Virgin Media's response to Regulatory Financial Reporting : A review

14 February 2014

Introduction

Virgin Media considers that Ofcom's review of the Regulatory Financial Reporting regime is essential to ensure that this key area of regulation is fit for purpose.

The provision of accurate, relevant and accessible information by an SMP provider to Ofcom and, through publication, stakeholders more broadly, underpins the effectiveness of the substantive SMP obligations imposed in markets where competition not effective.

Virgin Media shares the concerns identified by Ofcom and the industry generally that the current regime has lost credibility with an increasing series of restatements by BT, and the continued divergence between the cost base for regulated prices (through charge controls) and the cost attributed to those services as reported by BT.

Virgin Media supports UKCTA's views in response to this consultation, and in light of that does not seek to repeat the issues raised therein. This response therefore focuses on other issues that are not covered in the UKCTA response. To that end we have not sought to provide a response to each any every question raised in the consultation, and set out comments on four discrete points below.

Responses to Questions

Question 3.1 Do you agree that we have identified the purpose of both wider Regulatory Financial Reporting and the Published Regulatory Financial Statements in particular?

a. Ofcom must ensure that reporting obligations provide confidence of compliance with relevant SMP obligations.

Virgin Media agrees with Ofcom that in the context of the Published Regulatory Financial Statements there is a need to ensure that "*the level of information to be published should be appropriate to provide reasonable confidence to stakeholders that an SMP provider is complying with its regulatory obligations*."

Ofcom discusses various obligations that it considers would impact the level of information published in the RFS; cost orientation; charge controls; margin squeeze and non-discrimination and EOI.

Ofcom notes in relation to cost orientation that CPs need to be given reasonable confidence of compliance and monitoring cost orientation is an important consideration.

Virgin Media is concerned that the impact of fair and reasonable charges appears to have been omitted from the discussion, save for the brief discussion on margin squeeze (which has been regulated under the fair and reasonable access condition).

In the last BCMR Ofcom did not re-impose a general cost orientation obligation, but did explicitly apply a fair and reasonable charges obligation under network access obligation. This was imposes as a specific pricing remedy, being tested against s88 of the Act, and covered the lacuna left by the removal of cost orientation, to the extent that pricing concerns arising from BT's SMP could not entirely be resolved by a charge control.

It must follow that an appropriate level of publication should be made to ensure that BT complies with fair and reasonable charge obligations in order to achieve the identified purpose. Virgin Media raised this issue in the context of the Cost Orientation review that was split out from this review. It is noted that there has been no further publication of any final guidance following the Cost Orientation review consultation in June 2013, nor have any responses to that consultation been published on the website.

Whilst the market review will set the obligations (generally, and in relation to financial reporting), it is vital that Ofcom take the opportunity to ensure that the new reporting regime is transparent from day one and does not contain any element which could lead to a veil of uncertainty being drawn over compliance with a relevant condition.

b. Timings should be adhered to.

Ofcom states at paragraph 3.72 that there was general agreement that timeliness was important. That is certainly true, and indeed later in the document[1] Ofcom set out that BT, in the 10 years to 2012 had only published its RFS on time on two occasions. An 80% failure rate to comply with a regulatory obligation is staggering.

Ofcom suggest that no CP had provided details of any impact. It is of note that during the current Ethernet Appeal[2] before the CAT, there was evidence of the difficulties faced in interrogating the RFS being exacerbated by late publication. Whilst this was not an issue necessarily central to the consideration of that case, it is clear that there is evidence of the effect of late publication, which would be alleviated by (a) a more informative RFS in the first place and (b) timely publication in any event.

Clearly, in having met reporting deadlines for the last two years, there is a degree of optimism that 80% is no longer a relevant statistic, further, given Ofcom's intent to make the RFS more transparent and useful to stakeholders, there should, in future, be an ability to review and understand the RFS more quickly. However, it remains an area that Ofcom must continue to have regard

[1] Paragraph 4.51
[2] CAT Case Refs 1205-7/3/3/13

to and it cannot be allowed to creep back to the situation where 80% failure is tolerated.

Question 5.1 Taking each of our proposals in turn do you consider that they are proportionate and well balanced? Please provide evidence to justify your views.

Virgin Media agrees with the approach proposed by Ofcom to introduce a veto to proposed changes in methodology notified by BT, and considers that this is an important step forward in placing a check on the potential or incentive for BT, an SMP provider, to change methodologies in order to maximise benefit to itself in relation to regulatory constraints.

Ofcom also propose a process to ensure that material errors are reported, in that they have to be notified where they affect the previous years, or upcoming RFS. There is however, no apparent element of veto, in contrast to the methodology change. Whilst a mathematical error should be a matter of fact, so that there is no discretion as to whether it is "good or bad" in the same context as for methodology changes, Ofcom should ensure that the system ensures that there is no incentive for BT to create methodology changes by presenting them as error corrections.

Question 9.1 Do you agree that our proposed timeline provides a suitable basis for the implementation of changes?.

Virgin Media considers that the proposed timetable would provide a suitable base for the implementation of the new regime, but does have one caveat. The decision to impose the regime by market review, means that Ofcom is reliant upon BT to voluntarily align its reporting on "to be reviewed" markets until such time as they coma around for their periodic reviews. Given the recent BCMR and NMR statements this will not be until 2016, and therefore the importance of the voluntary commitment is not insignificant.

Virgin Media fully understands the difficulty in that any SMP condition is necessarily "tied" to the overarching market, and formally implementing the changes in BCMR / NMR markets (through SMP conditions) would require significant work by way of no material change assessments in those markets in addition to any proposal to amend/apply the SMP reporting conditions themselves. Therefore, to the extent that a voluntary commitment is an achievable way of ensuring a transition to a single regime across all market, this is supported by Virgin Media, provided that assurance can be sought by Ofcom and provided by BT at an early stage. Without BT's cooperation, a voluntary commitment will not be viable, and Ofcom would need to look to other ways of transitioning to a single reporting system.

Virgin Media
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