NON-CONFIDENTIAL

Fair treatment and easier switching for broadband and mobile customers: Proposals to implement the new European Electronic Communications Code

Virgin Media Consultation Response

1 - Summary

Virgin Media welcomes the opportunity to respond to Ofcom's consultation on implementing the European Electronic Communications Code (respectively the **"Consultation"** and the **"EECC"**).

Consistent with its recent work on the fair treatment of customers, Ofcom asserts at the outset that it *".....[wants] people to shop around with confidence, make informed choices, switch easily and get a fair deal*".[1] We support those broader aims. As a custodian of the Virgin brand, the fair treatment of customers is a fundamental tenet of our operating philosophy. We want to ensure that consumers are protected, treated fairly and are able to take advantage of the latest gigabit enabled services in a competitive market. This is particularly true for the most vulnerable and is why, in recent months, we have introduced voluntarily a range of measures designed to help overcome some of the obstacles that vulnerable customers face. These include our Talk Protected product and proactive annual package reviews that go beyond the requirements of Ofcom's End of Contract Notification rules.

In striving to ensure that consumers are protected and treated fairly, and to deliver high speed, future-proof next generation connectivity to as much of the population as possible, Virgin Media, Ofcom and indeed Government share common aims. Realising these aims is dependent not only on an appreciation of the interdependencies between them but also a need to consider each of them in a wider context. And, most importantly, the effect that the method of achieving them has on consumers.

While this need to consider the 'bigger picture' may be taken as read, we raise it at the outset of our response to the Consultation because we believe that greater consideration of the broader consequences of Ofcom's proposals needs to be undertaken.

The proposals as currently set out will have substantial cost and resource implications for Communications Providers ("**CPs**") – both in terms of what is required and the timescale for implementation. Indeed, we do not believe that implementation is achievable in the timeframe prescribed. More importantly, we believe that certain of the proposals will result in worse experiences for consumers. There is also a strong likelihood that they will inhibit and distract CPs

[1] *Fair treatment and easier switching for broadband and mobile customers: Proposals to implement the new European Electronic Communications Code*; Ofcom, 17 December 2019, Page 3.

from achieving Ofcom's and Government's desire for greater levels of investment in gigabit-capable infrastructure. In this regard we note that the EECC itself contains a renewed emphasis on promoting investment in high capacity networks.

We further believe that it is vital that Ofcom considers implementation of the EECC in the broader context of enhancements to consumer protection that have been introduced in recent months. In addition to the measures that Virgin Media has taken proactively to improve protection for vulnerable customers, the broader industry has committed to a number of measures - such as the Automatic Compensation scheme, the Broadband Speeds Code of Practice and Ofcom's Fairness Framework. Further, CPs are subject to recent mandated initiatives such as End of Contract Notifications. The starting point is not, therefore, a situation in which there are significant inadequacies in consumer protection measures.

We believe that a more balanced, proportionate approach to the proposals is possible that would, supported by a more realistic implementation timetable, better achieve Ofcom's aims, maintain the progress that is already being made towards broader objectives and, crucially, deliver better outcomes for consumers. This is within Ofcom's gift. We have accordingly set out in this response a number of alternative approaches to the proposals.

We believe that we share a common objective in seeking to ensure that any formal regulation delivers the best outcomes for consumers, is proportionate and is consistent with the need to prioritise investment. We want to work with Ofcom to address the challenges that we have identified and to achieve those aims.

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2 - Introduction

The question of how – and indeed if – the UK would transpose or otherwise incorporate elements of the EECC in national legislation has been the subject of considerable uncertainty. The continually shifting parameters of the UK's exit from the European Union and domestic political uncertainty have made it very difficult for CPs to anticipate or plan for any consequential changes to regulation. The resulting 'last minute' approach to Brexit, and thus the approach to the EECC, have compounded this, resulting in the currently proposed timescale for implementation being very short.

We believe that the proposals set out in the Consultation create two fundamental issues (for both CPs and Ofcom): the risk of unintended consequences (caused by the nature, and scope/scale of certain of Ofcom's proposals) and the insufficient time allowed for the implementation of the proposed changes (in terms of the period to anticipate and prepare for the changes and the deadline for implementation). We expand on our concerns below.

Timing

The proposed changes to the General Conditions ("**GCs**") set out in the Consultation are complex and numerous. They will require CPs to make significant and substantial changes to their systems and processes. This will have significant cost, resource and scheduling implications (including the likely need to re-schedule planned developments and upgrades). Given the uncertainty about Brexit (and thus the UK's approach to the EECC), CPs have not been able to plan fully for the changes – and it is not reasonable to expect CPs to have already taken any steps towards implementation. Furthermore, CPs will not have absolute certainty about what is required of them until Ofcom publishes its final statement later this year. For these reasons, we do not believe that it will be possible for CPs to implement the changes by the stated deadline of 21 December 2020.

Budgets for a forthcoming year are typically set several months in advance of the commencement of that period. This budget setting activity is complex and lengthy and it is very difficult to provide accurately for initiatives that do not have a clear scope – in fact it is difficult to secure any funding for a future initiative that is subject to the level of uncertainty to which implementation of the EECC has been. This is particularly true in the current market climate where CPs are experiencing falling returns and significant increases in their costs.

The same forward-looking provisioning approach applies to the allocation of resources. It is important to understand that the challenges that we have highlighted in this regard are not limited to trying to reorganise and redeploy internal/direct labour at short notice. Many of Ofcom's proposals will require system design, implementation and testing, which inevitably involves third party suppliers. Due to our contractual relationships, these roadmaps, release cycles and resources had been pre-committed far in advance of Ofcom's publication of the Consultation. In many cases these resources are working to implement existing regulatory changes, typically involving workflows that require 'major change' requirements to be avoided. Introducing any - particularly expedited -

material changes to our system development roadmap will be expensive and disruptive and may not be feasible **[✂]**[2].

Aside from the inability to anticipate and plan for the changes, the timeframe for implementation that is currently specified is problematic for a number of further reasons. First, CPs will likely have insufficient time to test their solutions or undertake a sufficient level of quality assurance. They will also likely need to put in place sub-optimal 'stop-gap' solutions. This is particularly concerning, given the consumer protection focus of many of the proposed changes. Second, even if CPs were to attempt to meet the deadline, they would incur substantial incremental cost – and would very likely need to divert resources and funding from other initiatives, including those that will deliver additional protections and benefits to consumers. Ofcom does not appear to have considered this significant risk of consumer harm.

This compression of timelines is a matter over which CPs have had no control. We acknowledge that, following confirmation of the result of the General Election in December 2019, the chances of a 'hard' Brexit reduced. However, until the UK Parliament finally voted, in late January, to leave the EU via the transition period provided for in the Withdrawal Agreement, CPs had no firm confirmation that the UK would not leave without a deal (and thus that it would be required, under EU law, to transpose the EECC).

We acknowledge also that Ofcom issued the Consultation shortly after the result of the general election – i.e. before definitive confirmation that the transition period would apply. However, we see no reason why Ofcom was unable to consult significantly in advance of the election – particularly since, we assume, its approach to implementing the EECC under a 'transition period' scenario would have been the same irrespective of when it was confirmed that the UK would leave the EU via that method.

Given that Ofcom will need to consider responses to the Consultation and then prepare a final statement, we do not expect to receive definitive confirmation of what is required until at least April/May of this year (based on typical Ofcom timeframes for such activity). This will provide CPs, in all likelihood, with fewer than seven months' notice to implement according to the requirements contained in the final statement. Even if CPs were to assume that the proposals in the consultation will come into fruition in their entirety/in their exact form (an approach that would constitute the taking of a significant risk for CPs), this would still provide fewer than twelve months' notice. Either way, the period of notice is insufficient – particularly for changes of the magnitude being proposed.

CPs are typically afforded at least twelve months from a final statement to implement changes of the scale and nature being proposed. For Ofcom to stipulate a timeframe significantly shorter than this for implementation of the EECC conflicts with precedent and is, we believe, contrary to its duties under Section 3 of the Communications Act 2003 (**"the Act"**) variously to act, in carrying out its functions, in a manner that is transparent, accountable, proportionate and consistent.

We acknowledge that the UK is required by law to transpose the EECC by 21 December 2020. However, given that the UK will cease to be subject to the underlying (EU) legislation requiring that transposition only ten days later, we consider this deadline – from a practical perspective at least –

[2] **[✂]**

to be of limited significance. Failure to transpose the EECC by that date would, we believe, present no risk. We consider it inconceivable that the European Commission would be minded to commence infringement proceedings (given that the UK would technically be infringing for only ten days, it surely has more pressing issues to which to assign its resources). Furthermore, a number of (remaining) Member States are likely to miss the deadline[3] – and action against these infringers would surely take priority over enforcement action against the UK.

We therefore urge Ofcom not to enforce the changes from 21 December 2020 and to confirm that it will, taking account of feedback from CPs, allow de facto additional time for implementation (including the specification of an alternative enforcement date). This is, in our view, by far the most pragmatic and appropriate approach and would lead to better outcomes for consumers (as CPs would be afforded the time to implement changes properly and would not need to divert resources and funding from other initiatives that deliver benefits for their customers).

However, if Ofcom is minded not to take such an approach, we believe that it nonetheless has significant scope to exercise its discretion on enforcement of the changes to the GCs introduced as a consequence of transposition. Given the unachievable deadline for implementation of the changes proposed by Ofcom, we believe that a moratorium or a phased approach to enforcement would be more proportionate – and would again lead to better consumer outcomes.

In particular, Ofcom could indicate to CPs that enforcement of the changes will not be an administrative priority until a more appropriate (specified) point in the future.[4] Alternatively, or in conjunction with this approach, it could indicate that it will prioritise enforcement of certain provisions over others. We think that those provisions that apply to vulnerable customers are an appropriate candidate in this regard for a 'phased enforcement' type of approach.

We are very keen to engage further with Ofcom on how to address the implementation timing challenges.

<u>Failure to assess, identify and understand sufficiently the impact of the proposals</u>

Separate to the issue of timing, we believe that certain of Ofcom's proposals are disproportionate and/or would result in unintended consequences. In many cases, this stems from the fact that Ofcom has failed to undertake an adequate impact assessment.

Throughout the consultation there are numerous examples of Ofcom making unsubstantiated assumptions about the impact, effectiveness and consequences of its proposals. There are frequent assertions about the perceived (immaterial) impact on CPs, such as "*We do not expect the changes we are proposing here to have a significant impact on providers*"[5] and "*We do not expect the cost of making these changes to be significant*"[6]. Without undertaking a proper assessment of the impact of its proposals, we do not see how Ofcom can confidently make such claims.

[3] An assessment by Cullen has found that only 10 out of 28 Member States (including the UK) have transposed or commenced public consultation on the transposition of the EECC (*EECC Transposition Status*, Cullen, December 2019)

[4] We note that there is precedent for Ofcom to take such an 'administrative priority' approach to the enforcement of General Conditions – for example the approach to reactive save under GC A1.3 (previously GC 1.2)

[5] Consultation, paragraph 4.77

[6] Ibid, paragraph 5.13

Moreover, we do not believe this is compliant with Ofcom's duties under the Act. Section 7 of the Act requires Ofcom to carry out impact assessments for "important" proposals. The proposals in the Consultation must surely be regarded as "important" in this context, particularly given that they will have a *"significant impact on persons carrying on businesses in the markets for any of the services, facilities, apparatus or directories in relation to which OFCOM have functions"*[7].

Aside from the legal inadequacies in Ofcom's approach, the failure to undertake an appropriate impact assessment has prevented Ofcom from identifying a number of instances in which the proposals will lead to poor consumer experiences or outcomes. We do not believe that this is Ofcom's intention.

For these reasons, we believe that Ofcom should revisit a number of its proposals and take the time properly to investigate the impact and consequences of them.

Key Construct, Application and Implementation Issues

We have identified the following aspects of Ofcom's proposals as being particularly problematic and/or as having a high likelihood of unintended consequences:

- **Right to cancel in the event of any changes to contractual conditions that are not *"to the exclusive benefit of the end-user"*** (including a very high risk of **[✂]**, the creation of exposure to charges and other factors over which CPs have no control)
- **Provision of additional/new information to consumers** (impractical/flawed process, information overload and confusion for consumers; disproportionate burden on CPs)
- **Multiplicity of business customer definitions** (incl. transient nature of some customers, how to classify customers with confidence, insufficiency of Ofcom guidance)
- **Application of consumer-focused regulation to businesses in general** (significant restriction in the scope of what can be offered to business customers in respect of certain products, consequent removal of choice for business customers, administrative burden for CPs)
- **The application of consumer-focused regulations to large business customers** (unnecessary, disproportionate and inefficient)
- **Provision of information to third parties** (confidentiality issues, impact on competition, reduction in the level of assurance)

We expand on these concerns in the sections that follow.

We note that in several instances, Ofcom refers to the fact that it is bound by the EECC and thus has no discretion to deviate from what is set out in, and required by, that instrument[8]. However, for the reasons set out above, we consider this, in the broader context at least, to be of lesser significance than it would have been had the UK remained in the EU. In our view, the risk presented by a deviation from the strict letter of the EECC is minimal – particularly given that the (legal) obligation to implement the EECC will fall away a mere ten days after the deadline for doing so.

Given that a number of the provisions contained with the EECC do not take account of, and are not in the best interests of specific UK national circumstances – not to mention the likelihood of them

[7] Communications Act 2003, Section 7(2)(b)

[8] See for example Consultation paragraph 2.19

leading to poor consumer experiences and outcomes – we believe that there is a very strong case for deviation from them, where appropriate.

We consider, in fact, that Ofcom has some legal justification to (knowingly) enter into a situation that de facto created a breach of EU law (albeit for a very limited time). We believe that the implementation of the new regulations in the form proposed would be contrary to Ofcom's duties under the Act, both in regard to its principal duties under section 3, and its obligations under section 47, to set General Conditions that are proportionate. This, we believe, justifies some deviation from the implementation requirements in order to ensure that Ofcom's duties under the Act (themselves derived from, and required by, the European Regulatory Framework) can be met. The same justification would, we believe, also apply to a deviation from the deadline for implementation.

In the alternative, if this is not considered to be an acceptable approach, we urge Ofcom to effect a more pragmatic approach to implementation, by signalling how it intends to interpret what is required of CPs (to reflect national circumstances) and prescribing a more realistic approach to the timeframe for implementation. We believe, however, that explicit deviation from the EECC would be a more suitable approach and would ensure better outcomes for consumers.

We expand on these points and set out our view on the specific aspects of Ofcom's proposals, in the sections that follow.

We have structured the remainder of this response to reflect the sections and categories set out by Ofcom in the Consultation – including, for ease of reference, alignment of section numbering. Where not covered by the foregoing, we have also included our responses to the specific questions raised at the end of each section, consistent with the Consultation format.

3 - Changes to the defined terms used in the General Conditions

Question 1: Do you agree with our proposed changes and additions to the defined terms used in the GCs in order to align with the EECC, as set out in Annex 11?

As an over-arching comment, we are concerned that changing the current definitions applying to existing GCs will have significant consequences. For example, CPs will be required to 'retro-fit' existing networks and services that were not designed with the amended definitions in mind to accord with the new definitions. This will be necessitated in particular by the consequent extension of consumer related GCs to businesses (including large businesses), the de facto broadening of the definition of 'End-user' and the consequential extension of the scope of GC A3. We do not believe that Ofcom has considered sufficiently the implications of these consequences on existing networks and services.

3.1 New definition of "electronic communications service" in the EECC

We note that to implement the EECC in the UK, it is likely that Government will need to make changes and additions to some of the defined terms used in the Act, including amending the definition of an electronic communications service and including legal definitions of the new sub-

categories of Electronic Communications Service ("ECS"), in order to align with the definitions used in the EECC.

Given that the EECC extends the types of services that are covered by the definition of ECS, and the wider context in which the Act uses the definition, we urge Ofcom to ensure that Government explores and considers fully the wider implications that amending the definition may have.

3.2 Definitions for different categories of customers

Ofcom proposes to make changes and additions to the definitions in the GCs to align with the different categories of customers in the EECC. We have a number of concerns about the proposed inclusion and form of certain of the definitions, as well their consequences. We also have some concerns about the consequential effects of references in some of the new provisions to certain definitions that remain unchanged. We expand on these concerns below.

End user vs Consumer

The EECC seeks to distinguish between the needs of different types of customers. In this regard it does not contemplate subjecting large businesses to the same regulatory requirements as residential consumers. For example, Recital 259 notes that "*larger enterprises usually have stronger bargaining power and do, therefore, not depend on the same contractual information requirements as consumers*".

We note, and welcome the fact that Ofcom acknowledges this. For example: "*Larger businesses, especially those that are significant users of communication services, tend to have a stronger bargaining power than residential customers*"[9].

However, the underlying appreciation of the needs of different types of customer (and thus the regulatory protections that they require) has not been applied consistently throughout the end-user rights provisions of the EECC (e.g. Articles 103-107). While in some provisions large businesses have been excluded, in others they remain (inappropriately) within scope. We see this lack of consistency as a missed opportunity for better regulation which is reflective of, and proportionate to the potential for harm. It is also inefficient and leads to unnecessary demands on both CPs and large business customers – to the extent, we believe, that some CPs (particularly smaller CPs) may be dissuaded from providing services to such customers, thereby limiting customer choice.

With this in mind, we urge Ofcom to review all GCs in which the term "end-user" features and to ensure that none of the consumer protection provisions are extended to large business customers. Further, where the applicability of the GC is dependent upon the type of "end-user", Ofcom should ensure that the scope extends only to those end-users who the condition is intended to protect.

Alternatively, Ofcom could make clear in its final statement that the needs of large business customers are different to those of consumers and confirm that it will take a proportionate or 'lighter touch' approach to monitoring and enforcement, based on the likelihood of harm. We note that there is precedent here – Ofcom has stated its intention to take a similar approach in respect of the requirement to send End of Contract Notifications to large businesses.

[9] Consultation, paragraph 7.90

Microenterprise, Small Enterprise Customer and Not For Profit Customer

We believe that the introduction of these definitions – and the consequential bringing of numerous business customers into the scope of what are ostensibly consumer regulations – will be materially disruptive for both CPs and those customers. CPs do not currently categorise smaller business customers in this way. Furthermore, the definitions do not align with the definition of 'Small Business Customer' that is currently used in the GCs (and according to which CPs have structured systems and processes). Having multiple definitions that, in some cases, overlap and conflict with each other is confusing and inefficient.

We believe that there is a significant risk that the new definitions could cause CPs to exit the market for providing services to the types of customer in question (with the consequent impact on customer choice and competition).

CPs will face considerable practical and operational issues in determining which customers fall within these definitions – and thus determining which rules apply to them. Establishing a definitive view of how many employees work for an organisation, and its level of turnover, is very challenging. Furthermore, these metrics are variable – a business may therefore fall in to and out of the various categories covered by the definitions, potentially with a high level of frequency.

This is not only a problem for CPs. Business customers may not know which definition they fall under (and thus which regulations apply to them) – or they may have a different view to the CP, particularly if there have been changes to employee numbers or turnover since the CP's classification of them. The scope for confusion and complexity is therefore considerable.

We note that, at paragraph A7.9, Ofcom sets out its intention to *"…take a pragmatic and flexible approach to compliance monitoring and enforcement*" and that in assessing compliance it will "*….. consider whether providers have taken reasonable steps to identify the different categories of customers to which the requirements apply. For example, factors they may use (but not be limited to) to identify the size of business customer might include the annual communications spend of the customer and/or the number of lines taken by the customer.*" This is welcome, however, we believe that Ofcom should go further – indeed the proposed guidance in paragraphs A7.7-A7.9 represents a reduction in flexibility (and clarity) compared to what is currently provided by Ofcom in respect of the classification of business customers. We therefore ask Ofcom to provide further guidance for CPs and confirm its intention to take a pragmatic approach to enforcement in the situation in which a business customer's classification changes during the course of a contract.

In respect of the overlap between new and existing definitions, we believe that Ofcom could consider, and assess the implications of, removing the (existing) definition of Small Business (on the basis that it is very close to, and overlaps with, the definitions of both Microenterprise and Small Enterprise) - and instead moves ahead with the three new categories. This could be combined with an alternative approach to the classification of Not For Profit organisations such that it would align with (or be subject to the threshold applying to) the definition of Small Enterprises (rather than Small Business Customers – see below).

Specific concerns about Not For Profit Customers

We are particularly concerned about the consequences of the proposed definition of "Not For Profit Customer". Specifically, we believe that the definition as it currently stands will bring a significant number of large business customers into the scope of a number of consumer protection regulations. This is unnecessary and, we believe, inconsistent with the intention of the EECC.

The EECC does not include a formal definition of "not-for-profit organisations". However, Recital 259 does describe them as follows:

"*Not-for-profit organisations are legal entities that do not earn a profit for their owners or members. Typically, not-for-profit organisations are charities or other types of public interest organisations. Hence, in light of the comparable situation, it is legitimate to treat such organisations in the same way as microenterprises or small enterprises under this Directive, insofar as end-user rights are concerned*."

Clearly, therefore, the intention is capture organisations that require a similar level of protection to consumers. Consistent with this, we note also that at paragraph 9.52 of the Consultation, Ofcom takes the view that *"…micro and small enterprise customers as well as many not for profit organisations are likely to behave in a similar way to residential customers (and can have more limited bargaining positions than some larger businesses)".*

However, as currently drafted, the definition goes far beyond the apparent intentions of both the EECC and Ofcom, capturing charities of any size (from small to multinational), as well as any Government body. Ofcom has not provided any assessment of the impact of such a broad definition.

Larger not-for-profit organisations have significant bargaining power and to all intents and purposes act like large business customers. For example, Government departments and agencies tend to have comprehensive and demanding procurement frameworks and requirements. Likewise, many charities are large, multinational organisations with substantial procurement resources and support functions. These organisations clearly do not require the same level of regulatory protection as consumers and small business customers. The definition as currently drafted would create a disproportionate level of complexity and risk for CPs.

Recital 259 of the EECC references not for profit organisations as *"…..defined in national law"* – therefore affording Member States discretion over how they define this category of customer. In this regard we note that the proposed EECC legislation in The Netherlands includes thresholds in the definition which limit it to only organisations which exhibit the characteristics (and therefore needs) of small businesses[10]. In France, the proposed approach to implementation of the EECC recognises that the organisations to whom consumer-focused regulations are intended to be applicable *"…..are considered to be in a situation comparable to that of the consumers in terms of bargaining power."*[11]

Given that Ofcom has discretion over the definition, and the fact that Article 101 of the EECC sets out a maximum harmonisation requirement for many of the consumer focused provisions, we believe there is significant impetus for Ofcom to amend its proposed definition.

[10] See: *https://zoek.officielebekendmakingen.nl/kst-35368-2.html* (at article 1.1) and *https://zoek.officielebekendmakingen.nl/kst-35368-3.html* (at page 38 of the PDF document)

[11] *https://www.entreprises.gouv.fr/files/files/directions_services/numerique/consultations-publiques/ANNEXE_8_-_Transposition_consommateurs.pdf*

Specifically, we think that Ofcom should amend the definition in the General Conditions to exclude explicitly large not-for-profit organisations and all Government bodies (who do not exhibit similar characteristics to consumers and do not, therefore, require the same level of protection). We believe that the threshold of ten employees contained in the existing definition of Small Business Customers would represent an appropriate cut off point for determining when Not For Profit organisations are out of scope of the definition.

Waiving of rights

We note that the proposed new categories of customer can, subject to their express consent, opt to waive their rights to certain of the regulatory provisions conferred upon them by the proposed definitions. However, it is not clear how this will work in practice. For example, will CPs be required to provide evidence that (i) they have been transparent with the business customer in advance of it waiving its rights; (ii) the business customer has chosen to waive its rights; and (iii) they did not exert any undue influence in the course of the business customer deciding to waive its rights. We urge Ofcom to provide guidance on how the waiving of rights will take place in practice and what it expects of CPs in this regard.

3.3 Definition of a bundle

As Ofcom notes, the new definition of a bundle affords Ofcom the express powers to regulate non-communications elements of a bundle (in circumstances where a bundle includes at least one internet access service or a publicly available number-based interpersonal communications service). This could result in Ofcom regulating non-communications elements of a bundle including, potentially, services that are subject to different regulatory regimes.

We think this creates a significant risk of regulatory clash. As we set out in our response to the Government's consultation on transposition of the EECC[12], we disagreed with its view that *"the potential for such a clash is limited at the current time, as other regulated services are not routinely included in communication bundles"*[13].

Given the increasing popularity of bill aggregation companies, and the emergence of innovative, cross-sector bundling packages, we believe that Government has underestimated the potential for regulatory clash. There is no consideration in the Consultation of how any disputes between conflicting regulatory regimes would be resolved. The uncertainty and potential inconsistency that this creates could have a considerable impact on providers of such bundles – resulting, potentially, in them being deterred from providing these innovative services, ultimately reducing consumer choice and convenience. We believe that a clear acknowledgment of this risk is required, together with some indication of how Ofcom will approach regulatory clash.

Whilst some degree of out-of-sector regulation is anticipated in the EECC, the rationale for it is expressly to ensure that "lock in" does not occur. Any exercising by Ofcom of the powers afforded to it should be limited to ensuring that this type of consumer harm is prevented, and should not lead to a situation where it inhibits novel initiatives that would actually deliver consumer benefits.

[12] *Implementing the European Electronic Communications Code:* Virgin Media Consultation Response, 10 September 2019.
[13] Ibid, page 37

We note in this regard that Article 107(5) provides discretion for Member States to apply the "regulatory extension" approach to other provisions in the EECC, beyond the transparency, contract termination and switching provisions expressly referred to in Article 107(1). For the reasons set out above, we have urged Government not to exercise that discretion.

4 - Provision of information to customers about their services

Question 2: Do you agree with our proposed changes to the GCs to implement Article 102, as set out at Annexes 11 and 16?

Question 3: Do you agree with our proposed guidance in Annex 6 on our expectations for how providers should comply with the provision of contract information and the contract summary?

We set out our response to these questions collectively below.

4.1 Providing Contract Information and Contract Summary

Virgin Media supports the concept of ensuring that consumers are provided with an appropriate level of contractual information and information about services provided in advance of any contractual commitment. The provision of appropriate, clear and transparent information is key to ensuring that consumers can make informed purchasing decisions and engage fully with the market.

However, Ofcom's proposed approach to implementing the corresponding elements of the EECC are, we believe, disproportionate and would likely result in unintended consequences.

First, we believe that there is a material risk of poor consumer experiences and outcomes, caused by the proposed process for providing the information, an over-burdening of information and potential delays to or interruptions in service activation.

Second, we believe that the scale and scope of information that CPs will be required to provide, and the logistics of coordinating dissemination of information across numerous sales channels, in numerous formats, amounts to a disproportionate burden on CPs.

Third, note that CPs are already required to make available certain information to consumers ahead of entering into a contract. We believe that this process is working well. We therefore believe that Ofcom should focus on refining this, rather than introducing substantial additional complexity and scale to it.

Timing and coordination of information provision and practical challenges

Before considering the specific content of such information, we believe that there is a need for further consideration of, and clarification on, the timing and coordination of the provision of such information – put another way, "how" and "when" the required information is provided. The only clear direction on this point is that it must be provided before a customer is bound by a contract.

It would appear that there has not been adequate consideration given to either the types of sales methods available from CPs or the overall customer experience. The Consultation indicates simply that customers should be issued with the Contract Information initially, followed by the Contract

Summary at the point of sale – the latter of which must be expressly agreed to by the customers in order for any contract to commence.

This seems, however, to be contradicted elsewhere in the Consultation when it is suggested that the Contract Summary can be used *"to compare different offers"*[14]. Although presenting such a summary of information to customers may indeed allow them to make comparisons, if this "comparison" is intended to be the purpose of the Contract Summary, the fact that it is also linked to the activation of a customer contract, could have significant consequences that have not been considered fully.

Moreover, it is likely that these consequences will arise regardless of whether the Contract Summary is used by the (prospective) customer to make comparisons, as a result of its position in the purchasing process.

For example, if upon receiving the Contract Summary, the customer decided to take a period of time to read and understand it and/or to compare it to other offers before choosing to proceed with Virgin Media, the process would become 'disjointed' and would cease to be a seamless experience for the customer. This is a particular issue for telephone sales.

The prospect of a non-contiguous sales process raises the question of how CPs should approach installation appointments[15]. Currently, these are typically arranged at the point of sale (i.e. when the customer has made a de facto commitment to take a service). In the proposed scenario, it is unclear if CPs can book an installation appointment when the Contract Summary is issued or only at the point at which the customer expressly agrees to the Contract Summary. This could be some time after that information is provided and could lead to lengthy delays to installation (with it taking place, potentially, on a date much later than was indicated to the customer at the point at which the Contract Summary was issued).

In this 'non-contiguous' scenario, we are also unclear about the process that Ofcom expects CPs to follow when seeking to establish if a customer does plan to agree to the Contract Summary (and thus take up service) – or indeed whether it is even appropriate to seek such confirmation. For example, will CPs be permitted to contact a customer who has not completed the acceptance process to establish if they wish to proceed? Alternatively, would it be appropriate to book an installation appointment at the point of issuing the Contract Summary and seek to obtain the customer's express agreement to it before the installation appointment? This strikes us as inefficient and a potential waste of resource.

While we are mindful of the need to avoid applying undue pressure to potential customers to get them to take a service, we believe that it is entirely conceivable that a customer who has been issued with a Contract Summary believes that they have, de facto, agreed to take service and will be expecting that service to commence as soon as possible.

These are just two examples of how the introduction of the proposed requirement could cause disruption to both customers, with potential delays to the commencement of their services, and CPs,

[14] Consultation, paragraph 4.36

[15] In some instances, when a new customer is arranging to take Virgin Media services there may, as with other CPs, be a need to arrange an installation appointment with an engineer.

with missed or wasted installation appointments. These delays would similarly be an issue where a customer self-installs equipment or for mobile customers. Any delay in accepting the Contract Summary would lead to a similar delay in sending out equipment or handsets.

We believe that further consideration must also be given to the various ways in which customers can purchase services from CPs. In a traditional face-to-face environment, the issuing of customers with durable copies of both Contract Information and Contract Summaries is relatively straightforward, as is the processing of customers' acceptance of what they are being offered. However, the vast majority of sales, re-contracts and upgrades no longer take place in this way, instead happening via a variety of methods such as phone or online. It does not appear that sufficient consideration has been given to these developments.

There will also likely be challenges in the case of customers who do not have an email address for the required information to be delivered to. Although a written copy would clearly be a "durable medium", providing information in this form would once again introduce delays and would likely frustrate customers. This is likely to affect elderly, disabled and other vulnerable customers disproportionately.

In terms of online sales, as the Consultation and guidance point out, provision of the two new forms of information could be incorporated into the sales process. However, this would not necessarily be straightforward. There would be a need for considerable system and process development in order to accommodate the requirement, including ensuring that both pieces of information are delivered to the customer via a durable medium and that they reflect the specificities of the customer and offer. We also believe that there is a need for clarification about the practical aspects of online purchasing processes. For example, does Ofcom expect CPs to provide for the ability for sales processes to be paused and saved for a prescribed, or unlimited, period of time (to allow, for example, prospective customers to take the required information away to read or compare with alternative offers)? Again this would entail significant cost and development and would still give rise to issues, such as how to deal with time limited offers, which are common in the UK's competitive market.

Sales that take place via the telephone would appear to be the most at risk of disruption as a result of the proposed requirement, not only for CPs but also for customers. This is a significant concern to us. Throughout this section of the Consultation, Ofcom emphasises the need to give customers the *"opportunity to assess"* the information that CPs have given them ahead of entering into a contract for their services. We support this principle, however, it is also vital that customers have the best possible experience and CPs have the ability to satisfy their needs at the first time of asking. When incorporated into a telephone conversation, the provision of these two new pieces of information would frustrate this, breaking up the conversation and introducing unnecessary extra steps, such as necessitating the customer to call the CP back (thus likely increasing inbound call volumes significantly) or to continue the purchasing journey online in order to confirm their acceptance. The Contract Information is particularly problematic in this regard, as customers will need time to read and understand the large amount of detail that it contains. We do not believe that introducing an additional step into the sales process represents a good customer experience.

Ofcom suggests an alternative approach in the Consultation whereby the Contract Summary could be sent to the customer while they are on the call (allowing them to access and read it during the

call). Although this may reduce the instances of a need to call back or complete the journey online, we think that it may lead to unintended consequences. Allowing time for the customer to read and understand even the Contract Summary during the call is inefficient. It would increase call lengths significantly, causing CPs resourcing and scheduling challenges and would lead to longer wait times for all customers, not just those wishing to join or upgrade. It may also put vulnerable customers (for example those with mental health problems, learning difficulties or cognitive impairments), at a greater disadvantage as they may feel under undue pressure to read, digest & agree to the information.

As an alternative, we believe that there is merit in exploring an approach to telephone sales whereby CPs' agents would be allowed to convey information about the contract verbally to customers (e.g. the salient points from the Contract Summary), allowing for verbal confirmation from them to be the trigger to place an order or installation request. This would obviously be followed by the documents being sent to the customer via a durable medium but would avoid the introduction of a de facto break in the sales process. We note that customers will, in any event, still have a 14 day cooling off period for protection.

Virgin Media agrees with the principle that, if and when the proposed new information is provided, it cannot be changed without the express permission of the customer. However, this does raise further questions about the purchasing process. If, for example, post issuance of the information a customer approached a CP with a request to change some aspect of the service that they were intending to purchase (or had expressly agreed to purchase), would the CP be required to start the process again, irrespective of the significance and magnitude of the change? If so, this could result in an incredibly negative customer experience. Virgin Media believes that this is another element on which additional guidance is necessary.

The same question arises in respect of any in-life changes to the service provided (of which there are typically hundreds of thousands each year): is it Ofcom's intention that every time a change is made, even one which does not alter the contract term, both the Contract Information and Contract Summary must be re-issued and then expressly (re)agreed to? We also believe that additional guidance is required as to if or how the new information requirements affect customers who are looking to re-contract with their current CP at the end of an existing fixed term. These customers have often been with the CP through a number of contract terms and wish to have their renewals processed as swiftly and smoothly as possible. A requirement to provide the Contract Information and Contract Summary in advance of any re-contracting would frustrate this process and would result in a poorer customer experience.

We also have concerns about data and privacy. When a prospective new customer approaches a CP, the CP does not hold any information about that individual. However, in order to provide the Contract Information or Contract Summary, the CP will need to collect information such as an email address or telephone number. If the individual chooses subsequently not to take up service, it is not clear what approach the CP should take to the treatment of his or her data (including retention and storage). We would therefore appreciate further clarification from Ofcom about what it considers to be appropriate in these circumstances.

Implications for disabled and vulnerable customers

We are concerned that customers with accessibility needs may be even more adversely affected by these proposals. Certain aspects of the Contract Information and the Contract Summary will be customer specific. Currently, the transcribing of communications into accessible formats can take up to five days. Therefore, having to wait for a contract summary to be transcribed, delivered and expressly agreed to would mean that these customers would be disproportionally impacted. This would, we believe, be in conflict with Ofcom's desire to treat all customers on an equivalent basis.

Fundamentally, the proposed process for provision of the Contract Information and Contract Summary has been insufficiently thought through and will, as currently envisaged, result in poor customer experiences and outcomes. Critically, we believe that there is a significant risk that it will frustrate the switching process by making it more difficult and confusing, quite possibly leading to a reduction in switching levels. This cannot be Ofcom's intention. We therefore urge Ofcom to reconsider how the provision of this information can realistically take place in practice and, at the least, develop guidance clarifying how the issues that we have identified can be overcome.

Content of the Contract Information and Contract Summary

We are concerned that the scale, scope and detail of information required to be included in the Contract Information and Contract Summary will lead to "information overload" for customers. This could have the effect of confusing them or frustrating them and, potentially, lead to them making an inappropriate purchasing decision. Our concern is not about the provision of this information to customers per se (we acknowledge that CPs are already required to provide much of the required information to consumers) – rather, we are concerned about the point in the customer relationship at which the information must be supplied and the manner in which this must be done.

The requirements relating to pricing information make the risk of a poor customer experience and outcome particularly acute. For example, Ofcom proposes that the individual price of each element of a bundle must be listed, if these elements can be purchased separately. **[✂]**

It is not clear if Ofcom requires CPs to set out the former or the latter. We would therefore appreciate further guidance on the display of pricing elements and whether Ofcom expects CPs to set out the 'standalone' prices for the bundle elements or to (attempt to) apportion the costs of each element against the bundle price. If it is the former, this would enable customers to establish the savings available to them by purchasing a bundle (as opposed to purchasing the services individually).

In the case of detailed pricing elements, such as one-off charges, it is important to understand that these may only be finalised at specific points in the sales process. Therefore it is possible that issues will arise when attempting to ensure that what is provided within the Contract Summary is accurate and not subject to change. Accordingly, an element of flexibility when presenting all pricing elements is essential.

Finally, Ofcom is proposing to require CPs to provide new, contextualised information about price rises that are scheduled to take place during the life of the contract agreed by the customer, as well as outlining any price changes that would take place when the contract period ends. Whilst we support the objective of ensuring customers are given clear information on how any planned price

changes may affect them, this is an additional piece of development that will require time to introduce.

Impact on CPs

Virgin Media does not believe that enough consideration has been given to the significant impact that these changes would have on CPs. Although, as previously acknowledged, some aspects of information that would be required are already provided to customers, the timing of when such information is provided is key - and amending these timings will be incredibly challenging. As is the case with all CPs, Virgin Media currently has an established journey that allows for customers to make informed decisions about what services they agree to take, with post-sale steps also existing that allow the customer to change their mind.

There are a number of systems that work in a defined way in order to generate the package and information that customers require and these systems rely upon certain interlinked criteria in order to generate the required information for the customer. Altering the sequential nature of these systems would require significant development work, especially with the personalised elements of the proposals. This development would involve alterations to all existing customer journeys and agent processes and scripts (and thus re-training of agents). They will therefore take considerable time to implement and will have significant resource and cost implications.

In addition, we believe that there will be further consequential impacts for CPs, including increases in call volumes and extensions to call handling times. Like most CPs, Virgin Media, has an existing programme delivery roadmap, which includes initiatives that will deliver benefits to end users (for example, Annual Best Tariff Notifications). Implementation of the new informational requirements in the manner currently prescribed, and by the December 2020 deadline, would therefore be extremely challenging and likely lead to poor outcomes for consumers. We therefore urge Ofcom to consider, in conjunction with industry, a different approach to, and timescale for these changes.

Contact summary template

Finally, we note the rudimentary nature of the Contract Summary Template as provided by the European Commission as an aid to complying with the EEC requirement. This document is incredibly basic and is accompanied by a limited amount of guidance about on how it should be used. This, in our view, affords Ofcom a significant amount of discretion to determine what should be included within the Contract summary and how it should be presented. We urge Ofcom, therefore, to exercise that discretion to ensure that consumers are not subject to 'information overload', and CPs are not subject to a disproportionate administrative burden. We note also in this regard that CPs are permitted to use their own methods of presentation and language when compiling End of Contract Notifications (whilst remaining within the guidelines of what is provided). There would therefore appear to be precedent for such an approach to the Contract Summary.

<u>4.2 Helping customers manage their use of communication services</u>

Virgin Media supports the principle that customers should be supported in managing their spending. Although Ofcom does not propose fundamental changes to what CPs currently do, we require clarification of certain aspects – and this may lead to a need to undertake some development work.

The main part of the proposal is for CPs to ensure that customers are given "up-to-date" billing information. We would like further clarification of what is meant by "up-to-date" to ensure that we have certainty about any requirements that may need to be implemented, and whether this will involve changes to our current processes.

We also seek clarification about how CPs should treat delayed charges that may impact a customer's account. Currently, CPs are given up to 90 days to apply these charges, such as interconnect or overseas charges. If Ofcom intends to reduce that period, we believe that further engagement with industry will be required, as the timing of receipt of information relating to such charges is typically outside of the control of the billing CP.

There is also a potential issue regarding customers with accessibility needs in relation to the "up-to-date" billing information requirement. There may be some customers who do not or cannot use email or text messaging due to an accessibility need. In these circumstances, information would usually be sent to them via an alternative means. This may result in a delay in notifying them about their usage and could therefore fall foul of the requirement to provide "up-to-date" information. We would therefore welcome clarification about how the requirement should apply to such customers.

5 - Publication of information and provision of data to third parties

Question 4: Do you agree with our proposed changes to the GCs to implement Article 103 and our proposed approach to implementing Article 104, as set out in Annex 11?

5.1 Publication of information (Article 103(1))

The necessity and benefit to customers of provision of further information is unclear

As Ofcom states, much of this information set out in its proposals is published already. We believe that the benefit to customers of publishing additional information is unclear and is likely to lead to "information overload", such that the sheer quantity of the information provided results in customer frustration and none of the information being read or understood.

Machine-readable and accessible format

Article 103(1) requires that information must be published in a "*clear, comprehensive, machine-readable manner and in an accessible format for end-users with disabilities*."

We refer you to the concerns we raise in Section 11 of this response as the same concerns apply here. We would encourage a pragmatic and flexible approach to implementing this obligation, particularly given technological advances in this area.

Application to Businesses

We note that Ofcom proposes that this obligation should apply to the publication of information to consumers, micro-enterprises, small enterprises and not for profit organisations. The multiplicity of

definitions is confusing and we refer you to the concerns we raise in Section 3.2 of our consultation response.

Cost of making changes

Ofcom states at paragraph 5.13 that it does not "*expect the cost of making these changes to be significant*." In the absence of an impact assessment we do not believe this can be stated with confidence. The cost of implementation will largely depend on how the requirement to provide information in an accessible format for end-users with disabilities is interpreted. The more extensive and bespoke the requirements for end-users, the more extensive the cost implications.

Provision of information to Ofcom before publication

We note that the information published shall, on request, be supplied to Ofcom before publication. Guidance on the circumstances when Ofcom may require notification in advance – and how far in advance of publication it wishes to be informed – would be helpful so that it can be factored into internal planning. If this is required after every single update to the information published on CPs' websites, it is likely to lead to many updates being sent to Ofcom from multiple CPs on a regular basis and would be onerous for Ofcom and CPs alike. We believe it would be more practical if this information was provided to Ofcom only by exception, upon request, and only after publication.

5.2 Publication of quality of service information (Article 104)

We agree with Ofcom's proposal not to introduce new requirements to publish quality of service information at this stage. If Ofcom is minded to change this position after it has published the new metrics in the 2020 Comparing Service Quality report, and after BEREC has finalised its guidelines on quality of service measures, we believe Ofcom should first consult on any such measures. Given that quality of service information is already made available – and Article 104 is a discretionary provision – we do not believe that the provision of further information is necessary or proportionate. We also remain concerned about "information overload".

5.3 Provision of data to third parties for the purpose of making available independent comparison tools (Article 103(2))

Summary

We recognise that comparison tools play an important role by helping consumers to navigate the market, allowing the comparison of different services according to a number of factors. We also recognise that the provision of some information will assist comparison tools to provide comparisons not only on price, but potentially also on other factors such as quality of service.

For Virgin Media, there are tangible commercial incentives for us to provide data to providers of consumer price comparison sites, given their popularity with consumers when choosing a new service. However, imposing an obligation to provide data to third parties is entirely new and raises a number of concerns. These include the ambiguity and scope of the obligation, confidentiality and security of data (given that serviceability information and any advance information about offers is commercially sensitive and confidential), the proportionality of the obligation and the associated development and management costs of compliance.

We do not believe that imposing such an obligation is necessary, given existing commercial incentives to provide information to providers of price comparison sites. However, if Ofcom decides to introduce this obligation, we believe that it should adopt a proportionate approach. In particular, if CPs are to be obliged to provide data we recommend that they should:

- **be obliged to provide data only in relation to consumer packages available to new customers;**
- **only have to provide one standardised set of information, not tailor the information to each request;**
- **be obliged to provide data only to members of the accreditation scheme;**
- **be able to choose how to provide the information - and particularly where information is sensitive and confidential they should be able to provide the data through an API; and**
- **be able to carry out appropriate due diligence and require third parties to agree to appropriate terms and conditions and security controls relating to the use and security of the data.**

CPs will also need sufficient time to develop the tools to provide this information. As with most significant solution development, this work is likely to take 12 months, but as things stand, the consultation document does not set out the obligations in sufficient detail to enable Virgin Media to commence development work with any assurance that the resulting tools will be compliant.

Ofcom should not underestimate the potential capital and operational costs involved in complying with this obligation. We have not seen any impact assessment on this and we note that the consultation makes no comment on whether the costs to a CP would be significant. We believe that the costs will be significant, and these costs will multiply further if CPs are required to provide a tailored, bespoke service, free of charge, to any third party making a request for the purposes of making available a price comparison tool, regardless of whether they are accredited or not. This seems disproportionate to CPs of all sizes.

Scope of the obligation

Ofcom's proposed new C2.19 states:

*"Regulated Providers shall **make available**, free of charge and in open data formats, the information listed in Condition C2.21, for the purposes of providing a Comparison Tool meeting the conditions set out in Condition C2.20."*

On the other hand, Article 103(3) states that third parties shall have **a right to use**, free of charge and in open data formats, the information published by providers of IAS and ICS, for the purposes of making available such independent comparison tools.

Article 103(3) is a permissive provision allowing third parties to use data published by providers. It does not explicitly mandate that this should be implemented by way of an active obligation on CPs to provide information to satisfy individual requests. Given that CPs will be obliged to publish information on their websites, the implication is that providers of comparison tools can obtain this information from those websites.

Ofcom is aware of the complexities, costs and confidentiality concerns of imposing such an obligation on CPs. Ofcom has hosted workshops in which attendees discussed these matters in detail. In addition, **[✂].**

We believe that the provision of information to third parties should always be subject to a commercial agreement, if the CP requires one. This enables the CP to impose necessary confidentiality and security obligations and ensure both parties are clear on their respective obligations.

[✂]

[✂]. If Ofcom imposes an obligation on CPs to provide information, there is nothing to stop a price comparison provider from demanding the data then not undertaking the development work to actually use it on their websites. At the moment, they are not making that demand unless they have a genuine need for the data and can make use of it.

We believe that entering into commercial agreements with price comparison providers should be considered evidence of CPs' compliance with their obligations under this new GC, even if the price comparison provider is not requesting from the CP all of the information set out in the proposed GC C2.21 for all services.

Open Data Format

We believe what an 'open data format' means in practice is unclear and should be clarified. We believe CPs should be able to specify the 'open data format' rather than be obliged to provide data in multiple formats to multiple third parties. We do not believe that it is proportionate or necessary to require CPs to provide a tailored, bespoke set of information to each third party making a request. The time it would take and the cost involved in providing a bespoke solution to every third party that makes a request would be prohibitive – and disproportionate.

Static information

Where information is static and does not change between serviceable premises (for instance package and tariff information about services available in all serviceable areas, and any quality of service information that is the same across serviceable areas), we do not believe that it is necessary or proportionate to require CPs to make available tailored information to each third party making a request. The CP should be able to satisfy the obligation if it makes this standard information available on its website in an open data format of its choice. It should not be required to tailor the format of this data for each third party making the request.

Information on whether services are available (Serviceability information)

Information about serviceable premises (address level information) is dynamic and highly sensitive and confidential. For security reasons and to keep the information up to date, CPs should be able to provide this information by way of a standard API (based on UPRN or address) rather than be required to provide a bulk data file of the their entire footprint. **[✂]**

Due Diligence Concerns

It is unclear what (if any) due diligence will be permitted in relation to requests to make available data. Is a CP entitled to refuse a request and if so in what circumstances? There are a number of circumstances in which it would not be fair, reasonable or proportionate to require a CP to make available commercially sensitive and confidential information such as serviceability data. For example, what if due diligence reveals that the requesting party is a start-up with no financial backing or liability insurance and no evidence of any published comparison tool? What if the relevant company is directed by individuals who have previously misused data (for instance disclosed data to a competitor)?

We can envisage numerous requests for this data from third parties who may have no genuine requirement for the data to provide a comparison tool. CPs should not be required to provide data where they have genuine concerns as a result of undertaking due diligence, or concerns over the use of and security of data.

Requiring the provision of data only to accredited members of Ofcom's scheme would certainly help in this regard. It would incentivise applications to the scheme and increase the level of accountability of providers of comparison tools. We believe this would achieve an appropriate and proportionate balance.

Competition implications

If, through the misuse of data, information relating to Virgin Media's network footprint was directly or indirectly disclosed in bulk to a competitor, it would afford that competitor an unfair competitive advantage. It would allow it, for example, to establish where Virgin Media has recently, or is likely to, expand its network and either target retail offers at the premises in question or undertake pre-emptive network upgrades of its own.[16] This could give rise to potential competition law risks.

An obligation to provide this information to multiple third parties without adequate controls increases the risk that this data will be published or disclosed to a competitor. This harm could not be remedied adequately through financial penalties payable by the third parties.

The provision of package related information and offers to third parties in advance of launch also has the potential to distort competition and to give rise to competition law risks. We believe the obligation to provide information relating to prices and tariffs should not extend to the provision in advance of any offers or flash sales to price comparison providers, but only to packages actually available to new customers via the Virgin Media website. **[✂]**

Ofcom is no doubt aware that although price comparison providers are independent from CPs, they are not necessarily unbiased. Their commercial model is dependent on commission from CPs - and that commission may vary between packages and providers. The fact that CPs pass information to a price comparison provider does not mean that the price comparison provider will display the information. How a price comparison provider displays information is within its own control – and it may be unduly influenced by one of the CPs from whom it obtains information.

Terms and conditions associated with provision of data

[16] Ofcom acknowledges this risk at paragraph 6.78 of the December 2018 consultation on designating Universal Service Providers and applying conditions.

Paragraph 5.25 of the consultation states that provision of data may be *"subject to, if relevant, agreeing reasonable terms on data security".*

We have numerous concerns about this statement. In particular, we are concerned that the proposed General Condition makes no reference to the obligation being subject to terms of any kind, security or otherwise. This should be a fundamental part of the General Condition itself. As a minimum we believe that the obligation should be subject to the third party agreeing the following terms with the CP:

1. A clear obligation on the third party to use the data only for the provision of an independent comparison tool complying with the proposed GC 2.20 and for no other purpose;
2. General obligations of confidentiality and to keep data secure; and
3. Specific obligations relating to data security, including the right of CPs to implement or impose technical security controls and other related terms such as a right of audit and a provision acknowledging that damages may not be a sufficient remedy for breach.

We believe it is fair and proportionate that data is only provided to those price comparison providers who agree to terms specified by the CP which cover as a minimum the points referred to above. Limiting the obligation to disclose data to members of Ofcom's accreditation scheme would also help ensure the data is kept secure and not misused.

Paragraph 5.25 of the consultation seems unduly limited and does not cover the concerns stated above. It simply states that provision of data may be subject to, if relevant, agreeing reasonable terms on data security. This raises a number of questions.

By way of example, who makes the determination as to whether a term is 'reasonable' in relation to a CP's data security? Would technical security controls imposed by a CP on use of an API and audit rights in a contract be considered 'reasonable' and part of 'terms on data security'? What about a provision that specified that damages may not be an adequate remedy?

We believe the minimum terms we set out above should be permitted in any commercial agreement in order to protect our sensitive and confidential information and that data should not be provided unless those terms are agreed to by the price comparison provider. We take the security of our data very seriously, and data relating to the Virgin Media footprint – and possible areas of expansion – would be very valuable to a competitor – and disclosure would potentially be very damaging to Virgin Media.

Dataset to be provided to third parties is unclear

The information to be provided to third parties is set out in the proposed GC C2.21, being information:

"…relating to:

(a) The prices and tariffs of services provided against recurring or consumption-based direct monetary payments; and
(b) *The minimum quality of service where offered, or the CP is required to publish such information."*

This is not clear and we would welcome clarification on the following points.

- What is information 'relating to' price, tariff and minimum quality of service? Is it intended to include any information other than price and tariff and quality of service?
- What does 'services' actually mean? What are relevant 'services' in this context? We believe the obligation should relate only to offers ***currently available*** to ***new consumer customers***. Other interpretations would add considerable cost and complexity for no consumer benefit. In particular, we do not believe that it would be proportionate to expand the scope of the obligation to include legacy packages, or retention offers made available to existing customers, or any business packages (given the obligation is to provide the data to third parties for the purpose of providing a Comparison Tool – which is defined as a tool that enables *Consumers* to compare services).
- How often must the information be updated, for instance to take account of network expansion and new packages? Must this be provided in advance of launch? We do not believe it should**[✂]**[17]. Given that the list of premises served will change frequently, for instance due to network expansion, an API is best used for existing serviceability information. New packages change less frequently and that information will be published on a CP's website - so we believe the onus should be on the price comparison provider to update package information. Even if we provide this information we have no control over whether or how it is used.
- How are value added services to be treated? Would they be considered recurring or consumption-based direct monetary payments? For instance, if a CP includes 12 months free Netflix or Antivirus, with further use being subject to direct charge from the third party, must that detail be provided?

There will be further complexities if Ofcom intends to include any offers available to existing customers. This would require the provision not just of "serviceability" information, but personal data on customers who are currently obtaining a service from that CP and information about those services. Package information should be limited to those packages available to new customers only, as set out on a CP's website.

[✂]

We would welcome clarity on the scope of the obligation.

Proportionality: the obligation should be proportionate, complementary and consistent with obligations on providers of comparison tools

This section reflects our response to the consultation on Digital comparison tools for telephone, broadband and pay-TV: Proposed changes to Ofcom's voluntary accreditation scheme ("**Digital Tools Consultation**").

We believe there is a clear link between the two consultations and the obligations proposed ought to be proportionate, complementary and consistent. As currently proposed, we do not believe this to be the case.

[17] **[✂]**

On the one hand, Ofcom proposes to move to a principles-based approach to comparison tool accreditation, removing a number of the more prescriptive elements and controls. In particular, Ofcom is no longer requiring the carrying out of an external technical audit in all cases and instead plans to let applicants compile their own evidence that their tool meets the relevant criteria, only conducting in-depth reviews in some discretionary instances.[18]

On the other hand, Ofcom is proposing to require CPs to make available, free of charge and in open data formats, specified information for the purposes of providing a comparison tool. As drafted, this obligation applies whether or not a third party is a member of the accreditation scheme.

We believe that this introduces risk and will reduce quality assurance. Currently, any provision of data to price comparison providers is subject to appropriate due diligence and commercial agreements. This is to ensure we provide data only to established and reputable providers, who have committed to keep Virgin Media's data secure and not to use it for other purposes, such as publication in bulk or disclosure or sale to competitors. Virgin Media has a commercial incentive to provide the data, but takes comfort from having a choice about whether to provide this data if it has genuine concerns about its security or use.

Ofcom is proposing to remove this choice, while loosening the obligations applicable to members of the accreditation scheme and requiring CPs to provide data irrespective of whether the third party is a member of the accredited scheme. This seems neither fair nor proportionate. Restricting the obligation to provide data to members of the scheme would incentivise applications to the scheme and increase the level of accountability of providers of comparison tools. We believe this would achieve an appropriate and proportionate balance. We believe that it would also deliver better outcomes for consumers, as the greater levels of quality assurance and diligence to which it would lead would allow them to have more confidence in the comparison services provided.

In summary, we recommend that:

- *If* **CPs are to be obliged to provide data, they should be obliged to provide data ONLY to members of the accreditation scheme, subject always to appropriate terms and conditions and security controls; and**
- **Ofcom revisits the removal of the requirement to carry out an external technical audit in all cases and considers the implementation of further requirements specifically requiring members of the scheme to keep the data secure and use the data only for the provision of the comparison tool and for no other purpose. Compliance with these obligations should be capable of audit by Ofcom and/or the CP.**

CPs would be free to enter into commercial agreements with non-accredited providers of comparison tools on a discretionary basis, but we do not believe it is fair or proportionate for them to be obliged to do so.

6 - Contract duration and termination

[18] 3.82, 4.2, Ofcom Consultation: '*Digital Comparison tools for telephone, broadband and pay-TV*' (published 17 December 2019)

Question 5: Do you agree with our proposed changes to the GCs to implement the requirements in Article 105, as set out in Annex 12?

Question 6: Do you agree with our proposed changes to the existing guidance as summarised here and set out at Annex 7?

6.1 Disincentive to Switch

Virgin Media welcomes Ofcom's proposal to limit the requirements relating to disincentives to switching to consumers and micro and small enterprises and not for profit organisations. However, we refer back to our comments above on the approach to defining new categories of business customer above.

6.2 Contract Duration

24 month maximum duration

Ofcom is proposing that implementation of the 24 month rule is extended (in line with Articles 105 and 107) to cover micro and small enterprises and not for profit organisations (unless they explicitly agree to waive their rights), and all elements of bundled contracts. While we agree that the implementation of this provision should not go beyond the requirements in the EECC, we refer to our earlier comments about the inappropriateness of applying this type of provision to business customers and the challenges of identifying these new categories and ensuring such classification remains accurate in the future.

In particular, Ofcom needs to recognise that this change will cause disruption to the business sector and will very likely lead to a reduction in choice for business customers. Business customers are currently offered mobile propositions as part of 36-month contracts, which will be prohibited under the rule changes for the smaller businesses and not for profit organisations in the scope of this regulation. The creation of alternative propositions (for example mirroring consumer facing, independent handset loans), will take considerable time and could deprive customers of mobile offers that would otherwise have suited their needs. We believe that Ofcom should take a pragmatic approach to enforcement in respect of such contracts to ensure that services that business customers want and value do not become unavailable.

At the very least, Ofcom should allow a suitable period of transition such that current propositions are allowed to continue (beyond the implementation deadline), whilst replacements are developed. This is yet another reason why Ofcom needs to consider a delay to the introduction of, or moratorium on/phased approach to enforcement of any new requirements, as outlined in Section 2 of our response above.

We also agree that split mobile contracts with a truly separate handset agreement will not be affected[19] by the extension of the 24-month restriction to bundles, such that handset loan agreements that (unlike "linked split" contracts) are not linked to the airtime contract can continue to have longer durations (in most cases a 36 month loan agreement). This type of arrangement delivers benefits to consumers and is increasingly popular: it allows them to benefit from the latest

[19] Consultation paragraph 6.24

technology handsets, whilst keeping overall monthly costs at an affordable level. The emergence of 5G emphasises the need to ensure that compatible handsets are made widely available to all consumers. Therefore the ability to provide handset loans over 36 months is critical to the take-up and realisation of the benefits of this technology.

12 month contract availability

We understand Ofcom's concern about retaining the provision that relates to 12-month maximum contracts, and the need to ensure that more flexible contracts are available.

Virgin Media offers a number of contracts, both for fixed line and mobile products that operate on a 30-day rolling basis, with no minimum commitment term. Such contracts address directly the CMA's concern that there is a need for flexible, shorter term contracts. We note that the proposals explained in paragraphs 6.35-6.41 of the Consultation refer to subscription to contracts "*with a commitment period of 12 months*". For clarity, we ask that Ofcom confirms that the obligation, as drafted in the GC, is met by offering contracts with a commitment period of 12 months or less[20]. It would be perverse if the interpretation of the rule changed to increase the term offered, and we do not believe this to be Ofcom's intention here.

6.3 Extending Contract duration when adding a service

The proposals for GC C1.12 could affect the way products are upsold to customers. Where a customer chooses to upgrade their services by adding a substantive additional service, it is reasonable to require a customer to re-contract their existing services, as they will be moving, essentially, from a "dual play" to a "triple play" package, for example. This allows the customer to be offered a commercially attractive offer, and is a way in which value can be provided to consumers within the market. We do not object to the underlying requirement (recognising that it forms part of Article 107), but would point out that if a customer was not willing to expressly consent to the new minimum term across all services, we would not necessarily be in a position to offer the addition of a single service. The customer could choose to remain on their current package, or could choose to leave (subject to any permissible early termination charges due), but it would prevent the ability to offer the additional service to that customer. This would clearly restrict consumer choice. We therefore urge Ofcom to consider providing additional guidance to allow for some discretion in these circumstances.

6.5 Contractual Modifications

Proposed condition C1.14 requires that any "contractual modification" is notified to customers in accordance with the framework provided within the new conditions.

This is to ensure that CPs are compliant with Article 105(4) of the EECC, which states that a customer will have a right to cancel in the event that there are "*changes in the contractual conditions proposed by the provider*".

[20] Currently, General Condition C1.5 requires that contracts are available with a "***maximum*** duration of 12 months" [emphasis added]

The recitals to the EECC are also clear that the changes relate to tangible and key aspects of the contract, setting out the (non-exhaustive) list of examples at Recital 275 as including "*charges, tariffs, data volume limitations, data speeds, coverage, or the processing of personal data*".

It is therefore vital that the condition is interpreted as changes to contractual conditions, and not changes to any service that the customer may receive. This is because services can legitimately vary during the course of the term of a contract between a consumer and CP. The customer will be on notice of such changes from their contract (noting the information that will be provided to the customer under the provisions of the revised GC C1.3-1.7).

Examples of this will include the provision of content within a television package or tier purchased by a customer. Such tiers will be made up of a number of linear channels and associated on-demand content. For example, at the time of writing Virgin Media's "Bigger Bundle" is advertised as having "*Over 227 channels including all the Entertainment Picks and BT Sport in 4K Ultra HD and top Sky channels in HD*".

The non-definitive nature of the number of channels quoted represents the fact that amounts will vary from time to time as individual channels and television services will be added and removed to ensure that the tier is kept fresh and reflects current and latest content and services available to customers. Content providers also launch and discontinue channels and services at their own discretion, such that in any one year it is very unlikely that the make-up of channels, services and/or other content in a TV package will remain static. The contractual term associated with the provision of content states:

*"2. The **television service** is a variable TV service, so we don't guarantee that we'll provide any particular channel, or other content, or access to any third-party services. This means we may add, remove, change or interrupt (some, or all, of) the **content** and/or the **television service** from time to time. We may also have to make changes for reasons including (but not limited to) **matters beyond our reasonable control**, or where **content** or a service is made available to us by a third-party and they stop making them available to us or we gain or lose the right to make the content or service available to you. Where this happens and, if appropriate, we will try to replace content with similar or equivalent content.*

3….[ ]…..

*4. Any example we have given of any **content** on the **television service** (including in advertisements, direct mail, in-store, on-line or on the telephone) is only an example of **content** that may be available as part of the **television service** at the time the example is given, and the example may not always be on the **television service** throughout the term of this **agreement**."*

Thus, the customer is on notice, at the time of contracting, of the basis of the provision of television content within the tier that they have selected. A change of content within those terms would not, therefore, be a change for the purposes of C1.14.

The tier will include channels available for linear viewing, on-demand content available through the customer's set top box and/ or via access to Apps that can then be viewed through the set top box.

To interpret this in any other way would go beyond the provisions of the EECC. **[✂]**

[✂]

[✂]

We reference that case as an extreme example of why we consider that the EECC provision (and resulting General Condition) must be limited to contractual changes only. However, this is not the only change that clearly sits outside the scope of this regulation. Video on Demand content available within TV packages has finite availability windows, and movie content available will refresh as newer titles are added and older content retired. This standard variation of availability windows should also not amount to a change for the purposes of C1.14.

It is also clear that the sheer magnitude of notifications that would be required if customers were to be informed of every item of content change would result in a vast information overload for customers, with more notification than could possibly be read or be in any way informative – in addition to being an enormous operational burden for CPs. Additionally, CPs will often not become aware of upcoming changes to content and services until fewer than 30 days in advance of the change, and as such timely notification under C1.14 would not be possible. This is a further example of why it is clear that the EECC provision could not apply to this type of service change.

Whilst this is most clearly evidenced through examples in **[✂]**, it is also clear that other services for broadband, phone and mobile customers should be similarly interpreted.

Where mobile services are provided through an MNO partner, a retail CP will have no control over coverage changes resulting from mast / cell site changes. This could result in a variation in coverage from time to time and, notwithstanding that overall coverage is increasing nationally, a reduction of service in any part of the country of a legacy mobile technology (e.g., 2G/3G) could be interpreted as being one change amongst many other positive coverage changes, that was not exclusively beneficial to a customer. If C1.14 applied to such changes, it could give a wide right to cancel across the whole base of the MVNO despite the lack of actual effect on the vast majority of customers. The key issue here is that such a technical variation is not a "contractual change": the relevant contractual provision already informs the customer of the potential for coverage unavailability:

***"4.1 Availability**: We will try to make our Services available to you at all times but quality and availability could be affected by factors outside of our control, such as the weather, or faults in the Network or any other networks used to provide the Services to you. The Network we use for the provision of our Services may from time to time need upgrading, maintenance or other work which may result in interruptions or unavailability. Where this is the case and our Network provider has informed us, we will detail any interruptions or unavailability on our website and details will also be available from our Team. We will do all we can to keep such unavailability to a minimum."*

This shows that the customer, at the time of choosing to accept the contract, accepts the basis upon which mobile network availability is offered, and therefore variations within that term will not be caught by C1.14.

Whilst changes to overall services made within the current terms and conditions are clearly outside of this proposed condition, it is also important that Ofcom gives sufficient clarity on changes that are outside of a CPs control.

The clearest example of this is the setting of Service Charges for unbundled tariff numbers. These charges are set, not by the customer's CP, but by the provider of the service (or by the terminating CP hosting that provider), and are subject to change at their discretion.

The customer's retail pricing will change (retail price being required, under GC B1.21, to be the sum of the Access Charge and the Service Charge), but only by virtue of the cost of the service being called changing. Such variations should not give rise to rights to cancel as this would effectively undermine any minimum contract period for any provider (given that there is an obligation to offer access to all number ranges), which cannot be the intent of the proposed changes.

This approach to Service Charge Changes (i.e. not including them as a trigger to C1.14 notice provisions) shows that there cannot be a blanket approach to all pricing changes, and there is a need to ensure that a CP is not penalised (by being required to offer a right to cancel) when there is no discretion on the part of the CP and equally, no expectation on the part of the customer that the pricing would be guaranteed to remain static. It may be that these potential variations in charges can be highlighted as part of the pre-contract information to the customer so that the customer is clear about the nature of them.

Mobile roaming is a further example of a service for which (changes to) certain aspects are outside of the control of the CP providing the service to an end user. The services provided by a roaming network - and indeed the availability of a certain roaming network - can change at a third party's discretion. Again, we do not believe that it would be appropriate for such circumstances to trigger the regulatory provision in question.

Finally, we are concerned about the application of the enhanced Right to Cancel provision to large business customers (which arises as a consequence of the use and definition of "End-user"). Such customers have substantially stronger bargaining power than consumers and small businesses – we do not believe, therefore, that they require the same level of protection in this regard. Contracts between CPs and large businesses tend to be bespoke, with negotiated terms and charges and specific contract termination clauses. Furthermore, large businesses typically have procurement teams and personnel with legal and administrative disciplines to assist them in reviewing and negotiating any proposed change to their contracts.

We believe, therefore, that Ofcom should exclude large business customers from the scope of the Revised GCs C1.14 to C1.19. Alternatively, we urge Ofcom to adopt the approach taken for End of Contract Notifications and allow flexibility for CPs who supply services to large businesses to tailoring their practices to these customers' needs, while adhering to the principles set out in the EECC.

Effect on Bundled Contracts

It is also important to consider how the proposed approach will affect the market in relation to "bundles". We acknowledge that if a bundle is sold to a customer (dual / triple / quad play) then a change to one element in the bundle would give rise to a right to cancel the whole bundle (rather

than just the affected service); this is the current position under GC C1, as explained in Ofcom's Guidance.

However, further consideration needs to be afforded to the effect of the proposed rules on services that are currently bought as an "add-on" to other services. The provisions relating to "closely related" or "linked contracts" are key to this.

The new rules should not be interpreted in such a way that core products and any additional add-ons are automatically regarded as constituting a single bundle. Sometimes, contracts are structured to facilitate the inclusion or addition of supplementary or ancillary products or services - precisely as an 'add on', rather than as an integral part of the core service. An example of this is Sky Premium subscriptions. We offer customers the ability to "bolt on" these services to a TV subscription. The bolt on is a 30-day rolling agreement, irrespective of the minimum term of the customer's core contract. Part of the reason for this is to ensure that if wholesale charges are increased, which will impact on the retail price of the service, then such pricing changes can be passed through to the customer, who can then choose whether to continue with that additional service as a separate decision that does not impact their core bundle in anyway. If a change in pricing of such "bolt on" services were to be considered in-bundle for the purpose of interpreting the proposed General Conditions, it would limit significantly the way in which such services could be offered to customers, reducing choice and flexibility of services, and ultimately being to their overall detriment.

Effect of triggering a Right to Cancel

Ofcom proposes a structure to the Right to Cancel framework that, in effect, requires an extended notice period to be given to customers. Under the proposed guidance, there is further definition of what constitutes "without penalty". We acknowledge that the guidance permits the usual notice period to be charged to a customer – which is the period that the customer expected and agreed to at the time they contracted, so is not a penalty - but are concerned that Ofcom has gone beyond the requirement in the EECC. C1.20 states that the contract has to end on the day before the modifications come into effect. If a change was notified 30 days in advance of a change, and the customer gave notice on the last day of that right to cancel window, the contract would be required to end immediately in order to comply with C1.20. This would create some significant practical difficulties, and although the customer could expressly agree a different contract cease date, this adds a further step into an already complex customer journey.

To avoid this issue, a CP could issue its notifications earlier, such that the 30 day Right to Cancel window ended a full 30 days prior to the change. This would allow CPs to enforce the 30 day notice period before the contract change was made, for a customer who cancelled on the last day of the window. However, this approach would require longer planning cycles, with the need to contact customers about changes that will not occur for two months or longer, thus losing the immediacy and transparency of the message. It would also mean that more reactive changes (for example to wholesale pricing changes) would be more difficult to manage if the lead time for notification of any change from the wholesale provider is fewer than 60 days.

The key factor that appears to have driven the proposed requirement under C1.20 is the requirement that customers should not be penalised as a result of deciding to act on a Right to Cancel. We agree that a customer should not have to pay more (or receive a reduced service) than

they anticipated at the time they contracted for a service, but this should not necessarily require the contract to end before the expiry of the standard notice period (as agreed when the customer contracted). We consider that there are a number of different ways in which this could be achieved without necessarily ending the contract before the conclusion of the standard notice period.

For example, if a customer who wanted to leave as a result of a price increase was required to remain with the CP until the conclusion of a standard notice period, but during that period they were not charged at the higher rate, then there would be no penalty involved – the customer would only be paying the contractually agreed rates. A similar approach could be followed where the contractual change resulted in a customer having in an allowance reduced, by applying a one off adjustment to the account for the days that the notice period continued after the coming into effect of the contractual change (for example, a customer who, as a result of the contractual change, faced a reduced data allowance, could be provided with an additional data allowance to ensure they were not worse off during this period).

These are just some examples of how a customer can avoid any "penalty" associated with a contractual change, but it does illustrate that there are different approaches to achieving the same aim. We consider that a more appropriate and proportionate approach to providing clarity on what constitutes a "penalty" for a customer when they exercise a right to cancel would be to add this into the C1 Guidance, with examples of "good practice" being used, mirroring the approach in the current Guidance on disincentives to switch. We think that the current proposed C1.20 is therefore disproportionate, as it imposes a solution that is not necessarily the only way to achieve the objective in the EECC, and one that creates unusual and inappropriate incentives for CPs.

7 - Switching and porting

Question 7: Do you support our proposals to introduce (a) new general switching requirements for all types of switches for residential and business customers and (b) specific switching requirements on information, consent, compensation and notice period charges for residential customers?

Question 8: Do you support our proposed guidance in Annex 8 on compensation for residential customers?

Ofcom is proposing to introduce a range of new 'general' switching obligations applicable to all end users. In addition, Ofcom proposes specific obligations for residential customers as well as modifications to existing switching processes.

Alongside these changes, Ofcom proposes to require that customers are able to port their number for at least one month after terminating their service as well as to ensure that the number and related services can be reactivated by the losing provider in the event of a porting failure.

<u>Porting-related changes</u>

We are concerned about the practicality of implementing Ofcom's proposed industry process changes by 21 December 2020. In parallel to its broader EECC implementation activities, Ofcom has invited industry to consider new specific processes to enable cross-network gaining provider led

("**GPL**") switching. Both candidate solutions envisage incorporating porting as part of their respective frameworks. The same resources from each CP will be engaged in designing and then delivering the new industry switching solution and therefore these interim changes to legacy process are likely to detract from resources that would otherwise be delivering the switching solution (and corresponding porting solution) earlier. At least in the case of industry's proposed Option X solution, the new process would be expected to limit significantly the potential for a port failure to require the losing provider to re-enable terminated services. There is therefore the potential for duplicative effort here.

In our view, Ofcom should confirm to CPs that it would not consider enforcement of these obligations to be an administrative priority until the industry has delivered on broader fixed switching reforms. Furthermore, in respect of the proposed 30-day delayed port window and emergency restoration, we note that the auto-switch solution for mobile switching introduced in 2019 is geared towards ensuring that customers seeking to switch their mobile service and port their numbers have greater control and a clear process for choosing whether to port their number or not. We are not clear that the EECC proposals provide an incremental practical consumer benefit beyond those enabled by auto-switch as we have no evidence to suggest that our newly acquired or recently lost customers are failing to request a port when switching.

Switching

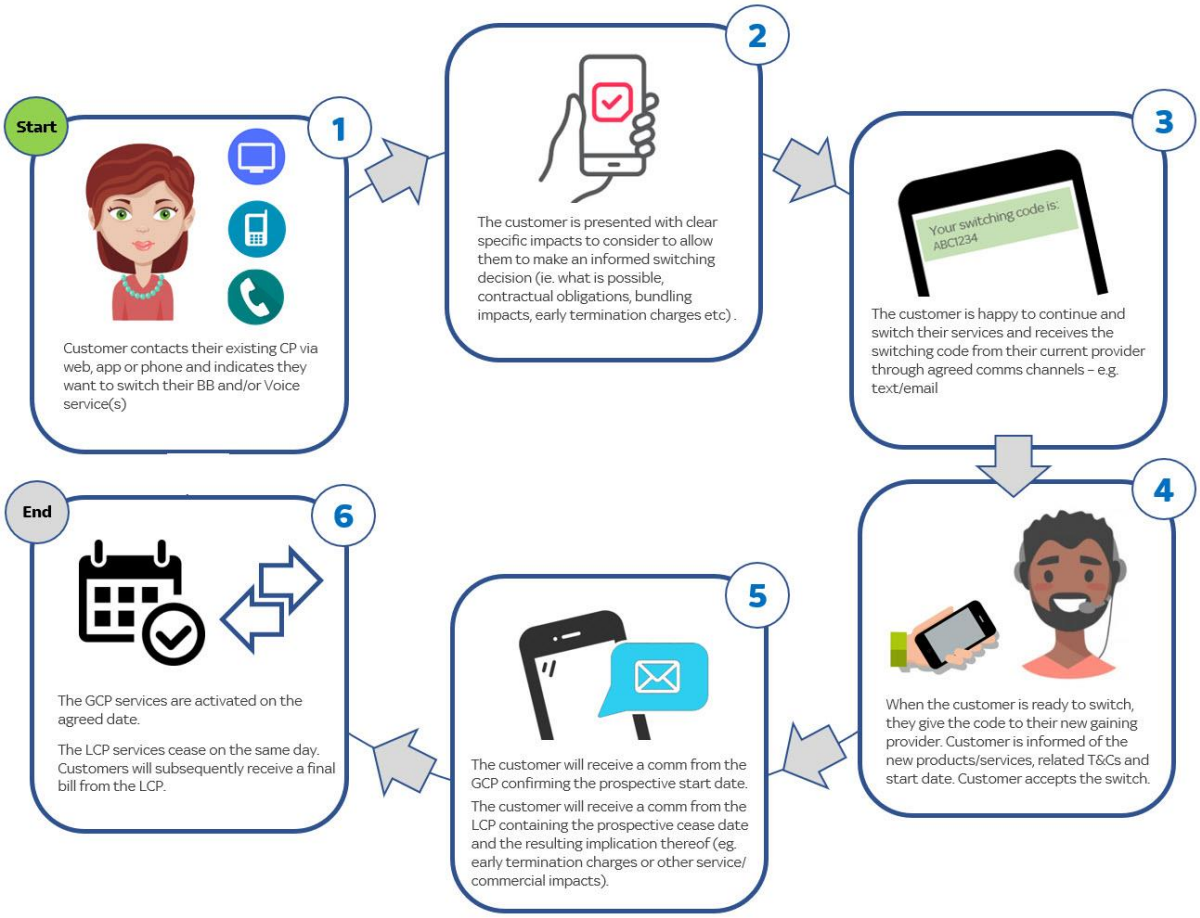
Ofcom notes that it has given industry the opportunity to develop detailed switching process proposals to meet both the general and specific switching obligations outlined in the EECC.

In August 2019, Ofcom invited industry to collaborate on developing a process for cross-platform GPL switching of fixed telecommunication services in preparation for implementing EECC requirements. From the outset of this cross-industry engagement, only one credible code based solution (industry's Option X proposal) has been the foundation of the discussions and subject to sustained and constructive scrutiny. Most recently, further details on both Option X and Option Y have been presented to Ofcom for consideration in the first months of 2020.

Ofcom's recent GPL mobile auto-switch reforms have been taken as a broad blueprint for how Option X could be designed and implemented. In response to Ofcom's May 2017 consultation, various respondents, including the Communications Consumer Panel and Advisory Committee on Older and Disabled people, supported Ofcom's preferred approach for mobile switching.

In our view, the assessment of those stakeholders has been vindicated. Option X advocates propose to implement these same enhancements for fixed telecommunications service switching. We are strongly of the view that this is the appropriate approach to take.

Option X – proposed customer switching process



Mobile switching reforms were implemented by industry, delivered on time and have been well-received by consumers. This model enabled cross-platform switching that worked for network operators, virtual networks and retailers alike. With some modifications, it also provided a framework for implementing GPL mobile business switching. As a proven model in operation today, it is the natural starting point for addressing cross-platform GPL switching for fixed telecommunication services.

Consistent with auto-switch, Option X would provide the similarly diverse range of friction-free and non-real-time mechanisms for an authenticated customer to inform the Losing Provider ("**LP**") of their intended course of action at the start, or during, their engagement with the market. In turn, the customer, well-informed, can engage confidently with the market and where necessary seek support of friends, family, carers or confidantes in evaluating their course of action ahead of time. Nobody, whether the consumer or gaining/losing provider, benefits from understanding the full repercussions of decisions only after a decision has been made and it may be too late; particularly where accommodating the understanding of the implications of the switch means the consumer is forced to accept artificial delays in switching provider.

A consistent theme of some industry discussions since August 2019 has been a preoccupation with excluding any (even passive) interaction with the LP during the switching process. In our view, this has blocked the achievement of a consensus and has been the Achilles' heel of counterproposals to Option X as it enables customer authentication, asset/service validation and avoids ambiguity or uncertainty about the customer's intentions. Objectors have been seeking to solve a problem that

troubled industry actors a decade and more ago and should not be the axiom around which switching models are considered or designed. We should be confronting the challenges of today and tomorrow.

The combined force of technological progress and consumer habits have addressed and rebuffed this out-dated concern. In parallel, Ofcom's regulatory framework (for example, mobile auto-switch General Conditions) has provided an effective enforcement mechanism for outlier bad actors. With these foundations we believe we should address Ofcom's 'exam question' of how to meet both the general and specific switching obligations outlined in the EECC squarely.

The challenge set by Ofcom to industry has been to find a way for current (and future) distinct networks to interact and manage the transition of a customer between providers, potentially across networks and between separate supply chains, led by the Gaining Provider. After first ensuring the customer can engage in this process without friction and is well-informed, we view the key consideration as being how to achieve this interaction robustly without misidentifying customers, assets, intentions or implications. In our view, Option X is designed, bottom-up, to confront this challenge. The key features of our proposal are:

- *Strong customer authentication* (via CPs existing validation processes)
- *Strong asset/service validation* (ensuring the correct service is switched and assets are reused where applicable)
- *Ease of engagement* (the process is currently used in mobile switching and offers many contact channels)
- *Quicker switching* (enabled through real confidence in authentication, intent and awareness)
- *Efficient design* (limiting the number of entities required to connect to the Hub)

As well as delivering all "must have" capabilities required of the new regulations, we have also sought to ensure this process can support Number Porting order exchange / activation. We are confident that this is the case and that Option X can also be used to manage the transfer of 999 address and DQ record ownership between CPs.

As requested by Ofcom we provided an estimate of the costs likely to be incurred by different industry players and a view of the timescales that we expect to be involved in implementing the change across Industry.

Ofcom has indicated that it intends to consult further on this topic in Spring 2020. We therefore look forward to responding to that standalone consultation.

8 - Disincentives to switch: mobile device locking

Question 9: Do you agree with our assessment that device locking can deter customers from switching and can cause customer harm?

Question 10: Do you agree with our assessment of the effectiveness in reducing the customer harm that can result from device locking and the impact on providers of Options 1 and 2? Question 11: Do you agree with our proposal to prohibit the sale of locked mobile devices?

Ofcom proposes to ban the sale of locked mobile devices to residential customers, following a 12-month implementation period.

As Ofcom notes in the Consultation, Virgin Media stopped selling locked mobile devices from 2015. Nevertheless, we are concerned that Ofcom's proposed ban is not proportionate. A range of existing and forthcoming regulatory measures may adequately address the concerns that Ofcom identifies, while still enabling operators to find mechanisms to differentiate and provide compelling customer services propositions.

As Ofcom also observes, over time an increasing number of CPs have already opted to sell unlocked devices, while some continue to maintain their existing practices.

Most large CPs voluntarily agreed to Ofcom's recent Fairness for Customers commitments during 2019. Due to the timing of agreeing those commitments and this Consultation, there has been limited opportunity for impacted CPs to potentially demonstrate these commitments under that agreement, by adjusting their policy on handset locking.

Even if sustained market forces, as well as the recently agreed voluntarily commitments, were not to prompt operators that continue to lock mobile devices to change their practices, Ofcom has a number of other mechanisms in-place (or incoming) to alleviate potential consumer harms that would be more measured than an outright ban:

- Mobile auto-switch: Ofcom proposes to reinforce and clarify "Switching Information" obligations related to mobile switching. An obligation to inform consumers with locked handsets about their circumstances and the ability to key *#06# for the IMEI would minimise any perceived hassle, particularly if (targeted) obligations on mandated unlocking timeframes and restrictions on charges were applied;
- Ofcom's proposed Contract Summary and Contract Information obligations could be specified to require operators to make clear at point of sale that the device is locked as well as to include guidance on how to unlock; and
- End of Contract Notifications could be specified to require CPs to include details of the locked status as well as unlocking guidance.

We consider these options should be considered, before proceeding to an outright ban.

9 - Disincentives to switch: non-coterminous linked contracts

Question 12: Do you agree that we should protect customers by issuing guidance on our proposed approach when considering the case for enforcement action against noncoterminous linked contracts?

Question 13: Do you agree with our proposed guidance in Annex 9 which sets out our proposed approach to assessing whether certain types of non-coterminous linked contracts are likely to act as a disincentive to switch?

Ofcom has set out draft guidance in support of GC C1, related to the factors it would consider when considering enforcement action concerning non-conterminous linked contracts. We welcome Ofcom's provision of guidance on this topic, setting out aggravating and mitigating factors that Ofcom may consider in a given scenario. We broadly agree with Ofcom's framework for considering this topic and agree that the relative strength of the linkage/dependency as well as the scale of the difference in contract end dates should be among the primary factors to consider if concerns related to disincentives to switching are under investigation.

We also welcome the fact that Ofcom's guidance recognises that non-conterminous linked contracts can provide benefits to consumers in some circumstances, by enabling CPs to provide, for example, lower prices or better services as a result of linking previously separate contracts. Similarly, we agree with Ofcom that these scenarios can be a result of providing consumers with the flexible option of purchasing further services from the same provider.

However, we are concerned that Ofcom's guidance notes that it "would" (as opposed to "may") disregard any countervailing consumer benefits if it considers these "*could be achieved in other, less restrictive ways*"[21]. In our view, making this judgement is likely to be challenging and would rarely be clear-cut.

We anticipate there are likely to be scenarios where Ofcom and the operator under investigation do not agree on whether the alternative approaches considered by Ofcom are viable and whether they are less restrictive to the customer. This risk of a false positive could be exacerbated by the fact that the counterfactual alternative mechanism would be hypothetical and would be used to compare against an actual suspected breach of C1.8 which would be supported by data and evidence.

Therefore, while we support the proposed core assessment framework, we urge Ofcom to reconsider how it intends to incorporate alternative commercial, contractual or technical mechanisms (that Ofcom considers viable) within this framework.

10- Emergency video relay

Question 14: Do you agree with our proposal to mandate emergency video relay for emergency communications to be accessed by end-users who use BSL?

Question 15: Do you agree with our proposal that the obligation to provide emergency video relay free to end-users should be imposed on regulated firms that provide internet access services or number-based interpersonal communications services?

Question 16: Do you have any comments on our proposed approval criteria for emergency video relay services, or the proposed approval process?

[21] Consultation, paragraph 9.27

Ofcom proposes to introduce a new requirement to mandate access to Emergency Services via British Sign Language ("**BSL**") video relay. This is to meet the EECC requirement that "*member states ensure that access for end-users with disabilities to emergency services is available through emergency communications and is equivalent to that enjoyed by other end-users*"[22]. Ofcom specifically highlights recital 288 that states "*member states take specific measures to ensure that emergency services are equally accessible to end users with disabilities, in particular, deaf, hearing impaired, speech impaired and deafblind end-users*".

There is no explicit requirement for Member States to mandate video relay for all CPs.

Ofcom intends that an approved BSL provider will be appointed and that CPs will contract to provide access to this service. It is proposed that all CPs offering telephony services and/or broadband services will be required to offer access to this service.

Ofcom acknowledges that BSL Video Relay would be one of a range of options that allow disabled customers to access Emergency Services through a variety of means (these include SMS access and text relay access for customers who are hearing or speech impaired).

BSL Video Relay would require a user to have compatible equipment in order to benefit from the access method. This would include a data connection and a screen enabling a video connection to be made.

Based on those requirements, a customer who was provided with only fixed line telephony services could not access video relay. It would certainly not be appropriate to ensure that any vulnerable 'phone only' customer was also provided with broadband and screen access in order that they may use the BSL Video Relay service. In reality, access to the service need only be provided to customers with a data connection (either fixed or mobile). This being the case it would be disproportionate to extend it to fixed line 'phone only' customers. To the extent that these customers take a mobile product from another supplier, or broadband from another supplier, those CPs would be bound to provide access, and the customer's needs would be met.

We also consider Ofcom's proposed time line for implementation to be unachievable. If an obligation is placed on any CP, it will be vital to ensure that any BSL service is fit for industry. Ofcom proposes that it will consult on the approval of any scheme, allowing industry to comment on whether it would be fit for purpose and comment on, for example, how it could be integrated into systems and processes. Ofcom suggests that the consultation would be published in "*Month 6*" after the publication of approval criteria, and that the final decision would be made in "*Month 7*"[23]. It is a challenge to respond to a consultation within a four week period, other than the most minor consultations that make minimal changes. The proposed period of one month not only includes the consultation period, but also the period during which Ofcom considers the responses and then makes its final and informed decision. This time period is inadequate for Ofcom to approve a mandatory scheme that has to be adopted by industry. The subsequent three month period allowed for contractual agreement and launch of the service is also immensely challenging, as CPs will need

[22] EECC Article 109(5)

[23] Consultation paragraph 10.57

to enter into contracts for access, integrate access to the service into systems and update web and other collateral to ensure the service is appropriately publicised and made available.

We note in this regard that many CPs have pre-existing contracts with Video Relay suppliers. Will Ofcom therefore be taking these into consideration or indeed ensuring/encouraging Video Relay providers to make provisions for end users to communicate via BSL? This could result in a better outcome for end users, as requiring them to use another service could be disruptive, as it will be for CPs in having to change providers.

As Ofcom acknowledges, this is not a requirement that comes directly from the EECC, but one of a series of measures that shows a policy of equivalent access is being followed. As such, it is not a requirement that this service is implemented by 21 December 2020, and it is not helpful for Ofcom to try to create an artificially short timeframe without input from relevant parties to achieve implementation as close to that date as possible. We believe that a more appropriate approach at this stage would be to focus on ensuring that a fit for purpose solution is offered to the customers who will benefit from it, rather than on precise timings for implementation.

11 - The provision of communications in accessible formats for disabled customers

Question 17: Do you agree with our proposal to a) extend the current requirement to cover the other specified communications i.e. any communication (except marketing) that relates to a customer's communication service, and b) extend the GC so that any customer who cannot access communications due to their disability should also benefit from accessible formats? When answering please provide evidence of any benefits or costs.

Question 18: Do you agree that implementation by December 2020 is reasonable?

Virgin Media strives to be a CP at the forefront of championing the needs and requirements of disabled and vulnerable customers. This is demonstrated in particular by the proactive measures that we have taken to ensure that disabled and vulnerable customers are supported and treated fairly and our long-standing corporate partnership with Scope. We are therefore supportive of the principle of "equivalence of access" for all customers to information and services. It is important that all customers are given the support and information that they need in order to feel empowered and in control of their own services. As part of our commitment to customer fairness, we are always looking at ways to support our customers, particularly those with accessibility needs.

In this regard we note that the exiting General Conditions are very clear on what type of information has to be provided in an accessible format, and in which formats it must be made available. Extending the requirement to all information, in whatever format a customer requires, could place a significant burden on CPs – and could jeopardise their ability to support the majority of customers who require information to be provided in an accessible format.

Satisfying the expanded requirement

We do, of course, want to do all that we can to support customers with accessibility needs. To assist in achieving this aim we believe that it would be very helpful to understand Ofcom's expectations of

CPs in meeting the expanded requirements. For example, guidance on how CPs should approach a request from an individual customer to provide information to them in a format that has not been requested by any other customer, and which may be disproportionately expensive or difficult to support, would be very welcome. Similarly, we believe that there is a need for guidance on what formats Ofcom considers to be 'accessible' (and thus within the scope of the obligation) – and indeed what it considers to be reasonable. We believe there is merit in industry working with Ofcom to develop 'best practice' guidelines in this regard.

We note that some customers have accessibility features on their mobile or tablet device or have some form of assistive technology on their PC or laptop. These features and technologies allow customers to consume the information that is sent to them in standard format email or SMS in an accessible format (i.e. they 'convert' the standard information). We believe that these types of application could meet customers' needs in respect of the proposed extended GC - and could in fact be preferred by customers. We are keen, therefore, to understand if Ofcom believes that the provision of 'conversion' applications and technologies would meet the new regulatory requirement.

Implementation

The expanded accessibility requirement represents a significant extension to the scope of what CPs are currently required to provide. On initial assessment, Virgin Media has identified more than **[✂]** service based communications that can be sent to our customers across our fixed and mobile platforms. In theory, we could be required to provide any of these communications in any number of accessible formats. This will require significant system and process development work – including measures that ensure an appropriate on-going audit and compliance assurance process exists, alongside re-training of frontline staff. These changes cannot be rushed – particularly given the need to ensure that the very highest levels of support are given to the customers in scope.

Furthermore, we will need to re-visit and potentially re-negotiate and establish new agreements with external suppliers (we currently contract with several third parties for the provision of certain information in accessible formats). These activities have significant time and financial implications.

For these reasons, we believe that a deadline of 21 December 2020 for implementation of (and adherence to) the expanded requirements is unachievable. Again, we encourage Ofcom to work with industry to develop an effective and proportionate plan for implementation.

12 - Availability of services and access to emergency services

Question 19: Do you agree with our proposed changed for implementing the requirements in Article 108 and Article 109 to reflect the differences between these EECC provisions and their predecessors in the Universal Service Directive?

Ofcom is proposing to make the minimum level of changes to GC A3 to reflect the relevant requirements of the EECC. Virgin Media supports this approach in relation to this condition.

As Ofcom notes there is an existing obligation on CPs to ensure "*the fullest possible availability of the Public Electronic Communications Network (PECS) and Publicly Available Telephone Services (PATS) provided by them in the event of catastrophic network breakdown or in cases of force majeure*".

The new obligation required by the EECC extends this to cover both voice and data services by replacing the PECS and PATS requirements with "voice communication services" and "internet access services".

Virgin Media notes that Ofcom considers this to be a change that will have minimal impact on CPs. However, we do not believe that this will necessarily the case, as disaster recovery plans will need to be reviewed and updated to ensure that they cover internet access services, in addition to any (likely significant) system and process changes that are required to be made in order that systems supporting internet access services are appropriately resilient in the event of a disaster.

We therefore again believe that adherence to this requirement by 21 December 2020 will be extremely challenging, if not unachievable. Given that the implications of the proposed extended requirement are likely to be complex and significant, we would welcome dedicated dialogue with Ofcom on this matter.

Virgin Media

March 2020