

Schedule

General Condition 23 on Sales and Marketing of Mobile Telephony Services

23. SALES AND MARKETING OF MOBILE TELEPHONY SERVICES

Scope

- 23.1 A Mobile Service Provider must comply with this General Condition with respect to a Customer of its Mobile Telephony Services, except that clauses 23.4(b)(iv) and 23.5 – 23.10 do not apply to Prepaid Mobile Telephony Services and SIM Only Contracts.

Mis-selling prohibition

- 23.2 When selling or marketing Mobile Telephony Services, the Mobile Service Provider must not:
- (a) engage in dishonest, misleading or deceptive conduct;
 - (b) engage in aggressive conduct; or
 - (c) contact the Customer in an inappropriate manner.

Publication of relevant obligations

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

Obligation with regards to Mobile Service Retailers

- 23.4 Where the Mobile Service Provider contracts with or appoints a Mobile Service Retailer directly in order to sell or market the Mobile Service Provider's Mobile Telephony Services it must ensure, and where a third party acting on behalf of the Mobile Service Provider contracts with or appoints a Mobile Service Retailer in order to sell or market the Mobile Service Provider's Mobile Telephony Services the Mobile Service Provider must use reasonable endeavours to ensure, that:
- (a) the Mobile Service Retailer is aware of this General Condition;
 - (b) provisions are in place which require the Mobile Service Retailer:
 - (i) not to engage in dishonest, misleading or deceptive conduct;

- (ii) not to engage in aggressive conduct;
 - (iii) not to contact a Customer in an inappropriate manner; and
 - (iv) to create and keep records about the sale of the Mobile Service Provider's Mobile Telephony Services for a period of not less than six months and, where applicable, about a related sales incentive as referred to in General Condition 23.10, for a period of not less than ninety days after the date by which this sales incentive has to be fully redeemed, but not less than six months.
- (c) the Mobile Service Provider monitors the Mobile Service Retailer's compliance with the provisions referred to in General Condition 23.4 (b); and
- (d) non-compliance by the Mobile Service Retailer with the provisions referred to in General Condition 23.4 (b) is appropriately sanctioned by the Mobile Service Provider.

Mobile Service – Information at Point of Sale

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

- (a) is authorised to do so;
- (b) intends to enter into this contract; and
- (c) is provided with the information set out below in a clear, comprehensible and accurate manner in paper or another Durable Medium which is available or accessible to the Customer or, where the Customer enters into or amends the contract during a sales call, by telephone:
 - (i) the identity of the legal entity the Customer is contracting with; its address and telephone, fax and/or e-mail contact details;
 - (ii) a description of the Mobile Telephony Service; the key charges (including minimum contract charges and any early termination charges, if applicable); payment terms; the existence of any termination right, including termination procedures; the likely date the Mobile Telephony Service will be provided, in case the provision of the Mobile Telephony Service is not immediate; and any minimum period of contract.

Where the Customer enters into a contract during a sales call, in addition to the oral provision of this information the Mobile Service Provider must use reasonable endeavours to ensure that this information is sent to the Customer in good time following the call in paper or another Durable Medium.

Records retention

23.6 Where the Mobile Service Provider acts as a Mobile Service Retailer, it must create and keep records about the sale of its Mobile Telephony Services for a period of not less than six months and, where applicable, about a related sales incentive as referred to in General Condition 23.10, for a period of not less than ninety days after

the date by which this sales incentive has to be fully redeemed, but not less than six months. Such records must include the date of the sale, the means through which the contract was entered into and the place where the contract was entered into, where applicable.

Training

- 23.7 The Mobile Service Provider must use reasonable endeavours to ensure that processes are in place which assure that a Mobile Service Retailer is appropriately trained to comply with this General Condition.

Due diligence

- 23.8 Where the Mobile Service Provider contracts with or appoints a Mobile Service Retailer directly in order to sell or market the Mobile Service Provider's Mobile Telephony Services it must ensure that, and where a third party acting on behalf of the Mobile Service Provider contracts with or appoints a Mobile Service Retailer in order to sell or market the Mobile Service Provider's Mobile Telephony Services the Mobile Service Provider must use reasonable endeavours to ensure that, it, or a person acting on its behalf, carries out and retains a record of the following minimum procedures with regards to any Mobile Service Retailer, contracted or appointed to sell or market the Mobile Service Provider's Mobile Telephony Services:

- (a) a credit reference search and check that the Mobile Service Retailer does not have a history of failing to meet its financial undertakings to creditors;
- (b) a check that any director of a Mobile Service Retailer concerned has not been a director of a third party that has filed for bankruptcy or gone into administration; and
- (c) appropriate checks to ensure that any due diligence information referred to in this General Condition 23.8 remains up-to-date and relevant.

These procedures must be carried out before contracting with or appointing the Mobile Service Retailer.

Use of information for the purpose of monitoring compliance

- 23.9 Where a Mobile Service Provider acquires information from a Mobile Service Retailer for the purpose of monitoring compliance with this General Condition, the Mobile Service Provider shall use that information solely for the purpose for which it was supplied and keep the information confidential. For the avoidance of doubt, the Mobile Service Provider shall not pass the information on to any other party (including its subsidiaries or partners) for whom such information could provide a competitive advantage.

Sales Incentives – Information at Point of Sale

- 23.10 The Mobile Service Provider must use reasonable endeavours to ensure that where a Mobile Service Retailer offers to a Customer a sales incentive, from which the Customer does not benefit immediately and which the Customer is entitled to receive after entering into the contract for the Mobile Telephony Service, the terms and conditions of such an offer are not unduly restrictive and that a Customer is provided with the following information in a clear, comprehensible and accurate

manner in paper or another Durable Medium, or, where the sales incentive offer is made during a sales call, by telephone:

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

Where the sales incentive offer is made during a sales call, in addition to the oral provision of this information, the Mobile Service Provider must use reasonable endeavours to ensure that this information is sent to the Customer in good time following the call in paper or another Durable Medium.

Definitions

23.11 For the purpose of this Condition:

- (a) "Customer" means Domestic and Small Business Customer as defined in section 52 (6) of the Act;
- (b) "Durable Medium" means a medium on which a Customer can store and retrieve unaltered information for a period of time adequate for the purposes of the information;
- (c) "Mobile Service" means a service consisting in the conveyance of signals, by means of a mobile Public Electronic Communications Network, through the agency of Wireless Telegraphy to or from Apparatus designed or adapted to be capable of being used while in motion;
- (d) "Mobile Telephony Service" means a Publicly Available Telephone Service that is a Mobile Service (and includes any SMS service sold as part of the package);
- (e) "Prepaid Mobile Telephony Service" means a Mobile Telephony Service for which the Customer pays charges in advance of the service being provided;
- (f) "Mobile Service Provider" means the provider of a Mobile Telephony Service;
- (g) "Mobile Service Retailer" means any person who sells or markets a Mobile Telephony Service directly to a Domestic or Small Business Customer; and
- (h) "SIM Only Contract" means a contract for a Mobile Telephony Service where the Customer only obtains a Subscriber Identity Module ('SIM') card from the Mobile Service Provider and the notice period for cancelling this contract does not exceed one calendar month.

Annex 7

Guidelines to General Condition 23

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

Introduction

- A23.1 General Condition 23 ('GC23') sets out a number of provisions in respect of the sales and marketing of Mobile Telephony Services with which the relevant Communications Provider providing a Mobile Service ('Mobile Service Provider' or 'MSP') must comply.
- A23.2 GC23 comprises provisions regarding the MSPs' own sales and marketing behaviour and requires MSPs to put in place certain minimum standard provisions in respect of the sales and marketing behaviour of their retailers.

Purpose of these guidelines

- A23.3 These Guidelines are produced by Ofcom to help Communications Providers and customers understand their rights and obligations under the General Condition and are intended to assist Communication Providers in achieving compliance.
- A23.4 The Guidelines set out some summaries, examples and guidance on the approach Ofcom is likely to take when enforcing GC 23. In particular, these guidelines:
- seek to provide clarity on the meaning of some of the terms and concepts used in GC23 so as to inform Mobile Service Providers and stakeholders of Ofcom's general view on them; and
 - describe factors that Ofcom might consider when applying the relevant requirements or obligations set out in GC23.
- A23.5 For the avoidance of doubt, where the Guidelines set out examples of the way in which Ofcom considers a Communications Provider may comply with a General Condition Ofcom will at all times determine compliance on the basis of the individual circumstances of the case whilst having regard to these Guidelines. If in any given situation we decide to depart from the principles set out in these Guidelines we will normally set out our reasons for doing so.
- A23.6 These Guidelines are not in any way incorporated into the General Conditions set by Ofcom. The obligations which apply to a Communications Provider will be determined solely according to the General Conditions. However, when applying General Condition 23, as stated in A23.5 above, Ofcom will have regard to these Guidelines and will normally set out its reasons when departing from the principles set out therein. Ofcom advises Communications Providers to seek independent legal advice if they are unsure of their obligations under the General Conditions.

Scope of General Condition 23

A23.7 GC 23.1 specifies that this General Condition is applicable to all Communications Providers which offer a Mobile Telephony Service to Domestic and Small Business Customers, with the exception of a number of provisions in respect of Prepaid Mobile Telephony Services and SIM Only Contracts. For the avoidance of doubt, mobile broadband and WiFi services are not captured by GC 23.

Mis-selling prohibition

A23.8 GC 23.2 sets out prohibitions on the MSP regarding unacceptable types of sales and marketing behaviour (generally described as 'mis-selling'). Such prohibited mis-selling behaviour includes, but is not limited to:

- the omission of relevant or the provision of false and/or misleading information (for example, about tariffs, potential savings or network coverage); such misleading conduct includes deceiving a customer or providing the customer with misinformation which is likely to affect a customer's purchase decision;
- aggressive conduct, such as harassment, coercion, or applying unacceptable pressure on a customer to enter into a contract, such as threatening or intimidating behaviour or refusal to leave (in case of doorstep selling); and
- 'slamming', an extreme form of mis-selling, where mobile customers can find themselves, without their knowledge and/or consent, with a contract from another or same MSP. A specific type of mobile slamming occurs when mobile customers find themselves without their knowledge and/or consent with a contract from another MSP, while their existing contract can still be valid, or with an additional contract with their current MSP.

A23.9 Below we have included aspects of approaching customers that Ofcom is likely to consider to be inappropriate:

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

Publication of relevant obligations

A23.10 GC 23.3 sets out that the MSP has to make a comprehensive summary of its obligations under GC23 available on its website or, where there is no such website, in its head offices. Upon reasonable request, a copy of the GC should also be provided to customers, free of charge. The MSP could do this by providing the customer with a paper copy of the GC in their shops, by sending a hard or soft copy to the customer, or by making it available for download or printing on their website.

A23.11 In relation to the obligation to publish this information on a MSP's website, Ofcom considers 'an easily accessible and reasonably prominent manner' to mean providing a clear reference to the obligations under GC23 on a consumer related part of the MSP's website.

Obligation with regards to Mobile Service Retailers

A23.12 Ofcom is aware that a number of different parties can be involved when selling a Mobile Telephony Service to a customer. These parties include:

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

A23.13 As can be seen from the examples above, the person who, in the end, has the direct contact with the customer to sell or market a Mobile Telephony Service might be the last link in what could be a long chain of persons involved in the sale and marketing process. It is the MSP's responsibility where it contracts directly with a retailer to put processes in place which ensure that the retailer does not engage in certain sales and marketing malpractices. Where a third party acting on behalf of the MSP contracts with a retailer, the MSP should use reasonable endeavours to ensure that these obligations are passed down the chain.

A23.14 As a result, GC 23.4 requires the MSP to ensure to a certain extent that all parties directly involved in selling a Mobile Telephony Service to the customer are:

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

A23.15 There are a number of ways for the MSPs of achieving these goals and we do not intend to prescribe exactly how the requirements are to be met. However, there are a number of practical steps that MSPs could take, in Ofcom's view, to assist them in meeting their obligations under General Condition 23.4. Such steps include:

- With regards to GC23.4 (a), in order to ensure awareness of the General Condition amongst retailers and third parties acting on their behalf, the MSPs could communicate the General Condition through account managers, in print through sales bulletins or newsletters, or on websites dedicated to distributors and retailers.
- With regards to GC23.4 (b), in order to put provisions in place which require retailers they contract with directly to comply with certain behavioural obligations, an MSP could include such requirements into contracts with the retailer. Similarly, where a third party is acting on behalf of the MSP, the MSP could require this third party to put provisions in the contracts these third parties have with their retailers.
- With regards to GC 23.4 (c), in order to ensure appropriate compliance monitoring, MSPs could look at numbers and types of complaints over time into their own organisations regarding retailers in relation to the volume of connections sold. If complaints information suggests a problem or issue, the MSP should take appropriate action. MSPs could also carry out spot checks, mystery shopping and sample checks of the retailer's marketing material. MSPs could require third parties acting on their behalf to undertake similar activities.
- With regards to GC 23.4 (d), appropriate sanctions by the MSP might depend on the severity and possible recurrence of a breach. In Ofcom's view they could include giving verbal or written warnings to the retailer, requiring the retailer to prevent recurrence in the future, requiring the retailer to remedy the breach or, in certain severe cases, ceasing to deal with a particular distributor or retailer. MSPs could require third parties acting on their behalf to undertake similar activities.

Information at Point of Sale

A23.16 GC 23.5 contains a number of provisions relating to information requirements that MSPs must comply with at the point of sale, when the customer expresses a positive intention to take out a new contract or amend an existing contract.

A23.17 Ofcom requires MSPs to use reasonable endeavours to ensure these requirements are met. There are a number of ways for the MSPs of achieving this goal and we do not intend to prescribe exactly how the requirements are to be met in each case. However, there are some practical steps that MSPs could take, in Ofcom's view, to assist them in meeting their obligations, including:

- Regarding ensuring customers are authorised to take out a contract or amend a contract, MSPs may wish to consider whether to require sales records to include an explicit check of the customer's identity, age and/or address (for example, MSPs may wish to ask for utility bills, a copy of a passport or driving licence);
- Regarding the provision of information to the customer, MSPs may wish to ensure there is a check list available for sales representatives or include

such a checklist in their training material which ensures that customers are provided with all the relevant key information about a service as part of their decision making process. In essence, customers must be able to make an informed choice as to whether or not to enter into a new or amend an existing contract.

- Key charges to be provided under these obligations include in Ofcom's view the monthly fee payable for the mobile subscription, the charge for calls to own and other mobile networks and to calls to fixed networks, as well as charges for SMS-messages and accessing voicemail.
- Any claims, offers or incentives to attract customers must not mislead them by stating an untruth or half-truth or through failing to state or not make sufficiently prominent an important term or condition likely to affect their decision.

A23.18 Where the MSP does not have the direct customer contact itself, it should ensure that there are provisions in place which require the person with the customer contact to comply with these requirements.

Records retention

A23.19 GC 23.6 requires MSPs to produce and keep records regarding the sales of their Mobile Service for a period of not less than six months from the date the record was created. Records regarding a related sales incentive as referred to in General Condition 23.10 (e.g. cashback offers), should be kept for a period of not less than ninety days after the date by which the sales incentive has to be fully redeemed, but not less than six months. For instance, if a sales incentive has to be redeemed over a time period of 12 months, records should be kept for 12 months + 90 days to allow for customers to complain or query in case something goes wrong in the process.

A23.20 Ofcom considers examples of records in this respect to include (but not be limited to) signed copies of contracts, either in electronic or paper form, call recordings (where they exist) or internet confirmation to buy a certain service.

A23.21 By 'the means through which the contract was entered into', we mean retail outlets (MSP's own and independent retailers' outlets), telesales or websales. In the event a contract was entered into at a retail outlet, the records should also contain sufficient information to be able to identify the outlet, for instance by providing the address of the outlet.

A23.22 These records should be such as to be capable of providing sufficient information to validate that the customer provided positive consent for the purpose of the transaction as well as information about the type of contract, the date the contract was entered into in case the customer questions having entered into a contract, or has complaints or queries regarding their contract.

Training

A23.23 GC 23.7 requires MSPs to use reasonable endeavours to ensure that processes are in place assuring that any person selling their Mobile Telephony Service is 'appropriately trained' to comply with GC 23. There are a number of ways for the MSPs of achieving this goal and we do not propose to prescribe exactly how this requirement is to be met. However, there are some practical steps that MSPs can take to assist them to meet their obligations, including:

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

A23.24 In respect of the training a retailer of Mobile Telephony Services should receive, Ofcom considers 'appropriately trained' to mean that the retailer has been made familiar with:

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

Due diligence

A23.25 GC 23.8 requires MSPs to carry out a number of due diligence checks in respect of new retailers through which they sell their Mobile Telephony Service.

A23.26 Due diligence is an important part of compliance with GC23 as it ensures that any parties with whom MSPs wish to contract, or who they wish to appoint, in order to sell their Mobile Telephony Services, have been subject to a number of checks and will be subject to similar checks in the future.

A23.27 The due diligence requirements set out at GC 23.8 specify a number of pieces of information that must be collected and maintained.

A23.28 There are a number of ways of carrying out the required due diligence exercise and we do not intend to prescribe exactly how this should be achieved other than setting out what we consider to be the minimum procedures necessary. There are a number of practical steps MSPs can take to meet their obligations. For example, producing a checklist, based on the requirements set out at GC.23.8 that ensures that the relevant information has been gathered.

A23.29 The MSP should use reasonable endeavours to ensure that parties it does not have a direct contract with and who sell the MSP's Mobile Telephony Service are also

subject to due diligence requirements. The MSP could achieve this by carrying out due diligence directly or requiring another party to undertake these activities, e.g. distributors.

A23.30 Ofcom expects that all parties involved in the required due diligence exercise will, where relevant, comply with all the data protection principles as set out in the Data Protection Act 1998.

Sales incentives – Information at Point of Sale

A23.31 GC 23.10 contains obligations imposed upon the MSP regarding sales incentives offered by any person selling or marketing the MSP's Mobile Telephony Services. Sales incentive in this context means an offer to encourage a customer to enter into a contract of which the Customer does not benefit immediately (i.e. at the point of sale, or in case of telesales and online sales, when the contract is concluded), but which the Customer is entitled to receive after entering into the contract.

A23.31 Sales incentives could consist of the promise to receive certain goods or products (such as additional equipment, or MP3 players), or the promise to receive a payment of monies at a certain stage or at certain stages during the period of the contract for a Mobile Telephony Service.

A23.33 GC 23.10 stipulates that Mobile Service Providers should take steps to ensure that the terms and conditions of sales incentives are not unduly restrictive. When assessing whether terms and conditions are not unduly restrictive, we would take into consideration whether the terms are not unduly onerous so that customers can legitimately claim their entitlement to advertised sales incentives without much difficulties.

A23.34 Ofcom considers unduly restrictive terms and conditions in respect of sales incentives to typically include:

- a requirement that the customer submits an original bill – a copy of a bill should be acceptable proof;
- a charge for processing a claim in relation to the offer;
- a requirement that such claims are submitted within a period less than 60 days from the date the claim arises;
- a condition stating that a payment will not be made if the customer has an outstanding balance on their account. However, in the case of persistent or repeated non-payment on behalf of the customer or where the retailer and/or the MSP have evidence that a customer engages in fraudulent behaviour regarding their mobile subscription, no payment will have to be made to the customer.
- in the case of cashback, a condition stating that if a customer fails to obtain a first claim, this would invalidate all future claims.

A23.35 There are a number of ways for the MSPs of achieving this goal and we do not intend to prescribe exactly how the requirements are to be met. However, there are practical steps that MSPs can take to assist them in meeting their obligations, including:

- putting in place contractual provisions requiring retailers to clearly advise customers of the terms and conditions of the sales incentive sold in connection with the Mobile Telephony Service, and of the process to be followed to obtain the sales incentive, where applicable;
- carrying out spot checks and mystery shopping for sales incentives;
- analysing complaints regarding sales incentives;
- checking terms and conditions of sales incentives; and
- checking retailers' advertising material regarding sales incentives.

A23.36 The MSP needs to use reasonable endeavours that any party, who sells the MSP's Mobile Telephony Service through another party, is required to ensure that the terms and conditions of sales incentives offered by the party with the customer contact are not unduly restrictive.

A23.37 In addition, GC 23.10 requires MSPs to take steps to ensure that any persons selling or marketing the MSP's Mobile Telephony Service provide clear and accurate information about the sales incentive (including that there is a separate contract for the sales incentive to that of the airtime service, and that the customer might remain bound to the terms of the Mobile Telephony Service irrespective of the sales incentive contract including if the retailer goes out of business).