

Three's Consultation response – Fair treatment and easier switching for broadband and mobile customers

Three welcomes the opportunity to comment on Ofcom's Consultation on Fair treatment and easier switching for broadband and mobile customers (the "Consultation").

Executive summary

This is the response of Hutchison 3G UK Limited (Three) to Ofcom's consultation on measures to implement the of the European Electronic Communications Code (EECC) which updates and amends the European Telecommunication Regulatory Framework. Three welcomes the opportunity to comment of Ofcom's Consultation on Fair treatment and easier switching for broadband and mobile customers (the "Consultation"). This response compliments and builds on arguments made directly to Ofcom in bilateral meetings on the implementation of the EECC.

Three is the UK's challenger mobile network and we are always looking for ways to enable our customers to make the most of their mobile. We have developed innovative propositions, such as our plug and play wireless home broadband offering and were the first network to offer 4G and 5G at no extra cost. We will also be rolling out 5G Fixed Wireless Access broadband which will be a credible alternative to fixed-broadband, offering gigabit-capable internet services.

Our investment in 5G technology will allow our consumers to work and play faster than ever before due to the faster speeds, greater capacity – which enables more users to access the internet at the same time – and lower latency which means less lag and buffering. Our deployment of 5G, which will enable Three to continue to challenge credibly and innovate in the UK market, will be at the same time as we implement measures in the EECC.

Inevitably this will create a tension around resource allocation and business capacity. It follows therefore that the timings for the implementation of the EECC are a matter of a concern for Three. As previously highlighted to Ofcom, Three already has concerns on the current difficult UK climate for investment. Global investors do not currently find investing in the UK's telecoms infrastructure attractive – return on investment is low and technology has been the worst performing sector in the stock exchange for several years. Enders Analysis has estimated that UK mobile revenues have declined by **[CONFIDENTIAL – THIRD PARTY PROVIDER INFORMATION]** % over the past decade, largely as a result of regulatory impacts. Ofcom's very prescriptive EECC end-user protection proposals will add to the burden business faces on 5G investment. Three also has concerns that an over-prescriptive approach by Ofcom risks discouraging innovation in the mobile market given that providers are left with little ability to differentiate their offerings and introduce technical developments for the benefit of consumers.

Three recognises that Ofcom must comply with its legal and regulatory obligations and has only limited ability to demonstrate flexibility. However, we urge Ofcom to take a proportionate

and flexible approach where appropriate to both implementation and enforcement. Under Ofcom's proposals, operators will have fewer than six months to implement a multiplicity of requirements, some of which will be inappropriate to UK market conditions and have been specifically brought forward to address concerns in other EU market jurisdictions.

While it is not yet clear whether telecoms will be part of any trade deal between the EU and the UK, the Government's determination to pursue a form of Brexit built on the principle of regulatory divergence means that it may be possible for Ofcom to de-prioritise those parts of the EEC that are either not relevant to the UK or will not deliver benefit to UK consumers. We believe that including a requirement to offer porting for up to 30 days after a customer has terminated their account is an example of this.

As a general point, Three notes that consumer satisfaction in the mobile market is high and the incidence of consumer harm slight. We also note that the mobile market is highly competitive at the retail level, with prices low by international standards. We therefore question both the imperative and the need for interventions in what is a highly regulated consumer space already. Specifically, Three is concerned that imposing the following measures on UK providers is disproportionate given the lack of any demonstrable consumer benefit (and no evidence of a detailed impact assessment being carried out) and the very real challenges and costs of implementation:

- Notifications to customers and stronger rights of exit for mid-contract changes (including Ofcom's apparent removal of the UK's material detriment approach to interpretation)
- Additional pre-contract information requirements for Telesales and unassisted channels
- Annual Best Tariff notification requirements for prepay
- Introduction of Emergency Video Relay services without wholesale regulation.

These are each explored below in more detail.

Given the volume of new requirements, we consider it is imperative that Ofcom prioritise those requirements that will deliver the greatest consumer benefit or do most to improve competition in the market.

To this end, Ofcom should look to bring forward and prioritise, a prohibition on handset locking which penalises customers and acts as disincentive to switching. Based on Three's experience, this requirement could be implemented by providers within six months. Three also believes that Ofcom is right to focus on measures to protect consumers by preventing "linked" split airtime and handset contracts of longer than 24-months. It is critical that these are expedited and brought ahead of some of the most onerous and difficult provision of detailed and confusing information to consumers for which there is no clear benefit or indeed where no consumer harm or detriment has been established.

The rest of this response comprises Three's specific comments on key areas of concern for Three on the Consultation proposals put forward by Ofcom. Three's specific concerns for comments have been underlined and Three's asks for Ofcom have been **highlighted in bold** below.

Three also wishes to bring to Ofcom’s attention that Three is currently undergoing a period of **[CONFIDENTIAL – BUSINESS SECRET]** which may **[CONFIDENTIAL – BUSINESS SECRET]** If issues arise in relation to this as Three develops its approach to delivering EECC requirements, we will notify Ofcom as soon as possible.

Finally, as a general matter, it would be helpful if Ofcom could clarify, to the extent possible at this time, how Ofcom propose post-Brexit to interpret any EECC requirements in practice. For example, will Ofcom continue to take the “utmost account” of EU decisions and/or guidance on a point of legal interpretation?

Three would be happy to discuss any of Three’s comments in this Consultation further, should this be helpful to Ofcom.

Specific comments on Ofcom’s end-user EECC proposals

Section 3: Changes to the defined terms used in the General Conditions

Question 1: Do you agree with our proposed changes and additions to the defined terms used in the GCs in order to align with the EECC, as set out in Annex 11?

Please see Three’s comments on Ofcom’s proposed definition of “Bundle” and “Commitment period” below.

Section 4: Provision of information to customers about their services

Question 2: Do you agree with our proposed changes to the GCs to implement Article 102 (Information requirements for contracts), as set out at Annexes 11 and 16?

Question 3: Do you agree with our proposed guidance in Annex 6 on our expectations for how providers should comply with the provision of contract information and the contract summary?

Contract Information and Contract Summary requirements

Three has the following specific comments on Ofcom’s proposed additional Pre-Contract Information, Contract Summary and Contract requirements:

Requesting a customer’s express agreement

- The new requirement to send customers a contract summary prior to contract and for customers to actively confirm their acceptance of the terms gives rise to some practical concerns in both the telesales and unassisted channels. Three sets these out below.
- Three also notes that while Ofcom’s new GC C1.6 makes clear that a customer’s contract will only become effective when the consumer has received the contract summary and

expressly agreed to its terms, this seems to be implicit in Ofcom's Guidance on Contract Information. Paragraph 4.25 of the Consultation states: "*Providers may also need to make changes to their processes, including customer sales journeys to ensure customers are given, and agree to, this information before the contract becomes effective.*" In Three's view, given the nature of a customer's pre-sales journey it would make sense to follow the same approach on requirements for both the contract summary and contract information.

Three asks that Ofcom clarify its guidance and proposed GCs on this.

Telesales

- Paragraph 4.38 of Ofcom's consultation considers the implication of this new requirement for contracts offered over the phone and states that the customer must have the opportunity to assess the information and to decide whether to enter into the contract based on those terms. It suggests that the contract summary could be sent during the call and customers could either confirm their acceptance during the call (by online account/email/SMS) or afterwards. Alternatively, the provider could send the summary after the call however for the contract to be effective the customer would need to actively confirm their agreement to the terms within it (by email or signing the contract electronically).
- This approach would require significant development of Three's current systems and processes. Today, in line with Ofcom's current General Condition 8.5 we confirm the main points of a customer's contract orally during a telesales call and send the required information to the customer following the call in a durable medium. This is a very different process from sending specific information relating to individual tariff plans to customers during or immediately after a call and requiring their active agreement in order to conclude the contract.
- Three considers that Ofcom's proposal on this point would also result in significant costs to Three's customer acquisition journey as it would mean longer calls and breaking the customer journey as contracts can no longer be concluded exclusively over the phone. Under Three's customer journey process, it would also present a challenge when it comes to **[CONFIDENTIAL – BUSINESS SECRET]**. Three would therefore need to revisit this process if Three is required to issue a contract summary **[CONFIDENTIAL – BUSINESS SECRET]**.
- Three also notes that the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 already provides sufficient protection for telephony and online sales which do not exist for retail. This includes: (i) the provision of specified pre-contract information (orally, in relation to telephony sales); (ii) the issue of a post-contract confirmation and (iii) a 14 day "cooling off" period during which the customer can then change their mind and get a refund.
- Other regulated industries, such as the Insurance industry place a similar requirement on providers to supply a standard document (the Insurance Product Information Document or "IPID") setting out key information pre-contract to allow prospective customers to make an informed purchasing decision. However, unlike Ofcom's proposals on the Contract Summary, when insurance is sold over the telephone and key contract information is given orally in the course of the call, the insurance contract can be concluded by telephone and the IPID provided immediately thereafter (without the need for the customer to then actively confirm their agreement to the terms within it in following receipt in order to be bound).

- Given the additional consumer protection measures already in place (under current GC8.2(b)), the requirement for customers to actively confirm their acceptance of the terms in the contract summary before the contract is concluded seems disproportionate based on the significant changes needed to the sales process and providing little additional benefit to the customer. There is clearly an element of overlap between this and Ofcom’s new GC proposals. **Three therefore asks that Ofcom revisit what, if any further requirements are strictly needed on this and link any further changes to a specific consumer harm Ofcom has identified.**

Unassisted sales channels

- It is not possible to provide the requested volume of pre-contract information Ofcom requires via a durable medium for unassisted channels such as PAYG SIMs which are sold extensively in supermarkets, filling stations, vending machines and corner shops. As these customers are typically anonymous, we cannot follow up with an email asking if they agree with the terms. It would also be extremely difficult to draw attention to specific information on the SIM pack as the available space is very limited. Three asks Ofcom to provide guidance on how this issue might be tackled in a user-friendly way. Three would recommend Ofcom invites industry to assist with this task. By way of example, digital solutions might be a good way of dealing with this issue – e.g, by having “QR codes” or links to videos or welcome website pages on SIM packs and offering accessibility formats on request.
- We understand that the role of the Contract Summary Template is to provide the customer with essential information relating to the main elements of the contract for clarity and for comparison purposes when the customer is making a buying decision. While this is clearly relevant for contracts based on a fixed commitment period Three does not consider it is relevant when purchasing prepaid services where there is no fixed commitment period or automatic renewal of the service. **Three asks that the obligation to provide a contract summary template for such services is therefore removed.**

Core subscription price information requirements – expected post-commitment period price

- At paragraph 4.45 of the Consultation Ofcom notes that:
*“One of the key pieces of information required by Article 102(1) is the provision of information about the recurring price for the services the customer is being offered. This is defined in the GCs as the core subscription price; this price includes both the recurring price of the customers’ service during their minimum contract period (or the ‘commitment period’ as defined in the GCs) as well as **the price the customer will pay once that commitment period has ended.**”*
- Three understands from recent discussions with Ofcom’s Consumer Policy team that this measure is simply to ask providers to set out their best reasonable estimate of likely pricing at the end of the contract, rather than hold a provider to certain pricing after the end the commitment period. **Three asks that Ofcom clarify this in its final statement.**

Core subscription price information requirements – RPI

- Three also notes that Ofcom is extending the level of transparency that needs to be included in a contract when increasing a core subscription price mid-term. In addition to explaining how the increase will impact the price customers will pay by providing an example of the pricing index (such as using the RPI for the previous year) the requirement is to also include the “*expected price (or a cross reference to the relevant list price) that the customer will pay at the end of the commitment period or a statement that the customer will continue to pay the same price after the commitment period has ended.*”
- Three understands from recent discussions with Ofcom’s Consumer Policy team that Ofcom is simply asking providers to include worked examples of the type of price rise a customer might reasonably expect during the lifetime of their contract. Three agrees with **Ofcom that this practice would be helpful for customers and asks that Ofcom clarify this guidance in its final statement.**

Helping customers control their usage

- Three notes that Ofcom proposes to implement Article 102 (5) of the EEC by introducing a new GC to ensure residential customers are notified when a service included in their tariff plan is used up. Ofcom also proposes that the 100% notification includes information on the charges customers will pay if they continue to use those services outside their tariff plan.
- As Ofcom notes at footnote 86 of the Consultation, Three already sends text notification to customers when they reach 80% and then 100% of their data allowance. Once a data allowance limit has been met a customer is unable to use data until the following billing month unless they have topped up by either buying a data add-on or changing price plan (this allows customers to move to a higher data plan without extending the contract tenure and changing any of their contract terms). In this situation where a hard stop is in place on usage outside of a customer’s data plan there is no risk of incurring unexpected charges or bill shock.
- Three does not believe it is Ofcom’s intention to require specific messaging on charges in this situation as there are no excess to bundle charges **but Three asks that Ofcom clarify this point in its final statement.**

Scope of Annual Best Tariff notification requirements

- Three notes that Ofcom’s proposed new GCs include a requirement from GC1.30 for providers to provide:

“best tariff information to a Relevant Customer at least annually, if each of the following requirements are met:

a) *the Relevant Customer has a contract with the Regulated Provider for a Relevant Communications Service; and*

b) *the contract is not subject to a Commitment Period.”*

Ofcom goes on to define ‘Commitment Period’ to mean:

“... a period beginning on the date that contract terms agreed by a Communications Provider and a Subscriber take effect and ending on a date specified in that contract, and during which the Subscriber is required to pay for services, facilities and/or Terminal Equipment provided under the contract and the Communications Provider is bound to provide them; “

- In Three’s view, PAYG customers should not be caught by this requirement as the way PAYG arrangements are set up is very different from PAY-Monthly arrangements. Three has concerns that Ofcom’s position on the scope of this requirement has not been consistent during its various phases of Consultation and is not aware of an EECC requirement for PAYG customers to be included. Three notes that:
- In Ofcom’s July 2018 Consultation on “End of Contract” and “Out of Contract Notifications”, Ofcom, Three notes that in a 95-page document, ‘Pay As You Go’ was only mentioned in section 3.17 (where Ofcom stated that PAYG was excluded from the research).
- In Ofcom’s May 2019 Statement, Ofcom appears to have changed its mind on the scope of the end-of-contract and annual best tariff notification requirements noting.

“Para. 11.19 (d):

Condition C1.16 requires providers to provide annual best tariff information to a subscriber if he or she has a contract for public electronic communications services, which is not subject to a fixed commitment period. If the subscriber is a consumer, Condition C1.17 requires the provider to comply with this requirement by sending an annual best tariff notification. The application of these conditions will therefore be fact-specific, depending on the consumer’s contract terms. A “rolling 30-day contract” would fall within the scope of these provisions, for example, if it is a contract with an initial fixed commitment period of 30 days that has since expired, or if the contract has no fixed commitment period but is subject to a 30-day notice period.¹³¹ We consider that it is appropriate for consumers on these types of contracts to receive an annual best tariff notification, if they remain with the same provider for more than one year. We have now made explicit provision for the timing of annual best tariff notifications for consumer contracts that do not contain any fixed commitment period (see the guidance on Condition C1.19).¹³²

FN 131:

In the December 2018 consultation, we set out our view that there was no need for customers on monthly rolling (30 day) contracts to receive an end-of-contract notification, and that contracts drafted as an indefinite term with a 30-day notice period would fall outside the scope of the draft general condition. However, we did not make any similar comment in relation to annual best tariff notifications.

FN 132:

As noted in Section 7, we have amended Condition C1.19 to include a high-level obligation on providers to send an annual best tariff notification at least once in every 12-month period. We have moved the detailed provisions on timing and aggregation of these notifications to the guidance.

- In correspondence with Three in August 2019 querying whether End-Of-Contract and Annual Best Tariff Notification requirements applied to PAYG customers who had monthly rolling (30-day) SIM-only contracts, Ofcom replied:

“In short, where you are providing a relevant service that does not have a fixed commitment period then there is no requirement to send an end-of-contract notification, but there would be a requirement to send an annual best tariff notification where the contract for that service continues in force for more than one year.”

Three does not consider this response to be Ofcom explicitly requiring Annual Best Tariff Notifications to be sent to PAYG Customers. If this is what Ofcom intended, in Three’s view, a full impact assessment should be carried out by Ofcom.

- In light of Ofcom’s above approach, Three is also concerned that there has not been transparent consultation on the inclusion of PAYG customers in Ofcom’s Annual Best Tariff Notification requirements. In Three’s view, given the technical build and delivery costs of extending this requirement beyond PAY Monthly offerings, **Ofcom should consider this further and re-consult on this issue, outlining any consumer harm concerns Ofcom has identified for the PAYG market and Ofcom’s impact assessment of this requirement for industry.**

Section 5: Publication of information and provision of data to third parties

Question 4: Do you agree with our proposed changes to the GCs to implement Article 103 and our proposed approach to implementing Article 104, as set out in Annex 11?

Publication of information

Three’s specific comments on Ofcom’s Publication of information proposals are as follows:

- Three asks that Ofcom provide further guidance on Accessibility requirements - Three note that in transposing Article 103 (1) of the EECC, Ofcom requires providers to publish the information listed in Annex IX of the EECC in a clear, comprehensive, machine-readable manner and in an accessible format for end users with disabilities or in such manner and form as directed by Ofcom. **It would be helpful if Ofcom could provide clear guidelines to providers on what this means in practice**, following the previous publication of helpful guidance on publicising services available to disabled people, including on which standards providers should adhere to when building and maintaining websites. By way of example, we would ask that Ofcom clarify:

- For information published online, does Ofcom require providers to meet the requirements of the Web Content Accessibility Guidelines (WCAG) 2.1 (which are widely recognised as the international accessibility standard for web accessibility) and if so at which level (A or AA)?
- Regarding the requirement for information to be provided in a “machine-readable manner”, guidance here as to Ofcom’s expectations would be appreciated as both the EECC and the Consultation are silent as to this point.¹ People with disabilities access and navigate websites in different ways, depending on their individual needs and preferences. For example, the Web Accessibility Initiative (who publish the WCAG Guidelines) explain that some common approaches for users with disabilities interacting with the Web include:

*“**Assistive Technologies** – software and hardware that people with disabilities use to improve interaction with the web. These include screen readers that read aloud web pages for people who cannot read the text, screen magnifiers for people with some types of low vision, and voice recognition software and selection switches for people who cannot use a keyboard or mouse.*

***Adaptive Strategies** – techniques that people with disabilities use to improve interaction with the Web, such as increasing text size, reducing mouse speed, and turning on captions. Adaptive strategies include techniques with standard software, with mainstream web browsers, and with assistive technologies.”*
[\(https://www.w3.org/WAI/people-use-web/tools-techniques/\)](https://www.w3.org/WAI/people-use-web/tools-techniques/)

- **Three asks that Ofcom works with the industry further on this to develop guidelines.**
- Once providers have clarity on Ofcom’s requirements, they will also need enough time to ensure legacy systems are updated if necessary. Given that there are typically tens of thousands of pages on a provider’s website a significant amount of dedicated time and resource will be needed to ensure a website meets Ofcom’s requirements.
- We would be happy to discuss this further with Ofcom and take part with any proposed industry discussions to gather views on this, should it be helpful.

Provision of data to third parties

Three’s specific comments on Ofcom’s provision of data to third parties’ proposals are as follows:

¹ Three notes that in Ofcom’s Guide to publicising services for users with disabilities (2016), the only suggestion as to how reference as to how screen readers could be used can be found at para 4.2 where Ofcom stated “ Most CPs have a dedicated website or a dedicated section of their website on accessibility issues. These should, as far as practicable, be readable by people with visual impairments using a range of screen readers.”

- At paragraph 2.11 of the Consultation Ofcom notes that *the “EECC requires EU Member States to ensure that consumers have access, free of charge, to at least one independent comparison tool that meets certain criteria and which allows users to compare different communications services using comparisons of tariffs and quality of service (Article 103(2) EECC). In addition, the EECC requires Member States to ensure that any comparison tool that meets these criteria can be accredited by competent authorities upon request (Article 103(3) EECC).”*
- Ofcom’s new GCs C2.19-20 ask that providers *“shall make available, free of charge and in open data formats, the information listed in Condition C2.21, for the purposes of providing a Comparison Tool meeting conditions set out in Condition C2.20.”* Three welcomes Ofcom’s proposals at GC C2.20 to make sure the Comparison Tool demonstrates features such as being *“operationally independent”*, setting out *“clear and objective criteria”* for their comparison, *“provide accurate and up-to-date information”* and *“include a broad range of offers covering a significant part of the market and, where the information presented is not a complete overview of the market, a clear statement to that effect, before displaying results.”* This set of criteria contains important safeguards for displaying provider data.

Ofcom goes on to detail the information providers must provide to a Comparison Tool in open data formats at GC C2.21 as being information related to:

“(a) the prices and tariffs of services provided against recurring or consumption-based direct monetary payments; and

(b) the minimum quality of service where offered, or the Regulated Provider is required to publish such information.”

- **Three would ask that Ofcom clarifies and provides more guidance on the following points of the new GC C2.19-2.21 requirements:**
 - Three notes that Ofcom does not define the term “open data” format and asks that Ofcom provides further guidance on this point. At the current time Three provides data to third parties under commercial arrangements in various formats. Is Ofcom looking to change this type of approach in terms of how the data is provided? Three asks that, given the limited data to be provided, Ofcom leaves this to industry to determine under commercial arrangements.
 - How in practice will a comparison tool’s “independence” be verified?
 - How will providers be satisfied that the open data to be provided will be kept secure and confidential?
- The above views of Three are on the suitability of EECC requirements for the provision of information on prices, tariffs (and quality of service where applicable) to third parties. For future requirements on smart data / open communications, we look forward to engaging with Ofcom further on this topic when they consult in due course.

Section 6: Contract duration and termination

Question 5: Do you agree with our proposed changes to the GCs to implement the requirements in Article 105, as set out in Annex 12?

Question 6: Do you agree with our proposed changes to the existing guidance as summarised here and set out in Annex 7?

Mid-term contract changes

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

Ofcom's Current approach

- Currently, Ofcom requires providers to provide customers with one month's notification of any contractual modifications likely to be of material detriment to that customer. Ofcom also enables customers to exit their contract without penalty on receiving such notice. When describing how this works in practice Ofcom's current GCs and Guidance on C1 also clarify that under these requirements i) there is an exclusion for VAT increases or mandated regulatory levies (see GC C1.8); and ii) an increase in the "Core Subscription price" is a contractual modification likely to be of material detriment to the customer (GC C1.6). Previous Ofcom guidance on (former GC 9.6 – see below) also draws a distinction between "core subscription" prices and "non-subscription prices," excluding price changes for out of bundle services such as international and premium rate services from the "material detriment" change requirements. In Three's view, this approach has worked well to date given that it is fair, balanced and proportionate. Three is not aware of any complaints that have arisen in relation to this approach and notes that Ofcom has not articulated in the Consultation any specific new consumer harm that needs to be addressed.

Ofcom's Proposed approach

- Three notes that Ofcom has taken a literal approach to interpreting the EEC Art.105(4) requirements for contract changes, requiring i) a notification of one month for all contract changes and ii) providing a right for customers to exit unless the change is "*exclusively to benefit of the customer, of a purely administrative nature and have no negative effect on the customer, or are directly-imposed by law.*" Ofcom has also removed existing GCs C1.6-1.9 entirely and there is very little clarity on what this means in practice in Ofcom's proposed accompanying guidance for Contract requirements on contractual modifications. Three consider this approach to be disproportionate and would encourage Ofcom to at the very least consider drawing a distinction between "price increase changes" and "other contract changes."

Practical problems and risk of consumer harm

In Three's view, Ofcom's proposed requirements are unworkable in practice for the following reasons:

1. Ofcom's proposals are unworkable in practice as mobile providers are subject to variations on a constant basis, some of which are out of a provider's control - if Ofcom's requirement is read literally, it creates a far higher test than currently exists as all customers would need to be notified of all changes that are not exclusively to the benefit of the customer or required by law regardless of whether they are of material detriment to that customer.

Ofcom's proposals as drafted present problems in practice and are fundamentally unworkable. Making a large number of price increases and changes to a customer's mobile service are a regular part of providing a mobile service. Providers have no choice but to amend contracts to take account of numerous changes day to day for developments which are both within and outside their control. By way of example, this might include where an international calling rate is varied for a non-EU country, where providers have to pass on wholesale price increases which are outside their control and testing the price elasticity of certain calls (i.e., short term price trials). Particularly onerous are Ofcom's requirements on this for changes outside a provider's control. By analogy, in Three's view, it would be absurd to ask a car leasing company to give a consumer who leases a car a right to exit if the price of petrol rises – a factor completely outside that car leasing company's control.

Three notes that providers also have to deal with new products and services being introduced to the market. The advent of APIs (creating an interface between mobile providers and a third-party billing system) adds to the burden for mobile operators, given that APIs provide thousands of more services, in turn risking many more contractual modifications mobile providers will need to engage with. With the advent of 5G and multiple content services, Three also predicts many more services will be offered to customers, bringing an added layer of complexity.

In light of the above, in Three's view, Ofcom's approach does not appear to be proportionate or clearly linked to any specific consumer harm. Moreover, Three considers Ofcom's approach to be a disincentive for mobile providers to offer additional products and services. The regulatory burden involved in doing so is simply unworkable for providers, discouraging investment in this area and stifling innovation which could provide benefits for consumers. Providers will become very wary of introducing any change if they risk customers having the ability to cancel their contract over a minor change with little impact on them. They will in particular be mindful of the potential risk of customer arbitrage if customers can simply exit despite having suffered no material detriment.

- There is a general risk of information overload. Three also notes the impracticality of sending frequent notifications to customers – Three has concerns this could risk the concealment of significant notifications and lead to absurd circumstances where a customer is provided with the ability to terminate a contract for a 1p increase to a service that customer has never previously used and will not use in the future. Notifications on material detriment allow for an efficient provision of relevant information and allow customers to act. The dilution of information on changes of material detriment with lots of other information on minor changes would lead to a less effective measure to alert consumers to price or contract changes. This could mean

that they are less likely to be able to act on a contractual change because too much information has been provided over a period of time. Three notes that the Financial Conduct Authority started work in 2015 to assess the overload of information to consumers in financial markets. Most notably, the FCA recognised that:

“information itself does not necessarily empower the consumer. Our work on behavioural economics has clearly shown it can overwhelm, confuse, distract or even deter people from making effective choices if presented in a way people struggle to engage with.”²

Similarly, Three notes that Ofcom has balanced the risk of information overload themselves when consulting on the content of end-of-contract notifications.³

Three supports information remedies that encourage consumers to engage with the market. However, we urge Ofcom to assess the potential impacts of information overload with regard to remedies where the benefits seem less clear.

- Ofcom’s approach appears to remove the current proportionate material detriment approach, which works well for providers

Three’s most significant concern is Ofcom’s apparent removal of current General Conditions C1.7-C1.9 (which contain today’s critical “material detriment” analysis approach). In Three’s view, this works well and helps providers take a proportionate approach, based on consumer harm concerns, to contractual modifications. In Three’s view, Ofcom should maintain and continue its “material detriment” approach. Three explains its reasoning, including legal interpretation points on this in more detail below.

Three’s main concern on this is the fact that Ofcom’s current requirements draw a distinction between the “core subscription” and “non-subscription services” providers offer under their mobile contracts. This distinction is critical as providers only in practice generally provide material detriment notifications for changes to their “core subscription” services – i.e., and not for “non-subscription services.”

To bring the importance of this distinction to life Three notes that when a customer purchases a mobile contract their mind will typically be focused on a comparison of “core subscription” services such as their monthly rental charge, with a device and the package of main services that accompany it such as unlimited text and voice and EU roaming services. In Three’s view it is absurd to think that a customer would be concerned about comparing “non-subscription” services, such as a third-party content or service or the wholesale cost of a call to Dubai. A customer may indeed never use such “non-subscription” services – so to notify them of a change of rate/service which has no or a minimal impact in relation to them simply does not make sense to Three.

² <https://www.fca.org.uk/publication/discussion/dp15-05-smarter-consumer-communications.pdf>, page 3

³ https://www.ofcom.org.uk/_data/assets/pdf_file/0018/148140/statement-helping-consumers-get-better-deals.pdf, paragraphs 4.45 – 4.48

- Risk of unintended consumer detriment - If Ofcom proceeds with a literal interpretation of its proposed approach, providers will have little choice but to answer the impracticality challenge by adopting the highest possible price for all services over the length of the contract, i.e, to avoid having to make any contractual modifications. This could create the risk of consumer detriment, which is unnecessary and avoidable.

Legal analysis - the current (pre-EECC) position recognises that “modification to the contractual conditions” requires interpretation

- In Three’s view, Ofcom’s proposals need to be viewed in the context of the current pre-EECC position. In particular, under Article 20(2) of the Universal Service Directive (“USD”) EU Member States must “ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications networks and/or services.” Three notes that these words have always been recognised to need interpretation, both by Oftel (in 2003) and then Ofcom (in 2013). By way of example, see paras 3.7-3.9 of Ofcom’s January 2013 consultation “Price rises in fixed term contracts”:

“3.7 The USD does not refer to a requirement for likely material detriment to the subscriber of any proposed modification before that subscriber can terminate the contract. Nonetheless, when it first introduced this obligation in 2003 through making GC9, Oftel read into the then Article 20(4) of the USD the words ‘materially detrimental’. (In that any modifications to the contract had likely to be of material detriment to the Consumer before s/he could withdraw from that contract as a consequence of the modification.) As Oftel explained at the time, this reflected the test the OFT used in Unfair Terms in Consumer Contracts Regulation 1999 (‘UTCCRs’) cases to decide whether contractual terms were fair or not.

3.8 When Ofcom consulted on GC9 in February 2011 in relation to implementing the revised EU framework, we said that we considered the material detriment threshold was still relevant and likely generally to reflect current consumer protection in this area (in particular the UTCCRs which provide that contract terms are unfair if, amongst other things, they create a “significant imbalance” in the consumer’s (subscriber’s) and supplier’s (CP’s) rights and obligations under the contract) . Our position, therefore, was that retaining a “material detriment” requirement would generally reflect the “significant imbalance” requirement used to determine the unfairness of relevant contract terms.

3.9 We also stated that we believed this approach was in line with the requirement for Framework obligations to be exercised in a proportionate manner; whereby, in this case, any proposed contract modifications must materially affect the subscriber before that subscriber can choose to exit from the contract. Our intention was not to rule out contract variations altogether.”

- Three also notes that in Ofcom’s decision in October 2013 on “Price rises in fixed term contracts: Decision to issue Guidance on General Condition 9.6” Ofcom changed its mind from the initial proposal (namely: consumers are able to withdraw from a contract without penalty for any increase in the price for services applicable at the time the contract is entered into) and decided instead to issue guidance under GC9.6. Under Ofcom’s revisions to the GCs in 2017/2018 Ofcom continued its policy on this point, incorporating

the GC 9.6 guidance into GC1.7-9 and maintaining a ‘material detriment’ and ‘core subscription price’ test accordingly.

The CJEU has confirmed the need to interpret the words “modification to the contractual conditions” – see, for example, the *Verein* case exception

- Three also notes that the CJEU has confirmed that the words “modification to the contractual conditions” need to be interpreted. One helpful example of how this has assisted providers in practice is C-326/14 *Verein für Konsumenteninformation*, where the CJEU recognised that RPI increases to the contract price were permissible. In this case, the Advocate General at §2 in particular recognised the connection of this analysis with the consumer protection in Directive 93/13 (i.e. as implemented domestically by the UTCCR, and now the Consumer Rights Act 2015).

Legal analysis - in circumstances where Ofcom continues to recognise the *Verein* case exception, Ofcom has no basis to abandon its existing interpretation of ‘material detriment’

- In Three’s view, even though the *Verein* exception is not referred to in Article 105(4) EECC, Ofcom proposes to maintain the *Verein* exception. Three notes paragraph 6.75(c) of the Consultation and Ofcom’s proposed guidance on Contract Requirements at A7.54. Ofcom is quite clear that this is a disapplication of the rule which might otherwise be applicable in C1.14.
- Three also notes that Ofcom proposes to maintain the concept of ‘core subscription price’ in its proposed guidance on Contract Requirements at A6.11-16, and A7.54 and within the End of Contract and Annual Best Tariff Notifications.
- In these circumstances, it is unclear to Three why the existing interpretation of the words “modification to the contractual conditions” should be abandoned for the words “changes in the contractual conditions” in Article 105(4) EECC. In Three’s view, the ‘material detriment’ analysis remains applicable.
- The ‘material detriment’ analysis is not prevented by the express exemptions in Article 105(4) EECC. The *Verein* exception is not an exemption in 105(4) EECC but is nonetheless applicable. Indeed, the ‘material detriment’ analysis is really a *de minimis* threshold for considering whether there has been a change in the contractual conditions, and so comfortably sits alongside the exceptions identified in Article 105(4). Accordingly, Three asks that Ofcom make this clear in its implementation of Article 105(4) EECC in the GCs and Guidance on Contract Requirements.

Legal analysis - further or alternatively, Three notes that Ofcom has identified no basis for failing to permit the full use of the *Verein* exception, i.e. where contract conditions change but in accordance with foreseeable, transparent and legally certain terms set out ex ante

- Three also note that the *Verein* case, and Ofcom’s guidance on it, also reflect characteristics of such a clause that are not limited solely to an RPI increase to the core contract price.⁴ In *Verein*, the important fact was that the clause “cannot place end-users in a contractual situation any different from that which arises from a contract in which the

⁴ See Ofcom’s former GC9.6 guidance at A1.4; current GC 1.9(a); proposed Contracts Requirements guidance at A6.12).

term at issue is provided for in the standard terms and conditions of that contract”, which was satisfied in that case because it was linked to a “clear, comprehensive and easily accessible price index, resulting from State decisions and mechanisms”.

- In Three’s view, this means that a broader approach to such a term can be constructed to be consistent with Consumer Rights Act 2015, Sch 2, Part 1, paras 11 and 15. See the Court of Appeal’s analysis permitting a cost review term in *du Plessis v Fontgary* [2012] EWCA Civ 409.

Legal analysis - Three is also concerned that there has not been transparent consultation on the abandonment of the ‘material detriment’ analysis

- Finally, Three notes that Ofcom consulted explicitly on this exact point only in 2013, and its position changed as a result of the consultation responses. It is therefore clearly a key area of concern to industry which Ofcom needs to carefully consider. In Three’s view, the broad reference in the Consultation to the implementation of Article 105(4) has not grappled with the question of whether the ‘material detriment’ analysis should be maintained or abandoned, nor has Ofcom carried out any form of appropriate balancing of consumer detriment/practicality etc. In consequence, Three has significant concerns that Ofcom has not yet turned its mind to the implications of its proposed course of action, and that stakeholders may not have generally appreciated the underlying issue being consulted upon. **Given that the omission of a “material detriment” could have important ramifications for both industry and consumers, with the risk of consumer harm, Three ask that Ofcom revisit its findings on this point and clarify its approach to interpretation.**

Section 7: Switching and porting

Question 7: Do you support our proposals to introduce (a) new general switching requirements for all types of switches for residential and business customers and (b) specific switching requirements on information, consent, compensation and notice period charges for residential customers?

Question 8: Do you support our proposed guidance in Annex 8 on compensation for residential customers?

Three’s specific comments on switching and porting proposals are as follows:

Ofcom’s proposal to allow end-users to port their number for at least a month after termination

- At paragraph 7.80 of the Consultation Ofcom details a new right for customers that request it to port their number for “*at least a month after the termination of a contract unless the customer expressly agrees otherwise when terminating that contract.*” Ofcom outlines how they “*expect that providers will ensure customers can contact them regarding porting a number after the termination of a contract through a variety of means, such as online, by phone or in person in a store.*”

- As Three is unaware of any clearly identifiable consumer harm that this is designed to address or any reasons why this is required for the UK market, Three asks that providers be granted flexibility to determine how this is implemented in practice. Three also remains concerned about the disproportionality of this rule, given that:
- In Three's experience, this has not been a complaint driver for customers.
- Existing legal protections are already in place for customers who choose to switch to different providers, such as a customer's statutory right to a 14-day "cooling off period" in which they have a right to cancel under the Consumer Contract Regulations.
- It requires technical and business implementation measures, at a cost to the business at a time when providers are being asked to implement multiple changes to comply with the EECC within a strict timetable.
- Three also **asks that Ofcom consider this a low priority for enforcement area and be as flexible as possible on enabling industry to implement this measure, with the minimum interference and cost to business.**

Auto-Switch

- Three welcomes Ofcom's proposal not to make any substantive changes to this process. Implementing auto-switch has been a major task for mobile industry to date and was only implemented in July 2019. In Three's view, **any further proposed reforms to this process should be strictly limited to a clearly identifiable consumer harm and proportionate.**

Section 8: Disincentives to switch: mobile device locking

Question 9: Do you agree with our assessment that device locking can deter customers from switching and cause customer harm?

Question 10: Do you agree with our assessment of the effectiveness of Options 1 and 2 in reducing the consumer harm that can result from device locking and the impact on providers of Options 1 and 2?

Question 11: Do you agree with our proposal to prohibit the sale of locked mobile devices?

Three's specific comments on Ofcom's mobile device locking proposals:

- **Three welcomes and fully supports Ofcom's assessment that device locking can deter customers from switching and cause customer harm.** Three agrees with Ofcom's provisional view at paragraph 8.80 of the Consultation that "*it is appropriate for [Ofcom] to protect the interests of customers from the deterrent effects of device locking on switching*" and conclusion at paragraph 8.132 that Ofcom "is minded to implement

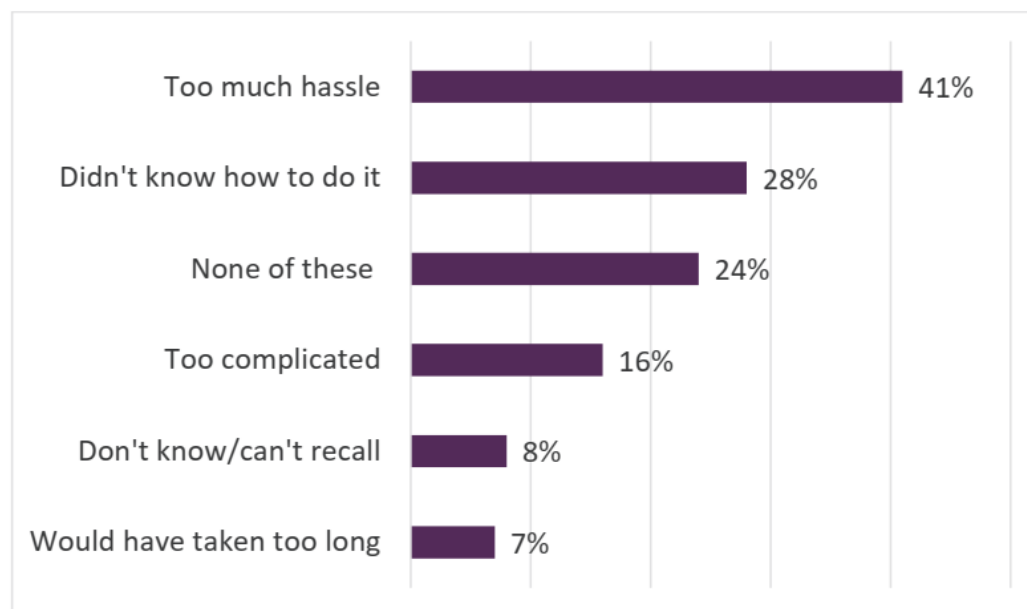
Option 1, that is, providers should be required to sell unlocked devices to customers.” In Three’s view, Option 2 (providers must either unlock devices or send all residential customers that buy a locked device the code to unlock it at specific points in time) does not go far enough and Option 1 is required to fully address the harm.

- **Three agrees with Ofcom that the current practice of device unlocking is causing consumer harm** and needs to be addressed. This issue clearly has a significant impact on consumers, as Ofcom’s assessment points to at paragraph of 8.58 of the Consultation, noting:

“We estimate that around 8.2 million people consider switching each year but do not do so, and that around 3 million pay-monthly customers are deterred from switching in part by a problem (or perceived problem) relating to device unlocking (in addition there will also be PAYG customers who experience problems with device unlocking). This figure is based on those who started to engage with the switching process; more customers may be deterred from even engaging with the process because of concerns about their device being locked (or the risk of it being locked).”

As Ofcom notes at paragraph 8.59 of the Consultation, Three’s You Gov survey results confirm that the “time, effort and difficulties encountered are factors deterring customers from unlocking their device and being able to use their handset with a new provider.” Figure 8.6 of the Consultation provides a helpful picture of the nature of issues consumers struggle with:

Figure 8.6 For those who had considered unlocking but decided not to, reason for deciding not to



Source: YouGov market research 2019²⁶⁶ IEH_Q7a. If you have considered unlocking more than one handset, please think about the LAST time you considered it. You previously said you have considered unlocking a

handset but have never unlocked any. Which, if any, of the following are your reasons for this? (Please select all that apply). Base: those who had considered unlocking a handset but had not done so (459).

- **In Three’s view, a complete prohibition on the sale of unlocked devices to customers should be implemented as soon as possible** for the following reasons:
 - **Implementing the removal of device locking should be a relatively simple matter for providers** – Three notes that at paragraph 8.104 of the Consultation Ofcom refers to direct implementation costs for some providers of needing to amend “*their contracts with device manufacturers*” and “*their internal policies along with associated staff training.*” Three agrees with Ofcom that such costs are likely to be small. In Three’s experience, device unlocking simply requires a request for a new configuration from the device manufacturer. Given that this would be a change for the operator there would likely need to be some testing on devices. In Three’s view this should not take longer than 12 weeks. Accompanying changes to device manufacturer contracts, internal policies and limited staff training should not in Three’s view, make this an onerous exercise for providers.
 - **As Ofcom rightly notes, a large part of the industry now sells unlocked devices** (see para. 8.79 of the Consultation).
 - **Three disagree that 12-months is needed for providers to sell any stock of locked devices (see paragraph 8.136 of the Consultation)** – Three typically has **[CONFIDENTIAL – BUSINESS SECRET]** weeks’ worth of device stock “on hand”. While Three acknowledge that this period could be slightly longer for larger providers, Three considers that this factor should not drive a significant delay to the implementation of this regulation.
 - **In Three’s view, the use of device locking to protect subsidies for PAYG devices should not be a barrier to introducing a device unlocking ban** – Three welcomes Ofcom’s view at paragraph 8.105 of the Consultation that the “*absolute amount of the subsidies are relatively small*” and “*may be offset by other changes to ensure offers remain attractive (e.g., lower call prices).*” Three also supports Ofcom’s assessment at paragraph 8.75 of the Consultation that:

“8.75 [...] PAYG device subsidies may not be entirely reliant on device locking, as they might partly rely on general customer inertia, and an assumption that few customers would be sophisticated enough to exploit such subsidies. The absolute amount of the subsidies is anyway relatively small and a corollary of lower device subsidies may be that there is increased competitive pressure on these providers to lower their airtime prices or make other changes to ensure their offers remain attractive.”
 - **In Three’s view, the possible increase in fraud and bad debt risk should not be a barrier to introducing a device unlocking ban** – In Three’s view, the benefits to consumers of introducing device unlocking far outweigh this risk. Three’s past experience of unlocking devices has revealed that (i) fraudsters can unlock the device without going to the network provider, (ii) operators maintain a list of devices that have been fraudulently acquired to prevent use on other networks; and (iii) a provider’s credit check process for contract customers should be the primary means of managing bad debt. Three therefore agrees with Ofcom’s following observations at paragraphs 8.67 - 8.70 of the Consultation that device locking is not essential for managing fraud and bad debt:

“8.67 However, mobile operators other than BT Mobile/EE and Vodafone manage fraud and bad debt without locking devices. This includes large operators such as O2 and Three which had previously sold locked devices and moved to selling unlocked devices, as well as the major mobile virtual network operators (MVNOs).

8.68 In addition to the credit check processes that can be used for any other product, for mobile devices there is a ‘blacklisting’ process, by which mobile providers in the UK keep a shared database of devices that are registered as lost or stolen. Three told us that in light of such blacklisting capabilities, its view was that locking devices to networks would not have any discernible impact in preventing fraud.

8.69 Another mobile operator O2 said that locking was of limited use in terms of preventing fraud. This was because fraudsters and thieves can find alternative ways to unlock devices without going through their provider’s official process. That it is possible to unlock some devices without going through the provider’s official process is consistent with some indicative survey evidence that has found a proportion of customers unlock devices in other ways than through their provider.

8.70 On balance, while we accept that locking mobile devices may help reduce fraud and bad debt, the fact that other providers manage fraud and bad debt without device locking suggests that device locking may not be essential to this.”

- **Three also agree with Ofcom’s comment at para. 8.106 of the Condoc that “*there are also likely to be to be some operational cost savings to providers from not having to deal with customers’ queries about unlocking, requests to unlock and complaints about the process.*”** In Three’s view, cost savings are likely with a ban on unlocking, for example, in terms of the provision of unlock codes post-sale.
- **On timing for implementing Option 1, Three disagrees with Ofcom’s assessment at paragraphs 8.135-8.136 of the Consultation that:**

“8.135 As explained above, providers would need to change their agreements with device manufacturers to make sure the devices they supply are now unlocked. They may also need to amend their internal policies with some associated staff training. We propose to allow providers 12 months from the date of our final statement to implement Option 1.

8.136 We have considered that providers may have an existing stock of locked devices and will continue to receive locked devices until they have changed their contractual arrangements. We believe that a 12-month implementation period should be sufficient for providers to change their arrangements with device manufactures and sell any stock of locked devices. To the extent that providers still have a stock of locked devices after the end of the implementation period, we understand that it is technically possible for providers to unlock these devices before selling them in order to comply with our rules.”

Considering Three's experience of implementing device unlocking in 2014 and current market knowledge, Three estimates that a device unlocking ban could be implemented, in a worst-case scenario, within a 6 month period, which would include time to allow providers to sell through old stock and carry out the necessary testing on new unlocked devices. Three estimates that the cost of testing a new software variant where the locking flag has been removed would be around two days of testing per handset type and a 6-month lead time for introducing unlocked devices is appropriate. Three understands that Ofcom's latest estimate for publishing a final statement to implement Option 1 is June 2020. In light of our above submissions, **Three asks that Ofcom revisit this finding as a matter of priority.** Three's experience has shown that implementation of Option 1 could be achieved far sooner.

Finally, if Ofcom is minded to allow providers a transitional period to introduce unlocked devices, **Three asks that Ofcom additionally considers introducing an interim requirement for providers to proactively contact their "free to go" customer base (who sit outside their minimum contract period) to provide them with a device unlocking code.** In Three's view, this requirement could be implemented in a short period (e.g., as part of routine communications with "free to go" customers) and helpfully mitigate (albeit to a limited extent) Ofcom's concerns before the benefits of full device unlocking come into effect. **Three would also recommend providers be asked to declare in their advertisements that handsets are being sold as locked.**

We would be happy to discuss Three's experience of unlocking devices further with Ofcom, should this be helpful.

Section 9: Disincentives to switch: non-coterminous linked contracts

Question 12: Do you agree that we should protect customers by issuing guidance on our proposed approach when considering the case for enforcement action against non-coterminous linked contracts?

Question 13: Do you agree with our proposed guidance in Annex 9 which sets out our proposed approach to assessing whether certain types of non-coterminous linked contracts are likely to act as a disincentive to switch?

Three's specific comments on Ofcom's non-coterminous linked contracts:

- As outlined in Three's response to Ofcom's Mobile handset Consultation of 22 July 2019, Three agrees that preventing "linked" split airtime and handset contracts of longer than 24-months is an effective consumer protection measure, ensuring that consumers are clear as to their contractual obligations and that they are not unexpectedly locked into commitments. Three has the following further comments on Ofcom's proposals in this area generally:
- Definition of bundle - Three notes that Ofcom defined when a "bundle" exists at paragraph 3.33 of the Consultation:

“Recital 283 sets out that a bundle exists in situations where the elements of the bundle are provided or sold by the same provider under the same or a closely related or linked contract. We propose to add the following definition of bundle in our GCs to reflect this: ‘Bundle’ means where public electronic communications services and other service(s) and/or terminal equipment are provided or sold by the same Communications Provider under the same or closely related or linked contracts.”

Article 107 EECC also sets out the provisions of the EECC that apply to the elements of a bundle of services or a bundle of services and terminal equipment (which comprise at least one internet access service or a publicly available communications service). This includes the provisions regarding contract summary information, transparency, contract duration and termination and switching.

Ofcom confirms this approach at footnote 23 of Ofcom’s Consultation on Digital comparison tools for telephone, broadband and pay-TV of 17 December 2019, noting:

“23 For the purposes of the EECC, a bundle will be found to exist where the different elements of it are provided or sold by the same provider under the same or closely related or linked contracts.”

Ofcom goes on to note at paragraph 6.88 of the Consultation that:

“[...] in the UK mobile market, there are two main types of mobile contracts that include a mobile device:

- The first is where a customer has a single contract for both the airtime and mobile device and pays a single monthly price (we refer to these types of contracts as “**bundled mobile contracts**”).*
- The second is where a customer takes a mobile airtime contract and a linked contract for a mobile device that is generally provided as a consumer credit loan (we refer to these as “**linked split mobile contracts**”). In these cases, the monthly cost to the customer is separated into a price for the airtime and a separate charge for the handset.”⁵*

For the avoidance of doubt, Three asks that Ofcom confirms in its final statement the fact that the EECC provisions applying to a “Bundle” (as defined at Article 107 EECC) do not apply to the “bundled mobile contracts” scenario which Ofcom describes at paragraph 6.88 of the Consultation. Based on Three’s recent discussions with Ofcom on this point and Three’s understanding of the EECC provisions, the EECC “bundle” requirements are not intended to apply to this category of services, so Three asks that Ofcom makes this clear in its final statement.

- Three disagrees with Ofcom’s delayed implementation timeframes for implementing a new requirement for 24-month limit on commitment periods for bundles:

⁵ These contracts can be linked by a requirement that where a customer terminates their airtime contract early, they have to pay off the remainder of their handset loan agreement as a lump sum.

- Three has significant concerns about Ofcom’s change of position on timing for implementing a 24-month limit on commitment periods for bundles. In Ofcom’s Mobile Handset Statement and Consultation of July 2019 Three notes Ofcom was quite clear in stating:
- Ofcom had clearly identified a consumer harm from split mobile linked contracts which needed to be addressed (by tackling existing practices and deterring providers from introducing similar measures):

“5.41 We are minded to make the proposed changes to the General Conditions as soon as possible. We are required to give effect to the EECC and secure its objectives by 21 December 2020 (and, until then, not to do anything that would undermine their achievement). Given the harm we have identified, we see no reason to deprive UK consumers (and other relevant customers) of the protections afforded by those provisions until then, especially as the extent of the harm is liable to increase the more prevalent linked split contracts become. We think it is important to stop the spread of that harm, as well as giving providers currently developing their split contract a clear signal about how they should be structuring these contracts before they launch them.”

- Ofcom planned to take quick action on “linked mobile split contracts” causing concern:

1.36 For split contracts, the EECC’s provisions on the duration of bundled contracts provide a solution that will address the majority of our concerns. They will prevent providers from linking split contracts where the handset contract is over 24 months. Customers will effectively not be tied to their airtime provider for excessive periods.

1.37 Because the use of split contracts is growing, and more providers are planning to offer them, we propose that these provisions should be implemented as soon as possible to protect people. We are therefore consulting in this document on an amendment to our rules to introduce the 24-month limit. Stakeholders have until 16 September 2019 to comment on this amended rule.

1.38 We are proposing that this rule could be implemented within three months of our final statement, which we plan to publish before the end of the year.”

- In contrast, Ofcom’s recent approach in the Consultation contains a significant delay on remedial measures to address the harm Ofcom identified back in July 2019:

“We are no longer proposing early implementation of the 24-month limit for mobile handset bundles

6.27 In our July mobile handsets document, we consulted on a proposal to implement the 24-month limit on commitment periods to linked split mobile contracts ahead of the December 2020 EECC deadline. We proposed an amendment to the existing GC C1.4 to reflect this and proposed an implementation period of three months from the date of our final statement. Our consultation closed in September and we received a number of responses, some of which raised specific concerns about the proposed implementation timings.

6.28 Whilst uSwitch, Vodafone and Three agreed with our proposed implementation timing, some providers disagreed and said implementation would involve system changes which would take longer than three months. In particular, Tesco said implementation would be a complicated process, involving dependency on third parties providing its customer services, billing and financing, and it would be unable to make the necessary changes to its systems without significant risk to its business until the end of Q4 2020.

6.29 A number of business contract providers also said that they would need to make significant changes, in particular because the 24-month minimum length requirement had not previously applied to this type of contracts. Verastar and Virgin Media said they would need at least six months to implement the changes to business contracts because the changes would involve major disruption, including changes to websites, point of sale material, contracts, training materials as well as system changes. BT, Virgin Media and Verizon also said that a piecemeal approach to the changes required by the EECC was unhelpful and created additional complexity for providers.

6.30 Having considered these responses, we are no longer proposing early implementation of the 24-month rule for bundles of mobile services (including linked split contracts and relevant business contracts). The 24-month limit on commitment periods that applies to all relevant services and contracts will take effect from December 2020. We recognise that early implementation for bundles of mobile services could have led to additional costs for providers, in particular because of the complexity of implementing early for mobile services alone, as well as the extension to some business customers which would have led to some impact on providers of these contracts.”

- This significant delay in Ofcom’s 24-month limit on mobile handset bundles provides a competitive advantage to other mobile providers. Providers’ continuing existing practices Ofcom has deemed harmful continue to persist despite Ofcom’s powers to act under existing GCs to prevent practices which disincentive switching. Three understands Ofcom is choosing to use the EECC as the most effective and quickest way to bring about change on this point. However, this issue persists in the market and consumers are being harmed. Three asks that Ofcom revisit its findings on timing implementation on this topic and bring forward the deadline.
- Upon the publication of Ofcom’s Mobile Handset Statement and Consultation of July 2019, Three **[CONFIDENTIAL – BUSINESS SECRET]**. From this July 2019 Statement and Consultation, Three understood that Ofcom viewed linked split mobile contracts” with durations longer than 24 months as an immediate risk to consumers and had decided to prevent them from February/March 2020. **Three would therefore ask that Ofcom provide an explanation as to what has changed from a consumer risk perspective, to enable a delay to such a ban, to December 2020.** Three is concerned that further delayed measures will prolong the status quo and gives providers offering “linked split mobile contracts” an extended opportunity to get customers to sign up to 36-month contracts.

- **Three considers that Ofcom’s guidance should also include more practical, worked examples** - on Ofcom’s proposals on non-co-terminous linked contracts, Three welcomes Ofcom’s guidance but asks that Ofcom goes further and provides more detailed guidance, with worked examples, on what might constitute good and bad practice in this area. In Three’s view, the guidance could provide more clarity on exactly how Ofcom envisages these rules will work in practice.

Section 10: Emergency video relay

Question 14: Do you agree with our proposal to mandate emergency video relay for emergency communications to be accessed by end-users who use BSL?

Question 15: Do you agree with our proposal that the obligation to provide emergency video relay free to end-users should be imposed on regulated firms that provide internet access services or number-based interpersonal communications services?

Question 16: Do you have any comments on our proposed approval criteria for emergency video relay services, or the proposed approval process?

Section 12: Availability of services and access to emergency services

Question 19: Do you agree with our proposed changes for implementing the requirements in Article 108 and Article 109 to reflect the differences between these EECC provisions and their predecessors in the Universal Service Directive? Please provide evidence to support your response.

Three has the following specific comments on Ofcom’s Emergency Video Relay and Availability of Services proposals:

Nature of Emergency Video Relay requirement in C5.11-12 and Ofcom’s expectations on availability of related data services (GCB A3)

- Three understands that from a technical perspective Ofcom is proposing an OTT service delivered via an Internet data connection (Fixed or Mobile Broadband). Customers who, due to their disabilities, communicate in BSL, will be able to access the service via a smartphone app or via a website.
- Given the nature of this and Ofcom’s expectations on offering a “24/7” availability of services of BSL deaf users, Three is concerned that it is not always possible to guarantee this service. On this, Three notes that Ofcom’s proposed GC asks that the emergency video relay “*provides facilities for access to Emergency Organisations and is available twenty-four hours a day, seven days a week*” and that providers “*subject to Condition C3.11,⁶ ensure that the Emergency Video Relay Service is available for lawful use by End-*

⁶ As a minor point, Three queries whether this reference in the Consultation proposed GC is correct given that it appears to relate to debt collection and disconnection (under Ofcom’s proposed new GCs)?

Users at all times.” Three understands that Ofcom expects that this service would benefit customers in a similar way to the use of video relay for deaf BSL users to access NHS 111 services (see paragraph A10.24 of the Consultation), again requiring a data connection (over fixed internet, Wi-Fi or mobile data).

However, in Three’s view providing a 24/7 video relay service will be challenging for providers. Providing a data to service to customers in an uninterrupted way would be a significant challenge. This is because providing continuity of a data service is extremely challenging and complex given the technical environment involving multiple service providers and multiple different third-party applications. Three notes that certain data services (e.g., wi-fi) will also be outside Three’s control. In contrast, the provision of voice call services is more straightforward, with a point to point network voice service environment. One further challenge of any additional higher “uninterrupted service” ask would be making sure the requirement was consistent with EU net neutrality rules, particularly given the current restrictions imposed on a provider’s ability to prioritise data traffic.

On Ofcom’s expectations for availability of services, including access to emergency services more generally, Three welcomes Ofcom’s clarification at GC A3.2 that:

“Regulated Providers must take all necessary measures to ensure:

*a) the **fullest possible availability** of Voice Communications Services and Internet Access Services provided over Public Electronic Communications Networks in the event of catastrophic network breakdown or in cases of force majeure; and*

*b) **uninterrupted access** to Emergency Organizations and uninterrupted transmission of public warnings as part of any Voice Communications Services offered.”*

In Three’s view, this approach is consistent with the challenges around data, as it would be a major, costly and very complex exercise to fulfil an obligation to achieve “*uninterrupted access*” to 24/7 emergency video relay services. It is, as Ofcom proposes, more appropriate that this standard is not asked for in relation to providing access to emergency services over data.

In light of the above, **Three asks that Ofcom amend the proposed GCs C5.11 and C5.12 to clarify their expectations on availability of data services to be offered to underpin the provision of emergency video relay. It would be also be helpful if Ofcom could confirm this in their guidance on security requirements in sections 105A to D of the Communications Act 2003.**

- Ofcom’s proposed “emergency video relay service” definition also asks that this service “insofar as reasonably practicable, allows for communication between end-users of the service at speeds equivalent to voice communications.” Three would ask that Ofcom make clearer what its proposed requirement is on this. Is it, for example, a call set-up time requirement for the video relay service provider? Given that there are no current minimum guaranteed speed requirements for mobile operators in either the EECC or under EU Open Internet Regulation rules, Three presumes that this is not a mobile network level requirement.

Emergency Video Relay Services – Funding – Requirement for service to be free to the user

- At paragraph 10.49 of the Consultation Ofcom notes that “*video relay for emergency communications will be free to the End-user and will be paid for by regulated firms that provide internet access services or number based interpersonal communications services.*”
- Three notes that in practice this will require mobile providers to zero rate the data traffic associated to the Emergency Video Calls on all of our products (Home, Mobile, MBB). We understand that this would involve Three and other providers having to contract with one or more approved Service Providers and bear the cost of the service. Given the burden of the cost the UK mobile industry will have to bear on this, Three asks that Ofcom ensure when implementing this proposal that the wholesale rates concerned are regulated to ensure they are both fair and non-discriminatory. Three also asks that Ofcom carry out a similar review of wholesale rates for accessibility services, particularly where they relate to access to emergency services such as text relay services, where in Three’s view such rates should also be monitored by Ofcom to ensure they are fair and non-discriminatory.
- To give Ofcom a picture of how rates are working in practice Three notes that wholesale rates for text relay and access to 999 services are not regulated and run the risk of BT potentially increasing rates. By way of example, BT recently unilaterally increased its mobile call handling charges for 999 calls from [CONFIDENTIAL – BUSINESS SECRET] pence per call to [CONFIDENTIAL – BUSINESS SECRET] pence per call on 1 June 2018 (25.8% increase) and then again 1 Aug 2019 to [CONFIDENTIAL – BUSINESS SECRET] pence per call (a further 6% increase). In relation to the cost of text relay services, at the current time, voice calls cost £ [CONFIDENTIAL – BUSINESS SECRET] pence per minute and we are charged £ [CONFIDENTIAL – BUSINESS SECRET] per SMS (Three understand that SMS and voice are treated the same from a charging perspective as the eSMSs are converted to a call). Text Relay voice calls currently cost Three approx. £ [CONFIDENTIAL – BUSINESS SECRET] at a wholesale level per annum.

Emergency video relay services - Battery back-up requirements

- Three also has concerns with Ofcom’s requirements for emergency video relay in light of paragraph 10.11 of the Consultation, which refers to an existing 999 calls requirement to “*require resilience solutions such as battery backup to ensure that emergency calls can be made on IP networks in power cuts.*” In Three’s view, the cost of the battery could be a significant portion of the “data” device price. Three therefore asks that the requirement to provide resiliency in the form of battery back-up for “data” devices which might be used to access emergency video relay services be removed as a disproportionate measure when compared to the likely consumer benefit this offers.

Emergency Video Relay Services – further requests for clarification

- In Three’s view it would be helpful if Ofcom could also clarify how Ofcom envisage this service working in practice for customers – e.g., will customers have to register for the service by using an app?

Availability of services - Public warning proposals

- Three notes that Ofcom’s proposed GC A3.2 asks that:

“Regulated Providers must take all necessary measures to ensure:

*b) uninterrupted access to Emergency Organizations and **uninterrupted transmission of public warnings as part of any Voice Communications Services offered.**”*

- Three is concerned that it is not currently able to provide any meaningful comments on the “public warnings” aspects of this proposal given that Three understands that the suitability of such a public warning system for the UK is still under consideration (as mentioned at paragraph 12.9 of the Consultation). Three is only able to comment on this if it has details of Ofcom’s proposals and asks that industry be provided with a further right to comment once more detail is provided by government.

Availability of services - Catastrophic Network Breakdown and Force majeure proposals, including definition of “Internet Access Services”

- Three notes that Ofcom’s proposed GC A3.2 asks that:

“Regulated Providers must take all necessary measures to ensure:

a) the fullest possible availability of Voice Communications Services and Internet Access Services provided over Public Electronic Communications Networks in the event of catastrophic network breakdown or in cases of force majeure; “

- Three notes that this extension of GC A3.2 to include all Internet Access Service providers will bring some providers into scope. Ofcom defines “Internet Access Services” as “a service made available to the public which provides access to the internet, irrespective of the network technology and terminal equipment used.” Three’s comment on this is that, as highlighted above, the provision of data services takes place in a complex technical environment. In this context, it **would be helpful if Ofcom could provide further guidance or clarification on how its definition of “Internet Access Services” is intended to work in practice to ensure operators are clear on Ofcom’s expectations on the division of responsibilities between for example a mobile network provider and OTT player.** Three would be happy to discuss this further with Ofcom, if it would be helpful.

Availability of services and access to emergency services - Provision of handset derived Caller Location Information (new GC A3.6(d))

- Finally, Three notes that proposed GC A3.6(d) asks that

“In order to make accurate and reliable Caller Location Information available to the Emergency Organisations handling the calls to “112” and “999” a Regulated Provider must comply with the following requirements: [...]

(d) in all circumstances where available, a Regulated Provider **must provide handset-derived Caller Location Information,**”

Ofcom defines “Caller Location Information” as “any data or information processed in an Electronic Communications Network indicating the geographic position of the terminal equipment of a person initiating a call.”

- At the current time there are limitations on what it might be possible for providers to technically offer on this. One helpful point of clarification Three would ask on this is what does Ofcom mean by “Location” in this context – if Ofcom is asking for longitude and latitude information? This is an important point as our technical team have advised that while it may be possible to provide [CONFIDENTIAL – BUSINESS SECRET] information for handset, [CONFIDENTIAL – BUSINESS SECRET] for providing information on handsets is many years away. Three also notes that what is possible on handsets will also depend on device manufacturer. If such measures are to be captured, Three notes that providers would also need to develop capability on how to record and monitor the data involved, which would of course need to be accurate given its intended use for facilitating access to emergency organisations. We would be happy to discuss this further with Ofcom, should this be helpful.
- As a general comment, Three would also be happy to join any further industry-level discussions with Ofcom on proposals for implementing these requirements, given that in Three’s view there are a number of remaining details which might be best worked out with industry’s assistance, given the technology complexities involved. Three also notes that further time may be needed to achieve this, which Ofcom should investigate.

Section 11: Communications in accessible formats for disabled customers

Question 17: Do you agree with our proposal to a) extend the current requirement to cover the other specified communications i.e. any communication (except marketing) that relates to a customer’s communication service, and b) extend the GC so that any customer who cannot access communications due to their disability should also benefit from accessible formats? When answering please provide evidence of any benefits or costs.

Question 18: Do you agree that implementation by December 2020 is reasonable?

- Three notes that these requirements impose an additional burden on mobile providers and ask that Ofcom take a proportionate approach on implementing and enforcement in this area.