



**SIMWOOD**  
STRAIGHT-TALKING, FORWARD-THINKING, TELECOMS

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20<sup>th</sup> April 2022

By e-mail

Dear Sirs,

**Reference: Consultations on Accuracy of Caller Line Identification and preventing misuse of sub-allocated and assigned numbers.**

**Non-Confidential**

## Introduction

Established in 1996, Simwood eSMS Limited is an alternative carrier offering managed services, voice and data exclusively to a channel of other Public Electronic Communication Networks (“**PECNs**”) and Services (“**PECS**”) in the UK. We provide services to several hundred PECS/PECNs of all sizes. We are interconnected with British Telecommunications plc (“**BT**”) over SS7 under the Network Charge Control Standard Interconnect Agreement (“**SIA**”) and have recently agreed to connect over IP (Type B). We are also interconnected with all the major fixed networks, generally on bilaterally equivalent terms. Simwood is a net importer of telephone numbers by a substantial margin. Simwood Inc is a licensed Competitive Local Exchange Carrier (CLEC) and Interexchange Carrier (IXC) in 25 States of the USA . Sipcentric Limited is a provider of hosted PBX and SIP Trunking services both to resellers and direct to market, including via its reseller Birchills Telecom Limited. Both were acquired in October 2019. All four companies are wholly owned subsidiaries of Simwood Group PLC and collectively referred to herein as “Simwood”, “we” or “us”. Whilst there will be engagement from trade associations that Simwood companies are members of, and we may well agree with them in part, the

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Office of Communications (“Ofcom”) should treat this response, and only this response, as being definitive of our views.

## Definitions

Simwood notes there are three inter-related documents which form part of Ofcom’s planned intervention to address the harm caused by nuisance calls. In this document, we refer to them as follows

- *“Improving the accuracy of Calling Line Identification (CLI) data. Consultation on changes to our General Conditions and supporting guidance on the provision of CLI facilities.”* published on 23rd February 2022 (the “**CLI Consultation**”).
- *“Good practice guide to help prevent misuse of sub-allocated and assigned numbers. A proposed guide for telecoms providers.”* (the “**Good Practice Consultation**”). The guide therein is referred to as the “**Good Practice Guide.**”
- *“Tackling scam calls and texts. Ofcom’s role and approach”* published on 23rd February 2022 (the “**Policy Positioning Statement**”).

As a general piece of feedback, Simwood consider that stakeholders would have been better served had all three documents been merged into one, given they represent two policy proposals to address a common harm cited in an evidence base related to them both.

## Executive Summary

Simwood notes with interest that the Consultation lacks any serious policy intervention in the issues surrounding the authenticity and integrity of CLI information. Broadly, the sum of Ofcom’s proposals is to tweak the edges of existing guidance and crowbar a due diligence requirement into an existing General Condition of Entitlement (“**GCs**”).

This does not appear to be compatible with the rhetoric of the Government, the regulator and various other stakeholders which consider nuisance (and to the extent relevant, fraudulent) telephone calls to be a significant problem in society. This rhetoric is not without evidence – the Policy Positioning Statement provides a significant insight.



It is therefore disappointing that Ofcom has chosen to defer even an exploratory call for inputs on more serious interventions until Q4 of 2022.

In making the previous comment, we also have regard for a Freedom of Information Act response reference 1256058 which stated that as of 7<sup>th</sup> June 2021 Ofcom had neither taken formal nor informal measures to enforce the existing rules. We are confused as to how Ofcom can advance the scale of harm in the Policy Positioning Statement while not acting within the existing framework - a framework that neither the CLI Consultation nor the Good Practice Consultation materially alter aspects of.

Simwood is also concerned that much of the evidence in the Policy Positioning Statement relates to scam text messages, but none of the proposed interventions address harm caused by malicious actors using an SMS Sender ID, regardless of whether it is part of the National Telephone Numbering Plan (“**NTNP**”).

Though we may agree with what Ofcom is proposing to ultimately achieve, the Communications Act 2003 (the “**Act**”) does not provide an exemption for Ofcom policy where the need for intervention is readily apparent or virtuous. Sections 4 and 47 of the Act (the “**Duties and Tests**”) exist because the will of Parliament is clearly for Ofcom to demonstrate certain thresholds are met every time it exercises its discretion, including in the rewording of GC C6.6 in the CLI Consultation.

The Policy Positioning Statement provides an evidential basis for harm, but the Good Practice Guide and the change of guidance proposed by the CLI Consultation side-step the Duties and Tests because they do not change the actual regulations. They merely provide an insight into how Ofcom might interpret them in the future, with the possibility that any such planned interpretation may be overturned in court years from now. The status of guidance, being not legally binding, also severely undermines the veracity of Ofcom’s approach to a subject it simultaneously alleges via the Policy Positioning Statement to be serious.

On the assumption the relatively modest interventions in the CLI Consultation and the Good Practice Consultation pass the Duties and Tests (noting that there are some issues we discuss below), we see no reason Ofcom would not take this opportunity to modify the National Telephone Numbering Plan (“**NTNP**”) and/or the GCs to give more robust effect to the proposals.



It is fair to say that this response is quite critical of Ofcom’s approach. However, Simwood would like to stress that we are supportive of measures to combat the issues identified in the Policy Positioning Statement – such support equates to a desire for the proposed policy interventions to have meaningful effect. Unfortunately, our criticisms are founded in our belief that Ofcom has either not considered adverse consequences, is being too ‘light-touch’ to address the harm or has taken shortcuts which are not compatible with the Act.

## The Status of Guidance

Guidance from Ofcom has no binding force and can be freely ignored by any Communications Provider. There is no provision in the Communications Act 2003 for the issuance of guidance (in relation to the subject matter at hand) and the case law on the subject means that guidance comes with inherent uncertainty (see §87-§134 of *British Telecommunications plc v Office of Communications* [2016] CAT 22 (the “APCCs Case”)).

The exact same logic applies to the Good Practice Guide.

If Ofcom are serious about the intent of either proposed change to its expectations of Communications Providers, then Ofcom would change the actual GCs (or NTNP) themselves to be more explicit.

Given that the publication of guidance side-steps the proportionality test for a change to the GCs, as required by section 47 of the Act (or at least defers relevant tests until enforcement action is attempted) and carries with it the uncertainty that Ofcom’s underlying intent could be challenged (and overturned) by way of the appellate courts years from now, it gives rise to legitimate questions about the potential effectiveness of Ofcom’s proposals.

The APCCs Case provides a cautionary tale. In September 2014, Ofcom determined that Average Porting Conveyance Charges (“APCCs”) should be capped at the Long Run Incremental Cost (“LRIC”) of the same, by way of issuing guidance.

The APCCs guidance was ignored by British Telecommunications plc (“BT”), who firstly charged APCCs more than the LRIC until Ofcom resolved two disputes in November 2015, forcing them to align to the intended LRIC by way of section 190 of the Act. BT then challenged Ofcom’s use of the power at the Competition Appeal Tribunal, where BT sought to challenge the guidance itself. Had Ofcom made



more explicit changes to regulations, as opposed to issuing guidance, BT's challenge to it would have been time-barred and over two years of uncertainty would not have been experienced by the industry.

In the APCCs case, Ofcom's guidance was upheld. However, one can easily imagine a scenario in which, BT is substituted for a malicious actor and APCCs are replaced with nuisance calls; two or more years from now, the Good Practice Guide, or guidance relating to GC C6.6 could be overturned on appeal by a malicious actor, while said actor is also absolved of causing harm.

It is one thing when the uncertainty associated with guidance affects the cash flow between major communications providers; it is an entirely different matter when that risk relates to the protection of vulnerable citizens from fraud.

To that end, we suggest Ofcom reconsult with a view to embody more of the proposals into instruments with actual force under the Act. We consider both the Consultation and the Good Practice Guide in turn below.

## **Instrument for the Good Practice Guide**

Criticism of Ofcom's approach aside, Simwood does consider that a form of proportionate due diligence is a crucial step in addressing nuisance calls. It removes the moral hazard of suppliers generating income from those that engage in harmful behaviour.

With respect, it appears that Ofcom have decided that due diligence on number sub-allocation is a good idea and are shoehorning it into GC B1.6/B1.9(c) by an over reliance on the meaning of the words 'efficiently and effectively.' Such an act carries the risks we describe above, however, a variation to the NTNP is markedly more desirable.

Compliance with the NTNP is already enshrined in GC B1.5(a), meaning that Ofcom only needs to pass any statutory tests that relate to the NTNP itself. That would mean the proportionality test at section 60(2) applies (which is materially similar to the more commonly invoked test at section 47) but, unlike a broader change to the GCs, an NTNP change triggers the general duty at section 63. That general duty, in our opinion, has the effect of framing the proportionality test by affording Ofcom the ability to give weight to its views in relation to 'best use' and 'efficiency and innovation.'



## Instrument for the CLI Consultation

The CLI consultation proposes to modify GC C6.6 by including explicit reference to the identity of the calling party. We suggest that this does not go far enough and that more of the guidance should be moved to an annex of GC C6 and referred to in the body of the relevant GCs to overcome the risks we identify above.

In any event, Ofcom's proposed change to GC C6.6 proves our argument that guidance alone is insufficient. If guidance alone were sufficient, then there would be no need to move the requirement for the network number to identify the calling party from the existing guidance's reference to ND1016 (which clearly defines the network number as a telephone number that unambiguously identifies the point of ingress into a network) to the face of the GCs. If guidance was an effective tool, then the CLI Consultation would not need to exist.

For whatever reason, Ofcom have concluded that the provision being in the guidance is insufficient to achieve its policy objective. That has the effect of undermining any weight that the rest of the guidance (existing or proposed) could otherwise be given; if it had weight, it would already be enforced.

Given the existing guidance also explicitly states it is not 'legally binding'<sup>1</sup> we question whether its intended audience will pay it any attention and thus whether the CLI Consultation will achieve any of its intended outcomes as a result.

Fundamentally, we say that any part of the new proposed guidance that Ofcom consider important in addressing the harms in the Policy Positioning Statement needs to be moved to the GCs themselves.

## Duties and Tests

Notwithstanding what was said above about a change to the NTNP, Simwood has several concerns regarding the rationale for Ofcom's proposed intervention.

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<sup>1</sup> §2.12 of "*Guidance on the provision of Calling Line Identification facilities and other related services*", published by Ofcom on 26<sup>th</sup> April 2018.



Firstly, Simwood is aware, from a Freedom of Information request, that as of 7<sup>th</sup> June 2021, Ofcom had not taken any formal, or even informal, enforcement action with respect to compliance with GC C6.6. This seems at odds with public perception of the problem and gives rise to serious questions about whether there is an issue that requires addressing.

Even if we assume that any enforcement action was hampered by the lack of explicit reference to the identity of the calling party, which is the purpose of the CLI Consultation as it relates to the GCs themselves, it is surprising that the regulator has allowed the magnitude of harm it cites in the Policy Positioning Statement to be perpetrated without exercising its powers against those responsible.

This has the effect of calling into question the proportionality, or need, for any intervention whatsoever. While, on paper (and in Simwood's qualified opinion), Ofcom's proposals have merit, we are surprised that Ofcom is unwilling to subject them to the Duties and Tests.

The only proposal in the CLI Consultation or Good Practice Consultation that requires this is the modification to GC C6.6 - and even then, we consider Ofcom to have failed in its statutory duties. At §3.12 of the CLI Consultation, Ofcom say "*We have not attempted to quantify the benefits of these proposed changes.*"

That is both *ultra-vires* and incompatible with the established jurisprudence. No matter how virtuous, or patently needed, or minor a change to make one GC consistent with another, Ofcom are required to demonstrate such a proposal passes the Duties and Tests. There is no shortcut in the Act, save for the copying out of European legislation, a moot point now the United Kingdom has left the European Union, in relation to these requirements.

We note that in the recent work on seamless switching<sup>2</sup>, Ofcom also misdirected itself in this manner<sup>3</sup>, by stating a cost-benefit analysis was not required to demonstrate proportionality.

Simwood considers the authority on proportionality to be [Vodafone Limited v Office of Communications \[2008\] CAT 22](#), where the Competition Appeal Tribunal considered proportionate to mean that the benefits outweighed the costs.

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<sup>2</sup> "*Quick, easy and reliable switching. Statement on changes to the General Conditions*" published by Ofcom on 3<sup>rd</sup> February 2022 (the "**OTS Statement**").

<sup>3</sup> §3.144 of the OTS Statement



In the case of the proposed change to GC C6.6, we do not consider it likely that a cost-benefit analysis would fail to demonstrate proportionality - nor, subject to what we say below about certain scenarios, would enshrining aspects of due diligence explicitly into GC B1 or the NTNP. It would certainly expose some of the issues we discuss below and therefore would help Ofcom make more informed policy decisions.

Ofcom may know the proposals are the answer to the problem... Ofcom may have convinced itself the benefits outweigh the costs and Simwood and others may agree - that does not absolve Ofcom from a requirement to show its workings. A requirement, we say, is mandatory by law and upheld by jurisprudence.

## **Other Issues**

### **Incorrect target of due diligence requests**

We construe the Good Practice Guide as placing a requirement on the supply of telephone numbers to businesses. We note that from §2.28 of the Good Practice Consultation, that Ofcom intends the Good Practice Guide to apply to all scenarios save for consumers (as defined in the GCs) i.e. natural persons outside of their trade and profession.

In our experience, many of the malicious actors to which we have experienced the misfortune of providing services to (until discovered and disconnected in each case) have been natural persons. A natural person is Schrodinger's Consumer. Until one opens the box, they are both simultaneously a domestic residential user and a sole trader or a business.

In scenarios where users can engage with a telecommunications service by way of creating an account online and adding credit card details (which may be as a representative of a business but entering their own natural person details - a not uncommon scenario), the reality is that we doubt the Good Practice Guide will be applied, leaving one of the most common vectors (in our experience) of harm not being addressed. Indeed, we also note that Ofcom appear to frame the problem in terms of End Users generally<sup>4</sup> and not just business users; the problem is malicious users' access to telephone

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<sup>4</sup> For example at §2.4+2.9 of the CLI Consultation.





numbers. A malicious actor can access telephone numbers by way of a residential service, or pay-as-you-go SIM, not just a business contract.

The only way to overcome the issue of Schrodinger's Consumer is for all allocation and adoptions, regardless of the end user, to be in scope of the Good Practice Guide.

Additionally, we note that the due diligence requirement is especially burdensome on providers whose business model minimises human interaction and contact in the provisioning process. Situations where sign-up and provisioning are done entirely online or via an app do not lend themselves to the due diligence Ofcom envisages.

This business model is clearly one valued by Ofcom<sup>5</sup>, so it is with surprise that Ofcom (for example at §3.14 of the Good Practice Guide) seem to be advocating invasive manual reviews of provisioning requests, regardless of whether the business customer is a public electronic communications network taking a national sub-allocation to support its voice business, or a plumber.

Simwood can understand how the Good Practice Guide is applicable to its relationships with its wholesale customers, and to that end, it is an extension of some of the existing due diligence already performed.

However, it undermines the credibility of the Good Practice Guide - even with the reference to *'taking steps that are reasonable and proportionate,'* when it discusses shadow directors or the CIFAS register in the context of providing service to a taxi driver.

It is overkill in the context of a plumber signing up for two hosted seats, and therefore the guidance needs significant work to differentiate scenarios instead of treating 'business customers' as a single homogenous group and further guidance on what Ofcom means by 'reasonable and proportionate.'

We consider the Good Practice Guide needs to be broken into sections recognising the differences between a sub-allocation by a Public Electronic Communications Network to another Public Electronic Communications Network (or, as appropriate, Service) and the allocation by a regulated entity to a Subscriber. Further, the Good Practice Guide needs significant work to recognise automated

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<sup>5</sup> For example, in an open letter dated 3<sup>rd</sup> March 2022 from Ofcom's Christina Luna-Esteban, reference is made to online customer order journeys and clarity for the customer being given in real-time.



provisioning systems, especially as this is a sales process that appears to be valued by Ofcom (as described above) and, in our experience, extensively by customers.

### **No discernable impact on spam texts**

Given the CLI Consultation explicitly excludes CLI in relation to SMS (and, by default, Sender IDs or short codes outwith the NTNP) it is unclear how the harm described in the Policy Positioning Statement with respect to nuisance and fraudulent texts will be addressed. Given that there appears to be an increase in the incidence of these messages<sup>6</sup> during the period of voluntary initiatives such as those described at §2.25-2.27 of the Policy Positioning Statement, Simwood cannot understand why no statutory intervention is being contemplated by the regulator.

While GC C6 applies to providers of number-based interpersonal communications services (which includes SMS where it uses numbers from the NTNP), GC C6.4 and C6.6 are fettered by it explicitly relating only to ‘calls.’

Simwood does not understand how one application using resources from the NTNP (i.e., voice) is subjected to burdensome set of explicit requirements about CLI authenticity when another application (i.e. SMS) which has been proven to be causing harm is not.

The following suggestion may be best placed to inform Ofcom’s forthcoming Call for Inputs; however, it seems strange given the evidence adduced by Ofcom as well as Ofcom’s requirements to be technology neutral and non-discriminatory, that a distinction between voice and SMS is made which allows a vector of harm to continue unabated. To that end, we would advocate for a change to the GC C6.4 and C6.6 which capture all number-based interpersonal communication services, not just voice.

### **The Do Not Originate List**

The concept of a list for the blocking of telephone numbers known to be associated with various institutions that do not use them for outbound calling (the “**DNO List**”) is laudable.

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<sup>6</sup> For example, as discussed at §2.20 of the Policy Positioning Statement.



Simwood has access to the DNO List and has already incorporated the process into its operations. However, our experience of adopting the DNO List suggests that Ofcom underestimated the demand it would receive for access.

For many years, Simwood, and others, have suggested that Ofcom's view of the industry, being characterised by a handful or large, vertically integrated operators, gives rise to a risk of inappropriate regulation, unintended consequences and poor policy making.

While that view may be true of the residential consumer market, Ofcom is aware of some 450 entities which have completed a PECN declaration to access numbering resources alone – our experience with the DNO List reinforces our view that the regulator may have some work to do to understand how the market differs in practice to the simplified view we often see it express.

The reality is that the vast majority of UK calls transit one of a small handful of large carrier networks; e.g. BT, Simwood, Gamma, Magrathea, TalkTalk and Vodafone. Therefore, the DNO list, if implemented by the large wholesalers, will have significant effect, even if not used everywhere, so in this case our concern may be academic.

We also accept there are issues around the security of the DNO List and that, in the wrong hands, it could become a 'shopping list' for malicious actors and, for the avoidance of doubt, therefore do not consider Ofcom has acted inappropriately with the process to gain access. However, we also hope that the experience is useful learning and informs future policy work on the true scale and complexity of the UK telecommunications market.

### **Calls from outside the UK**

§4.24 of the CLI Consultation refers to incorporating ND1447 into the guidance. ND1447 has no operative function other than to recommend segregating traffic at the international gateway into two trunks.

There are legitimate use cases (as Ofcom alludes to at §4.24); for example, we are aware that one of the most competitive transit routes for UK mobile can be those offered by providers traditionally offering international direct dial services, such as Tata.



A call that originated in the UK, but happens to trombone through architecture abroad, represents a competitive market delivering financial value to the caller in terms of their rates and is a perfectly legitimate scenario which acts to keep wholesale rates down for the benefit of citizen consumers. Such calls will genuinely have UK presentation and network numbers in full compliance with GC C6.

Additionally, a network (for example that of a multinational operator offering services in many countries) may operate in a failure state from Dublin, Frankfurt, Amsterdam or others. This is a perfectly legal example (even considering the forthcoming Telecoms Security Regulations) and may result in a hosted PBX instance in Holland generating calls with UK presentation and network numbers, being handed to a Dutch provider's interconnect.

Given in that scenario the hosted PBX customer is a UK customer, using their UK handset, from the same place as they would in a non-failure state, we consider the use of UK numbers in that scenario to be completely lawful, and indeed, considering the provider's obligations in GC A3.2 and the TSRs, even one that should be encouraged.

Unfortunately, some providers take a blanket approach to blocking calls with UK presentation or network numbers at the international gateway regardless. We are taken to understand that at least one major vertically and horizontally integrated operator engages in such behaviour following their comments in industry forums, amongst others. This would have the effect of reducing the scale of the UK transit market to just UK operators and risk an inflationary pressure on wholesale rates. We also note the inherent moral hazard in a transit player erroneously citing the guidance on non-UK originating calls to oligopolies a market in which it acts. Behaviour such as this could give rise to legitimate allegations of a breach of the Competition Act 1998 on account of major operators having already been found to have a monopoly in termination to their customer's telephone numbers in the most recent market review for Wholesale Call Termination.

We therefore urge Ofcom to take extreme caution with the subject matter. Simwood notes that §4.17 of the draft guidance makes it clear that these scenarios are lawful and should not be blocked; however, it is impossible for any terminating operator, algorithmically in call set-up, to ascertain whether a given scenario is legitimate or illegitimate. We also note that Ofcom plan to require a dispute resolution process, per Annex 2 of the latest draft guidance, but we do not have any faith that major operators will publish a process nor resource it to give rapid resolutions to genuine concerns



from their competitors - especially given the moral hazard of using it as an excuse to raise barriers to entry or innovation.

Therefore, we consider the guidance needs two significant changes.

1. That any allegation of erroneous blocking raised by a communications provider by way of A2 of the draft guidance be required to be treated by the terminating or transit provider as if it were a priority 1 service affecting fault under its standard service level agreement with its own customers; and
2. That the guidance be fettered such as where there is any doubt on the legitimacy or otherwise of a non-UK originated call, it be connected. In other words, the benefit of the doubt goes to the calling party and the signalling originally presented.

Many providers (by way of example, COLT is one in our experience) will automatically reject any service queries from entities which are not a direct contractual counterparty. Annex 2 of the latest draft guidance clearly anticipates that anyone should be able to make meaningful contact with the appropriate people, but our experience is such that we believe Ofcom (via perhaps the Office of the Telecommunications Adjudicator) will need to make the existence of the requirement abundantly clear and monitor compliance.

These modest changes ensure that harm from erroneous blocking is firstly mitigated by only those calls which a provider has investigated and determined to be illegitimate are blocked, and secondly, provides for a rapid restoration of service for where erroneous blocking is causing harm.

## **Conclusion**

The CLI Consultation and Good Practice Consultation have merit but are fundamentally a missed opportunity to address harm – harm which the regulator has reported on extensively in the Policy Positioning Statement – and, without further consideration of moving operative provisions from guidance to the GCs or NTNP themselves, are not likely to do anything other than restrict competition and innovation from operators which automate the provisioning process.

As ever, my team are at Ofcom's disposal to answer questions arising from our response.



Yours faithfully,

Simon Woodhead

Chairman and Founder