

BIS regulatory enforcement consultation

<http://www.bis.gov.uk/consultations/regulatory-enforcement-strategy>

FCS response- September 2011

Introduction

FCS is the UK trade association for the communication services industry representing 320 companies who deliver communication products and services to individual consumers and business customers transmitted by wireless, copper and fibre. More information on the FCS and our members may be found on our website www.fcs.org.uk.

The communications services sector is regulated by Ofcom, which operates as an economic regulator and a provider of services such as radio spectrum licensing to subsectors of the industry. Ofcom also has agreements with smaller organisations that carry out some of the responsibilities under the Communications Act 2003. Over half of our member companies are small and medium sized enterprises some of whom experience barriers associated with red tape imposed by larger enterprises.

We very much welcome the initiative of BIS to look at regulatory enforcement to assist the pro growth agenda. The competitive communications services sector supports the economy by improving business efficiency for end users and overall is a growing sector of the economy. We have gathered input from FCS members through a members' survey and feedback from membership sub groups.

In this response we describe the impact of regulatory enforcement from the perspectives of:

1. Ofcom as an economic regulator
2. Our experience of the smaller organisations that "regulate" parts of our sector
3. Ofcom as a service provider
4. Implementation of environmental regulations
5. SMEs more generally

1 Ofcom as an economic regulator

We recognise that the main thrust of this consultation is probably not the work of the economic regulators which are recognised specifically as not requiring a "sunset clause".

There clearly needs to be an ongoing economic regulator in the communications market with the expertise to challenge and control the market behaviour of large companies with significant market power such that a "sunset clause" for Ofcom is not appropriate. In this context, we consider that there is a need for continuing regulatory focus on establishing and protecting the competition brought to the market by smaller players, particularly those who are involved only in retailing of communications services. Here, we believe that more regulation to govern the behaviour of infrastructure providers and to establish coordinated arrangements to allow end customers to easily switch retail suppliers would allow the forces of competition to develop the retail market in the best interests of end customers, with

Ofcom then able to rely more on general consumer protection legislation than sector specific requirements for this part of the market. Thus, we would like to see the building blocks put in place to allow “sunset clauses” to be put on some of the prescriptive customer-facing regulatory requirements in the retail communications market – for example, the prescriptive codes of practice requirements in relation to premium rate and some other types of non-geographic numbers.

In the case of Ofcom, we do believe that they could go further in adopting co-regulatory measures, which is raised in the consultation and which we believe would help to address the development of the retail market discussed above. In response to the questions presented after paragraph 38 of the document:

*Are there areas where you think co-regulation could be applied to enable more formal sharing of regulatory responsibility, including delegating functions to business or third party providers?
What specific functions do you think could be delegated from particular public regulators?*

We do believe that co-regulation could be used more extensively in the communications market, in particular to help drive the coordination between market participants and management of change that is needed to establish a positive experience for end customers as they seek to exercise their choice of service provider in a competitive retail market. Although it would take some effort to set up in a transparent, inclusive and proportionate manner, we believe that this would be well worth the effort in the fast-moving and technically complex communications market. In this market, regulator-driven changes to the framework often happen very slowly with some projects taking years to complete such as consumer switching and the review of non-geographic numbering.

In some cases, we think a co-regulatory industry body would allow industry to take on more of the day-to-day running of these types of market mechanism. Ofcom, via its involvement at higher level in the co-regulatory body, could set the direction of evolution, subject to a set of principles and clear outcomes such as “providing positive benefits for the customer experience” that any proposed changes would be tested against. It could also be involved in appeals raised through the co-regulatory governance process where some parties disagreed with the “industry” approach to tackling an issue and this could not be resolved informally.

This type of involvement would provide Ofcom with an overview of developments, allow it control over the direction of these and open up the possibility of less of its own resource being used to manage and implement detailed process changes as these become necessary due to technological and market developments. It would not prevent Ofcom initiating changes in approach where it saw fit but would allow industry in the first instance to manage and adapt key processes as issues arise.

The existence of a co-regulatory body could make implementation of solutions to issues raised easier for Ofcom to achieve. In a number of recent consultations, Ofcom has mentioned the need for an industry forum and/or industry coordination to implement changes in particular market areas. We believe that a co-regulatory body could embody the concept of an “industry forum” in a more formal and inclusive manner than ad-hoc, unincorporated groups that smaller players in the industry struggle to attend, yet which can influence industry developments that will affect their business. Currently implementation of Ofcom directions lies in the hands of a series of ad hoc groups that are not all open to contributions

from smaller players. As the market share of the smaller suppliers grows these barriers to involvement in decision making become a competitive issue.

Particular areas we think could benefit from a co-regulatory approach are:

- Managing the customer experience of changing their provider of retail communication services;
- Management of telephone numbering issues – such as the allocation and preservation of geographic numbers; and number porting;
- Management of directory entry processes;
- Supplier of last resort arrangements to ensure continuity of services such as fixed-line telephony in the event of commercial failure of any relevant market participant.

Ofcom has seemed reluctant to set up any co-regulatory bodies in the communications market. We do not believe that government sees any bar to Ofcom progressing co-regulatory arrangements but this current initiative from BIS may provide some welcome impetus for this type of approach to be explored more seriously. Perhaps some relatively discrete and ring-fenced areas could be targeted first to establish principles and prove the approach.

It is worth noting that co-regulatory arrangements have been successfully set up in other industries. For example, in energy supply and in the non-domestic market for water supply in Scotland. These industries have significant parallels with communications where competitive supply of retail services is delivered over asset-intensive infrastructure networks. In both cases, the fundamental area being addressed in a co-regulatory manner is that of the processes which allow end customers to change their retail supplier easily. In the list of specific areas of the communications market noted in the bullet point list above, it can be seen that all of them are entailed to some extent in the over-arching “change of retail provider” processes.

2 Our experience of the smaller organisations that regulate small parts of our sector

Although Ofcom is tasked with economic regulation of the communications services sector, it has arrangements with third parties [generally companies limited by guarantee and owned by the directors] to carry out certain functions associated with clauses in the Communications Act 2003 or required by European Directives.

These third parties include Phonepay Plus, which operates a code of practice recognised by Ofcom under Section 120 of the Communications Act 2003 for premium rate services. In addition communications providers are required to join one or other of the two alternative dispute resolution [ADR] schemes under the General Conditions of Entitlement, set out by Ofcom as a mechanism to implement the European Communications Framework Directive.

Smaller providers report to FCS that payment towards these organisations looks like a tax.

These regulatory bodies rarely interface with smaller providers as a result of disputes with customers, because any such disputes are sorted out by the company concerned. Yet the smaller providers have an obligation to pay a separate contribution and registration processes. The organisations concerned generally take larger consumer facing communications providers to task for non compliance with their rules, but not the smaller players. Three additional bodies to the industry results in replication of cost in administration, call centre and adjudication processes. The total cost to the industry of these additional organisations is over £10 million annually. Our members question why there are two ADR schemes, when one would be adequate, since competition between the two does not increase efficiency or reduce costs, but doubles the overheads. Consumers are increasingly purchasing bundled domestic services – energy, communications and TV- from the same supplier and they would expect that any complaint is resolved by a single body not several.

The separate regulation of premium rate services by a body outside Ofcom appears to be outmoded, as micropayment mechanisms using telephony are part of the continuum of services in this market and would be better contained within the General Conditions regime and under Ofcom direct control. Alternatively it could be argued that micropayments are financial services and therefore more appropriately regulated by the FSA

3 Ofcom as a service provider

As well as its role as an economic regulator Ofcom also provides specific services to the industry that it regulates. One third of the companies in FCS membership access radio spectrum from Ofcom via a licensing regime.

Ofcom changed its method of issuing radio spectrum licences for the business radio community at the end of 2008. However this resulted in a myriad of administrative problems by Ofcom resulting in some cases of loss of access to spectrum by organisations that had been using it for essential services for many years. Three years later FCS members continue to complain about the licensing service they receive. While new IT projects often experience teething troubles the prolonged nature of this administrative change is difficult to understand. FCS representatives have liaised closely with Ofcom staff to reduce the problems for Ofcom’s customers, but the pace of change has been slow and Ofcom is the monopoly supplier.

Allocation of spectrum licences is a completely different function to economic regulation of telecommunication, broadcasting or postal services.

4 Implementation of environmental regulations

Electronic communications equipment suppliers and users are subject to a growing range of environmental directives from Europe and implementing regulations in the UK. These include the WEEE Directive, Regulation of Hazardous Substances [RoHS] and Batteries Directives. Enforcement has been by market surveillance. Although this has increased in some areas under RoHS the net result is that there is very little enforcement because there is little surveillance.

Enforcement by the National Measurement Office [NMO] is by a set of clear principles which, our members concur, are very pragmatic and sensible. There is an official mechanism for complaint if the need arises.

The WEEE directive is in place to reduce the amount of waste electrical and electronic equipment going into landfill. However, it is not clear whether the directive results in a reduced environmental impact overall. We recommend that studies are put in place to assess the environmental impact of the WEEE directive and if the conclusion demonstrates that a greater environmental impact occurs then the directive should be abolished.

5 Impact of red tape on SMEs

FCS members who are themselves SMEs but who supply goods and services to large corporate customers or local authorities have reported a growing burden associated with accreditation schemes imposed by large customers. In order to become a supplier SMEs have to become accredited as a business or undertake a Health and Safety course to be accepted. For the small company the cost of accreditation and the resource allocation becomes disproportionate.

Many of the schemes are outsourced. Many of the schemes cover the same ground, but are replicated for each customer. Small suppliers end up attending the same courses, learning nothing new, in order to be able to supply a service to different customers. Our members complain that “a whole industry has sprung up around health and safety, which has no benefit other than to line the pockets of those involved and to place such a burden on small businesses that they become uncompetitive”.

Clearly one single cost effective accreditation scheme designed for small suppliers is needed that covers their financial position, health and safety and environmental policies and which is universally accepted by the larger customers.

Responses to consultation questions

Questions : principles of regulatory enforcement

Are these the right principles to underpin the front line delivery of regulation?

Yes these principles capture the scope of effective regulation

Are there other principles you would like to see included?

We support the principle of prompt and effective enforcement where necessary

Questions : Current experience of regulatory enforcement

What aspects of regulatory enforcement are most problematic for you?

For the communications services sector we are concerned that there are different definitions applied by Ofcom,

PhonepayPlus and Ombudsman services to the same type of company or service, which leads to confusion. We believe that Ofcom should take the lead to ensure that all definitions are consistent with those set out by the European Framework Directive

Do you have examples of when you feel you have been treated unreasonably?

1 Phonepay Plus has set out a new code of practice for companies coming under its controlled premium rate services regulation, but associated with this is a new obligatory registration scheme for all parties in the distribution chain, from the largest network operator, such as BT, to the smallest provider of horoscope services.

Companies that have an annual turnover of more than £5000 per annum [less than the individual annual state pension] are required to register and pay an annual fee of £100, which appears disproportionate when BT has to pay the same amount.

Phonepay Plus is writing to service providers and network operators requiring them to supply data on their customers or other companies who may, or may not be, their customers. An example is given in the appendix. This is a new and overbearing obligation on companies in the distribution chain, which has apparently little relationship to the orderly supply of PRS services or the avoidance of any potential fraud. Revenues in the PRS sector have been declining and this new heavy handed obligation seems unlikely to support the development of this sector.

2 Ofcom licensing centre- see section 3 above

3 In 2006 Ofcom came to a regulatory decision to remove revenue sharing for the telephone number range 0870, but had not taken into account the usefulness of the number for small UK businesses. Suppliers of the 0870 numbers lost business and their customers had to incur cost in obtaining new non geographic telephone numbers. At the same time Ofcom introduced the 03 number range which is a local rate number for use anywhere in the UK and solved many of the consumer complaints associated with 0870

How frequently have these problems occurred?

Example 1 cited in the question above has been reported by several companies in September 2011.

In section 3 above we have noted problems with Ofcom's new radio licensing scheme and for some members the problems are occurring weekly

Do you feel there are effective mechanisms in place for you to appeal or complain about the way regulations are enforced?

Whereas enforcement by the NMO of the environmental regulations has been identified as suitable with a complaints mechanism, there are concerns about the ability of smaller companies regulated by Ofcom to complain. Competition decisions made by Ofcom can be appealed to the Competition Appeals Tribunal, but the

cost and resource needed for this route is prohibitive for a small company. We have suggested that a more proportionate route is developed for the hundreds of companies that are regulated by Ofcom but a recent review of the Ofcom appeals process by the Department of Culture ignores this aspect of regulation; DCMS website <http://www.dcms.gov.uk/consultations/8349.aspx>

What aspects of regulatory enforcement work best for you?

What are the best examples of when you've been dealt with well?

An informal approach and discussion of a problem can often be the most effective

Questions: Reviewing cumulative burdens and the scope to improve front line delivery

How would you want to be involved in this sort of sector-based review of enforcement and the regulatory landscape?

The FCS would wish to be consulted on any relevant sector based review.

How can reviews be used to strike a better balance between 'self-managed compliance' and intervention by state regulators?

Questions

What are the key issues faced by business in the day-to-day experience of locally managed enforcement services?

What role do you think Local Enterprise Partnerships could play in driving improvements?

What else could help deliver improvements in locally managed regulatory services?

We have no additional comments

Questions

Do you have compliance measures in place that you feel are being over-looked?

FCS operates a voluntary accreditation scheme for individuals who install mobile radios, phones and telemetry equipment into vehicles; FITAS – details of the scheme can be found here

<http://www.fcs.org.uk/FITAS/FITAS%20home.aspx>

This scheme is based on application of the industry code of practice for such installations, called FCS 1362. We believe that BIS and DfT could consider this scheme as one that they would recommend

Under the RoHS recast Directive compliance is specified and the developing CENELEC standard developed by CLC/TC111X WG0% should be approved as an En to give credibility to the methodology once the standard is fully elaborated

How could we ensure that existing compliance measures are given proper consideration?

By a survey of trade associations to identify the scope of voluntary schemes in place

Questions : increasing the scope for self-management through co-regulation

Are there areas where you think co-regulation could be applied to enable more formal sharing of regulatory responsibility, including delegating functions to business or third party providers?

We have set out our views in section 1 on page 1 as to where co-regulation could assist Ofcom with the effective implementation of Ofcom directions, which would have an additional benefit for Ofcom in reducing its own resource requirements.

What specific functions do you think could be delegated from particular public regulators?

Ofcom services, such as those described in section 3 above, could be reviewed to identify whether a dedicated third party supplier could be more effective for customers.

Questions : increasing capability and industry ownership through professional standards

Are there existing frameworks of professional standards that you feel could be given greater consideration in managing regulatory compliance?

Are there areas where you feel new professional standards schemes could be usefully developed?

What barriers do you think might stop this approach from being used more widely?

There is a need for a single, global standard on ecolabelling which contains justifiable and viable criteria.

In terms of the need for global standards more needs to be done to gain international acceptance and development. Communications products, such as mobile phones, are manufactured for a world-wide market and global standards will have to evolve. As a first step wider international engagement is needed in the development of CEN, CENELEC and ETSI standards and processes.

Questions : setting clear requirements and supporting compliance through assured guidance

Would you welcome assured guidance?

What would be required to make it work?

How best could this be achieved?

We support as much assured guidance as possible from our regulators. Ofcom, as the industry economic regulator, puts regulations in place so that the UK can comply with the European Communications Framework. The rules, in particular the General Conditions of Entitlement, are frequently described at a high level and further more detailed assured guidance would be a valuable asset to the smooth functioning of the communications market, which is composed of many smaller suppliers that do not have the resources to constantly refer to lawyers for interpretation of the rules.

Questions : setting clear standards of service for regulators and supporting capability

Are there particular areas of skills and expertise that you feel could be helpfully developed for enforcement officers?

What are your worst experiences of interactions with regulators, and how could these be improved through professional development?

Have you ever referred to the Regulators' Compliance Code when seeking to address an issue with a regulator?

Are there ways in which you think the Regulators' Compliance Code could be enhanced to help improve regulatory services?

Generally our members recommend that enforcement officers spend part of their initial and on-going training inside the industry that they are to enforce, learning about the makeup of the industry, the players involved and how industry interprets the rules from the regulator. Some of the concerns about regulatory enforcement appear to arise from a misinterpretation of the rules or a difficulty with implementing rules in practice.

Across industries regulators have a common purpose in implementing legislation or regulation. All regulators would benefit from a commonality of approach, cross auditing of regulators to make sure they are applying cost effective measures to reduce their costs and sharing best practice.

Appendix 1: correspondence from Phonepay Plus to FCS members –September 2011

Dear Sir/Madam

This is a formal request for information under s3.2.1 of the [Code of Practice \(12th Edition\)](#):

3.2.1 Any direction, instruction, notice or request for information issued by PhonepayPlus will be effective immediately upon being sent by fax or email to a fax number or email address provided by the relevant premium rate services provider for registration with PhonepayPlus. If a direction, instruction, notice or request for information is sent by PhonepayPlus by first class pre-paid post to an address provided by the relevant premium rate service provider for registration with PhonepayPlus, then it will be effective on the second working day after posting.

As you know, PhonepayPlus has granted a limited fee exemption for PRS providers who earn less than £5,000 per annum for a trial period of twelve months. To ensure the fair use of the exemption, we are conducting a proportionate investigation of organisations claiming this exemption.

XYZ Limited has registered you, **ABC Ltd**, as supplying their premium rate services connection on the PhonePayPlus.

XYZ Limited has claimed an exemption from payment of the Registration Scheme fee based on [annual turnover from PRS of less than £5,000](#).

This request is for sufficient information to verify this claim. Sufficient information may include invoices or outpayment statements (excluding VAT) to **XYZ Limited** covering your last financial year.

If **XYZ Limited** is a new customer, please provide evidence of the start of their contractual relationship with you.

This information will be used to validate their claim to exemption. Should this exemption have been claimed by **XYZ Limited** in error, we will contact them to assist them in correcting the incorrect claim for exemption.

You must provide this information within **5 working days** of receipt of this email. Please see the [Code of Practice](#) for more information relating to your code obligations in relation to directions.

If you require any further assistance in processing this request, please contact us on the details below.

Best regards,
PhonepayPlus

registration@phonepayplus.org.uk / 0844 264 1222*

* Calls provided by BT will be charged at up to 2p per minute. Mobile and other providers' charges may vary and are likely to cost more.