

Implementing Decisions from Ofcom's Numbering Review

We thank Ofcom for extending the consultative period, beyond its legal obligation of one month. However, we were very surprised that Ofcom has not used its normal open, clear and separate notification process, for this crucial consultation. We wonder how many other stakeholders had not realised that the Statement held an embedded consultation.

Consultation questions (as buried on page 171 of the Numbering Statement¹)

Question 1 Which of Ofcom's two options for a price ceiling for 070 numbers - above which a free pre-call tariff announcement would be required to inform the customer of the maximum price that could be charged - do you prefer, and why:

*a) a standard price ceiling of 20p per minute or per call from all originating providers ; or
b) a customer-specific price ceiling of no more than the maximum that a customer would pay, on a per minute or per call basis, to call a customer on a mobile network from that originating provider?*

Neither, this is a discriminatory proposal. For detail see answer to question 5.

Question 2 Is the proposed implementation date of around February 2007 reasonable to implement either of the two price ceiling options? Will either of the price ceiling options be more complex or require more implementation time than the other?

No. For detail see answer to question 5.

Question 3 Do you agree with the proposed designation of 071 to 075 inclusive as mobile services, and the corresponding amendment to the application form to include 075?

No. For detail see answer to question 5.

Question 4 Do you have any comments on Ofcom's guidance on the categories of end user eligible for 0300 numbers? Can you suggest any other categories of public service and not-for profit bodies that should be included in the guidance?

We support the 03 proposals, in general, but Ofcom has ignored the crosscutting impact on 0870 proposals, in breach of UK (& EU) law. For detail see below.

Question 5 Do you have any other comments on the specific changes that Ofcom is proposing on the Numbering Plan and application forms?

FleXtel has no comment to make on the application forms at this time. FleXtel supports Ofcom's work in reducing scams and promoting price transparency.

To open up competition and innovation in the UK telecoms industry, Oftel, (Ofcom's predecessor) set up Number Translation Services (0870) and Personal Numbering (070) Services. As a direct result of Oftel's initiative, in 1993, FleXtel launched a highly innovative, competitive and ethical service. It has operated for over ten years and has an exemplary track record. FleXtel also has an established, satisfied and stable customer base, with a wide range of bona fide applications. It has never had any valid fraud claim made against it.

However we strongly disagree with Ofcom's interventionist methodology and its abuse of Number Planning in a hopeless attempt to deliver Price Controls, Price Transparency and the removal of scams by the deletion of bona fide telecom services in the 0870 and 070 ranges. This, in our opinion, is a reflection of Ofcom's failure to regulate this market effectively. It is also symptomatic of a panic, knee-jerk reaction to media and political pressure.

Such methodology will only result in detriment to the Citizen/Consumer and to investors and stakeholders within the UK Telecoms industry.

¹ As set out in the Ofcom Numbering Review See: <http://www.ofcom.org.uk/consult/condocs/numberingreview/statement/>

FleXtel has communicated extensively² with the Regulator on this issue and expounded effective methods for the non-discriminatory delivery of Price Transparency and thereby the inherent protection of Citizens and Consumers from scams and fraud. At the same time such price transparency would be a powerful driver for full price competition, driving down prices. In particular it would reduce excessive charging for mobile originated calls to innovative services, such as 0870 and 070. See table below.

Typical Mobile Excessive Charges³.

Daytime calls, worst case pricing to show risk to consumers for a typical 3 minute call e.g to doctors or public services						
Operator	0800	Landline	0844	0845	0870	0871
BT	Free	9p	15p	12p	24p	30p
BT Payphone	Free	30p	42p	50p	50p	50p
Orange	75p	45p	45p	75p	45p	105p
Three	45p	45p	45p	45p	45p	45p
Virgin	45p	45p	30p	30p	30p	30p
O2	105p	75p	105p	105p	105p	105p
T-Mobile	120p	90p	120p	120p	120p	120p
Vodafone	90p	90p	90p	90p	90p	90p

Prepay mobile cited - for low income families, who cannot afford BT line rental.

Accurate at the time of analysis in 2005. Please check latest price with supplier.

In particular, notice that a 3 minute 0870 call, costing about 24 pence on BT, can cost up to £1.20 on some mobile networks. Since these excesses are worst on pre-paid phones, it is likely that many low-income families will be harmed by this artificial "digital divide", due to lack of clear pricing information and opaque, complex tariffs.

Driven by the above, Ofcom has responded to the demands of Citizen/Consumer and Government by delivering low cost "Nationwide Numbers" in the 03 range. It is obvious 03 must impact on the proportionality and necessity of the proposals for 0870 and that they are not complimentary, as suggested by Ofcom. Ofcom closed the consultation on 0870 in December 2005. It is on the record that Ofcom has intentionally refused⁴ to consult on the 0870 proposals in the light of 03 proposals revealed to the public and Industry only in February 2006. This seems to FleXtel that this is, inter alia, an abuse of due process.

Ofcom's 070 proposal directly discriminates against and impacts FleXtel's service proposition, whilst failing to target scammers and over-charging by mobile networks. Note: In the Consultation⁵, FleXtel supported and still supports the removal of number allocations from rogue Communication Providers.

Ofcom would be advised to look to methodologies used by other EU Regulators, who, under the same EU Directive, are able to control quality in the marketplace. We note that many EU Regulators impose more stringent tests for the allocation of numbers to bona fide communication providers and stricter control of sub-allocation.

We hold Ofcom, (and not Oftel) fully responsible for the parlous state of the 0870 and 070 markets. We believe we have a duty to our bona fide Customers, many of which are SME's, to protect them from over-zealous and badly targeted regulation. Hence FleXtel, as an SME itself, has had to expend much effort in trying to make the Ofcom behemoth listen.

In short, by effectively deleting the 0870 and 070 services Ofcom is reducing choice and constraining innovation i.e. it is throwing the baby out with the bath water.

² See: <http://www.flextel.co.uk/ofcom>

³ Excessive Mobile Call Charges - See: http://www.flextel.co.uk/ofcom/20051206_ngn_cost_comparison.pdf

⁴ Refuses to consult on 0870 in light of 03. See: 2.4 of the Statement & http://www.ofcom.org.uk/telecoms/groups/nts_focus/notes/nts2mar05

⁵ Telephone Numbering - Safeguarding the future of numbers see: <http://www.ofcom.org.uk/consult/condocs/numberingreview/>

The Legal Framework

In 2003 Ofcom was set up as a direct result of the EU Framework Directive ("the EU Directive")⁶ which mandated the Communications Act 2003 ("the Act")⁷ by the 25th July 2003. Ofcom therefore replaced Oftel in 2003 and most of the Telecom Act 1984 was repealed⁸.

Accordingly, Ofcom has at least the following legal duties and obligations:

1) Ofcom must:

1. Secure that regulation does not involve-
 - (a) imposition of burdens which are unnecessary; or
 - (b) the maintenance of burdens which have become unnecessary.
2. Carry out Impact Assessments for important proposals.
3. Ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral⁹.
4. Exercise its powers impartially and transparently¹⁰.
5. Must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed¹¹
6. Promote competition¹² in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:
 - (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;
 - (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
 - (c) encouraging efficient investment in infrastructure, and promoting innovation; and
 - (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.
7. Promote the provision of clear information¹³, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services.

2) Ofcom must not:

1. In exercise or performance of any power or duty¹⁴ unless they are satisfied that the condition or (*as the case may be*) the modification satisfies the test that the revision or modification is-
 - (a) objectively justifiable in relation to the matters to which it relates;
 - (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (c) proportionate to what the modification is intended to achieve; and
 - (d) in relation to what it is intended to achieve, transparent.
2. Withdraw numbering allocation if the reorganisation, so far as it relates to numbers of any description, discriminates unduly¹⁵-
 - (a) against particular communications providers;
 - (b) against particular users of the allocated numbers; or
 - (c) against a particular description of such providers or users.

Considering the foregoing summary and the content of the EU Directive and the Act, we assert that some of Ofcom's proposals are in breach of both EU and UK law. These proposals are "Important Proposals" as defined in the Act, as it will have a significant impact¹⁶ on FlexTel and other legal persons carrying on businesses in the same markets as FlexTel.

⁶ EU Framework Directive, see: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf

⁷ Communication Act 2003, see: <http://www.opsi.gov.uk/acts/acts2003/20030021.htm>

⁸ Schedule 19 of the Act. See: <http://www.opsi.gov.uk/acts/acts2003/30021-aq.htm#sch19>

⁹ Article 8(1) of the EU Directive.

¹⁰ Article 3(3) of the EU Directive.

¹¹ See section 3(3) of the Act.

¹² Article 8 (2) of the EU Directive.

¹³ Article 8(4) of the EU Directive.

¹⁴ See section 47 and 60(2) of the Act.

¹⁵ See section 62(2) of the Act.

¹⁶ See section 3(12b) of the Act.

Proposed changes to the National Telephone Numbering Plan

We will show here that some of Ofcom's proposed measures are not proportionate and certainly cannot pass the test for setting or modifying conditions, as set out in section 47 of the Act and in particular section 62(2) of the Act. ("the Test"). In particular we challenge Ofcom to prove that all its measures are Objectively Justifiable. We assert that Ofcom is acting ultra vires in its proposals for 0870 and 070.

03XX Range

A2.40 & A2.41

The basis for introducing 03 is valid in that it does indeed deliver a "Nationwide Number" to their customers at a simple cost that its customers will know and understand. FleXtel supports this measure.

However, the linkage to the NTS proposals means Ofcom is suggesting an 0870 range and an 0370 range delivering identical price points. This is an inefficient use of numbering space and a reduction in choice for the Citizen/Consumer. The forced imposition of the new price point for 0870 fails the Test.

Ofcom should admit that Government departments will indeed move from 0870 to 03xx and that those Government departments or commercial users who need a higher price point could, and indeed should, remain on 0870. The enforced price point change will impose a cost burden on the Citizen/Consumer. Ofcom has received input from Government departments on this matter of appropriate price point. Recent COI advice¹⁷ indeed recommends that 0870 is not used. Thereby demonstrating the pointlessness of Ofcom's 0870 proposals...

COI – Update August 2006

The position with 0870 is more complex, as to try to re-establish some trust in this range Ofcom plans to change the rules so that from January 2008, calls will be charged at no more than the originating providers national calls to geographic numbers (unless a pre-call announcement warns of a higher rate to be charged) and revenue share is not permitted. This would make 0870 more palatable for use in a Government context perhaps in a business-to-business environment. In the meantime, 0870 should not be referred to as 'national rate' in any publicity or by agents. However given the lack of trust in this particular number range, serious consideration should be given by Departments to migration to the new 0300 range to avoid criticism.

Ofcom has failed to consider that, in the light of the 03 proposals, the proposal for 0870 may now fail the Test and have become unnecessary and/or be no longer proportionate. Nor have they permitted public consultation on this matter. In fact they have actively blocked it. It is interesting to note that, of all the stakeholders, only BT will benefit by the 0870 proposal due to the removal of cost based NTS conditions.

A2.42

The dual use of 0370 and 0870 numbering space is an example of an inefficient use of the numbering plan, unless 0870 and 0370 are at different price points, thereby delivering choice for the Citizen/Consumer.

A2.43- A2.45

0870 services, like the cited 070 service, also have existing arrangements, but in this case Ofcom is forcing providers to a new price point and this fails the Test, primarily due to the existence of this new 03xx range making the change of 0870 price point unnecessary. In short the Ofcom proposals for 0870 are overkill and are a market distortion in breach of Article 8(2) of the EU Directive. Ofcom has delivered two solutions to one problem. One of which is unnecessary and detrimental to competition and existing stakeholders of 0870, including SMEs using 0870. The 0870 proposal should be withdrawn, immediately.

A2.46-A2.56

We agree with the proposal for 03, which is, in our opinion, objectively justifiable and passes the Test.

¹⁷ August 2006 – Cost to Citizen Update. See: <http://www.coi.gov.uk/documents/ccg-update.pdf>

070 Range

This proposal fails the Test on a number of counts and we are surprised that Ofcom dare propose it. The lack of delivery by the National Regulator of good Price transparency, adequate number husbandry and enforcement with respect to rogue CPs, is not an excuse for this “sticking plaster” solution. The medium term plan being to move the problem to 06, whilst ignoring the clear benefits of this vital service in a convergent communications market. ...The very raison d'être of Ofcom itself!

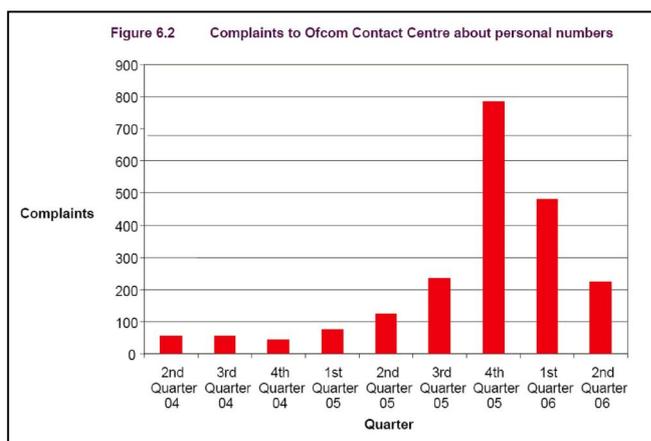
A2.57

Restated, 97%-99% of all complaints are NOT related to 070. This measure fails the Test. It is not objectively justifiable and is a result in our opinion of Ofcom bowing to media and political pressure.

In fact Ofcom's own measurements¹⁸ (shown on the right) already show a sharp decline in complaints in this area, due to other measures, including dealing with rogue Communication Providers.

The dramatic drop over the last six months exceeds 75%. If this trend continues, then the need for the proposed measures will be unnecessary and only serve to be detrimental to Users and Service providers, thereby failing the legal Test.

To quote the Act: “regulatory activities should be transparent, accountable, proportionate, consistent and **targeted only at cases in which action is needed**”.



Note: FleXtel supported, and still supports the removal of number allocations from rogue Communication Providers, in the Consultation¹⁹.

We hold Ofcom, (and not Oftel) to be fully responsible for the parlous state of the UK 070 market. However, we have a duty to our Consumers to protect them from over-zealous and badly targeted regulation.

Ofcom would be advised to look to methodologies used by other EU Regulators, under the EU Directive, to control quality in the marketplace. We note that many EU Regulators impose more stringent tests for the allocation of numbers to bona fide communication providers and stricter control of sub-allocation.

A2.59

This proposal is discriminatory. It will encourage OCPs to discriminate against Personal Number services by artificially inflating the retail price and thereby triggering per-call announcements, unjustly. This is a breach of the EU Directive²⁰. It is worth mentioning here that examples of excessive charging by mobile providers have already been submitted to Ofcom from various sources, including FleXtel²¹. Ofcom have yet to show they have a plan to address this issue. Ofcom should expect serious market distortion to occur in this area, unless it does something that is better targeted.

A2.60

The inclusion of VAT in the cap, as suggested on page 130 of the Statement, is a further indication of lack of competence by Ofcom. If, in the future, the VAT rate is adjusted, as is likely with EU harmonisation in this area, there would be a chaotic situation due to the effective loss of stakeholder operating margins.

¹⁸ Page 86 of the Statement - Figure 6.2 Complaints to Ofcom Contact Centre about personal numbers

¹⁹ Telephone Numbering - Safeguarding the future of numbers see: <http://www.ofcom.org.uk/consult/condocs/numberingreview/>

²⁰ Article 10(2) of the EU Directive.

²¹ Excessive Mobile Call Charges - See: http://www.flextel.co.uk/ofcom/20051206_ngo_cost_comparison.pdf

A2.61

This proposal discriminates against bona fide service providers and constrains innovation, choice and competition. In breach of Ofcom fundamental duties as enshrined in UK and EU law.

A2.62

We cannot see how it can meet 60(2,b). It discriminates against FleXtel and our customer base.

A2.63

Ofcom has not proven this statement and we challenge Ofcom to demonstrate this. We believe Ofcom lack market intelligence and has a poor track record, in terms of accurate impact assessment for SME service providers. Indeed Ofcom has acknowledged this in recent publications. Therefore Ofcom cannot be confident that such a discriminatory proposal is objectively justifiable as it lacks accurate data to support this claim.

However, we do see merit and would support a blanket (non-discriminatory) application of pre-call announcement (our Call Price Labelling proposal cited earlier) for all Telecom services.

A2.64

This is nonsense. The proposal clearly discriminates against 070 providers with respect to their ability to compete with mobile and VoIP providers. It cuts across the concept of communication convergence and the support of diverse and innovative services. Ofcom cannot slice and dice markets to justify their draconian proposals.

A2.65

We agree in principle, but to avoid discrimination Ofcom must apply this measure to all services or none. See A2.64 above.

A2.66

Ofcom has ignored FleXtel's expert input in this area. Therefore the process is anything but transparent. We believe Ofcom cannot defend its position here and hence has remained silent.

A2.67-A2.70

Ofcom are regulating without heed to the detail of a very complex market and in a manner that is not self-consistent in terms of tariff transparency. The destruction of innovative service propositions cannot be argued to be supportive of innovation. Stating black is white can only lead to a full parliamentary inquiry into Ofcom's integrity and competence in this area.

Mobile Numbering Range

A2.71-2.81

Ofcom is in breach of Article 8 of the EU Directive and has clear legal duties, as set out above to make regulations technologically neutral.

It beggars belief that Ofcom does not understand the full impact of convergence and the vision that Oftel held for the 07 range.

It is even more surprising when Ofcom discusses such technologic neutrality at length in sections 3.4, 4.4, 4.93 and 4.95 of the Statement. To quote Ofcom's own Statement:- "those numbers which are available must as far as practicable be allocated in a technology neutral manner". It is therefore almost laughable that Ofcom should promote a "mobile brand".

We are deeply embarrassed and extremely worried that a British quango, with a budget of over £100 Million per annum, has not the skills to deliver self-consistent guidance to an industry that is crucial to the wellbeing of the UK economy.

Indeed, given that Ofcom is still mixing tariff "brands" with technological "brands" the whole philosophy collapses at this point.

Furthermore the fact that the 087 “up to 10ppm revenue share brand” is proposed to contain a geographic linked non-revenue share(0870) range, means that the starting point for “branding” is already a shambles. In simple terms, Ofcom is destroying its much vaunted drive for Price Transparency with its own numbering proposals.

At this point we can only suggest that the self-evident incompetence, or perhaps negligence in this area, demands that Ofcom withdraws its Numbering Plan modification proposal for a full internal review. Alternatively, Ofcom should be prepared to face serious legal challenges to its competence.

A2.82- A2.84

It is not clear to us why the UK needs an additional 500 Million mobile numbers on top of the 300 Million already deployed. The UK population is less than 75 Million; and that mobile numbering should not suffer the allocation inefficiencies of geographic numbering (which contain detailed routing digits which lower numbering efficiency). Accepting only a 50% numbering efficiency, then we could expect that the existing 300 million numbers to support at least a population of 150 million users i.e. capable of delivering at least two mobiles for every person in the UK, including infants and the very elderly. The new proposal raises that figure to over 10 mobiles per person! We can only conclude that Ofcom's number management policy has failed in this area.

Therefore this proposal for number capacity by Ofcom is once again nonsense. It reflects either a gross inefficiency in Ofcom's Number Management unit or a simple and ill-founded desire to kill off Personal Numbering. The latter would be in breach of Article 8 (2,b) i.e. Ofcom must ensure “that there is no distortion or restriction of competition in the electronic communications sector”.

Ofcom would be advised to look to methodologies used by other EU Regulators to control quality in the marketplace. We note that many EU Regulators impose more stringent tests for the allocation of numbers to bona fide communication providers and stricter control of sub-allocation.

Other Annexes

We do not consider it efficient to comment on the detailed annexes at this time. We will comment once the proposed new Number Plan has been withdrawn and modified by Ofcom or, alternatively, as a result of extensive Judicial Review of such proposals, which will no doubt shed more light on Ofcom's working practices and its efficacy.

FleXtel
Sandbach
14th September 2006