



Virgin Media's response to Ofcom's consultation – Price rises in fixed term contracts

14 March 2013

Summary

Virgin Media is pleased to respond to this consultation.

This response expresses the views held by both Virgin Media's telephony and broadband business and its mobile business. Those views are consistent but we make clear where the practices of those businesses or the terms on which they offer services to customers differ in respect of in-contract price changes.

In broad terms we agree with Ofcom's preferred course of action in respect of mid-contract price changes. However, we strongly disagree with two aspects of the consultation proposals.

Firstly, there is only a justification to apply the proposal to the fixed recurring charge that the customer has agreed to pay. The proposal should not apply in respect of out of-bundle charges – in short, because those charges are avoidable. Our reasoning for this view is set out in more detail below.

Secondly, by not covering the prices charged for television and content services, which services are frequently subject to initial fixed term periods, the new requirements can potentially be subverted by increasing the price of those services while keeping the pricing of the services subject to the obligation (i.e. line rental and broadband charges) unchanged. Ofcom's proposal seems to deal with only part of the problem which may cause the consumer harm identified.

Section 4

Do you agree with the consumer harm identified from communications providers' ability to raise prices in fixed term contracts without the automatic right to terminate without penalty on the part of consumers?

We agree that consumers may suffer harm as a result of a material increase in the fixed monthly price which they are contractually bound to pay, in circumstances where the consumer has no ability to terminate the agreement, without incurring an early termination charge.

The current version of General Condition 9.6 was drafted precisely to avoid that occurrence. Two factors have caused there to be public dissatisfaction with the current practices of some communications providers. The first is the presumption that a price increase which does not exceed the retail prices index will not cause material detriment to any consumer. That is something which seems to have gone largely unchallenged by

Ofcom and as a consequence, has come to be taken for granted. The second is the sustained period for which the RPI has been at a high level.

Virgin Media's terms and conditions for telephony, broadband and television services make clear (at condition J.3.) that if we increase our charges, our customers have the right to terminate our agreement with them and no early termination charge will be payable. Our terms and conditions for mobile services (at condition 5.2), do in fact give us the right to make price increases up to a percentage equivalent to the RPI. However, we have never increased the recurring charge for any of our mobile customers who are in their minimum contract period. In our view, Ofcom's proposal will bring the rest of industry into line with Virgin Media's existing practice both for its fixed and mobile businesses.

While consumer harm may have been identified by Ofcom as a result of industry practices, it has not been identified in respect of Virgin Media's customers.

We have concerns about the limited scope of Ofcom's proposal in that the proposal does not deal with the potential for price increases on television and content services, which services are frequently, if not usually, the subject of an initial fixed term period. At paragraph 4.10 of the consultation document, Ofcom states:

"We are aware that if restrictions are imposed on price increases in fixed term contract, then providers may respond by making variations to other terms. For example, by reducing call allowance (and/or text and/or data allowance where relevant) included in the consumer's monthly subscription price."

Ofcom's statement seems to overlook that the most obvious response by an operator who charges separately for telephony, broadband and television services will be to increase the price of the services not covered by the restriction. The more the operator allocates its pricing into the charge for the television service (and cross-subsidises the other services), the better the position that it will be in. It will be able to increase that charge by a comparatively modest percentage (and one which might still arguably not fall foul of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCRs")) but still extract considerable additional revenue from its customers, without giving them an opportunity to exit their contract.

The scope for subversion of the proposed restriction is so significant as to make the new restriction – which we support – almost worthless when it comes to protecting customers whose chosen offering incorporates a charge for television or content services.

At paragraph 5.38 of the consultation Ofcom asserts that GC9.6 can only apply to the services which are subject to the general authorisation regime for electronic communications networks and services. Even if that view is robust from a legal perspective, then the response should not be to merely regulate what sits most obviously within Ofcom's powers if that is going to leave a gap which will result in a distortion of the market and a continuation of consumer harm. The purchasing of bundles which include telephony, broadband, content and television services is only going to increase in popularity. BT, TalkTalk, Sky and Virgin Media all now offer television services. In Virgin Media's view, Ofcom's duty to further the interests of citizens in relation to communications matters will be severely hampered going forward if it cannot impose consumer regulation in respect content and television services which is consistent with that imposed for telephony and broadband services.

This may be a policy issue about which Ofcom should raise with Government but in any event, it should not be simply ignored to the detriment of consumers.

In the absence of an interpretation of the law which would permit Ofcom to regulate content services or a change to legislation if that is necessary, Ofcom should address this problem by issuing guidance in respect of how it will apply the UTCCRs. Proposals for price increases of services which are not covered directly by Ofcom General Conditions but where the increase is likely to have a similar impact in terms of the consumer harm should be regulated consistent with whatever is ultimately applied to telephony and broadband. [redacted]

Should consumers share the risk of communications providers' costs increasing or should communications providers bear that risk because they are better placed to assess the risks and take steps to mitigate them?

Virgin Media expends and invests significant resource in assessing future risk and doing all that is commercially reasonable to minimise that risk.

The most obvious answer to this question by a consumer or a consumers' association would be that the risk should be born by communications providers and Ofcom's question almost seems couched so as elicit that response. However, we are concerned that for the most part an increase in risk for any communications provider will result in that risk being costed and a return being required for taking it. That return will be factored into the price for services and the level of that return will be limited by competition in the ordinary way.

[redacted]

Do you agree with the consumer harm identified from communications providers' inconsistent application of the "material detriment" test in GC9.6 and the uncertainties associated with the UTCCRs?

Virgin Media agrees that the current approach to "material detriment" leaves scope for uncertainty and therefore consumer harm. However, that harm is not necessarily related to the inconsistent application of the term. There has certainly been inconsistent application of that expression, but the harm, in our view, would have been caused even if the interpretation had been consistent, i.e. if all operators had interpreted the expression in the same way as certain mobile operators have. The harm has been caused when operators have set what is arguably a high threshold for what constitutes "material detriment".

In respect of the recurring monthly charge paid by Virgin Media's fixed line customers (including telephony, broadband and television services), Virgin Media is contractually bound to permitting those customers to terminate their contract without penalty where we propose any increase. That is written into our terms and conditions. We have taken the view that customers should be permitted to assess the new deal with the option to terminate if they don't believe that it continues to represent value for money as compared to other offers, irrespective of the amount of the increased which is proposed.

As mentioned, above, Virgin Mobile has not so far increased the price of the recurring monthly charge for any customer that is still in their minimum fixed term.

We believe that other operators have at least taken full advantage (and have possibly gone beyond that) of their view that "material detriment" is a relatively high threshold. We believe that the consumer harm identified by Ofcom is directly attributable to that.

Should communications providers be allowed (in the first instance) to unilaterally determine what constitutes material detriment or should Ofcom provide guidance?

The General Condition, having been drafted in its current form was predictably going to give rise to varying interpretations by communications providers, especially by those seeking to stretch its interpretation to meet revenue targets whilst limiting churn. We agree with Ofcom that because consumers do not know when, and by how much, a price increase will occur, that comparison of price plans becomes more difficult and it may be that one price plan is more competitive at the time of the customer signing up but becomes considerably less competitive shortly after, due to a price increase which is positioned as not materially detrimental, and so does not give rise to a right to terminate without paying an ETC.

The only argument against this position is one along the lines that communications providers can suffer – perhaps appropriately - at the hands of blogs, chat groups and consumer websites, when such events occur. However, the recurrence of price increases without customers being advised of a right to terminate would seem to indicate that such negative sentiment is not sufficient to deter the practice.

In terms of Ofcom providing “guidance”, it is unclear as to the form that guidance would take but presumably it could take the form of binding guidance akin to that which Ofcom made in respect of additional charges (in February 2008 and updated in November 2010). The problem with any such guidance is that to be of value it would need to set a cap on what was an acceptable level of increase, above which, the increase would be regarded as materially detrimental. We can foresee the likelihood that that cap would be regarded almost as an Ofcom approved standard price increase to which contracts for the provision of communications services would be subject. Such an outcome is unlikely to benefit consumers or be popular with consumers’ associations.

Ofcom’s favoured proposal is that any price increase amounts to a change to the deal struck between the parties and should allow the consumer to re-evaluate the deal. As already stated and subject to the comments made elsewhere in this response, we agree with that position.

What are your views on whether guidance would provide an adequate remedy for the consumer harm identified? Do you have a view as to how guidance could remedy the harm?

Virgin Media’s views on the adequacy of guidance as a remedy are mixed. By that we mean that to the extent that Ofcom has the power to directly regulate by the creation of a General Condition under section 45 of the Communications Act 2003, that is likely to be appropriate here. However, we have discussed our views on the lack of application of Ofcom’s preferred position in respect of content and television services and in the absence of an ability to directly regulate changes to the pricing of those services under the Communications Act – if there is such an absence – then the issuance of guidance on how Ofcom might apply the UTCCRs, as has occurred in respect of additional charges, could be a means of filling that regulatory gap.

Do you agree with the consumer harm identified from the lack of transparency of price variation terms?

In Virgin Media’s view, knowledge of the existence of a price variation term is not of itself especially useful to a customer, unless an indication is given to the customer of the amount by which their bill might be increased and when.

To improve the transparency of the existence of a price variation term would be tantamount to ensuring that customers are told, “the price might increase during the fixed term”. The immediate retort would be “by how much and when?”. An absence of information to answer that latter question makes the initial statement, fairly unhelpful.

However, to go one step further, even if the provision of that additional information were mandated and it were sufficiently prominent, the complexity of comparing differing offerings with so many variables would be very challenging for even the most informed customers.

Do you agree that transparency alone would not provide adequate protection for consumers against the harm caused by price rises in fixed term contracts?

Yes, we agree with Ofcom’s position on transparency of price variation terms for the reasons set out in our response to the preceding question.

Section 5

Do you agree that any regulatory intervention should protect consumers in respect of any increase in the price for services provided under a contract applicable at the time that contract is entered into by the consumer?

There may be good reason for protecting customers in respect of increases in the monthly charge which they are required to pay under the terms of their contract. Upon agreeing to enter the contract with their communications provider, they are bound to pay at least that amount, irrespective of the level of use that they make of the service. The only means by which they can cease to pay that amount is to terminate their agreement the consequence of which will likely be an early termination charge.

However, the same considerations do not apply to out-of-bundle charges. Customers are not bound to pay those amounts because in many, if not all, instances customers will have the option of acquiring those services from alternate providers. For example, the sending of a picture by MMS may incur a charge which the customer believes is unreasonable if the customer uses the service provided by his/her communications provider. That customer may elect to use an app, such as “WhatsApp”, to send the same picture and rather than incurring the per unit charge imposed by their provider, at most incur a small charge associated with the data usage.

In the case of increases in international call charges there are VoIP Apps (such as Virgin Media’s “Smart Call”) offering significantly reduced priced calls as well as consumers

having the option of using a fixed line. There are alternatives to incurring directory assistance charges.

Ofcom notes at paragraph 5.7 that “most of the complaints made to us and via Which? appear to relate to the monthly subscription charge”. We believe that is a direct consequence of the point made in two paragraphs above.

We strongly disagree with Ofcom’s comment at paragraph 5.9 that “It does not appear to Ofcom to make any material difference how a provider has chosen to divide up the price between monthly subscription charges and other elements.” We believe that it makes a material difference to both provider and consumer.

It benefits providers considerably more to increase the price of a fixed recurrent charge which a customer may not avoid (other than by terminating his/her contract) than it does to increase an out-of-bundle charge which a customer can avoid simply by not using that service and likely obtaining the same service through another means. An increase in the monthly charge is not subject to competitive forces, due to ETCs, until a customer’s minimum term concludes – unless, as occurs for Virgin Media’s customers, the customer has a right to terminate following the announcement of the proposed price increase. Out-of-bundle charges are constantly subject to competitive forces and technological advances over the past decade have heightened those forces considerably.

[redacted]

Do you agree that any regulatory intervention should apply to price increases in relation to all services or do you think that there are particular services which should be treated differently, for example, increases to the service charge for calls to non-geographical numbers?

As discussed above, the compulsory nature of the recurring monthly charge makes it different to all out-of-bundle charges not just out-of-bundle charges, the quantum of which might be controlled by a third party. Consistent with that viewpoint, the recurring monthly charge associated with television and content services, should be subject to the same rules as telephony and broadband services and we have discussed above.

Do you agree that the harm identified from price rises in fixed term contracts applies to small business customers (as well as residential customers) but not larger businesses?

Virgin Media does not have a view on this question.

Do you agree that any regulatory intervention that we may take to protect customers from price rises in fixed term contracts should apply to residential and small business customers alike?

Virgin Media does not have a view on this question,

Do you agree that our definition of small business customers in the context of this consultation and any subsequent regulatory intervention should be consistent with the definition in section 52(6) of the Communications Act and in other parts of the General Conditions?

Virgin Media does not have a view on this question.

Do you agree that price rises due to the reasons referred to in paragraph 5.29 are outside a communications provider's control or ability to manage and therefore they should not be required to let consumers withdraw from the contract without penalty where price rises are as a result of one of these factors?

Yes, we agree that the price rises identified are out of the control of communications providers and that consumers should not have the right to withdraw from their contract without penalty where prices increase as a result of one of those factors. We reiterate our comments on out-of-bundle charges which are set out above.

Except for the reasons referred to in paragraph 5.29, are there any other reasons for price increases that you would consider to be fully outside the control of communications providers or their ability to manage and therefore should not trigger the obligation on providers to allow consumers to exit the contract without penalty?

As we have already discussed above, the reason for mandating that customers be given a right to exit their agreement without penalty if there is a price increase must at least be substantially based on the legal obligation that exists for the consumer to pay the increased monthly sum. Consumers are not legally required to purchase out-of-bundle services in the same way that they are legally required to pay the fixed monthly charge. Any increase in the out-of-bundle charges, so long as those increases are properly communicated to customers, can be avoided by consumers.

Ofcom's emphasis should not be on the ability of communications providers to control charges, it should be on the ability of consumers to avoid charges, should they regard those charges as uncompetitive.

Do you agree that communications providers are best placed to decide how they can communicate contract variations effectively with its consumers?

We see no need for Ofcom to intervene formally in respect of the manner and form in which communications providers communicate proposed contract variations, including any right which a consumer may have to terminate his/her contract as a result of the proposed contract variation.

Do you agree with Ofcom's approach to liaise with providers informally at this stage, where appropriate, with suggestions for better practice where we identify that notifications could be improved?

Following on from the previous answer, we think this approach is reasonable until an issue which cannot be remedied by that approach, is identified.

What are your views on Ofcom's additional suggestions for best practice in relation to the notification of contractual variations as set out above? Do you have any further suggestions for best practice in relation to contract variation notifications to consumers?

We think that the additional suggestions for best practice are reasonable. The right to terminate should be clear from the main body of the notification but the process for termination can, in our view, reasonably be set out in a footnote or by link to a web page.

What are your views on the length of time that consumers should be given to cancel a contract without penalty in order to avoid a price rise? For consistency, should there be a set timescale to apply to all communications providers?

Yes, there should be a set timescale and the minimum period which is currently mandated of one month seems reasonable to Virgin Media.

What are your views on whether there should be guidance which sets out the length of time that communications providers should allow consumers to exit the contract without penalty to avoid a price rise?

We are of the view that the existing provision in General Condition 9.6 is reasonable and could be applied in the context of a similar obligation but which required notice and the giving of a right to cancel without penalty for any price increase.

Section 6

Option 1

Do you agree that this option to make no changes to the current regulatory framework is not a suitable option in light of the consumer harm identified in section 4 above?

Virgin Media believes that the conduct of certain communications providers and their interpretation of General Condition 9.6 is resulting in that obligation not providing the protection that it was intended that it would provide. Based on that, the option of making no change to the regulatory framework is unlikely to remedy any consumer harm being caused by that conduct.

Option 2

Do you agree with Ofcom's analysis of option 2? If not, please explain your reasons.

Yes, we agree with Ofcom's analysis in respect of requiring greater transparency of price variation terms. On the issue of publication of guidance on the application of GC9.6 and the UTCCRs to price rises, we think that such guidance should at least be considered in respect of the application of the UTCCRs to contracts for the provision of content and television services.

Option 3

Do you agree with Ofcom's analysis of option 3? If not, please explain your reasons.

Yes, we agree that this solution is not optimal, particularly for the reasons enunciated by Ofcom at paragraphs 6.30 and 6.31 of the Consultation.

Option 4

What are your views on option 4 to modify the General Condition to require communications providers to notify consumers of their ability to withdraw from the contract without penalty for any price increases?

Subject to the comments which we have made in the preceding text and particularly our comments in relation to out-of-bundle charges and the issuance of guidance around how Ofcom will interpret the UTCCRs in respect of charges for television and content services

which should result in as consistent restrictions as legally possible across broadband and telephony services on the one hand and content and television services on the other, we are supportive of Ofcom's proposal.

Other

Do you agree with Ofcom's assessment that option 4 is the most suitable option to address the consumer harm from price rises in fixed term contracts?

We have commented on option 4 throughout this response and we would refer to the totality of our comments.

Do you agree that Ofcom's proposed modifications of GC9.6 would give the intended effect to option 4?

The proposed modifications to GC9.6 give effect to Ofcom's option 4 as it is currently proposed.

What are your views on the material detriment test in GC9.6 still applying to any non-price variations in the contract?

It is appropriate that the material detriment test continue to apply to all variations which are not specifically caught by the proposed new restriction. That should include the material detriment test applying to changes to out-of-bundle charges, which should be excluded from the new restriction, as advocated above.

For our preferred option 4, do you agree that a three month implementation period for communications providers would be appropriate to comply with any new arrangements?

In Virgin Media's view, a three month implementation period is too short. We foresee the need to review our customer terms and conditions, in light of the change. We anticipate that process taking longer than three months and would ask that Ofcom consider allowing six months instead.

What are your views on any new regulatory requirement only applying to new contracts?

Virgin Media is of the view that the changes proposed should apply in respect of all contracts – both new and existing. As Ofcom points out, a customer who has just entered a two year contract could be subjected to price increases for the next two years,

without a right to terminate. If Ofcom provides a six month implementation period, we believe that communications providers will have sufficient time to plan their response to the imposition of the change to all customer contracts.