

Wholesale Broadband Access Market Review

Introduction

Virgin Media welcomes the opportunity to comment on the proposals put forward by Ofcom in this consultation.

The regulation of active broadband services impacts investment decisions by network owners such as Virgin Media. Thus far the regulatory environment has resulted in very positive competitive outcomes for consumers with a wide range of innovative products for consumers to choose from. Against a backdrop of a stable and reasonably foreseeable regulatory outlook, Virgin Media anticipates the market continuing to yield positive results for consumers with investment decisions being made in light of regulatory certainty.

The market for broadband is currently evolving to provide consumers with superfast speeds. This is directly attributable to continued investment and innovation by Communication Providers (CPs) ensuring a significantly enhanced consumer experience and facilitating the Government's Digital Economy agenda. It is vital, therefore, that the regulatory framework applying to such services is fit for purpose and achieves the right balance between promoting competition and investment, while still ensuring that the necessary safeguards for both citizen consumers and purchasers of wholesale services from dominant providers are in place.

Ofcom continues to recognise the importance of promoting competition and investment in 'super-fast' broadband (SFBB) networks. It remains essential, especially following the considerable investment Virgin Media has made in the period since the last review, that this objective should apply not only to new investments but should also reflect the need to avoid undermining investments that have already been made.

In the period since 2010, Virgin Media has invested substantial sums in its network to ensure that its customers receive cutting edge SFBB services. Virgin Media has undertaken a speed doubling exercise that offers SFBB to all customers as standard with headline speeds of up to 120Mbit/s on generally available propositions. This has helped to drive up broadband performance nationally (a key factor in the increase in average UK broadband speeds), and has also stimulated investment by other CPs to ensure that SFBB is now seen as a staple element of commercial offerings alongside ADSL based services.

Virgin Media continues to invest in the cable network in order to maintain and progress its industry leading proposition. [X].....[X]. It is vital, therefore, that such innovations and investment are not stifled or restricted by regulation, which would ultimately lead to end users losing out from the resultant missed opportunity. Additionally, the investment that is currently driving the industry forward is playing a key part in ensuring that the UK continues to keep pace on digital economy issues.

Ofcom's proposed approach and the modest modifications to the WBA market for the forward look period are consistent with the evolution of a successful broadband market and provides the industry with regulatory certainty. It is important that the product market has been

maintained and that the amended geographic market criteria has resulted in a classification of competitive and non-competitive markets which could have reasonably been predicted by those making investment decisions. This is an entirely appropriate approach to provide a stable basis for continued growth and sustained investment in this sector.

There remains a need for regulation in the geographic market covering the limited number of premises in the UK which do not benefit from competition in the wholesale market. The continuation of existing remedies will provide scope for the provision of national coverage.

In respect of the charge control, Virgin Media considers there is a case for maintaining the existing cost orientation remedy in relation to Market A. Ofcom's proposal not to include cost orientation as a remedy represents a significant departure from previous regulation in terms of the reliance and significance that can be placed upon the fact that charges for access will be set on a fair and reasonable basis. Previous reviews have relied upon a market wide cost orientation obligation to provide protection from excessively high or low pricing, either as a stand alone obligation, or in conjunction with a charge control. That obligation should be continued in respect of Market A.

Virgin Media's response to the Consultation questions

Question 3.1: Do you agree with Ofcom's proposed product market definitions? If not, please explain why.

Yes, Virgin Media agrees with the proposed product definition. As mentioned in Virgin Media's response to Ofcom's Call for Inputs in respect of this review, Virgin Media continues to view ADSL services as imposing a pricing constraint on, at the least our 30Mbps service, due to the chain of substitution.

Question 4.1: Do you agree with Ofcom's view of the relevant criteria for assessing the geographic market boundaries? If not, please explain why.

Yes, Virgin Media agrees with those criteria.

Question 4.2: Do you agree with Ofcom's proposed set of Principal Operators (POs)? If not, please explain why.

Yes, Virgin Media agrees with the proposed set of POs.

Question 4.3: Do you agree with Ofcom's geographic market definitions? If not, please explain why.

Yes, Virgin Media agrees with Ofcom's geographic market definitions.

Question 4.4: Do you agree with Ofcom's proposals to update the geographic market boundaries? If not, please explain why.

Yes, Virgin Media agrees with the revisions to the geographic market boundaries.

Question 5.1: Do you agree with Ofcom's proposal that BT holds SMP in Market A? If not, please explain why.

Yes, Virgin Media agrees that BT holds SMP in Market A.

Question 5.2: Do you agree with Ofcom's proposal that no operator has SMP in Market B? If not, please explain why.

Yes, Virgin Media agrees that no operator holds SMP in Market B.

Question 5.3: Do you agree with Ofcom's proposal that KCOM holds SMP in the Hull Area? If not, please explain why.

Virgin Media does not have a view on this question.

Question 6.1: Do you agree with the general access, non-discrimination and transparency obligations we propose to impose on BT in relation to the market for WBA in Market A? If not, please explain why.

Yes, Virgin Media agrees with the imposition of those remedies on BT in respect of Market A, however, Virgin Media considers there is a case for maintaining the existing cost orientation remedy.

Ofcom's proposal not to include cost orientation as a remedy represents a significant departure from previous regulation in terms of the reliance and significance that can now be placed on the principle that charges for access will be set on a fair and reasonable basis. Previous reviews have relied upon a market wide cost orientation obligation to provide protection from excessively high or low pricing, either as a stand-alone obligation, or in conjunction with a charge control. It also places increased reliance upon the fair and reasonable charge aspect of the access condition. Virgin Media understands that this can provide additional flexibility for Ofcom in that a "fair and reasonable charges" obligation can, where it is transparently applied, extend beyond the traditional "floors and ceiling" protection offered by cost orientation.

There is little guidance as to what fair and reasonable means in the context of a price control condition. Previous incarnations of this condition have not been tested against s87(9) and s88 of the Communications Act 2003 (the Act), perhaps due to the fact that the price control "safety net role" was undertaken by a cost orientation condition. Guidance from the CAT on fair and reasonable, comes in the context of dispute resolution, and would not necessarily provide a read across to an SMP condition set under s87 of the Act.

Whilst Virgin Media considers that any guidance which imposes a strict level of constraint is inappropriate, we consider that a complete absence of guidance creates a lack of sufficient transparency to ensure that the remedy fulfils the function Ofcom intends. Virgin Media has

raised this very issue in responding to Ofcom's recent consultation on Cost Orientation, indicating that the abandonment of cost orientation as a market wide remedy, in favour of a "fair and reasonable" obligation unnecessarily creates regulatory uncertainty. There is considerable value in Ofcom addressing this point in the context of the cost orientation review, but it should also ensure that this issue is resolved in the context of this specific market review.

Question 6.2: Do you agree with our proposal not to require a period of notice for the withdrawal of existing regulatory obligations in respect of the exchanges that move from Market 1 or Market 2 (which are currently subject to regulation) to Market B (which we are proposing not to be subject to regulation)? If not, please explain why.

Yes, Virgin Media agrees with this proposal.

Question 6.3: Do you agree with the general access and non-discrimination remedies Ofcom proposes to impose on KCOM in relation to the market for WBA in the Hull Area? If not, please explain why.

Virgin Media does not have a view on this question.

Question 6.4: Do you agree with Ofcom's approach to price remedies in the Hull Area? If not, please explain why.

Virgin Media does not have a view on this question.

Question 6.5: Are there other remedies that, if imposed by Ofcom, would promote entry into the market in the Hull Area by other providers?

Virgin Media does not have a view on this question.

Question 7.1: Do you agree that an Inflation-X type of control is the appropriate form of charge control?

Yes, Virgin Media agrees that an inflation minus X is an appropriate form of charge control.

Question 7.2: Do you agree that CPI is the most appropriate inflation index?

Virgin Media considers that the discussion on the potential change of inflation index is not sufficiently developed and, on balance, considers that the status quo should be maintained, retaining RPI as the relevant metric for this control. Ofcom suggest that CPI is preferable over RPI as concerns over the index have lead to it no longer being designated as a national statistic. It is of note that CPI runs about 1% lower than RPI and is likely to be less volatile than RPI. As Ofcom notes, CPI is also subject to a government target¹ so there is some assurance that it will meet a particular range, given that fiscal policy will be implemented to

¹ Although Ofcom state that the target is 2%, the actual target is expressed as 2%+/-1%, so allows for a target of between 1 and 3 %.

achieve this desired outcome. However, RPI is still a relevant statistic and will continue to be relevant for the short/medium term of the forward look of this review. Additionally, other controls are set with RPI, including the outgoing controls for these markets and controls in related markets (such as those for business connectivity products that may increasingly overlap with access products as broadband speeds increase).

Given that the future of inflation statistics remains unclear (in particular: the future of RPI; the relevance of RPIJ; the effect of European regulation on CPI), it may not be the correct time to switch from the proven metric of RPI in this control. An independent project could be run to consider the appropriate index for the next round of charge controls, given that all fixed telecom substantive reviews have recently been completed (BCMR / Narrowband2), using RPI, and the next review is not due to be completed until April 2016 (BCMR). A review project would be more focussed than the discussion of this point within an overall market review, and would provide stakeholders with advance notice on the proposed approach to the 2016/7 round of reviews, and for example, bring a common approach to the treatment of adjustments that sit across controls (eg the RAV).

As Ofcom notes the choice of a particular index is largely academic as final costs are estimated and the X is set adjusted to the level of the inflation index in order to meet the cost forecast. Although Ofcom suggest that this means that a change of index is likely to have a small effect, it is also suggestive that there is no great need to make a change in regulatory policy, and, as stated above there may be good reasons for holding back on doing this at this stage, including that Ofcom should have regard to regulatory consistency under s3 of the Act.

Question 7.3: Do you agree that an upstream input CPI-X approach still remains the most appropriate form of control?

This approach will provide consistency of regulation and based on that, Virgin Media is supportive of it.

Question 7.4: Do you agree that a charge control duration of three years is appropriate?

Virgin Media agrees that the charge control should span the life of the forward look period and until such time as the next market review occurs.

Question 7.5: Do you agree that IPstream Connect and the relevant ancillary services are the appropriate services to charge control?

Virgin Media agrees that those services are the appropriate services to be subject to charge control.

Question 7.6: Do you agree that all the services should be placed in one single basket and sub-caps applied to certain services?

² Subject to EC sign off and final publication

Virgin Media agrees that those services should be placed in the single basket and sub-caps applied.

Question 7.7: Do you agree that the cease charge should continue to be set to £0 and excluded from the main basket?

Yes, Virgin Media agrees that the cease charge should be £0 and excluded from the main basket.

Question 7.8: Do you agree with our adjustments to BT's base year costs?

Virgin Media has no comment on these adjustments.

Question 7.9: Do you agree to our proposed simplified modelling approach and the use of anchor pricing?

Virgin Media has no comment on this approach.

Question 7.10: Do you agree with our volume assumption analysis?

Virgin Media has no comment on this analysis.

Question 7.11: Do you agree with our asset and cost volume elasticities assumption analysis?

Virgin Media has no comment on this analysis.

Question 7.12: Do you agree to the use of the "rest of BT" rate for the cost of capital assumption?

Virgin Media has no comment on this assumption.

Question 7.13: Do you agree to our proposed operating cost efficiency improvements of between 3.5% to 5%?

Virgin Media has no comment on this proposal.

Question 7.14: Do you agree with our proposal not to make one off adjustments to WBA prices at the start of the control?

Virgin Media has no comment on this proposal.

Question 7.15: Do you agree that the range of plausible X values is -10% to 0%?

Virgin Media agrees with this range of values.

Question 7.16: Do you agree with our base case range of X values and the assumptions underlying this range?

Virgin Media has no comment on the range of X values or the assumptions.

Question 7.17: Do you agree with the proposed levels of the sub-caps?

Virgin Media has no comment on these proposed levels.

Question 7.18: Do you agree with our proposals on cost accounting?

Virgin Media has no comment on these proposals.