

FREESERVE.COM PLC'S RESPONSE TO OFCOM'S CONSULTATION ON VOICE OVER BROADBAND SERVICES

Introduction

Freeserve.com plc ("Freeserve") welcomes the opportunity to respond to Ofcom's consultation on Voice over Broadband ("VoB") services.

Freeserve is the UK's largest Internet Service Provider with over 2.6 million Internet access customers of which approximately 180,000 are broadband customers. Freeserve is the UK subsidiary of Wanadoo, one of the largest ISPs in Europe and the Internet business unit of France Télécom.

Executive Summary

Freeserve submits that Ofcom should:

- Ensure that its regulation is technology neutral. VoB is not a service and Ofcom should direct its regulation at particular services rather than technologies;
- Permit providers of voice services over broadband to use geographic numbers regardless of whether or not such providers are providing Publicly Available Telephone Services ("PATS"); and
- Not restrict VoB services to a specific non-geographic number range.

General Points

Regulation should not be Technology Specific

Ofcom's overall approach to numbering for VoB services is flawed as it starts by considering a new technology and then considers how to regulate it instead of starting from a position of technological neutrality in regulation.

Ofcom should not (and indeed has no objective justification for) restricting access to geographic numbers on the basis that the service is primarily provided over broadband. The technology is irrelevant provided that the service and obligations are equivalent.

VoB is not a Service

Ofcom very helpfully sets out in paragraph 3.2 of its consultation how broadband enables the provision of a variety of different services. Although Ofcom lists a variety of new and different services, broadband can also be used to deliver services which are indistinguishable from existing voice services. It is inconsistent with Ofcom's duty to not discriminate for it to treat any

service provided over broadband in a different manner from the same service provided over another infrastructure. Insofar as Ofcom considers regulation appropriate, it should consider this at the level of services bought by citizen-consumers, rather than at the infrastructure layer - especially when (as in this case) Ofcom's primary concern is with consumer protection issues.¹

Number Allocations should not Create Regulatory Barriers to Entry

As noted above there are also a wide range of services which may be provided over broadband. Different communications providers have different commercial plans and may wish to target different customer segments or offer different products.

For example, an internet service provider such as Freeserve without a legacy of circuit-switched voice customers may wish to enter the retail telephony market with a service which happens to be provided over fixed broadband access, but which is positioned to compete directly with traditional circuit-switched telephony. Without geographic numbers (or number portability), Freeserve would be severely constrained in its ability to compete on equal terms. Ofcom should be careful not to erect regulatory barriers to entry which may stifle such innovation contrary to the short and long term interests of citizens and consumers, or to restrict artificially the ability of communications providers to offer directly substitutable products on existing number ranges using new technology.

Consumer Protection Issues to be dealt with by All Stakeholders

It will be important to ensure that legitimate consumer protection concerns are dealt with in an appropriate and proportionate manner. Freeserve welcomes Ofcom's ongoing consultation. As a responsible corporate citizen, Freeserve takes its social responsibilities very seriously and looks forward to contributing to the ongoing development of appropriate regulation with all stakeholders. With mobile penetration levels now over 90% and the maintenance of analogue lines by many broadband customers, Freeserve thinks it important that Ofcom takes a holistic view of the appropriate level of protections for consumers. The day when the fixed telephone was the only means of communications for many consumers is firmly in the past. However, Freeserve recognises that for some groups in society, fixed telephony may remain the primary method of communications and that more work is needed to address legitimate consumer protection concerns. Freeserve suggests that the correct way to deal with these important issues is by an industry co-regulatory or self-regulatory approach which has worked very successfully in other areas of consumer protection such as premium rate services and mobile content.

As part of this exercise, Freeserve suggests that it would be sensible for Ofcom to revisit the OfTel 2002 guidelines on the essential requirements for network security and integrity and criteria for restriction of access to the network.

Freeserve contends that consumer protection issues are not legitimately addressed through allocation of a number range exclusively for VoB telephony. As Ofcom's primary consumer protection concerns lie in making consumers who take up non-PATS telephony services aware of any limitations in such services, these issues concern call origination, to which the number range allocated to the service will be irrelevant.

¹ Freeserve is only using the phrase "Voice over Broadband" to make its response compliant with the terminology employed by Ofcom in this consultation.

What should Ofcom do next?

Freeserve submits that Ofcom should:

- Allocate numbers from existing numbers ranges to any provider of electronic communications services which meets the current requirements for the allocation of such number ranges regardless of the underlying technology used to provide the service. For example:
 - Geographic numbers should be allocated to VoB providers which provide a service in conjunction with a fixed broadband connection (DSL or cable modem) which meet the criteria for the allocation of such geographic numbers contained in the national numbering plan. Those criteria are that the geographic number is used to route calls either to a fixed network termination point within the defined geographic area, or if the network termination point is not within the geographic area, that the tariffing is consistent with the geographic area code. Provided these criteria are met, there is no possibility of customer confusion;
 - The current criteria for allocation of geographic numbers contained in condition 18 of the general conditions of entitlement and the national numbering plan, which do not discriminate between PATS and non-PATS communications providers, should be retained;
 - In future fixed-mobile convergent services, VoB providers might be willing to offer a unique mobile number to its subscribers, in conjunction with a mobile broadband connection (e.g. 3G) and a fixed broadband connection (e.g. WiFi);
 - Personal numbers should be allocated to VoB providers which provide a “find me anywhere” service where the service may be accessed at a variety of locations (e.g. via 2.5 or 3G roaming, Wi-Fi roaming and/or fixed broadband); and
 - NTS and premium rate numbers should be allocated to VoB providers if they are providing services equivalent to those provided over circuit switched networks in respect of such numbers.
- To the extent that new number ranges are opened for new services (not technologies), ensure that these are allocated in a technology neutral way and do not oblige the providers of services over broadband to use that specific number range.
- Work with the industry to develop appropriate consumer protection measures as a separate exercise from its number allocation policy. Consumer protection issues have been effectively dealt with by co-regulatory (e.g. premium rate services regulation by ICSTIS) and self-regulatory (e.g. mobile content rating) initiatives and Freeserve is committed to work with Ofcom, consumer groups and the rest of the industry to develop appropriate codes to ensure consumers are adequately protected. This approach would allow the development of appropriate consumer protection measures which could address the various ways in which consumers may be protected (for example through analogue back-up lines or through the use of mobile telephones) and which would not be

unnecessarily technologically or commercially prescriptive. Ofcom would of course retain backstop powers to modify the general conditions of entitlement should this approach not be successful. Ofcom should revisit the Oftel 2002 guidelines on the essential requirements for network security and integrity and criteria for restriction of access to the network.

Legal Constraints on Exercise of Ofcom's Discretion

Introduction

It is a general principle of administrative law that a statutory body such as Ofcom should exercise its discretion within the scope of its statutory powers and in accordance with its statutory duties.

As a matter of domestic law this is construed by reference to "the policy and objectives of the Act."² Part II of the Communications Act 2003 ("the Act") is the result of the transposition of the EU electronic communications framework. Ofcom must therefore have regard to the source European legislation when construing its powers and duties under part II of the Act.

To the extent that this transposition is incomplete or inaccurate there is a clear principle of community law that national "organs of the state" - which includes Ofcom - should give effect to EU law if there is a conflict with national law.³

For this reason, we have set out the constraints on Ofcom's discretion primarily by reference to the source EU legislation with secondary references to its transposition into UK law in the Act.

Over-arching Principle of Technology Neutrality

Article 8(1) of the Framework Directive sets out the policy objectives for National Regulatory Authorities ("NRAs"). Article 8(1) it sets an over-arching requirement that NRAs "take the utmost account of the desirability of making regulations technologically neutral" - this was transposed by s4(6) of the Act.

Article 8(1) sets out specific objectives which NRAs should take "reasonable measures to achieve" in articles 8(2)-8(4). These are transposed by s4(3)-4(5) and s4(7)-4(10) of the Act.

This over-arching requirement for NRAs to take utmost account of technology neutrality is perhaps not given the prominence it has in the Framework Directive in its transposition into UK law. Nevertheless, we submit that as a matter of community and UK law, Ofcom should give utmost regard to this requirement and that it should be the starting point for its analysis in the current consultation.

Restriction on Imposition of Ex-Ante Conditions

² Padfield v MAFF [1968] AC 997.

³ See Commission comments to Viestintävirasto (Finnish telecommunications regulator) pursuant to Article 7(3) of Directive 2002/21/EC on Case FI/2003/0031 : Market for voice call termination on individual mobile networks, in which it cited the judgment of the ECJ of 9 September 2003 in case C-198/01, Consorzio Industrie Fiammiferi (CIF) v contra Autorità Garante della Concorrenza e del Mercato (not yet reported), paragraphs 48 and 49, confirming earlier case law of the ECJ.

The Authorisation Directive limits what conditions may be imposed by NRAs. Article 6 deals with the conditions which may be attached to the granting of rights of use of numbers.

Article 6(1) provides that rights of use for numbers may only be subject to conditions listed in parts A, B and C of the Annex and that any such conditions should be “objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.”

Part C of the Annex lists conditions which may be attached to rights of use for numbers as follows:

1. Designation of service for which the number shall be used, including any requirements linked to the provision of that service.
2. Effective and efficient use of numbers in conformity with Directive 2002/21/EC (Framework Directive).
3. Number portability requirements in conformity with Directive 2002/22/EC (Universal Service Directive).
4. Obligation to provide public directory subscriber information for the purposes of Articles 5 and 25 of Directive 2002/22/EC (Universal Service Directive).
5. Maximum duration in conformity with Article 5 of this Directive, subject to any changes in the national numbering plan.
6. Transfer of rights at the initiative of the right holder and conditions for such transfer in conformity with Directive 2002/21/EC (Framework Directive).
7. Usage fees in accordance with Article 13 of this Directive.
8. Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.
9. Obligations under relevant international agreements relating to the use of numbers.

This list highlights that Ofcom does not have the power to limit the use of any number range based on the underlying delivery technology - whereas it is clearly contemplated that Ofcom may restrict the allocation of number ranges by reference to services.

Responses to Questions

1. Ofcom believes that non-geographic numbers would be suitable for VoB services. Do you agree?

As set out more fully above, Freeserve submits that VoB is not a “service”. VoB (as used by Ofcom) more accurately describes a disruptive technology which may be used to deliver a range of services - which include both a range of new services and substitutes for existing services.

To the extent that services provided over broadband are similar to existing services, providers should be able to provide them behind the same numbers as existing services.

However, Freeserve submits that Ofcom should not define number allocation by technology, nor should it restrict services provided over broadband to a sub-set of non-geographic numbers.

2. Ofcom’s provisional view is that none of the non-geographic number ranges currently determined for allocation fully meet the requirements of VoB services. Do you agree?

No. To the extent that services provided over broadband fall within existing categories of service defined in the national numbering plan, such services should use existing number ranges, including geographic numbers and, where appropriate to the service offered, personal numbers or mobile numbers.

To the extent that services provided over broadband do not fall within existing categories of service defined in the national numbering plan, Ofcom may open up additional number ranges.

3. Do you agree with Ofcom’s proposal to make 056 numbers available as a dedicated non-geographic number range for VoB services and why?

Freeserve does not object to Ofcom making the 056 number range available for use by providers who wish to offer new services on a distinct number range. However, Freeserve submits that Ofcom should not restrict the provision of VoB to the 056 range.

4. Ofcom has not proposed a sub-structure for the 056 number range. Do you think one should be imposed and, if so, on what basis and for what advantage?

No. The market is still in an early stage of development and Ofcom should wait to see how the market develops before considering sub-division.

5. Ofcom suggests that the 056 range should have a tariff ceiling of no higher than 5ppm. What are your views on setting a tariff ceiling for 056 numbers at this level?

Ofcom does not have the power to impose retail price controls on originating operators via conditions attached to the rights of use for numbers. The retail price of calls to 056 numbers will be set by originating operators based on the relevant interconnection payment they have to make to terminating operators, their own costs and a mark-up.

Ofcom has separately reviewed the markets for voice call termination and call origination and has imposed price controls in respect of a basket of services provided by BT and Kingston

Communications. Freeserve believes that it is not within Ofcom's power to propose additional regulation within the context of this numbering consultation. Freeserve believes that any attempt to impose a tariff ceiling other than through the market review process would be contrary to UK and EU law. Should Ofcom wish to consider additional price controls, then Ofcom should do so via the market review process.

6. Ofcom suggests that fixed and mobile Communications Providers should consider treating 056 numbers like geographic numbers in terms of retail pricing and inclusion in calling options schemes. Do you agree that this would be a desirable approach?

See response to question 5 above. These prices will be set by the market in the light of Ofcom's existing regulation of call termination and call origination. We fail to see any objective justification for Ofcom regulating retail prices via numbering.

7. Ofcom proposes to designate the 056 range as 'Voice over Broadband services'. Do you have any comment on this designation, for example, with respect to its reference to technology?

Freeserve submits that number ranges should not be designated based on technology, but by service characteristics.

For the reasons set out above, Freeserve submits that any attempt to so designate a number range would be a challengeable decision by Ofcom and so strongly urges Ofcom to not designate the 056 as "Voice over Broadband Services."

Ofcom's consultation has been prompted by requests from communications providers wishing to provide new services (which happen to be provided over broadband) for which they require a new numbering range. In dealing with this immediate issue, Ofcom should adopt a proportionate and least intrusive approach, which is to open up the 056 number range for such services.

Numbers in this range should not be allocated based on the underlying technology used to provider the service, but rather by reference to the differences in the service provided.

Any definition should focus on the different service characteristics, not the underlying technology.

8. Ofcom proposes to modify the Plan so that 056 numbers are available for allocation for VoB services and 055 numbers are available for allocation for corporate numbering services. Do you have any specific comment on the proposals to modify the Plan in this manner?

See our comments above. Freeserve strongly disagrees that "VoB" is an appropriate method for allocating numbers and that any attempt to do so would be contrary to UK and EU law.

9. Communications Providers have put forward arguments (involving consumer perception and ease of competing with existing services) in support of allocation of geographic numbers for VoB services and Ofcom has provided its thoughts in response. What are your views?

Recognisable Number Range

If communications providers who happen to use broadband are forced to use an unfamiliar number range, this will significantly raise customer acquisition costs for such providers.

Customers' unfamiliarity with the number range and concerns about uncertain tariffing will raise their switching costs. As such, forcing providers of substitute services provided over broadband to use non-geographic numbers would not be proportionate or justified and would discriminate in favour of legacy operators.

Ease of Competition

See comments above.

Portability of Existing Geographic Numbers

Subscribers have the right to port their number. This is not contingent on the service being provided over any particular technology so any attempt to artificially restrict the ability of a provider (even if the service were to be provided over broadband) to port geographic numbers would not be proportionate or justified and would discriminate in favour of legacy operators.

Retail Price and Interconnection Arrangements

These have been addressed by Ofcom in its market reviews. To the extent that services provided over broadband are in the same product markets as those reviewed by Ofcom, there is an existing regulatory framework in place. If the services are in the same market, then existing retail and interconnection pricing rules apply - and it is difficult to see the logic for forcing VoB onto a different numbering range.

Eligibility for Inclusion in Calling Options Packages

Provided that VoB providers can choose whether to provide services behind geographic or non-geographic number ranges, this is less of an issue.

10. Ofcom would be interested in hearing views from fixed and mobile Communications Providers as to how they might charge for calls to 056.

See our answer to question 6 above.

11. VoB services might offer an element of mobility – do you think that this raises definitional issues for geographic numbers?

No, provided that geographic numbers are used by providers whose service is sold primarily for use over a fixed broadband link.

If bundled with mobility options, then it may be more appropriate for such providers to use personal (Wi-Fi roaming) or mobile (3G) numbers for their services.

In any event, provided that the caller is charged as if the call were being made to the identified area code, Freeserve does not see that any consumer protection issues which would warrant intervention from Ofcom are raised.

12. Ofcom has identified four options for how it might allocate geographic numbers for VoB services. Which of the four options do you prefer and why? Are there any other options that Ofcom should consider?

Modified option one - any services which look like a geographic circuit-switched service should be allocated geographic numbers even if delivered over broadband.

13. If option one ('allocate to all VoB services') or option two ('allocate to PATS VoB only') were adopted, which of the five sub-options intended to ensure sufficient capacity was available for allocation would you favour and why?

Freeserve favours a solution in which the allocation of numbers is reduced to smaller blocks and accordingly favours options 1b or 1c.

These options minimise disruptive widespread code changes whilst ensuring that numbers are conserved in such a way that they are available for the maximum number of competing service providers

14. What comments and quantitative data can Communications Providers supply on the likely impact and timescales for implementing the five approaches (sub options a – e) for ensuring that sufficient geographic numbering capacity is available to meet demand if allocated for VoB services?

No comments.

15. Do you have any comments on Ofcom's proposed telephone numbering application form (as set out in Annex E) for 056 numbers?

If Ofcom amends the definition of 056 numbers, the form should be amended accordingly.

Conclusion

Freeserve would welcome the opportunity to meet with Ofcom to go through its submission and discuss any matters arising. If Ofcom would find a meeting useful, please contact Simon Persoff on 01727 207 127 or via email to simon.persoff@freeserve.com.

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