



25 November 2019

Consumer Policy - Trials team
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Three's Consultation Response – Trialling Consumer Remedies

Three welcomes the opportunity to respond to Ofcom's Consultation on Trialling Consumer Remedies of 25 September 2019 (the "**Consultation**").

Three is the UK's challenger mobile network. Since our launch in 2003, our focus has been on enabling our customers to make the most of their mobile service through the development of innovative propositions, such as Unlimited data packages and 4G – now 5G - at no extra cost. As a result, Three carries nearly a third of the UK's mobile data traffic, with our customers using more than 10.4GB of mobile data per month – roughly 3 times the industry average. Three will be the market leader in 5G, as the only UK mobile network operator (MNO) with 100 MHz contiguous 5G spectrum, and we are investing £2.3bn in building the UK's fastest 5G network

Three supports Ofcom's work to ensure fairer outcomes for consumers and acknowledges that trialling remedies is potentially an effective way of improving market engagement. However, we do not agree that Ofcom should have the powers to compel operators to participate in the trials and believe that this would be a retrograde step.

Trials will work best when industry is embedded into their design; this will be best achieved through a voluntary approach. Three supports Ofcom in work to further the interest of consumers but there are critical technical and business impacts which will need to be considered as part of the trial design process. These include issues such as system compatibility, potential costs and how the trial will fit into our future programme of work. To ensure these complex range of factors are fully considered and factored into the design of the trials, participation in the trial must be voluntary.

Additionally, as we set out in our response to Question 3 we believe that Ofcom's legal powers in this regard would only provide for Conditions which are general in nature. We do not believe that this restriction would enable Ofcom to design effective consumer engagement trials. Voluntary participation would produce better results for consumers. We are very happy to work together with the industry and Ofcom on such a solution.

Three has the following detailed comments on Ofcom's Consultation proposals; these are followed by answers to specific questions. We would welcome the opportunity to discuss these proposals with Ofcom at the earliest opportunity to see how we can work together on implementing an effective remedy trialling process.

Finally, this response should be read alongside that of Mobile UK's, which we fully support and endorse.

1. Participation in trials should be voluntary

In Three's view voluntary trials would be more effective and efficient as they would:



- **Produce better, more transparent, reliable, effective results for consumers** - Providers have a wealth of insight and experience of conducting consumer measures trials which could be shared with Ofcom to ensure remedies are effective. Consumers participating in such trials should also be clearly informed of the purpose, scope and regulatory nature of trials to ensure any potentially harmful customer experience issues are kept to a minimum.
- **Be more timely** - Ofcom's proposed GC Direction process could be lengthy if providers need to engage in potentially lengthy formal consultation processes. A more collaborative, voluntary process is likely to result in a quicker way of working if providers are given adequate notice and opportunity to engage. The existing commitments of providers should also be taken into account when considering the likely impact and timing of trials.
- **Be more proportionate** – In Three's view, a specific harm should be identified before Ofcom is able to conduct a trial. Any trial proposed should be strictly limited in scope to resolving such a harm and the cost of such a trial should be borne by Ofcom (rather than an individual provider and ultimately their customers) to ensure there is no distortion of competition.
- **Avoid wasted investment** – Three is mindful that a great deal of time (and potentially money) could be wasted on Ofcom driven trials which are not designed in an appropriate way for consumers or industry. If industry is involved in framing the scope of voluntary trials from the outset, far less invasive measures could be adopted, in the interests of better regulation.
- **Avoid negative impacts on both customers and revenue** – Three is concerned by Ofcom's comments at para.4.4. of the Consultation that "*taking part in trials may not always be in providers' commercial interests. Trials which successfully increase customer engagement may cause the provider taking part in the trial to lose revenue, for example due to customers switching away to competitors, or due to receiving less revenue from their existing customers. As such, providers may be unwilling to participate in trials on a voluntary basis.*" Three considers that Ofcom's approach on this is unduly burdensome and disproportionate to its regulatory aim. Ofcom has not yet fully explored with industry on how trials can be conducted without resulting in a loss of customers and revenue for providers. It is critical this exercise is carried out. Industry and Ofcom should work together to find a way of working that can ensure fairness for customers in a far less invasive way, co-designing and implementing any trial proposals. Ofcom's dismissal of this possibility (on the basis that the burden of trials would be fairly and appropriately distributed between providers) needs to be re-examined. A fair balance also needs to be struck between regulatory objectives and commercial interests – with industry and Ofcom working together to produce a collaborative and fair great experience for customers. In Three's view trials should also be consent based, with appropriate customer consent.

2. Industry and Ofcom should co-design and implement any trialled remedies

Three is willing to work with industry and Ofcom to explore a voluntary approach to trialling remedies.



3. Three's responses to the specific questions raised by Ofcom are as follows:

Question 1: Do you agree with the proposal to make a general condition to protect end-users' interests requiring all providers to participate in trials of customer engagement remedies, as directed by Ofcom?

Three has the following comments on Ofcom's GC proposals:

Ofcom's legal powers only provide for Conditions which are general in nature:

As Ofcom recognises, the only possible basis for the proposed condition to allow trials is as a GC under section 51 of the Communications Act 2003 (the "Act").

In Three's view, Ofcom cannot, however, use the power to set GCs to impose conditions that differ according to the identity of the communications providers: see section 51(3).

As Ofcom will be aware – in the Explanatory Notes to the Act, and in the very name, GCs must be of general application, applying equally to all providers of a particular class of network or service. Three notes that this has been tacitly acknowledged by Ofcom in previous work.¹

In Three's view, strict limits on the application of regulatory obligations to particular providers and not others are inherent in the scheme of the EU Common Regulatory Framework ("CRF"). One important objective of the CRF was to limit the scope for individualised obligations. This is reflected in, amongst other places, Article 6(2) of the Authorisation Directive (2002/20/EC) in only permitting obligations to be imposed on specific entities where allowed under identified provisions and legally separate from the rights and obligations under the general authorisation.

Consumer engagement measures of the type envisaged by Ofcom, whether directly required by a GC or by a direction issued under a GC, could only ever be permitted under the CRF, if at all, as conditions on the general authorisations allowed by Article 6(1) of the Authorisation Directive and Paragraph 8 of the Annex to the Authorisation Directive² and not as a specific obligation authorised by Article 6(2) of the Authorisation Directive.

As the GC proposed in the Consultation purports to give Ofcom the power to issue directions which include "*the imposition on different Regulated Providers of different requirements*"³, the GC proposed would in Three's view not be allowed by sections 45 and 51 of the Act when read with the clarification in section 51(3). Three also considers that any direction under the GC that imposed obligations on only selected individual providers would be impermissible for the same reasons.

Three considers that any direction issued under the proposed new GC would also run a substantial risk of being unduly discriminatory and/or disproportionate contrary to section 49A of the Act.

Three expressly reserves the right to challenge any decision by Ofcom to adopt the proposed new General Condition and/or any directions that might subsequently be issued under it.

¹ See, for example, pages 7 and 8, Modifications to the National Telephone Numbering Plan and Application Form for 08 Telephone Numbers to reflect retail price and numbering arrangements for calls to 0845 and 0870 numbers (Ofcom Final Statement, 22 July 2004) available at https://www.ofcom.org.uk/_data/assets/pdf_file/0019/32446/modified.pdf.

² Including possibly by reference to Articles

³ Draft General Condition C9.5, annexed to the Consultation.



A voluntary approach should be adopted

Three is not averse to the idea of trialling consumer engagement measures but believes strongly that Ofcom should try voluntary participation before even considering the possibility of mandating participation. This would be consistent with Ofcom's obligation under section 3(3) of the Act to "*have regard, in all cases, to... the principles under which regulatory activities should be... targeted only at cases in which action is needed*". As Ofcom records in the Consultation, providers have already been willing to participate in trials on a voluntary basis. It is premature to assume that participation will have to be mandated.

As mentioned above, Three is willing to work with industry and Ofcom to explore a voluntary approach.

If formal powers are introduced, they must be general in nature, with the costs borne by Ofcom

If Ofcom does ultimately conclude that participation in trials has to be mandated, it must ensure that participation is required by all providers of the particular network or service. The proposed GC should be amended to reflect that. Any trials would also have to be restricted to consumer engagement measures that might ultimately be permissible as permanent measures. We note, in this respect, that Articles 101 to 115 of the new European Electronic Communications Code (Directive (EU) 2018/1972) will restrict Ofcom's options given the requirement for full harmonisation.

Question 2: Do you agree with our proposed approach for determining whether it is appropriate to conduct a trial in future cases?

Three agrees with Ofcom that it will only be appropriate to conduct trials in certain circumstances. In Three's views trials should only be introduced if strictly necessary and proportionate, with a clearly identified consumer harm Ofcom are looking to address. Providers should be given adequate advance notice and their existing commitments should be taken into account.

Three notes that Ofcom proposes at para. 3.24 of the Consultation a range of non-exhaustive considerations for deciding whether a trial is needed. In Three's view, any trial proposed would need a very clear purpose and justification. Providers will have different demographics, capabilities and bandwidth to assist with trial work, so any measures proposed would need to be as specific as possible and customer friendly. In Three's view, more specificity would be needed for industry on trial scope – Ofcom mentions "longer trials" being needed and trialling "large sample sizes" and proposes that industry should bear the cost of this. In Three's view, Ofcom would need to clearly assess the burden of trials upfront and only propose strictly necessary measures. Less invasive alternative solutions for remedying any potential consumer harm should also be identified by Ofcom before pursuing the trials proposed – e.g., by working with industry on a voluntary basis, informally requesting insights on issues of concern from providers.

As noted above, Three also considers that any trial proposed should be general in nature, applying to all providers, with the costs borne by Ofcom.

Question 3: Do you agree with the proposed criteria for selecting which provider(s) we would direct to take part in a trial? Please provide evidence in support of your views on each question.

Please see Three's comments above – Three considers that all providers should participate in any mandated trials. However, Three's preference is for a voluntary approach to trials.



Question 4: Do you have any comments on our assessment and provisional conclusions set out in Section 5?

Please see Three's comments above.

Question 5: Do you have any comments on the draft condition set out in Annex 5 to this document?

Please see Three's comments above on Ofcom's legal powers.

Question 6: Do you have any other comments on our proposals? Please provide evidence in support of your views on each question.

It would be helpful to understand further why Ofcom has ruled out exploring a voluntary, collaborative approach with industry to designing and implementing trial remedies.