

Three's Consultation response – Implementing the new European Electronic Communications Code (“EECC”) – Revised proposals for annual best tariff information and business customer definitions

Three welcomes the opportunity to comment on Ofcom's Consultation on Implementing the new EECC – Revised proposals for annual best tariff information and business customer definitions (the “Consultation”).

Executive summary

Three welcomes the opportunity to comment on the Consultation. This response compliments and builds on arguments made directly to Ofcom in bilateral meetings on the implementation of the EECC.

By way of introduction Three is always looking for ways to enable our customers to make the most of their mobile. Three's 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. We are therefore very mindful of resource and business capacity consideration and would ask that only EECC measures that are relevant to the UK market and will deliver benefit to UK customers are put forward by Ofcom. It follows therefore that Three welcomes Ofcom's less onerous revised EECC end-user protections in the Consultation.

As it remains unclear whether telecoms will be part of any trade deal between the EU and the UK, Three notes that it may still be possible for Ofcom to de-prioritise those parts of the EECC that are either not relevant to the UK or will not deliver benefit to UK consumers and will likely require resource and cost from providers to implement. In Three's view, the very real challenges and costs of implementation for Annual Best Tariff notification requirements for prepay and extensive Business customer definition requirements are unnecessary. Given the volume of new EECC 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.

Finally, as a general matter, Three continues to be of the view that it would be helpful if Ofcom could clarify, to the extent possible at this time, how Ofcom proposes 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? It would be helpful if Ofcom could confirm this.

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

Specific comments on the Consultation proposals

Section 3: Annual best tariff notifications

Question 1: Do you agree with our proposed changes to the GCs and our Guidance on General Condition 1 in relation to best tariff information?

Three welcomes Ofcom's revised EECC proposals for annual best tariff notifications and has the following comments:

1. **Three supports Ofcom's revised pre-pay position** – At para. 3.6 of the Consultation, Ofcom notes that its original EECC proposals confirmed that "from February 2021 onwards, providers would be required to send annual best tariff information to customers who are not subject to a minimum contract term." Ofcom's May 2019 Statement went on to introduce a wide-ranging requirement that annual best tariff information had to be given to all contracts for public electronic communications services, including those not subject to a fixed commitment period such as 30-day rolling contracts.

As Ofcom notes at paragraph 3.12 of the Consultation, Three, along with other providers have raised concerns about the application of the annual best tariff requirements to pre-pay mobile customers. In Three's view, Art. 105(3) EECC only requires annual best tariff information when a fixed duration contract is automatically prolonged, as follows:

"Where a contract or national law provides for automatic prolongation of a fixed duration contract for electronic communications services other than number-independent interpersonal communications services and other than transmission services used for the provision of machine-to-machine services, Member States shall ensure that, after such prolongation, end-users are entitled to terminate the contract at any time with a maximum one-month notice period, as determined by Member States, and without incurring any costs except the charges for receiving the service during the notice period. Before the contract is automatically prolonged, providers shall inform end-users, in a prominent and timely manner and on a durable medium, of the end of the contractual commitment and of the means by which to terminate the contract. In addition, and at the same time, providers shall give end-users best tariff advice relating to their services. Providers shall provide end-users with best tariff information at least annually." (emphasis added)

As can be seen, no mention was made of this applying to pre-pay mobile customers. Moreover, in Three's view, prepay customers are well informed about the different tariffs available in the market and can and do exercise choice by switching between tariffs and providers so this end-user protection is unnecessary. Three therefore welcomes Ofcom's change of view on this point – and in particular Ofcom's recognition that: i) "customers on 'traditional'¹ pre-pay contracts will be making a conscious purchasing decision each time

¹ The Consultation defines 'traditional' top-up pre-pay tariffs to mean where a customer tops up their account on an ad-hoc basis and any usage is charged on a per-unit basis using their credit balance.

they top up their credit and are therefore unlikely to need annual information to inform their choices”; and ii) for “hybrid” pre-pay tariffs² many “customers still top up manually (and will therefore also be making a conscious purchasing decision on a regular basis)” and such customers “*can, and do, choose to switch between ‘bundles’ or ‘packs’.*” Three agrees with this view and supports Ofcom’s clarification at para. 3.31 of the Consultation that any contract that was not previously subject to a commitment period will no longer be in scope of the requirements to send annual best tariff advice. This will help reduce implementation costs for EECC. Three notes Ofcom’s view that it is nevertheless good practice to send periodic reminders to customers in contracts that are subject to a commitment period (particularly those contracts which are rolled-over automatically – e.g., pre-pay “packs” which roll-over each month, and where a customer has set up an auto-recurring payment) about the details of the service they are buying, how this compares to their usage and whether there are alternative tariffs available that may be cheaper given their usage.

2. **Request for clarity on requirements for 30-day rolling contracts and contracts drafted as an indefinite term with a 30-day notice period:** Three understands from the Consultation that Ofcom’s revised GC C1.16 would align with the text in the EECC and reads as follows:

“Regulated Providers must provide best tariff information to a Subscriber at least annually, if each of the following requirements are met:

(a) the Subscriber has a contract with the Regulated Provider for Public Electronic Communications Services, other than machine-to-machine transmission services; and

(b) the contract ~~is not~~ was previously subject to a Fixed Commitment Period, which has now expired.”

Three welcomes this greater clarity and notes from para. 3.36 of the Consultation that Ofcom’s accompanying revised guidance would read:

“ 1.80 ... b) For contracts entered into after the date of entry into force of Condition C1.19, the first annual best tariff notification must be sent within ~~the first 12 months of the contract term. An exception to this is where the contract contains a commitment period. In that case, the annual best tariff notification should be sent within~~ 12 months of the date on which the CP has sent an end-of-contract notification in relation to that contract.”
(emphasis added)

Three understands from the above revised guidance changes that annual best tariff notifications should only be sent to those who have previously received an end-of-contract notification (i.e., before the end of their minimum commitment period). With this in mind, Three notes that Ofcom specifically excluded 30-day rolling contracts from end-of contract notification requirements (as this scenario was treated as not having a fixed commitment period) in their May 2019 statement at:

“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

² The Consultation defines “hybrid” pre-pay tariffs to mean those which enable the customer to purchase a ‘bundle’ or ‘pack’ of inclusive calls/texts/data for a set monthly fee, with any use outside these allowances being taken from a more traditional pre-pay credit balance. Ofcom notes that such hybrid ‘bundles’ or ‘packs’ generally last for a period of 30 days/one month.

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.[FN 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).[FN 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.

For the avoidance of doubt, Three asks that Ofcom confirms its latest position on whether annual best tariff notifications should be sent for 30-day rolling contracts if the customer remains with the same provider for more than one year. If such contracts are included, in Three’s view, this should be clarified in Ofcom’s guidance. They currently appear to be out of scope under Ofcom’s guidance given that such customers would not receive an end of contract notification. In Three’s view this makes sense as customers are well informed about the different tariffs available in the market and in this situation can exercise choice by switching between tariffs and providers.

In relation to contracts drafted as an indefinite term with a 30-day notice period, Three assumes that these would remain outside the scope of the revised general condition. Please could Ofcom confirm this remains the position.

Section 4: Definitions for microenterprise, small enterprise and not for profit organisations

Question 2: Do you agree with our proposal to remove financial thresholds from microenterprise and small enterprise customer definitions?

Question 3: Do you agree with our proposal to revise the headcount threshold for small enterprises down to 10 staff members and to merge this definition with that for microenterprises? Please provide evidence to support your view.

Question 4: Do you agree with our revised proposed definition of not for profit customer?

Question 5: Do you agree that the guidance we have proposed to help providers identify employee headcount should also apply to not for profit organisations?

Three notes Ofcom’s revised EECC proposals for definitions for microenterprise, small enterprise and not for profit organisations. In Three’s view Option 2 on the definition of small enterprises (i.e, reduce the headcount threshold for small enterprises down to 10 staff members and consolidate the small enterprise and microenterprise definitions into a single customer definition) is the most preferable option of Ofcom’s three proposals. Three also agree with Ofcom’s narrower proposed definition for “Not for Profit Customer” (to align it with Ofcom’s proposed revised headcount threshold for small enterprises) and would welcome Ofcom extending its guidance on identifying employee headcount to these customers to help

with any practical difficulties that may arise. This will help with reducing the cost and burden of implementing the EECC for industry.

In Three's view, as much flexibility as possible should be given to providers when dealing with business customers, as the nature of their business relationship differs. Providers should have flexibility to judge what is appropriate on a case-by-case basis depending on the nature of the relevant business customer concerned. On this, Three notes Ofcom's consideration of the use of consistent definitions with the existing small business definition in the GCs. Three agrees that Ofcom should seek to achieve consistency and clarity throughout the GCs in this area, to reduce confusion and complexity in terms of the number of different customer definitions which providers would have to take account of.

On Ofcom's employee headcount proposals, Three does however share the concerns of other providers about the practical difficulties (see paragraph 4.21 of the Consultation) and also notes the cost implications for providers in seeking to find out headcount information from customers, or potential customers, to identify which businesses meet the criteria for Ofcom's definitions. On this, Three also notes that headcount information may be outdated fairly quickly, so would ask Ofcom to clarify in its guidance Ofcom's recommendations for example, on how often such information would need to be collected and what providers should do if customers are unwilling to provide this information. Three is also mindful that providers are unable to control how business customers choose to set up their staff use of mobile plans – this is particularly relevant for business customers who operate a "Bring your own device" to work policy (i.e., allowing their staff to purchase their own individual devices (from any provider) and use them for work purposes, claiming their phone expenses from their employer). For the avoidance of doubt, in Three's view, Ofcom should clarify in its guidance that such arrangements fall outside the scope of the requirements (as providers are unable to influence this behaviour). To account for practical challenges in this area, Three also welcomes Ofcom's comment at paragraph 4.28 of the Consultation that "*where headcount information is not available, we consider that providers may use reasonable proxies, such as the number of connections.*" Three agrees that providers should have flexibility on this point but again, it would be helpful to have further clarity from Ofcom (with practical examples) of what Ofcom might consider to be reasonable proxies on this – e.g., estimates for the number of connections that might be required or the type of contract caught.