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Anne Hoitink
Consumer Policy, Ofcom

By email anne.hoitink@ofcom.org.uk / mobile.misselling@ofcom.org.uk

Dear Anne

Ofcom consultation: Protecting consumers from mis-selling of mobile telecommunications services

Vodafone 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' published on 18 March 2008.

Executive summary

Vodafone wholly supports the protection of consumers from mis-selling and from the damaging aspects of cashback deals. Vodafone recognises there have been problems with a small number of dealers with regards to cashback offers and has reacted sympathetically to those customers who came to us with problems of this nature, dealing with any issues on a case-by-case basis. Vodafone itself does not offer cashback deals and it absolutely does not mis-sell its products and services.

Vodafone, whilst welcoming developments in consumer protection, does however have some concerns that Ofcom's approach is not as efficacious, proportionate or targeted as it could be. The General Condition approach reflects Ofcom's preference to exercise its regulatory power indirectly through the commercial leverage of mobile operators rather than utilise its own power directly, or that of the OFT and Trading Standards, through general consumer legislation. Vodafone is concerned about the fairness of this approach. Vodafone contributes enormously to Ofcom's Consolidated Fund, through general taxation, corporation tax and spectrum fees and should be entitled to rely on regulators / law enforcement agencies to exercise their powers against those who cause consumer harm.

Aspects of GC23 effectively require Vodafone to enforce consumer protection legislation and requiring us to do this, particularly when Ofcom and other agencies of the state have the powers to do so directly, is unwelcome. This form of indirect regulation (i.e. regulating company 'a' to influence the behaviour of company 'b') introduces an element of liability for mobile operators (and others in the value chain) that must increase their risk profile and costs.

Vodafone would also like to highlight the following areas of concern:

1. Compliance with EU and UK competition law: GC23 requires Vodafone and other mobile service providers to impose restrictions upon those in its distribution chain that could be considered to be contrary to EU and UK competition law. Vodafone's concerns have not been dealt with in the consultation document.

Vodafone Limited

Baird House, The Connection, Newbury, Berkshire RG14 2FN, England
www.vodafone.com

E: richard.sullivan@vodafone.com

2. Mobile operators' self-regulatory Code: Vodafone is disappointed that the Code was given such a short time to prove its worth. We would remind Ofcom that, under the Communications Act 2003, it must have regard to "the desirability of promoting...the use of effective forms of self-regulation".
3. GC23: there is ambiguity in the drafting of GC23 which is contrary to a requirement upon Mobile Service Providers to utilise "best endeavours" to conduct their sales in accordance with GC23. Vodafone considers Ofcom's own drafting indicates the requirements placed upon Mobile Service Providers lend themselves more readily to the standard of "reasonable endeavours".
4. Mobile Number Portability (MNP): Vodafone notes Ofcom's contention that its policy on near instant gaining provider-led MNP is consistent with its stance on clamping down on mis-selling contained in this consultation, but respectfully submits that this is not, in fact, the case.

The role of the independent dealer channel

Ofcom has recognised the role of the independent channel in the mobile communications marketplace and that it is a valuable part of the competitive landscape. Vodafone gladly recognises that the vast majority of independent dealers, including those that offer cashback (as Ofcom's research shows), do treat their customers reasonably. We would stress however that the problems that have occurred with cashback have been down to a small number of independent dealers and have in no instance been due to the actions of Vodafone. Given this, we would encourage Ofcom to more clearly apportion responsibility for cashback situations that have caused consumer harm.

The role of consumer law

Ofcom should recognise and explicitly state that it is primarily the duty of the management of all independent commercial organisations to ensure that they and their staff obey the law and treat customers fairly. Vodafone, as with all companies, should be free to make contracts in good faith with an expectation that its counter-party is law abiding (and that those who are not would be tackled by appropriate regulatory / law enforcement agencies). Ofcom has instead asserted that it is primarily the duty of mobile operators to police other independent commercial organisations.

Ofcom has rejected using its direct general powers under the Enterprise Act – and soon under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) – on the grounds that there are a large number of independent retailers in the market, making "effective targeting very difficult in this sector as it would require a disproportionately high level of finite resources". Vodafone is concerned about the fairness of this approach as it contributes enormously to Ofcom's Consolidated Fund, through general taxation, corporation tax and spectrum fees and should be entitled to rely on regulatory / law enforcement agencies to exercise their powers against those who cause consumer harm.

The prohibition in 23.2 replicates those found within consumer protection legislation. Aspects of GC23 effectively require the mobile operator to enforce this legislation. Below is text from GC23.4 (b) and, subsequently, from the CPRs, regulation 3:

require the Mobile Service Retailer not to engage in dishonest, misleading or deceptive conduct...

Unfair commercial practices are prohibited...A commercial practice is unfair if it is a misleading action...a misleading omission....it is aggressive....

These rules appear to want to achieve very much the same end. Commercial organisations will frequently decide not to deal with another commercial organisation because they do not trust them to act legally. It is, however, a very different matter for a regulator to require a commercial organisation to enforce the law on another commercial organisation, particularly when they and other agencies of the state have the powers to do so directly.

This form of indirect regulation (i.e. regulating company 'a' to influence the behaviour of company 'b') introduces an element of liability for mobile operators (and others in the value chain) that must increase their risk profile and costs. Vodafone suspects that one effect of the new GC will be to make it less viable to do business with smaller independent outlets, as the costs of monitoring entailed in GC23 could exceed potential business benefit.

Further, Ofcom's replication of these consumer protection requirements are undertaken in a manner which is ambiguous and without definition; for example those contained within 23.2 would presumably be defined by reference to existing and pending consumer protection legislation yet this is not referenced.

Where conduct is essentially illegal under consumer protection legislation, in particular the upcoming the Unfair Trading Regulations, there should not be provision for it in a General Condition. Nor should there be the requirement for one commercial entity to enforce the law against another commercial entity. That is rightly the role of regulators, trading standards' departments and law enforcement.

Compliance with EC and UK Competition Law

Vodafone is both supplier and competitor in the retail market and as such always has to manage the tension between its responsibilities to ensure the customer is treated fairly, with its obligations under EC and UK competition law. Those commercial organisations engaged by Vodafone that compete with Vodafone at the downstream level must be allowed to operate their own business models and interference in such models is fraught with legal risk.

In particular, Vodafone notes that under section 23.8 of the proposed new General Condition, it will be required to ensure that it will be required to carry out due diligence checks in respect of any reseller of its airtime and devices. As Ofcom will be aware, Vodafone instructs a number of distributors to resell Vodafone airtime and handsets; they may in turn engage other third parties. Under EC and UK competition law, and in particular Article 4 of Commission Regulation 2790/1999 on the application of Article 81(3) to categories of vertical agreements and concerted practices, restrictions on the activities of independent third party distributors would generally be prohibited (in the absence of exclusive or selective distribution arrangements). One of the potential consequences of Ofcom's requirement of Vodafone to perform these due diligence checks on third party distributors may be that Vodafone would need to instruct a third party distributor not to engage or to terminate the contract of a particular reseller because of its failure to meet the conditions stipulated in section 23.8.

Moreover, Vodafone notes that under section 23.9 of the proposed General Condition, it is required to use "best endeavours" to ensure that where any retailer engaged by it offers sales incentives, the terms and conditions of such an offer must not be "unduly restrictive". Once again, Vodafone would wish to point out that it cannot interfere in the pricing practices (including rebates and discounts) of any independent third party engaged by it. Vodafone notes that Ofcom has provided guidance as to the definition of "unduly restrictive" at paragraphs A7.34 and A.7.35 of its guidelines. At A7.35, the guidelines suggest that Vodafone should put in place "contractual provisions" governing sales incentives offered by third parties. It is unclear as to what is meant by this term and Vodafone suggests to Ofcom that it includes a clearer definition of the words "unduly restrictive" to ensure that any such requirements are compatible with Vodafone's obligations under EC and UK competition law. Further, Vodafone would suggest that this definition be included with the definitions at 23.10 of the proposed General Condition so as to remove any doubt as to range of permissible actions.

Vodafone wishes to receive confirmation from Ofcom in writing that it considers the regulatory obligations it is mandating and the necessary conduct resulting from it will be compatible with Article 81(1) of the EC Treaty and Chapter I of the UK Competition Act 1998.

The tension between Vodafone's responsibilities to ensure the customer is treated fairly and its obligations under competition law can be exemplified by the hypothetical (though plausible) case of Vodafone receiving a handful of complaints of mis-selling in relation to a single dealer. If we fail to terminate the contract, would we fall foul of the new General Condition? On the other hand, if we do terminate the contract, could

we be sued for breach of contract or an infringement of competition law by the dealer, in the event that such action is deemed unreasonable by a court? This potential double jeopardy introduces a highly unwelcome element of risk, which will be hard to assess and manage.

The role of self-regulation

Vodafone was disappointed that Ofcom gave the mobile operators' self-regulatory Code such a short time to prove its worth. We would remind Ofcom that, under the Communications Act 2003, Ofcom must have regard to "the desirability of promoting...the use of effective forms of self-regulation."

The Code was published in July 2007 and Ofcom announced its review only three months later – in October 2007. This was despite Ofcom's acknowledgment that there would be a delay in the time it would take for the measures described in the Code to take effect and become effective. This approach does not provide encouragement to Vodafone that Ofcom will seriously encourage or promote self-regulation for areas within its remit in the future.

While self-regulation does exist in the communications sector (e.g. the mobile operators' content code and IMCB, the CAP Code for advertising and the Internet Watch Foundation), this is for areas not inside Ofcom's direct remit. We would suggest that the mobile operators' code on responsible sales and marketing was the first self-regulatory code of any significance in an area that is within the direct regulatory remit of Ofcom. Vodafone believes that Ofcom could – and should – have worked with the mobile operators for longer to sort out any perception of unevenness in the Code's application.

Vodafone recognises that there was political and media interest – as well as public interest – in 'cashback'. Nevertheless, the fact remains that no more complaints were being generated by the mobile sector than in the formally regulated fixed sector, despite the mobile sector being far more competitive and having a customer base nearly three times the size. GC23, as Ofcom acknowledges, will introduce costs, risks and inefficiencies into the distribution channel that might have been avoided if self-regulation had been given a fair chance to prove its worth.

Ambiguity within General Condition 23

Vodafone has a specific concern over the concept of 'best endeavours', as in: "must use best endeavours to ensure that the Customer before entering into or amending a contract for a Mobile Service... understands and intends to enter into this contract".

We believe that the clause should read that we must use best endeavours to require rather than to ensure, the measure through contractual means. We also have concerns over the legal test being set by 'best endeavours'. We have previously asserted our concerns over one commercial organisation enforcing the law against another. This is compounded by the 'best endeavours' test proposed by Ofcom. We have serious concerns over the level of risk this places us under and what effect it might have on willingness to deal with smaller independent retailers given the proposed requirement.

A more reasonable approach – one more in line with other regulation – would be to require us to use 'reasonable endeavours'. We would remind Ofcom that PhonepayPlus' Code uses the term 'reasonable' in its rules on network operator obligations, which is one of the very few areas where regulatory enforcement is expected of one commercial entity on another commercial entity. We would stress however that this model for PRS regulation is very unusual and justifiable by the very particular features of PRS and its susceptibility to spam and scam if not tightly controlled.

In fact, the drafting of GC23 is ambiguous in parts such that it appears what Ofcom is seeking from Mobile Service Providers is really that they undertake steps that are reasonable to ensure that GC23 is met. This is a reasonable endeavours standard as opposed to that required under a best endeavours standard which is to undertake all possible reasonable steps.

Vodafone would also mention that the Guidelines at A7.7 exclude other Mobile Service Providers such as Independent Service Providers and Resellers who provide a Mobile Service.

Mobile number portability (MNP)

Vodafone would highlight Ofcom's November 2007 Statement which concluded, inter alia, that mobile service providers should implement a near-instant (no more than two hours) process for porting mobile numbers led by the gaining provider by 1 September 2009. Vodafone simply does not recognise Ofcom's contention that its policy in the area of clamping down on mis-selling is consistent with its policy in respect of MNP. Ofcom has previously highlighted the high degree of protection against slamming and mis-selling afforded by donor led-processes for mobile porting and broadband transfers – notably in its February 2007 consultation on mis-selling. Against this background, Vodafone finds the decision to mandate a recipient-led mobile porting process perverse. The difficulty is compounded, however, by Ofcom's insistence that the mobile porting process should be not only recipient-led but also near instant, allowing no time for mistakes of any kind to be detected and rectified before a port takes place.

Ensuring customers are well informed is integral to combating mis-selling, of which slamming is the most extreme form. Yet recipient providers are simply not in a position to inform customers about the detail of any contractual obligations they may owe to the donor provider they are leaving, even though this may be a material consideration for the customer. Any safeguard to remedy this that requires the customer to contact the donor provider prior to commitment results in a process that is in many key respects indistinguishable from the current donor-led model, negating the claimed incentive and convenience properties Ofcom has appealed to in support of its decision to mandate near instant recipient-led mobile porting.

In short, Ofcom's contention that it does not believe that changes to MNP policy "would necessarily give rise to more slamming and mis-selling" is simply not backed up by fact or experience and it should actively re-consider its stance on MNP given its concerns about mis-selling.

If you have any questions about this response, please do not hesitate to contact me.

Yours sincerely

Richard Sullivan

Richard Sullivan
Regulatory Affairs Manager