

**T-Mobile's response to Ofcom's consultation:
'Protecting consumers from mis-selling of mobile
telecommunications services A consultation on options to
prevent problems with mis-selling and cashback issues in the
mobile retail market'**

Introduction

T-Mobile welcomes the opportunity to respond to Ofcom's consultation "Protecting consumers from mis-selling of mobile telecommunications services – A consultation on options to prevent problems with mis-selling and cashback issues in the mobile retail market" ("the mis-selling consultation"). Ofcom's consultation raises a number of important issues and T-Mobile recognises Ofcom's concerns, in particular, those relating to the problems some consumers have had with cashback arrangements. T-Mobile appreciates the difficult position some customers now face and are sympathetic to their plight. T-Mobile values its reputation as a consumer champion and recognises that the failure of some independent dealers to meet their commitments to customers could lead to a wider loss of trust in the sector. We continue to take steps, including working with dealers and other mobile operators, to protect consumer interests.

General comments

According to Ofcom's Telecommunications Market Data Update Q3 2007 (published February 2008) there are now more than 66 million mobile subscriptions in the UK with more than 23 million of those being pay monthly contracts. The independent sales channel plays a valuable role in a highly competitive market. Where cashbacks are offered, the majority of customers have benefited from them and continue to be able to, and do, redeem them. The problems relating to cashbacks stem largely from the small independent dealer community.

As a responsible company T-Mobile is committed to protecting consumers from being confused or misled during the sales process. It is for that reason that T-Mobile banned its channel partners from cold calling both current and potential T-Mobile customers in April 2006. Since 2007 T-Mobile has worked with other mobile operators and Ofcom to put in place the Code of Conduct for the Sales and Marketing of Subscriptions to Mobile Networks ("the Code"), the primary objective

being to protect customers. Following problems with some independent dealers going bankrupt and given the volume of complaints about bad cashbacks, last year, in addition to advice about the Code, T-Mobile issued additional guidance to its independent dealer network reiterating the terms of acceptable practice. There are obviously legal constraints as to how far operators are able to control the operations of independent businesses but, to the extent possible, much effort has been made to promote more responsible business practices. T-Mobile also continues to work closely with its local Trading Standards office to consider what further action may be required to ensure consumers are protected and that the competitive situation that exists within the mobile sector works for consumers benefit.

Specific comments on Ofcom's proposal

1. T-Mobile does not believe that formal regulation is the answer.
2. T-Mobile has commercial relationships with small dealers as well as larger communications providers. Given that Ofcom will have a direct relationship with the larger players, in cases where they or their subsidiaries are deemed to be in breach of their regulatory obligations, Ofcom should deal directly with them and not with T-Mobile.
3. Ofcom should not rely solely on the number of customer complaints. The introduction of the Code and its enforcement has led to the demise of many cash back retailers. The Code has been instrumental in ending most poor practice and eliminating those retailers who were unable to meet the standards required. Although T-Mobile does not have open access to retailers' accounts, it undertakes due diligence, including performing credit checks and taking trade references, before entering into trading agreements with both dealers and distributors. None of the prominent retailers whose demise has brought attention to the cash back issue started trading after the introduction of the code. It was their poor practice and failure to provision sufficiently for cash back claims that has led to the problem being highlighted and difficulties for some customers.
4. Ofcom has not allowed sufficient time for the voluntary arrangement to take its full effect. The Code was published at the end of July and Ofcom began its review in October. The fixed operators were given much longer to allow their voluntary arrangement to work before formal regulation was imposed. T-Mobile is confident that the Code

will have a considerable effect and that formal regulation is not the answer. However, it takes time for cash back deals to flush through the system.

5. The principal of using one commercial organisation to regulate another commercial organisation means that structurally Ofcom is indirectly regulating a party it, or the OFT, should be directly regulating. T-Mobile is not party to agreements between the customer and the retailer and T-Mobile has no visibility of issues arising under such contracts until a complaint is received. T-Mobile cannot physically police every transaction; it can only enforce General Condition 23 through its commercial contracts with retailers.
6. The Code outlaws unreasonable redemption terms. As with any arrangement where a future promise is made it is up to the customer to make an assessment as to whether the dealer is good for its part of the bargain.
7. T-Mobile is also limited in its ability to enforce or restrict offers made to customers by third parties for competition reasons. This could breach the Chapter 1 prohibition in the Competition Act. Also, T-Mobile would not want to limit customer choice in a highly competitive market.

Comments on the proposed General Condition 23 and accompanying guidance

T-Mobile makes the following points on the proposed drafting of General Condition 23:

1. Throughout the proposed Condition, Ofcom uses “best endeavours”. This should be changed to “all reasonable endeavours”. Legally the best endeavours requirement is still uncertain, but recent authority has almost equated it with a legal obligation and given T-Mobile’s lack of privity as far as the relevant arrangements are concerned this is neither proportionate or, indeed, possible.
2. The obligations under paras 23.4(iv) and 23.6 are onerous where they refer to retaining records validating the person who made the initial customer contact. This means that when customers shop around and return at a later date to purchase a subscription, there should have been a record kept of the first visit in anticipation of them returning. The

retailer would need to make a note of every person who enters the store in order to comply with this!

3. Under para 23.5(b) T-Mobile can require, through its contracts with the independent channel that relevant information is provided to the customer at the point of sale. However, unless T-Mobile is present during the sale how can it be expected to know or ensure that the customer “understands and intends to enter into this contract”?
4. The cost to T-Mobile of the due diligence obligations under para 23.8 will be extremely high and disproportionate. In particular the requirements to:
 - check independent retailers within twelve months from the general condition coming into effect;
 - conduct appropriate checks to assess whether any due diligence information remains up-to-date and relevant; and
 - verify that the retailer is compliant with the general condition and applicable consumer protection laws.
5. If Ofcom is minded to introduce General Condition 23 then a transition period of two months is not sufficient. A minimum period of six to nine months is a reasonable period of time during which relevant processes and procedures can be put into place. It will also allow the providers to review and amend existing contracts with independent dealers, where applicable. Furthermore, it should be subject to a sunset clause so that the obligation would lapse following a period after introduction unless a positive need is demonstrated for its retention. This will be consistent with the approach Ofcom adopted when imposing a similar condition on fixed line operators.
6. Under para A7.25 Ofcom states that retailers must be trained on “the relevant principles of consumer protection law”. It is the responsibility of the staff engaged in the sales process to ensure that they are familiar with general consumer law. T-Mobile is not a regulator.