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Three's response to Ofcom's mobile handset consultation

1. Please see below a response by Hutchison 3G UK Limited ("Three") to Ofcom's consultation on Helping consumers to get better deals in communications markets: mobile handsets, published on 22 July 2019 (the "consultation").
2. This is a non-confidential version of Three's response. Confidential information has been removed and replaced with [REDACTED].

Introduction and summary of Three's response to Ofcom's consultation on mobile handsets

3. Three welcomes Ofcom's proposed measures to make the mobile handset market work better for consumers. As the market challenger, Three has a track record of campaigning for positive changes to the mobile market, which is why we have engaged closely with Ofcom over the years on many consumer initiatives.
4. As the mobile market has evolved, and handsets are becoming ever more expensive, it is crucial that providers can provide solutions to make handsets accessible and affordable for consumers. Those solutions must be fair for consumers, whilst being financially viable for providers.
5. Therefore, Three supports Ofcom's proposals to ensure that consumers are not locked into mobile bundles for longer than they need to be and that providers do not structure their offerings in a way that inhibits or disincentivises switching.
6. In particular:
 - Three agrees with the proposed implementation timeframes and considers that the proposed measures should apply to all relevant arrangements in force at the time of implementation.
 - 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 would be grateful for confirmation that Ofcom takes no issue with handsets provided under an FCA-regulated consumer credit arrangement to customers who simultaneously take out, under separate agreement, certain airtime contracts when there are no interdependencies during the life of either contract.
- Three would also welcome clarification as to Ofcom's position on non-coterminous contracts, specifically the theory of harm that underpins such arrangements.

Implementation timeframes

7. Three believes that the proposed changes to the General Conditions should be made as soon as possible in order to extend these protections to UK consumers without unnecessary delay. The implementation period of three months, as proposed by Ofcom, is sufficient in our view.
8. Three notes that the proposed General Conditions would apply to contracts of a relatively long duration, and therefore, our view is that, once implemented, these General Conditions should apply immediately to all contracts in force as at the date of implementation. Otherwise, a consumer who has entered into an arrangement prior to implementation of the revised General Condition would continue to suffer the harm identified by Ofcom for a substantial amount of time (potentially almost two years). This would be contrary to achieving, in a timely manner, Ofcom's aims to ensure a competitive market and that customers are not disincentivised from switching.
9. We note that, as pointed out by Ofcom at paragraphs 3.20 and 5.11, O2, Sky Mobile and Tesco Mobile are currently offering "linked split" contracts which contain terms requiring that if the consumer ends their airtime contract at any time, they must also pay off the remaining balance under their handset agreement as a lump-sum. We also note that in each of these cases the handset cost has been inflated beyond the RRP.
10. Ofcom has noted, at paragraphs 5.14 to 5.16, the substantial sums that customers of O2 and Sky, for example, would be required to pay with respect to their handset agreements if they were to terminate their linked airtime contracts. Ofcom has noted that this would likely deter switching and effectively tie the customer to the provider as an airtime customer for longer than the 24-month period permitted by GC C1.4 (if the handset agreement is for longer than 24 months). This would circumvent that regulatory provision and undermine the purpose – facilitating switching – for which it exists. In Three's view, more generally, this could also be considered a disincentive to switching providers, in breach of GC C1.3.

Linked split contracts

11. Three is supportive of Ofcom's proposal preventing contracts for electronic communications services, such as airtime (which in accordance with the existing rules under GC C1.4 cannot stipulate a fixed commitment period of longer than 24 months) and contracts for the provision of handsets of a duration of longer than 24 months from being "linked". We think this is an effective approach from a consumer perspective, in order to ensure that consumers are clear on the extent of their obligations with respect to all elements of the contracts they enter into, at the outset.
12. We have considered what would constitute a "link" for the purposes of this prohibition and recognise that Ofcom proposes to define a "bundle" in line with recital 283 of the EECC, which states that *"a bundle should be considered to exist 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"*.
13. We note the comments made at paragraph 5.20 of the consultation, emphasising:

"where the termination of the airtime contract would have a financial or other impact on the handset agreement, such as the loss of a discount, or an effect on the price of the devices, changes to the terms and conditions, or changes to the way the device may be used".
14. We note this statement is qualified by footnote 102:

"This paragraph does not, however, seek to define linked or closely related contracts in an exhaustive way. There may also, for example, be other kinds of close relationships between services that mean they fall within the EECC's definition of a bundle in recital 283 and should be treated in a similar way".
15. We also note the reference at paragraph 5.21 to *"financially linked or interdependent contracts"* and having an *"adverse effect"* on such a contract *"that could otherwise continue unaffected"*, and at paragraph 5.38 that the concept is not engaged *"where the terms of the airtime and handset agreements are wholly independent of one another"*.
16. Taking these references into account, Three's understanding is that for contracts to be linked, they must have some effect on each other during their respective lifetimes, such that if the customer were to engage a term with respect to one contract, it would in turn engage a term in the other contract. We see the most obvious example being a mutual termination clause, such that if the customer terminates one contract, the other is also automatically terminated.
17. Three has therefore considered how this might work in practice so as to ensure compliance with GC C1.4, as amended by the proposals set out in the consultation.
18. Firstly, we note that in principle, a longer-than-24 month handset financing agreement remains permissible under Article 107 EECC, provided that it is not in

a bundle (i.e. same contract, closely related contract, or linked contract) with “*an internet access service or a publicly available number-based interpersonal communications service*”.

19. Given Ofcom’s current concerns regarding the handset financing propositions currently available in the market (as referred to above), we have considered how a proposition of this sort might be structured in order to guarantee consumer protection as well as its commercial viability.
20. In light of the consultation proposals, a provider could offer linked airtime and handset contracts, as long as each contract did not exceed 24 months. Were a provider to offer a handset financing contract of a duration of longer than 24 months, it must not be linked to an airtime contract, so as to form a bundle, and therefore, there must be no relational effect between the contracts once they had been entered into and the customer has committed to a term.
21. Therefore, if a provider is offering airtime and handset financing to its customers where the handset financing agreement is longer than 24 months, those customers must be able to leave the airtime contract early, without any adverse effect with respect to the handset financing agreement. The customer must be able to get what they originally intended under the handset financing arrangement.
22. In considering these principles against the commercial viability of our own handset financing propositions, we must also take into account our customers’ expectations as a mobile network operator. Three is primarily a provider of electronic communications services, like airtime, rather than a retailer of standalone hardware. Accordingly, our customers expect us to provide “one-stop shop” connectivity solutions, encompassing both the provision of airtime and handsets.
23. With this focus in mind, our target customer base for handset financing solutions are those customers who also take airtime. We do not see Ofcom’s proposals as limiting our ability to choose which customers we would offer handset financing to – for example, offering a handset financing loan to a customer who also takes out a particular airtime contract. Indeed, we note that financing loans are subject to other FCA eligibility rules, such as affordability requirements.
24. It would be helpful for Ofcom to confirm that there would be no impediment to Three’s ability to decide who it can offer handset loans to. If the airtime and handset financing would be provided via two completely separate contracts, that have no effect on each other during the term of each contract, it is difficult to see why there should be any restriction on Three, in this regard. We recognise Ofcom’s concerns around unfairly locking customers into contractual relationships, indeed we have previously raised this and alerted Ofcom to these harmful practices. So once entered into and committed to, the customer would be free to terminate the airtime contract (subject to any early termination fee relating only to the airtime contract), without any effect on the handset financing loan.

25. Three notes that when a customer does purchase a handset loan and airtime together, this would of course be subject to a statutory cooling off period under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which gives customers 14 days in which to cancel the contract once entered into. In order to preserve the commercial viability of our handset offering and be able to offer a [X] financing loan to customers, Three would ask Ofcom to ensure that the statutory cooling off period does not provide a loophole to allow customers who would not otherwise be eligible to take out a financing loan. In Three's view the question of whether a customer is "locked in" to a contract should only be considered at the end of this statutory cooling off period.

Are non-coterminous contracts unlawful in and of themselves?

26. Three would welcome clarification on how separate non-coterminous contracts that consumers enter into with providers are impacted by Ofcom's proposals. In particular we would like to understand whether Ofcom considers that non-coterminous contract in and of themselves should be prohibited either in the context of GC1.3 (which prohibits any conditions or procedures which disincentivise an end-user from switching providers at the end of their minimum contractual period), or in the context of GC1.4, as amended pursuant to the proposals set out in the consultation.

27. Three notes that the consultation appears to adopt an inconsistent approach as to whether there is consumer harm arising from non-coterminous contracts. In places, Ofcom appears to take a relaxed approach towards a situation where an airtime contract has ended, but a handset agreement continues. For instance, paragraph 5.16 states:

"The customer should, of course, pay for their handset in full. However, they need not remain an airtime customer of their provider in order to be able to do that over the fixed term of their handset agreement. They could switch airtime provider, potentially to a deal that better suits their needs, whilst continuing to pay off their handset with their existing provider."

28. Similarly, 5.38 states that the consultation proposals "mean providers could continue to use split contracts involving handset agreements longer than 24-months where they fall outside the definition of a 'Bundle.' ... This means providers could continue to sell handsets under separate agreements for longer than 24 months but, if the customer wants to switch airtime provider, they could not be subject to a requirement to pay-off the remainder of their handset liability in one go."

29. However, paragraph 5.39 states:

"We also recognise that our proposed amended condition would mean providers could continue to link their split contracts for up to 24 months. We remain concerned that the linked terms in these contracts could deter switching, particularly where the contract end dates are not aligned (for example, where the minimum contract period for the airtime is 12 months, and the handset agreement is 24 months long – we refer to these as non-coterminous contracts)."

30. In considering these statements, Three has identified two potential theories of harm underpinning Ofcom's concerns.
31. The first regards a situation where a consumer is free to switch provider, but because of an ongoing handset agreement the customer is in effect able to switch only to SIM-only, rather than to an entire bundle.
32. We note Recital 283 of the EEC Directive which is concerned that "*divergent rules on contract termination and switching or on contractual commitments regarding the acquisition of terminal equipment*" means that "*consumers are effectively hampered in their rights under this Directive to switch to competitive offers for the entire bundle or parts of it*" (emphasis added).
33. However, we note that the remedy imposed by the EEC Directive for this concern is to ensure that a commitment period longer than 24 months is not mandated. However, if this were the harm underpinning Ofcom's concern, we are not clear why paragraph 5.39 refers to it in the context of linked contracts, whereas the concern arises equally in the permissible situation of unlinked contracts.
34. The second potential theory of harm we have identified concerns a situation where a consumer believes they are entering into an airtime contract of a certain length (e.g. 30 days, or 12 months), but in fact the link with the handset agreement means that the tie to the provider lasts for a longer period (up to 24 months). The concern would therefore be akin to a transparency requirement / ensuring that the consumer was not misled.
35. We consider this to be easily remedied by ensuring that the length of the "link" between an airtime and handset agreement is the same as the length of the airtime contract (or other equally as effective transparency measures). We would welcome Ofcom's clarification as to its position.