

Vodafone's response to Ofcom's July 2006 consultation on 03 and 070 numbering

Summary and conclusions

1. Vodafone notes the publication of Ofcom's July 2006 Statement on Telephone Numbering ('the Statement'). The Statement contains a mixture of specific proposals for immediate implementation (subject to statutory consultation) and broader indications of Ofcom's preferred 'direction of travel' with detail deferred for further, separate, consultations.
2. This response focuses on the Statement's proposals subject to statutory consultation now. It does not seek to comment on all aspects of the Statement, though Vodafone's comments are set in that broader context. Vodafone reserves the right to comment further on the Statement, and policy proposals stemming from it, in due course.
3. The two key proposals on which Ofcom is currently consulting are:
 - Opening the 03 range for countrywide non-revenue share services, as part of which Ofcom proposes a substructure within 03 and an unqualified requirement that origination pricing by all originating operators is inextricably tied to the pricing of geographic calls;
 - Introducing one of two alternative retail price ceilings for 070 personal numbers, while allowing originating operators to depart from such ceilings where they provide pre-call announcements to that effect.
4. In Vodafone's view, both proposals are seriously flawed in concept, particularly insofar as they seek to regulate retail pricing of non-Significant Market Power (SMP) operators.
5. As Vodafone has previously noted¹, the phenomenon of abuse of 070 numbers is primarily concerned with outpayments, not origination pricing. The appropriate response is effective enforcement of existing prohibitions on end-user revenue share, not retail price regulation of originating operators.
6. Vodafone does not object to (and indeed has explicitly welcomed) the concept of an 03 number range dedicated to non-revenue share non-geographic services. We do, however, have serious concerns about Ofcom's proposal to impose retail price controls on non-SMP operators by tying 03 origination pricing to pricing of calls to 01/02 geographic numbers².
7. Requiring all originating operators to price 03 calls in the same way as geographic calls effectively requires mobile operators to originate many of such calls at a loss, or to increase their geographic call prices – for example by discontinuing their inclusion from call bundles. A regulatory requirement to price particular calls below cost is effectively a requirement to cross-subsidise these call types. This distorts the competitive outcome, and inevitably has implications for other pricing decisions. Ofcom's current proposals for 03 therefore threaten to have consequences detrimental to the promotion of effective competition in the interests of citizen-consumers. The proposals cannot, therefore, responsibly be adopted in their current form as their effect is not in the interest of a competitive market serving the citizen-consumer.

¹ See Vodafone's formal response to Ofcom's previous consultation "*Telephone Numbering – Safeguarding the future of numbers*" ("Vodafone's response").

² Vodafone's welcome for a new non-geographic non-revenue share 03 range was specifically qualified in this respect. See Vodafone's response at paragraph 19 and footnote.

8. The current proposals are also incoherent³ and fundamentally inconsistent with the EC regulatory framework⁴. Therefore Vodafone submits that they cannot legally be adopted in their current form. Ofcom has made no attempt to address this issue in its current consultation.
9. In the light of these concerns, Vodafone urges Ofcom to abandon its current proposals for 03 or 070 and instead to consider alternative, proportionate and non-discriminatory means of addressing its policy objectives. Such alternative means could include more rigorous enforcement of the existing prohibition on end-user revenue share on 070 numbers, and opening a 03 non-revenue share, non-geographic number range *without* imposing retail price controls on non-SMP operators.
10. The remainder of this response examines Ofcom's specific proposals for 03 and 070 in more detail. It should be read in conjunction with Vodafone's response to the original Ofcom consultation. Our previous response raises fundamental issues of principle that bear directly on Ofcom's current proposals which Ofcom has not sufficiently considered. We therefore invite Ofcom to consider them now in the specific context of this statutory consultation.

³ Ofcom acknowledges the difficulties of applying common pricing constraints to all operators, but then inexplicably disregards such difficulties in the case of 03 – see further discussion below.

⁴ The starting point of the Framework Directive is that regulation should be rolled back wherever possible. Recital 27 states: *"It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem."* Article 16 of the Framework Directive states that NRAs must carry out market analyses and *"where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article."* In relation to the mobile market at least, in 2003 Oftel completed its market analysis and found the market to be effectively competitive. On this basis, Ofcom is not entitled to impose regulatory controls on this market. Moreover, Article 17 of the Universal Services Directive states that not only should regulatory controls on retail services only be imposed upon undertakings having significant market power, but also, they should only be imposed if an NRA concludes that wholesale obligations imposed under the Access Directive would not result in the achievement of the Article 8 objectives. This strongly suggests that, other than those particular consumer protection measures specifically envisaged in the Universal Services Directive, (which do not apply here) other measures such as the proposed measure will not be permitted. Even if it could be argued that Ofcom's proposed measures fall within those conditions which are specifically authorised under the Authorisation Directive (which Vodafone does not accept) such conditions must meet an overriding requirement to be *"objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent."* Given the highly intrusive nature of retail price caps and the strong presumption against such an approach, (particularly in relation to mobile originated calls where Ofcom explicitly recognises higher origination costs), Ofcom's proposed measures are both disproportionate and discriminatory. Allowing in-call announcements for 03 calls may be a more proportionate approach to meeting the Framework Directive objective of tariff transparency but this requires further work by Ofcom quantifying the size of the problem versus the cost to providers and inconvenience to customers of in-call announcements.

Detailed comments on 03 and 070 proposals

11. Ofcom states that the Numbering Plan should provide service and tariff transparency⁵. Elsewhere, however, Ofcom insists that it has no intention to price regulate non-SMP operators⁶. Ofcom therefore needs to reconcile these two potentially conflicting objectives.
12. Unfortunately, Ofcom's current proposals do not achieve such reconciliation. Ofcom's 03 proposal provides the starkest example of this failure. When previously proposing a 'price as geographic' rule for 08 NTS numbers, Ofcom was at pains to deny that its proposals amounted to retail price control – and sought to appeal to pre-call announcements not making the 'convention' an absolute ceiling⁷. Vodafone finds this analysis unconvincing⁸, but nevertheless notes that by ruling out any possibility of departing from a pricing 'convention' Ofcom has given up its pre-call announcement fig leaf, thus effectively abandoning any pretence that its 03 pricing rule is not a retail price control.
13. Ofcom itself acknowledges apparent inconsistency in its approach to 03 and 070 price caps. At A2.43, Ofcom states:

“ Ofcom is conscious that the tariff descriptions on the 03 range will impose a restriction on all providers of 03 numbers, in so far as it will restrict providers from charging in excess of the charge that would be applied to a call made to a normal geographic number. This may appear inconsistent with Ofcom's decision to propose a price ceiling for 070 numbers, which enables providers to price above that limit so long as a free of charge pre-call announcement is provided to the caller. ”
14. Ofcom then goes on to deny inconsistency, stating:

“The two situations are different. The 070 range is the only range on which personal numbering services may be provided, whereas the 03 range will be an additional range on which UK-wide numbers can be provided. UK-wide numbers can also be provided on the 08 and 09 ranges.”
15. Throughout this passage, Ofcom uses the terminology 'providers of 03 numbers'. It is not clear whether this is intended to refer to terminating operators or to end-users of those numbers. Either way, however, Ofcom's attempt to differentiate between 03 and 070 misses the most crucial point: that *it is the originating communications provider (OCP) whose pricing is constrained by the proposed rules, and in neither case does the OCP have any option to switch number and thus price.*

⁵ See Ofcom Statement at paragraph 1.45 *“Ofcom firmly believes that the whole purpose of the Numbering Plan is to provide transparency about the services and prices involved when making a call, so that consumers can make informed choices. The ability of consumers to make informed choices is severely compromised when tariff transparency only applies to calls made from a single provider.”*

⁶ See original Ofcom consultation document at paragraph 5.92 *“Ofcom's intention in doing this is not to use the Numbering Plan to regulate the prices which communications providers charge. Communications providers should be free to determine what price they wish to charge for their services, subject to any price controls imposed following a finding of Significant Market Power ('SMP').”*

⁷ See, for example, Ofcom's NTS Statement at paragraph 4.21 *“Ofcom considers that it has proposed to establish a numbering convention (i.e. that 0870 calls should be charged at the same rate as national calls to geographic numbers) rather than regulate retail pricing.”*

⁸ See discussion of 08 and 09 pricing proposals in Vodafone's response, in particular paragraphs 47 to 50.

16. This is exactly the same confusion evident in the previous consultation, which Vodafone highlighted in its response. At paragraph 5.92 of the previous consultation, Ofcom stated:

“Ofcom’s intention in doing this [proposing pricing rules that bind all originating operators] is not to use the Numbering Plan to regulate the prices which communications providers charge. Communications providers should be free to determine what price they wish to charge for their services, subject only to any price controls imposed following a finding of Significant Market Power (‘SMP’).”

17. Ofcom went on in the same passage to suggest that communications providers can choose what price they like *“and then chose a number range which is consistent with that price.”* However, as noted above, it is OCPs who set originating prices, and they have no control over the destination number chosen by the receiving party end user. The fact that end-users of numbers can chose which number range they want does nothing to alter the nature of the pricing constraint facing OCPs. As Vodafone has previously highlighted, there is a fundamental mis-match between *service* designations that present a menu choice for terminating communications providers (TCPs) and end users and *pricing* designations that constrain OCPs⁹.

18. Despite its previous recognition that there is no basis for imposing price controls on non-SMP operators¹⁰, Ofcom now appears to be shifting its position to say that its proposed new rules ‘do not require a finding of SMP’¹¹. This is fundamentally different from the previous pretence that its proposed ‘conventions’ were not actually price controls.

19. Ofcom’s 03 proposals appear even more curious in the context of its clear acknowledgement of ‘complex issues’ around common price ceilings for all originating operators due, inter alia, to mobile origination costs¹². Vodafone submits that it is perverse and irrational to recognise these difficulties, promise further detailed work to examine them, and then pre-empt any further consideration by carrying on as if there were no problem in the first place.

20. Ofcom’s failure to consider the relevance of higher mobile origination costs in relation to 03 results in proposals which are both discriminatory against mobile operators and disproportionate (notwithstanding assertions to the contrary in Annex 2). Ofcom’s portrayal of its proposals as transparency measures and assertion that the appropriate legal tests are met is no substitute for an objective analysis of the facts.

21. Ofcom’s 070 proposals raise many of the same issues as its 03 proposals, though there are also certain key differences concerning both the detailed mechanics and purported rationale for intervention.

22. The price cap mechanism Ofcom proposes for 070 differs in detail from its 03 counterpart. Whereas the proposed 03 rule is ‘price as geographic’, for 070 the ceiling

⁹ It would be disingenuous for Ofcom to attempt to argue that OCPs are not, in fact, constrained by its proposed pricing rules, as this would render its proposals meaningless.

¹⁰ See original Ofcom consultation document at paragraph 5.92, cited above, and similar formulation at 5.133 of the current Statement.

¹¹ See present consultation document at paragraph 1.47 *“Applying tariff descriptions in this way does not depend upon a provider having Significant Market Power (‘SMP’) in delivering a particular service. Rather it is about providing clarity to consumers through general obligations on all relevant providers.”*

¹² Paragraph 1.47 continues: *“Ofcom acknowledges that there are complex issues involved in developing Numbering Plan descriptions that will cover costs from all lines, including mobile phones, given that call origination costs and charges vary between networks. We will analyse these issues further in the second half of 2006.”*

would be either 20 pence per minute or the highest rate charged for any call to a mobile number depending on which option is selected. In common with the 03 cap, however, Ofcom proposes to apply this ceiling to all OCPs. Thus the issue of discrimination against mobile operators by virtue of their higher mobile origination costs clearly arises in relation to 070 as it does with 03.

23. Neither of the options Ofcom is consulting on directly address the issue of wide variability of 070 termination *rates* and *structures*¹³. This directly affects the costs faced by all originating operators, and casts doubt on the wisdom of a regulatory price ceiling across all 070 ranges. On one hand, adhering to the proposed ceilings may require OCPs to originate certain calls at a loss – the same issue arising from the ‘price as geographic’ rule for 0870 and 03. On the other, the notional common ceiling could easily turn out to be a *de facto* floor. As a general rule, Ofcom should be wary of undermining incentives to compete on price in the name of consumer protection.
24. In contrast with the 03 proposals, Ofcom’s 070 proposals do at least provide for OCPs to exceed the ‘ceiling’ where they provide a free of charge pre-call announcement to that effect¹⁴. We note that Ofcom is, in this case, proposing to allow generic announcements indicating a single maximum price, rather than the precise call cost on the caller’s particular tariff¹⁵. While this may reduce complexity relative to the sort of prescription Ofcom has proposed (though not yet conducted a statutory consultation on) for NTS, it does not alter the fact that the proposed ceiling is a non-market constraint on pricing – which, as Vodafone has previously noted¹⁶, is essentially the same thing as a regulatory price control.
25. Another important difference between Ofcom’s 03 and 070 proposals is that the purported rationale for a retail price ceiling on 070 is to tackle abuse and misuse of this number range. Vodafone agrees that there is a problem with abuse and that this needs to be tackled, but it is clear that retail price controls are not the appropriate instrument because they fail to address the root cause of the problem. ‘Scams’ and other abuses perpetrated using 070 numbers are not fundamentally a product of the retail pricing by OCPs but of unregulated termination rates and ineffective enforcement by Ofcom of the existing ban on end-user revenue share. Crudely, the problem of abuse is due to ‘money out’, not ‘money in’.
26. Ofcom’s retail pricing proposals do nothing directly to address the problem of money out through illicit end-user revenue share. As a result, they do nothing to dampen incentives for abuse since these are invariant to the retail pricing policies of individual OCPs. In contrast to 08 ranges subject to the ‘NTS formula’ there is no mechanical link between origination pricing and outpayments to end-users (which, as noted, are not permitted in the case of 070 numbers). Ofcom’s proposals therefore appear to be based on the false premise that it is OCPs who perpetrate and benefit from 070 scams, whereas in fact OCPs are themselves often the victims of third party fraud¹⁷.
27. The appropriate and proportionate answer to such abuse is to police existing rules on end-user revenue share, not to introduce retail price controls. By proposing a weak and irrelevant alternative to tackling the real problem directly, Ofcom is not sending out the right message to those who would defraud the public. Ofcom should have the will,

¹³ Pence per minute rates currently vary from just under 2ppm to just under 40ppm, but some numbers are charged at 42 pence per call plus 0.5ppm.

¹⁴ See, for example, paragraph 6.64, first bullet.

¹⁵ See paragraph 6.75

¹⁶ See Vodafone’s previous response, in particular paragraphs 38 to 51

¹⁷ Vodafone has previously provided examples to Ofcom in confidence and is happy to elaborate further.

determination and resource to police its existing rules effectively, so that fraudsters will conclude that it is not safe to rip people off via 070 scams. Capping the level of harm at no more than 20ppm, instead of dealing with the harm, is, to say the least, a very curious approach to consumer protection.

28. Vodafone's conclusion on 070 is that Ofcom should abandon its current proposal and instead police the existing ban on end-user revenue share with greater vigour and effectiveness than it has done to date. If, having pursued this course for a sufficient period to judge its effects in the light of evidence, Ofcom concludes that further measures are necessary, it should consider invoking rules against persistent misuse of networks, direct regulation of *termination* pricing (subject to SMP) and/or withdrawal of number allocations where abuse is found in preference to imposing retail price controls on non-SMP OCPs.

Vodafone
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