

## Introductory comments

Virgin Media is pleased to respond to this second consultation in relation to non-geographic numbers.

We have not responded to all of Ofcom's questions because there are issues on which we don't have a defined view and we have sought to focus our efforts on the issues which are important for Virgin Media. For those questions to which we have not responded, our lack of response should be taken neither as a support for or opposition to Ofcom's proposal.

In our response to Ofcom's consultation published in December 2010 ("2010 Consultation Response"), we advocated strongly that Ofcom should approach regulatory intervention by first addressing the wholesale layer and only if the outcomes associated with measures imposed to correct the problems of the wholesale market did not cause an abatement of those problems, should intervention at the retail level be considered. We continue to believe that such an approach is the one required by the Common Regulatory Framework and that is reflected in the Communications Act 2003.

Specifically, a more targeted approach of intervention at the wholesale layer, including a review of the NTS call termination market with the imposition of appropriate remedies, in conjunction with the instigation of a comprehensive consumer education campaign (in which Ofcom would play a leading role), is the appropriate and required course of action.

We believe that such a review of the NTS call termination market would result in BT and all other TCPs being found to have SMP in the market and that the resulting constraints on termination charges would have a significant positive impact on both the wholesale and retail markets.

We elaborate further on the need for review of the NTS call termination market in our response to Ofcom's Fixed Narrowband Market Review and Network Charge Control Call for Inputs. Specifically our responses to questions 1 and 19 are relevant.

Inherent in the design of Ofcom's "unbundling" solution, is a belief that there is consumer harm which is driven by a lack of information. In our opinion, Ofcom has misinterpreted the data and the underlying problem is a lack of understanding of non-geographic call services and what the charges for those services represent. The answer to that lack of understanding lies in educating consumers rather than merely exposing them to yet more information.

Unbundling charges for 08, 09 and 118 (but excluding freephone)

Question 10.1

We continue to be of the view, expressed in our 2010 Consultation Response that, in the form proposed, the unbundled remedy imposes too many restrictions on OCPs and would stifle innovation, and ultimately competition, at the retail level. For example, the limitation on being able only to apply a pence per minute AC and not a pence per call charge would significantly constrain OCPs' flexibility. Moreover, the imposition of a common AC for NGCS that prevented differentiation at least by number range type, would be equally constraining. This would very likely lead to a dilution of package offerings in the market and could exacerbate any tariff package effect. Instead of being able to tailor individual ACs for different number ranges, we will be forced to average the charge which will result in calls to some ranges (e.g. 08) cross subsidising calls to other ranges (e.g. 09).

We accept that, the more complex the AC pricing structure, the greater the risk that it will not be transparent to callers and the concept that a single price may be easier for callers to remember than multiple prices. However, we think that Ofcom underestimates the ability of consumers and ignores that they already remember several different prices for their telephone calls, depending on the category of the call – calls to geographic numbers, calls to mobile numbers, calls to 080 freephone numbers etc.

In Virgin Media's view it is not essential that all types of calls to non-geographic numbers should be considered to fall in the same category, and thus be charged at the same price by OCPs, just because the calls fall within the scope of Ofcom's current review. Indeed, Ofcom has already proposed that there will be three distinctly charged categories of such calls, with 03 numbers continuing to be charged like geographic calls, 080 numbers free to caller, and only the other types of non-geographic calls subject to the "single" AC. Additionally, in Ofcom's proposed illustrative guide to the number ranges, Ofcom clearly and transparently lists out 3 different categories of NGCS calls that will be subject to an AC – "08 numbers", "09 Premium Rate numbers" and "Directory Enquiries".

With this in mind, Virgin Media continues to advocate that it will not materially impair Ofcom's transparency objectives nor the ability of customers to remember the relevant charges if OCPs are given the flexibility to set a different level of AC for these 3 distinct categories of NGCS calls. At the same time, we believe that this approach would bring clear consumer benefits. In particular, this would enable OCPs to more accurately reflect their underlying costs when setting the AC. We anticipate that calls to "09 Premium Rate numbers" and potentially also calls to "Directory Enquiries" will continue to cost more to the caller than calls to "08 numbers". As acknowledged by Ofcom with the PRS Bad Debt Surcharge of 5.2% afforded to BT as an OCP in relation to premium rate calls, there is accordingly a materially higher risk of bad debt in relation to these calls. Additionally, for some premium rate calls there is a mandatory a pre-call announcement, offering the caller the option to terminate the call at no charge to the caller. Such aborted calls nevertheless generate costs for the OCP. It is both efficient and appropriate to allow OCPs to reflect the different potential costs when setting the AC. Otherwise, if OCPs are required to use a blended single pence per minute AC to cover the higher costs associated with calls to "09 Premium Rate numbers", the AC is likely to unduly penalise callers accessing "08 numbers".

## Question 10.2

Where an OCP, [X], charges a 'connection charge' for all calls (both geo and non-geo numbers) within a specific call plan (outside of calls within an all-inclusive call basket and calls to freephone numbers), they should continue to be permitted to include a connection charge in their AC. Ofcom's goal of simplicity is better achieved by all calls being charged in the same way, i.e. a connection charge and a pence per minute rate, rather than some calls attracting a connection charge and some not.

Furthermore, if CPs were to conservatively derive a single pence per minute AC that accounted for their current call connection charge, that charge would unduly penalise callers who make longer calls and this would not be a favourable outcome for consumers.

## Question 10.3

We agree that Ofcom should not impose a cap on the AC. We believe this would be a very intrusive and overly prescriptive move in circumstances where a market failure has not been demonstrated.

## The Service Charge

## Question 10.4

Yes, we agree that bespoke SCs should be prohibited, for the reasons described by Ofcom. In respect of structure of the SC and the absence of restrictions, there is an inconsistency in the approach taken for the SC versus the AC. We are concerned that OCPs' ability to structure the AC in a way which is commercially attractive to our customers is being constrained to ensure simplicity whilst that same goal is not equally restricting the structure of the SC. In short, the burden of ensuring simplicity for consumers is being cast disproportionately on OCPs.

We don't necessarily object to the pricing flexibility which is proposed to be afforded to SPs but, as discussed at Question 10.1 above, we believe that greater flexibility should be given to OCPs.

The subject on which Ofcom is less specific, but on which we believe Ofcom must provide much greater clarity, is variable termination rates or ladder charging. It is not clear whether the proposed prohibition on bespoke SCs (at 10.221 of the Consultation) necessarily includes ladder charging arrangements. Ladder charging is referred to in Ofcom's consultation but when discussing bespoke SCs, Ofcom does not make clear whether ladder charging arrangements are included or that bespoke SCs only refers to deals done between TCPs and OCPs to reduce the SC for commercially motivated reasons, such as promotion of the underlying service by the OCP.

We note that the arguments made previously by certain mobile operators, that ladder charging arrangements were discriminatory because they purport to charge different amounts for the provision of the same service, were rejected by Ofcom during the relevant disputes and that rejection was upheld by the Competition Appeals Tribunal.

If Ofcom's position is that ladder charging forms a specific type of bespoke SC and so would be outlawed as part of a prohibition on bespoke SCs, then Virgin Media fully supports Ofcom's position. That is the position which we believe Ofcom intends. If that is not the case, or if there is any scope for an argument by a TCP that ladder charging is not a form of bespoke SC, then Virgin Media believes very strongly that Ofcom must make it clear that ladder charging is prohibited. The rationale behind that prohibition is the same as that which underlies the prohibition on bespoke SCs, namely; consumer price awareness and efficient pricing.

#### Question 10.5

Yes, we agree with the imposition of caps of maximum SC levels based on number ranges.

#### Question 10.7

Yes, we agree with a restriction on the number of SC price points and that a number somewhere between 60 and 100 points is reasonable. We understand that Ofcom has convened a meeting or meetings of the NGCS Focus group to discuss this issue. We will participate in any such meetings and Virgin Media's views will be informed by that discussion and we will make any views known in that participation.

#### Assumed Handover Point ("AHP")

#### Question 10.9

Yes, we agree that Near End Handover is the most appropriate handover point for the reasons that Ofcom has outlined in the Consultation.

#### Question 10.10

We strongly support Ofcom's proposed position in relation to the TCP paying for transit on calls routed via a transit network. The alternative would give rise to exactly the issue which is expressed at paragraph A18.36 of the Consultation, i.e. TCPs concerned only to reduce their costs by limiting the number of interconnection points to the transit provider disincentivising network build out and causing inefficient traffic routing.

#### Implementation

#### Question 12.1

Yes, the presentation of disaggregated AC and SC charges on customers' bill would have added considerable cost. We appreciate Ofcom taking into account the views expressed in response to Ofcom's first consultation.

We think that mandating the inclusion of the AC on customers' bills is unnecessary and it is unlikely to be beneficial to consumers. The presence of an AC on a customers' bill is likely to cause confusion to someone who does not regularly call 08, 09 or 118 numbers. We reiterate the point which we have already made, that the answer to issues of transparency and understanding is not simply to provide more information. It is incumbent on Ofcom to educate consumers. Even for customers who regularly call the relevant numbers, they will only understand the AC if they have been educated on how charging for 08, 09 and 118 numbers works. If Ofcom fulfils that educational role, so that consumers understand the new charging arrangements, consumers so interested will be able to ascertain their AC by visiting their CP's website or calling their CP's customer service centre.

#### Material detrimental changes

Virgin Media is concerned that Ofcom has paid little attention to the issue of changes to prices of calls to non-geographic numbers which occur as part of the transition to the regime of unbundled charges and how General Condition 9.6 will impact that transition. Ofcom's comments on the issue appear at paragraph 12.113 of the Consultation document and are scant to say the least.

Whether an existing charge increases or falls will depend on a number of factors, including the current charge, the providers new AC and the new SC determined following the mapping process about to be undertaken by industry. There is a likelihood that the aggregate of the AC and SC for calls to some numbers will be greater than the existing charge and for some numbers it will be lower. Furthermore, it is likely that the ACs and SCs will not be known until quite close to the deadline by which the implementation of the new regime is required to be made. With that in mind, it is difficult to see how Ofcom's explanation that - "we are consulting on an implementation period of 18 months which should enable OCPs to notify the majority of customers of the potential changes prior to the end of their contracts" – is a relevant comment.

Additionally, on an ongoing basis, the setting of the SC by the TCP may result in price increases over which the OCP will have no control.

Both the transitional changes and the ongoing scope for price changes driven by a third party, raise uncertainly as to the application of GC9.6. In Virgin Media's view the changes necessitated by Ofcom's regulatory changes and the ongoing change to prices which are driven by a third party should not attract the operation of GC9.6. We would encourage Ofcom to provide some clarity on this issue.

#### Wholesale Issues

### Question 12.3

Virgin Media is aware of an historic issue in relation to the timely building out of new number ranges. In response to that issue and through collaboration, industry has created, and a number of industry participants including Virgin Media have already subscribed to, a non-binding code of practice which we believe has the potential to address the concerns. We believe that, at this stage, there is no justification for Ofcom intervening and the cooperation shown by the parties who have signed up to the Code of Practice, should be allowed to run its course.

Other implementation issues

### Question 12.8

Yes, we agree that an internationally originated call should be charged the same SC as an equivalent domestic call. It is difficult to see how a different charge could be warranted if the service provided is the same. Of course, if the nature of the service provided is different, the service provider should be using another number rather than charging more depending on the location of the call originator.

Yes, originators should be able to set a separate AC level for roaming calls (and which may vary country by country) due to the fact that underlying costs vary widely for the provision of roaming services in different countries.

### Question 12.10

As Ofcom rightly acknowledges, its consultations do not identify any specific forms of detriment having been suffered by business customers in relation to their use of NGCS. The business to business telephony market is highly sophisticated and, as Ofcom notes, its research provides evidence in respect of residential consumers only.

The obligation to levy a single AC per tariff package will inhibit the development of bespoke contracts and create uncertainty as to what amounts to a “tariff package” in the context of those contracts. CPs offering bespoke contracts to business customers may be forced to bear the additional burden and wasted resource of ensuring that each business customer is on a different “tariff package” so that any negotiated difference in AC does not contravene the regulatory obligation.

The comments we have made in response to 10.2 above, apply even more strongly in respect of B2B contracts because of the preferences which corporate customers may have for charging which reflects their specific calling patterns. That customisation will be severely inhibited if the inflexibilities of the AC apply to bespoke B2B agreements.

The application of the proposed rules to services outside of the consumer space will be seen by business as yet more “red tape”, the rationale for which will be inexplicable in the well informed business market.

We would encourage Ofcom to consider a carve out for contracts for the provision of telecoms services to entities falling outside the definition of “Domestic and Small Business Customer” set out in General Condition 14. That carve out would ideally exclude the application of the restrictions associated with the form of the AC, i.e. only ppm, and any obligations to specifically draw customers’ attention to the AC or to publish the AC on bills.

#### Question 12.11 - Timing

We agree that the implementation period necessary for the changes proposed by Ofcom is at least 18 months.

We have not so far seen a draft of the detailed legal instruments which will implement the proposed changes. We had expected that to be published well before the closure of this consultation. That detail would have assisted us in some areas, for example, in relation to the prohibition on bespoke charging and ensuring that it will cover ladder charging. Given the absence of that detailed information, we reserve the right to comment on the substance of the conditions as well as their form in our response to that consultation, where we determine from the draft legal instruments that there is a deviation from what we expected based on the terms of this consultation.

In respect of implementation of the proposed change to make calls to 080 free to caller, while, as we set out in response to Question 16.1, we are not in full agreement with this change, on the assumption that it does go ahead we believe that the same implementation period of 18 months should apply. This is based on the efficiency of Ofcom being able to conduct a simultaneous campaign to educate consumers on both the changes to how charges for calls to 08, 09 and 118 numbers will be calculated and that calls to 080 will be free of charge from mobiles, as well as fixed lines. Furthermore, it would be good for industry to have some certainty as to this measure becoming, and remaining, law. We predict that the substantive change could be the subject of an appeal and that if the change is upheld, there could be a fiercely argued dispute as to the amount of the origination payment which TCPs will be obliged to pay mobile operators. It would be ideal to have as much of that litigation concluded prior to the changes taking effect, as possible.

#### Freephone

#### Question 16.1

Virgin Media continues to believe that Ofcom has not fully considered the impact of the different options relating to calls to freephone numbers. For example, while there may be benefits in changing the designation of the 080 range to be ‘free-to-caller’, there will also undoubtedly be negative consequences, of which we do not believe that Ofcom has taken sufficient account.

These consequences are, in our view, of sufficient magnitude to render it inappropriate to mandate an absolute prohibition on charging for calls to 080 numbers in the absence of safeguards to mitigate against them. We consider that significant benefits could be achieved, and many of the issues addressed, by expanding the approach taken by the Department for Work and Pensions, whereby SPs that have a particular need/desire for their services to be free to caller enter into a commercial arrangement with MNOs under which a level and structure of payments is agreed, in return for the MNOs not levying a charge at the retail level. Such approach could also be adapted or extended under the direction of Ofcom to incorporate services of social importance and value. Consumer protections would be maintained in respect of any 080 calls that remained chargeable at the retail level as a consequence of the requirement to provide PCAs on such calls.

We believe that there is a potential but serious inefficiency associated with encouraging calling using a mobile device which is inherently more costly than making the same call from a fixed line service. At present, where consumers have a choice, the price of calling from a mobile will appropriately drive them to choose the least costly method. Making calls completely free to caller means there will be no incentive for subscribers to utilise the most efficient form of communication, which may be a fixed line service if they are in the home. An approximate measure of that inefficiency is the difference in cost between call origination on the respective fixed (0.5ppm) versus mobile (2.5 to 3ppm) networks, which based on Ofcom's estimates is approximately 2 to 2.5ppm. That additional cost will need to be recovered by TCPs either through the tariff package effect impacting their retail charges or an increase in cost to their hosted service providers.

By way of back of the envelope calculation, we estimate cost of that inefficiency to the economy to be £78 million to £98 million per annum.

That is based on 080 volumes of 11.2 billion minutes per annum (per Analysis Mason Flow of Funds 5.1.1) and Ofcom's assumption that 35% market share will migrate from fixed to mobile (Ofcom Consultation 16.137) –  $(35\% \times 11.2 \text{ billion minutes}) \times 2 \text{ to } 2.5\text{ppm}$

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