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Mr David Stewart
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Ofcom
Riverside House
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7 April, 2008

Dear David,

Mobile Sector Assessment
Comments on Project Guidelines

FleXtel welcomes Ofcom's request for comments on the MSA project guidelines[1] and I would like to thank you for considering this late submission.

I note that the guidelines cite part of Ofcom's draft Annual Plan 2007-08[2]. FleXtel supports Ofcom's regulatory principles and policy objectives contained in this and also in the final plan, published last Wednesday.[3] In particular we strongly support the following Ofcom commitments:

3.5

- **Our bias against intervention aims to minimise the risk of unintended consequences** arising from regulation. Such consequences could distort or **stifle the development of competitive** and rapidly changing markets. However, where intervention is required we will intervene quickly and decisively. For example, the emergence of new services and technologies creates an increased risk that consumers will fall victim to scams, such as internet rogue diallers. **Taking firm action to prevent such activities** is vital: it can give consumers the confidence to take advantage of the increased flexibility and choice which new, convergent services can bring continuing to reduce regulation and minimise administrative burdens; and maximising our impact on international policy development to best represent the interests of UK citizens and consumers.

4.5

- **Promoting competition and innovation** in converging markets by ensuring that our fixed telecoms strategy is implemented effectively, encouraging efficient investment in next generation networks and examining the potential for new sources of market power to emerge;
- **Empowering citizens and consumers** and improving regulatory compliance where necessary by promoting media literacy and **ensuring that consumers have the information to make informed choices** in the marketplace. We will also continue to develop and enforce consumer protection rules, working to improve regulatory compliance by simplifying the rules and reviewing our approach to enforcement; and

I am absolutely delighted that Ofcom has, at last, sort to strengthen its stance on empowering Citizens to make informed choices. This is an issue about which FleXtel has been actively lobbying Ofcom for over two years. I therefore hope that Ofcom will give due weight to the above key objectives when it performs its MSA.

In particular we agree wholeheartedly with the Chairman's and CEO foreword to the Annual Plan[4], which states that "*Convergence, alongside more intense competition, can lead to complexity and varying degrees of confusion and anxiety. We need to ensure that people are both protected and able to protect themselves and their families so that they are able to enjoy fully the*

[1] MSA Project Guidelines: http://www.ofcom.org.uk/research/telecoms/msa/
[2] Draft Annual Plan: http://www.ofcom.org.uk/consult/condocs/draftannplan0809/
[3] Annual Plan 2008-09: http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0809/
[4] Foreword: http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0809/statement/

benefits of convergence." We do indeed need to empower consumers, so that people can protect themselves against some of the excesses of mobile service provision.

However, I must take issue with the comment that "*[Convergence] is bringing great advantages to all of us through increased choice, innovation, convenience and* ***lower prices driven by increased competition***". I cannot agree that pricing has been driven down by competition. Such a statement conveniently ignores the fact that both the EU Commission and Ofcom have been forced to intervene to regulate both retail and wholesale prices. Surely this is a symptom of failure of effective competition? It is my considered view that this is directly due a lack of clear labelling of prices at the point of sale and that poor price transparency remains a critical issue that telecoms regulators need to address as a matter of urgency.

I now turn to the five key questions as set out in the MSA Project Guidelines.

1. ***Should Ofcom revise its approach to regulation of the mobile sector, in order to respond to the changing market environment?***

   Yes, definitely.

   Firstly there is an urgent need to empower consumers to make informed choices and thereby restore trust in mobile services. This been highlighted by consumer outrage over call charges (0844/0870/0871 and premium rate) and EU intervention over roaming charges. Last Monday the scope of the public debate was widened by BBC Watchdog's investigation into mobile data roaming charges.[5]

   It is now clear that the regulatory authorities (EU Commission, Oftel and Ofcom[6]) should have paid more attention to the impact of poor price transparency for call (and data) access. With hindsight, good price transparency should have been delivered, before the launch of an open competitive market for communications. Such a requirement could have been enshrined in the 2002 EU Framework Directive[7] and the Communications Act 2003[8], so that all EU consumers could have been empowered to make informed choices at day one. This has now become a critical factor and without it Ofcom will be swamped by consumer outrage and competition disputes between stakeholders.

   Severe service price opacity has lead to a malfunctioning telecoms market, with consumers unable to make informed choices and protect themselves from sharp practice. The high incidence of scams, rapacious mobile call charges and resulting consumer outrage is testament to the true state of affairs.

   Lack of price transparency explains why Ofcom is now entrenched in a rear guard action to pacify both consumers and also the EU Commission with a raft of complex and ineffective micro-regulatory initiatives. Many of these have been shown to be highly intrusive (e.g. 070 pre-call announcements) and badly targeted (e.g. 0870/0871 interventions) and only serve to distort competition and stifle innovation. Ofcom's meddling with wholesale prices for mobile termination rates based on its specious Gains from Trade arguments are clearly a fudge and its similar attempt to foist the same hogwash onto 0870 services is nothing more than a thinly disguised retail price control.

[5] BBC Watchdog: http://www.bbc.co.uk/consumer/tv_and_radio/watchdog/reports/services/services_20080331.shtml
[6] Oftel: http://www.oftel.gov.uk/ Ofcom: http://www.ofcom.org.uk/ EU Commission: http://ec.europa.eu/information_society/policy/ecomm/index_en.htm
[7] EU Framework Directive: http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf
[8] Communications Act 2003: http://www.opsi.gov.uk/acts/acts2003/pdf/ukpga_20030021_en.pdf

Ofcom's reactionary interventions are guaranteed to lead to reduced choice, competition and innovation in what could be a vibrant market. Furthermore many of these initiatives are in breach of Article 8 of the Framework Directive which, to ensure effective competition, calls for "*national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral*".

Once again, I urge Ofcom to stop tinkering with detailed micro-regulation of wholesale markets with weak, woolly Gains from Trade arguments. This not only distorts competition and stifles innovation, but also does nothing to protect consumers from rapacious retail call pricing.

It should now be obvious to Ofcom that it has one simple choice, either it:

1. **Imposes retail price controls to stop rapacious pricing and so protect consumers;**

   Or

2. **Empowers consumers by delivering Service Price Labelling at the point of sale.**

I consider option 1 as an admission of market failure. For this reason FleXtel has called on Ofcom with respect to option 2 for over two years in our "call price labelling" proposals. Today I broaden the scope of my crusade on behalf of the consumer, to ask Ofcom to commit to a detailed and in depth study into the delivery of highly transparent retail price labelling, not only for calls, but also for data. Such "Service Price Labelling" should be available at the "point of sale" i.e. at the time of placing a call or accessing the Internet, (e.g. downloading a video/software or initiating a multi-user game).

Today mobiles deliver a complex array of services and facilities. Is it really so challenging to deliver pricing information e.g. by free SMS text message or free voice announcement? Considering, that, on most pre-paid mobile services, cash-balance information is already delivered free of charge, how hard can it be? How can weak arguments, to do with complexity and the impact on reseller arrangements, be accepted as a reasonable excuse to continue trading without adequate consumer protection? Is not time consumer detriment and damage to competition be given its due weight? Why has Ofcom not yet had an in depth public consultation on this matter?

2. What are the implications of market change for mobile and wireless services?

We agree with Ofcom that the mobile market is changing rapidly – with convergence becoming a reality, greater competition, technology change and service innovation. We expect the number and types of service to expand even further. Obviously this will lead to greater consumer confusion.

The onslaught of convergence and service diversification means that the relationship between service types and numbers will be lost. This is already true for geographic numbers; e.g. using VoIP[9], calls to London 020 numbers now connect calls to India or Australia. So the geographic-numbering relationship is already history. Is Ofcom's strategy to deliver meaningful pricing guidance within number ranges also doomed? Absolutely!

Similarly, the boundary between mobile and other numbers will continue to blur and as such Ofcom's proposed branding of 07 as "mobile only" is fundamentally archaic in nature, since it ignores the impact of convergence and so constrains innovation. Since this intervention is not

[9] Voice over Internet Protocol: http://en.wikipedia.org/wiki/Voip

"technology neutral" and so in breach of Article 8, it should be dropped. In any case, it is doomed to failure and will constrain consumer choice, only serving to protect the vested interests of the incumbent "big-four" mobile network operators.

3. *How are consumers and citizens affected by developments in the mobile and wireless sectors?*

A critical feature of any properly operating market is good price transparency, which allows consumers to make informed choices and protects them from being subject to tricky tariffs and rapacious pricing.

Convergence will cause service interaction to increase and boundaries to blur, so any vestige of price versus number relationship will soon be confused. In FleXtel's opinion Ofcom's attempt to use the numbering plan to deliver price transparency is both naïve and doomed to failure and only serves to constrain innovation, competition and consumer choice.

Ofcom's current approach is now leading to farce and brings Ofcom's reputation into disrepute. For example Ofcom's recently aborted 0870 intervention, in itself attempted to breach the 08 tariff ladder i.e. 0870 calls would have been cheaper than 0844 calls in breach of the price transparency policy of Ofcom's own Numbering Unit. Ofcom's own data proves that this intervention is badly targeted and that over-charging, for mobile call origination, is the critical factor driving consumer outrage. Ofcom own data shows that the BT retail price of about 8 pence per minute, for 0870 access, bears no relationship with the retail mark-up for the same service, of up to £1 per minute.

Indeed the recent, disastrous, 070 "pre-call announcement" intervention was not only in breach of international conventions, but served to highlight that some mobile providers marked-up prices for these calls to £2 per minute or per call, a mark-up of at least 400%!

Due to the increasing number of services and competitors, I believe that most consumers no longer know the cost of calls from their mobile phones, not only in the UK, but also when roaming. In my opinion, this leads to anxiety and distrust and the excessive mark-up of 08 calls, including charging freephone (0800) calls, has lead to consumer outrage for 08xx service pricing.

FleXtel has called for free price labelling at the point of sale for over two years. The mobile sector (now over 50% of all call origination within the UK) is in desperate need of such a consumer protection mechanism and has the technological capability to deliver it. This would be a true driver of competition and force retail prices down from the outrageous to more reasonable levels, as informed consumers would vote with their feet.

Unfortunately, Ofcom policy has yet to recognise this threat to the proper operation of the mobile market. Considering that the called party is paying to subsidise freephone calls, how can mobile providers charge more for these than for mobile to mobile calls? The result of such unethical pricing led the Varney report for Treasury[10] to note the impact that such a despicable distortion had on vulnerable citizens, such as the homeless, some of which rely on mobile phones. This in turn has led Ofcom to the distractions of its 03 initiative, which may serve only

[10] Service Transformation: http://www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr06/other_docs/prebud_pbr06_varney.cfm

to increase consumer confusion, rather than target the underlying problem. It may be that Mobile freephone may be a special case in which retail price control is objectively justifiable.

4. ***What are Ofcom's purposes in regulating mobile networks and services, and what does that imply for the point(s), if any, in the mobile value chain that regulation should focus on?***

It is important that Ofcom watch carefully the actions of powerful mobile service providers, such as T-mobile, O2, Orange and Vodafone. These can be likened to the large supermarket chains, which, although do not have SMP, in the current technical definition, they do wield massive countervailing buying power in the origination market. So much so that we would like Ofcom to consider revising its end to end connectivity statement[11] to include those CPs that have exhibited abuse of market power. To this end you may wish to note that a number of new entrant mobile CPs were disconnected unilaterally and without notice in 2007. FleXtel was one of these. As a direct result we have had to shelve our plans for service deployment and are now unwilling to enter the market until such time as we have regulatory cover for our investment. All we require is an undertaking that we may remain connected on fair and reasonable terms and the opportunity for commercial negotiations. This, we believe, is in line with the principles enshrined in Article 8 of the EU Framework Directive.

5. ***What is the scope for deregulation, competition and innovation in the mobile sector, and what does this mean for the future approach to regulation?***

Once the issues of retail price transparency and end to end connectivity have been resolved, it would seem to be appropriate that Ofcom could look forward to stepping back and allowing competitive forces to drive lower pricing and to deliver innovation and choice. By focussing on empowering consumers and protecting smaller service providers from predatory practices, Ofcom should be able to tear down many of its complex and costly micro-regulatory structures and restore the balance to favour reduced intervention. This should lower the current level of dispute and enforcement activity in which Ofcom is embroiled.

In Conclusion

I hope that Ofcom will make better impact assessment and proceed with more caution, than it exhibited in the recently aborted 070 and 0870 interventions, of the second half of 2007. These were not only in breach of international regulations, disrupted bona fide services and distorted competition, but they also resulted in costly and dangerous unintended consequences, that put both lives and property at risk.

I hope you find the foregoing useful in your deliberations. I look forward to remaining fully engaged with Ofcom's regulatory activities and hope that FleXtel and Ofcom can have a more constructive dialogue this year.

Yours sincerely,

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

[11] End to end connectivity: http://www.ofcom.org.uk/consult/condocs/end_to_end/