



9 July, 2008

Mr E Richards
Chief Executive Officer
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Dear Mr Richards,

**Re: 070, 0870 and 0871 Changes
A safe way forward?**

1 Status of Ofcom's Consumer Protection Interventions

I wrote to you in September 2007, regarding 070 and my concerns that Ofcom's 070 intervention created a health and safety risk. I would like to thank you for passing my letter on to David Stewart, whose team made a thorough investigation, using Ofcom's formal powers, and confirmed that the imposition of pre-call announcements (PCAs) on 070 services did, indeed, create such a risk. Ofcom subsequently decided to withdraw the requirement for these dangerous PCAs. A decision to be commended for its wisdom and reflecting the analytical approach that Ofcom adopted, in this specific case. For details see:

<http://www.ofcom.org.uk/consult/condocs/numbering03/070precall/>

1.1 070 Review

I am encouraged that Ofcom has decided to make a full and thorough review of 070. I also recognise that, unless FleXtel and other PN providers make an extra effort to help provide a solid database of bona fide applications, it will not be possible for Ofcom to make a balanced judgement in this matter. I therefore have instructed my team, at FleXtel, to support this work, proactively. To this end, FleXtel has asked all 070 end users in its customer base (*built-up over the past 15 years*) to assist by answering questions by Ofcom and to fill out Ofcom's online inquiry form. I am impressed with the professionalism with which this investigation is being conducted and am confident that the outcome will be that Ofcom will better understand what this powerful service is achieving for the UK economy. It should therefore be in a position to separate the important issues of protecting consumers from scams from those of inadvertently destroying innovation. For details see:

<http://www.ofcom.org.uk/consult/condocs/numbering03/070precall/review/>

1.2 0870 Changes

Based on the outcome of the 070 team's investigation, the 0870 team, led by Gareth Davies, rightly determined that the use of PCAs, as consumer protection mechanism, is not sustainable. Consequently, in November last year, Ofcom withdrew the requirement for PCAs in its letter from Mr Davies. For details see:

<http://www.ofcom.org.uk/consult/condocs/numbering03/letternts.pdf>

In his letter, Mr Davies stated:

"Ofcom will not make the changes until a satisfactory solution can be found. We are already assessing the extent of the problem and identifying potential solutions. As you would expect, we will include consumers, consumer organisations and industry through full public consultation".

He also stated:

“While it is very disappointing to us that a delay is necessary, I am sure you will agree that Ofcom’s duty in such circumstances is to ensure that this risk is addressed before proceeding further. The overall objective of Ofcom’s approach remains unchanged: to increase consumer protection for calls to 0870 numbers”.

However, the promised consultation “0870 Changes”, which closed last month, supplied no such solution to the consumer protection problem. For this reason, I was surprised at the Consumer Panel’s support of this proposal in its press release. See:

<http://www.ofcomconsumerpanel.org.uk/news/020508.htm>

Indeed, with the loss of the primary consumer protection mechanism of PCAs, there is now no effective protection of consumers offered this intervention. What the Consumer panel may have missed is that mobile and fixed providers (OCP) would still be free to charge what they like for 0870, provided they publish the fact, e.g. on a website. Indeed the proposed removal of the NTS condition, means that BT would also be free to charge consumers what they like, increasing rather than reducing confusion for consumers, over the real cost of calling 0870.

1.2.1 Responses to 0870 Changes

- **BT** warns that if it is to comply with the spirit of Ofcom’s proposed option B, with all other factors remaining equal, then BT would have no choice but to increase the cost of calls to 01 & 02 numbers. I agree with BT’s logic and FleXtel’s economic model supports this prognosis. However, from a broader business perspective, it would make more sense for BT to ignore Ofcom’s now weak plea for geographic rates and use its newfound freedom to charge 0870 at a higher rate. This I believe will be the likely medium term outcome and a significant risk for consumer protection.

- **C&W’s** erudite input, supports this position by demonstrating mathematically how this intervention strongly favours BT and states:

“As the dominant operator in call origination BT would have both the ability and incentive to become dominant in 0870 termination”.

I agree with C&W’s analysis, in that Ofcom’s intervention now delivers a windfall opportunity for BT. In broad terms, BT has lobbied Ofcom, for this enhanced business position, since the 7th January 2005, in its input to Ofcom’s “NTS Options for the Future” consultation. Furthermore, Ian Livingston, as former head of BT Retail, has publicly supported this stance. So, Ofcom’s intervention now makes very good business sense for BT, but does nothing for the consumer. See:

<http://www.ofcom.org.uk/consult/condocs/ntsoptions/Responses/>

<http://business.scotsman.com/business/BT-calls-on-Ofcom-to.2642029.jp>

- **Consumer groups** state that they do not see a consumer protection mechanism. Indeed Mr Julian Shersby, a longstanding supporter of the *saynoto0870* campaign states:

“The only requirement now proposed by Ofcom for telecoms companies, still wanting to rip off telecoms consumers with these unjustified higher call charges, is that the consumer must be able to look them up on some obscure web page or in the small print of some leaflet, available on request from their telecoms company”.

I find myself in the strange position of agreeing fully with this part of his submission, as Mr Shersby is clearly, “right-on-the-money”.

- The **FCS Numbering Group**, for all the above and other reasons, calls for a full review of the proposals:

“In the light of this significant recent change, we do not believe that Ofcom should proceed with the current proposals but should engage with all stakeholders and in particular with industry experts to carry out a more wide ranging consultation aimed at addressing the issue in a comprehensive way. Taking into account not only the problems associated with pre-call

announcements but also the CAT judgement and the introduction of the 03 range which provides a geographic rate alternative”.

I agree with the FCS NG, its arguments are carefully thought through and well founded.

In summary, these responses highlight that, having lost PCAs, because they are unsafe, Ofcom has also lost its primary consumer protection mechanism. This means that the 0870 intervention is no longer objectively justifiable and clearly fails the cost-benefit tests incumbent on Ofcom i.e.

- Benefit – None (*in fact it has make matters worse for BT customers*)
- Costs and detriment remain:
 - ✓ To industry, innovation and SME TCP's; and
 - ✓ To the UK economy; and
 - ✓ EU and international cross-border trade; and
 - ✓ On 0870 consumers of call termination (*number changes*).

I have great difficulty in understanding how Ofcom could consider it reasonable to put these proposals on the table, since I and other consumers of 0870 see no benefit, whatsoever. Since the only beneficiary seems to be BT, whilst causing real harm and increased confusion to consumers, it seems Ofcom is now sailing into very dangerous waters indeed. Did Ofcom actually perform a revised cost-benefit analysis before recommending its option B? For details see:

<http://www.ofcom.org.uk/consult/condocs/0870calls/responses/>

1.3 087 (except 0870) Premium Rate Services Regulation

The responses to this consultation also serve to highlight that this planned intervention is also mired in multifaceted problems, similar to those facing 0870. It also fails to retrofit effective and enforceable consumer protection to a vibrant call termination market, of significant importance to the UK economy. In fact, this tactical, media-driven, intervention, like 0870, makes a shambles of Ofcom's numbering strategy. It will therefore cause consumer detriment by increasing confusion, since premium rate can no longer be relied upon to be "*those numbers beginning 09*", but will also include 087x, but exclude 0870. Surely, this is becoming farcical?

Admittedly, PPP (*formerly ICSTIS*) have done their best to comply with Ofcom's request and deliver enforceable detailed regulations, but this has not been a success. Now that we can see unintended consequences of Ofcom's blue-skies policy, is it really a sustainable and objectively justifiable intervention? For details see:

<http://www.ofcom.org.uk/consult/condocs/087prs/responses/>

2 Consumer Protection

I strongly support Ofcom its policy of consumer protection. It is also in the commercial interest of FleXtel and other bona fide and ethical telecom providers, to stop scammers bringing telecom markets into disrepute. I also concur with Ofcom's published view that consumer empowerment is a critical factor for the proper operation of the market. Indeed, I was encouraged to see that Ofcom's recent Annual Plan has moved consumer empowerment up its agenda and now assigned this matter "*top priority*". Indeed, it is worth quoting from page 18 of the latest plan.

"The fast pace of change and increasing diversity of services mean that consumers' needs for empowerment and protection are changing. In telecommunications, the number of new offers is growing continuously and service propositions are often more complex. In this environment we need to ensure that consumers are able to make well-informed choices and move easily between services".

I could not agree more, in my opinion, this should be at the core of Ofcom's strategic thinking. It needs to work on this area, as a matter of urgency, in order to steer itself away from the regulatory and enforcement resources "*black hole*" into which it is being drawn. For details see:

http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0809/projects/

2.1 The General Condition 14 Enforcement Experience

It is clear that none of the above noted interventions have offered safe and cost-effective consumer protection. This is partly due to the current onerous policing and enforcement overheads, for which Ofcom and PPP clearly do not have adequate resources. This view is underpinned by the failure of Ofcom's GC14 initiative made in August 2006. This policy, although well meaning, has been shown not to be enforceable. It must be obvious that Ofcom cannot resource the policing of every OCP. These can vary in scale from major multinational corporations e.g. Vodafone/BT, down to a vast host of "one-man-bands", some of which simply resell services, but may also set their own retail tariff. This task is gargantuan and Ofcom should admit it is beyond its capacity and, even if adequately resourced, will not be cost effective. Since the consumer funds Ofcom, indirectly via higher Telecom service costs, can this bureaucratic and ineffective approach be of benefit to them or to the UK economy?

Furthermore, even a bona fide provider, such as BT, presents consumers wishing to know the cost of calls 087x with the need to read and understand a 32-page tariff guide, plus a 56-page supplement. See:

<http://www.productsandservices.bt.com/consumerProducts/displayTopic.do?topicId=15718>

<http://www.productsandservices.bt.com/consumer/consumerProducts/pdf/UKInternationalprices.pdf>

<http://www.productsandservices.bt.com/consumer/consumerProducts/pdf/SpecialisedNos.pdf>

Although an heroic effort by BT to comply with GC14, does anyone really believe that these tomes empower the consumer to make an informed choice?

2.2 Price Caps

It is clear that the EU commission admits that the competitive market in call origination has failed by its recent well-publicised retail price cap on mobile roaming charges. It is also clear that Ofcom also accepts that competition is failing, by its imposition of wholesale price caps on mobile termination. However, it is less clear that Ofcom has recognised that either it must fix this market failure or it must impose retail price capping, as per the EU commission.

Of course, price capping is a very slippery political slope, with significant and well-documented unintended consequences. The EU, driven by its politically popular success of a high level cap, necessary to take the heat out of rapacious mobile pricing for roaming, is now considering further action to reduce mobile termination rates at the national level.

2.3 Calling Party Pays Rule

However, the EU pushing mobile termination prices to a point to beyond which the "calling-party-pays"(CPP) rule is breached is not sensible. The success of the GSM CPP model versus the USA model of "mobile-party-pays"(MPP) is well understood. GSM's adoption of the CPP model was the direct outcome of a strenuous debate between the advocates of the Nordic and the UK CPP business models and the French MPP model, as adopted for Radiocom 2000. It is worth observing that Radiocom 2000 was never a major success and closed in 2000. Similarly, the Swedish analogue system, operated by Comvik AB, also used the MPP model and closed in the early 1990's. Typically, MPP mobile consumers do not publish their mobile numbers to save paying for unwanted callers, making the service less attractive than fixed for call termination. In contrast, CPP mobile consumers broadcast their mobile numbers widely, which leads to the strong substitution trend of mobile over the fixed line services, seen across Europe.

For historians the failure of the MPP model should not be surprising, since the principle of "message-sender-pays" has been long established, as a sound business practice. Infact, a direct result of the failure of a "receiver-pays" policy in the British postal system, led to the invention of the postage stamp (*Penny Black 1840*).

It is worth commenting here that Ofcom attempted to breach the CPP rule and change the 0870 business model to "receiver-pays" by a stealth retail price cap embedded in its original 0870 intervention proposal (*now lost in the latest concept*). This was rather foolhardy and played into BT's hands.

3 Consumer Empowerment – The Generic Way Forward

- for all call services, including 01, 02, 03, 07, 08 and 09 etc.

On the 26th May, 2008 the Consumer Protection from Unfair Trading Regulations 2008 came into force. These wide ranging Regulations apply to all business sectors. They support pricing information, as an important aspect of consumer protection. The regulations state (*in terms of the definition of misleading actions*) that:

“price or the manner in which the price is calculated” is a consideration “if it or its overall presentation in any way deceives or is likely to deceive the average consumer” such that “it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise”.

Obviously placing a call is clearly a *“transactional decision”*. Even in bundled call packages an *“in-bundle call”* uses up the bundle limit and therefore increases the likelihood of the limit being breached and costs being incurred. In any case, many call types are outside such bundles e.g. other 08xx services, including Freephone (0800) calls. So deciding to place a call will depend on its price, which should be available, in a simple and clear format, before a consumer decides to agree to pay for it (*i.e. to make a transactional decision and place a call*). Schedule 2 of these regulations makes amendments to various acts, including the Telecommunications Act 1984, sections of which were not repealed by the Communications Act 2003 and are therefore still in force. In particular, the *“Control of Misleading Advertisements Regulations 1988”* are replaced by the new regulations. For details see:

<http://www.berr.gov.uk/consumers/buying-selling/ucp/index.html>

http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_6#sch2

I believe this new legal framework now presents Ofcom with a **one-off opportunity** to at last solve the *“Consumer Protection Problem”*, in a manner, that:

- is consistent with Ofcom’s policy objectives;
- is cost effective, proportionate and objectively justifiable;
- is none-discriminatory;
- will promote effective price competition and
- will reduce the need for either retail and wholesale price controls, *which are symptomatic of ineffective price competition.*

I strongly suggest that Ofcom make use of these new regulations to impose the introduction of Call Price Labelling (CPL). This is the process where any consumer can check the price of any call, at the point of sale. This is done by dialling an industry-wide agreed prefix (e.g. 104, * or #) followed by the number to be checked. This price-check call is a free call. If the price of the call is acceptable, the consumer then redials to place the call in the normal manner. This is a safe operation and does not carry the risks associated with PCAs.

Some Originating Carrier Providers (OCPs) may wish to offer an enhanced service, whereby the caller simply holds for connection. However, this must not be imposed on industry, in the first instance, due to the negative impact on legacy systems (BT et al).

Ofcom should by now be aware that the introduction of CPL is essential, if the UK and EU Telecom markets are to be stabilised by the resulting consumer empowerment. The only other alternative is retail price capping, with all the associated risks of market distortion. However, for CPL to be viable, Ofcom and the established OCPs must accept, that current retail tariffs (*both direct and via resellers*) may need to be simplified to accommodate such a requirement. The argument that CPL is simply too expensive to deploy, has always assumed that such tariff structures are sacrosanct. This is quite simply the *“cart before the horse”*.

Over the twenty years that have elapsed since opening up the market to competition, no one has seriously asked... Can we deliver CPL yet? The answer is of course we can. Today, there is probably more computing power in a mobile phone, than in BT's billing system in 1984. In today's computer driven world CPL is not only feasible, but verging on the trivial. It all depends

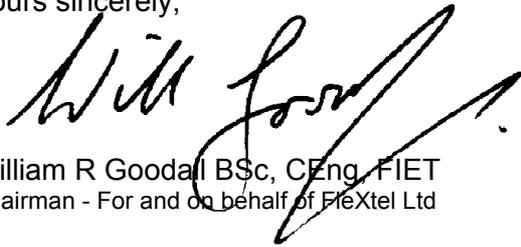
on the technical approach and, crucially, choosing compatible tariff structures and compatible reseller incentive schemes.

With hindsight, the UK could have introduced CPL soon after 1984. In this case, would the tricky tariffs, punitive 08xx pricing and random reseller deals have ever become established? It is simply unacceptable to state it can't be done because of established practice. I say to Ofcom, introduce CPL and simplified tariffs will follow. Tariffs that consumers may actually be able to understand.

I therefore call upon Ofcom to make a high level decision to cease all this unenforceable micro-regulatory nonsense and thereby restore regulatory certainty to the affected markets. Instead, I suggest Ofcom set up a wide-ranging study into how industry can ensure compliance with the Consumer Protection from Unfair Trading Regulations 2008 and a perform a quality cost-benefit study of the CPL concept. I would be happy to participate in such a study. For details see:

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

Yours sincerely,



William R Goodall BSc, CEng, FIET
Chairman - For and on behalf of FlexTel Ltd

Copies:

OFCOM Consumer Panel
BERR
FCS