price competition and can bring benefits to customers.

Commission payments

- 3.24 We understand that independent retailers are typically paid commission for signing up customers. Commission structures are negotiated between mobile service providers, distributors and independent retailers and may vary widely. Based on information from MNOs, independent retailers and distributors, the commission ranges typically from £100-£500 per contract depending on the tariff package and

¹⁰ Source: Ofcom Communications Market Report 2007 available at <http://www.ofcom.org.uk/research/cm/cmr07/telecoms/>

¹¹ This is based on information obtained in meetings with independent retailers and MNOs.

contract duration. Often, the handset cost is funded out of the commission for post-pay contracts.¹²

- 3.25 We understand that commissions are a major source of revenue for independent retailers and can be used to provide funding for cashback payments. Cashback can be viewed as a mechanism by which the independent retailer returns part of the commission earned on a sale to the customer. Therefore, the amount of cashback offered should not usually be greater than the commission earned on a sale (assuming redemption rates close to 100%). Ofcom has cause to believe that in a number of cases independent retailers were offering cashback amounts apparently greater than the commission which suggests the schemes were fundamentally unsustainable, if the redemption rate is high.
- 3.26 We understand from independent retailers, MNOs and distributors that some independent retailers have revenue sharing agreements with mobile service providers where commission is earned over the life of the contract. Under a revenue sharing agreement the independent retailer earns a proportion of the revenue generated by an airtime contract. The independent retailer only earns income on 'live' contracts so if a customer defaults before the contract term is completed the independent retailer will not earn further income on the contract.
- 3.27 Smaller independent retailers tend to receive a large proportion of the commission upfront when the sale is made. Further payments may follow later in the contract e.g. as a quality bonus if certain targets are reached and the customer continues to pay the airtime bills. When commission is paid upfront the mobile service provider usually has a 'clawback' clause in the contract which means part or all of the commission can be recouped by the mobile service provider for a number of reasons, for example, if customer fraud is suspected, the customer changes price plan or defaults on the contract within a certain period of time. Such arrangements may encourage the independent retailer to connect 'quality' customers who intend to stay with the mobile service provider for the duration of the contract.
- 3.28 Independent retailers may sometimes get 'bonus' commissions or preferential commercial terms if they hit sales targets or meet key performance indicators. The performance indicators can refer to a variety of measures e.g. customers acquired, churn levels, return levels and bad debt.

What has happened so far?

Own initiative enquiry

- 3.29 During 2006 Ofcom had received numerous complaints regarding mobile cashback schemes both directly into the OAT and from local Trading Standards Services (TSS). The complaints typically alleged that consumers were not receiving the promised cashbacks from independent retailers, offered as an incentive to consumers to encourage take up of a particular mobile phone package.
- 3.30 Following these complaints, in September 2006, Ofcom opened an enquiry into the practices of various MNOs in order to assess whether enforcement action could be taken to address this problem. As part of the enquiry, Ofcom met with the OFT, TSS and a number of MNOs. During the enquiry consideration was given as to whether action could be taken under the general conditions regime set up pursuant to the

¹² This is the case when the handset is offered 'free' as part of the mobile phone/tariff package.

Communications Act 2003, in particular under General Condition 10 ('GC10') on "Transparency and Publication of Information".

- 3.31 However, where retailers are only providing handsets and not an electronic communication network or service themselves, they will not be subject to the general conditions.
- 3.32 As a result of the direct engagement with the MNOs, Ofcom received voluntary undertakings from a number of them. This included an undertaking to revise their sales and marketing practices, and to issue updated Minimum Business Standards prohibiting various and potentially unfair terms from being included in the cash back terms and conditions used by their retailers. These MNOs also informed Ofcom that they had made clear to all their distributors and independent retailers that non-compliance with these terms would put them in breach of their legal obligations and their contractual agreements with the relevant MNOs. On this basis, Ofcom decided to close the enquiry, although it continued to monitor complaints.

Introduction of Voluntary Code of Practice

- 3.33 In early 2007 complaints to Ofcom about selling practices in the mobile market were rising. As a result of the growing concern, Ofcom worked with the mobile industry to progress a self-regulatory initiative in the form of a voluntary code of practice, aimed at stamping out misleading sales and marketing practices. The code lays out best practice principles for selling and promoting mobile phone subscriptions and pre-pay deals through both direct and indirect sales channels. It also sets standards on sales incentives and due diligence on behalf of mobile operators. The voluntary code was introduced on 31 July 2007. A full copy of the code can be found in Annex 8.
- 3.34 Provisions on mobile service providers and third parties for the prevention of mis-selling cover a wide number of areas under the voluntary code. They include:
- training of all sales representatives - including on sufficient knowledge of products, services, consumer law, complaint handling procedures and appropriate forms of customer contact;
 - provision of clear consumer information - including taking reasonable steps to ensure a customer understands they are entering into a contract, the key features of the contract and names of the contracting parties before accepting an order;
 - due diligence on behalf of mobile service providers and their appointed distributors to ensure independent retailers are credit checked, comply with the operator's minimum business terms and conduct spot checks to ensure due diligence remains up to date;
 - complaints handling processes to deal with complaints from customers that have been subjected to 'slamming' or who are having difficulties in making claims on sales incentives schemes and advising them on how to obtain redress;
 - monitoring all sales channels for compliance with the voluntary code, requiring MNOs to take action for any breaches of the code, and ensuring escalation procedures are in place;
 - regular monitoring of complaints and the nature of complaints; and
 - promoting awareness of the code to all sales channels.

- 3.35 The code stipulates minimum business standards for all sales channels offering cashbacks including making clear who the different contracts are with. It also includes examples of unduly restrictive terms and conditions regarding the process of claiming cashback.

Section 4

Effectiveness of existing consumer safeguards and extent of consumer harm

Introduction

- 4.1 In this section we assess the effectiveness of the current safeguards in place to protect consumers from harm and estimate the size of the cashback market and the extent of potential financial harm for consumers. First, we analyse the effectiveness of the voluntary code. Then, we will assess the effectiveness of existing legal provisions.
- 4.2 As set out in Section 2, we have gathered evidence from different sources and stakeholders. Below we give an overview of the relevant evidence we have obtained in our review.

Industry code of practice for the sales and marketing of subscriptions to mobile networks

- 4.3 In order to assess the effectiveness of the voluntary industry code, the MNOs have provided us with information detailing how they have implemented the code. We have also discussed the code with a number of independent retailers and distributors. Below we give an overview of actions taken by the MNOs and, where available, comments from independent retailers and distributors.
- 4.4 MNOs appear to have mainly communicated the voluntary code to their distributors and direct dealers in writing through news and sales bulletins and through the provision of guidelines for sales and marketing processes. One MNO has sought to try to guarantee compliance with the new Code by requiring their retailers to review and sign such communications, another has simply asked staff to make themselves familiar with the requirements of the voluntary code. Some MNOs have explained the code to a number of their distributors through face to face meetings and the distributors have in turn been required to cascade the information down to independent retailers, which they have done mainly in writing. We understand that it is mainly the distributors' responsibility to manage the behaviour of their appointed independent retailers in line with the voluntary code.
- 4.5 For their own retail shops, we understand that MNOs have in place structured training and guidance on best practice for colleagues to help develop and consolidate appropriate selling practices. Such training typically consists in a combination of face to face training, online training, in store training and buddying/mentoring with a focus on selling techniques and the brands commitments to its customers.
- 4.6 We understand that MNOs offer training programmes to independent retailers which they use to promote or sell their services but that this training primarily focuses on the MNOs' products and services as opposed to responsible selling practices.
- 4.7 In most instances, MNOs have used their agreements with their distributors and independent retailers to stipulate required standards for selling and training obligations. For instance, where some MNOs specify in their contracts that a minimum number of staff should be adequately trained in the respective MNO's

products/services and present during the independent retailers opening hours, all agreements state that sales staff should not purport to be part of the MNO they are selling on behalf of. Some MNOs' contractual obligations also attempt to tackle problems of mis-selling by prohibiting independent retailers from making outbound telemarketing calls to existing customers to sell their contracts.

- 4.8 In a bid to ensure responsible and credible selling by their distributors and independent retailers, MNOs have told us they have in place structured programmes for assessing the viability of business plans and models of new independent retailers. This includes putting systems in place designed to obtain trade and commercial references and check the history of company directors.
- 4.9 MNOs have also told us that they continue to provide guidance to independent retailers through regular bulletins, dialogue and meetings. Furthermore, we understand that one MNO's terms and conditions in contracts specify clauses which give them the right to carry out spot checks of the distributors or independent retailers premises.
- 4.10 The MNOs have in place regular mystery shopping exercises designed to monitor the performance of their own sales channels. Whilst the frequency of these vary across MNOs, mystery shopping exercises help capture instances of inappropriate behaviour and selling practices thereby allowing the MNO to take subsequent action to remedy the problem where necessary. Further methods adopted by MNOs to monitor the selling practices of staff include commission schemes that reward sales representatives on the quality as well as the quantity of sales (see also Section 3 on Commissions).
- 4.11 MNOs state they also monitor the quality of selling practices of independent third parties through the quality of connections put forward. Examples of such Key Performance Indicators (KPIs) include levels of handset return, churn levels, the number of first bills not paid by customers and the level of complaints received through the MNO's contact centres.
- 4.12 In the event of inappropriate sales practices on behalf of sales representatives employed through their direct channels, MNOs have responded on a case by case basis. We understand that common disciplinary actions include issuing verbal and written warnings, suspensions and clawing back of staff commissions. MNOs have told us that deliberate mis-selling and fraudulent activities may result in staff dismissals. From Jan-07 to Oct-07 one MNO has dismissed 68 members of staff, but not all necessarily for mis-selling, another has dismissed 7 for mis-selling and a third MNO has dismissed 14 for mis-selling.
- 4.13 Independent retailers who perform poorly against their KPIs on quality of connections or who are found to be involved in inappropriate sales practices may have been issued with verbal or written warnings. They may also have had their commissions clawed back from MNOs. MNOs have also explained that they may suspend accounts to acquire new connections until the independent retailer is able to improve their selling practices. One MNO has told us that they may issue "Do Not Deal Notices" where no improvement is achieved and the offence persists. Do Not Deal notices are issued against the individual responsible to avoid the problem re-surfacing later in the event of the person setting up a new business under a new guise. In extreme cases where contracts have been materially breached, MNOs have told us that they have terminated their trading relationship with the independent retailer.

- 4.14 We asked the MNOs to provide us with information regarding their procedures for handling complaints and customer redress in the case of mis-selling and cashback issues. Some MNOs have told us that, following continued complaints regarding mis-selling and difficulties obtaining with cashbacks, they have set up dedicated teams to address such issues and speed up the resolution process.
- 4.15 The MNOs were also asked to provide us with their complaints data in respect of mis-selling and cashback. We realise that in the first instance, most cashback complaints will be dealt with by the independent retailer. Consumers will only escalate their complaints to their MNO when the independent retailer can't resolve the problem.
- 4.16 The number of complaints received by the MNOs from January – October 2007 varied widely. Possible reasons for this variation include differences in reporting mechanisms used to record complaints levels and a variation in definitions used by the MNOs. Despite the huge differences in total numbers, the data indicates that overall, complaint numbers regarding mis-selling have been broadly stable since the introduction of the voluntary code.
- 4.17 Whilst there are no general rules regarding customer redress, complaints are handled by MNOs on a case by case basis. Generally the customer has the same rights and routes of redress for a complaint in respect to cashback, mis-selling or slamming as any other complaint. MNOs are currently under no formal obligations to honour financial commitments such as cashbacks made by independent retailers. However, where individual circumstances warrant it, some MNOs have told us that they would be willing to assist complainants via various good will gestures, sometimes under the condition they extend their contract with them, including offering customers the opportunity to:
- migrate to a cheaper/more affordable tariff;
 - reduce line rental for the remainder of the customer's contract;
 - reduce the contract length; and
 - have a credit refund.
- 4.18 Some MNOs have also indicated that on a case by case basis they would be willing to consider releasing a customer from their network contracts in exceptional circumstances; however this appears to be an option offered only to customers who have been mis-sold a product or service, e.g. an MNO may offer this to a customer who has been mis-sold on coverage or slammed.

Complaints information Ofcom

- 4.19 The OAT receives customer complaints about a wide variety of issues. The number of complaints about general mis-selling of mobile services, including 'slamming', and about problematic cashback deals has increased significantly over the past year.

Mis-selling

- 4.20 General mis-selling complaints can be broken down into two main categories:
- Where a contract is agreed without the consumers' full understanding, or where the customer has been deliberately misled; and

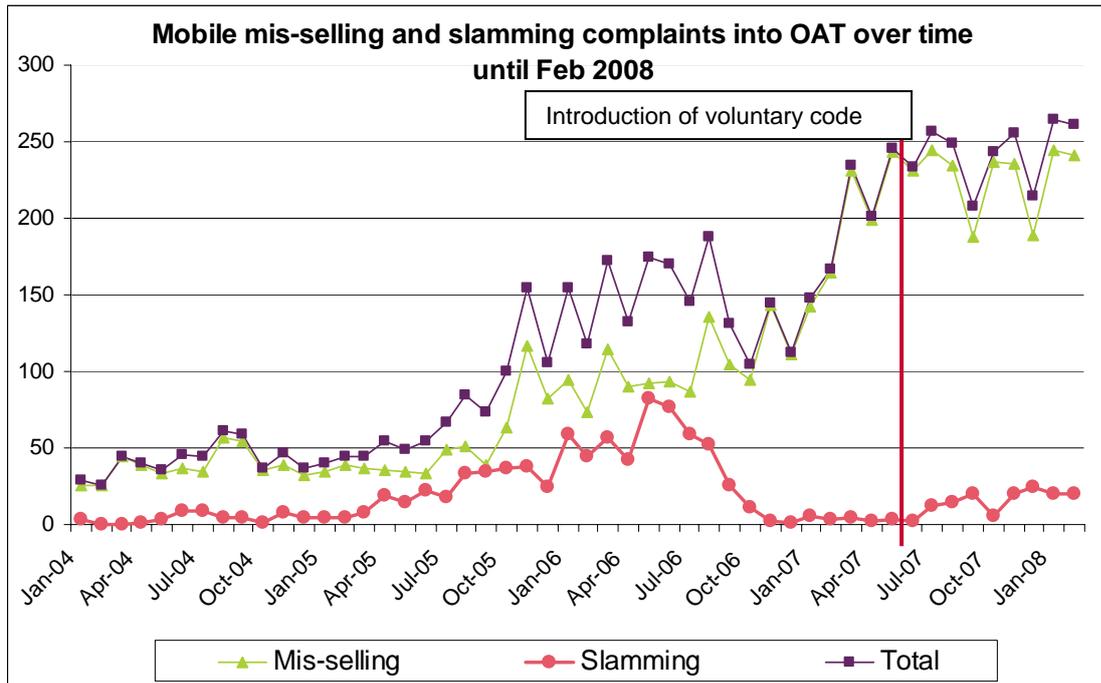
- ‘Slamming’ where a customer is being entered into a new mobile contract without their consent or knowledge.

4.21 Examples of general mis-selling complaints recorded by the OAT include:

- Misleading/inaccurate information about the product or service. For example, a customer may sign up to a service after being told coverage in their area is good but then find that they have little or no reception;
- Misleading/inaccurate information about competition/ future mergers and acquisitions of providers in a customer’s coverage area to give the impression of limited choice of providers;
- Misleading/ inadequate information about tariffs and/ or features of the service or phone resulting in the customer being sold features of a package/service and costs that differ from those that are actually delivered. For example a customer may find themselves signed up to a more expensive tariff than agreed at point of sale or may find that the functionality of the phone differs from that sold;
- Misleading/ inadequate information about the transfer process from the customer’s existing service or billing implications of the transfer resulting in a customer receiving two bills and /or being charged a termination fee for the previous contract. For example, a customer may upgrade their contract or move to a different provider after being told by the sales representative that they are nearing the end of their existing contract and then subsequently find that this is not true; and
- Misleading/ inadequate information about the terms and conditions of the new contract, such as the length of the new contract and notice period. A common example is where customers upgrade their 12 month contract believing they are signing up to another 12 month contract and then subsequently find themselves entered into to a new 18 month contract.

4.22 Figure 2 below shows the monthly average number of mis-selling complaints over time. Originally, our data analysis started in 2006 but we decided to extend the time series to assess the level of mis-selling complaints since 2004. It can be seen that from 2004 onwards the monthly average number of complaints into the OAT regarding general mis-selling and slamming has increased significantly, from 42 in 2004 to 225 in 2007.

Figure 2: Mis-selling and slamming complaints from January 2004 – February 2008



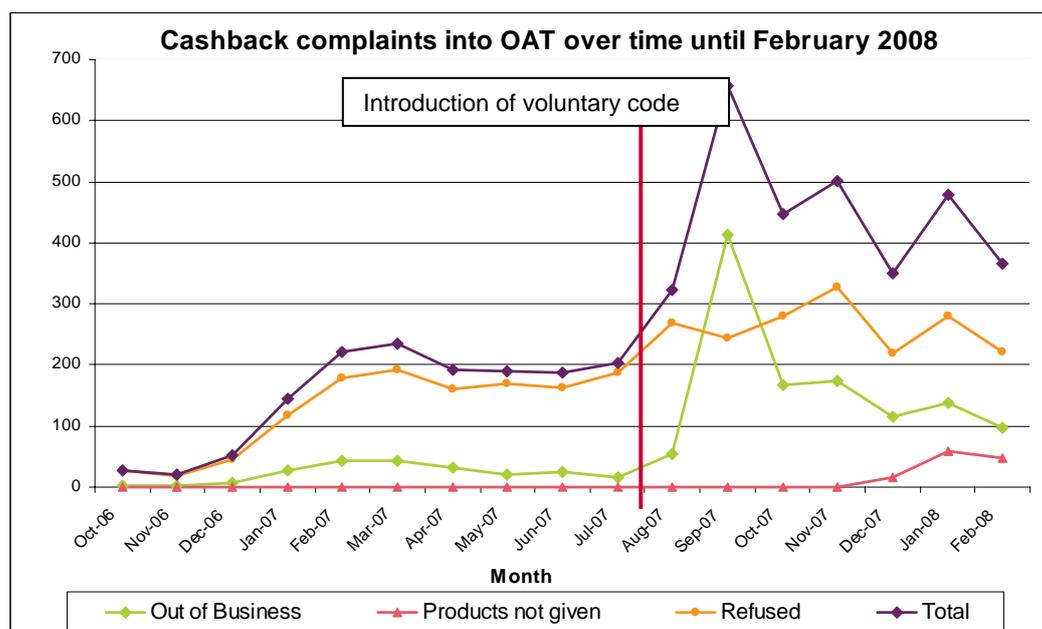
4.23 From July 2007 onwards, complaints numbers have been broadly steady – there has been no significant decrease since the voluntary code was introduced. Slamming complaints increased over the first half of 2006 and then decreased (although the last 6 months have shown a slight increase). Currently, most complaints relate to general mis-selling.

Cashback

4.24 Figure 3 below shows an overview of complaints regarding cashback received by the OAT. Issues regarding cashback started to generate complaints into our OAT at the end of 2006 for the first time. The OAT uses three subcategories for recording cashback complaints:

- Cashback refused, where the customer has not been able to redeem the full cashback, for instance because they allegedly do not comply with the terms and conditions of the cashback contract;
- Cashback out of business, where the independent retailer who offered the cashback has gone into administration and is unable to honour his payments to customers; and
- Products not given, where a customer has been unable to obtain any goods that have been offered free of charge or at a reduced retail price as a sales incentive, for example an i-Pod or an X-Box.

Figure 3: Cashback complaints from October 2006 – February 2008



- 4.25 Figure 3 shows that from October 2006 the average monthly number of complaints regarding cashback has increased significantly, from an average of 36 over the whole of 2006 to 311 in 2007, reaching a peak in September 2007 of 665.
- 4.26 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 retailer as a consequence of the voluntary code. As independent retailers were increasingly less able to impose unduly terms and conditions, this may have led to an increase in the total amount of cashback customers were able to redeem as well as in the number of successful redemptions. A likely result of this is that a number of independent retailers, who had based their business models on artificially low redemption rates, were unable to honour all their cashback payments.
- 4.27 Ofcom has recently seen a growth, albeit modest, in complaints related to sales incentives where a product has been offered in return for a customer taking out a contract/ upgrading a contract but which has subsequently not been provided.

Complaints information: Consumer Direct and CAB

- 4.28 We have also analysed complaints data from Consumer Direct, CAB and a number of Trading Standards offices in areas where there have been a high number of complaints about cashback deals.
- 4.29 From January to October 2007, Consumer Direct received approximately 43,000 complaints regarding mobile phones. Of these 29,000 relate to mobile phone agreements (the rest being hardware issues). Based on the category codes for complaints used by Consumer Direct, we estimate around 6,000 may relate to mis-selling and cashback complaints.
- 4.30 Like Consumer Direct, CAB do not have dedicated complaints categories for mis-selling and/or cashback related complaints. However complaints descriptions regarding mobile phones show a number of common themes, some of which are

similar to complaints Ofcom have received and seen in the results of market research conducted. For instance complainants to CAB often:

- are from low income households and/or the unemployed;
- are from ethnic minorities and some have poor/ or no understanding of English;
- are complaining about independent retailers; and
- have entered into multiple contracts (enticed by sales incentives such as “buy one get one free”).

4.31 Customers who have complained about their difficulties in obtaining cashback have cited a variety of reasons to CAB including:

- an independent retailer going into administration;
- an independent retailer disappearing from their trading premises;
- sending in their claim too early and therefore having their subsequent claims for cashback invalidated by the independent retailer; and
- not sending in their original bill as part of their claim.

Examples of complaints to CAB

One complainant reported that they were required to provide evidence of bills and payments by email only even though they did not have access to a computer and this restrictive criterion for claiming cashback was not mentioned at point of sale.

Another complainant explained that, having taken out one 18 month contract with a independent retailer and having successfully redeemed six months worth of cashback, they were then persuaded by the reseller to take out a further three contracts. However, the complainant did not receive any cashback thereafter.

Another complainant, with a poor level of understanding English, explained how she was assigned a sales representative that spoke her native language and was subsequently mis-informed and pressurised into accepting more than one mobile contract on the basis that any additional contract would be part of a free promotional gift and that she would not be required to pay for it.

Market research¹³: size of the cashback market

4.32 A national sample¹⁴ of 3973 UK adults was surveyed during November and December 2007. The survey showed that 51% of customers purchased their post pay contract from a mobile phone independent retailer and 37% purchased their contract from the MNO direct (the remaining 11% didn't know). 13% of contract customers opted for a cashback deal at the time of the research equating to 1.75

¹³ Further detail on the market research survey is provided in Annex 9.

¹⁴ The sample reflected the UK profile of sex, age and working status. The data has been weighted to ensure the sample is representative of the UK adult population.

million adults. At the time the cashback contract was purchased 79% thought the process to claim was very or fairly clear and 16% thought the process was unclear.

- 4.33 At the time the research was conducted, cashback customers were at varying stages in their contract and therefore not all of them had tried to obtain their cashback yet. Of those that had tried, 61% had received all their money and 18% had received part of their money. 5% had forgotten to claim. 6%¹⁵ of cashback customers had been unable to claim the cash, equating to 105,000 people. Of those who had tried to claim cashback, 79% found the process very or fairly easy to follow and 14% found the process fairly or very difficult.
- 4.34 The financial harm caused to consumer by ‘bad’¹⁶ cashback deals depends critically on:
- The total amount of the cashback offered;
 - The amount of cashback which customers are unable to claim; and
 - The number of consumers who are unable to claim.
- 4.35 The amount of cashback offered and the number of customers able to claim varies widely between different independent retailers. The cashback offered is typically larger for more expensive contracts and those with a longer duration. The market research has provided an estimate for the number of people unable to claim, but was not designed to be able to calculate the proportion who were only able to claim some but not all of their cashback. It is difficult to derive an accurate estimate for either the number of people unable to claim or the amount of cashback they forgo. However, on the basis of the information from the market research, OAT complaints data and information provided by independent retailers and mobile service providers, we estimate that the potential consumer harm arising from consumers not being able to successfully claim the cashback to which they are entitled lies in the range of £50-£60 million over a 1-2 year period, i.e. the range of contract durations considered (details of our analysis are set out in Annex 5).
- 4.36 The financial harm caused by the other types of mis-selling has not been quantified.

Conclusions

- 4.37 Mis-selling has been, and remains, a significant issue for the mobile industry. The provision of false or mis-leading information about products or services and the ‘slamming’ of customers leads directly to harm for those consumers affected and more generally undermines confidence in the industry.
- 4.38 Our research shows that in most cases cashback deals work well, stimulating competition and providing benefits to consumers. In the majority of cases, consumers are happy with their cashback offers and have found the process for claiming relatively easy. However, a significant minority of consumers have experienced problems with certain deals where it has been overly onerous to make claims. As set

¹⁵ Anecdotal evidence indicates that the problems with inability to claim cashback have a higher incidence than stated in specific geographic areas and ethnic groups. The market research is based on a representative national sample therefore this survey may underestimate the incidence of cashback and its associated problems amongst ethnic minority groups and regions with higher than average ethnic minority population. For further details, see Annex 9.4.

¹⁶ The term ‘bad cashback’ is explained in Annex 5.7.

out above, the overall amount of cashback forgone by customers is estimated to be relatively large and the overall level of harm to consumers affected significant. It is important that problems associated with 'bad' cashback deals are tackled effectively but it is important to bear in mind the impact of such measures on the 'acceptable' cashback offers.

- 4.39 The evidence we have collected indicates that the introduction of the code of practice to address mis-selling and sales incentives has caused mobile service providers to review their sales practices and those of the independent retailers of their services. The code appears to have been communicated to the retail chain.
- 4.40 Where mobile service providers have taken monitoring and compliance action, the main focus appears to be on addressing cashback and slamming problems rather than general mis-selling activity. However, the implementation of the code has not affected the number of complaints to Ofcom. The levels of complaints have not changed significantly and moreover, in January 2008 they were at a higher level than in July 2007.
- 4.41 We expected complaints about cashbacks to have continued to some degree as a result of a 'lag effect', as contracts agreed before the voluntary code will continue to generate complaints and as some independent retailers go out of business meaning they are unable to honour their cashback deals. However, 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.
- 4.42 In addition, the review we carried out seems to suggest that the extent of monitoring and compliance activity varies between mobile service providers. In our talks with the MNOs and independent retailers it became apparent that while some mobile service providers might take a severe stance against mis-selling and cashback issues, others might take a more lenient approach. This could lead to an unfair competitive advantage for more lenient mobile service providers, which in turn could reduce the incentive on mobile service providers to police the behaviour of retailers adequately and thereby reduce the likelihood that the voluntary code would succeed in protecting consumers over the longer term.
- 4.43 Another potential side effect of the code in terms of regulating the behaviour of their independent retailers is that mobile service providers could use their discretion as to which independent retailers to be stringent with, depending for instance on the number of customers acquired or the quality of the subscriber base acquired by a certain independent retailer. This could result in a situation where some independent retailers would have certain advantages over other independent retailers, leading to a potential distortion of competition among retailers to the detriment of consumers.

Assessment of the effectiveness of existing legislation

- 4.44 Ofcom is a designated enforcer under Part 8 of the Enterprise Act 2002. Infringements of consumer protection legislation, such as the Unfair Terms in Consumer Contracts Regulations, the Consumer Protection (Distance Selling) Regulations and the Consumer Protection from Unfair Trading Regulation¹⁷, are enforceable under Part 8 of the Enterprise Act.

¹⁷ As an implementation of the Unfair Commercial Practices Directive the Consumer Protection from Unfair Trading Regulations are scheduled to come into force in the UK shortly.

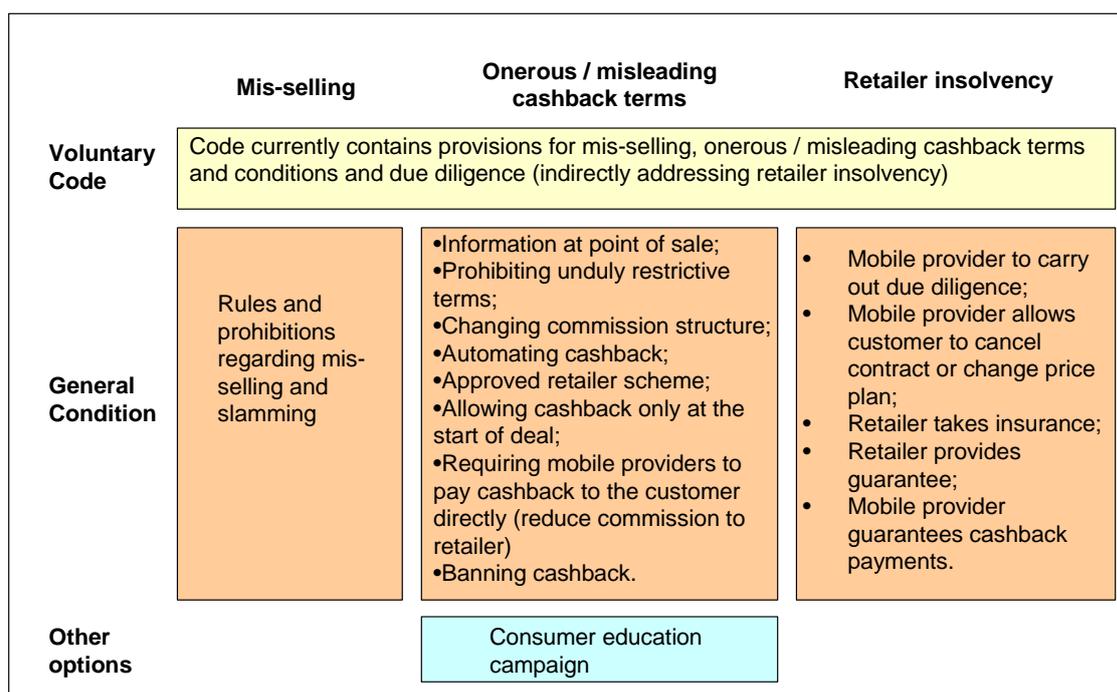
- 4.45 However, when considering whether enforcement action under our Enterprise Act powers in the specific case of potential mis-selling in the mobile retail market is possible at all and, if so, an appropriate response to the issues identified, Ofcom identified the following issues.
- 4.46 First, in particular the nature of cashback problems currently seen by Ofcom means that when independent retailers start to generate complaints, insolvency may swiftly follow, thus making any forward looking Enterprise Act enforcement undertakings in this specific case of limited value. In addition, 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.
- 4.47 There is a further issue due to the fragmented nature of the sales channels, where there is 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 as it would require a disproportionately high level of finite resources.
- 4.48 Lastly, our complaint data suggests that small businesses are also affected by issues regarding mis-selling and cashback problems. The consumer protection regime under the Enterprise Act does not extend to the protection of small business customers. Section 52 of the Communications Act 2003, however, does require Ofcom to secure effective protection for domestic *and* small business customers.
- 4.49 As a result, some parts of the problem raised by mobile mis-selling and the abuse of 'bad' cash-back schemes could be addressed by Ofcom under existing legislation only with the deployment of a disproportionate amount of resources, currently not available to us, whereas other parts could not be addressed at all under the Enterprise Act. Ofcom has therefore considered the appropriateness of a new General Condition to tackle these issues.

Section 5

Introduction to options and relevant legal framework

- 5.1 As set out in Section 2, we are seeking to address three different types of issues.
- i) general mis-selling including slamming;
 - ii) customers unable to claim their cashback because of onerous or misleading terms and conditions ('bad' cashback deals); and
 - iii) customers unable to claim their cashback because of independent retailers, have ceased to trade and, as a result are unable to honour their cashback payments.
- 5.2 In Sections 6,7 and 8 set we describe the options to tackle each of these three issues. We give a short description of each option, we consider potential advantages and disadvantages and assess our preferred option against Ofcom's duties and other legal requirements. We conclude each of these sections with our preferred option and our reasons for it.
- 5.3 The options we have developed can be grouped under the following categories:
- a) Options involving the voluntary code;
 - b) Options involving a general condition; and
 - c) Other options.
- 5.4 Figure 4 below gives a high level overview of the options and issues we consider.

Figure 4: Overview of options and issues to be addressed



5.5 The Impact Assessment in Annex 5 discusses all options in further detail and assesses the impact of each on competition and relevant stakeholders.

The relevant legal framework

5.6 In this section we provide an overview of Ofcom’s duties under the Act, its requirements to carry out its functions in line with its duties and criteria to be met before Ofcom can introduce regulation.

Ofcom’s general duties

5.7 Section 3(1) of the Act states that

“it shall be the principal duty of Ofcom, in carrying out their functions:-

- a) to further the interests of citizens in relation to communication matters; and
- b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

5.8 Section 3(2) of the Act states that Ofcom is required, when carrying out its functions, amongst other things, to secure the availability throughout the UK of a wide range of electronic communications services.

5.9 Section 3(3) of the Act requires Ofcom, when performing its duties, to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and any other principles appearing to Ofcom to represent the best regulatory practice.

5.10 Section 3(4) of the Act states that in performing its duties, Ofcom must also have regard to such of the following as appears to be relevant in the circumstances, in particular:

- the desirability of promoting competition in relevant markets;
- the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- the desirability of encouraging investment and innovation in relevant markets;
- the needs of persons with disabilities, of the elderly and of those on low incomes; and
- the opinions of consumers in relevant markets and of members of the public generally.

European Community requirements for regulation

5.11 Section 4 of the Act requires Ofcom to act in accordance with the six European Community requirements for regulation. In summary these requirements are to:

- promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;
- contribute to the development of the European internal market;
- promote the interests of all persons who are citizens of the European Union;
- not favour one form of or means of providing electronic communications networks or services, i.e. to be technologically neutral;
- encourage the provision of network access and service interoperability for the purpose of securing:
 - i) efficient and sustainable competition; and
 - ii) the maximum benefit for customers of Communications Providers; and
- encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of Communications Providers.

5.12 In doing so, Ofcom has to read these requirements in accordance with the requirements of Art. 8 of the Framework Directive.¹⁸ These include, in particular, the obligation to:

- ensure that users, including disabled users, derive maximum benefit in terms of choice, price and quality (Art. 8(2) (a));
- ensure a high level of protection for consumers in their dealings with suppliers (Art. 8(4)(b)); and

¹⁸ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services; OJ L108/33.

- promote the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services.

Setting or modifying general conditions

- 5.13 Matters to which general conditions may relate under section 51(1) of the Act include conditions appropriate for protecting the interests of end-users of public electronic communications services ('PECS') (section 51(1)(a) of the Act). This includes according to section 51(2) conditions relating to the supply, provision or making available of goods, services or facilities in association with the provision of PECS. The Authorisation Directive¹⁹ further sets out that conditions which can be attached under Art. 6(1) and paragraph 8 of Annex A explicitly includes consumer protection rules specific to the electronic communications sector.
- 5.14 Sections 52 (1) and 52(2)(e) of the Act set out that it is Ofcom's duty to set such general conditions as it considers appropriate for securing that providers establish and maintain procedures, standards and policies necessary to secure the effective protection for domestic and small business customers of such providers. A definition of "domestic and small business customers" can be found in section 52 (6) of the Act.
- 5.15 As set out under section 47(1) of the Act, in setting a condition, Ofcom must be satisfied that the test set out under section 47(2) has been met. The test is that the condition or modification of the condition is:
- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b) not unduly discriminatory against particular persons or against a particular description of persons;
 - c) proportionate to what it is intended to achieve; and
 - d) transparent in relation to what it is intended to achieve.

¹⁹ Directive 2002/20/EC on the authorisation of electronic communications networks and services; OJ L108/21.

Section 6

Options to tackle general mis-selling

- 6.1 We have identified two options to tackle general mis-selling, including slamming.
- a) Continue to rely on the existing voluntary code; and
 - b) Regulate the mobile service provider through a General Condition (GC).
- 6.2 Below we will describe the details of the two options, including potential advantages and disadvantages. More details regarding these options can be found in the Impact Assessment in Annex 5.

a) Continue to rely on the existing voluntary code

- 6.3 Under this option no new formal regulation would be introduced, however, the voluntary code of practice would be retained. Ofcom would be able to pursue all retailers (independent retailers and mobile service providers) under general consumer protection legislation (e.g. the Enterprise Act 2002) if this was deemed appropriate.
- 6.4 Under section 6 of the Act, Ofcom has a duty to ensure that it does not impose or maintain unnecessary burdens. A 'no change' option is appropriate if there is no clear evidence that mis-selling in mobile telecommunications is a significant problem and/or the costs of formal regulation exceed the benefits. This course of action may be appropriate if the voluntary code needs longer to take effect. Ofcom would monitor the effectiveness of the code to determine whether formal regulation was required.

Comments

- 6.5 The complaints data collected suggest that the voluntary code has not addressed the problem as hoped (as shown in Figure 2 in Section 4). Without further intervention it is possible that complaints may persist (or rise), or that complaints may fall over the short term but problems may arise again at some point in the future.
- 6.6 Although we believe the main provisions in the voluntary code are the right ones, we do not consider the voluntary code to be sufficiently effective. We consider the voluntary character of the code to have a number of drawbacks which negatively impact its effectiveness:
- Ofcom cannot enforce the voluntary code. Only the mobile service providers can do so and they may each have a different approach regarding enforcing the code and ensuring compliance. This variety in approaches could ultimately distort competition between mobile service providers. More lenient mobile service providers could gain an unfair competitive advantage over mobile service providers who take a more severe stance in respect of their own channels and their independent retailers.
 - These potential differences in approach between the mobile service providers could also lead to confusion in the market, where customers are faced with different sales and marketing practices depending on which mobile service provider they engage with.

- 6.7 For the reasons set out in Section 4, we consider that existing consumer protection legislation is not sufficient on its own to tackle mis-selling issues.

b) Regulate mobile service provider through a General Condition (GC)

- 6.8 This option would involve introducing formal regulation requiring mobile service providers to comply with a series of rules to tackle general mis-selling and to ensure their independent retailers also comply.
- 6.9 Ofcom cannot directly regulate independent retailers under the Act where they are not a provider of Electronic Communications Services or Electronic Communications Networks. However, independent retailers must comply with contract terms stipulated by mobile service providers, so Ofcom can indirectly influence the actions of independent retailers by regulating mobile service providers.
- 6.10 The regulation would incorporate parts of the voluntary code of practice, including requirements to not engage in misleading or deceptive conduct and to ensure that the customer understands and intends to enter into a contract. Enforcing the same set of rules across all retailers (both the mobile service providers' direct retail arm and their retailers) would help ensure a level playing field.

Comments

- 6.11 The main issue for consumers is how effective the rules are at preventing mis-selling. This option relies on mobile service providers monitoring independent retailer behaviour. Mobile service providers ultimately benefit from independent retailers selling their services. Therefore, we would expect them to exercise a degree of control over how their services are sold.
- 6.12 Where the independent retailer is supplied by a distributor, the mobile service provider may delegate monitoring compliance to the distributor, but would ultimately remain responsible for ensuring that those selling their services would comply with certain minimum behavioural standards.
- 6.13 This approach would involve additional resource for mobile service providers initially as some changes would be required to contract terms and mobile service providers would be responsible for ensuring the rules were followed across the independent retailer network. However, a number of mobile service providers already incorporate the voluntary code as part of independent retailer contract terms so any increased cost should be relatively low.
- 6.14 Mobile service providers would also be required to monitor behaviour and take action against any independent retailer who fails to comply with the rules. However, the mobile service providers should already be monitoring independent retailers to ensure compliance with the voluntary code so this should not be unduly onerous.

Our preferred option to deal with general mis-selling

- 6.15 Our preferred option is b), regulating the mobile service provider through a GC. This GC will require the mobile service providers to comply with a set of rules and prohibitions to address mis-selling. The mis-selling provisions in this GC are broadly based on the voluntary code. The detailed proposed GC can be found in Annex 6.
- 6.16 We propose the following mis-selling provisions to be included in the GC:

- The mobile service provider is required to make the GC available to its customers (GC 23.3), and should ensure their independent retailers are aware of the GC (GC 23.4 (a)). This way, the standards in respect of expected sales and marketing behaviour are known by all parties involved in selling and marketing mobile services, including customers.
- The mobile service provider should not engage in mis-selling behaviour itself (GC 23.2) and should ensure there are provisions in place which require the retailer not to engage in such behaviour (GC 23.4 (b) (i) – (iii)). The objective of this prohibition is to prevent unacceptable sales and marketing behaviour and resulting harm related to mis-selling.
- The mobile service provider must monitor retailers' compliance with the GC (GC 23.4 (c)) and must sanction breaches by retailers appropriately (GC 23.4 (d)). These provisions shall ensure that mis-selling is identified and addressed by mobile service providers.
- The mobile service provider should ensure that the customer intends and is authorised to enter into a contract and that the customer will be provided with details about the company, the service, and the terms and conditions applicable to the deal (GC 23.5). In the event that a customer enters into a contract via telesales, the retailer should send the relevant information in paper or another durable medium to the customer within 3 working days after the contract has been entered into. This should ensure that customers receive confirmation of the contract, setting out the relevant information with sufficient time to verify the details and, if necessary, exercise their cancellation right under distance selling provisions. In order to effectively address the types of mis-selling described in this document, this confirmation letter should contain information about the type of contract entered into, specifics of the subscription such as call types and available services, allowances, tariffs, coverage, contract duration and terms and conditions. As a result, this letter, in Ofcom's view, would need to go beyond what is required under general distance selling provisions. At the same time the letter should address the risk of slamming.
- The mobile service provider itself must retain records regarding the contract the customer has entered into for a time period of 12 months (GC 23.6) and must ensure that the retailer also retains such records for the same period of time (GC 23.4 (b) (iv)). This allows all parties involved (including Ofcom) to quickly gather relevant evidence if there are allegations that mis-selling occurred or that a 'bad' cashback deal was offered. The requirement should, therefore, ensure that adequate information is available in the event that Ofcom takes enforcement action for a breach of this GC. Ofcom considers the time period of 12 months to be appropriate, in particular with regards of cash back, as problems related to alleged breaches may take some time to emerge e.g. because the first cash back claim could be several months after conclusion of the contract.
- The mobile service provider should ensure that independent retailers have personnel that are appropriately trained for the purpose of selling mobile services (GC23.7). This should reduce instances where the customer misunderstands the contract based due to inaccurate or false information being given.

6.17 We believe our preferred option is objectively justified and proportionate for the reasons set out in this document, in particular:

- The voluntary code has not brought about a significant reduction in the number of complaints to Ofcom about mobile mis-selling. The current consumer safeguards do not provide sufficient consumer protection on their own against mis-selling of mobile telecommunications services and Ofcom notes that small business customers are not protected.
 - As a result we believe that further measures are required. Ofcom considers that instances of mis-selling can be distressing to those consumers involved, and this can work against the interests of consumers and undermine consumer confidence in the mobile market.
 - Ofcom considers that the proposed GC would ensure that consumers (including small business customers) are better protected. It sets out requirements to address mis-selling. Ofcom will be able to investigate and enforce its provisions.
 - If problems of mis-selling should continue or arise again in another form in the future, action can be taken promptly by Ofcom when formal regulation is in place.
 - We believe it is unlikely that the implementation of a GC will create additional significant costs for mobile service providers and independent retailers already complying with the voluntary code. In Section 9 we discuss the additional provisions in the GC compared to the voluntary code and further details are given in the Impact Assessment in Annex 5.
- 6.18 The proposed GC is not unduly discriminatory in that it would apply indiscriminately to all mobile service providers and they would all be under the same obligation to influence and monitor the behaviour of those independent retailers selling or marketing their mobile services. The introduction of a GC helps facilitate a level playing field for mobile service providers and independent retailers.
- 6.19 Ofcom is satisfied that the proposed GC is transparent insofar as the nature and intended effect of the proposed provisions are clearly set out in this document.

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

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

Section 7

Options to tackle onerous/misleading cashback terms and conditions

- 7.1 We have identified three main options to tackle issues in respect of onerous or misleading contractual cashback terms and conditions..
- a) Rely on existing voluntary industry code;
 - b) Consumer education campaign;
 - c) Regulate mobile service providers through a General Condition. Such a GC might include a range of requirements or prohibitions including:
 - Providing more information at the point of sale;
 - Prohibiting unduly restrictive terms;
 - Changing the independent retailer commission structure;
 - Automating cashback;
 - Introducing an approved independent retailer scheme;
 - Allowing cashback only at the start of the deal;
 - Requiring mobile service providers to pay cashback (with reductions in commission payments to independent retailers); and
 - Banning cashback.
- 7.2 Below we will describe the details of these three options, including potential advantages and disadvantages. More details regarding these options can be found in the Impact Assessment in Annex 5.
- 7.3 To proceed with a number of the more intrusive options set out under c) above section, Ofcom would need to do further work to explain the proportionality and justifiability of those options.

a) Continue to rely on the existing voluntary industry code

- 7.4 Under this option no new formal regulation would be introduced. However, the voluntary industry code of practice, which includes provisions on unfair terms in relation to sales incentives, would be retained and Ofcom would be able to pursue independent retailers under existing consumer protection legislation (e.g. the Enterprise Act 2000) if this was deemed appropriate.
- 7.5 Ofcom would be able to review again the effectiveness of the code at a later date.

Comments

- 7.6 As discussed in Section 4, it would appear that the voluntary code introduced in July 2007 has not yet addressed this problem (given, for example, the ongoing number of cashback complaints). However, we recognise that complaints may continue in the short term as cashback contracts can last for up to 2 years and the code will only be fully operational for cashback deals entered into after July 2007.
- 7.7 Similar to our reasoning regarding mis-selling, we believe the main provisions in the voluntary code in respect of cashback terms and conditions to be the right ones. However, we do not consider the voluntary code to be sufficiently effective for the same reasons set out in Section 6.
- 7.8 For the reasons set out in Section 4, we consider that existing consumer protection legislation is not sufficient on its own to tackle the abuse of overly onerous or misleading cashback terms and conditions. Pursuing independent retailers would not necessarily result in consumer getting their cash payments, as action under the Enterprise Act does not provide for compensation.

b) Consumer education campaign

- 7.9 A significant part of the problem with 'bad' cashback deals is around customers not understanding the full terms and conditions of the contracts they are signing. For example, customers may believe cashback is provided by the mobile service provider rather than the independent retailer or they may not understand that line rental offers are quoted net of cashback (which they must claim separately).
- 7.10 Under this option, a campaign would be undertaken to try and improve education so consumers are more informed about the contracts they are taking.

Comments

- 7.11 Consumer education is desirable as it would enable more informed choices. Under Section 26 of the Act Ofcom may publish information and advice about matters in relation to its duties. Ofcom regularly publishes information for consumers and providers.
- 7.12 However, in this case we consider Ofcom providing information may not be very effective. Targeting the right consumers and making them aware of information on Ofcom's website will be difficult. Ofcom using other means could be a large, costly and difficult exercise.
- 7.13 There would still be potential for harm and the impact would be limited in the longer term, unless the education effort is repeated on a regular basis. In addition, the cause of 'bad' cashback offers would not be addressed.

c) Regulate the mobile service providers through a GC

- 7.14 We have considered a number of options to address onerous or misleading contractual terms and conditions around cashback and other sales incentives that would entail regulating mobile service providers. We consider these below. Some of the options could be combined.
- 7.15 In discussions with the MNOs we have asked for the likely impact in terms of costs and implementation times of specific options under consideration. No quantitative

information was provided although some MNOs gave us an indication of which options would be more costly.

i) Providing more information at point of sale

- 7.16 One problem with some cashback deals is that consumers do not fully understand how to claim the cash, for example, they may send the claim too late or too early. Under this option, the GC would require mobile service providers to ensure that more information is given at point of sale, for example the independent retailer explaining to customers exactly what they need to do at each point in time to ensure the claim is successful. This option could be used in conjunction with other options listed below.

Comments

- 7.17 Providing more information at point of sale may help some customers make successful claims for cashbacks and other sales incentives. Customers would be able to consider whether the terms were unduly onerous and better assess the likelihood of making successful claims.
- 7.18 The mobile service provider would need to insist that independent retailers provide the information required at the point of sale and take action if they are not.
- 7.19 Independent retailers would need to fully explain the cashback contract terms and conditions to consumers – this may discourage the imposition of onerous terms and conditions. There may be some additional small cost to independent retailers in providing this information.

ii) Prohibiting unacceptable terms

- 7.20 Under this option the GC would prohibit unduly restrictive terms and conditions regarding sales incentives. This would in large part formalise the existing sales incentives provisions in the voluntary code.

Comments

- 7.21 This option should help to ensure that all customers are offered fair terms and conditions. Mobile service providers would need to monitor the terms and conditions offered by independent retailers to ensure they complied with the GC. Ofcom would have powers to ensure that the mobile service providers enforced the terms on independent retailers. Consumers would still have to follow the independent retailers' processes to claim cash or other incentives (e.g. remembering to send bills at various points in the contract).
- 7.22 This would result in some additional cost for the mobile service providers. However, the incremental cost should be small as mobile service providers should already require independent retailers to comply with the voluntary code.

iii) Changing independent retailer commission structure

- 7.23 As described in Section 3, commission structures are negotiated between the mobile service provider, the distributor and the independent retailer and vary widely. Under this option, the GC would require mobile service providers to incentivise good practices by independent retailers by paying out commission payments at a late stage in the customer's contract or clawing back commission payments if bad practices involving cashbacks were uncovered.

Comments

- 7.24 It may be difficult for the mobile service provider to administer the scheme. For example, they will require information on who has not received cashback, need to check the claim validity and then alter commission payments accordingly.
- 7.25 Changing commission structures may be a costly and complicated process for mobile service providers. In terms of enforcement, it would be difficult for Ofcom to determine the balance between incentivising sales and ensuring cashback is paid.
- 7.26 This is an intrusive option. Commissions are important for business funding purposes (they form part of the independent retailer's working capital). Changing the commission basis may have funding implications e.g. a sudden change from upfront to instalment commission payments may have cash flow implications and create short term problems even for viable business models. The option is more likely to have an adverse impact on smaller independent retailers who tend to receive more commission up front and may therefore have an impact on the extent and form of competition. Further analysis is given in the Impact Assessment in Annex 5.

iv) Automating cashback

- 7.27 Under this option the GC would require that cashbacks are only allowed where they are paid automatically by the independent retailer at the appropriate time. The method of payment would not be prescribed, for example it could be by bank transfer or by a cheque sent through the post. The key feature is no action would be required by the customer to generate payment, such as sending in copies of bills.

Comments

- 7.28 Automation makes the cashback process much simpler for customers. Automated cashback schemes tend to offer a smaller amount of cashback as the redemption rate is 100% with certainty (market research suggests that approximately 5% of customers forget to claim cashback which independent retailers may legitimately factor into the amounts offered).
- 7.29 As all cashbacks would be redeemed, independent retailers would need to operate sustainable cashback models (i.e. not offering large cashback amounts which rely on some customers being unable to claim to remain viable). This would also reduce the probability that an independent retailer ceases to trade due to cashback claims being larger than expected. It is likely to reduce the size of the cashbacks offered.
- 7.30 In order for an automated scheme to work, independent retailers need to be able to identify which customers are still honouring the contract and which have defaulted/cancelled/changed contract. If a customer cancels/defaults on a contract (and is no longer paying fees to the mobile service provider) or changes tariff plan they may not be qualified to continue to receive cashback (as independent retailers will be subject to clawback on commissions). Mobile service providers would need to provide information on live customers to independent retailers.
- 7.31 The option would therefore require mobile service providers to develop new systems and processes, which means that it could not be implemented swiftly. There would be setup and administration costs for mobile service providers and independent retailers.

v) Introducing an approved independent retailer scheme

- 7.32 Under this option the GC would require the mobile service providers to operate an approved independent retailer scheme. This could be done in a number of ways including an approved industry body. Approved independent retailers would need to fulfil a number of conditions to prove they were fit for approval; conditions could include some of the other options outlined, for example, automation of cashback payments and passing due diligence checks conducted by the mobile service providers (which would reduce the probability of insolvency).

Comments

- 7.33 It would need to be clear to consumers which independent retailers were operating under the approved scheme and the potential consequences of taking a contract with a non-approved retailer, so consumer education would be required. There would still be scope for non-approved independent retailers to deceive customers.
- 7.34 Setting up the scheme and monitoring the compliance would be a significant resource burden.

vi) Allowing cashback only at start of the deal

- 7.35 Under this option the GC would require all cashbacks to be paid upfront at the start of the contract.
- 7.36 In practice, the cashback would need to be paid at the end of the customer statutory 'cooling off' period, which is the time during which they can cancel the contract with no penalties. Without this the customer could otherwise claim the cashback and then legitimately cancel the contract – and the independent retailer may find it difficult to recover the cashback paid.
- 7.37 Such upfront cashbacks already exist in the market. They tend to be for lower amounts than cashbacks staged throughout the contract.

Comments

- 7.38 This option would avoid the need for a contract between the independent retailer and the consumer and means the consumer is not exposed in the event of independent retailer insolvency after the contract has commenced. However, this option may create perverse incentives for consumers. Receiving all of the cashback upfront, including a handset could encourage some people to take out contracts which they do not intend to honour.
- 7.39 Market research conducted by Ofcom suggests that 41% of customers would prefer upfront cashback versus 31% who prefer several staggered payments (29% had no preference). There is some suggestion that customer defaults increase when incentives are offered up front (i.e. customers take the contract to receive the incentive without the intention of honouring contractual obligations).
- 7.40 In some cases the mobile service provider has revenue sharing arrangements with the independent retailer or retains a proportion of the independent retailer commission, which is paid later in the contract providing the customer pays their bills. In most cases the independent retailer will have commission clawed back if the customer changes or defaults on the contract within a certain time period.

- 7.41 The independent retailer may argue that the cashback deals, where payments are spread over time, encourage customers to stay with their network for the whole contract which in turn enables independent retailers to earn the full commission (and not suffer clawbacks).
- 7.42 If customers cancelled the contract before the end of the term, independent retailers would need a mechanism to clawback the cashback from the consumer. This might be an onerous process for independent retailers.

vii) Requiring mobile service providers to pay cashback to the customer directly (with reductions in commission payments to independent retailer)

- 7.43 Under this option the mobile service provider would have to pay the cashback directly to the consumer as a deduction on the monthly bill. The mobile service provider would, in turn, make a corresponding deduction from the independent retailer's commission.
- 7.44 This option avoids the need for a separate contract between the independent retailer and the customer for the cashback component of the deal.²⁰ A single contract between the customer and the mobile service provider would incorporate both the airtime contract and cashback elements. An example is provided in the Impact Assessment in Annex 5.

Comments

- 7.45 The cashback payment is provided automatically as a deduction from the airtime contract fees, which is both reliable and convenient for the consumer. Significantly, problems relating to independent retailer insolvency during the contract would be eliminated as the mobile service provider is paying the cashback.
- 7.46 However, this approach places an extra burden on the mobile service provider as they would have to deal with the cashback directly. Potentially they would have to calculate and process the commission/contract fee on each contract separately. Significant system changes for the mobile service provider billing systems would be necessary requiring both investment and time to implement.
- 7.47 MNOs have indicated that this would be the most costly option. In response to this cost, the mobile service provider may simply refuse to deal with independent retailers offering cashback, which would impact on consumer choice and competition.
- 7.48 There is a possibility that independent retailers will try and evade these rules by offering incentives other than cash e.g. MP3 players, thus bypassing regulation.

viii) Banning cashback

- 7.49 Under this option the GC would require mobile service providers not to deal with any independent retailer offering cashback. All cashbacks – irrespective of whether the terms are fair or not - would be eliminated.

²⁰ Typically when the reseller offers cashback it is via a separate contract with the customer. So the customer has a contract with the MNO for airtime and a contract with the reseller for cashback.

Comments

- 7.50 This solution would harm any consumers who benefit from the effective discounts which result from cashback deals. Our research suggests that the vast majority of cashback consumers are happy with their cashback deals.
- 7.51 Banning cashback reduces the number of variables that independent retailers can compete on. This may erode their competitive position relative to the mobile service providers' direct sales who have a wider range of options, for example extra minutes/discounts on contract fees. It is possible that independent retailers may cease to be a significant outlet for mobile sales.
- 7.52 Independent retailers may respond by offering non-cash incentives (e.g. MP3 players) which may raise similar concerns to cashbacks if provided during the course of the contract (e.g. customer having to comply with onerous conditions to claim the incentive). Banning all inducements would severely restrict independent retailers.

Preferred option to deal with onerous/misleading cashback terms and conditions

- 7.53 Our preferred option is to introduce a General Condition combining a set of rules on sales incentives, such as cashbacks, and an obligation to ensure the provision of information at the point of sale. These are options ci) and cii) set out above.
- 7.54 We propose the following provisions regarding onerous/misleading terms and conditions of sales incentives to be included in the GC:
- The mobile service provider must ensure that, where an independent retailer offers a sales incentive, the customer is provided with details about the company offering the incentive and relevant information regarding the sales incentive itself (GC 23.9). This should clarify the process for the customer and reduce confusion about who is providing which part of the deal, when to claim and when the incentive will be received.
 - The mobile service provider should ensure that the terms and conditions of sales incentives offered by their independent retailers are not unduly restrictive (GC 23.9).
- 7.55 We believe our preferred option is objectively justified and proportionate for the reasons set out below:
- Cashback, as a sales incentive, is a legitimate form of price competition when offered with reasonable terms and conditions. However Ofcom considers that problems arising due to onerous or misleading cashback terms and conditions can be distressing to those consumers involved. They can lead to significant financial harm and this can work against the interests of consumers and undermine consumer confidence in the mobile market.
 - We consider that the balance of evidence indicates the current consumer safeguards are not sufficient on their own to address the abuse of overly onerous or misleading cashback terms and conditions. In addition, they do not protect small business customers.
 - Ofcom considers that the provisions in the proposed GC regarding terms and conditions of sales incentives and the provision of information to the customer

would ensure that consumers (including small business customers) are better protected, by placing an obligation on mobile service providers to ensure that independent retailers comply with the rules on terms and conditions and the provision of information.

- Ofcom will be able to investigate and enforce the GC. If problems in respect of sales incentives should continue or arise in another form in the future, action can be taken promptly by Ofcom under a GC, including requiring the contravening party to remedy the consequences of any contravention.
- We believe it is unlikely that the implementation of a GC will create additional significant costs for mobile service providers and independent retailers already complying with the voluntary code. In Section 9 we discuss the additional provisions in the GC compared to the voluntary code and further details are given in the Impact Assessment in Annex 5.
- Options which make it harder to offer cashback or ban it outright may make it harder for independent retailers to compete with mobile service providers' direct offers (as mobile service providers can offer a wider range of tariffs which are not always available to independent retailers).
- Any option putting a significant additional burden on the mobile service provider (compared to the voluntary code) might make the provider decide to stop selling its services through independent retailers, or only use a small sub-set of independent retailers instead. This could reduce competition in the mobile retail market.

7.56 The proposed GC is not unduly discriminatory in that it would apply to all mobile service providers and they would all be under the same obligation to ensure that terms and conditions of their independent retailers cashback offers are reasonable and that their retailers provide customers with information about sales incentives, such as cashbacks, and so facilitate a level playing field for retailers and mobile service providers.

7.57 Ofcom is satisfied that the proposed GC is transparent insofar as the nature and intended effect of the proposed provisions are clearly set out in this document.

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

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

Section 8

Options to tackle issues regarding retailer insolvency

- 8.1 The options set out in this section address situations where an independent retailer is no longer able to make cashback payments because they have ceased trading. Under these circumstances customers may have to continue paying the airtime contract fees with the mobile service provider, whilst not receiving the cashback payments.
- 8.2 Businesses cease to trade across all industries for many reasons leaving creditors who are owed money. There is a system for dealing with firms that fail with creditors usually going through legal channels to recover monies owed. By intervening in this process, where mobile independent retailers fail, we are suggesting that this is a special market which requires extra protection. This is not unknown - in the UK an insurance scheme is provided for bank deposits in the event of a bank failure - but is an unusual step which would require strong justification, for example an unacceptable level of financial harm. In addition, it introduces the issue of moral hazard as customers may take 'high risk' contracts as they know that where there is a failure, they will be bailed out.
- 8.3 We have identified six options to tackle issues in respect of retailer insolvency. The options we set out do not prevent independent retailers from engaging in bad cashback schemes directly but they may alter the behaviour of mobile service providers and independent retailers indirectly with respect to the deals they offer.
- 8.4 Options we consider to deal with retailer insolvency are as follows:
- a) Do nothing additional i.e. mobile service provider to carry out due diligence through the voluntary industry code;
 - b) General condition requiring mobile service providers to carry out due diligence;
 - c) Mobile service provider allows customer to cancel contract or change price plan;
 - d) Independent retailer takes out insurance;
 - e) Independent retailer provides guarantee;
 - f) Mobile service provider guarantees cashback payments.
- 8.5 To proceed with a number of the more intrusive options set out above, Ofcom would need to do further work to explain the proportionality and justifiability of those options.
- a) Do nothing additional i.e. maintain the voluntary code which requires the mobile service provider to carry out due diligence checks on independent retailers**
- 8.6 Under this option, the mobile service provider has to carry out due diligence on all organisations with whom they contract and appoint to promote the operator's

services to ensure the independent retailer is credible, in line with the requirements in the code.

Comments

- 8.7 The option would entail the least intervention by Ofcom. If operated and policed effectively by the mobile service providers, it should reduce the instances of independent retailer insolvency with the consequent consumer harm that entails. However, if the mobile service providers did not adequately carry out due diligence, Ofcom would not have direct enforcement powers to address the problem.
- 8.8 Similar to our reasoning in respect of mis-selling, we believe the main provisions in the voluntary code in respect of due diligence to be the right ones. However, we do not consider the voluntary code to be sufficiently effective for the same reasons set out in Section 6.

b) GC requiring the mobile service provider to carry out due diligence on independent retailers

- 8.9 Under this option, the GC would require the mobile service provider to conduct certain due diligence activities to ensure the independent retailer is credible. This could include requiring the mobile service provider to:
- Ensure independent retailers' business models are not based on exploiting or misleading consumers, for example checking that the model does not assume artificially low redemption rates; and
 - Carry out a credit reference check, checking firm history with trading standards, and checking company directors.

Comments

- 8.10 Under a GC, Ofcom could monitor and enforce compliance and ensure a framework of due diligence checks was in place that should reduce the instances of independent retailer insolvency and the consequent consumer harm. As a result it is Ofcom's view that an obligatory due diligence regime which will be applied consistently throughout the sector, could be a useful and effective tool, to prevent unsustainable business models which might lead to retailer insolvency.

c) Mobile service provider allows customer to terminate contract/move to a lower tariff level if requested

- 8.11 Under this option, if an independent retailer becomes insolvent the customer may still have to pay contract fees to the mobile service provider even though the cashback payment stops. At the point of purchase, the customer may have viewed the contract and cashback as part of the same deal (and budgeted on that basis).
- 8.12 Without the cashback payments the customer may struggle to afford the airtime contract fees. At the very least, the customer may have chosen a different contract if they had known at the time of purchase that the cashback would not be paid in full.

Comments

- 8.13 Under this option the GC would require the provider to allow the customer to terminate the contract without penalty or to allow a switch to a lower tariff level. The

mobile service provider would need to work with the customer to find the best solution.

- 8.14 This approach allows flexibility for the mobile service provider and consumer to work towards a mutually acceptable solution. However, allowing consumers to terminate contracts early may have significant financial implications for the mobile service provider which will be exacerbated if the mobile service provider has already paid independent retailer commission on the contract. It may also encourage consumers to take out 'higher risk' cashback contracts in the knowledge that the mobile service provider will be required to find a solution if the cashback fails.

d) Require independent retailer to take insurance

- 8.15 Under this option, the GC would require the mobile service provider to ensure the independent retailer takes out insurance against failure to make cashback payments if they cease trading. The mobile service provider would require the independent retailer to take insurance as a condition of an agreement to sell and market its services.

- 8.16 This option is dependent on the development of an appropriate insurance product. It is possible that insurers might introduce premiums scaled to the risk of business failure which would also encourage good business practices in the independent retailer. For example, evidence of a good business model (such as honouring all prior cashback claims) could be provided as a condition of a lower premium.

Comments

- 8.17 This option would be costly for independent retailers so may simply discourage cashback deals. This could have implications for competition as reducing cashback would make it harder for independent retailers to compete with mobile service provider direct sales. Smaller independent retailers in particular may find it harder to afford the insurance premiums so be at a disadvantage under this option.

e) Independent retailer must obtain guarantee

- 8.18 Under this option, the GC would require the mobile service provider to ensure that independent retailers provide a guarantee that a minimum amount of funds/assets would be available to pay cashback obligations in the event of insolvency.
- 8.19 The guarantee could be provided by the independent retailer itself, for example against property/assets owned by the business owner, by a parent company or a bank. The mobile service provider would be required to ensure the guarantee was in place and for a sufficient minimum amount given the scale of the independent retailer cashback business.

Comments

- 8.20 In the event of insolvency, financial harm for cashback customers would be minimised. The guarantee would have to be provided by the independent retailer which is intuitively more logical than forcing the mobile service provider to bear the cashback obligations in the event of independent retailer insolvency.
- 8.21 Small independent retailers may find it difficult to provide a guarantee, for example if their assets were small or access to capital was limited. It may also be difficult to

decide how much the minimum guarantee should be for as it could be difficult to forecast cashback obligations in the future.

f) Mobile service provider to guarantee payments

8.22 Under this option, the GC would require the mobile service provider to take over the cashback payments of the independent retailer in the event of insolvency.²¹

Comments

8.23 This would encourage the mobile service provider to ensure that the independent retailers were financially viable and take greater responsibility for the independent retailer network. Consumer harm in the event of independent retailer insolvency would be eliminated.

8.24 This option would place a considerable burden and risk on mobile service providers and may simply encourage them only to sell through direct retail outlets. In effect this may foreclose independent retailers which could reduce competition.

8.25 Forcing mobile service providers to 'bail out' independent retailer cashback obligations in the event of insolvency would not encourage prudent risk management by independent retailers. In fact, it introduces a risk that some independent retailers may pursue a high risk strategy knowing that mobile service providers will bear the cost in the event of failure.

Preferred option to deal with retailer insolvency

8.26 The preferred option is to require mobile service providers, through the GC, to carry out due diligence when using independent retailers. This is option b described above.

8.27 We propose the following provision regarding onerous/misleading terms and conditions of sales incentives to be included in the GC:

- The mobile service provider must carry out due diligence (or require their distributors to carry out due diligence) and a number of checks in respect of independent retailers to ensure that the company and its directors are 'sound' (GC 23.8). This should reduce 'rogue' retailers entering the market.

8.28 For the reasons set out in this document, and in particular for the reasons set out below, we believe our preferred option is objectively justified and proportionate:

- Some checks are required to ensure new retailers entering the market are financially sound and are not 'rogue traders' who have no intention of honouring customer agreements. Enforcement action can be taken in the event that mobile service providers fail to meet the requirements in the code.
- The problem of independent retailer insolvency as a result of cashback should naturally diminish because of the proposed new GC rules, set out in Section 7, requiring mobile service providers to ensure independent retailers do not impose unduly restrictive terms and conditions on consumers with regards to their ability to claim the cashback offer. This means independent retailers will not be able to rely on artificially low redemption rates when offering cashback, which can lead to financial problems if redemption rates turn out to be higher than expected. Given

²¹ This option assumes the probability of mobile service provider insolvency is negligible.

that we realistically expect problems with insolvency to diminish, using the more intrusive options listed above seems disproportionate.

- Most mobile service providers already undertake checks and this option formalises the main requirements of the code and ensures consistency, so the option should not create a significant additional burden. Further details are set out in Section 9 on additional provisions in the GC compared to the voluntary code and in the Impact Assessment in Annex 5.
- Any option putting a significant additional burden on the mobile service provider (compared to the voluntary code) might make the provider decide to stop selling its services through independent retailers, or only use a small sub-set of independent retailers instead. This could reduce competition in the mobile retail market.

- 8.29 The proposed GC would not be unduly discriminatory in that it will apply to all mobile service providers and they would all be under the same due diligence obligation, hence creating a level playing field for mobile service providers and retailers.
- 8.30 Ofcom is satisfied that the proposed GC is transparent insofar as the nature and intended effect of the proposed provisions are clearly set out in this document.
- 8.31 In cases where retailers nevertheless go out of business leaving customers with unredeemed cashback deals but with ongoing airtime contracts, Ofcom strongly urges the mobile providers to find mutually acceptable solutions for customers experiencing difficulties.

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

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

Section 9

Conclusion

- 9.1 As explained in Sections 6-8, our combined preferred option involves the introduction of a new GC, GC 23. This GC encompasses provisions regarding mis-selling, sales incentives and due diligence.
- 9.2 Figure 5 below gives an overview of this option. The proposed GC requires mobile service providers to comply with a set of rules and prohibitions and, in respect of a number of those provisions, to use best endeavours to ensure that any third party through which they sell and market their services, complies with certain rules and prohibitions as well.

Figure 5: Overview of our preferred option

	Mis-selling	Onerous / misleading cashback terms	Retailer insolvency
General Condition	Rules and prohibitions regarding mis-selling and slamming	Information at point of sale; Prohibiting unacceptable terms.	Mobile provider to carry out due diligence;

- 9.3 Unlike GC 14.5, which aims to tackle mis-selling in the fixed line market, the new proposed GC will not require a Communications Provider to establish and maintain a Code of Practice based on a set of guidelines developed by Ofcom.²² Instead, the proposed GC itself will contain a set of rules and prohibitions which a mobile service provider will need to adhere to. It will be accompanied by guidelines, which are intended to assist the mobile service providers in their compliance with the condition and in which Ofcom sets out examples and guidance how it would interpret words, types of expected behaviour, required information and terms and conditions deemed to be unduly restrictive.
- 9.4 The notification and the details of the proposed GC can be found in Annex 6, the guidelines are attached in Annex 7. A high level overview of all the provisions and objectives of the new GC is shown below:
- The mobile service provider is required to make the GC available to its customers (GC 23.3), and should ensure their independent retailers are aware of the GC (GC 23.4 (a)). This way, the standards in respect of expected sales and marketing behaviour are known by all parties involved in selling and marketing mobile services, including customers.
 - The mobile service provider should not engage in mis-selling behaviour itself (GC 23.2) and should ensure there are provisions in place which require the retailer

²² The terms 'Communications Provider' is used here in the sense they are defined in Part 1 of the General Conditions of Entitlement; the term 'Code of Practice' is used as defined in GC14.

not to engage in such behaviour (GC 23.4 (b) (i) – (iii)). The objective of this prohibition is to prevent unacceptable sales and marketing behaviour and resulting harm related to mis-selling.

- The mobile service provider must monitor retailers' compliance with the GC (GC 23.4 (c)) and must sanction breaches by retailers appropriately (GC 23.4 (d)). These provisions shall ensure that mis-selling is identified and addressed by mobile service providers.
- The mobile service provider should ensure that the customer intends and is authorised to enter into a contract and that the customer will be provided with details about the company, the service, and the terms and conditions applicable to the deal (GC 23.5). In the event that a customer enters into a contract via telesales, the retailer should send the relevant information in paper or another durable medium to the customer within 3 working days after the contract has been entered into. This should ensure that customers receive confirmation of the contract, setting out the relevant information with sufficient time to verify the details and, if necessary, exercise their cancellation right under distance selling provisions. This way, the customer should have all relevant information based on which they can make an informed decision whether or not to enter into a contract. At the same time the risk of 'slamming' will be addressed.
- The mobile service provider itself must retain records regarding the contract the customer has entered into for a time period of 12 months (GC 23.6) and must ensure that the retailer also retains such records for the same period of time (GC 23.4 (b) (iv)). This allows all parties involved (including Ofcom) to quickly gather relevant evidence if there are allegations that mis-selling occurred or that a 'bad' cashback deal was offered. The requirement should, therefore, ensure that adequate information is available in the event that Ofcom takes enforcement action for a breach of this GC. Ofcom considers the time period of 12 months to be appropriate, in particular with regards of cash back, as problems related to alleged breaches may take some time to emerge e.g. because the first cash back claim could be several months after conclusion of the contract.
- The mobile service provider should ensure that independent retailers have personnel that are appropriately trained for the purpose of selling mobile services (GC23.7). This should reduce instances where the customer misunderstands the contract based due to inaccurate or false information being given.
- The mobile service provider must ensure that, where an independent retailer offers a sales incentive, the customer is provided with details about the company offering the incentive and relevant information regarding the sales incentive itself (GC 23.9). This should clarify the process for the customer and reduce confusion about who is providing which part of the deal, when to claim and when the incentive will be received.
- The mobile service provider should ensure that the terms and conditions of sales incentives offered by their independent retailers are not unduly restrictive (GC 23.9).
- The mobile service provider must carry out due diligence (or require their distributors to carry out due diligence) and a number of checks in respect of independent retailers to ensure that the company and its directors are 'sound' (GC 23.8). This should reduce 'rogue' retailers entering the market.

Additional provisions in the GC compared to the voluntary code

- 9.5 In Annex 11 we have included a comparison of the provisions in the code and in the proposed new GC. Apart from the mandatory character of the proposed GC, which explicitly requires mobile service providers to monitor their independent retailers' behaviour, there are three main areas where the requirements under the GC are more onerous than those required by the code.
- i) The first area is regarding record keeping, where we propose to increase the time records have to be held from 6 to 12 months. Since certain mis-selling issues, especially around cashback, can become apparent after a longer time period, we believe it is reasonable and proportionate to increase this time period. These records could be used as evidence in the event of an investigation. We do not consider the additional burden to be excessive.
 - ii) The second additional provision in the GC, not currently part of the voluntary code, would require retailers, in the event a contract is entered into by telesales, to send a confirmation letter including certain information with regards to the contract and/or the sales incentive in the post or by other durable medium to the customer within 3 working days after a customer has entered into a contract. The objective of this letter would be to make the customer aware of the details of the deal they have entered into and provide a reference for future use. If the contract terms are not as anticipated then the consumer can cancel within the statutory 'cooling off' period. In order to be effective in reducing the type of mis-selling described above, this letter should contain information about the contract entered into, specifics of the subscription such as call types and available services, allowances, tariffs, coverage, contract duration and terms and conditions. As a result, this letter, in Ofcom's view, needs to go beyond what is required under general distance selling provisions.
 - iii) The third area where the GC is more onerous than the voluntary code is in the area of due diligence, where we propose that checks should be carried out regarding independent retailers with whom the mobile service provider is already contracting within 12 months from the GC coming into force. The voluntary code requires checks on 'new' independent retailers only. The objective of this provision is to ensure that all independent retailers have been subject to the same checks, thus creating a level playing field for independent retailers and a uniform level of protection for consumers. We consider a 12 month implementation period to carry out checks regarding existing independent retailers to be reasonable taking into account the large number of independent retailers mobile service providers can contract with, either directly or via their distributors.
- 9.6 As set out before, we acknowledge that these three provisions are not included in the voluntary code and introducing it would mean additional costs and require implementation time for the mobile service providers and independent retailers.
- 9.7 We consider that a transition period of two months from the day the GC comes into force should be sufficient for mobile service providers and retailers to implement the provisions of the new GC. This should allow for the additional provisions, in particular the extension of the time period to keep records and the sending of the confirmation letter, to be implemented. In addition, we consider that mobile service providers may implement some of the provisions through contractual obligations, requiring amendments to existing contracts with distributors and independent retailers.

Question 7: We would like to have your views on these proposals, specifically:

- Could you give an indication of the costs of keeping records for an additional 6 months?*
- Do you think a confirmation letter would help in tackling mis-selling and cashback issues?*
- What kind of information do you think such a letter should contain for it to be effective?*
- For retailers selling services via telesales could you give us an indication of costs and time to implement this proposal?*
- 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?*
- Could you give us your views on the proposed transition period of 2 months to implement the provisions of the GC?*

Links to other Ofcom workstreams

Mobile Number Portability

- 9.8 In November 2007, Ofcom published its statement on Telephone Number Portability for consumers switching suppliers.²³ In this statement Ofcom concluded, among other things, that mobile service providers should implement a near-instant (no more than 2 hours) process for porting mobile numbers led by the gaining provider by 1 September 2009.
- 9.9 Ofcom explained that it did not believe that this change would necessarily give rise to more slamming or mis-selling. However, Ofcom explained that it expected providers of mobile services to take all reasonable steps to protect consumers, to the extent that the new process might pose additional risks to consumers. It stated that the process will need to enable swift reversal of ports associated with slamming.
- 9.10 Ofcom recommended that industry should start to consider how technology such as SMS could be used to provide more effective protection against unauthorised switching (whether or not associated with the porting of a number). Ofcom also expects the new process to be designed to ensure that customers are made aware that their number is being ported to a new provider. If industry initiatives prove insufficient to ensure workable and practicable safeguards, the statement made clear that Ofcom will formally require changes.
- 9.11 We consider that the proposals to tackle mis-selling and cashback set out in this consultation document are consistent with these measures and will further reinforce consumer protection.

Mobile Sector Assessment

- 9.12 During 2008/9 Ofcom is carrying out an assessment of our overall approach to regulation of the mobile communications sector. This work has two main objectives:
- to consider possible approaches to the future regulation of the mobile sector, including scope for the promotion of competition and the reduction of regulation.

²³ <http://www.ofcom.org.uk/consult/condocs/gc18review/statement/> .

- to define the principles that will inform Ofcom's work for the next phase of the market's development.
- 9.13 The assessment will consider a broad range of issues, including: the implications of continuing convergence; the aims of regulation; identifying the scope for deregulation, innovation and competition in the mobile market; and the implications of the continued growth in mobile services for competition more generally.
- 9.14 The review will also take account of issues wider than mis-selling that have been raised in our meetings with independent retailers and other stakeholders as part of the pre-consultation for this document.

Cross product migrations: moving to single switching processes across all transferable communications services

- 9.15 Ofcom is currently reviewing existing approaches to migrations, switching and mis-selling across transferable communications services, covering different technologies and infrastructure, where there is a direct consumer impact, including mobile services. The aim of the review is to ensure that regulations and processes are in place for the future that do not inhibit to consumers' ability to switch, both in a world of single product migrations but also in a world of bundled product offerings.
- 9.16 As part of the review, Ofcom is considering the case for moving to a single uniform migrations process for all transferable communications services. Ofcom's concern is that where switching is not easy, this may act as an obstacle to switching, and will inhibit switching which is an essential part of a competitive process.
- 9.17 Ofcom published a report by Deloitte on the costs and timelines for moving to a single migrations process for transferable communications services on 17 January 2008.²⁴
- 9.18 Ofcom will be publishing a consultation document this Spring reflecting on stakeholder feedback so far, and setting out recommended next steps. The cross-product migrations work will take account of the findings and responses received in the context of the mobile mis-selling review.

²⁴ <http://www.ofcom.org.uk/telecoms/ioi/mbp/deloitte/> .

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 29 April 2008**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/mobmisselling/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email mobile.misselling@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Anne Hoytink
Consumer Policy
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3706
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Anne Hoytink on 020 7783 4190.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate Annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in July 2008.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest. For this consultation we are consulting for a period of six weeks. This is because the scale of consumer harm that arises from mis-selling and the urgent need for Ofcom to consult on proposals for new proposals to address this harm.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:
 To (Ofcom contact):
 Name of respondent:
 Representing (self or organisation/s):
 Address (if not received by email):

CONFIDENTIALITY

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

Nothing	<input 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?	

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 Signed (if hard copy)

Annex 4

Consultation questions

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

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

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

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

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

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

Question 7: 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?*
- Do you think a confirmation letter would help in tackling mis-selling and cashback issues?*
- What kind of information do you think such a letter should contain for it to be effective?*
- For retailers selling services via telesales could you give us an indication of costs and time to implement this proposal?*
- 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?*
- Could you give us your views on the proposed transition period of 2 months to implement the provisions of the GC?*

Annex 5

Impact Assessment

- A5.1 The analysis presented in this annex represents an impact assessment, as defined in section 7 of the Communications Act 2003 (the Act).
- A5.2 You should send any comments on this impact assessment to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.
- A5.3 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in Section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on our website:
http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf
- A5.4 The structure of the impact assessment is as follows:
- The consumer interest
 - The nature of the problem
 - Ofcom's policy objectives
 - Options to deal with mis-selling:
 - Analysis of the options;
 - Preferred option for mis-selling.
 - Options to deal with onerous cashback terms and conditions:
 - 1) Options to deal with onerous cashback terms and conditions:
 - Analysis of the options;
 - Preferred option for onerous cashback terms and conditions.
 - 2) Options to deal with independent retailer insolvency:
 - Analysis of the options;
 - Preferred option to deal with independent retailer insolvency.

The consumer interest

- A5.5 Complaints relating to mobile phone mis-selling have increased since the start of 2007. The term 'mis-selling' covers a range of sales and marketing activities that can work against the interests of both consumers and competition and undermines confidence in the industry as a whole. Some types of mis-selling are set out in Section 2. In July 2007 a voluntary code was introduced to tackle mis-selling in the mobile telecommunications industry. However, as shown in Figure 2 in Section 4 the number of complaints relating to mis-selling has not shown a significant decrease.
- A5.6 One specific form of mis-selling can arise from the way in which cashback schemes are operated. Mobile cashback schemes are a form of promotion offered to consumers, where a consumer signs up for a mobile phone network, and is promised the payment of a certain amount of money in return.
- A5.7 Ofcom have observed two different types of problems involving cashback schemes:
- i) Independent retailers refusing to honour cashback offers, on the basis that the consumer has failed to comply with the terms of the offer. In a number of cases it is considered that the terms and conditions attached to the cashback offer are unduly onerous and the consumer was misled when taking the contract. Onerous terms and conditions are imposed to reduce the redemption rate i.e. making it more difficult for consumers to claim the cash that they are due. As some consumers fail/are unable to claim the independent retailer can offer very attractive deals, which, if fully redeemed would not be financially viable. Hereafter, cashback deals which rely on artificially lowering redemption rates are referred to as 'bad' cashback deals. 'Acceptable' cashback deals are those where the amount offered is based on expected commissions and a redemption rate which is not artificially lowered by independent retailers putting in place barriers to claiming.²⁵
 - ii) Independent retailers going out of business and therefore being unable to honour the cashback offers. Recently a number of independent retailers have reported problems when cashback claims are larger than expected (i.e. the independent retailer is operating a 'bad' cashback scheme and the actual redemption rate is greater than that expected/assumed). However, this problem is not exclusive to independent retailers offering 'bad' cashback deals and businesses may cease trading for a large number of reasons.
- A5.8 Market research has estimated that approximately 1.75 million people aged 16+ purchased a mobile phone contract with a cashback component. Of these people about 6% said they could not get their cashback²⁶ (equating to 105,000 people). The cashback problems appear to be more common in particular geographic areas. For example, where an independent retailer trading in a particular area ceased trading a large number of people in that area may be unable to claim cashback – this would not be fully captured by a random sample taken across the UK and may mean the number unable to claim is underestimated.

²⁵ Some customers will forget to claim cashback and independent retailers might reasonably include this type of failure to claim in their cashback models. Market research suggests that on average approximately 5% of customers forget to claim. This will vary according to the amount of cashback on offer and other factors.

²⁶ There may be valid reasons why a consumer was unable to claim cashback e.g. they changed their tariff package or failed to pay a bill which invalidated the cashback agreement.

A5.9 Ofcom recognises that a significant number of consumers are able to claim cashback. Market research suggests that 79% of people found claiming their cashback very or fairly easy. There is no fundamental flaw with cashback schemes if the offers are legitimate; the amount offered is based on expected commission and the redemption rate is not artificially lowered by independent retailers. Cashback is one means by which independent retailers have innovated on price competition and can bring benefits to consumers.

A5.10 The size of the cashback problem depends on the amount of cash which consumers are entitled to but unable to claim, and the number of people affected. The amount of cashback offered, and the amount the consumer is typically able to claim varies widely across deals, contract length and independent retailer. Ofcom has used two methods and a number of data sources in an attempt to quantify the aggregate monetary size of consumer detriment caused by 'bad' cashback offers:

Method 1: Combining data on cashback owed from complaints into the OAT, and data from the market research survey on consumers unable to claim cashback.

Method 2: Using data received from independent retailers on the average cashback amount and average redemption rate.

Method 1:

A5.11 Ofcom has taken a sample of 129 complaints on cashback deals received into the OAT. The sample contains complaints about solvent and insolvent independent retailers. For the sample of complaints, the average cashback promised per customer²⁷ was £504, the average cashback owed at the time of the complaint was £482. For the subset of consumers who had not managed to redeem any cashback on their contract(s)²⁸ the average owed was £518.²⁹ The cashback promised and amount owed for the OAT sample is likely to be higher than that observed more generally, as people are more likely to call the OAT if a large sum of money is at stake.

A5.12 Based on the market research statistics an estimate for the number of people who have been unable to claim cashback is 6% of cashback consumers which amounts to 105,000 people. Multiplying the cashback owed for consumers unable to redeem any cashback by the number of consumers unable to claim³⁰ gives an estimate for 'unclaimed' cashback of £54 million (i.e. £518*105,000).

A5.13 On the one-hand, this estimate may overstate cashback unclaimed. This is for three reasons:

- First, the high cashback amounts owed for OAT complaints are likely to be above the average due to selection bias (i.e. complaints are more likely if the sums involved are large).
- Second, it is not clear whether survey respondents who reported that they could not get cashback had actually managed to partially redeem some of the

²⁷ Some customers had more than one cashback contract; the average number of contracts per consumer was 1.27.

²⁸ Hence excluding customers who had claimed part of the cashback.

²⁹ Which is clearly the same as the amount promised since no cashback was received.

³⁰ We assume that consumers who reported in the market research that they could not claim cashback were unable to redeem any cash (i.e. no partial claims).

cashback promised (e.g. only later claims had failed). Method 1 assumes that the survey respondents reported as unable to claim did not get any cashback.

However, if some of the respondents included as 'unable' to claim have actually managed to redeem part of the cash promised then the true £ level of detriment will be lower than estimated by method 1 (other things equal).

- Third, in some instances mobile service providers have offered 'rescue' packages to consumers who have suffered due to independent retailer insolvency (e.g. downgrading tariff plan) which will have mitigated the harm to some extent.

A5.14 On the other-hand it is possible that this method underestimates the true level of consumer harm. It is possible that the number of people unable to claim is underestimated as the national consumer survey does not reflect the concentration of cashback problems in particular geographic areas and amongst ethnic minority groups.

Method 2:

A5.15 The second approach uses information received from independent retailers. The method essentially compares (i) what cashback consumers are due with (ii) the amount of cashback that would be paid based on the redemption rates assumed. The difference between (i) and (ii) above therefore gives an estimate of the potential consumer loss.

A5.16 Method 2 is focused on consumers that have problems redeeming cashback from solvent independent retailers. It does not include losses due to independent retailer insolvencies which means the total detriment is potentially understated. There is also uncertainty surrounding the values for some of the key assumptions and the values used for this analysis are only indicative.

A5.17 Some consumers will not receive their cashback either because they forget or because they are ineligible to claim (e.g. because they have defaulted on the contract or changed price plan). These factors need to be accounted for in the estimation of the cashback which they are due in order to give a more accurate representation of the potential consumer harm.

A5.18 In calculating the amount due to consumers our analysis assumes that 5% of contracts forget to claim³¹ (based on the market research survey) and 22% of contracts are not eligible to claim for various reasons (e.g. consumer has defaulted on contract). We have assumed that the average cashback amount is £133, which when multiplied by the number of cashback contracts, which we estimate at just under 2 million per annum, and stripping out forgetful and ineligible consumers, gives an estimate of the amount due to consumers (ie quantity (i) in paragraph A5.15 above).

A5.19 The amount we would actually expect to be paid (quantity (ii) above) is obtained by multiplying the average redemption rate per contract (which is assumed to be 51%) by the average amount of cashback per contract and the number of contracts.

A5.20 Using this method we estimate that the total cashback consumers are unable to claim is approximately £60 million.

³¹ When a consumer forgets to claim we assume that they forget for all the contracts they have taken.

Sensitivity analysis

- A5.21 The estimated amounts above for the total cashback unclaimed show that bad cashback deals have resulted in considerable consumer detriment. However, there is some uncertainty around the input values we have assumed so we have created some sensitivity scenarios in order to show how changing specific inputs affects the outcome. In all cases one input was changed at a time while holding the others constant at the 'base' values. The results are shown in the table and chart below.
- A5.22 For method 1 there are only two inputs – the amount of cashback owed and the number of people unable to claim. We believe that the amount of cashback owed is more likely to be over- than under-stated for the OAT sample of complaints. As explained earlier this is because people are more likely to call the OAT if a large amount of cash is owed. Therefore the scenario calculated is for a 10% reduction in the average cashback amount.
- A5.23 To provide lower and upper bounds for the number of people unable to claim cashback, the 95% confidence interval³² around the sample estimate has been calculated.
- A5.24 For method 2 the sensitivity analysis is conducted for the assumptions which the outcome is most sensitive to. These are the percentage of consumers eligible to claim and the redemption rate (these are also the inputs we are least confident in estimating). For both these variables the sensitivity scenario considers a +/-10% change relative to the base case since there is no a priori reason for a one-way sensitivity. The results are summarised in the table and chart below.

Table A5.1: £million cashback unable to claim under sensitivity scenarios

Input	Base case value	Scenario value	£million cashback unclaimed
Method 1			
Base case	-	-	54
10% reduction in the cashback amount	£518	£467	49
Lower 95% confidence interval bound on no. of consumers unable to claim	105,000	37,000	19
Upper 95% confidence interval bound on no. of consumers unable to claim	105,000	173,000	90
Method 2			
Base case	-	-	60
10% increase in % of eligible consumers	78%	86%	79
10% decrease in % of eligible consumers	78%	70%	40
10% increase in the redemption rate	51%	57%	46
10% decrease in the redemption rate	51%	46%	73

³² I.e. the range within which we are 95% confident that the true value lies.

Figure A5.2 Estimate of potential cashback consumer harm under sensitivity scenarios



A5.25 Although the uncertainty in some of the key inputs to the two methods produces a potentially large range for the estimate of harm, the ranges for the sensitivity analyses for the two methods overlap considerably and the base case estimates for the two methods are very close: i.e. £54 million and £60 million. We therefore consider that an order of magnitude estimate for the potential consumer harm arising from consumers not being able to successfully claim the cashback to which they are entitled lies in the range £50-£60³³ million over a 1-2 year period i.e. the range of contract durations considered.

A5.26 Clearly the consumer harm from other forms of mis-selling identified and discussed in this consultation would add to the overall estimate of potential consumer harm. However, these have not been quantified.

The nature of the problem

A5.27 Mis-selling may arise as a form of market failure, because independent retailers possess information which is not readily available to consumers (i.e. information asymmetry). As a result, consumers may be misled into taking a contract that is not as anticipated.

A5.28 As the term market failure suggests, regulatory intervention could be considered appropriate if there are characteristics of the market such that the market itself

³³ Moreover, utilising the number of cashback customers from the market research (1.75 million) in Method 2 yields an estimate of consumer harm of around £53million (with all other parameters in Method 2 unchanged from base case values). However, this approach mixes data on the number of customers purchasing cashback deals (1.75 million) with statistics based on the number of cashback contracts (e.g. the average cashback per contract). If some customers have more than one contract then clearly the level of potential harm would be greater. For example, if on average there were 1.1 contracts per consumer, the level of consumer harm would be around the top end of the range reported above.

might not function properly. Where market failure occurs, governments or regulators may be required to intervene to ensure a more socially optimal outcome.

A5.29 In the specific example of cashback the market failure which can arise is when consumers enter into a contract on the expectation of being able to claim all the cashback offered but subsequently find they are unable to. This can result in market failure because some consumers can end up having selected a tariff which is sub-optimal ex-post (i.e. they would have been better off on another deal if they had known at the time of purchase that the cashback obligation would not be fulfilled). There are two types of information asymmetry in this case:

- a) Consumers may not understand the full terms and conditions of the contract because some independent retailers have designed the contract so the terms are misleading. Failure to comply with the terms and conditions means the independent retailer does not legally have to honour the cashback contract.
- b) Consumers cannot accurately estimate the probability that the independent retailer ceases to trade over the life of the contract. If the independent retailer becomes insolvent during the contract the consumer cannot claim the cashback to which they are entitled. The information asymmetry arises here because independent retailers have a better idea of their business risks and probability of insolvency than consumers. In general, consumers will be unable to distinguish independent retailers with viable businesses and those without.

A5.30 In both cases the independent retailer possesses information that is not (easily) accessible to the consumer but would be valuable when deciding whether to purchase the contract. It may also be the case that independent retailers abuse the trust of consumers and use deception to obtain sales by convincing consumers that contracts are more attractive than they really are.

A5.31 Where market failure exists, and is not likely to be self-correcting, an economic approach would suggest assessing the costs and benefits of regulatory intervention, and the risk of regulatory failure.

Ofcom's policy objectives

A5.32 Under section 3 of the Communication Act 2003 it is the principal duty of Ofcom to:

- To further the interests of citizens in relation to communication matters; and
- To further the interests of consumers in relevant markets, where appropriate by promoting competition.

A5.33 The objectives set out in Section 2 of this consultation are:

- To support, and promote, competition in retail mobile communications to the benefit of customers including, preserving, to the maximum extent possible, the commercial freedom of mobile service providers and independent retailers to compete in creating varied offers that may appeal to different groups of consumers.
- To ensure that consumer confidence in the market is not undermined.
- To ensure that consumers have adequate protection from irresponsible and inappropriate sales and marketing activities.

- To ensure that terms and conditions around sales incentive offers are fair and consumers are able to redeem offers.
- To ensure any proposed solution is targeted at those undertaking mis-selling activity, and is a proportionate response in line with Ofcom's regulatory principles.

Options considered

- A5.34 The options to deal with generic mis-selling and cashback are considered separately, because a large number of options have been drawn up to specifically target problems with cashback deals (although a number of the options considered under general mis-selling also apply to cashback). The options to deal with generic mis-selling are considered first.
- A5.35 In discussions with the MNOs we have asked for the impact in terms of costs and implementation times for a number of the options below. No quantitative information was provided although some MNOs gave us an indication of which options would be more costly.

Options to deal with generic mis-selling

- a) Continue with the existing voluntary code/regulations;
- b) Regulate mobile service providers by amending an existing, or introducing a new, General Condition (GC).

a) Continue to rely on the existing voluntary code

- A5.36 Under this option no new formal regulation would be introduced, however, the voluntary code of practice would be retained and Ofcom would be able to pursue sellers (independent retailers or mobile service providers) under existing legislation (e.g. the Enterprise Act) if this was deemed appropriate.
- A5.37 Under section 6 of the Communications Act, Ofcom has a duty to ensure that it does not impose or maintain unnecessary burdens. A 'no change' option is appropriate if there is no clear evidence that mis-selling in mobile telecommunications is a significant problem and/or the costs of formal regulation exceed the benefits. This course of action may be appropriate if the voluntary code needs longer to take effect. Ofcom would monitor the effectiveness of the code to determine whether formal regulation was required.

Issues for consumers

- A5.38 It would appear that the voluntary code has not reduced complaints as hoped (as shown in Figure 2 in Section 4). Ofcom has committed to looking at the option of formal regulation as a next step. Without formal regulation it is possible that complaints will persist, or that complaints may fall over the short term but problems will arise again at some point in the future.
- A5.39 In the case of potential mis-selling in the mobile retail market, the option of enforcement under the Enterprise Act alone does not appear to guarantee sufficient protection on its own. It does not seem to be an effective use of Ofcom's resources to tackle the problems identified. This is partly due to the large number of individual independent retailers in the market which offer and sell mobile services and associated goods and services. Consequently, we would have to monitor the

commercial behaviour of a large number of independent retailers with whom we do not have a direct stakeholder relationship.

- A5.40 As a result, in order to ensure effective protection for consumers against mobile mis-selling under existing legislation, Ofcom would have to deploy a disproportionately large amount of resources, currently not available to us.

Issues for mobile service providers

- A5.41 This is a low cost option for mobile service providers as it maintains the status quo. However, if mis-selling problems persist then industry reputation may suffer and consumer confidence may be damaged.

Issues for independent retailers

- A5.42 This option represents no change for independent retailers so those who engage in mis-selling may not be discouraged from doing so without further action from mobile service providers. The threat of legal action under existing legislation (e.g. Unfair Contract Terms) should discourage independent retailers from mis-selling but this does not appear to be effective. It would be difficult and costly to pursue all independent retailers under the legislation so in reality the threat of action is not a strong deterrent.

Issues for competition

- A5.43 There is no evidence that mis-selling activity has affected competition between mobile service providers. Nevertheless, where certain independent retailers exploit consumers through mis-selling and thereby gain an unfair competitive advantage this is clearly undesirable since it is not competition on the merits.
- A5.44 The voluntary nature of the code also implies that while some mobile service providers could take a severe stance against mis-selling and cashback issues, others could take a more lenient approach. This could distort the market leading to a competitive advantage for more lenient mobile service providers.

b) Regulate mobile service providers through a General Condition (GC)

- A5.45 Ofcom cannot directly regulate the actions of independent retailers under the Communications Act where they are not a provider of Electronic Communications Services or Electronic Communications Networks. However, independent retailers must comply with contract terms stipulated by mobile service providers, so Ofcom can indirectly influence the actions of independent retailers via regulating mobile service providers providing the mobile service providers exert control over independent retailers.
- A5.46 This option would involve introducing formal regulation requiring mobile service providers and those they contract with to comply with a number of rules. The regulation would incorporate parts of the voluntary code of practice, including requirements to not engage in misleading or deceptive conduct and to ensure that the customer understands and intends to enter into a contract. Enforcing the same set of rules across all retailers (both the mobile service providers' direct retail arm and their retailers) would help ensure a level playing field. A table which outlines the extent to which the proposed GC goes beyond the voluntary code is provided in Annex 11.

Issues for consumers

- A5.47 The main issue for consumers is how effective the rules are at preventing mis-selling given that they are indirectly imposed on independent retailers via mobile service providers. This approach relies on mobile service providers monitoring independent retailer behaviour. Mobile service providers ultimately benefit from independent retailers selling their services. Therefore, we would expect them to exercise a degree of control over how their services are sold.
- A5.48 Where the independent retailer is supplied by a distributor, the mobile service provider may delegate monitoring compliance to the distributor (but will remain responsible).

Issues for mobile service providers

- A5.49 This approach would involve additional resource for mobile service providers initially as some changes would be required to contract terms and mobile service providers would be responsible for ensuring the rules were followed across the independent retailer network. However, a number of mobile service providers already incorporate the voluntary code as part of independent retailer contract terms so the incremental cost should be relatively low.
- A5.50 Mobile service providers would also be required to monitor behaviour and take action against any independent retailer who fails to comply with the rules. However, the mobile service providers should already be monitoring independent retailers to ensure compliance with the voluntary code so this should not be unduly onerous.

Issues for independent retailers

- A5.51 Independent retailers will experience some changes to their contract terms. The impact will vary from independent retailer to independent retailer depending on their current business practices.

Issues for competition

- A5.52 Mobile service providers and independent retailers will be subject to the same GC so this should not distort competition at the point of sale. It is possible that monitoring compliance will require additional resource from mobile service providers and therefore they may reduce the number of independent retailers used to limit this burden. This could have the effect of reducing competition and consumer choice at the point of sale.

Preferred option

- A5.53 Our preferred option is b) regulating the mobile service provider through a GC. This GC will require the mobile service providers to comply with a set of rules and prohibitions to address mis-selling.
- A5.54 The reasons for this are as follows:
- The voluntary code has not brought about a significant reduction in the number of complaints to Ofcom about mobile mis-selling. The current consumer safeguards do not provide sufficient consumer protection on their own against mis-selling of mobile telecommunications services and Ofcom notes that small business customers are not protected.

- As a result we believe that further measures are required. Ofcom considers that instances of mis-selling can be distressing to those consumers involved, and this can work against the interests of consumers and undermine consumer confidence in the mobile market.
- Ofcom considers that the proposed GC would ensure that consumers (including small business customers) are better protected. It sets out requirements to address mis-selling. Ofcom will be able to investigate and enforce its provisions.
- If problems of mis-selling should arise again or in another form in the future, action can be taken promptly by Ofcom when formal regulation is in place.
- We believe it is unlikely that the implementation of a GC will create additional significant costs for mobile service providers and independent retailers already complying with the voluntary code.

Options to deal with inability to claim cashback

A5.55 The options to deal with cashback problems have been split into two areas; 1) Onerous/misleading contractual terms and conditions making it hard to claim and 2) Independent retailers ceasing to trade. In some cases an option deals with both areas (those which tackle both are marked with an asterisk (*) below).

A5.56 We have identified three options to deal with onerous/misleading contractual terms and conditions

- a) Rely on existing voluntary industry code;
- b) Consumer education campaign;
- c) Regulate mobile service providers through a General Condition. The GC might include a range of requirements or prohibitions including:
 - Providing more information at point of sale;
 - Prohibiting unacceptable terms;
 - Changing the independent retailer commission structure;
 - Automating cashback;
 - Introducing an approved independent retailer scheme;
 - Allowing cashback only at the start of the deal*;
 - Requiring mobile service providers to pay cashback (through reductions in independent retailers' commissions)*;
 - Banning cashback*.

a) Rely on the existing voluntary code/legislation

A5.57 Under this option no new formal regulation would be introduced, however, the voluntary industry code of practice, which includes provisions on unfair terms in

relation to sales incentives, would be retained and Ofcom would be able to pursue independent retailers under the Enterprise Act if this was deemed appropriate.

- A5.58 As discussed in Section 4, it would appear that the voluntary code introduced in July 2007 has not yet reduced cashback complaints. However we recognise that complaints may persist for some time as cashback contracts can last for up to 2 years and the code will only be fully operational for cashback deals entered into after July.
- A5.59 Indeed policing of the code may cause complaints to rise in the short-term as the rules imposed mean that more people can successfully meet the qualifying criteria to claim cashback, and increasing the redemption rate may force some businesses into insolvency.
- A5.60 Ofcom would be able to review again the effectiveness of the code at a later date.

Issues for consumers

- A5.61 It would appear that the voluntary code has not yet reduced cashback complaints as hoped (shown in Figure 3 in Section 4). Ofcom has committed to looking at the option of formal regulation as a next step. Without formal regulation it is possible that complaints will persist, or that complaints may fall over the short term but problems will arise again at some point in the future.
- A5.62 As explained above, it would be overly resource intensive to pursue all potentially violating independent retailers. In addition pursuing an independent retailer under the Enterprise Act is unlikely to result in consumers getting some form of compensation.

Issues for mobile service providers

- A5.63 Continuing bad press regarding mis-selling and cashback deals is detrimental to the industry reputation and will damage consumer confidence in the market. Even though mobile service providers are not responsible for independent retailer cashback offers, consumers frequently blame mobile service providers when cashback is difficult to claim (as the cashback is perceived to be associated with the airtime contract).

Issues for independent retailers

- A5.64 Independent retailers who follow 'best practice' and only offer fair terms and conditions may find their offers are less attractive in face value financial terms and face a competitive disadvantage. Consumers will typically be unable to distinguish independent retailers offering 'bad' cashback deals from those offering acceptable deals.
- A5.65 Effective policing of the voluntary code by the mobile service providers and the threat of legal action under existing legislation may discourage independent retailers imposing unfair terms and conditions. The impact of existing regulation depends on whether independent retailers see the threat of action by Ofcom as credible. This will depend on the probability of prosecution and the severity of the punishment if the independent retailer is found guilty. If independent retailers perceive a low probability of prosecution or the penalty is small then the threat of using legislation will have little impact.

Issues for competition

A5.66 There is no evidence that cashback activity has affected competition between mobile service providers and there do not appear to be competition issues raised by this option. Nevertheless, there may be some distortion of competition if certain independent retailers exploit consumers by offering bad cashback deals (and thereby gaining an unfair competitive advantage) while others do not.

b) Consumer education campaign

A5.67 A significant part of the problem with bad cashback is consumers not understanding the full terms and conditions of the contracts they are signing. For example, they believe cashback is provided by the mobile service provider rather than the independent retailer, or consumers do not understand that line rental offers are quoted net of cashback (which they must claim separately). Under this option, a campaign would be undertaken to try and improve education so consumers are more informed about the contracts they are taking. The practical implications for organising the campaign would need to be considered, in particular responsibility for funding and running the campaign.

Issues for consumers

A5.68 Consumer education is desirable as it would enable more informed choices. Under Section 26 of the Act Ofcom may publish information and advice about matters in relation to its duties. Ofcom regularly publishes information for consumers and providers.

A5.69 However, in this case we consider Ofcom providing information may not be very effective. Targeting the right consumers and making them aware of information on Ofcom's website will be difficult. Ofcom using other means could be a large, costly and difficult exercise.

A5.70 There would still be potential for harm and the impact would be limited in the longer term, unless the education effort is repeated on a regular basis. In addition, the cause of 'bad' cashback offers would not be addressed.

Issues for mobile service provider /independent retailer

A5.71 None.

Issues for competition

A5.72 None.

c) Regulate mobile service providers through a GC

A5.73 It is not possible for Ofcom to directly regulate the actions of independent retailers. However, independent retailers must comply with contract terms stipulated by mobile service providers, so Ofcom can indirectly influence the actions of independent retailers via regulating mobile service providers providing the mobile service providers exert control over independent retailers. A number of specific options have been considered:

i) Providing more information at the point of sale

A5.74 Part of the problem with cashback deals is consumers do not fully understand how to claim the cash (e.g. they send the claim too late or too early). Under this option, the GC would require mobile service providers to ensure that more information is given at the point of sale, for example the independent retailer explaining to customers exactly what they need to do at each point in time to ensure the claim is successful. This option could be used in conjunction with other options listed below.

Issues for consumers

A5.75 Providing more information at the point of sale may help some customers make successful claims for cashback and other sales incentives. Customers would be able to consider whether the terms were unduly onerous and better assess the likelihood of making successful claims.

Issues for mobile service providers

A5.76 The mobile service provider would need to insist that independent retailers provide the information required at the point of sale and take action if they are not.

Issues for independent retailers

A5.77 Independent retailers would need to fully explain the cashback contract terms and conditions to consumers – this may discourage the imposition of onerous terms and conditions. There may be some additional small cost to independent retailer in providing this information.

Issues for competition

A5.78 None

ii) Prohibiting unacceptable terms

A5.79 The GC for mis-selling, proposed above, would cover sales incentives and state that the terms and conditions of such incentives should not be unduly restrictive.

Issues for consumers

A5.80 This option should help to ensure that all customers are offered fair terms and conditions. Consumers would still have to follow the independent retailers' processes to claim cash or other incentives (for example remembering to send bills at various points in the contract).

Issues for mobile service providers

A5.81 Mobile service providers would need to monitor the terms and conditions offered by independent retailers to ensure they complied with the GC. Ofcom would have powers to ensure that the mobile service providers enforced the terms on independent retailers. However, the incremental cost of compliance should be small as mobile service providers should already require independent retailers to comply with the voluntary code.

Issues for independent retailers

- A5.82 Independent retailers should already be following the requirements of the voluntary code so this option should not result in a significant change for compliant independent retailers.

Issues for competition

- A5.83 The effect of the GC will apply equally to mobile service providers and independent retailers so should not distort competition between the parties.

iii) Changing the independent retailer commission structure

- A5.84 Commission structures are negotiated between the mobile service provider and the independent retailer and vary widely. Larger independent retailers tend to operate revenue sharing agreements where part of the commission is earned over the life of the contract. Smaller independent retailers tend to receive more commission upfront (with a variety of models which fall in between).
- A5.85 Under this option, the GC would require mobile service providers to incentivise good practices in independent retailers by paying out some commission payments at a later stage in the customer's contract or clawing back commission payments if bad practices involving cashbacks were uncovered.
- A5.86 As explained in Section 3, some mobile service providers already operate similar schemes, for example, offering a quality/performance bonus later in the contract – see Section 3 for more details.

Issues for consumers

- A5.87 Consumers will need to communicate their cashback experiences/problems to mobile service providers in order that mobile service providers can reflect this in commission payments.
- A5.88 This option is more likely to mean that cashback is spread out over the contract (to match commission payments) which may not be ideal e.g. in the event that an independent retailer ceases trading.

Issues for mobile service providers

- A5.89 Mobile service providers use commissions to incentivise independent retailers. Typically we would expect independent retailers to prefer earlier commission payments, so if one mobile service provider pays a commission later than other mobile service providers their products may be viewed less favourably with a probable impact on promotion and sales effort by independent retailers.
- A5.90 It may be difficult for the mobile service provider to administer the scheme e.g. they will require information on who has not received cashback, check the claim validity and then alter commission payments accordingly.
- A5.91 Changing commission structures may be a costly, complicated and onerous process for mobile service providers. In terms of enforcement, it would be difficult for Ofcom to determine the balance between incentivising sales and ensuring that cashback is paid.

Issues for independent retailers

- A5.92 This is an intrusive option. Expected commissions are important for business funding purposes (they form part of the independent retailers' working capital). Changing the commission basis may have funding implications e.g. a sudden change from upfront to instalment commission payments may have cash flow implications and create short term problems for even viable business models. The option is more likely to have an impact on smaller independent retailers who tend to receive more commission up front.
- A5.93 Changing the commission structure may have implications for the independent retailer in the event that the consumer falls into arrears on the contact payment e.g. the mobile service providers may decide not to pay any ongoing commissions. This means mobile service providers can transfer some of the risk of early termination to independent retailers who may be less well placed to manage or absorb such risks. To some extent mobile service providers already share the risk of early termination with independent retailers as commissions can be clawed back if the consumer falls into arrears within a given number of months. Similarly, with revenue sharing (which is currently in place for some independent retailers) the exposure to early termination is shared between the mobile service provider and the independent retailer. It is not possible to gauge exactly how much risk will be transferred from mobile service providers to independent retailers as commission structures vary widely.

Issues for competition

- A5.94 Commission payments are used to incentivise independent retailers, so intervening may indirectly affect how mobile service providers compete with each other for independent retailer 'effort' (i.e. it reduces flexibility in the incentive structures offered to independent retailers). As all mobile service providers would be subject to the same conditions this is unlikely to have a significant impact on competition. Changing the commission structure may impact on competition between mobile service provider direct sales and independent retailers.

iv) Automating cashback

- A5.95 Under this option the GC would require that cashbacks are only allowed where they are paid automatically by the independent retailer at the appropriate time. The method of payment would not be prescribed e.g. it could be by direct debit, standing order or by a cheque sent through the post. The key feature is no action would be required by the customer to generate payment, such as sending in copies of bills.

Issues for consumers

- A5.96 Automation makes the cashback process much simpler for consumers. Consumers would need to provide independent retailers with updated details if they change their address or bank account (if paid by direct debit or standing order).
- A5.97 Automated cashback schemes tend to offer a smaller amount of cashback as the redemption rate is 100% with certainty (market research suggests that on average 5% of consumers forget to claim cashback which independent retailers may legitimately factor into the amounts offered). One question is whether consumers prefer to receive a smaller amount with ease and certainty or favour taking a risk on a larger amount which is more difficult to obtain.

Issues for mobile service providers

- A5.98 In order for an automated scheme to work independent retailers need to be able to identify which consumers are still honouring the contract and which have defaulted/cancelled/ changed contract. If a consumer cancels/defaults on a contract (and is no longer paying fees to the mobile service provider) or changes tariff plan they should not receive any ongoing cashback (as independent retailers will be subject to claw back on commissions). Mobile service providers would need to provide information on live consumers to independent retailers.
- A5.99 The option would therefore require some mobile service providers to develop new systems and processes, so the option could not be implemented swiftly. There would be setup and administration costs for mobile service providers and independent retailers.
- A5.100 Mobile service providers would need to insist that independent retailers automated cashback payments as a condition of contract.

Issues for independent retailers

- A5.101 As mentioned above the independent retailer would need to be able to identify consumers still in contract which requires additional information from the mobile service provider. The process may be complicated as in some cases mobile service providers and independent retailers do not have direct contact but work via a distributor. The information would need to be provided in a timely manner to ensure cashback payments were stopped promptly.
- A5.102 A guaranteed redemption rate of 100% would force independent retailers to operate sustainable cashback models (i.e. not offering large cashback amounts which rely on erecting artificial barriers to consumers being able to successfully claim cashback in order to remain viable). This would also reduce the probability that an independent retailer ceases to trade due to cashback claims being larger than expected.

Issues for competition

- A5.103 None.

v) Introducing an approved independent retailer scheme

- A5.104 Under this option the GC would require the mobile service providers to operate an approved independent retailer scheme. This could be done in a number of ways including an approved industry body. Approved independent retailers would need to fulfil a number of conditions to prove they were fit for approval; which could include some of the other options outlined for example, automation of cashback payments and passing due diligence and other checks conducted by mobile service providers, (which would reduce the probability of insolvency).

Issues for consumers

- A5.105 It would need to be clear to consumers which independent retailers were operating under the approved scheme and the potential consequences of taking a contract with a non approved independent retailer (i.e. consumer education required). There would still be scope for non-approved independent retailers to deceive consumers.

Issues for mobile service providers

A5.106 Setting up the scheme and monitoring compliance would be a significant resource burden.

Issues for independent retailers

A5.107 There would be some cost to independent retailers to prove compliance with the conditions – for independent retailers already operating a reasonable business model the cost should be small.

Issues for competition

A5.108 There are unlikely to be significant issues for competition. In theory an approved independent retailer scheme could result in selective distribution in the independent retailer network which could reduce intra-brand competition (i.e. fewer independent retailers for each brand). However, whether this is likely depends on how much the specific scheme would act as a barrier to entry for legitimate independent retailers.

vi) Allowing cashback only at the start of a deal

A5.109 Under this option the GC would require all cashbacks to be paid upfront at the start of the contract.

A5.110 Realistically the cashback would need to be paid at the end of the customer statutory 'cooling off' period which is the time during which they can cancel the contract with no penalties. Otherwise the customer could claim the cashback and then break the contract – and the independent retailer may find it difficult to recover the cashback paid.

A5.111 Such upfront cashbacks already exist in the market. They tend to be lower value than cashbacks staged throughout the contract.

Issues for consumers

A5.112 A significant advantage of this approach is the consumer is not adversely impacted if the independent retailer ceases trading after the contract is taken – as the independent retailer does not have any ongoing financial obligation to the consumer.

A5.113 Market research conducted by Ofcom suggests that 41% of consumers would prefer upfront cashback versus 31% who prefer several staggered payments (29% had no preference). Some independent retailers have suggested that consumer defaults increase when incentives are offered up front (i.e. consumers take the contract to receive the incentive without the intention of honouring contractual obligations).

Issues for mobile service providers

A5.114 Mobile service providers would need to ensure that independent retailers offering cashback provided it at the start of the deal which would clearly require some monitoring and enforcement on the part of the mobile service providers.

Issues for independent retailers

- A5.115 In some cases the mobile service provider has revenue sharing arrangements with the independent retailer or retains a proportion of the commission which is paid later in the contract providing the consumer pays their bills. It might be argued that the cashback deals where payments are spread over time encourage consumers to stay with their network for the whole contract which enables the independent retailer to earn the full commission. If consumers cancelled the contract before the end of the term independent retailers would need a mechanism to claw back the cashback paid up front – this might be an onerous process for independent retailers.
- A5.116 Independent retailers will face a problem if upfront cashback deals result in a large number of consumers defaulting on contracts – as cashback will have been paid but commissions on defaulted consumers can be clawed back by the mobile service provider from the independent retailer, or later commission instalments will not be paid. To compensate for the higher level of defaults the independent retailer may reduce the amount of cashback paid meaning that compliant consumers effectively subsidise defaulting consumers. However, if independent retailers react by reducing upfront cashback amounts this may hamper their ability to compete with direct sales channels.
- A5.117 Offering cashback upfront means the cash is likely to be paid before the full commission is received. The independent retailer would also make one large payment rather than smaller payments spread through time. This may have funding implications for the independent retailer and result in short term cash flow problems. Independent retailers may need to manage this carefully to avoid liquidity problems.

Issues for competition

- A5.118 As noted above, this option may result in lower cashback being offered and so could reduce the ability of independent retailers to compete against direct sales channels.

vii) Requiring mobile service providers to pay cashback directly to the consumer (with reductions in commission payments to independent retailers)

- A5.119 Under this option the mobile service provider would pay the cashback directly to the consumer as a deduction on the monthly bill. The mobile service provider would make a corresponding deduction from the independent retailer commission.
- A5.120 This option avoids the need for a separate contract between the independent retailer and the consumer for the cashback component of the deal³⁴. A single contract between the consumer and the mobile service provider would incorporate both the airtime contract and cashback elements. This is illustrated in the following example:

Contract length: 12 months

Monthly contract fee (as charged by mobile service provider): £30 (total annual charge £360)

Independent retailer commission: £100 (assume paid up front)

³⁴ Typically when the independent retailer offers cashback it is via a separate contract with the customer. So the customer has a contract with the MNO for airtime and a contract with the independent retailer for cashback.

Independent retailer cashback to consumer: £5 a month (total cashback over contract £60)

Under this option the mobile service providers would be required to net off the line rental and cashback, and make an appropriate deduction of the total independent retailer commission to account for the cashback paid. So in the above example:

Net monthly contract cost to consumer: £30-£5 = £25

Net total commission to independent retailer: £100 - £60 = £40

- A5.121 A number of permutations for the 'cashback' agreement are possible for example, pay all the cashback at the start of the contract, provide initial months free in lieu of cashback.

Issues for consumers

- A5.122 The cashback payment is provided automatically as a deduction from the contract fees which is both reliable and convenient for the consumer. Significantly, problems relating to independent retailer insolvency during the contract would be eliminated, as the mobile service provider is paying the cashback.

Issues for mobile service providers

- A5.123 This approach places an extra burden on the mobile service provider as they would have to deal with the cashback directly. Potentially they would have to calculate and process the commission/contract fee on each contract separately. Significant system changes for the mobile service providers' billing systems would be necessary requiring both investment and time to implement. This option is likely to be significantly more costly compared to the counterfactual of continuing with the existing voluntary code. All five MNOs indicated that this option would be costly and have a long lead time.
- A5.124 In response to the administrative burden the mobile service providers may simply refuse to deal with independent retailers offering cashback - so the outcome would be equivalent to banning cashback (see below). An alternative would be to allow independent retailers to offer a limited number of cashback offers – but this might stifle competition between mobile service providers and independent retailers.

Issues for independent retailers

- A5.125 The independent retailer would be forced to consider the consequences of cashback more carefully – as it would be deducted directly from their commission. There is a possibility that independent retailers will try and evade these rules by offering incentives other than cash e.g. MP3 players, resulting in regulatory failure.

Issues for competition

- A5.126 The mobile service provider would have information on the cashback discounts offered by independent retailers to consumers. Potentially they could use this information to compete more effectively through their own retail arm (e.g. undercut the independent retailer and avoid commission payments). It is possible that mobile service providers could 'force' the independent retailers to only allow for certain amounts of discount, taking away some of the pricing freedom of the independent

retailers (e.g. because it may be unduly costly for mobile service provider systems to deal with more than a limited number of discount packages).

viii) Banning cashback

A5.127 Under this option the GC would require mobile service providers not to deal with any independent retailer offering cashback. However, an undesirable consequence is that acceptable cashback deals would also be eliminated.

Issues for consumers

A5.128 This solution would harm any consumers who benefit from the effective discounts which result from cashback deals.

Issues for mobile service providers

A5.129 Mobile service providers would be required to ensure that independent retailers did not offer cashback which would involve costly monitoring and enforcement effort which they do not currently undertake.

Issues for independent retailers

A5.130 Banning cashback reduces the number of variables independent retailers can compete on which may erode their competitive position relative to mobile service providers' direct sales. Independent retailers may respond by offering non-cash incentives (e.g. MP3 players) which may be subject to the same problems if provided during the course of the contract (e.g. consumer having to comply with onerous conditions to claim the incentive). Banning all inducements would severely restrict independent retailers which seems disproportionate.

Issues for competition

A5.131 As outlined above, banning cashback reduces the number of variables that an independent retailer can compete over. This would stifle one means by which independent retailers have innovated on price competition. This option may give an advantage to mobile service providers who have a wider range of variables to compete over (e.g. offer extra minutes/discounts on contract fees).

A5.132 It is possible that independent retailers may cease to be a significant outlet for mobile handset/contract sales. Consumers could lose out as a result of reduced competition (e.g. they have fewer deals to choose from and/or pay more over the lifetime of a contract). Alternatively, independent retailers may innovate and compete along different lines (e.g. pre-sales advice, better handsets, sales of peripherals).

Preferred Option

A5.133 Our preferred option is to use a new GC to prevent unduly restrictive cashback terms and conditions in conjunction with more information at the point of sale (options ci and cii). The reasons are summarised below:

- Cashback, as a sales incentive, is a legitimate form of price competition when offered with reasonable terms and conditions. However, Ofcom considers that problems arising due to onerous or misleading cashback terms and conditions can be distressing to those consumers involved. They can lead to significant

financial harm and this can work against the interests of consumers and undermine consumer confidence in the mobile market.

- We consider that the balance of evidence indicates the current consumer safeguards are not sufficient on their own to address the abuse of overly onerous or misleading cashback terms and conditions. In addition they do not protect small business customers.
- Ofcom considers that the provisions in the proposed GC regarding terms and conditions of sales incentives and the provision of information to the customer would ensure that consumers (including small business customers) are better protected, by placing an obligation on mobile service providers to ensure that independent retailers comply with the rules on terms and conditions and the provision of information.
- Ofcom will be able to investigate and enforce the GC. If problems in respect of sales incentives should continue or arise in another form in the future, action can be taken promptly by Ofcom under a GC, including requiring the contravening party to remedy the consequences of any contravention.
- We believe it is unlikely that the implementation of a GC will create additional significant costs for mobile service providers and independent retailers already complying with the voluntary code.
- Options which make it harder to offer cashback or ban it outright may make it harder for independent retailers to compete with mobile service providers' direct offers (as mobile service providers can offer a wider range of tariffs which are not always available to independent retailers).
- Any option putting a significant additional burden on the mobile service provider (compared to the voluntary code) might make the provider decide to stop selling its services through independent retailers, or only use a small sub-set of independent retailers instead. This could reduce competition in the mobile retail market.

Options to deal with independent retailer insolvency

- A5.134 In this instance we are dealing with a situation where an independent retailer is no longer able to make cashback payments because they have ceased trading. This includes independent retailers with acceptable cashback deals who have run into financial difficulties and independent retailers who offered cashback deals on an unsustainable business model.
- A5.135 These options do not prevent independent retailers from engaging in bad cashback schemes directly but they may alter the behaviour of mobile service providers and independent retailers indirectly with respect to the deals they offer.
- A5.136 Businesses cease to trade across all industries for many reasons leaving creditors who are owed money. There is a system for dealing with firms that fail with creditors usually going through legal channels to recover monies owed. By intervening in this process where independent mobile retailers fail we are suggesting that this is a special market which requires extra protection. This is not unknown (e.g. in the UK an insurance scheme is provided for bank deposits in the event of a bank failure) but is an unusual step which would require strong justification (e.g. unacceptable level of financial harm, strong information asymmetry). In addition, it introduces the

issue of moral hazard as customers may take 'high risk' contracts as they know any failure will be bailed out.

A5.137 We have identified the following options to deal with independent retailer insolvency

- a) Do nothing additional i.e. mobile service provider to carry out due diligence as stipulated under the voluntary code;
- b) General condition requiring mobile service provider to carry out due diligence;
- c) Mobile service provider allows consumer to cancel contract or change price plan;
- d) Independent retailers take insurance;
- e) Independent retailers provides guarantee;
- f) Mobile service providers guarantee cashback payments.

A5.138 As noted above, some of the options to deal with onerous terms and conditions eliminate the consumer problems related to independent retailer insolvency as the independent retailer does not have an ongoing obligation to the consumer (i.e. options vi to viii above).

a) Do nothing i.e. maintain the voluntary code which requires the mobile service provider to carry out due diligence checks on independent retailers

A5.139 Under this option, the mobile service provider has to carry out due diligence on all organisations with whom they contract and appoint to promote the operator's services to ensure the independent retailer is credible in line with the requirements in the voluntary code.

Advantages

A5.140 This option would entail the least intervention by Ofcom. If operated and policed effectively by the providers, it should reduce the instances of independent retailer insolvency with the consequent consumer harm that entails. Some of the more intrusive options listed below effectively 'bail out' the consumer in the event of retailer insolvency which introduces the issue of moral hazard³⁵, as consumers may take high risk contracts knowing that any failure will be bailed out.

Disadvantages

A5.141 If the providers' did not adequately carry out due diligence, Ofcom would not have direct enforcement powers to address the problem.

A5.142 This option aims to reduce the probability of independent retailer insolvency but does not provide any relief for consumers in the event that an independent retailer ceases to trade.

³⁵ Moral hazard arises because the individual does not bear the full consequences of their actions, and therefore has a tendency to act less carefully than they otherwise would, leaving another party to bear some responsibility for the consequences of those actions.

b) Introduce a GC requiring the mobile service provider to carry out due diligence checks on independent retailers

A5.143 Under this option, the GC would require the mobile service provider to conduct due diligence to ensure the independent retailer is credible. This could include requiring the mobile service provider to:

- Ensure independent retailers' business models are not based on exploiting or misleading consumers, for example checking that the model does not assume artificially low redemption rates; and
- Carry out credit reference checks, checking firm history with Trading Standards, checking company directors.

A5.144 Under a GC, Ofcom could monitor and enforce compliance and ensure a framework of due diligence checks was in place that should reduce the instances of independent retailer insolvency and the consequent consumer harm.

Advantages

A5.145 This option is not overly intrusive for the mobile service provider or independent retailer and essentially builds on the due diligence processes which we would expect to be in place under the voluntary code. The incremental cost should be low as mobile service providers should already have some of the processes in place under the voluntary code.

Disadvantages

A5.146 This option aims to reduce the probability of independent retailer insolvency but does not provide any relief for consumers in the event that an independent retailer ceases to trade. The success of this option depends on mobile service providers making thorough checks and monitoring independent retailer business models - given the multitude of independent retailers such detailed checks may be costly for mobile service providers (although this should not be considerably more costly than option a).

c) Mobile service providers allow consumers to terminate contract/move to a lower tariff level if requested

A5.147 If an independent retailer becomes insolvent the consumer still has to pay contract fees to the mobile service provider even though the cashback payment stops. At the point of purchase the consumer would have viewed the contract and cashback as part of the same deal (and budgeted on that basis). Without the cashback payments the consumer may struggle to afford the contract fees or at the very least end up with a contract which is sub-optimal ex-post (i.e. they would have been better off with a different contract if they had known at the time of purchase that the cashback would not be paid in full). One solution to avoid financial distress is to allow the consumer to terminate the contract without penalty if desired. Another alternative would be to allow migration to a lower tariff level. The mobile service provider would need to work with the consumer to find the best solution.

Advantages

A5.148 This option is not too intrusive for the mobile service provider or independent retailer. This approach allows flexibility for the mobile service provider and consumer to work towards a mutually acceptable solution.

Disadvantages

A5.149 Allowing consumers to terminate contracts early may have significant financial implications for the mobile service provider which will be exacerbated if the mobile service provider has already paid independent retailer commission on the contract.

A5.150 It is possible that the consumer might find the solutions offered significantly inferior to the original contract plus the cashback deal that was expected.

d) Require independent retailer to take insurance

A5.151 Independent retailers would be required to take out insurance against failure to make cashback payments if they cease trading. Mobile service providers would require independent retailers to take insurance as a condition of contract. This option is dependent on the availability of an appropriate insurance product.

Advantages

A5.152 Consumers would receive cashback payments as originally anticipated so financial harm would be reduced.

A5.153 Forcing the independent retailer to bear the cost of the risk of insolvency via an insurance premium is intuitively more logical than transferring the risk and cost to the mobile service provider (as in option f) below).

A5.154 It is possible that insurers might introduce premiums scaled to the risk of business failure which would also encourage good business practices in the independent retailer. For example, evidence of a good business model (such as honouring all prior cashback claims) could be provided as a condition of a lower premium.

Disadvantages

A5.155 This option would be costly for independent retailers so may simply discourage cashback deals. This could have implications for competition as reducing cashback would make it harder for independent retailers to compete with mobile service provider direct sales (mobile service providers can offer line rental discounts/free minutes promotions which are not available to independent retailers). Independent retailers may evade this regulation by offering other incentive schemes e.g. MP3 players, which under the option above would not be subject to an insurance requirement like cashback.

A5.156 Smaller independent retailers may find it harder to afford the insurance premiums so be at a disadvantage under this option.

e) Independent retailers must obtain a guarantee

A5.157 The independent retailer would be required to provide a guarantee that a minimum amount of funds/assets would be ring-fenced to pay cashback obligations in the event of insolvency. The guarantee could be provided by the independent retailer

itself (e.g. against property/assets owned by the business owner), by a Parent Company or a bank. The mobile service provider would be required to ensure the guarantee was in place and for a sufficient minimum amount given the scale of the independent retailer cashback business.

Advantages

A5.158 Funds would be set aside for payment of cashback in the event of insolvency so consumer financial harm would be minimised. The guarantee would have to be provided by the independent retailer which is intuitively more logical than forcing the mobile service provider to bear the cashback obligations in the event of independent retailer insolvency.

Disadvantages

A5.159 Small independent retailers may find it difficult to provide a guarantee (e.g. if their assets were small or access to capital was limited). It may be difficult to decide how much the minimum guarantee should be for – as it could be difficult to forecast cashback obligations in the future. Nevertheless, similar requirements are not uncommon in banking and the minimum could be reviewed at periodic intervals.

A5.160 The mobile service provider would incur some costs checking that guarantees were adequate and valid.

f) Mobile service provider to guarantee payments

A5.161 Under this option mobile service providers would take over the cashback payments of the independent retailer in the event of insolvency³⁶.

Advantages

A5.162 This would encourage the mobile service provider to ensure that the independent retailers were financially viable and take greater responsibility for the independent retailer network. Consumer harm in the event of independent retailer insolvency would be eliminated.

Disadvantages

A5.163 This approach would place a considerable burden and risk on mobile service providers and may simply encourage them to only to sell through direct retail outlets. In effect this may foreclose independent retailers which could reduce intra brand competition.

A5.164 Forcing mobile service providers to 'bail out' independent retailer cashback obligations in the event of insolvency would not encourage prudent risk management by independent retailers, in fact, it introduces a moral hazard as independent retailers may pursue a high risk strategy knowing that mobile service providers will bear the cost in the event of failure.

A5.165 This option would be very costly for mobile service providers in the event of independent retailer failure.

³⁶ This option assumes the probability of MNO insolvency is negligible.

Preferred Option

A5.166 The preferred option is to require mobile service providers, through the GC, to carry out due diligence when using independent retailers. This is option b) described above.

A5.167 The reasons for this are as follows:

- Some checks are required to ensure new retailers entering the market are financially sound and are not 'rogue traders' who have no intention of honouring customer agreements. Enforcement action can be taken in the event that mobile service providers fail to meet the requirements in the code.
- The problem of independent retailer insolvency as a result of cashback should naturally diminish because of the proposed new GC rules, set out in section 7, requiring mobile service providers to ensure independent retailers do not impose overly onerous or restrictive terms and conditions on consumers with regards to their ability to claim the cashback offer. This means independent retailers will not be able to rely on artificially low redemption rates when offering cashback, which can lead to financial problems if redemption rates turn out to be higher than expected. Given that we realistically expect problems with insolvency to diminish, using the more intrusive options listed above seems disproportionate.
- Most mobile service providers already undertake checks and this option formalises the main requirements of the code and ensures consistency, so the option should not create a significant additional burden.
- Any option putting a significant additional burden on the mobile service provider (compared to the voluntary code) might make the provider decide to stop selling its services through independent retailers, or only use a small sub-set of independent retailers instead. This could reduce competition in the mobile retail market.

Annex 6

Notification under section 48(2) of the Communications Act 2003

Proposal for the setting of General Condition 23 on Sales and Marketing of Mobile Services for the purpose of imposing requirements upon all Communications Providers providing a Mobile Service to Domestic and Small Business Customers to comply with the provisions of the General Condition.

1. Ofcom in accordance with section 48(2) of the Act hereby makes the following proposals for the introduction of General Condition 23 on Sales and Marketing of Mobile Services.
2. The draft general condition is set out in the Schedule to this Notification.
3. The effect of, and Ofcom's reasons for making the proposals referred to in paragraph 1 above are set out in the explanatory statement accompanying this Notification.
4. Ofcom considers that the proposed setting of the general condition referred to in paragraph 1 above complies with the requirements of sections 45 to 52 of the Act, as appropriate and relevant to each of the proposals.
5. In making the proposals set out in this Notification, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
6. Ofcom is proposing that the general condition referred to in paragraph 1 will take effect two months after the date of publication of the final statement.
7. Representations may be made to Ofcom about the proposals set out in this Notification and the accompanying statement by 5pm on 29 April 2008.
8. Copies of this Notification and the accompanying statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act.
9. In this Notification:
 - (i) "the Act" means the Communications Act 2003;
 - (ii) "Ofcom" means the Office of Communications; and
 - (iii) "Mobile Service" means a terrestrial public mobile telephone service.
10. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
11. For the purpose of interpreting this Notification:
 - (i) headings and titles shall be disregarded; and
 - (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
12. The Schedule to this Notification shall form part of this Notification

Claudio Pollack

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

18 March 2008

Schedule

Proposal for the setting of a new General Condition 23 on Sales and Marketing of Mobile Services

23. SALES AND MARKETING OF MOBILE SERVICES

Scope

23.1 A Mobile Service Provider must comply with this General Condition with respect to a Domestic and Small Business Customer ('the Customer').

Mis-selling prohibition

23.2 When selling or marketing Mobile Services, the Mobile Service Provider must not:

- (a) engage in dishonest, misleading or deceptive conduct;
- (b) engage in aggressive conduct; or
- (c) contact the Customer in an inappropriate manner.

Publication of relevant obligations

23.3 The Mobile Service Provider must publish a comprehensive summary of its obligations under this General Condition 23 in an easily accessible and reasonably prominent manner on its website or, where there is no such website, by making it available in its registered office during normal office hours for inspection free of charge by members of the general public. In addition, the Mobile Service Provider must provide a copy of this General Condition to the Customer upon reasonable request and free of charge.

Obligation with regards to Mobile Service Retailers

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

- (a) the Mobile Service Retailer is aware of this General Condition;
- (b) provisions are in place which require the Mobile Service Retailer:
 - (i) not to engage in dishonest, misleading or deceptive conduct;
 - (ii) not to engage in aggressive conduct;

- (iii) not to contact the Customer in an inappropriate manner; and
 - (iv) to retain records validating contracts regarding the sale of the Mobile Service Provider's Mobile Services and, where applicable, regarding related sales incentives offered to the Customer for a period of not less than twelve months. Such records must include the date of the contact with the Customer, and be such as to allow subsequent identification of the person(s) involved in selling and marketing the Mobile Services, including the person who made the initial Customer contact.
- (c) the Mobile Service Provider monitors the Mobile Service Retailer's compliance with the provisions referred to in General Condition 23.4 (b), for example through conducting sample checks of the retailer's sales and marketing material and activities; and
- (d) any breach by the Mobile Service Retailer of the provisions referred to in General Condition 23.4 (b) is appropriately sanctioned by the Mobile Service Provider.

Mobile Service – Information at Point of Sale

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

- (a) is authorised to do so;
- (b) understands and intends to enter into this contract; and
- (c) is provided with the information set out below in a clear, comprehensible and accurate manner in paper or another Durable Medium which is available or accessible to the Customer or, where the Customer enters into or amends the contract during a sales call, by telephone:
 - (i) the identity of the legal entity the Customer is contracting with; its address; and telephone, fax and/or e-mail contact details;
 - (ii) a description of the Mobile Service; the cost of charges, including minimum contract charges, and any early termination charges, if applicable; payment terms; the existence of any right of cancellation, including procedures to exercise such a cancellation right; the likely date of provision of the Mobile Service; and any minimum period of contract.

Where the Customer enters into or amends the contract during a sales call, the Mobile Service Provider must use best endeavours to ensure that, in addition to the oral provision, this information is also sent to the Customer within three Working Days in paper or another Durable Medium.

Records retention

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

Training

23.7 The Mobile Service Provider must use best endeavours to ensure that a Mobile Service Retailer is appropriately trained to comply with this General Condition.

Due diligence

23.8 The Mobile Service Provider must ensure that it or any person acting on its behalf carries out and retains a record of the following minimum procedures with regards to any Mobile Service Retailer with whom they contract, or who they appoint, in order to sell or market the Mobile Service Provider's Mobile Services:

- (d) carry out a credit reference search and check that the Mobile Service Retailer does not have a history of failing to meet its financial undertakings to creditors;
- (e) check the Mobile Service Retailer against any information supplied to the Mobile Service Provider by Ofcom and/or the local Trading Standards office to ensure that the person concerned has not had contracts terminated with other Communications Provider for violations of provisions required under General Condition 23.4 (b) or breaches of consumer protection laws;
- (f) check that any director of a Mobile Service Retailer concerned has not been a director of a third party that has filed for bankruptcy or gone into administration owing money to a Communications Provider's Customer;
- (g) conduct appropriate checks, to assess whether any due diligence information referred to in this General Condition remains up-to-date and relevant; and

- (h) request copies of the Mobile Service Retailer's terms and conditions and verify that they are compliant with this General Condition and applicable consumer protection laws;

such procedures to be carried out prior to contracting with or appointing the Mobile Service Retailer or, where the Mobile Service Provider or any person acting on its behalf has contracted with or has appointed the Mobile Service Retailer before this General Condition comes into effect, within twelve months of this General Condition coming into effect.

Sales Incentives – Information at Point of Sale

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

- (i) the identity of the legal entity which makes the sales incentive offer and undertakes to meet the obligation(s) tied to this offer; its address; and telephone, fax and/or e-mail contact details;
- (j) a description of the sales incentive itself; and
- (k) the terms and conditions of the sales incentive, including a detailed and clear explanation as to the process the Customer has to follow to obtain the sales incentive.

Where the sales incentive offer is made during a sales call, the Mobile Service Provider must use best endeavours to ensure that, in addition to the oral provision, this information is also sent to the Customer within three Working Days in paper or another Durable Medium.

Definitions

23.10 For the purpose of this Condition:

- (a) “**Communications Provider**” means the provider of an Electronic Communications Network and/or Electronic Communications Service, both as defined in section 32 of the Act;
- (b) “**Domestic and Small Business Customer**” has the meaning set out in section 52 (6) of the Act;

- (c) “**Durable Medium**” means any instrument which enables the Customer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;
- (d) “**Mobile Service**” means a service consisting in the conveyance of signals, by means of an Electronic Communications Network, where every signal that is conveyed thereby has been, or is to be, conveyed through the agency of Wireless Telegraphy to or from Apparatus designed or adapted to be capable of being used while in motion;
- (e) “**Mobile Service Provider**” means the provider of a Mobile Service;
- (f) “**Mobile Service Retailer**” means any person who sells or markets a Mobile Service directly to a Domestic or Small Business Customer;
- (g) “**Working Days**” means the hours between 09.00 – 17.00 on Monday to Friday with the exception of bank holidays.

Annex 7

Guidelines in respect of General Condition 23

Guidelines to General Condition 23: Sales and Marketing of Mobile Services

Introduction

- A7.1 General Condition 23 ('GC23') sets out a number of provisions in respect of the sales and marketing of Mobile Services with which the relevant Communications Provider providing a Mobile Service ('Mobile Service Provider' or 'MSP') must comply.
- A7.2 GC23 comprises provisions regarding the MSPs' own sales and marketing behaviour and requires MSPs to put in place certain provisions in respect of the sales and marketing behaviour of their retailers.

Purpose of these guidelines

- A7.3 These Guidelines are produced by Ofcom to help Communications Providers and customers understand their rights and obligations under the General Conditions and are intended to assist Communication Providers in achieving compliance.
- A7.4 The Guidelines set out some useful summaries, examples and guidance on the approach Ofcom is likely to take to enforcing GC 23. In particular, these guidelines:
- seek to provide clarity on the meaning of some of the terms and concepts used in GC23 so as to inform Mobile Service Providers and stakeholders of Ofcom's general view on them; and
 - describe factors that Ofcom might consider when applying the relevant requirements or obligations set out in GC23.
- A7.5 For the avoidance of doubt, where the Guidelines set out examples of the way in which Ofcom considers a Communications Provider may comply with a General Condition Ofcom will at all times determine compliance on the basis of individual circumstances whilst having regard to these Guidelines. If in any given situation we decide to depart from the principles set out in these Guidelines we will normally set out our reasons for doing so.
- A7.6 These Guidelines are not in any way incorporated into the General Conditions set by Ofcom. The obligations which apply to a Communications Provider will be determined solely according to the General Conditions. Ofcom advises Communications Providers to seek independent legal advice if they are unsure of their obligations under the General Conditions.

Scope of General Condition 23

- A7.7 GC 23.1 specifies that this General Condition is applicable to all Communications Providers which offer a Mobile Service to Domestic and Small Business Customers. This, in Ofcom's view, includes Mobile Network Operators as well as Mobile Virtual

Network Operators. The definition of Mobile Service has the same meaning as that set out in the National Telephone Numbering Plan and includes the provision of a Mobile Service either paid for by a monthly fee or by prepay.

Mis-selling prohibition

A7.8 GC 23.2 sets out prohibitions on the MSP regarding unacceptable types of sales and marketing behaviour (generally described as 'mis-selling'). Such prohibited mis-selling behaviour includes, but is not limited to:

- the omission of relevant information (for example, the terms and conditions attached to a specific offer including any restrictions on, or limitations of the offer);
- the provision of false and/or misleading information (for example, about tariffs, potential savings or promising offers or gifts which do not actually materialise);
- aggressive conduct, such as harassment, coercion, or applying unacceptable pressure on a customer to enter into a contract, such as threatening or intimidating behaviour or refusal to leave (in case of doorstep selling); and
- 'slamming', an extreme form of mis-selling, where mobile customers can find themselves, without their knowledge and consent, with a contract from another MSP (while their existing contract can still be valid) or with an additional contract with their current MSP.

A7.9 Below we have included aspects of approaching customers that Ofcom considers to be inappropriate:

- Current or prospective customers should not be approached at an inappropriate time of day. For example, we would not expect any outbound customer contact, including doorstep selling and telesales to take place at an unreasonable time of day, say before 8.00am and after 8.00pm, unless the customer requests otherwise.
- For sales representatives not to introduce themselves clearly and fully and state the purpose of the contact at the start of any sales and marketing activity to current or prospective customers. The representatives should clearly state the name of the company or organisation they are working for, and that they are an authorised dealer for a certain MSP. The expression 'calling on behalf of [MSP]' should not be used, unless the representative is an agent of the MSP.
- For sales representatives with direct customer contact to take advantage of vulnerable customers; e.g. those who are elderly or whose first language is not English.

Publication of relevant obligations

A7.10 GC 23.3 sets out that the MSP has to make a comprehensive summary of its obligations under GC23 available on its website or, where there is no such website, in its head offices. Upon reasonable request, a copy of the GC should be provided to customers, free of charge. The MSP could do this by providing the customer with a paper copy of the GC in their shops, by sending a hard or soft copy to the customer, or by making it available for download or printing on their website.

A7.11 In relation to the obligation to publish this information on a MSP's website, Ofcom considers 'an easily accessible and reasonably prominent manner' to mean providing a clear reference to the obligations under GC23 on a consumer related part of the MSP's website.

Obligation with regards to Mobile Service Retailers

A7.12 Ofcom is aware that a number of different parties can be involved when selling a Mobile Service to a customer. These parties include:

- the MSPs themselves, for example through websales, direct retail outlets or telesales;
- direct retailers who act as agents of the MSP;
- distributors, who, whilst not working directly as agents for the MSP, usually have contracts with the MSP which enable them to authorise on behalf of the MSP a third party retailer to sell or market the Mobile Service for the MSP; and
- independent retailers who typically have no direct contractual relationship with the MSP, and are authorised to sell on behalf of the MSP through arrangements made with another party, usually either a direct retailer or a distributor.

A7.13 As can be seen from the examples above, the person who, in the end, has the direct contact with the customer to sell or market a Mobile Service might be the last link in what could be a long chain of persons involved in the sale and marketing process. It is the MSPs responsibility to use best endeavours to ensure that where its Mobile Services are sold, that this last link in the chain does not engage in certain sales and marketing malpractices.

A7.14 As a result, GC 23.4 requires the MSP to ensure to a certain extent that all parties directly involved in selling a Mobile Service to the customer are:

- aware of GC 23;
- required to comply with a number of behavioural obligations;
- monitored with regards to their compliance with those obligations; and
- appropriately sanctioned if breaching those obligations.

A7.15 This obligation exists independently of the fact whether the MSP deals with the retailer directly, or whether the retailer contact is made through other links in the chain, such as distributors or any other person acting for or on behalf of the MSP. Persons "acting on behalf" of the MSP include, but are not limited to, agents of the MSP.

A7.16 Ofcom requires MSPs to use best endeavours to ensure these requirements are met. There are a number of ways for the MSPs of achieving this goal and we do not intend to prescribe exactly how the requirements are to be met. However, there are a number of practical steps that MSPs could take, in Ofcom's view, to assist them in meeting their obligations under General Condition 23.4. Such steps include:

- With regards to GC23.4 (a), in order to ensure awareness of the General Condition amongst retailers, the MSPs could communicate the General Condition

through account managers, in print through sales bulletins or newsletters, or on websites dedicated to distributors and retailers.

- With regards to GC23.4 (b), in order to put provisions in place which require retailers to comply with certain behavioural obligations, an MSP could include such requirements into contracts with the retailer. Similarly, where the MSP is not directly dealing with the retailer but has a contractual relationship with another party, such as a distributor, the MSP could require this third party to ensure that where the latter has an agreement with a retailer that the retailer is also contractually obliged to comply with these requirements. Ultimately, it is the responsibility of the MSP whose services are sold to the customer to ensure that, independently of the type of chain that exists, the retailer is required to behave as set out in GC 23.4.
- With regards to GC 23.4 (c), in order to ensure appropriate compliance monitoring, MSPs could carry out spot checks and mystery shopping and conduct sample checks of the retailer's marketing material, and require similar activities to be undertaken by its distributors in relation to their retailers. In addition to its own complaints data, MSPs could also put provisions in place which allow them to collect complaints data made directly to its retailers, and require its distributors to do similarly.
- With regards to GC 23.4 (d), appropriate sanctions by the MSP might depend on the severity and possible recurrence of a breach. In Ofcom's view they could include giving verbal or written warnings to the retailer, requiring the retailer to prevent recurrence in the future, requiring the retailer to remedy the breach or, in certain cases, ceasing to deal with a particular distributor or retailer.

Information at Point of Sale

- A7.17 GC 23.5 contains a number of provisions relating to information requirements that MSPs must comply with at the point of sale, when the customer expresses a positive intention to take out a contract or amend an existing contract.
- A7.18 Ofcom requires MSPs to use best endeavours to ensure these requirements are met. There are a number of ways for the MSPs of achieving this goal and we do not intend to prescribe exactly how the requirements are to be met. However, there are some practical steps that MSPs could take, in Ofcom's view, to assist them in meeting their obligations, including:
- regarding ensuring customers are authorised to take out a contract or amend a contract, MSPs may wish to consider whether to require sales records to include an explicit check of the customer's identity, age and/or address (for example, MSPs may wish to ask for utility bills, a copy of a passport or driving licence);
 - regarding the provision of information to the customer, MSPs may wish to ensure there is a check list available for their sales representatives which ensures that customers are provided with all the key relevant information about a service as part of their decision making. In essence, customers must be able to make an informed choice as to whether or not to enter into or amend an existing contract. Any claims, offers or enticements to attract customers must not mislead them by stating an untruth or half-truth or through failing to state or not make sufficiently prominent an important term or condition likely to affect their decision.

- regarding sending information to the customer in the event a contract has been entered into or amended via telesales, the MSP may wish to incorporate this activity into its own sales process.

A7.19 Where the MSP does not have the direct customer contract itself, it should ensure that there are provisions in place which require the person with the customer contact to ensure that this person, i.e. the retailer, is obliged to comply with these requirements.

Records retention

A7.20 GC 23.6 requires MSPs to keep records validating contracts regarding the sales of their Mobile Service for a period of not less than 12 months from the date the record was created.

A7.21 Ofcom considers examples of records in this respect to include (but not be limited to) signed copies of contracts, call recordings (where they exist), check lists, notes of a conversation with a customer or the customer's internet confirmation to buy a certain service.

A7.22 By 'the means through which the contract was entered into', we mean retail outlets (MSP's own and independent retailers' outlets), telesales or websales. In the event a contract was entered into at a retail outlet, the records should contain sufficient information to be able to identify the outlet, for instance by providing the address of the outlet.

A7.23 These records should be such as to provide sufficient information to validate that the customer provided positive consent for the purpose of the transaction as well as information about the type of contract, the date the contract was entered into or amended and the sales representative involved in case the customer questions having entered into a contract, or has complaints or queries regarding their contract.

Training

A7.24 GC 23.7 requires MSPs to use best endeavours to ensure that any person selling their Mobile Service is 'appropriately trained' to comply with GC 23. There are a number of ways for the MSPs of achieving this goal and we do not propose to prescribe exactly how this requirement is to be met. However, there are some practical steps that MSPs can take to assist them to meet their obligations, including:

- putting contractual provisions in place in respect of mandatory training with their distributors and retailers;
- providing retailers with training courses, manuals and product information regarding the Mobile Service;
- providing retailers with training courses and manuals on using sales related systems;
- providing retailers with information on new products;
- providing training and information on processes, such as ordering a new phone or customer credit checking.

A7.25 In respect of the training a retailer of Mobile Services should receive, Ofcom considers 'appropriately trained' to mean that the retailer has been made familiar with:

- the relevant provider's customer terms and conditions;
- the terms and conditions applied by the retailer (if applicable);
- the process for ordering the mobile handset and subscribing to the network service;
- the major elements of the MSP's services;
- details of the tariffs offered by the operators, charges that will be incurred by customers and methods of payment;
- the relevant principles of consumer protection law; and
- the relevant obligations under this General Condition.

Due diligence

A7.26 GC 23.8 requires MSPs to carry out a number of due diligence checks in respect of the retailers through which they sell their Mobile Service.

A7.27 Due diligence is an important part of compliance with GC23 as it ensures that any parties with whom MSPs wish to contract, or who they wish to appoint, in order to sell their Mobile Services, have viable business models, thus diminishing the risk of retailer insolvencies.

A7.28 The due diligence requirements set out at GC 23.8 specify a number of pieces of information that must be collected and maintained.

A7.29 There are a number of ways of carrying out the required due diligence exercise and we do not intend to prescribe exactly how this should be achieved other than setting out what we consider to be the minimum procedures necessary. There are a number of practical steps MSPs can take to meet their obligations. For example, producing a checklist, based on the requirements set out at GC.23.8 that ensures that the relevant information has been gathered.

A7.30 GC 23.8(c) and (d) require MSPs to obtain clear evidence in respect of the identity of companies and named people with whom they contract or who they appoint. There is no requirement to obtain specific items of documentation, such as certified copies of directors' passports or driving licenses. It is up to the MSP to decide what evidence is sufficient in each specific case. It should be noted also that information such as the names and addresses of directors can be obtained from sources other than the parties themselves; GC23.8 is not prescriptive on this point.

A7.31 The MSP needs to ensure that any party, who sells the MSP's Mobile Service through another party, is required to carry out due diligence in respect of the party with the customer contact, for example through contractual obligations.

A7.32 Ofcom expects that all parties involved in the required due diligence exercise will, where relevant, comply with all the data protection principles as set out in the Data Protection Act 1998.

Sales incentives – Information at Point of Sale

A7.32 GC 23.9 contains obligations imposed upon the MSP regarding sales incentives offered by any person selling or marketing the MSP's Mobile Services. By sales incentive, in this case, we mean an offer by a retailer to encourage a customer to enter into a contract for a Mobile Service. Sales incentives can consist of the promise to receive certain goods or products (such as additional equipment, or MP3 players), or the promise to receive a payment of monies at a certain stage or at certain stages during the period of the contract for a Mobile Service.

A7.33 GC 23.9 stipulates that Mobile Service Providers should take steps to ensure that the terms and conditions of sales incentives are not unduly restrictive. By unduly restrictive, we mean that the terms are not unduly onerous so that customers can legitimately claim their entitlement to advertised sales incentives without any difficulty.

A7.34 Ofcom considers unduly restrictive terms and conditions in respect of sales incentives to include:

- a requirement that the customer submits an original bill – a copy of a bill should be acceptable proof;
- a charge for processing a claim in relation to the offer;
- a requirement that such claims are submitted within a period less than 60 days from the date the claim arises;
- a condition stating that a payment will not be made if the customer has an outstanding balance on their account;
- in the case of cashback, a condition that states that if a customer fails to obtain a first claim, this would invalidate all future claims.

A7.35 There are a number of ways for the MSPs of achieving this goal and we do not intend to prescribe exactly how the requirements are to be met. However, there are practical steps that MSPs can take to assist them in meeting their obligations, including:

- putting in place contractual provisions regarding sales incentives, for instance in respect of terms and conditions, to be provided to customers;
- carrying out spot checks and mystery shopping for sales incentives;
- requiring the retailers to provide copies of terms and conditions of sales incentives; and
- checking retailers' advertising material regarding sales incentives.

A7.36 The MSP needs to ensure that any party, who sells the MSP's Mobile Service through another party, is required to ensure that the terms and conditions of sales incentives offered by the party with the customer contact are not unduly restrictive.

- A7.37 In addition, GC 23.9 requires MSPs to take steps to ensure that any persons selling or marketing the MSP's Mobile Service provide clear and accurate information about the sales incentive (including that there is a separate contract for the sales incentive to that of the airtime service, and that the customer will remain bound to the terms of the Mobile Service irrespective of the sales incentive contract including if it comes to an end, or the retailer goes out of business).
- A7.38 Regarding sending information to the customer in the event a sales incentive contract has been entered into or amended via telesales, the MSP may wish to incorporate this activity into its own sales process where it has the direct customer contract. Where the MSP does not have the direct customer contract, it should ensure that there are provisions in place which require the person with the customer contact to ensure that this person, i.e. the retailer, is obliged to comply with these requirements.

Annex 8

Code of Practice for the sales and marketing of subscriptions to mobile networks

Introduction

- A8.1 There are in excess of 66 million active mobile accounts in the UK. In search of ever improving tariffs and services, customers regularly change their packages, either staying with their current network on a different tariff or switching to another network. In order to serve this customer demand, there is intense competition within the mobile retail segment, through direct sales, service providers and resellers, to retain and/or acquire customers. In general, this is of great benefit to customers.
- A8.2 However, because of the intensity of the competition, it is also necessary to guard against the risk of customers being confused or misled during the sales process. A customer must be clear as to which network and tariff he or she is being signed up to and what his/her obligations will be under the terms of the contract with the mobile operator and, if applicable, the reseller.
- A8.3 As a consequence, the signatories named below have agreed this code of practice (the "Code"), defining the principles of best practice for promoting and selling mobile airtime subscriptions, including pre-pay airtime, ("mobile services") services and handling any complaints arising from the sales process.
- A8.4 Under the Code, mobile operators have flexibility as to how they apply these principles to their respective retail channels. For example, they may forbid a particular mode of selling altogether or set out terms and conditions in their contracts with third party dealers/distributors/resellers (collectively referred to here as resellers) following the principles of the Code. However, nothing in the Code limits the rights of any party to take any relevant action against any other party in accordance with their legal and/or contractual rights.
- A8.5 The following sections set out the guidelines as to what constitutes acceptable practices to be followed by those marketing and selling mobile services:

Training

- A8.6 The representatives of all organisations selling and promoting mobile services should be properly trained and have sufficient understanding of the products and services they are promoting and selling. Topics to be covered in any training process should, at a minimum, include:
- the relevant operator's customer terms and conditions;
 - the terms and conditions applied by the reseller (if applicable);
 - the process for ordering the mobile handset and subscribing to the network service;

- the relevant principles of consumer protection law;
- details of the tariffs offered by the operators and charges that will be incurred by customers and methods of payment;
- customer cancellation processes; and
- procedures for handling customer complaints.

Applicable laws

A8.7 The sales and marketing process must be carried out in accordance with all applicable laws and regulations. An indicative (non-exhaustive) list of relevant legislation is provided in the Annex to this Code. This list does not constitute legal advice. All operators and their resellers are responsible for consulting their own advisers, as appropriate.

Customer contact

- a) All approaches to current or prospective customers should be made at an appropriate time of day. For example, if the approach is to be made by telephone, the call must be made at a reasonable time of day, say after [8.00am and before 9.00pm].
- b) Customers that have signed up to the Mailing Preference service, Telephone Preference Service, the Fax Preference Service and the E-mail Preference Service must have their wishes respected.
- c) All data used to contact prospective customers must be obtained in a manner that complies with UK data protection law.
- d) All automated calling equipment should be used in a way that is compliant with Ofcom's policy for preventing the persistent misuse of electronic communications networks (see Annex).
- e) At the start of any telephone call with a consumer [customer won't work as it begs the question as to whose customer], the caller must introduce himself/herself clearly and fully and state the purpose of the call, for example:

"Hello, my name is and I am calling from [organisation],
an authorised dealer for [network]."

The expression 'calling on behalf of [network]' should not be used.

- f) Representatives should not abuse the trust of vulnerable customers; e.g. those who are elderly or whose first language is not English.

A8.8 Sales and marketing campaign records [including recordings of conversation] should be maintained by the organisation making the sale or conducting the marketing campaign for six months. These should include the date and the time of the conversation with any contacted person and sufficient information to permit the identification of the representative involved, so as to assist in dealing with any subsequent complaint or inquiry, if required.

Entering into a contract

- A8.9 Before accepting an order, the reseller must take all reasonable steps to ensure that the contacted person understands that he/she is entering into a contract, the key features that contract and the names of the contracting parties.
- A8.10 Once the contacted person has agreed to place an order, he or she must be furnished with the appropriate information, which, at a minimum, should include:
- a) A clear statement that a contract is being entered into, and the key features of that contract including;
 - i) any minimum period of contract,
 - ii) minimum contract charges, and
 - iii) any early termination charges.
 - b) The name of the company or companies with which the customer is contracting and its contact details (generally the reseller for the handset, and the operator for the airtime. Sales incentives can come from both parties. The details of each must be made clear to the customer, if applicable).
 - c) Details of the cancellation rights that apply to the product and /or services the customer is purchasing, including the period in which any cancellation rights can be exercised and confirmation that the customer has the right to change his or her mind without cost during the cancellation period.

Sales incentives

- A8.11 If any part of the offer to the consumer contains a sales incentive, the consumer must be provided with a clear written statement as to which legal entity (i.e. dealer or mobile operator) is making the offer and is undertaking to meet that obligation. The terms of the offer must be clearly and prominently stated in writing, be made in good faith and not be unduly restrictive.
- A8.12 For example, in relation to a cashback offer, the following terms should be regarded as unreasonable:
- a requirement that the customer submits their original statements – copies of statements should be acceptable proof;
 - charge for processing a cashback claim;
 - a requirement that cashback claims are submitted within an unreasonably short period (such as anything less than 60 days, for example);
 - terms stating that a cashback payment will not be made if the customer has an outstanding balance on their account.

The following sections cover the mobile operators' undertakings.

Due Diligence

- A8.13 Mobile operators (or, their appointed distributors, as applicable) will carry out due diligence on all organisations with whom they contract and appoint to promote the operator's network services. In particular they will:
- Carry out a credit reference search and check that the company does not have a history of failing to meet its undertakings to creditors;
 - Check the organisation against any information supplied to the operator by Ofcom and/or the local Trading Standards office to ensure that the organisation concerned has not had contracts terminated with other mobile network operators for breaches of this Code;
 - Check that the directors of the organisation concerned have not been directors of other resellers that have filed for bankruptcy or gone into administration owing money to the operator's customers;
 - Make spot checks, on a sample basis, to assess whether due diligence information remains up-to-date and relevant;
 - Reserve the right to request copies of the reseller's customers terms and verify that they are compliant with the operator's minimum business terms (which will include reference to applicable laws).

Handling of complaints

- A8.14 The mobile operators have in place processes for handling complaints about the sale and promotion of their mobile services. These processes include handling complaints from customers that have been subjected to 'slamming' or who are having difficulties in making claims on sales incentive schemes and advising them on how to obtain redress. Mobile operators do not, however, underwrite the obligations of other legal entities.
- A8.15 If a mobile operator receives a complaint in relation to the sales and marketing activities of another mobile operator's dealer in contravention of this code, the complaint will be passed to the mobile operator whose dealer is the subject of the complaint for investigation. Within a reasonable time frame agreed between the respective operators, that mobile operator will respond to the complainant mobile operator with the findings of its investigation.
- A8.16 Where a customer's complaint is found to be valid, if practical and appropriate, the complainant mobile operator will endeavour to re-instate the customer's original contract and telephone number.

Monitoring of compliance with Code requirements and escalation procedures

- A8.17 Mobile operators, through regular monitoring, will take reasonable steps to make sure that their resellers are complying with the Code.
- A8.18 On discovery of an instance of non-compliance with the Code, mobile operators will vigorously pursue the case and will request that the reseller promptly investigate the complaint and in no more than ten working days provide an explanation for any apparent breach of the Code.

- A8.19 If the reseller fails to provide an explanation or the explanation is not satisfactory, the mobile operator will escalate the complaint to senior management within the reseller's organisation. In the case of serious or repetitive breaches of the Code, mobile operators will send a written warning to the reseller. The written warning will include details of sanction(s) that will be imposed on the reseller should the reseller continue to be in breach of the Code.
- A8.20 Providing always that it acts proportionately, a mobile operator will invoke contractual penalties, including termination of the reseller's contract, if it fails to cease and desist its non-compliant behaviour after a written warning.
- A8.21 In the event that a mobile operator terminates a reseller's contract for breaches of the Code (as opposed to the normal course of business), the mobile operator will inform Ofcom and their Trading Standards home authority.

Monitoring of complaints

- A8.22 On a regular basis, under the auspices of the Mobile Broadband Group, the mobile operators will review complaints that have been received by them and Ofcom in relation to the Code and its subject matter. In particular, operators will detail the number of complaints that have had to be passed to other operators for investigation. They will also give examples of the types of activity and behaviour that have given rise to complaints. Where appropriate, the Code and associated processes will be reviewed to take account of new information.
- A8.23 On a twice-yearly basis, the mobile operators will meet with Ofcom to report on the level of compliance with the Code and any other relevant information.

Awareness of the Code

- A8.24 The mobile operators will make reference to the Code on their respective consumer facing web-sites and provide a full copy of the Code either through a link on a web site or a printed version by post, on request.
- A8.25 The signatories will place contractual obligations on their distributors and dealers to comply with the Code of Practice.
- A8.26 Mobile operators will use their reasonable endeavours to ensure that all resellers of their services similarly make the Code available to their customers.
- A8.27 A copy of the Code, together with information on how to make a complaint, will also be published on the web site of the Mobile Broadband Group.

Annex 9

Market Research

A9.1 During November 2007 Ofcom commissioned market research to establish:

- The size of the cashback market;
- The extent to which consumers had been prevented from obtaining their cashback;
- Whether the process for making claim/s was made clear at the point of sale and easy to navigate; and
- Which cashback option was preferred by consumers - cashback upfront, or staggered payments throughout the contract.

Summary of findings

Cashback deals appear to be working for the majority but a minority are being prevented from claiming their money

- A9.2 Just over one in ten (13%) mobile contract customers had purchased a cashback deal at the time of the research (equates to 1.75 million UK adults³⁷). Cashback deals were significantly more popular amongst contract customers from ethnic minority groups (21% of contract customers from ethnic minority groups take out a cashback deal).
- A9.3 At the time the research was conducted cashback customers were obviously at varying stages in their contract and therefore not all of them were eligible to claim their cashback. Of those who were, the vast majority (79%) had received all or part of their money. However, 6% said they had been unable to get their cashback and a further 5% said they had forgotten to claim, 5% said they were currently in the process of claiming and the remainder were unsure.
- A9.4 The level of complaints received by Ofcom and other consumer bodies suggested that non-receipt of cashback was higher than indicated by the market research. This data also suggested problems with cash-back were more common than stated amongst non-English speaking ethnic minority groups, and certain UK regions. The market research was designed to provide nationally representative results and survey of this kind may underestimate the incidence of issues pertinent to particular sub-populations. As the survey has established, mobile cash-back is one of these types of issues. Therefore, given the limitations of the research as noted above it would not be unreasonable to assume that cash-back and its associated problems may have been under-stated amongst ethnic minority groups and any regions with a higher than average proportion of ethnic minority groups such as London and the West Midlands.³⁸

³⁷ Based on 84% adults with mobile phone, 35% mobile customers using contract package

³⁸ Ofcom's Communications Market Report, Nations and Regions 2007

For most the process for claiming cashback was made clear upfront and easy to follow although a minority struggled when making a claim

- A9.5 While almost four out of five (79%) cashback customers said the process had been very or fairly clear when they purchased their mobile contract, a fifth (18%) disagreed and the remaining 3% were unsure.
- A9.6 Consistent with these findings – half (50%) of customers who had at least tried to claim their money back - said the process had been very easy to follow and a further 29% said it had been fairly easy. However, a significant minority (14%) had found it difficult to claim their cash. The remaining 7% said the process was neither easy nor difficult.

Consumers show a slight preference towards receiving their cash at the start of the contract

- A9.7 Currently most cashback customers have a deal where payments are received after a period of time – either one lump sum (4%) or several staggered payments (6%). The remainder (3%) said their deal provided cashback at the start of their contract. This breakdown is shown in Figure 9.1 below.
- A9.8 When asked about their preference, slightly more cashback customers said they would prefer their cash at the start of the contract (41%) than those who said they would like to spread the payments (30%). The remainder showed no preference towards either option (27%) or did not know (2%).

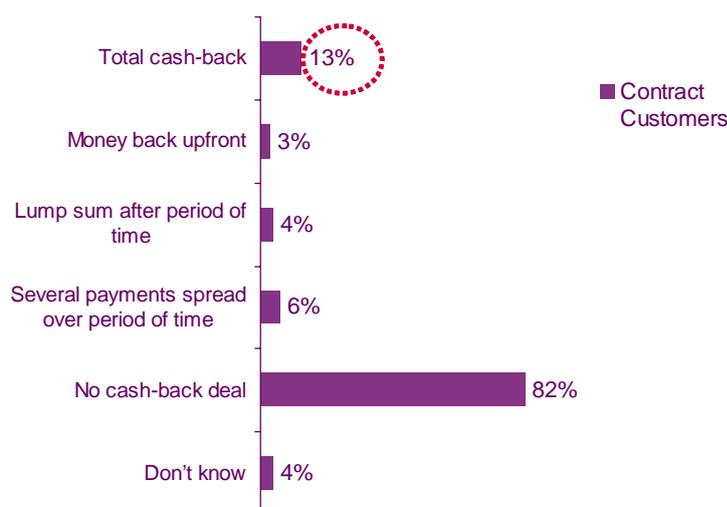
Main Findings

Size of the residential mobile cashback market

- A9.9 Research conducted between November and December 2007 indicated that 13% of adults had a mobile contract which was purchased with a cashback deal. As this survey is based on a sample of adults and not the entire population, data is subject to a margin of error. Taking this into account there were between 1.62 and 1.89 million adults with a mobile cashback deal at the end of 2007³⁹.

³⁹ The error margin for % of cashback customers, based on 95% confidence, is +-1%. Therefore, the size of the cashback market is between 12%-14% of mobile contract customers.

Figure 9.1: Size of mobile cashback market and breakdown of type of cashback deal



Source: Ofcom data, survey conducted by TNS, Nov-Dec 2007. Base: 1040 mobile contract customers

A9.10 Due to the small base size of cashback customers (143 respondents) it was difficult to draw any conclusions regarding their demographic profile. However, there were indications of higher take up in the West Midlands and cashback deals were significantly more popular amongst contract customers from ethnic minority groups (21%). These findings are consistent with complaints data provided to Ofcom by various consumers groups.

A9.11 Consumers said they purchased their cashback deals from a variety of sources – largely mobile re-sellers although some consumers believed they purchased their deal directly from their mobile service provider. Since mobile service providers do not offer cashback deals themselves, this is an indication of confusion in the market in respect of cashback deals.

A9.12 The three mobile cashback deal are:

- a) cashback provided up front at the start of the contract – 3% of mobile contract customers said they had this type of contract;
- b) lump sum after period of time – used by 4% of mobile contract customers;
- c) staggered cashback payments, money paid at various stages throughout the contract – used by 6% of mobile contract customers.

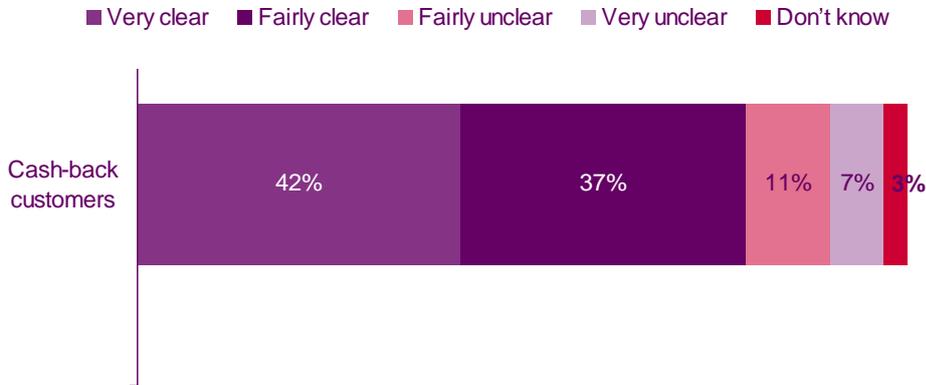
A9.13 When offered a choice between staggered payments or cashback upfront preferences were divided. Cashback upfront was marginally more popular with four in ten (41%) mobile cashback customers who said they would prefer this deal. This compares to three in ten (30%) who said they would prefer to receive staggered payments. A further three in ten didn't mind (27%) or were unsure (2%).

Clarity and ease of process for claiming cashback

A9.14 Consumers were asked whether the process for claiming their money back was clear to them when they purchased their mobile phone. As shown in Figure 9.2 the majority (79%) of cashback customers said they thought the process very or fairly

clear when they purchased their mobile contract. However, a significant minority disagreed (18%) and 3% did not know.

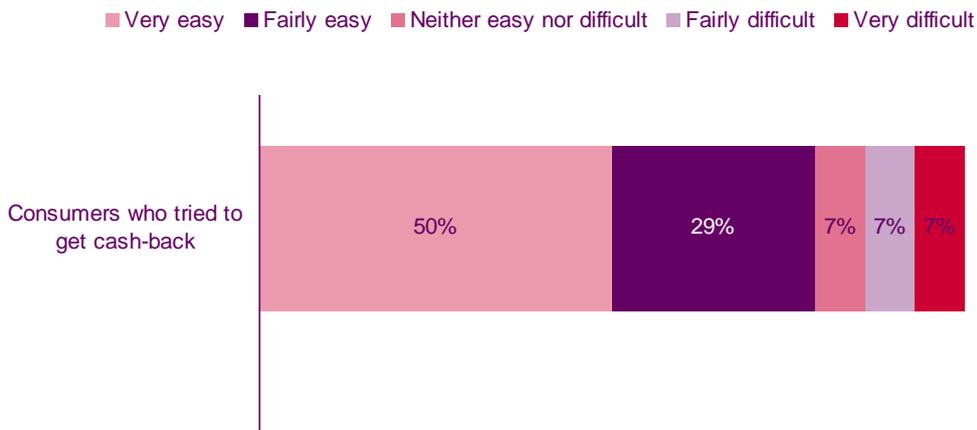
Figure 9.2: Clarity of cashback claiming process at start of contract



Source: Ofcom data, survey conducted by TNS, Nov-Dec 2007. Base: 143 mobile cashback customers

A9.15 At the time the research was conducted different cashback customers were obviously at varying stages in their contract and therefore not all of them were eligible to claim. As shown in Figure 9.3 below those respondents who had at least tried to claim were asked how easy the process had been. Consistent with findings above the majority of these consumers said the process had either been very (50%) or fairly (29%) easy and a further 7% said it had been neither easy nor difficult. However, 14% said they found the process difficult.

Figure 9.3: Ease of claiming cashback

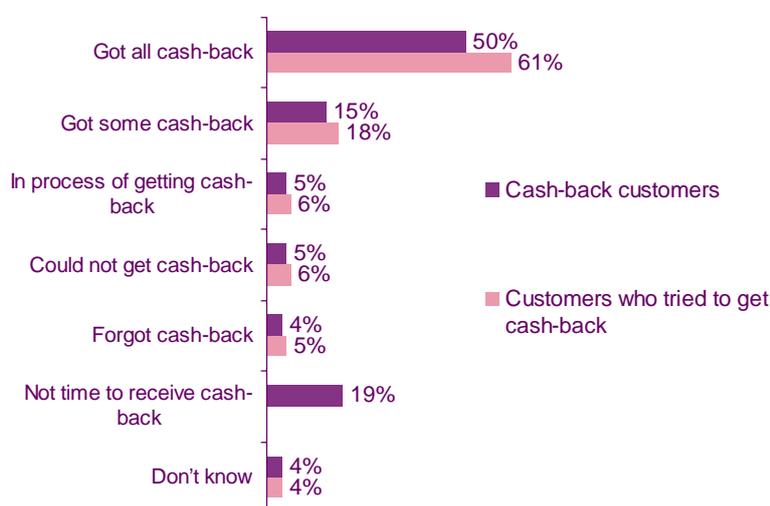


Source: Ofcom data, survey conducted by TNS, Nov-Dec 2007. Base: 106 mobile cashback customers who had tried to get cashback

Whether cashback customers have claimed and received their money

- A9.16 As noted above not all of the respondents in this survey were eligible to claim their cashback. Around one in five (19%) of this sample had not reached the specified stage in their contract and a further 6% said they were currently in the process of claiming.
- A9.17 Amongst those who had tried to get their cashback the majority (79%) had been successful and received at least some of their money, as shown in Figure 9.4. 61% had received all of their cash and 18% had received some.
- A9.18 6% of these consumers who had tried to claim said they had been unable to get their cashback. Given that this figure is based on a sample of the population it is subject to margins of error. The error margin for this figure is $\pm 4\%$. Therefore, we are 95% confident that the proportion of consumers who had been unable to get their cashback was between 2%-10%.

Figure 9.4: Whether cashback received



Source: Ofcom data, survey conducted by TNS, Nov-Dec 2007. Base: 106 mobile cashback customers who had tried to get cashback

- A9.19 While the survey data was weighted to the profile of the UK adult population surveys of this nature tend to exclude the non-English speaking community. Also while the survey was designed to provide nationally representative results, any survey of this kind will underestimate the incidence of issues pertinent to particular sub-populations – as the survey has established that mobile cashback is one of these types of issues.
- A9.20 Therefore, given these limitations it would not be unreasonable to assume that cashback and its associated problems may have been understated by this survey. The subgroups with potentially higher cash-back/problems are ethnic minority groups and regions of the UK with higher than average ethnic minority populations such as London and the West Midlands.

Methodology

- A9.21 This survey was conducted for Ofcom by TNS between November and December 2007 amongst 3973 UK adults aged 16+, reflecting the UK profile of sex, age, and working status.
- A9.22 Data has also been weighted to ensure the sample is representative of the UK adult population. Because the survey was conducted amongst a sample of adults, rather than the whole population, the data may be subject to a small margin of error. The error margin for a total sample of 3973 consumers is about $\pm 1\%$, and for 143 cashback customers is $\pm 6\%$ but higher among smaller sub-groups.
- A9.23 Results referred to as significantly different have been tested at the 95% level of confidence and hence are outside of the error margins and therefore can be considered real changes.
- A9.24 All data shown is weighted data. Unweighted base sizes are shown on charts and tables to show the number of consumers who were asked the question.

Annex 10

Glossary

Act	Communications Act 2003 www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1 .
Cashback	A type of sales incentive where a retailer promises the payment of a certain amount of money to the customer when the customer takes out a mobile contract.
CAB	Citizens Advice Bureaux. Citizens Advice is an independent charity and membership organisation with Bureaux across England, Wales and Northern Ireland. They provide information and advice through face-to-face, telephone and email services and online at www.citizensadvice.org.uk .
Consumer Direct	A telephone and online consumer advice service, supported by the Department for Business and Regulatory Reform. www.consumerdirect.gov.uk/ .
Clawback	Part or all of the commission that can be recouped from the retailer/distributor by the mobile service provider under certain circumstances, e.g. the customer defaulting on its contract or downgrading to another mobile contract.
Distributor	A channel to market used by mobile service providers. Distributors can fulfil an intermediary role between mobile service providers and independent retailers and/or can also sell directly to end-users.
Enterprise Act	Enterprise Act 2002, which, among other things contains consumer protection legislation. Ofcom is one of the designated enforcers of the Enterprise Act. More information on the Enterprise Act can be found on OFT's website www.of.gov.uk .
General Condition	Set of conditions applying to communication providers, imposing legal obligations on providers.
KPIs	Key Performance Indicators are financial or non-financial measurements that help an organisation define, measure and monitor how well their business is progressing.
LACORS	The Local Authorities Coordinators of Regulatory Services. The local government central body responsible for overseeing local authority regulatory and related services in the UK.

Mobile service providers	MNOs and MNVOs
MNOs	Mobile Network Operator (Vodafone, O2, Orange, T-Mobile, '3')
MNVO	Mobile Network Virtual Operator - an organisation which provides mobile telephony services to its customers, but does not have allocation of spectrum (for example Virgin Mobile, Fresh).
MSP	Mobile Service Provider
OAT	Ofcom Advisory Team - the team within Ofcom responsible for advising and dealing with complaints and enquiries from members of the public.
Ofcom	Office of Communications. The regulator for the communications industries, created by the Act.
OFT	Office of Fair Trading. The consumer and competition authority of the UK. www.oft.gov.uk
PECS	Public Electronic Communication Services.
Prepay	Mobile services paid for in advance.
Redemption rate	The proportion of cashback which consumers are able to claim successfully.
Retailer	A channel to market used by mobile service providers to promote and sell products to end-users, including mobile phone subscriptions, accessories, handsets and SIM-cards.
Independent retailer	A third party channel to market used by mobile service providers to promote and sell products to end-users, including mobile phone subscriptions, accessories, handsets and SIM-cards.
Slamming	An extreme form of mis-selling, where customers find themselves with a service from a new provider, or new contract from their existing provider, without their knowledge and consent
SME	Small or Medium-sized Enterprise.
Trading Standards	The Trading Standards Service enforce the laws that govern goods and services bought, hired and sold, including Trade Descriptions Act 1968, The Consumer Protection Act 1986, The Consumer Credit Act 1974, Enforcement provisions under Part 8 of the Enterprise Act 2002.
Trading Standards	Government organisation giving advice about consumer protection issues.

Voluntary Code

Best practice guidelines/principles on sales and marketing which the mobile service providers introduced in July 2007 (see Annex 8).

Annex 11

Comparison of provisions in the voluntary code and in General Condition 23

Key differences between Voluntary Code of Practice (VC) and proposed General Condition (GC) for the sales and marketing of subscriptions to mobile networks

This table does not cover differences in the drafting of the two documents. It is intended to capture key and material differences in the content of the two codes, particularly where the GC has a greater level of requirements than the VC.

Area and reference in GC	Discussion/reason for difference
Mis-selling prohibition	Mis-selling prohibitions are not included in the VC but are included in the GC. These are the normal standards we would expect businesses to comply with e.g. not engage in dishonest, misleading, deceptive or aggressive conduct. We would expect that businesses already comply with these requirements and therefore they do not impose any additional costs. Mobile service providers ('MSPs') will be expected to use best endeavours to ensure that their independent retailers/contractors do not mis-sell services.
Publication of GC obligations	No significant additional requirement over the VC.
Obligation to require independent retailer to oblige with certain behavioural provisions	The MSP is required to use best endeavours to ensure any independent retailer selling on their behalf complies with aspects of the GC and take appropriate sanctions in the event of a breach. This implies that MSPs will need to undertake monitoring activities and apply sanctions where a breach is identified. As MSPs should be active in policing and enforcement of the current VC this should not impose a significant extra burden.
Information at point of sale	<p>The GC requires additional information to be provided to the customer at the point of sale. Some of the information is already provided as part of the VC e.g. minimum contract period, minimum contract charges and early termination charges. It is considered that the incremental cost of providing the extra information required by the GC e.g. payment terms, cancellation rights is small.</p> <p>Where the sale is made via the phone the seller is required to follow up an oral provision of this information in a durable medium within 3 working days. This is to ensure the customer can refer to the information at a future point in time if desired.</p> <p>The GC requires the MSP to take best endeavours to ensure that the customer is authorised to enter the contract. Independent retailers are currently required to check the identity of customers to mitigate fraud so this should form part of the normal business processes.</p>

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Obligation to retain records	<p>The VC requires sales and marketing campaign records be kept for a minimum of 6 months whereas the GC requires that records be kept for a minimum of 12 months. The GC requires records to be kept for an additional 6 months to ensure adequate information is available in the event that Ofcom takes enforcement action for a breach of the GC. A report by Schema for Ofcom into mis-selling and slamming suggested that records be kept for 12 months to enable Ofcom to monitor mis-selling over a longer time period and reduce the ability of service providers to claim records were no longer held.</p> <p>In the case of cash back particularly problems may take some time to emerge e.g. because the first claim could be several months after the contract is completed. The benefit of ensuring information is available for enforcement action if necessary is considered to exceed the additional cost of holding the records for a longer period.</p>
Obligation to train staff	<p>Staff must be trained to comply with GC; we would expect staff to be trained to comply with VC currently so this should not impose significant extra cost.</p>
Due diligence obligation	<p>The GC requires not only 'new' independent retailers to be subject to due diligence, but also requires existing independent retailers to be checked within 12 months after the GC comes into force. This should ensure a level playing field for independent retailers and a uniform level of protection for consumers. The benefit of 'backdating' due diligence for existing independent retailers is considered to exceed the additional cost of carrying out due diligence for existing independent retailers.</p>
Information at point of sale – sales incentives	<p>The GC requires additional information to be provided at the point of sale to ensure the customer understands any processes required to obtain the sales incentive and has information on the associated terms and conditions. The VC already requires that the terms and conditions are provided and the small incremental cost of providing the additional information is considered reasonable to provide extra customer clarity.</p>