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Dear Jess

Revising the Penalty Guidelines

Virgin Media is pleased to have the opportunity to comment on Ofcom's consultation on revising the penalty guidelines.

Virgin Media notes that Ofcom suggests that the central objective of imposing a penalty is deterrence and the amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance. Virgin Media would suggest however that deterrence should be a subset of a broader objective which is to impose penalties which reflect the seriousness of the infringement (within the framework of the particular statutory provisions) and to thereby act as an effective incentive to compliance.

Virgin Media notes that Ofcom proposes to move away from its previous approach of setting a starting point for the penalty and then adjusting up or down according to various factors on the basis that this is overly complex and does not put deterrence at the heart of the process.

Virgin Media notes that the approach of setting a starting penalty and then adjusting up or down is the process adopted in the OFT's Guidance on setting penalties for infringements under the Competition Act (which is broadly in line with the Commission's approach). Virgin Media recognises that Ofcom's guidelines do not apply to its Competition Act powers and that in some cases the statutory provisions which Ofcom is dealing with set a fixed sum, so its guidelines therefore need to be flexible. However, Virgin Media does not fully understand why Ofcom finds the current approach complex and notes that this is not clearly set out in the consultation. Given that this alleged complexity is one of the key reasons for changing the guidelines, Virgin Media believes it is incumbent on Ofcom to fully address why it feels the current structure of the guidelines is overly complex.

In addition, it is not immediately clear to Virgin Media that revising the guidelines in the way proposed by Ofcom will necessarily address Ofcom's concern that there are stakeholders who have committed very serious and repeated contraventions of the Broadcasting Code without apparently being deterred by the prospect of penalties.

While Ofcom suggests that it may be the case that the current penalty guidelines are insufficiently clear that such repeated behaviour is likely to lead to a substantially increased fine, Virgin Media feels that the existing guidelines are clear in that they clearly set out that a factor that will tend to lead to an increase in the penalty will be repeated contraventions by the same regulated entity.

Virgin Media does not believe that Ofcom's proposed revisions (whereby repeated contraventions become a factor to be taken into account in setting the starting penalty) is likely to seriously change behaviour. Rather, Virgin Media suggests that it is Ofcom's practice of actually carrying out enforcement activities and

imposing fines rather than the guidelines themselves which is the factor that is most likely to deter parties from repeated offences.

Given the above comments, at this point in time Virgin Media is not convinced that Ofcom had made a clear case for moving away from a structure whereby the guidelines clearly set out factors that may increase or decrease a penalty and is similar to the structure that is followed by the OFT and so is well recognised by parties.

Indeed the new structure proposed by Ofcom where all the factors are thrown in together is likely to be less clear to parties and Virgin Media suggests is more likely to lead to confusion. Virgin Media also suggests that there is a halfway house between Ofcom's proposed guidelines and the existing guidelines whereby Ofcom could combine the factors in section 4 and 5 of its current guidelines to illustrate the factors it would take into account in setting a starting penalty and then retain sections 6 and 7 of the current guidelines being factors that would tend to increase or decrease a penalty

Virgin Media suggests Ofcom may wish to reconsider whether the revision of the guidelines in the form it has suggested is really likely to achieve its aims. Should Ofcom however decide to retain its proposed revised structure Virgin Media would also suggest that Ofcom should consider including a factor such as "genuine uncertainty on the part of the regulated entity as to whether the conduct constituted an infringement."

If you have any questions about this matter please do not hesitate to contact me.

Yours sincerely,



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