THE HIGH COURT

COMMERCIAL

IN THE MATTER OF REGULATION 31(5) OF THE EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (UNIVERSAL SERVICE AND USERS' RIGHTS) REGULATIONS 2011, S.I. NO. 337/2011

[Record No. 2022/229MCA]

[2025] IEHC 66

BETWEEN

COMMISSION FOR COMMUNICATIONS REGULATION

APPLICANT

AND

VIRGIN MEDIA IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Denis McDonald delivered on 7th February 2025

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Introduction

1. In these proceedings, the applicant (*"ComReg"*) seeks a declaration that the respondent (*"Virgin Media"*) has failed to comply with Regulation 25(6)(b) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users Rights) Regulations 2011 (S.I. No. 337 of 2011) (*"the Universal Service Regulations"*). Under Article 25(6)(b) of the Universal Service Regulations, electronic communications service providers are required, without prejudice to any minimum contractual period which may apply, to ensure that conditions and procedures for contract termination do not act as a disincentive to a consumer changing service provider. The Universal Service Regulations were enacted to give effect to the Universal Service Directive (i.e. Directive 2002/22/EC, as amended by Directive 2009/136/EC). ComReg is the statutory body responsible for the regulation of the electronic communications sector. Virgin Media holds a general authorisation as an authorised operator in the provision of electronic communications services. It has approximately 400,000 fixed customers on its cable network and approximately 140,000 mobile customers in Ireland. The proceedings are brought pursuant to Regulation 31 of the Universal Service Regulations which empowers the High Court to make a number of orders including a declaration of non-compliance with an obligation imposed on providers of electronic communication services. In addition,

an order is sought directing Virgin Media to remedy the alleged non-compliance by taking a number of specific steps which I describe further in para. 93(b) to (g) below.

2. While it will be necessary to examine ComReg's allegations in more detail in due course, ComReg makes the case that Virgin Media is in default of its obligations under the Universal Service Regulations in two respects:-

(a) In the first place, it is alleged that Virgin Media is in breach of the obligation imposed by Regulation 25(6)(b) as a consequence of the procedure for cancellation operated by Virgin Media via 1908 calls. ComReg contends that the Virgin Media procedures involve mandatory *"save activity"* on the part of Virgin Media employees who are incentivised to seek to persuade customers to stick with Virgin Media. 1908 is a freephone number which Virgin Media customers can use to speak to a member of Virgin Media's customer support team. ComReg contends that Virgin Media should operate a *"two step"* process under which the customer would first be explicitly offered the choice to proceed directly to cancellation or, in the event that the customer so consents, to listen to save activity on the part of Virgin Media agents about Virgin Media's products and services. Under this process, customers who opt to go directly to cancellation would not have to listen to any such save activity;

(b) The second aspect of the case made against Virgin Media is that it is alleged that Virgin Media has unlawfully imposed a 30-day notice requirement on customers who wish to change electronic communications service providers outside the minimum contractual period. Clause 3.1 of Virgin Media's terms and conditions states that,

unless otherwise specified, the minimum period of a contract is 12 months from the date of activation of service. But it also states that: *"If you want to terminate this Agreement after the Minimum Period, one month's written notice is required."* This is reinforced by clause 11.6 which states that: *"After the Minimum Period expires this Agreement will continue unless it is terminated by either of you or us giving the other one month's prior written notice. You must pay all relevant Charges up to the end of that one month notice period."* ComReg contends that this requirement constitutes a breach of Regulation 25(6)(b) of the Universal Service Regulations because it allegedly charges customers for switching and, according to ComReg, it is likely to have a dissuasive effect on switching. ComReg also contends that the 30-day notice requirement amounts to a charge in that a switching customer may not require the service for 30 days and may wish to switch immediately (subject to completion of the switching process between providers) and that the customer should have the option to do so. ComReg has calculated that the average amount charged to a customer in respect of this 30-day notice period is €88.52.

The role of ComReg

3. I should explain, by way of background, that ComReg was established under s. 6 of the Communications Regulation Act 2002 (*"the 2002 Act"*). Its functions are specified in s. 10 of the 2002 Act. Under s. 10(1)(a), one of its functions is to ensure compliance by undertakings under its remit with the obligations that apply to them in relation to the supply of and access to electronic communications services. Furthermore, under s. 10(1)(d), it is also empowered to carry out investigations into

matters relating to the supply of and access to electronic communications services. Section 12 of the 2002 Act deals with the objectives of ComReg in exercising its functions. Under s. 12(1)(a), ComReg is required, in relation to the provision of electronic communications services, to promote competition and to promote the interests of users. In addition, under s. 12(2), the Commission is to take all reasonable measures aimed at achieving its objectives including, in so far as the promotion of competition is concerned, ensuring that users derive maximum benefit in terms of choice, price and quality, and ensuring that there is no distortion or restriction of competition in the electronic communications sector. In addition, under s. 12(2)(c), ComReg is required, in so far as the promotion of the interests of users is concerned, to ensure a high level of protection for consumers in their dealings with suppliers and to promote the provision of clear information *"in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services"*. ComReg also has significant additional powers and obligations under the Universal Service Regulations. As noted above, these were enacted to give effect to the Universal Service Directive. While that Directive has since been superseded by Directive (EU) 2018/1972 establishing the European Electronic Communications Code (*"the Code"*), the parties are agreed that the issues to be resolved in these proceedings are to be determined by reference to the pre-existing Directive and the Universal Service Regulations which implemented that Directive in Ireland. Recital 47 to the 2009 Directive is relevant to the obligation imposed by Regulation 25(6)(b). Recital 47 (which is quoted in para. 129 below) provides that consumers should be able to make informed choices and to change providers without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures or charges. The recital

makes clear that this does not preclude the imposition of reasonable minimum contractual periods in consumer contracts.

4. Among the obligations imposed on ComReg under the Universal Service Regulations is the requirement under Regulation 31(1) to monitor compliance with the obligations imposed on service providers by the Regulations[1]. In turn, Regulation 31(2) provides that, where ComReg *"finds"* that an undertaking has not complied with an obligation under the Regulations, ComReg is to notify the undertaking of those *"findings"* and give the undertaking an opportunity to state its views or to remedy the non-compliance within a reasonable time limit specified by ComReg. Regulation 31(5) provides that where, at the end of the period specified by it under Regulation 31(2), ComReg is of opinion that the undertaking has not complied with an obligation, ComReg may apply to the High Court for such order as ComReg considers appropriate, including a declaration of non-compliance. This is the provision under which the present proceedings are brought. Regulation 31 does not specify the test to be applied by the court on the hearing of an application under the Regulation but Regulation 31(6) is drafted in quite broad terms. Regulation 31(6) provides that the High Court may, on the hearing of an application under Regulation 31(5): *"…make such order as it thinks fit"* including a declaration of non-compliance or an order directing an undertaking to comply with the obligation in question.

5. I have been informed by the parties that this application by ComReg under Regulation 31 is the first such application brought before the High Court. It will, therefore, be necessary to consider what is the appropriate test to be applied by the High Court in determining an application of this kind. It should be noted that, initially, ComReg sought to make the case that the relevant test to be applied by the court on a

[1] There is an exception in respect of Regulation 18(3) and Regulation 18(5) neither of which is relevant.

hearing under Regulation 31(6) is that the opinion of ComReg should be followed by the Court unless it is vitiated by *"manifest error"*. In support of that contention, ComReg had, in its written submissions, cited a number of authorities including the decision of Cooke J. in *Rye Investments Ltd v. Competition Authority* [2009] IEHC 140 where, in the context of an appeal from a determination of the Competition Authority under the Competition Act 2002, Cooke J., at para. 5.20, had indicated that the court should not interfere unless the Authority was shown to have committed a serious error or had failed to take into consideration relevant information or data or had otherwise made a material error of law or infringed some applicable principle of constitutional or natural justice. However, ComReg is no longer pursuing its argument based on manifest error. This is unsurprising in circumstances where, unlike *Rye Investments*, the present case does not involve an appeal from a binding decision taken by ComReg. This is an action taken by ComReg itself seeking relief from the court. Without an order from the Court, there is no binding decision enforceable by ComReg against Virgin Media. In the course of closing submissions, counsel for ComReg accepted that the burden is on it to demonstrate its case on the balance of probabilities. However, counsel nonetheless submitted that, under Regulation 31(6), the court is not involved in conducting its own investigation. Instead, each of the steps specified in Regulations 31(2) and 31(5) have already been taken by ComReg. Counsel argued that these are *"significant steps, because they are steps that manifest the views of the expert body in the area"*. Counsel submitted that some deference must be given by the Court to ComReg as an expert body and to the opinion which it has formed following its review of the evidence. Counsel suggested that it is for Virgin Media to engage with the expert views of ComReg, as the regulator in this area of activity.

6. In contrast, Virgin Media argued that the assessment of whether a breach of a statutory obligation has occurred is *"quintessentially"* a judicial function. It argued that the opinion formed by ComReg is given no legal effect under Regulation 31. Instead, the High Court is the first formal adjudicative forum whose determination has legal effect. Virgin Media strongly made the case that it is for ComReg to prove the breach of any obligations imposed by Regulation 25(6)(b). Virgin Media highlighted that there is nothing in Regulation 31 which confers any special status on the opinion formed by ComReg.

7. Virgin Media has also forcefully maintained that there was no infringement of Regulation 25(6)(b). In addition, Virgin Media has made the case that the two-step process mandated by ComReg is excessively and disproportionately restrictive and that it would introduce a stilted and highly unsatisfactory customer experience. Virgin Media submitted that ComReg has fundamentally misunderstood the nature of the relevant interactions between customers and Virgin Media. It contended that ComReg has misunderstood the full context of the customer communications and that it has wrongly assumed that all situations in which customers raise cancellation as an issue begin with a customer calling to cancel. In addition, Virgin Media maintained that ComReg lacks the legal power to impose the two-step process. Virgin Media submitted that ComReg's approach captures not only potentially unreasonable or misleading activity, but also reasonable and inoffensive activity in which better service offers are made to customers. Virgin Media made the case that such activity promotes competition and secures the best outcome for consumers. In so far as the 30-day notice issue is concerned, Virgin Media argued that notice periods of this duration are very common across many consumer sectors and that they cannot credibly be described as a disincentive to a customer changing his or her service provider. Virgin Media rejected

the suggestion that the notice period amounts to a charge for switching. It made the point that no additional charge need be incurred at all by customers who organise, as they are free to do, for their new service to commence upon termination of the 30-day notice period. Virgin Media also pointed to the fact that, under Article 105(3) of the Code (which replaces the Universal Service Directive), a notice period of one month is specifically contemplated in the context of a contract that is automatically continued after the expiry of the minimum contractual period.. Virgin Media suggested that, in enacting Article 105(3), the EU legislature could not have contemplated that such a requirement had previously been prohibited under the pre-existing Directive.

The structure of this judgment

8. Having outlined in broad terms the nature of the dispute between the parties, I should explain the structure of this judgment. First, in paras. 9 to 95 below, I describe the series of interactions between the parties that took place prior to the commencement of these proceedings, including the steps contemplated by Regulations 31(2) to (31(5) and including also (at paras. 9 to 12) a brief description of an earlier action taken by ComReg against Eircom which ComReg contends is relevant to this case. Second, in paras. 96-97, I briefly describe the commencement of these proceedings and I identify the issues which require to be addressed. Third, in paras. 99 to 117, I consider the approach to be taken by the Court in proceedings under Regulation 31(5). Fourth, in paras. 118 to 152, I address the legal test to be applied under Regulation 25(6)(b). Fifth, I address ComReg's case against Virgin Media in respect of save activity in paras. 156 to 236. This element of the judgment is broken down into a consideration of the evidence in relation to such activity (at paras. 156 to 208), findings of fact (para. 209), additional findings derived from transcripts of customer calls (paras. 212 to 221), and I then set out my conclusions in relation to this aspect of ComReg's case at paras. 222 to

236. Sixth, in paras. 237 to 285, I consider the case made by ComReg in respect of the 30-day notice requirement. This element of the judgment is further broken down into a consideration of the evidence in relation to this requirement (at paras. 237 to 270), my conclusions in relation to the issue (at paras. 271 to 278) and I then address, in paras. 279 to 283, the argument made by Virgin Media that Article 105(3) of the Code demonstrates that the EU legislature regards such a notice requirement as lawful. Finally, I summarise the orders to be made in paras. 284 to 288.

ComReg's information notice 14/77 dated 14th July 2014 in relation to Eircom

9. While Virgin Media disputes the entitlement of ComReg to rely, as against it, on this notice and a previous notice (ComReg information notice 14/43) issued to Eircom Ltd, ComReg claims that this information notice forms part of the backdrop to the present proceedings. In due course, it will be necessary to consider whether it has any relevance to this case. The description which follows is, therefore, without prejudice to the objections Virgin Media make in respect of this notice. The notice recorded that ComReg had previously notified Eircom of its opinion that Eircom was not compliant with its obligations under Regulation 25(6)(b) of the Universal Service Regulations and that an out-of-court settlement had subsequently been agreed between it and Eircom. The notice stated that the terms of settlement were confidential and that neither ComReg nor Eircom would say anything further than what was contained in the information notice. Paragraph 9 of the information notice dealt with *"save activity"*. It provided as follows:-

> *""Eircom will not engage in "Save" activity with a customer who is attempting to notify Eircom about switching service provider without first accepting and confirming the notice provided and subsequently seeking confirmation from the customer that they wish to continue the conversation with Eircom."*

10. In addition, ComReg indicated in para. 14 that, through the compliance action taken by it against Eircom, it has set:-

> *"...what it considers to be an acceptable standard, at this point in time, with respect to undertakings' obligations at Regulation 25(6)(b) of the Universal Service Regulations. ComReg expects all undertakings to adhere to the standard so as to ensure that they are compliant. In this regard, ComReg is continuing its monitoring programme in respect of compliance by all undertakings including the application of termination charges in lieu of notice and other non-compliant conditions and procedures for contract termination including inappropriate save activity. ComReg will take all necessary enforcement action in respect of any such activity."*

11. The notice also stated, in para. 5 that, in the case of customers who are switching service provider outside of their minimum contract term, Eircom will immediately remove from its terms and conditions any provisions allowing charges, claims or penalties to be applied in lieu of notice. In addition, para. 6 stated that Eircom customers outside of their minimum contractual term may change service provider by agreement with a new provider without any penalty being applied by Eircom.

12. In support of its argument that the Eircom Information Notice is relevant to its case against Virgin Media, ComReg drew attention, in its submissions, to the provisions of Regulation 31(3) under which ComReg may publish *"in such manner as it thinks fit, any notification given by it under this Regulation"*. ComReg made the case that, in circumstances where it is charged with monitoring compliance with the Universal Service Regulations, ComReg expects industry to review information notices of this kind to inform themselves on ComReg's position in relation to regulatory matters. This is not accepted by Virgin Media. It contends that the information notice is not given

any particular status as against it. It also contends that the Eircom settlement notice did not go so far as to oblige Eircom not to apply a notice period. In addition, Virgin Media maintains that clause 9 of the Eircom settlement notice is less prescriptive than the two-stage process which ComReg seeks to impose on Virgin Media.

The first ComReg notification to Virgin Media dated 1st November 2019

13. As noted in para. 4 above, ComReg is empowered under Regulation 31(2) to notify a service provider where it finds that the provider has not complied with its obligations under the Universal Service Regulations, following which the service provider has a period of time in which to respond. ComReg issued such a notification on 1st November 2019 in relation to a concern which ComReg had in respect of contract change notifications (*"CCNs"*) issued to Virgin Media customers. I should explain that, under Article 20(2) of the Universal Service Directive (as amended), Member States must ensure that subscribers have a right to withdraw from their contract without penalty where they receive a notice from their provider of an intention to modify the terms of the contract. As a result, Regulation 14(4) of the Universal Service Regulations requires providers to give their customers one month's notice of intention to modify the terms of the contract and inform them that they have a right to withdraw from the contract.

14. ComReg's concern in relation to CCNs is not a live issue in these proceedings but, as part of its investigation into that issue, ComReg requested the transcripts of 20 calls pertaining to consumers who made contact with Virgin Media at the 1908 telephone number on receipt of a CCN. These transcripts were provided in November 2019. On reviewing the transcripts, ComReg became concerned with the manner in which the calls were handled by Virgin Media agents in cases where customers requested, on receipt of a CCN, that their Virgin Media service should be cancelled. In

particular, ComReg was concerned that Virgin Media agents were engaging in extensive *"save activity"* during the course of such calls. The transcripts also raised a concern on ComReg's part in relation to the requirement to give 30-days' notice of cancellation of the Virgin Media service even where the minimum contract term had expired. These concerns prompted ComReg to open a second investigation. This led to the issuing of a request for information on 16th March 2020.

The information request of 16th March 2020

15. In its letter of 16th March 2020, ComReg requested a detailed response from Virgin Media in relation to a number of specific questions both in respect of the 30-day notice requirement and the save activity. It is unnecessary for present purposes to describe this request in detail but there are some aspects of it which should be noted. As part of this request, ComReg, at Q1 of Appendix 1 to the letter, asked Virgin Media to explain how customers are advised of the means by which they can cancel their contract (outside of the cooling-off period). At Q5 of Appendix 1, Virgin Media was requested to provide copies of all training manuals used by Virgin Media agents in the previous two years when handling cancellation requests on foot of a CCN, or within a cooling-off period or any other cancellation request. At Q6 of Appendix 1, Virgin Media was asked to provide details of any incentives paid to agents in relation to the handling of cancellation requests. Virgin Media was also asked to provide a list of the first 20 calls received via the 1908 number dealing with three individual categories of cancellation requests (as specified in Q7 of Appendix 1[2]) relating to particular time periods in October 2019 and March 2020. ComReg also sought audio recordings and transcripts of the first ten calls in each of those categories. In addition, at Q8 of the same

[2] These related to cancellation requests on foot of CCNs, cancellation requests received during cooling off periods and any other cancellation requests received during the three periods specified in Q7.

appendix, Virgin Media was asked to provide details of the numbers of (a) customers who called and requested a cancellation, (b) customers who did not proceed with the cancellation on that call, (c) customers who proceeded with cancellation on that call and (d) customers included at (b) above who proceeded to cancel at a later date.

The response from Virgin Media of 19th June 2020

16. In its response, Virgin Media rejected any suggestion that the application of the 30-day notice requirement for general cancellation requests constitutes a condition which acts as a disincentive to a customer changing service provider. Virgin Media also made clear that this requirement was disapplied as regards porting requests or cooling-off cancellation requests. I should explain the reference to porting requests. As both sides accepted in the course of the hearing, there is a specific industry regime in place to facilitate customers switching providers of fixed and mobile telephone services. Under this regime, the customer is entitled to *"port"* the telephone number from one provider to another without having to give extensive notice. At the relevant time, that regime did not capture broadband services. I should also explain the reference to cooling-off cancellation requests. It relates to cases where a customer cancels a contract at a very early stage namely before the cooling-off period expires following the entry into a contract with a service provider. In its response, Virgin Media also maintained that the 30-day notice period was clearly set out in all terms and conditions and that it amounts to an *"industry standard"* term explicitly recognised as legitimate by Article 105(3) of the Code.

17. In relation to the concern expressed by ComReg about disincentives to switching, Virgin Media stated:-

> *"Cancellation requests can be made either by letter, e-mail or via the Virgin Media call centre. Those formats are made clear to all Virgin Media customers*

and all such formats work smoothly. All staff who deal with such cancellation requests, whether by letter, e-mail or call receive appropriate training to enable them to process such a cancellation request.

Virgin Media, like all other electronic service providers and indeed utility operators like Electric Ireland, Energia etc have call centre staff trained to engage with customers about their reasons for seeking to exit their contracts, sort out technical issues that can sometimes underpin such requests or identify misunderstandings (such as that accounts must be cancelled when moving house). Such call centre staff are also trained to explain other options and offers including plans which are cheaper or more closely aligned with the customer's needs and which might result in the customer deciding to remain with Virgin Media. Indeed, some customers can believe that the threat of cancelling will ensure they get the best deal available from their existing operator."

18. In response to ComReg's request for transcripts of calls with customers, Virgin Media provided 39 transcripts. I will return to consider some of these transcripts at a later point in this judgment. In answer to Q8 of Appendix 1 of the ComReg request, Virgin Media provided the details (set out in Appendix 3 of its response) of the numbers of customers who *"called and requested a cancellation"* and also the numbers who did not proceed with the cancellation on that call together with the number who did and also those who did so at a later date. That information was provided in respect of cancellations on foot of a CCN, cooling-off period cancellations and also *"general cancellation requests within the past 12 months".* The vast majority of cancellation requests (i.e. 194,784) fell into that general category. This material should be read in conjunction with Virgin Media's response to Q1 of Appendix 1 to the information request, where Virgin Media confirmed that approximately 95% of customers who

make a cancellation request do so by calling Virgin Media at the 1908 number. In addition, it was expressly stated that *"the cancellation process* [is] *activated during the call/at the conclusion of the call (where appropriate* ***following an explanation of other options****)."*[3] This plainly suggests that, whether cancellation occurs during the call or at its conclusion, an explanation of other options is an inherent part of the cancellation process operated by Virgin Media. This also emerges from the bundle of training materials which Virgin Media provided at Appendix 5 to its response to Q5 of Appendix 1 to the information request. I deal with these training materials in more detail at a later point in this judgment. It was also explained that, where a customer makes contact with Virgin Media by email or letter seeking cancellation information or making a cancellation request, a Virgin Media agent will seek to reach that customer by phone. Virgin Media stated that:-

> *"This is to explain the cancellation process to the customer, confirm date of cancellation, how this interacts with a customer's billing cycle and where appropriate, to outline the other options available. For example, there are instances where a customer makes a cancellation request because he/she is moving home and thinks that he/she must cancel the account at the current address before opening a new account at the new address and this is not in fact the case."*

19. In response to Q6 of Appendix 1 of the information request (where Virgin Media was asked for details of incentives paid to agents in handling cancellation requests), Virgin Media stated that some agents receive incentives for certain customer interactions, including resolving a customer's issue; saving a customer; selling products or services to a customer or renewing a customer's contract. Virgin Media stated:-

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[3] Emphasis added.

"Virgin Media has Customer Value Management (CVM) agents who handle cancellation requests and complex calls such as resolving customer complaints. Commissions for such agents in handling a cancellation request where that customer ultimately decides to stay with Virgin Media (perhaps as a result of solving technical issues or moving to a lower price plan / better matched to their needs) is 92c per call and subject to monthly and annual caps. Where CVM agents are at capacity, other agents in Customer Care also deal with such calls and can earn commissions (at a lower level)."

20. ComReg had also asked Virgin Media to confirm if a customer is required to give one month's notice if the customer is switching to another provider. In response[4], Virgin Media stated that its customers are contractually required to give one month's notice in all circumstances, including where they are switching to another provider. However, Virgin Media clarified that, in the case of a customer porting his or her fixed line number without first making contact with Virgin Media[5], the customer's contract for the service is cancelled immediately and the customer is ported within one working day of receipt of notification of the change by the new service provider. In such circumstances, the requirement to give one month's notice is waived and no amounts are payable following the cancellation date. In this context, it should be noted that, subsequently, Virgin Media maintained that this also applies in the case of mobile phone services[6].

[4] See the answer given by Virgin Media to Q9 as set out in Appendix 1 to the letter of 19th June 2020

[5] This will occur where, for example, the customer signs up to a new service provider in respect of a fixed or mobile telephone service without first notifying Virgin Media. In such cases, Virgin Media will be notified by the new service provider.

[6] See para. 80 of the first affidavit of Bláithín Harnett sworn on behalf of Virgin Media on 14th November 2022 in response to the present application, in which she stated that, due to agreed industry processes for porting customers' telephone numbers, Virgin Media does not require 30-days' notice to be given where a customer wishes to port either a mobile telephone or fixed telephone number. Ms. Harnett also stated that Virgin Media may also, on compassionate grounds, waive the requirement to provide 30 days' notice.

The ComReg request for further information dated 19th August 2020

21. On 19th August 2020, ComReg sought further information from Virgin Media. In its covering letter, ComReg noted that the information provided by Virgin Media in June 2020 identified over 90,000 accounts on which post-cancellation charges were billed within a 24-month period. ComReg indicated that it had, therefore, decided to extend the period of its investigation from September 2014 to June 2020. In relation to the 39 transcripts which Virgin Media had supplied in June 2020, ComReg noted that, in most of the cases, the customer had proceeded to cancel the Virgin Media service. ComReg asked Virgin Media to provide transcripts of the first ten calls in each of the periods previously identified in its request of March 2020 where the customers did not proceed to cancel.

The Virgin Media response of 9th October 2020

22. In its response of 9th October 2020, Virgin Media expressed concern about the burden imposed on it by ComReg's request. It also stated that it believed that all of the information provided to date was sufficient to permit ComReg to make an evaluation of the case.Virgin Media nonetheless addressed the questions raised by ComReg, including the request for transcripts.

23. In relation to the original batch of transcripts provided, Virgin Media stated that it had understood the original request from ComReg to relate to calls where the customer proceeded with a cancellation. Virgin Media now attached transcripts of calls during each of the periods in question where the customer did not proceed with the cancellation during the course of the call.

The ComReg Notification of Non-compliance dated 29th March 2021

24. On 29 March 2021, ComReg issued a notification of non-compliance under Regulation 31(2) of the Universal Service Regulations in which ComReg made a finding that Virgin Media had not complied with Regulation 25(6)(b). This was stated to be on the basis that Virgin Media had allegedly failed to ensure that its conditions and procedures for contract termination do not act as a disincentive to a consumer changing service provider. In circumstances where this notification has subsequently been replaced by a later notification issued in September 2021, it is unnecessary to consider this notification in any detail. It should, however, be noted that, among the matters raised by ComReg was a concern that Virgin Media customer service agents were providing inaccurate information to customers in relation to the merits or reliability of the services offered by competitors of Virgin Media. These allegations met with a detailed response on behalf of Virgin Media but, for reasons which I explain in para. 30 below, I do not believe that it is necessary to address that material here.

The initial response of Virgin Media to the March 2021 notification

25. On behalf of Virgin Media, Matheson Solicitors wrote to ComReg on 28th April 2021. In that letter, Matheson submitted that it was essential that Virgin Media be provided with more detail in relation to the factual and legal basis for each element of the *"findings"*. This was met with a relatively short response from ComReg on 11th May 2021, in which the points made by Matheson were not accepted. In turn, this resulted in a further letter from Matheson of 14th May 2021 in which the request for further details of the factual and legal basis for each element of the findings was repeated. There was a further exchange of correspondence between the parties on 21st

and 24th May 2021. In the latter letter, Matheson again reiterated that Virgin Media was entitled to sufficient information to allow it to understand the legal and factual basis for each element of the notification. Nonetheless, Matheson ultimately responded substantively to the notification in a detailed letter of 11th June 2021.

The substantive response to the March 2021 notice as set out in the Matheson letter of 11th June 2021

26. As noted above, this is a very detailed letter. It is unnecessary to repeat all of it here. There are a number of paragraphs in the letter on which counsel for Virgin Media relied in the course of his oral submissions to the court. Counsel drew attention, in particular, to paras. 5.2.7 and 5.2.10(f) of the letter. However, much of that material relates to the issue concerning the accuracy of comparative information given by Virgin Media agents to customers extolling Virgin Media's service while denigrating that of its rivals. For the reasons explained in para. 30 below, that is no longer a live issue in the case. For that reason, I believe that it is sufficient to refer to the following extract from the letter:-

> *"5.2.5 Virgin Media's view is that its call centre activity cannot, in law or practice, be properly construed a 'disincentive' to a customer changing service provider within the meaning of Regulation 25(6)(b).*
>
> *5.2.6 Furthermore, to the extent that ComReg contends that there is a statutory prohibition (constituting a criminal offence) on a service provider from seeking to identify the reasons why a customer might wish to cancel (e.g., a faulty line / equipment) and offering to rectify the issue or identifying offers that might be more attractive so that the customer can make an informed choice and decide to stay, we believe this is a contention without foundation. Indeed, not to offer the customer the best*

solution possible in these situations would undermine Virgin Media's ongoing customer support duties and helping the customer make an 'informed choice' within the meaning of the Code. Conversations with customers should plainly be viewed as incentivising customers to stay, rather than amounting to a 'disincentive' from switching giving rise to criminal liability.

5.2.7 Virgin Media agents are trained to ask the customer upfront why he or she wishes to cancel. As Virgin Media has a very reliable network, inevitably the majority of the reasons given by customers for cancelling are related to price or switching. The 'solution' an agent can give a customer in this respect is an alternative offer. Indeed if a customer states that he or she wishes to leave because the internet is not working properly, the Virgin Media agent will find the appropriate solution. In some instances a higher speed product will work and in others, a free visit by a technician. …"

ComReg's amended Notification of Non-compliance dated 23rd September 2021

27. ComReg's issued an amended Notification of Non-compliance on 23rd September 2021. According to the evidence of Ms. Miriam Kilraine[7], ComReg's compliance operations manager, ComReg considered the case made in the Matheson letter of 11th June 2021 and, having done so, issued the amended Notification of Non-compliance. It should be noted that ComReg is expressly empowered under Regulation 31(4) to amend or revoke any notification under Regulation 31.

[7] See para. 31 of her affidavit sworn on 6th September 2022

28. In the amended Notification of Non-compliance, ComReg set out the relevant legal framework. It then set out the obligations which it contends are owed by Virgin Media under the Universal Service Regulations. It also referred to a decision of the Competition Appeal Tribunal (*"the CAT"*) in the United Kingdom, in *Virgin Media Ltd v. Office of Communications* [2020] CAT 5 in which the CAT expressed the view that the reference to *"conditions"* in the UK equivalent to Regulation 25(6)(b) would be understood as extending to price and other contractual terms while the meaning of the word *"procedures"* goes further, and covers the steps that a customer needs to take – *"the hoops that must be jumped through"* – in order to change provider.

29. The notification recorded that ComReg *"shares"* the interpretation given to *"procedures"* by the CAT. ComReg also referred to the view expressed by CAT (based on the case law of the CJEU) that a regulator must use an objective and reliable method to determine what activities act as a disincentive. In addition, ComReg relied upon the finding made by the CAT that a disincentive is not limited to something that actually deters a particular action, but also extends to circumstances that have the effect that the step is less likely to be taken. ComReg again referred to the Eircom settlement notice described above. It then described the background to the investigation which it had carried out. Next, the notification set out a summary of the exchanges which had taken place between ComReg and Virgin Media.

30. Having referred to that material and the Eircom information notice described above, ComReg stated, in para. 83 of the notification, that 95% of Virgin Media customers who have submitted a cancellation request are required to speak to a Virgin Media agent. In para. 84, it also noted that in 62 of the 71 transcripts of calls that were provided by Virgin Media, the customer was not afforded the option of proceeding to cancel the service without first having to listen to details of Virgin Media's prices and

products or comments regarding competitors. In paras. 85 to 93 of the notification, ComReg, again outlined its concerns about the manner in which Virgin Media agents provided what it contended was misleading information in relation to services offered by its competitors. However, in circumstances where those complaints are not repeated in any level of detail in the subsequent opinion issued by ComReg (addressed below), I do not believe that it is necessary to address that issue in this judgment. This was confirmed on Day 5 of the hearing[8] when, in the course of her closing submissions, counsel for ComReg noted that, in the subsequent opinion, ComReg's concern was *"very much watered down from the original complaints"* made in the amended notification and she, very properly, conceded that what was said by Virgin Media's agents about speeds of other broadband suppliers *"simply falls away as an issue"*. In my view, counsel for ComReg was entirely correct to take that course.

31. At para. 94 of the notification, ComReg stated that, on the basis of its analysis of the data provided by Virgin Media in relation to cancellation requests, it was clear that the vast majority of Virgin Media customers do not proceed to cancel following a telephone call. ComReg set out its analysis of the data in Schedule 7 to the amended notification. In Schedule 7, ComReg divided the customers into two groups. Group A comprised those who called to cancel but did not proceed with cancellation. Within Group A, there were three sub-groups: (a) those who called to cancel in response to a CCN (10,664 customers), (b) those who called within a cooling-off period (415 customers) and (c) *"general cancellation requests"* (155,672 customers). Group B comprised those who *"called and requested a cancellation and proceeded with that cancellation on that call".* Again, that was broken down into the same three sub-groups (571 were in the CCN sub-group; 395 were in the cooling-off sub-group and 39,112

[8] See p. 92 and following pages of the Day 5 transcript.

were in the *"general cancellations request"* category.) Only the last category in Groups A and B is relevant for present purposes. The total number of customers in Groups A and B in that category was 194,784 of whom 20.1% cancelled and 79.9% did not. All of these figures seem to me to be consistent with the information provided by Virgin Media in Appendix 3 to its June 2020 response to Q8 in Appendix 1 to ComReg's request for information of 16th March 2020. Schedule 7 also identified that there was a further cohort of customers (described in Schedule 7 as Group D) who cancelled at a later date (256 of whom were in the CCN sub-group, 28 in the cooling-off sub-group and 7,602 in the *"general cancellation request"* category). When those 7,602 customers in the last category are taken into account, that increased the total number of cancellations to 46,714[9]. In percentage terms, that equates to 24% of the *"general cancellation request"* category with the result that those who chose not to cancel accounted for 76% of the total. Based on this data, ComReg noted:-

(a) With regard to the general cancellation requests only 20.1% of 194,784 customers who called to cancel, proceeded to cancel on that call;

(b) Only a further 3.9% proceeded to cancel on a subsequent call;

(c) Accordingly the vast majority – being 76% – were *"dissuaded"* from cancelling after speaking with a Virgin Media agent having telephoned Virgin Media specifically to do so.

32. In para. 95 of the notification, ComReg referred to the confirmation given by Virgin Media (quoted in para. 19 above) that agents received commission of €0.92 per call where a customer decides not to cancel their service. ComReg stated that agents are, accordingly, incentivised to engage in *"save activity"* on 1908 calls and contended

[9] As in the case of the figures mentioned earlier in this paragraph, these figures appear to me to be consistent with the data supplied by Virgin Media in Appendix 3 to its June 2020 response to ComReg's information request of 16th March 2020.

that, as shown by the data, this is a *"hugely successful procedure at dissuading customers from switching"*.

33. The notification also addressed the 30-day notice requirement imposed under Virgin Media's terms and conditions. As noted in para. 2(b) above, this arises under clauses 3.1 and 11.6 of those terms and conditions. The effect of those clauses is that, from a contractual perspective, the agreement will continue after the minimum period of the contract expires, unless and until it is terminated by the customer giving one month's prior notice and paying all relevant charges up to the end of that one month notice period. The usual minimum period is a term of 12 months.

34. In para. 98 of the notification, ComReg stated that it did not consider it permissible to impose a notice period on customers seeking to switch to another provider after expiry of the minimum contract period. ComReg further stated that it considers the imposition of such a term to be an obstacle to a competitive market between service providers. ComReg highlighted that, in the case of a customer porting a fixed line number without first contacting Virgin Media, the contract for the service is cancelled immediately such that the requirement to give one month's notice is waived. In para. 105, ComReg stated that: *"By implication, therefore, it appears that Virgin Media does charge one month's notice to a customer porting their fixed line number who does contact them."* In para. 107, ComReg concluded that there was no transparent, consistently applied basis or rationale as to why, in some circumstances, the 30-day notice period is applied while in others it is not.

35. In para. 109, ComReg set out its analysis of financial data provided by Virgin Media. It noted that 89.9% of the customers switching to another provider were charged a 30-day notice period; 69.5% of customers had a charge imposed on their bill equating to the 30-day notice period where Virgin Media had received a loss notification from

another service provider confirming that the customer's number was porting to that provider. It also stated that the average amount charged to a customer in respect of the 30-day notice period (both in cases where the customer indicated that they were switching or where Virgin Media received a loss notification) was €88.52. In para. 110, ComReg stated that it does not believe that any fees should be levied on customers who wish to switch operators.

36. In paras. 114 to 116 of the notification, ComReg set out its findings. I do not propose to set these out here in circumstances where the findings, on foot of which the present application has been brought, must now be read in light of the subsequent opinion which was issued by ComReg after Virgin Media had responded in detail to the amended notification. The opinion therefore constitutes ComReg's final position. I should, nonetheless, refer to para. 115 of the notification where ComReg said that it considered that *"the fact that 76% of customers calling to cancel were dissuaded from switching to another … provider indicates that Virgin Media's conditions and procedures individually and collectively deter most people from switching … and so impacts upon consumers ability to take advantage of competition."* The basis for the 76% figure has previously been described in para. 31 above.

Virgin Media's response of 30th November 2021 to the Amended Notification

37. A detailed response was sent by Matheson on behalf of Virgin Media to ComReg on 30th November 2021. In their letter, Matheson contended that the amended notification failed to provide an adequate factual or legal basis for the findings made by ComReg. Matheson stated that Virgin Media rejected any suggestion that it had engaged in conduct that constitutes a breach of its obligations under Regulation 25(6)(b). The letter also contained a detailed argument in support of this contention based on CJEU case law. With regard to the approach taken by ComReg in relation to

save activity, it was contended that ComReg had misunderstood the data supplied by Virgin Media as analysed by ComReg in Schedule 7 to the Amended Notification[10]. In particular, the case was made that the data related to customer interactions with Virgin Media and could not all be characterised as *"cancellation requests data"*. It was contended that the only relevant data presented in Schedule 7 which could be said to amount to cancellation requests data was that described in Group B which, it was said, relates to genuine and verifiable "*cancellation requests data*" in respect of *"Numbers of customers that called and requested a cancellation and proceeded with a cancellation on that call*". It should be recalled, in this context, that, as explained in para. 31 above, Group B in Schedule 7 to the Amended Notification was said by ComReg to comprise those customers who called Virgin Media to cancel and proceeded to cancel on that call. Group A was said by ComReg to comprise the total number of customers who called to cancel and did not proceed to do so on that call. As further noted in para. 31 above, if one excludes those customers who called in response to a CCN and those who cancelled during a cooling off period, the proportion of all of the customers who actually cancelled – as against those who did not – was between 20.1% (if one also excludes those who cancelled in the days after the initial call) and 24% (if those who cancelled in the days after the initial call are taken into account).

38. As outlined above, Matheson made the case that the data in respect of Group A should properly be characterised as *"interactions data"* rather than cancellation data. It was also said that this *"interactions data"* relating to Group A includes the numbers of those customers who called 1908 where Virgin Media call agents identified, on the basis of language used, that *"there might be **some risk** of that customer ultimately exiting (without the customer actually requesting a cancellation on such call) and with*

[10] The approach taken by ComReg in relation to this material is summarised in para. 31 above.

Virgin Media then seeking to make an improved offer to the offer currently in place/otherwise indicated as taking effect"[11]. The letter then suggested that such interactions might include cases where a customer complains about *"having issues with their service"*, or says that he or she is *"looking around"* or that *"your competitors have x price" / "a better price"* or even that they are thinking about cancelling. On that basis, it was contended that the numbers in Group A do not capture solely the numbers of customers who called and requested a cancellation but did not proceed. Matheson stated that no such data is *"formally recorded"*. In addition, it was suggested that *"this misunderstanding"* also has an impact on Group D which was said, in para. 94 of ComReg's amended notice, to comprise those who cancelled at a later date. Matheson confirmed that Virgin Media agreed that Schedule 7 correctly counted the total number of cancellations namely 46,714[12]. In considering this part of the case made on behalf of Virgin Media, it is also necessary to keep in mind that, in Q8 of Appendix 1 to ComReg's request for information dated 16th June 2020, Virgin Media was expressly asked to provide details of the numbers of customers in four categories, the first of which was the number of customers who *"called and requested a cancellation"*. As recorded in para. 18 above, Virgin Media, provided those details in Appendix 3 its response of 19th June 2020 (expressly using the description *"Number of customers that called and requested a cancellation"*) and made no suggestion at that time that this was an inaccurate or inappropriate description.

39. At a later point in the letter, Matheson went so far as to describe the ComReg analysis summarised in para. 31(a) to (c) above as a *"foundational error"* and they contended that there is no factual or legal basis for the *"assertion that customer*

[11] Emphasis added.
[12] As noted in para. 31 above, this is made up of the total number of those in Groups B and D (excluding those who cancelled in the wake of a CCN or during a cooling off period).

numbers reflected in Schedule 7 telephoned Virgin Media specifically to make a cancellation request". They reiterated that the only figures in Schedule 7 that are accurate are those that relate to actual cancellations which, in the aggregate, amount to 46,714 customers.

40. Matheson also stated that Virgin Media believed that it is entitled to engage with customers who call seeking to cancel. It was submitted that such engagement enables customers to make an informed choice as to whether their interests lie in staying with Virgin Media or in terminating the relationship. It was also stated that Virgin Media was concerned that the two-step process mandated by ComReg might result in customers not being made aware that a technical or service issue might be fixed or that other pricing options were available. The letter further stated that Virgin Media must be entitled to ask a customer the reason why cancellation was being considered with a view to resolving a customer's concern, particularly where that concern related to service or pricing issues. In para. 5.2.11, Matheson said:-

> *"There is a very significant difference between a customer being encouraged to stay with an ECS provider due to inter alia the fixing of a technical issue or the acceptance of a better offer and making an informed choice in that regard (noting the provision under Recital 273 of the Code) and a customer making a clear and unequivocal request to cancel and actually being prevented or deterred from cancelling by the erection of a practical, legal or technical obstacle. In this context, a matter entirely ignored by ComReg in the Amended Notification despite the evidence provided is that typically in the region of 70% of Virgin Media customers who contact its call centre and who Virgin Media agents identify as possibly considering leaving it are actually provided with a* ***better offer*** *which would take effect after the call than they had before making*

the call. It is submitted that it is the improved offer that is likely to result in decisions on the part of such customers to remain with Virgin Media."

41. The letter also stated that Virgin Media objected to the suggestion in paragraph 114.8 of the amended notification[13] that its customers are "s*ubjected*" to a procedure that would, if ComReg was right, amount to a breach of the criminal law[14]. The letter also took issue with the Comreg's view that, because Virgin Media agents might make the customer aware of other offers available from Virgin Media, the provision of such information constitutes a disincentive within the meaning of Regulation 25(6)(b).

42. In para. 5.2.37 of the letter, Matheson addressed the fact that agents of the customer value team receive a commission of €0.92 per call where a customer decides not to cancel the Virgin Media Service (which ComReg contends constitutes incentivisation to agents to engage in save activity). Matheson made the case on behalf of Virgin Media that the references to incentives by ComReg were *"mischaracterised"*. They asserted that the €0.92 incentive is based on the work done by agents in resolving customer issues such that the customer opts to continue the relationship with Virgin Media. According to Matheson, the incentive is related to *"issue resolution"* and that it is not focused on whether or not a customer decides to cancel. In many instances, Matheson suggested that the issue raised by a customer is a technical one and the agent will try to resolve the issue. Matheson submitted that there was nothing inherently wrong with agents being incentivised to address customer problems or advise customers of available offers, including lower price offers, and that it could not be the case that fixing a service issue or resolving other issues constitutes conduct amounting to a

[13] The relevant *"findings"* of ComReg were made in para. 114 of the Amended Notification. As explained previously, they have not been replicated in this judgment in circumstances where they have since been overtaken by ComReg's opinion which was issued subsequently. In para. 114.8, ComReg maintained that many customers who call to cancel are *"subjected to 'Save Activity'"*.

[14] This was a reference to the fact that, under Regulation 25(8), a failure to comply with an obligation under Regulation 25(6) constitutes a criminal offence.

disincentive within the meaning of Regulation 25(6)(b). However, it must be recalled in this context that, as recorded in para. 19 above, Virgin Media expressly stated, in its response of 19th June 2020 to a question raised by ComReg in relation to incentives paid to Virgin Media agents in handling cancellation requests, that commissions were paid to its agents in handling a cancellation request where the customer *"ultimately decides to stay with Virgin Media"* – albeit that Virgin Media added that the decision to stay may have been as *"a result of solving technical issues or moving to a lower price plan/better matched to their needs."* The key point to note is that the answer given in June 2020 clearly suggested that the factor that triggers payment of the commission is the decision to stay with Virgin Media. The commission is not paid as a consequence of the agent identifying a solution to a technical issue or a lower price. It is only paid where the offer of that solution or price results in the retention of the customer.

43. The Matheson letter also addressed in some detail the issue raised by ComReg in its amended notification as to the comparisons drawn by Virgin Media agents to the perceived qualities of Virgin Media's service as against those of its competitors. As explained in para. 30 above, I do not believe that it is necessary to address that issue here.

44. With regard to the 30-day notice requirement, Matheson rejected the case made by ComReg that a 30-day notice period is only required of customers who switch providers. In para. 5.3.3 of the Matheson letter, it was stated that the 30-day notice period is required in the case of all customers, including those who might be terminating service provision entirely. It is not limited to those customers who are changing providers. In the same paragraph, it was contended that Virgin Media will only know that a customer is switching to another provider where that customer wishes to port a

number. As noted previously, customers who are porting a telephone number do not have to provide 30 days' notice.

45. The point was also made, in para. 5.3.2 of the Matheson letter, that ComReg appears to regard *"switching"* as covering two situations:-

(a) Where a customer of a fixed telecommunication service provider moves the fixed line service in conjunction with porting the fixed number. Matheson suggested that this was switching *"in the truest sense"*; and also,

(b) Where a customer seeks to terminate other services with one provider, such as the broadband service or TV service, and establish a new relationship with a new provider with no transfer or *"switch"* of products.

46. In para. 5.3.7, Matheson stated that, from a review of the websites of Tesco Mobile, Vodafone and Three (which, it was said, make up approximately 85% of mobile phone contracts and provide services to over 4 million customers in Ireland), these providers also require that 30 days' notice should be given where a customer wishes to terminate after the minimum term. In para. 5.3.9, Matheson rejected the assertion that the imposition of a 30-day period amounts to a charge or a penalty. The point was made that Virgin Media services are available to the customer for the entire 30-day period of the notice. The letter contrasted this situation with the case of a *"true switcher"* who has actually ported a telephone number and can, as a result, no longer obtain service from Virgin Media. In those circumstances, it was suggested that it is *"not reasonable"* to seek to portray the 30-day notice requirement as having a dissuasive effect.

47. In para. 5.3.11, Matheson submitted that ComReg was in error in suggesting that Virgin Media arbitrarily treated porting customers differently to others. Matheson expressly accepted that ComReg was correct in so far as it recorded, in para. 104 of the amended notification, that one month's notice is waived by Virgin Media where a customer ports a fixed line number without first contacting it (i.e. when Virgin Media is contacted by another provider rather than by its customer). However, Matheson maintained that ComReg was wrong in the assumption made, in para. 105 of the amended notification (to the effect that Virgin Media does charge one month's notice to porting fixed line customers who do contact Virgin Media). Matheson stated that Virgin Media waives the 30-day notice requirement in situations where a customer ports their fixed line number and contacts Virgin Media for that purpose. Paragraph 5.3.11 concluded with the following clarification:-

> *"Therefore, in all cases where a Virgin Media customer ports his / her fixed line number i.e., by contacting Virgin media or failing to contact Virgin Media there is no payment sought for the 30-day period. The critical distinction remains that where a customer ports their number there is no service provided after the porting date. The same is not true of the situation prevailing in the present case where services remain available to the customer until the actual cancellation date."*

48. In para. 5.3.12, Matheson addressed the issue raised in para. 107 of the amended notification in relation to Virgin Media agents' discretion to waive the 30-day notice requirement. Matheson expressed the view that it is *"very surprising"* that ComReg would suggest that the service fee is levied even in *"hard cases"* such as where there are technical issues, or a house move or a death or serious illness, or where a customer has to move from home to a nursing home. Matheson submitted that Virgin Media

should be free to choose to waive the fee in certain circumstances to be assessed on a case by case basis.

49. In para. 5.3.13, Matheson reiterated the argument made in previous correspondence that, where 30 days' notice is given, there is no cost for a customer wishing to change provider or to terminate service. The letter continued:-

> *"A customer merely needs to give 30-day notice and, where it is moving to another provider, to set up its new provider on the expiry of such period, a mechanism that is effected hundreds of thousands of times every year. The imposition of the 30-day fee is clear and transparent and the discretion not to levy it for 'hard cases' should be applauded and not criminalised…"*

50. The Matheson letter concluded with a reiteration that Virgin Media *"refutes"* the *"purported findings"* in the amended notification and that Virgin Media strenuously denies that it has engaged in any conduct that constitutes a breach of its obligations under Regulation 25(6)(b) of the Universal Service Regulation.

ComReg's opinion on non-compliance issued under Regulation 31 in advance of the commencement of proceedings

51. ComReg issued an opinion under Regulation 31 on 5th July 2022 in which, it expressed the view that, notwithstanding the case made by Matheson, Virgin Media has not complied with its obligations under Regulation 25(6)(b). In para. 13 of her affidavit sworn on 6th September 2022, Ms. Miriam Kilraine confirmed that, in forming its findings and opinion, all points raised on behalf of Virgin Media in the correspondence with ComReg were considered. Paragraph 111 of the opinion also expressly states that it is based on and derived from matters referred to in the amended notification and the investigation, correspondence and engagement with Virgin Media both prior to and subsequent to the amended notification.

52. In common with the amended notification, the opinion began with an overview of the applicable legislative regime. It then referred to the decision of the CAT in *Virgin Media Ltd v. Office of Communications*. It also referred to the decision of the CJEU in Case C-99/09 *Polska Telefonia* [2010] I ECR 6636. The opinion made clear that ComReg remains of the view that it should follow the same methodology as that adopted by the CAT in considering whether any relevant condition or procedure amounts to a disincentive. It also again referred to the Eircom settlement notice. ComReg clarified that, contrary to the contention made on behalf of Virgin Media, it did not assert that it had power to change the law by means of such notices. Instead, the information notices published in respect of the Eircom investigation recorded ComReg's interpretation of Regulation 25(6)(b) and were published by ComReg pursuant to its powers under Regulation 31(3) to *"ensure all of industry may inform themselves as to ComReg's interpretation of those obligations"*. ComReg also rejected the case made by Virgin Media that the conditions and procedures referred to in the allegations made against Eircom related solely to Eircom's telephone service contract and not its *"wider contracts"*. In para. 29 of its opinion, ComReg stated that the undertakings set out in the Eircom settlement information notice were not stated to be limited to telephone service contracts. Furthermore, in para. 30 of the opinion, ComReg stated that it disagreed with Virgin Media's contention that the facts relevant to the Eircom notice are *"entirely distinguishable"* from the conditions and procedures adopted by Virgin Media. On the contrary, ComReg contended that Virgin Media's conditions and procedures regarding contract termination are very similar to those addressed in the Eircom notice. In that context, ComReg referred to the concern identified by it in the Eircom investigation in relation to the requirement that customers

must give one month's written notification and the requirement that the customer must make contact with the Eircom *"save"* team.

53. Paragraphs 55 to 86 of the opinion addressed the points made by Matheson in respect of the *"save activity"* issue in their letter of 30th November 2021. In para. 56, ComReg made the point that the *"save activity"* procedures operated by Virgin Media mean that there is *"no direct method for a consumer to switch thereby creating an obstacle/hindrance to switching"*. ComReg asserted that this is borne out by the statistics which it contends demonstrate that approximately 76% of customers calling to cancel do not proceed to cancel their contract. It also maintained that this conclusion is borne out by the call transcripts provided by Virgin Media which it contended *"clearly demonstrate the obstacle/hindrance to switching created by save activity"*. In para. 57, ComReg referred to the confirmation given in para. 5.2.11 of the Matheson letter of 30th November 2021 that the majority of customers who contact the Virgin Media call centre and who are identified as possibly considering cancellation are actually provided with a better offer. ComReg maintained that the *"clear purpose of this is to dissuade the customer from switching".* In para. 58, ComReg stated that, even if Virgin Media disputes the 76% figure, ComReg considers that Virgin Media is failing in its duty pursuant to Regulation 25(6)(b). This contention was made on the basis that Virgin Media has a duty to *"ensure"* that no disincentive arises. On that basis, it was alleged that a policy of engaging in save activity without a facility to opt out amounts to a failure to comply with the obligation imposed by Regulation 25(6)(b). ComReg also referred to research conducted by the Body of European Regulators for Electronic Communications (*"BEREC"*) which suggests that save activity can have a significant impact on the willingness of a consumer to switch. At para. 3.4, the opinion cited the BEREC Report on Terminating Contracts and Switching (March 2019) where, at para.

3.4, it noted that fourteen Member States have rules in place to regulate *"save/win back practices"*, and it was suggested that this demonstrates that this type of activity is clearly a concern for other EU telecommunications regulators. ComReg referred, by way of example, to the fact that, as noted by BEREC, service providers in both Italy and in Malta are prohibited from contacting the consumer during the switching process. ComReg also cited para. 3.1 of the report which notes that, in Bulgaria, the service provider, as well as its sales representatives, distributors and partners, are not allowed to contact the subscribers that have submitted a switching request and are also not permitted to discuss the benefits or disadvantages of switching or to suggest changes to terms and conditions of the customer's existing contract.

54. ComReg also stated that the sample call transcripts provided by Virgin Media demonstrated that save activity usually takes a *"significant period of time"* and that in *"many cases"* it is clear that customers want to cancel without having to listen to the save activity. In this context, ComReg, at para. 64 of its opinion, referred to Transcript 22 This is a transcript of a call that was made on 26th October 2019 by a customer who, immediately at the commencement of the call, indicated an intention to cancel the Virgin Media service. In para. 64 of the opinion, ComReg says that this transcript illustrates how save activity creates an obstacle for customers. The extract from the transcript quoted by ComReg is in the following terms:-

> *"…CALLER: Em,* ***I would like to cancel the service, the internet and broadband****.*
>
> *MR. P…: And would there be any reason that you're looking to cancel? CALLER: Yeah, it's just the price for us. We're going to change to a cheaper provider.*

MR. P…: And if we could bring down the price for it, would you be interested in staying with us?

*CALLER: Em**, no, not at this time I think anyway**.*

MR. P…: I know you have the 240 meg broadband at the minute, so if you were to switch to a different company they would only be able to give you up to a 100 meg in your area. So it would be a less masting (as heard) speed that you can get there; do you know?

CALLER: Yeah, I'm grand.

MR. P…: Actually, with the broadband that you have, what sort of devices would you normally use with that?

CALLER: Em, laptops I guess.

MR. P…: Okay, and would you be streaming Netflix or anything like that?

CALLER: Em, yeah.

MR. P…: And would there be many of you at the address?

CALLER: There's two, yeah.

MR. P…: Okay. Em, we're averaging in about or in around 70 to 90 gigabyte download per month. If you are using up to two devices at once at the address there and you're not streaming and whatnot, you might struggle to keep up that (inaudible) usage with the companies, do you know. With ourselves we wouldn't share the lines or anything like that, so there shouldn't be any slowdown of the service. But if you're interested what I could do is I could have a look in the account for you and see if there is any good offers available to bring down the price?

*CALLER: Em**, thanks a million, but no. It's okay. Thanks, I've already made up my mind, but thank you. I appreciate it.***

MR. P…: Yeah, no problem. Yeah. I'll just load it up on your account for you so. Is it okay if I pop you on hold for a second?

CALLER: Yeah, yeah, no problem.

MR. P…: Thanks. Hello?

CALLER: Hello.

MR. P…: Sorry, thanks for holding for a minute. I was just pulling through information for you. It came up, just to let you know that we would have that very top offer for you for the broadband, we could give it to you for 29.50 there for six months and then it would be 59 for the last six months. Again, I have been putting through since you have been with us for a while that you could avail of that there?

CALLER: Em, one second.

MR. P…: Yeah, no problem.

CALLER: Can you just hold on for a second. Em, ***sorry, no, it's okay. Thanks, I'll just – thank you for offering, but no.***

MR. P…: All right. Yeah, no worries. It's still down to price, is it?

CALLER: Eh, yeah, ***we're just happier to move; it's fine. We want to try another one, but thank you***.

MR. P…: Yeah, no problem. What we might be able to do for you we could extend that to the nine months for you, so it would be the 29.50 for the nine and then the 59 just for the last three, which would be – that would be the very top offer that we give out. We very rarely give out that offer, to be honest with you.

CALLER: Eh.

MR. P…: But, em, since you have been with us for a while now we could give you that offer there.

CALLER: Em, ***thank you, but no. We're good. Thank you****.*

MR. P…: Yeah, no problem. I just have to read you through the terms and conditions so.

CALLER: Yeah.

MR. P…: And I can get that cancelled now for you. Is that okay?

CALLER: Yeah…"[15]

55. ComReg also referred to an extract from transcript T 28. This is a transcript of a call which took place on 26th October 2019. As in the case of T 22, it is clear from the full transcript that the caller wished to cancel the service. He made it clear at the outset of the call that he was moving to another provider. The full transcript is significantly longer than the extract quoted in the ComReg opinion. That extract is in the following terms:-

"CALLER: ***So whatever you tell me, it doesn't make a difference. I'm cancelling it today.***

MR. G…: Okay, (inaudible) they tried to give you a discount already.

CALLER: ***Please, please****.*

MR. G…: But my colleague --

CALLER: ***No, no, I'm not going to talk to you, I just want to cancel it.***

MR. G…: Okay. Thirty days' notice starts from today. Hold on, I will have a look here.

Okay, all right, you spoke to my colleagues three days actually regarding the package already.

CALLER: Yeah.

[15] Emphasis added.

MR. G…: So enough said there that - you say you would think about it. Yes --

CALLER: And I thought about.

MR. G…: Yeah, you want to cancel it. Okay.

CALLER: Yeah, please."[16]

56. ComReg also included an extract from Transcript T 4. This is a transcript of a call from a customer which took place on 17th October 2019. The full transcript shows that the caller indicated at the outset that he had received a notification of an increase in price and that he wished to cancel the account. Although not quoted in ComReg's opinion, the call commenced as follows:

"MR. M …: Hi, you're through to Virgin Media. How can I help you?

CALLER: Hi, we got a notification that there's going to

be an increase on price.

MR. M …: Yeah.

CALLER: I wish to cancel that account.

MR. M …: No problem. Would you have your account number?

CALLER: Yeah [...]

MR. M …: And are you the account holder?

CALLER: Yeah.

MR. M …: Okay, Sean, and what would be the reason for cancellation?

CALLER: Increase in price.

MR. M …: Okay, and where would you be planning to go then?

CALLER: I don't know yet.

MR. M …: Fair enough. Are you aware that with any provider you will be reducing your broadband speed?

[16] Emphasis added.

CALLER: Sure I can hardly get it anyway, so it's all

the one.

MR. M …: Now generally it would be reduced by two-and-a-half times, so it would be even harder to get then.

CALLER: Yeah, well sure it doesn't matter like.

MR. M …: It depends, like is there many people using the broadband in your house?

CALLER: No, only me …"

57. The short extract from Transcript T 4 included in the opinion is in the following terms:-

"MR. M…: Okay. What would you think if we would just to bring you down to €56 and there wouldn't be any increase?

CALLER: No, you're grand, I'll just move away.

MR. M…: So no offer or anything to stop you here?

CALLER: Nah, I don't think so; just tired.

MR. M…: Then what is the point of cancelling then like?

CALLER: Because I want to.

MR. M…: It's not the price increase then; is it?"

58. The opinion also refers to a very short extract from Transcript T 64. This is the transcript of a call which took place in March 2020. This call commenced with the customer indicating that he wished to cancel in circumstances where the monthly price for the broadband, television and telephone line service had increased from €49 to €90. It is clear from the text of the transcript as a whole that the customer was interested in understanding whether the service could be reduced to broadband only excluding television and whether it could be reduced in price. After the initial interactions between

the caller and the Virgin Media agent to check the identity of the caller, the substance of the call commenced as follows:

> *"MR. O'H…: Hi J…, so what are you looking to do on the account?*
>
> *CALLER: Yeah, just the broadband and the phone line, just we got a contract there and it's like €90 something a month now.*
>
> *MR. O'H …: Yeah.*
>
> *CALLER: I want to cancel that* ***or.***
>
> *MR. O'HANLON: All right. It's just the price there at the moment, is it?*
>
> *CALLER: Yeah because it was like 49 and it's just sort of doubled like,* ***so I don't really.***
>
> *MR. O'H…: Yeah. You're out of contract there, so we'd be able to get the price down from that at the moment. Like, you're using, you have the TV, the broadband and the home phone. Like, are you using the television as well, like, or would you just be looking for the broadband on its own?*
>
> *CALLER: Um, well, I'm not really using the TV.*
>
> *MR. O'H…: Yeah. Do you want to see what price like the broadband would be on its own there or do you want to see, kind of, like the bundle as a whole or?*
>
> *CALLER:* ***Um, well how much is it just for the broadband by itself?****"*[17]

59. While the above extract is not quoted in ComReg's opinion, I believe that it is important to include it here because it shows that the customer was plainly linking an intention to cancel with an increase in price and it also illustrates that the unqualified intimation of a decision to cancel did not occur until a later point in the conversation. It is clear from a consideration of the transcript, as a whole, that the agent went through a number of different pricing option with the customer who, initially, showed interest in

[17] My emphasis

hearing them and went so far as to ask the agent to explain them. The extract from the transcript quoted in ComReg's opinion comes at a significantly later point in the conversation by which time it has become clear that the customer is not tempted by anything said by the agent. The extract is quite short and is in the following terms:-

> *""MR. O'H…: But as I was saying it's just a bit of a safety net because if you went to other providers, like, and you weren't happy with what they were going to give you either, like, and then you were to come back, you know if you had no other choice really, you know at least that would be there for you because if you had to cancel it now, like, it just wouldn't be there if you were to came back, you know, it just wouldn't be available. So, I can give you the order number there, as I said if you want to double check that's fine, you know.*
>
> *CALLER: No, I think I will just cancel it because it saves me from ringing up again and holding it for so long.*
>
> *MR. O'H…: Yeah.*
>
> *CALLER: It would save me the hassle because I was like on the phone for nearly 15 minutes, like, I don't want to be on the phone for another 15 minutes to get through to somebody else.*
>
> *MR. O'H…: Yeah.*
>
> *CALLER: You know. So, yeah, can I just cancel and just deal with it.*
>
> *MR. O'H…: Yeah. Like I can push it out there to make it 44.50 for the nine months but, like, that would be the very best I could do, like, and then the final three months then would be at 89 where you could get the price back down again then the final month after that, do you know?*
>
> *CALLER: Um, no, I think I'll just cancel."*

60. On the basis of the transcripts supplied by Virgin Media, ComReg rejected the contention made by Virgin Media that its customer service agents had no way of knowing whether a customer calling to cancel intended (a) that the customer no longer wished to have a service from any provider or (b) were considering terminating their service with Virgin Media for the purposes of establishing a new relationship with a different service provider. ComReg expressed the view that it is *"easily discernible from the call transcripts"* that the majority of customers calling to cancel were doing so with a view to changing provider. ComReg also reiterated its opinion that, having regard to the fact that 76% of customers calling Virgin Media to cancel do not ultimately proceed with cancellation, this demonstrates that there is a high probability that the customer will be *"dis-incentivised"* from switching due to the *"mandatory save activity"*.

61. In para. 67 of the opinion, ComReg also rejected the case which had been made on behalf of Virgin Media to the effect that:-

> *"typically in the region of 70% of Virgin Media customers who contact its call centre and who Virgin Media agents identify as possibly considering leaving it are actually provided with a better offer which would take effect after the call than they had before making the call. It is submitted that it is the improved offer that is likely to result in decisions on the part of such customers to remain with Virgin Media."*[18]

62. In rejecting that contention, ComReg stated that it did not consider that the two-step process creates any impediment to consumers receiving a better offer. According to ComReg, all Virgin Media need to do is to seek the customer's consent before giving

[18] This is the case that had been made in para. 5.2.11 of the Matheson letter of 30th November 2021

further information about Virgin Media's other products and services. The opinion stated:-

> *"ComReg considers that the customer is best placed to decide whether they wish to hear about Virgin Media's alternative offers or proceed directly to cancellation. ComReg's view is that while some customers may have received what Virgin Media classify as 'better offers', respectfully whether the offer was better or more suitable for the customer than an offer they might have obtained from another provider, is a matter for the customer, having been given an opportunity to cancel directly or if it wishes, to hear about Virgin Media's other offers. Therefore ComReg rejects Virgin Media's reliance on this statistic as regards to the number of customers who obtain, in its view, a 'better offer' (and who ultimately may have lost out on obtaining a more suitable or cheaper package from another provider to meet their needs). ComReg considers that the offering of such discounts to Virgin Media's customers that have indicated an intention to change service provider acts purely as a dissuasive measure."*

63. It may be helpful, at this point, to note that Virgin Media's case is that this is illogical. Counsel for Virgin Media observed that, based on what is said in the above passage, ComReg's case is that better offers constitute a disincentive because they have the effect of dissuading customers from switching. Counsel described this as the crunch issue in the dispute. He highlighted that, at the same time, ComReg say that their two-step process does not create any impediment to customers receiving better offers. So the thing which is said to be a disincentive is, by the same token, not impeded at all by the remedy that ComReg seeks to impose. He contended that this reveals a significant flaw in ComReg's definition of *"disincentive"* under the scheme. With regard to ComReg's point that the customer is best placed to decide whether they wish to hear

about alternative offers from Virgin Media or proceed directly to cancellation, counsel said that there is no evidence that Virgin Media customers do not want to have *"reasonable non-hassling save activity"* first. He also made the point that there is no evidence that any customer got a better offer from a rival provider and, even if ComReg had identified two or ten examples, that does not come close (so he argued) to showing a need for this process to be imposed on each customer interaction which he suggested amount to 197,000 annually. He submitted that the vast majority of the transcripts show Virgin Media meeting or beating the rival offer. He argued that this is reflected in the *"fact"* that 70% of the customers who phone considering cancellation do not go ahead with it[19]. He said that it is inherently unlikely that 70% of the customers considering cancellation were *"duped"*. He said that it was much more likely, on the balance of probabilities, that these customers were made an objectively better offer and stayed with Virgin Media for that reason. I will consider the respective arguments of the parties on this and other issues at a later point in this judgment.

64. Turning to the next aspect of the opinion, ComReg, in para. 68 of the opinion, rejected the suggestion made by Matheson in their November 2021 letter that the data on which ComReg had relied in para. 94 of the amended notification was *"interactions data"* as opposed to *"cancellations data"*. ComReg stated that this contention on the part of Virgin Media is *"entirely misplaced"* in circumstances where ComReg, in advance of issuing its amended notification, had specifically and clearly requested data in the nature of *"cancellation request data"*. In support of this view, ComReg referred to the specific information request made by it in March 2020[20], the response from Virgin Media of 19th June 2020[21], ComReg's notification dated 29th March 2021 and

[19] See pp. 99-101 of Day 4
[20] See the terms of Q8 of Appendix 1 summarised in para. 15 above.
[21] See the terms of Appendix 3 to the Virgin Media response noted in para. 18 above.

Virgin Media's response of 11th June 2021 to that notification in which it did not characterise the data as *"interactions data"*. ComReg also pointed out in para. 72 of the opinion that it had requested transcripts of calls dealing with *"cancellation requests"* and that a review of the 71 sample transcripts provided by Virgin Media in response showed that, in the majority of those calls, the customer requested cancellation. On that basis, ComReg expressed the view that these calls were not purely *"interactions"*.

65. In para. 76 of the opinion, ComReg also refuted the suggestion, which had been made in the Matheson letter, that Virgin Media had previously characterised the data as *"interactions data"* in its October 2020 response to ComReg's request of 19th August 2020 for additional information. In my view, ComReg was clearly justified in refuting that suggestion. It is true that there was a reference to *"interactions data"* on p. 5 of the appendix to Virgin Media's response of 9th October 2020 but that must be seen in context. ComReg's request for further information of August 2020 was very clearly framed in the context of its concerns about Virgin Media's cancellation process. That is made abundantly clear both by the heading of the Appendix to the covering letter and by a consideration of the terms of the specific requests for further information. Among those requests was a question raised at Q1(k)A, which related to details of the means by which customers cancelled. ComReg noted that in a previous response to an earlier question, Virgin Media had, in a number of instances replied *"other"* where no means of cancellation could be found. In Q1(k)A of the August 2020 request, ComReg asked Virgin Media to explain why this was so. In its response, Virgin Media stated:

> *"As highlighted in our June Response the means by which the customer cancelled can only be determined by looking at interactions on the customer's account. The*

'interactions' data is entirely dependent on what information is inputted by an agent. There are a number of reasons why 'other' has been used:

- *If we were not able to determine the means by which the customer cancelled by looking at the interactions data, 'other' has been used.*
- *'Other' can include situations where a cooling off period cancellation form was submitted.*
- *As the data is dependent on actions by agents, it is subject to error so an agent may accidently input 'other' instead of the actual means of cancellation.*

We have checked a selection of customer accounts in detail where the agent inserted 'other' and we can see that the cancellation requests were received via email, letter or call. It is not possible to extract this level of detailed information on all accounts."

66. In my view, that paragraph plainly cannot be construed as suggesting that Virgin Media was making the case that the data in question should be characterised as *"interactions data"* rather than *"cancellation data"*. ComReg was correct in para. 76 of its opinion to describe the use of the term *"interactions data"* as a *"passing reference".* To my mind, Virgin Media was simply using the term to explain that, in order to determine the means of cancellation in any particular case, it is necessary to examine the interactions between the customer and the Virgin Media agent. It was not making the case subsequently sought to be made in the Matheson letter of November 2021. That said, there is still a live issue between the parties as to whether all of the customers in Group A (as described in para. 31 above) can properly be characterised

(as ComReg seeks to do) as customers who called to cancel but did not proceed. It should be recalled in this context that ComReg contended that there were 155,672 customers in this Group albeit that this reduced to 148,070 when the 7,602 customers who cancelled at a later date are taken into account[22]. Notwithstanding the terms of its June 2020 response to Q8 of Appendix 1 to ComReg's March 2020 request for information[23], Virgin Media maintains that ComReg has failed to establish that all of the calls in by customers in Group A can be said to have been for the purposes of cancellation.

67. In paras. 74 and 75 of the opinion, ComReg rejected the case made by Matheson in their November 2021 letter that the data in respect of customers within Group A includes a range of interactions, including those where a customer says that he or she is having issues with their service or looking around or thinking about cancelling. It will be recalled that, in their letter, Matheson made the case that, because there was a range of reasons underlying customers' calls, the numbers in Group A in Schedule 7 to the amended notice do not capture solely the numbers of customers who called and requested a cancellation but did not proceed. In response to that point, ComReg reiterated that the data in question had been provided by Virgin Media. Secondly, ComReg noted that Virgin Media's website provides that, if a customer has been *"with us for over 14 days, you can contact our cancellation department at 1908 (select the cancel option)…"*. On that basis, ComReg stated that it is reasonable to conclude that customers who phone 1908 and then *"select the cancel option"* are seeking to cancel their contract.

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[22] This is based on the figures and groups discussed in ComReg's Amended Notification of Non-compliance of 23rd September 2021 summarised in para. 31 above.

[23] See para. 18 above where I note that Virgin Media itself provided figures for a number of categories including *"Number of customers that called* ***and requested a cancellation****"* (emphasis added).

68. In para. 78 of its opinion, ComReg reiterated that it is satisfied that the two-step process does not create an obstacle to the consumer being given information in order to allow the consumer to make an informed choice. According to ComReg, any consumer wishing to obtain further information from Virgin Media about its alternative services or offers would be in a position to obtain this information, once consent is sought and provided to the Virgin Media agent. In this context, ComReg noted that Virgin Media is operating the two-step process for customers who call to cancel having received a CCN. In para. 80 of the opinion, ComReg made clear that the two-step process would not be triggered if the customer does no more than signal that there are technical or service issues.

69. Paragraph 82 of the opinion addressed the contention made in para. 5.2.14 of the Matheson letter that Virgin Media *"did not acknowledge that its customer agents seek to dissuade a customer who calls to cancel from doing so".* In reply , ComReg drew attention to the June 2020 response from Virgin Media, where it was stated that "*Virgin Media, like all other electronic service providers and indeed utility operators like Electric Ireland, Energia etc have call centre staff trained to engage with customers about their reasons for seeking to exit their contracts, sort out technical issues that can sometimes underpin such requests or identify misunderstandings (such as that accounts must be cancelled when moving house). Such call centre staff are also trained to explain other options and offers including plans which are cheaper or more closely aligned with the customer's needs and which might result in the customer deciding to remain with Virgin Media. Indeed, some customers can believe that the threat of cancelling will ensure they get the best deal available from their existing operator."*[24]. ComReg also referred, in this context, to Virgin Media's training materials which were provided

[24] Underlining added by ComReg

in the June 2020 response. This material included an *"Objections Handling"* document in the wake of price increases introduced by Virgin Media in 2019. Although this is not addressed in the text of the ComReg opinion, I should explain that the document set out a step wise plan for Virgin Media's customer value team which involved (among others) the following steps: (a) listening to the issue, (b) explaining the price change, (c) reinforcing the value of the Virgin Media product, (d) addressing the position if, at that point, the customer still wants a reduction (in which case, the agent was directed towards discussing lower priced bundles – and finally – (e) *"Still wants to cancel: Use your CVM tools to save the customer or process the cancellation".* It will be seen that this last step clearly envisages that, at an earlier point in the call, the customer had intimated an intention to cancel and that, notwithstanding all the agent had said in the intervening period to highlight the virtues of the Virgin Media service, the customer at the end of the process *"still"* wants to cancel. It will be seen that the process described in the *"Objection Handling"* document is consistent with Virgin Media's response on 19th June 2020 to ComReg's request for information of 16th March 2020. As noted in para. 18 above, it is clear from Virgin Media's response of 19th June 2020 that an explanation of *"other options"* (i.e. options other than cancellation) is an integral part of Virgin Media's cancellation process. This is also consistent with a more general document entitled *"Cancellation/Termination Notice Procedure"* included in the same bundle of training material supplied by Virgin Media in Appendix 5 to its June 2020 response. Although not identified in ComReg's opinion, this document is relevant in this context and it forms part of the evidence before the Court in these proceedings. It speaks of: *"**At the end of these calls** the communication is clear that the customer intends to cancel."*[25] The final page of the script states: *"When a customer requests to*

[25] Emphasis added.

cancel/terminate their services, ***and you cannot save the customer****, you must tell them the following information …"*[26] The information to be given is in relation to the cancellation fee to be paid (if still within the minimum term), the need to give 30 days' notice in other cases and details of the final bill and the collection of Virgin Media equipment. This material appears to clearly envisage that this final stage of the call will take place after the agent has been unable to save the customer. In other words, it envisages that the final stage will be preceded by save activity.

70. ComReg concluded in para. 82 that: *"It is apparent that calls are structured and designed so as to dissuade a customer from cancelling such that it will result in the customer remaining a customer of Virgin Media."* In further support of its view, ComReg also noted that Virgin Media had, in the course of its interactions with ComReg accepted that call centre staff are financially incentivised to dissuade customers from cancelling. It should also be noted that, in the same paragraph, ComReg appears to have gone so far as to express the view that even the provision of a better offer by an agent constitutes a disincentive to switching. In that context, ComReg stated in para. 82 that: *"Indeed, Virgin Media has asserted many times in the November Response that the majority of customers who contact its call centre and who Virgin Media agents identify as possibly considering leaving it are actually provided with a better offer, the objective of which is to dissuade switching."*

71. ComReg turned, in para. 85 of the opinion, to the case made by Virgin Media that the number of transcripts of calls reviewed by ComReg (i.e. 71 transcripts which equates to 0.04% of calls in the period under review) is too small to constitute an accurate and complete representation of Virgin Media's customer service practices or procedures. ComReg rejected that contention in the following terms:-

[26] Emphasis added.

> *""In circumstances where Virgin admits that it engages in save activity, without giving the customer the option to move directly to cancellation, and Virgin operates a script based system for its customer service agents, ComReg is of the view that the calls are reflective of ComReg's treatment of customer calls relating to cancellation in the period reviewed, and which calls for example were not limited to calls from a particular Virgin Media agent. In any event, save activity is company policy and accordingly the number of calls is not directly relevant to ComReg's findings."*

72. ComReg also rejected the case made by Matheson on behalf of Virgin Media that the €0.92 incentive relates to *"issue resolution"* rather than cancellation. ComReg made clear in para. 86 of the opinion that the view previously expressed by it in para. 95 of the amended notification was based directly on Virgin Media's response set out in para. 19 above to the effect that: "*Commissions for ... agents in handling a cancellation request where that customer ultimately decides to stay with Virgin Media (perhaps as a result of solving technical issues or moving to a lower price plan/ better matched to their needs) is 92c per call and subject to monthly and annual caps."*

73. As noted previously, ComReg did not pursue, in the opinion, the case previously made in para. 114.11 of the amended notification in which it was alleged that Virgin Media customer service agents engage in unwarranted criticism of Virgin Media's competitors and their offerings. In paragraph 5.2.21 and following paragraphs of the Matheson letter of 30th November 2021, this allegation was addressed in detail and rejected on behalf of Virgin Media. The only response which was made by ComReg to these detailed submissions was in para. 84 of the opinion where ComReg stated that its:-

> *"... general position is that Virgin Media must ensure that its comments about other ECS providers are correct, appropriate and not potentially misleading. For example, even if a customer would get lower broadband speeds with another ECS provider than what was contracted from Virgin Media, the customer would not necessarily suffer a degradation in service, as indicated by some Virgin Media's agents to customers."*

74. Thus, ComReg has plainly not gone so far, in its opinion under Regulation 31(5), as to express a view that Virgin Media agents have provided misleading information to customers about the services available from Virgin Media's competitors. That is very important and takes that issue out of the case. In light of the approach taken in the opinion, it is unsurprising that, as recorded in para. 30 above, counsel for ComReg conceded that this *"falls away"* as an issue.

75. In paras. 87 to 103 of the opinion, ComReg addressed the imposition of the 30-day notice period. In para. 87, that ComReg stated that it had considered Virgin Media's submissions but that it was, nonetheless, satisfied that the imposition of a 30-day notice requirement on customers who wished to change provider outside the minimum contractual term constitutes a disincentive to changing service provider within the meaning of Regulation 25(6)(b). ComReg explained that it has reached that view in circumstances where the 30-day notice requirement effectively charges consumers for switching notwithstanding that it is described as a notice period. On the basis that it constitutes a charge to consumers for switching, ComReg stated that it is likely to have a dissuasive effect on switching. In para. 88, ComReg again referred to the Eircom notice and said that Virgin Media has, therefore, been aware (or ought to have been aware) that this has been ComReg's position for a number of years. Reference was, again, made to the *CAT* decision which suggests that, in assessing a disincentive,

consideration should be given to whether there is *"some cost or other hindrance which makes the step less attractive, such that customers may choose not to take it"*.

76. ComReg also addressed Virgin Media's argument that its services are available to the customer for the entire 30-day notice period such that the requirement could not be said to constitute a charge or penalty. In para. 89 of the opinion, ComReg expressed the view that the 30-day notice requirement constitutes a charge in circumstances where a switching customer may not wish for the service to be available for 30 days and may wish to switch immediately.

77. In support of its case in respect of the 30-day notice requirement, ComReg cited a number of extracts from transcripts of calls between Virgin Media customers and agents. The first was an extract from Transcript T 21. This is the transcript of a call made on 29th October 2019. It should be noted that this call commenced with the customer making clear that the customer was currently on a promotion and enquiring when the promotion would end and full payments would kick in. When told by the Virgin Media agent that the offer was due to end on 17th November 2019, the customer enquired what could be done if the customer did not wish to continue with the plan. The agent answered that it was up to the customer but that, for any cancellation, Virgin Media required 30-days' notice. The customer then asked what could be done to switch to a different Virgin Media contract. These exchanges took place before the exchange recorded in the relatively short extract quoted by ComReg from this transcript in the opinion, as follows:-

> *"MS. H…: Yeah. So you see if you were to give cancellation today that means that your service stays active with Virgin Media up until the 28th November. So you'd be liable for the charge up until that date.*

CALLER: That is strange because I am not ending the contract, you know, I am changing my -- because you gave me a contract for 12 months, so at the end of the contract I need not give you notice to you because I have renewed that I will get rid of it because --

MS. H…: Yeah, so --

CALLER: -- the contract is not beyond that. So once the contract ends again, so I didn't sign for anything beyond that, you know.

MS. H…: But you see, you see –

CALLER: So why are you rolling the contract?

MS. H…: It's a subscription contract. As is stated, it is a rolling contract, so we don't cut your service on the 17th November.

CALLER: Yeah, but you won't cut it but I'm giving you now that I don't want to continue, so why should you be rolling on".

78. It is important to consider this extract in its proper context. It is clear from a consideration of the transcript as a whole that the customer was unaware of the terms within the Virgin Media contract that continued the contract in being after the expiry of its minimum term unless the customer gave 30 days' notice of cancellation. It is also clear from the transcript that the customer believed that the contract came to an end on the expiry of the minimum term and that the customer had no contractual liability to Virgin Media under that contract once the term expired. It also emerges from a consideration of the transcript as a whole that, initially, the customer did not want to terminate service from Virgin Media, but simply wished to have a new offer based solely on a broadband and telephone service but without any television element. Ultimately, after several changes of mind, the caller opted to cancel the entire Virgin Media Service and gave 30 days' notice.

79. The second extract is from Transcript T 69. This is a transcript of a call which took place in the period between 1st March 2020 and 13th March 2020. This call commenced with the customer indicating that the Virgin Media Service was too expensive. The customer cited offers he had been made by competitors and enquired what *"we'd be talking here if I stay with you"*. The agent then quoted a price. The customer expressed disappointment at the price. The customer then asked when the contract was due to end. After a number of back and forth exchanges between the customer and the Virgin Media agent, the customer indicated that the service could be confined to television only and that the customer would seek broadband somewhere else. It is at that point that the extract quoted by ComReg arises, as follows:-

> *"MR. H…: We do require 30 days' notice to cancel the broadband.*
>
> *CALLER: So, you want another month's payment off me. Is that what you're telling me?*
>
> *MR. H…: Well --*
>
> *CALLER: Another €50?*
>
> *MR. H…: Well, we require --*
>
> *CALLER: Now, that's ridiculous. Now hang on, love, and I'll tell you something. Now, I'm not giving out to you but when I went up and I spoke to them they told me, no, be in two days before your contract ends.*
>
> *MR. H…: Which?*
>
> *CALLER: They told me, I asked them up in the shop, I asked in Blanchardstown and they told me, be in two days before your contract ends.*
>
> *MR. H…: Yeah, but like you're cancelling a product. Like as you're cancelling a product we require 30 days' notice. They're the terms and conditions.*

CALLER: Yet the other one's finished. So, you're going to still get another 50 off me.

MR. H…: Well, like you -- I don't know what the amount would be. That would be the case here you'd be billed for the whole thing. Like for another month essentially up until 1st April.

CALLER: Why the 1st April and it's the 6th March now, I don't follow.

MR. H…: That's taken --

CALLER: My contract finishes on Wednesday.

MR. H…: Yeah, but the 30 day's would be from whenever you want to give the termination, which would be today, which would push you to the 1st April.

CALLER: Come here, sure I can get broadband for €20 a month. I was talking to a chap yesterday and his was paying 19.99 a month. So, why would I pay 76 like?

MR. H…: I know, like, there's like--

CALLER: I'm not giving out to you. Honest to God, chicken, I'm not giving out to you.

MR. H…: That's okay."

80. It should be noted that, when counsel for Virgin Media came to make his submissions, he maintained that the problem for this customer was not that the 30-day notice requirement was acting as a disincentive or was causing frustration; the problem was that the customer did not know that the 30-day notice period was part of the contract. The customer appears to have become aware of it only at the point of cancellation. Counsel submitted that this is a transparency problem, i.e. that the customers did not know about it and that this should be distinguished from the contention that the 30-day notice period operates as a disincentive. There might be an

issue with what the customer was told in Blanchardstown, but counsel argued that this is not evidence of a systemic procedure which operates to deter, or is liable to deter, switching. He characterised it as a consumer protection issue which ComReg would be entitled to raise and, if raised, counsel said Virgin Media would have addressed it. For example, it might be necessary to put the 30-day notice requirement in *"bright lights"* in the contract, but that is a different complaint[27]. I will return to consider the arguments at a later point in this judgment but it is important to keep in mind that Regulation 25(6)(b) is not solely concerned with procedures but also contractual terms. Thus, the mere fact that the 30-day notice requirement is embedded in the contract between Virgin Media and its customers does not, of itself, exclude it from the potential application of the Regulation.

81. The third extract cited by ComReg in its opinion is taken from Transcript T 32. This is the record of a call which took place on 2nd March 2020. The customer commenced by indicating a wish to cancel the service as the customer was making only very limited use of it and found it to be slow. The agent explained that, based on the customer's usage, there was a cheaper broadband offering available from Virgin Media which would be sufficient for the customer's particular usage requirements. Having provided information to the customer about that offering, the agent then referred to the fact that, if the customer wished to cancel, there would be a 30-day notice charge. It is only that aspect of the conversation that is cited in the ComReg opinion as follows:-

> *"MS. M…: The one thing I'd say to you, like even giving 30 days' notice then you're being charged €69 then as well for your last month, do you know what I mean?*

[27] See Day 4, pp. 168-169

CALLER: Yeah.

MS. M…: Whereas if you were going with the new offer your next bill is 44 and your next bill, like, is due to generate on the 7th which is, what, five days' time at the weekend, do you know. It's totally up to you now like I said but if you work I suppose the 30 days' notice into it, it does make a difference as well, do you know what I mean?"

82. For completeness, it should be noted that, following further exchanges between the agent and the customer, Transcript T 32 shows that the latter ultimately decided to cancel the Virgin Media service and the transcript shows that this was to take effect on the expiry of that 30 day period. In the opinion, ComReg stated that it is clear from this transcript that Virgin Media itself considers the 30-day notice period to operate as a charge. When it came to his turn to make submissions, counsel for Virgin Media maintained that this is not credible. He submitted that the fact that an agent describes it as a charge in that way does not mean that Virgin Media has accepted that it is a charge and he argued that it constitutes a payment for a service which has been rendered to the customer.

83. In para. 91 of the opinion, ComReg drew attention to the fact that customers seeking to cancel in the context of a CCN are not required to provide 30 days' notice and are advised that, if they are switching service provider, they can call back and request immediate cancellation once they have service from the new provider. That paragraph refers to circumstances where, as I have previously explained, Virgin Media (and the same applies to its rivals) changes its terms and conditions and notifies the customer of the change. In such circumstances, the customer has an automatic right to cancel the contract without having to give any period of notice. As noted by Ms. Miriam Kilraine in her affidavit sworn on 22nd September 2022, the fact that Virgin Media can

do this in such cases suggests that there is no technical reason why the 30-days' notice requirement cannot be dispensed with in all cases.

84. The same point is also driven home in para. 92 of the opinion. This paragraph was highlighted, by counsel for ComReg in her closing submissions on Day 5. ComReg noted, in that paragraph, that Virgin Media has not provided any reason as to why 30 days' written notice of termination is required. Counsel for ComReg submitted that, in the course of these proceedings, Virgin has failed to adduce any evidence to explain the basis for the 30-days' notice requirement. While counsel for Virgin Media had urged that the 30-days' notice period allows Virgin Media to organise its customer base in a predictable way, counsel for ComReg submitted that this was not said on affidavit by Ms. Harnett, who swore two affidavits in these proceedings on behalf of Virgin Media. However, as will be seen when I come to examine the affidavit evidence in the case, it would be wrong to say that Ms. Harnett offered no rationale for it. In fact, she did. She said that a 30 day notice period provides an orderly timeframe *"of modest advance notice"* for the termination of a contract. She also made the point that, in some instances, service supply will have been ongoing for many years and she suggested that a 30 day notice period represents a reasonable notice requirement and that *"most consumers"* are used to engaging with similar notice periods for service termination.

85. In the course of the hearing, I suggested that one possible rationale for the requirement might be that commercial enterprises like to have predictable income streams so that they can know what funds they will have available for business planning purposes. However, counsel for ComReg stressed that there is nothing in the evidence put forward by Virgin Media to support a conclusion that this was the reason underlying the contractual requirement in this case. I accept that argument. Virgin Media had ample opportunity in the course of these proceedings to address the reasons underlying the

contractual requirement. Its evidence on the issue is quite limited and, for the purposes of this judgment, I must confine myself to the evidence which Virgin Media has chosen to place before the Court.

86. In para. 94 of the opinion, ComReg addressed the complaint made at para. 5.3.6 of the Matheson letter of November 2021 to the effect that ComReg is *"purporting to make findings and take action against* [Virgin Media]*... while other service providers remain free and unhindered in terms of including 30-day notice periods"*. ComReg expressed the view that non-compliance with a statutory obligation cannot be excused by an assertion that other service providers in the market are not in compliance. If other service providers are not in compliance with Regulation 25(6)(b), ComReg said that it will take appropriate action. However, in para. 94, ComReg observed that Eir, Sky and Pure Telecom do not impose such a term. It should be noted that, subsequently, on Day 5 of the hearing, counsel for ComReg submitted, on that basis, that the 30-day notice period cannot be treated as industry practice.

87. Next, ComReg addressed Virgin Media's argument that the validity of a 30-day notice requirement is recognised by the provisions of Article 105(3) of the Code. As previously noted, the parties are agreed that, having regard to the fact that the repeal of the Universal Service Directive did not take effect until 21 December 2020[28], the present dispute is not governed by the Code. But Virgin Media relies on the fact that a 30 day notice requirement appears to be permitted under Article 105(3) of the Code and it has argued that this demonstrates that the EU legislature does not consider such a requirement to be unlawful. In response to that argument, ComReg expressed the view, in para. 95 of the opinion, that Article 105 addresses cancellation outside the minimum term which could involve either termination simpliciter or termination for the purposes

[28] See Article 125 of the Code.

of switching. However, where a customer is cancelling in order to switch, ComReg maintains that Article 106 applies and ComReg highlighted that there is no equivalent to Article 105(3) in the context of Article 106 which expressly addresses switching. ComReg contends that Article 106 of the Code is clear that the contract must be automatically terminated by the losing provider once the switching process is complete and that it should be completed on a date chosen by the consumer. In this context, ComReg drew attention to the provisions of Article 106(1) which imposes an obligation on the receiving provider to ensure the activation of internet access occurs within the shortest possible time. ComReg also referred to Article 106(6) which provides that the end user's contracts with the transferring provider *"shall be terminated automatically upon conclusion of the switching process"*. On this basis, para. 97 of the opinion stated that ComReg is of the view that Article 106(1) and (6) preclude a provider from applying a 30-day notice period where it has been notified of a request to terminate for the purposes of switching providers. ComReg maintained that this overrides any contractual notice period. Subsequently, in the course of submissions at the trial, counsel for Virgin Media stressed that Article 106 is a new provision that introduces a new regime for all switching and that it is not confined to porting of numbers. He also highlighted that 9th June 2023 was the date fixed for commencement of this obligation in the Regulations. Accordingly, he submitted that it does not apply to the periods in issue here.

88. In para. 100 of the opinion, ComReg addressed the argument made by Virgin Media that its customers continued to receive service during the 30-day notice period. As outlined in the Matheson letter, Virgin Media had argued that the notice requirement does not constitute a penalty levied on the customer and that it likewise does not constitute a cancellation fee. Instead, Virgin Media maintained that it was a *"normal*

service fee properly incurred for the continuation of the service during the period". In para. 100, ComReg responded noting that, if a customer wishes to switch immediately and no longer wishes to receive service from Virgin Media, the customer is still required to pay a charge equivalent to the 30-day notice period. ComReg expressed the view that this *"therefore operates as a charge or form of penalty in a similar way to the 30 day charge in lieu of notice imposed in the Eircom case"*.

89. ComReg next turned, in paras. 101 to 103 of the opinion, to Virgin Media's case that there is no arbitrary imposition of the 30-day notice period. This argument arises in circumstances where ComReg had raised the distinction between customers who do no more than port their telephone number to another operator (in which case Virgin Media does not require 30 days' notice of termination) and those customers who wish to terminate the service following the expiry of the minimum term (who are required to give 30 days' notice and pay charges for that period). On behalf of Virgin Media, Matheson had made the case that:-

> *"The critical distinction remains that where a customer ports their number there is no service provided after the porting date. The same is not true of the situation prevailing in the present case where services remain available to the customer until the actual cancellation date"*.

90. ComReg made a number of points in response to the case made by Virgin Media in that passage. First, in para. 102 of the opinion, ComReg stated that it did not accept Virgin Media's position that, in all cases where a customer ports a fixed line number, there is no payment sought in respect of the 30-day notice period. ComReg noted that, having reviewed the data provided by Virgin Media, a loss notification (issued following a customer porting his or her number) was received in respect of 7.9% of

customers who cancelled the Virgin Media service. Paragraph 102 then continued as follows:-

> *"ComReg notes that approximately 5.5% were charged the 30 day notice charge, post their cancellation request date; whereas in respect of approximately 2.4% of customers who cancelled and a loss notification was received, no 30 day notice charge was applied. ComReg understands that in respect of the 2.4% of customers' services which were cancelled immediately once the loss notification was received, that they avoided a 30 day notice charge as those customers had not contacted Virgin Media to cancel, as per Virgin Media's letter of 19 June 2020 and its response to Q9 of Appendix 1."*

91. ComReg also stated that it does not consider that any weight should be given to the distinction between porting a number and switching a broadband provider. Whether the service is of a fixed line nature or broadband-only services, ComReg maintained that the customer should be enabled to cancel the service immediately if the customer wishes to do so and should not be obliged to pay a charge equivalent to 30 days' *"unwanted service"*.

92. ComReg then set out its conclusions in paras. 104 to 109 of the opinion. In para. 106, ComReg stated that, for the reasons outlined in the opinion, it is of the view that Virgin Media has not complied with Regulation 25(6)(b) of the Universal Service Regulations *"as it has failed to ensure that its conditions and procedures for contract termination do not act as a disincentive to a consumer changing service provider"*.

93. In para. 110, ComReg set out the measures which it believes are required to remedy Virgin Media's alleged non-compliance. These are as follows:-

(a) Virgin Media is to amend its terms and conditions and website so that customers are informed that no notice period is applied when a customer

is switching to another service provider outside a minimum contract period; that, if they are porting their telephone number to another operator, they are not required to make contact with Virgin Media to cancel their services; and that, if they are not porting their number to another operator, they should contact Virgin Media when they have received service from their new provider following which Virgin Media will cancel their service with immediate effect;

(b) Virgin Media must undertake that, when contacted by a customer seeking information about cancellation procedures or to cancel their service, Virgin Media will not provide information about its services or offers unless it first engages in the following two-step process:

(i) the customer must first be explicitly offered the choice to proceed directly to cancellation; and,

(ii) having done so, Virgin Media may seek the consent of the customer to hear further information about Virgin Media's products and services;

(c) Virgin Media must undertake that it will provide training/retraining to all agents and agree to carry out spot checks to ensure no unverified or inaccurate criticisms or comparisons are being made in respect of other service providers;

(d) Virgin Media must undertake that it will cancel a customer service with immediate effect upon receipt of a loss notification from another operator or upon receipt of a contact from a customer informing Virgin Media that the customer is receiving service from another provider;

(e) Virgin Media must also undertake to refund switching customers who incurred charges for the 30-day notice period from November 2017 to 23rd September 2021;

(f) Virgin Media must confirm the total refund amount payable on foot of (e) above and explain the basis upon which it was calculated; and

(g) Virgin Media must undertake to write to the customer cohort referred to at (e) above indicating that they are due a refund.

94. The furnishing of that opinion by ComReg was the final step in the process envisaged by Regulation 31 of the Universal Service Regulations before the commencement of proceedings by ComReg. There were some further exchanges between the parties over the course of July and August 2022 including a letter dated 16th August 2022 from Matheson in which it was argued that ComReg had misanalysed the factual context, misinterpreted Regulation 25(6)(b) and had *"failed to reflect that the conduct which it criticises represents standard practice within the sector across Europe."* However, I do not believe that it is necessary to address that correspondence here. It has been overtaken by the evidence subsequently filed in these proceedings.

95. One last point should be noted in relation to the opinion. In the course of his submissions, counsel for Virgin Media suggested that, in its opinion, ComReg had failed to address all of the points made on his client's behalf by Matheson in their letter of 30th November 2021. I do not believe that it is necessary to address that contention. For the reasons which I explain further below, I have come to the conclusion that, if it is to succeed in these proceedings, ComReg must prove its case on the balance of probabilities. In those circumstances, any alleged failure on the part of ComReg to adequately address any argument made or evidence previously presented by Virgin Media is not relevant to the decision which the Court must make. The Court must reach

its own decision as to whether or not ComReg has succeeded in establishing a failure to comply with the obligation imposed by Regulation 25(6)(b). As explained below, the opinion has no binding effect albeit that the material contained in it is of some relevance in so far as ComReg urges the Court to adopt a similar view in respect of the claim made by it in these proceedings. But, because the opinion has no legal effect in itself, any alleged failure to address an argument made by Virgin Media is not material.

The commencement of these proceedings

96. These proceedings were launched pursuant to Regulation 31(5) of the Universal Service Regulations on 6th September 2022. The proceedings are in the form of an originating notice of motion (as provided for under Order 84B of the Rules of the Superior Courts) in which a declaration is sought that Virgin Media has not complied with its obligations under Regulation 25(6)(b) of the Universal Service Regulations and in which ComReg also seeks an order directing Virgin Media to undertake the steps set out in para. 110 of the opinion and summarised in para. 92 above including the requirement to refund customers.

The issues which require to be addressed

97. As noted in the introduction to this judgment, this is the first application to the Court under Regulation 31. In those circumstances, it seems to me that the first issue which requires to be addressed is the approach to be taken by the Court on an application of this kind. I then need to consider what is the meaning to be given to Regulation 25(6)(b). Once those issues have been addressed, I will turn to address whether, on the basis of the materials before the Court, a breach of Regulation 25(6)(b) has been established on either of the bases alleged by ComReg i.e. by reference to (a) the save activity on 1908 calls and/or (b) the imposition of a 30-day notice requirement

in cases where the minimum term has expired. For that purpose, it will be necessary to consider the materials which I have previously described above together with the affidavit evidence before the Court (as summarised below).

The approach to be taken by the Court on an application under Regulation 31(5)

98. In order to determine the approach which should be taken by the Court on an application of this kind, it is necessary to carefully consider the provisions of Regulation 31. The role of the Court is addressed in Regulations 31(5) to 31(8). However, as always, it is necessary to consider those provisions in the context of the Universal Service Regulations as a whole and in light of the wording and purpose of the Universal Service Directive (as amended) which the Regulations were designed to implement.

Analysis of the provisions of Regulation 31

99. As noted in para. 4 above, ComReg is required by Regulation 31(1) to monitor compliance with the Universal Service Regulations. Regulation 31(2) envisages that, as part of its policing role in monitoring compliance, ComReg can make findings of non-compliance against service providers. Regulation 31(2) provides as follows:

> *"Where the Regulator finds that an undertaking has not complied with an obligation, term or condition, requirement, specification or direction under these Regulations, the Regulator shall notify the undertaking of those findings and give the undertaking an opportunity to state its views or, if the non-compliance can be remedied, to remedy the non-compliance within a reasonable time limit as specified by the Regulator."*

100. Regulation 31(2) therefore envisages a process which involves ComReg, first, carrying out an investigation; second, making findings of non-compliance (or compliance as the case may be) on foot of that investigation; third, notifying the

relevant service provider (in this case Virgin Media) of those findings; and, fourth, giving the provider the opportunity to state its views (which Virgin Media availed of). In this case, the notification was subsequently amended but that is something that is specifically envisaged by Regulation 31(4) which provides that ComReg may *"amend or revoke any notification under this Regulation."* Regulation 31(4) plainly contemplates that it may be necessary for ComReg to modify the findings made in a notification of non-compliance in light of the views expressed by the provider in response to the notification.

101. From the language and structure of Regulation 31, it is clear that the Regulation envisages that the notification to be given by ComReg to the affected party is a formal document setting out its findings in some level of detail. That follows from the fact that Regulation 31(2) requires that notification is given to the affected party of ComReg's *"findings"* and from the fact that it envisages that the party must be given the opportunity to state its views. Clearly, the affected party would be unable to do so unless the basis for the findings was appropriately explained. The fact that Regulation 31(3) empowers ComReg to publish the notification further reinforces this conclusion.

102. Notwithstanding the formal and detailed nature of the notification and notwithstanding the reference to *"findings"* made by ComReg, the notification is not the final step in the process. In the first place, Regulation 31(2) plainly envisages that the *"findings"* are subject to further submission from the recipient of the notification, following which the notification can be amended or revoked under Regulation 31(4). Secondly, Regulation 31 does not purport to make the findings outlined in the notification legally binding on the recipient. Instead, Regulation 31(5) provides that, if ComReg is of opinion that the recipient of the notification has not complied with an obligation arising under the Regulations, it may apply to the High Court for (among

other things) a declaration of non-compliance and an order directing the recipient to comply with the obligation in question. It is noteworthy that the Regulation does not envisage that an application can be made to enforce the findings made in ComReg's notification or in its opinion. This is clear from the language of Regulation 31(5) which provides as follows:

> *"Where, at the end of the period specified by the Regulator under paragraph (2), the Regulator is of the opinion that the undertaking concerned has not complied with an obligation, term or condition, requirement, specification or direction, the Regulator may, whether or not the non-compliance is continuing, subject to paragraph (10), apply to the High Court for such order as the Regulator considers appropriate including -*
>
> *(a) a declaration of non-compliance,*
>
> *(b) an order directing compliance with the obligation, term or condition, requirement, specification or direction,*
>
> *(c) an order directing the remedy of any non-compliance with the obligation, term or condition, requirement, specification or direction, or*
>
> *(d) an order as provided for in paragraph (9)."*

103. It is very important to note that the reference to an "*obligation, term or condition, requirement, specification or direction"* is not to any direction or obligation imposed by ComReg in its notification setting out its *"findings"* – or in its subsequent opinion – but to the "*obligation, term or condition, requirement, specification or direction"* identified in Regulation 31(2) namely those which arise *"under these Regulations".* Thus, although the formation of an opinion by ComReg is a necessary precursor to the bringing of proceedings under Regulation 31(5), the proceedings are not to enforce the opinion or the notification which preceded it. The proceedings are to

enforce the underlying obligations arising under the Universal Service Regulations. It is therefore clear that the approach taken in Regulation 31 is quite different to that taken in relation to decisions of ComReg under many other Regulations that applied at the time these proceedings were commenced such as the Access Regulations[29] or the Authorisation Regulations[30] or even other aspects of the Universal Service Regulations themselves[31]. In the case of decisions made by ComReg under a range of Regulations, there is a right of appeal to the High Court under Regulation 4(1) of the Framework Regulations.[32] In such cases, absent a successful appeal, those decisions of ComReg are final and binding and must be complied with by the undertaking to which they are addressed. In contrast, neither the notification nor opinion under Regulation 31 are given that status. For that reason, Regulations 3(2) and 3(3) of the Framework Regulations specifically exclude the notification and opinion under Regulations 31(2) and 31(5) of the Universal Service Regulations from the ambit of Part 2 of the Framework Regulations dealing with appeals to the High Court.

104. Furthermore, there is nothing in Regulation 31 to suggest that the notification under Regulation 31(2) or the opinion under Regulation 31(5) are given any evidential or other status in the context of an application under Regulation 31(5). This makes it quite different to the statutory provision considered by Cooke J. in *Rye Investments Ltd. v. Competition Authority* [2009] IEHC 140 which was one of the authorities cited by counsel for ComReg in their written submissions in support of the proposition that the

[29] i.e. EC (Electronic Communications Networks & Services) (Access) Regulations 2011 (S.I. 334 of 2011)
[30] i.e. EC (Electronic Communications Networks & Services) (Authorisation) Regulations 2011 (S.I. 335 of 2011)
[31] For example, Regulation 6(2) of the Universal Service Regulations empowers ComReg to impose terms and conditions on undertakings in the context of disabled end-users. Under the Framework Regulations described below, an appeal lies from such decisions to the High Court.
[32] i.e. EC (Electronic Communications Networks & Services) (Framework) Regulations 2011 (S.I. 333 of 2011)

"material error" test is the approach which should be taken under Regulation 31(6)[33]. The *Rye Investments* judgment involved a consideration of s. 24 of the Competition Act 2002 (*"the 2022 Act"*). Not only did s. 24 provide for an appeal to the High Court from a determination of the Competition Authority under s. 22 of 2022 Act[34] but it expressly provided in s. 24(4) that:

> *"Any issue of fact or law concerning the determination concerned may be the subject of an appeal under this section* ***but, with respect to an issue of fact, the High Court, on the hearing of the appeal,*** *may not receive evidence by way of testimony of any witness and* ***shall presume,*** *unless it considers it unreasonable to do so,* ***that any matters accepted or found to be fact by the Authority*** *in exercising the relevant powers under section 22* ***were correctly so accepted or found****."*[35]

105. In contrast to s. 24 of the 2002 Act, there is no language to similar effect in Regulation 31. Nor is there any other language suggesting that the findings made by ComReg are to be given any special status – or any status at all – in the context of proceedings instituted by ComReg under Regulation 31(5). On the contrary, Regulation 31(5) merely speaks of ComReg applying to the High Court for *"such order as the Regulator considers appropriate including (a) a declaration of non-compliance …"* or any of the other relief specified in paras. (b) to (d). The very fact that ComReg has to apply to the High Court for such orders reinforces the fact that notifications and opinions of ComReg under Regulation 31 are not self-executing. Regulation 31(5) does not envisage that ComReg can apply to enforce its findings or its opinion against a

[33] As noted previously, this argument was not pressed at the hearing.
[34] Section. 22 was concerned with determinations made by the Competition Authority in relation to mergers or acquisitions – in particular as to whether they would lessen competition.
[35] Emphasis added

provider which it considers to be in default of its obligations under the Universal Service Regulations. Instead, the Regulation clearly requires ComReg to apply to the Court to seek the relief of the kind specified in each of paras. (a) to (d) each of which requires a finding to be made by the Court that there has been a failure to comply with an obligation under the Universal Service Regulations. Having regard to the terms of Regulation 31(5), it is plainly for the Court to reach a determination on that issue.

106. This conclusion is further reinforced by the terms of Regulation 31(6) with which Regulation 31(5) must be read. The latter deals with the application by ComReg while the former addresses the powers of the Court. Regulation 31(6) provides as follows:

> *"The High Court may, on the hearing of the application referred to in paragraph (5), make such order as it thinks fit which may include -*
>
> *(a) a declaration of non-compliance,*
>
> *(b) an order directing compliance with the obligation, term or condition, requirement, specification or direction,*
>
> *(c) an order directing the remedy of any non-compliance with the obligation, term or condition, requirement, specification or direction, or*
>
> *(d) an order as provided for in paragraph (9),*
>
> *or refuse the application. …"*

107. It is clear from the language of Regulation 31(6) that the Court is given very wide powers on foot of an application by ComReg under Regulation 31(5). The Court can *"make such order as it thinks fit"*. It can refuse ComReg's application or it can grant the relief sought but it is clear that it is not limited solely to either of those courses. The list of orders specifically enumerated in Regulation 31(6) is not exhaustive of the

Court's powers. This follows both from the fact that the Court can make such order as it thinks fit and from the use of the words *"which may include ..."*. While that is so, it is notable that the language of Regulation 31(6) does not suggest that the legislator[36] intended that the Court would make an order affirming the findings or opinion of ComReg or any other order framed by reference to those findings or opinion. No reference whatever is made in Regulation 31(6) to either the notification which ComReg is empowered to issue under Regulation 31(2) or to its opinion under Regulation 31(5).

The submissions on behalf of Virgin Media in relation to the interpretation of Regulation 31

108. In light of the terms of Regulations 31(5) and 31(6), counsel for Virgin Media submitted that there was a clear parallel between the approach taken in that Regulation and the approach taken in s. 14 of the 2002 Act under which the Competition Authority was given a right of action in respect of an agreement, decision, concerted practice or abuse which was prohibited under ss. 4 or 5 of that Act or Articles 81 or 82 of the Treaty establishing the European Community.[37] Counsel for Virgin Media relied in particular on the following passage from the judgment of the Supreme Court in *Competition Authority v. O'Regan* [2007] 4 I.R. 737 where Fennelly J. said at p. 764:

> *"There are, furthermore, two fundamentally different ways of incorporating competition principles into law. The first model assigns investigation and decision making power to an independent expert administrative body designated as a competition authority. Under that model, primary decisions are made by the authority. Consequently, the role of the courts is normally limited*

[36] The Regulations were enacted by the Minister under s. 3 of the European Communities Act 1972.
[37] As the European Union was designated at the time. Both the 2002 Act and the Treaty have been significantly changed since the former was enacted in 2002 but those changes are not relevant for present purposes.

> *to judicial review. This is the model of the European Union, where the Commission investigates and makes decisions, which may be reviewed by the Court of First Instance pursuant to Article 230EC. It is also the model in some member states. The second model entails assigning to the courts the task of making the substantive decisions. It is true that, under the direct effect of Articles 81 and 82 of the Treaty, courts may, from time to time, be asked to resolve competition disputes between private undertakings. There have been a small number of such cases in this jurisdiction. The present case arises from the special role assigned by s. 14 of the Competition Act 2002 to the Authority. The Authority has not made any decision other than to institute the proceedings. It identifies market conduct and invites the court to condemn it.* ***There is no prima facie legal presumption in favour of the Authority's view. The Authority carries the normal civil burden of proof****."*[38]

109. There is an obvious difference between the terms of s. 14 of the 2002 Act and Regulation 31 in that the former merely contemplated the commencement of proceedings by the Competition Authority. Section 14 did not contain any of the preliminaries to action which are required under Regulation 31 namely the service of a notification setting out the findings of the regulator, the submission of *"views"* by the recipient of that notification or the forming of an opinion by the regulator prior to the commencement of the proceedings. However, there is, nonetheless, a parallel in that both provisions envisage the commencement of proceedings by the relevant regulator in which the regulator will seek a primary remedy from the Court namely a finding that the respondent or defendant has not complied with an obligation imposed by a relevant

[38] Emphasis added.

statutory provision. In neither case is the relief available framed by reference to some earlier step taken or finding made or opinion formed by the relevant regulator.

ComReg's submissions in relation to the interpretation of Regulation 31

110. Counsel for ComReg submitted that, in the case of an action under s. 14 of the 2002 Act, the Court would start with a completely *"clean slate"*. Counsel argued that, under Regulation 31, *"it is not an entirely clean slate"* because, prior to the commencement of proceedings, *"significant steps"* have been taken which *"manifest the views of the expert body in the area"*[39] and that *"the Court has the benefit of ComReg's findings of fact"*[40]. Counsel also submitted that *"there is considerable curial deference to be paid to the views of ComReg. ... we ... say that, ... in making this application we have to satisfy the Court on the civil standard, balance of probabilities, that there is non-compliance with the obligation in the manner we allege ... But, clearly, the Court does not have to and could not possibly conduct the investigation all over again or go through every piece of evidence..."*[41] As noted previously, counsel for ComReg had initially sought to make the case that the *"findings"* of ComReg should only be interfered with if they were shown to be subject to a material error but that argument was not ultimately pursued at the hearing.

Conclusions with regard to the approach to be taken by the Court under Regulation 31

111. In my view, counsel for ComReg were clearly correct to acknowledge that, on an application under Regulation 31(5), ComReg bears the burden of satisfying the Court, on the balance of probabilities, that there is non-compliance with an obligation

[39] See the transcript for Day 5 at p. 113
[40] See the transcript for Day 5 at p. 116
[41] See the transcript for Day 1 at p. 37

imposed by the Universal Service Regulations. That seems to me to follow from all of the considerations outlined in paras. 99 to 107 above. However, counsel for ComReg has not identified any legal basis for their argument that the Court can proceed on the basis of *"the findings of fact"* by ComReg. As I have already explained, the findings made by ComReg in any notification under Regulation 31(2) or any amended notification under Regulation 31(3) are not given any status under the terms of the Regulation as a whole. There is nothing in the terms of the Regulation as a whole to suggest that the findings have any legal effect. On the contrary, the Regulation requires that an application be made to the Court for a declaration of non-compliance. In circumstances where the Regulation does not go so far as to make the *"findings"* of ComReg legally binding and where it does not confer any evidential status on either its *"findings"* in the notification or its opinion, it cannot be the case that the Court can proceed to address the matter on the basis of any such findings unless those findings are accepted by the respondent to the proceedings under Regulation 31(5) (in this case, Virgin Media).

112. Counsel for ComReg also did not identify any sufficient legal basis to establish that, in proceedings under Regulation 31(5), the Court should accord curial deference to ComReg's findings or views. On a number of occasions in the course of the hearing, I sought to tease out with counsel for ComReg the basis on which they contended that curial deference should be shown to the findings or views of a regulator in circumstances where:

(a) the regulator is required under Regulation 31(5) to initiate action in the Courts seeking a declaration from the Court that there has been a breach of the Regulations; and

(b) where it is accepted that ComReg has the burden of proving its case on the balance of probabilities.

113. In response, in the course of closing submissions on Day 5 of the hearing counsel for ComReg refined the argument as follows[42]:

> *"… the Court has the benefit of that statutory process having already happened and that's the extent of it ….* [counsel for Virgin Media] *is not disputing aspects of this, and much of it he doesn't, he disputes the characterisation of some of it, but not some of …* [the] *fundamental facts that we rely upon. So the Court can take those and use them to determine whether we have discharged our burden of demonstrating that … the … conditions and procedures do not act as a disincentive. So that is the extent of it … **I'm not asking for a radical reworking of the burden or suggesting that any deference such as would apply on a statutory appeal or a judicial review applies here**… "*[43]

114. While counsel for ComReg did not go so far as to wholly abandon the argument that some level of deference should be accorded to ComReg's views, her submissions came very close to it. In my view, counsel was plainly right to retreat on this issue. No authority was cited which suggests that curial deference arises in circumstances such as these. In the course of the hearing, the only two circumstances which were identified as triggering some level of curial deference were appeals from specialist or expert bodies and judicial review of decisions made by such bodies. The decisions of the Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Orange v. Director of Telecommunications Regulation* [2000] 4 I.R. 159 are examples of the former while the decision in *O'Keeffe v. An Bord Pleanála* [1993]

[42] See the Day 5 transcript at pp. 116-118
[43] Emphasis added.

1 I.R. 39[44] is an example of the latter. Crucially, in both of those types of case, a determination has been made by the expert body concerned which, in the absence of an appeal or a successful judicial review challenge, would be final and binding. Those types of case are in marked contrast to the present application where the findings in the notification and the opinion have no binding legal effect. Given that the legislator has not seen fit to make ComReg's findings or opinion under Regulation 31 binding on anyone (or to confer any particular status on them), I cannot identify any proper basis on which the Court could take it upon itself to accord any curial deference to them. In the circumstances, it is unnecessary to reach any conclusion on the argument made by counsel for Virgin Media that, in any event, the issues in question involve matters of law in respect of which ComReg could not be said to have any expertise.

115. It also seems to me that counsel for ComReg were right to concede that their client, as the applicant for the relief claimed in these proceedings, bears the burden of establishing that Virgin Media is in breach of its obligations under the Universal Service Regulations. This follows from the fact that, as previously noted, ComReg is required under Regulation 31(5) to commence proceedings in the High Court seeking to establish – through a High Court determination – that the provider is in breach of its obligations under the Regulations. It is trite law that he who asserts must prove. As the authors of *McGrath on Evidence*[45] succinctly observe: *"The general principle applied in civil cases is that he who asserts must prove (ei incumbit probation qui dicit, non qui negat). Thus, whichever party contends for the existence of a particular fact will bear the burden of proving its existence."*

[44] Albeit that *O'Keeffe* must now be read in the light of *Meadows v. Minister for Justice, Equality & Law Reform* [2010] 2 I.R. 701
[45] 3rd Ed., 2020, at para. 2-136

116. There may, of course, be circumstances where facts are agreed or not contested, in which case, an applicant is relieved of the normal burden of proof. In this case, as illustrated by paras. 15 to 94 above, there was extensive engagement between the parties prior to the commencement of the proceedings. In the course of that engagement, Virgin Media answered questions posed by ComReg and supplied information to ComReg. It seems to me that ComReg is entitled in these proceedings to rely on any admissions made by Virgin Media during the course of that engagement. Unsurprisingly, since those documents emanated from Virgin Media itself, no objection was taken by Virgin Media in relation to their admissibility into evidence. ComReg is also entitled to rely on any conclusions of fact reached by it in its amended notification or opinion to the extent that they are accepted by Virgin Media. However, in the event that any dispute arises on the facts, ComReg bears the ordinary burden in civil litigation of proving such disputed facts on the balance of probabilities. In this context, it should be noted that the hearing proceeded solely on the basis of the affidavit evidence and the documents exhibited in those affidavits. There was no cross-examination of the deponents of the affidavits to assist in resolving any disputes as to fact that may exist. Having regard to the decision of the Supreme Court in *RAS Medical Ltd. v. Royal College of Surgeons in Ireland* [2019] 1 I.R. 63, this has the capacity to create a difficulty for ComReg (as the party who bears the burden of proof in the proceedings) in the event that it is necessary to resolve any such factual dispute in order to determine the issues between the parties.

117. It will therefore be necessary to carefully consider the exchanges between the parties prior to the commencement of the proceedings and also the affidavit evidence in order to determine the necessary facts for the purposes of assessing the case made by ComReg. It will also be necessary to come to a view on the legal test to be applied

under Regulation 25(6)(b) in assessing the material before the Court. That is the issue to which I now turn.

The legal test to be applied under Regulation 25(6)(b)

118. Before considering the text of Regulation 25(6)(b), there was one issue raised by counsel for Virgin Media that requires to be addressed first. In their written submissions, they argued that Regulation 25(6)(b) should be construed strictly in circumstances where a breach of the Regulation will also constitute a criminal offence. They referred in this context to Regulation 25(8) which provides as follows:

> *"An undertaking that fails to comply with—*
>
> *...*
>
> *(c) the requirements of paragraph (2), (4) or (6)*
>
> *commits an offence."*

119. In support of this argument, counsel for Virgin Media cited the well-known observation of Henchy J. in *Inspector of Taxes v Kiernan* [1981] IR 117 where he said, at p. 121:

> *"... if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language..."*

120. Counsel for Virgin Media also relied on the following passage from the judgment of Kearns J.[46]in *DPP v Moorehouse* [2006] 1 IR 421 at 443:

[46] As he then was.

> *"If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication."*

121. As counsel for ComReg submitted, in the course of opening the case, the principle addressed in the judgments of Henchy and Kearns JJ. is concerned with ambiguity in statutory provisions imposing criminal liability. In very broad terms, where such ambiguity exists, the Court will adopt the interpretation which is more favourable to the accused person than the less favourable interpretation. It is clear from the case law that this approach will be taken solely where there is genuine ambiguity. If there is no ambiguity, the principle will not apply.

122. This is confirmed by a number of authorities cited by counsel for ComReg including the decision of Noonan J. in *Fingleton v. Central Bank of Ireland* [2016] IEHC 1. That case concerned a challenge by the former chief executive of Irish Nationwide Building Society to a notice of inquiry served by the Central Bank under s. 33 AO of the Central Bank Act 1942 (as amended). The challenge was advanced on a number of grounds including a submission that the section should be construed narrowly by analogy with the principle against doubtful penalisation. Noonan J. addressed that principle in para. 96 of his judgment where he said:

> *"96. Although the subsection cannot be classified as one that imposes a penal sanction, it was I think conceded by the respondent in argument that it relates*

to such a provision and as such falls to be construed, if necessary, by reference to the principles applying to such legislation. These include the principle against doubtful penalisation or perhaps expressed in another way, penal statutes will be construed strictly in favour of the party subject to the penalty. Of course even where penal statutes are concerned, the court's function is to ascertain the meaning of the words used aided, if necessary, by the relevant rules of construction. This is clearly expressed in the words of Plowman J. in HPC Productions Ltd. [1962] Ch 466, at p. 485:

> *'In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted.'"*

123. Those observations of Plowman J succinctly describe the approach to be adopted. Noonan J. then considered the relevant authorities including *DPP v. Moorehouse* but concluded that the meaning of the provision was clear such that the principle was not engaged. He explained the position as follows in paras. 103 to 104:

> *"103. These cases demonstrate that the court may have resort to the relevant canons of construction where the legislative intent is unclear or ambiguous. The same applies to the double construction rule referred to by the applicant. The substance of this rule is said to be that where two constructions of the statute are equally possible, the court must give effect to the one that does not raise a constitutional issue. The constitutional issue that is said to arise in that context*

is that the interpretation proposed by the respondent provides for the imposition of a penal sanction without limitation as to time. I cannot see how that, without more, gives rise to any potential constitutional issue. Many criminal offences, including those of the most serious kind, are not subject to any statutory time limit. … Here again, the double construction rule only operates in the presence of two or more possible constructions of the statute.

104. ***None of these canons or rules avail the applicant in the absence of ambiguity, uncertainty or obscurity in the words of s. 33 AO (2)****. In my view, the meaning of the words is clear and does not depend on adding in anything to the section that is not there. The expression 'person concerned in the management' is in itself time neutral and is given context and meaning by the words that follow it in the subsection. It is to my mind clear beyond doubt that the time at which the person concerned in the management of a RFSP must be so concerned is the time at which the RFSP commits the prescribed contravention in which the person concerned participated. Any other construction offends common sense and gives rise to absurd results."*[47]

124. Counsel for ComReg also highlighted the approach taken by Charleton J. in *HSE v. Brookshore Ltd.* [2010] IEHC 165[48] at para. 11 where he said:

"It seems to me that the relevant subsection requires very little in the way of statutory interpretation. The 2002 Act was expressly passed in the interests of public health and uses the word 'roof' as an everyday expression, as opposed to a word that may have a slang meaning or one which has a technical implication to an expert. Whereas the provision creates a criminal offence, I am

[47] Emphasis added. The acronym *"RFSP"* refers to a regulated financial service provider.
[48] This was one of the authorities cited by counsel for Virgin Media in their written submissions.

not entitled to construe it so as to extend the area of operation of that offence beyond that which the Oireachtas intended, nor do I propose, and I am not entitled, to so strip it of meaning that the clear purpose of the legislation is undermined. That intention is to be found from the plain words of the statute set within its proper context."

125. Notably, these aspects of ComReg's submissions were not subsequently addressed in any level of detail by counsel for Virgin Media in his oral submissions. While the strict construction argument articulated in the latter's written submissions was not abandoned, counsel did not identify any specific element of ambiguity in the provisions of Regulation 25(6)(b). Absent ambiguity or lack of clarity in the words used in the Regulation, it is clear that the Court should give effect to the words used construed in context and in a manner which is consistent with the wording and purpose of the Universal Service Directive (as amended) which the Irish Regulations were designed to implement. In this context, it is important to keep in mind the well-established principle derived from the decisions of the European Court in Case C-14/83 *Von Colson v. Land Nordrhein-Westfalen* EU:C:1984:153 and Case C-106/89 *Marleasing v. Comercial Internacional de Alimentacíon* EU:C:1990:395 that national courts are obliged, in interpreting national provisions implementing a Directive, to do so in light of the wording and purpose of the Directive in order to achieve the results pursued by the Directive. Those principles have been applied on numerous occasions by courts in the State, including by the Supreme Court in *Nathan v. Bailey Gibson Ltd* [1998] 2 I.R. 162 and by McKechnie J. in *Eircom v. Commission for Communications Regulation* [2007] 1 I.R. 1, at paragraph 35.

126. Keeping those principles in mind, I now turn to the language of Regulation 25(6)(b) which provides as follows:

> *"Without prejudice to any minimum contractual period the undertaking shall ensure that conditions and procedures for contract termination do not act as a disincentive to a consumer to changing service provider."*

127. It will be seen that Regulation 25(6)(b) is in fairly simple and straightforward terms. It does not use technical or obscure language. That said, the Regulation provides no definition of the words *"condition", "procedure"* or *"disincentive".* It is true that Regulation 2 the Universal Service Regulations incorporates the definitions contained in Regulation 2 of the Framework Regulations but there is no definition of any of those words in that Regulation. The only relevant definition in Regulation 2 of the Framework Regulations is in respect of the word *"consumer"* which is defined as *"any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession".* There is no dispute between the parties that the customers of Virgin Media in issue are consumers.

128. Similarly, the underlying Universal Service Directive[49] (which the Universal Service Regulations transpose into national law) contains no relevant definitions for this purpose. Subject to one point of distinction, the terms of Regulation 25(6)(b) mirror the terms of the Universal Service Directive. Article 30(6) provides:

> "*Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider."*

129. The one point of distinction is that the Directive imposes the obligation on Member States while Regulation 25(6)(b) imposes the obligation on service providers such as Virgin Media. However, for present purposes, the key point is that Article 30(6) uses each of the three words that I have to consider in the context of Regulation 25(6)(b)

[49] See para. 1 above for the full citation of the Directive (as amended in 2009).

namely *"conditions"*, *"procedures"* and *"disincentive".* Article 30(6) must, in turn, be construed in light of the relevant recitals to the Directive which assist in understanding the purpose which the EU legislature had in mind in enacting the article. In my view, Recital 47 to the 2009 Directive[50] provides useful assistance in relation to the rationale for the introduction of Article 30(6) and should therefore be borne in mind in considering the meaning of the words in issue. Recital 47 provides:

> *"In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. This does not preclude the imposition of reasonable minimum contractual periods in consumer contracts. Number portability is a key facilitator of consumer choice and effective competition in competitive markets for electronic communications and should be implemented with the minimum delay, so that the number is functionally activated within one working day and the user does not experience a loss of service lasting longer than one working day …"*[51]

130. The words *"without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on"* are particularly helpful in understanding what the EU legislature had in mind when referring to *"conditions and procedures for contract termination do not act as a disincentive against changing service provider".* It seems to me to be clear from Recital 47 that the

[50] Again, see para. 1 above for the full citation of the 2009 Directive.
[51] Recital 47 goes on to deal with number portability and with circumstances where consumers are switched from one provider to another without their consent. However, as neither of those issues are directly in point, it is unnecessary to quote the full terms of the recital here. The evidence suggests that Virgin Media gives effect to number portability.

intention is to ensure that obstacles or impediments (whether contractual or procedural in nature) should not be imposed on customers who wish to cancel service after the minimum contractual period has expired. It follows that the word *"disincentive"* should be construed accordingly.

131. It was urged by counsel for Virgin Media that Recital 32 is also relevant for present purposes. It commences by stressing that: *"The availability of transparent, up-to-date and comparable information on offers and services is a key element for consumers in competitive markets where several providers offer services."* However, I believe that counsel for ComReg was correct when she suggested in her closing submissions that this recital is linked to Article 21 rather than Article 30. Article 21 imposes an obligation on Member States to ensure that their national regulators require service providers to publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs. There is a clear correlation between Article 21 and Recital 32 just as there is an equally clear correlation between Article 30(6) and Recital 47. I therefore do not accept that Recital 32 is relevant for present purposes.

132. In considering the approach to be taken under Article 25(6)(b), it is useful to consider the decision of the CAT[52] in *Virgin Media v. Office of Communications* [2020] CAT 5. That case involved a consideration of the meaning and effect of General Condition 9.3 (*"GC 9.3"*) of the relevant regulatory regime in the United Kingdom which, like Article 25(6)(b) in this jurisdiction, was based on Article 30(6) of the Universal Service Directive. At the time of the CAT decision, GC 9.3 provided as follows:

> *"Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination*

[52] The CAT was chaired on this occasion by Falk J.

> *do not act as disincentives for End-Users against changing their Communications Provider. …"*

Thus, the language is very similar to Regulation 25(6)(b). In its decision, the CAT provided some very helpful guidance as to the meaning to be attributed to the words *"conditions", "procedures"* and *"disincentive"*. The decision is particularly useful in circumstances where, although it dates from the same month as the exit of the United Kingdom from the European Union, it nonetheless interprets GC 9.3 in light of the wording and purpose of the underlying directive in precisely the same way as the courts of a Member State would do. The decision addressed an appeal by Virgin Media against a decision of the Office of Communications (*"Ofcom"*) in relation to charges imposed by Virgin Media in respect of early termination of a contract prior to the initial commitment period. Ofcom found that Virgin Media was in breach of GC 9.3 because, in practice, it charged customers an amount that was more than the revenue foregone, less costs saved arising from the premature termination. It was accepted that Virgin Media was legitimately entitled to impose conditions which genuinely protected the initial commitment period. That was specifically permitted under the GC 9.3, which in conformity with Article 30(6) of the Universal Service Directive, provided that the rule against disincentives to switching was without prejudice to the initial commitment period. The problem for Virgin Media in that case was that, although its contractual conditions expressly stated that the early termination fee would be *"no more than the charges you would have paid for the services for the remainder of the minimum period less any costs we save, including the costs of no longer providing you with the services."*, it imposed a higher charge, in practice, than was stipulated in the terms of the contract. That practice was considered both by Ofcom and the CAT to be a *"procedure"* within the meaning of GC 9.3.

133. In addressing the issue of the meaning to be given to *"conditions"* and *"procedures",* the CAT said at para. 74:

> *"Both Article 30(6) and GC 9.3 refer to 'conditions' and 'procedures'. The reference to 'conditions' is clearly apt to cover price and other contractual terms, but 'procedures' goes further, and covers the steps that a customer needs to take – the hoops that must be jumped through – in order to change provider. This might include, for example, procedures that made it excessively difficult to contact a CP, or obtain information, about switching."*[53]

134. The meanings given by the CAT to those words seem to me to accord with the ordinary meaning of the words. In my view, the word *"condition"* plainly refers to contractual terms. Because it is derived from EU law and is intended to be given the same meaning throughout the European Union, the word *"condition"* is not to be given the special meaning attributed to the word under Irish or English law – i.e. a term, the breach of which will entitle the innocent party to elect to rescind the contract and sue for damages. That is plainly not the meaning that would be given to the word in ordinary language. It seems to me that, when Article 30(6) is read in light of the wording and purpose of the Universal Service Directive, the word *"condition"* must be construed as referring to any contractual terms dealing with termination (other than those concerned with the minimum contractual period provided for in Article 30(5)) that act as a disincentive to a consumer switching service provider. Moreover, Recital 47 expressly uses the words *"**contractual** conditions"*[54].That seems to me to put the meaning beyond doubt. It follows that Regulation 25(6)(b) should be interpreted in the same way.

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[53] The acronym *"CP"* refers to a communications provider.
[54] Emphasis added.

135. The fact that Regulation 25(6)(b) extends to contractual terms means that the Regulation is capable of applying to those provisions of Virgin Media's standard form contract which extend the duration of the contract beyond the minimum term and which require the customer to give 30 days' notice of cancellation if he or she wishes to cancel after the expiration of that minimum term. In other words, the fact that the customer has signed up to the condition does not render Regulation 25(6) inapplicable. On the contrary, both the Directive and the Regulation are intended to apply to contractual terms which act as a disincentive to switching. This has the result that, if the 30 days' notice requirement amounts to such a disincentive, the fact that it is an express part of the contract with the customer will not, *per se*, take it outside the ambit of Regulation 25(6).

136. The meaning attributed by the CAT to the word *"procedures"* is equally helpful. It also accords with the ordinary meaning of the word when read in light of the wording and purpose of the Universal Service Directive. As the CAT stated in the extract quoted above, the meaning of the word *"procedures"* goes further than contractual conditions and extends to any hoops that must, in practice, be jumped through in order to change provider. That meaning sits well with the language of Recital 47 which, as noted above, refers to changing provider *"without being hindered by legal technical or practical obstacles … including … procedures, charges and so on."* The EU legislature clearly intended that the word *"procedures"* in Article 30(6) would cover any hoops of the kind described by the CAT. This therefore captures non-contractual or extra-contractual impediments to switching. It is therefore potentially relevant to the issue of *"save activity"* here.

137. The CAT also addressed the meaning to be given to the word *"disincentive"* in the context of GC 9.3. The CAT first discussed the decision of the CJEU in *Polska*

Telefonia EU:C:2010:395. That decision addressed Article 30(2) rather than Article 30(6). Article 30(2), in its then current form[55], provided that national regulators *"shall ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities."* Although *Polska Telefonia* was concerned with Article 30(2), it was, nonetheless, relevant to the issue before the CAT because, like Article 30(6), the test under Article 30(2) incorporated a requirement that the charges should not act as a disincentive. That said, the principal issue in *Polska Telefonia* related to whether a national regulator was entitled – in balancing the right of a service provider to recover its costs against the need to ensure that the charges imposed did not act as a disincentive – to fix the charge at a level exceeding the cost incurred by the provider in facilitating porting of the number. It should be noted that, at para. 25 of its judgment, the CJEU came to the conclusion that, under Article 30(2), national regulators have the task, using *"an objective and reliable method"*, of determining both (a) the costs incurred by the operators in providing number portability and (b) the level of the charge that could be imposed *"beyond which subscribers are liable not to use"* their entitlement to port their number. The CJEU then stated at para. 28:

> *"Having regard to all of the foregoing, the answer to the question referred is that Article 30(2) of the Universal Service Directive is to be interpreted as obliging the NRA to take account of the costs incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive. However, it retains the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, when a*

[55] The terms of Article 30 of the 2002 Directive were significantly overhauled in 2009.

charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility."[56]

138. In the case before the CAT, Virgin Media had sought to argue that, in *Polska Telefonia*, the CJEU had put a gloss on the words *"act as a disincentive"* in Article 30(2) and that the CJEU had gone so far as to require that a regulator must demonstrate that the measure in question had actually deterred the porting of a number.[57] As recorded in para. 98 of the CAT decision, Virgin Media placed particular emphasis on the reference to *"liable not to use"* in para. 25 of the CJEU decision. That argument was rejected by the CAT which made the point at para. 26 of its decision that, in *Polska Telefonia*, the CJEU was not focused on the meaning of the word *"disincentive"*. The CAT then continued in para. 100 and, very helpfully, advanced the following meaning for that word:

> *"In any event, the conclusion* [of the CJEU] *at [28], as well as the operative part of the judgment, ... refers both to 'disincentive' and to 'liable to dissuade'. The latter is in our view entirely consistent with 'act as a disincentive'.* ***A disincentive is not limited to something that actually deters a particular action, but also extends to things that mean that the step is less likely to be taken: is there some cost or other hindrance which makes the step less attractive, such that customers may choose not to take it? The phrase 'liable to dissuade" is consistent with this. It does not mean that customers are necessarily deterred.*** *However, if there is no objective evidence that demonstrates that the relevant condition or procedure had an impact on customer behaviour in fact, then it is*

[56] The acronym *"NRA"* refers to a national regulatory authority.

[57] Article 30(2) provides that regulators shall ensure that pricing between operators and/or service providers related to the provision of number portability is cost-oriented and that any direct charges to subscribers *"do not act as a disincentive for subscribers against changing service subscriber".* Thus, although Article 30(2) is directed at a different mischief to that addressed in Article 30(6), the test that the relevant cost should not act as a disincentive has an obvious parallel with Article 30(6).

> *difficult to see how it could be established that the condition or procedure does act as a disincentive, bearing in mind that Polska Telefonia requires an objective and reliable method to be used to determine whether the relevant condition or procedure acts as a disincentive. As discussed at [105] and [106] below, in this case Ofcom was entitled to conclude that there was an impact on customer behaviour"*[58]

139. In that case, Ofcom has gone so far, in its decision, to say that a disincentive need not necessarily delay or prevent a course of action, but simply makes it more difficult or costly to complete that action. It concluded that *"... where the source of discouragement is established by reference to clear and objective factors, that is sufficient to demonstrate a breach even if the discouragement does not prevent or delay switching in most cases".* The CAT took the view that, in light of *Polska Telefonia*, that conclusion *"slightly overstates the position".* The CAT explained that the requirement for an objective and reliable method (as identified in *Polska Telefonia*) relates not to the source of the discouragement as such but to the question whether the relevant procedure or condition acts a disincentive. At para. 102, the CAT then explained:

> *"If there was no impact at all on customer behaviour then the test is unlikely to be met. For that reason, for example, a very small overcharge might not be shown to act as a disincentive. In contrast, if there was an objectively measurable impact then that will be evidence that the condition or procedure acted as a disincentive. There may be an impact even if switching was not delayed or prevented in 'most cases' ... Indeed, that phrase implies that there was some impact."*

[58] Emphasis added.

140. In the course of his submissions in these proceedings, counsel for Virgin Media expressly acknowledged that it had never been part of Virgin Media's case in Ireland that disincentives are confined to things that will necessarily block switching.[59] However, he drew attention to what the CAT said in the previous paragraph of the decision (i.e. para. 101) where they said that a disincentive *"need not necessarily delay or prevent a course of action, but simply make it more difficult or costly to complete."* He argued that, taking the words "*difficult"* and *"costly"* together, this gives a flavour of what is envisaged by a disincentive. But I would not read para. 101 as suggesting that the relevant term or procedure must give rise to both difficulty and cost before it can be considered to constitute a disincentive. It seems to me that the CAT regarded difficulty and cost as separate (and alternative) examples of the kind of impediment which, depending on the circumstances, are capable of amounting to disincentives. In the case before the CAT, the issue was primarily one of cost but there is nothing in the rationale of the Tribunal to suggest that cost is a necessary element of a disincentive. Moreover, there is nothing in the terms of the Universal Service Directive to support the view that there must be a cost aspect to the disincentive. On the contrary, Recital 47 simply includes cost as one of the factors in a non-exhaustive list of factors that may constitute an obstacle to cancelling service. It will be recalled that the recital refers to legal, technical or practical obstacles *"including contractual conditions, procedures, charges and so on".* There is nothing in that language to suggest that cost is a necessary element of a disincentive. It is merely one example of what might, of itself, amount to a disincentive. The language of the recital plainly contemplates that a contractual condition or procedure which creates an obstacle may amount to a disincentive even where it has no costs implications.

[59] See Day 3, p 128.

141. On the facts, the CAT upheld the decision of Ofcom even though the data supplied in an expert report provided by Virgin Media showed that the number of customers who were deterred was *"quite modest".* At para. 106, the CAT made clear that:

> *"we do not accept that some particular threshold of materiality should be read into GC 9.3. As we have said at [102] above, if there is no objectively measurable impact then it is unlikely that it will be demonstrated that the relevant condition or procedure acts as a disincentive. If an impact on customer behaviour is shown, as we consider it was in this case, then the level of materiality may well be relevant to the quantum of penalty, but not to the prior question of whether GC 9.3 is engaged at all."*

142. One further aspect of the CAT decision merits attention for the purposes of this case. One of the arguments made by Virgin Media in that case was that impact on competition was a consideration at least in the context of materiality. In para. 109 of the decision, it is recorded that counsel for Virgin Media had made the case that, because no impact on competition had been demonstrated, there could not be said to be any evidence of disincentive effect, apart from the quite modest numbers disclosed in Virgin Media's expert report. This argument was rejected by the CAT in terms which seem to me to be plainly correct. At para. 110, the CAT said:

> *"We do not consider that Ofcom fell into error on this issue. Article 30(6) and GC 9.3 are straightforward. The aim is to ensure that consumers can change CPs without being hindered. Clearly, the underlying policy is to allow consumers to take advantage of the competitive environment, but what engages those provisions is conditions or procedures that disincentivise switching. There is no separate requirement to show any particular impact on competition."*

143. It seems to me that the approach taken by the CAT is entirely correct and that it is consistent with the wording and purpose of the Universal Service Directive. I believe that a similar approach should be applied in respect of Regulation 25(6)(b) of the Universal Service Regulations. In my view, the following conclusions can be reached as to the meaning and effect of the Regulation:

(a) The word *"conditions"* should be construed as referring to contractual terms (including price). But the word cannot be read on its own. The only contractual terms that fall within the ambit of the Regulation are those which act as a disincentive to the exercise of a customer's choice to move to a different provider. Where contractual terms do fall within the ambit of Regulation 25(6)(b), it is no defence for a provider to rely on the fact that the customer, by signing up to the contract, has agreed to such a term.

(b) Given the terms of Recital 47, it seems to me that the word *"disincentive"* must be read as something which operates as an obstacle or impediment to switching. For that reason, I believe that ComReg has gone too far in para. 82 of its opinion in so far as it appeared to suggest that the offer of better terms would, of itself, constitute a disincentive within the meaning of the Regulation. While there are circumstances where the making of such an offer (in combination with other factors) will amount to an obstacle or impediment to switching, I do not believe that the making of such an offer would ordinarily be understood in that way – at least in circumstances where the customer is receptive to such an offer being made. On the other hand, where an agent persists in sales activity in which the customer has no interest, that would seem to me to be capable of constituting an obstacle to switching. This is an issue to which I return when considering some of the transcripts of customer calls;

(c) Having regard to the approach taken by the CAT, the word *"disincentive"* is not limited to something that actually deters switching. It also extends to procedures or contractual terms that have the effect that switching is less likely to occur.

(d) The word *"procedures"* has a very broad meaning and, when read in conjunction with the word *"disincentive",* it extends to practical obstacles or impediments that a provider may, in practice, seek to place in the path of a customer to hinder the exercise of their choice to move to a different provider. To paraphrase what was said so succinctly by the CAT – such procedures cover any hoops that the customer must jump through in order to change provider;

(e) It also seems to me that the word *"procedure",* when used in connection with a service provider,[60] involves some level of systematic operation or course of action on the part of the provider. An isolated or one-off occurrence could not plausibly be described as a *"procedure";*

(f) An objective and reliable method must be used to establish whether a particular condition or procedure acts as a disincentive. While the decision of the CAT to that effect was made in the context of binding findings being made by a regulator; it seems to me that ComReg must be held to the same standard in discharging the burden, in these proceedings, of establishing, on the balance of probabilities, that Virgin Media's conditions or procedures act as a disincentive against switching.

[60] Regulation 25(6)(b) refers to an *"undertaking"* but it is clear that the type of undertaking concerned is a service provider.

(g) If there is no objective evidence of impact on customers' behaviour, then it becomes more difficult to establish that the condition or procedure does act as a disincentive.

(h) On the other hand, as the CAT made clear, there is no threshold of materiality; once an objectively measurable impact on customer behaviour is shown, that is enough even if switching was not delayed or prevented in a majority of cases.

(i) The CAT also made clear that it is not necessary to show that there is an impact on competition.

144. It seems to me that this approach is entirely consistent with the wording and purpose of the Universal Service Directive and with the ordinary meaning of the words used in Regulation 25(6)(b) when read in the context of the Directive. The words used in the Regulation are ordinary words. They are not technical words. They are not ambiguous or difficult to construe – although it will always be a matter of judgment to determine whether, on the facts of any given case, the facts come within the ambit of the specific language used. That does not make the words ambiguous. It simply reflects the fact that such a determination must always be made whenever it is necessary to decide whether a given factual situation falls within the ambit of a specific statutory prohibition.

145. In looking at the meaning of Regulation 25(6)(b), counsel for Virgin Media sought to rely on Ofcom guidance issued in 2022 in relation to reformulated provisions then brought into force in the United Kingdom – namely *"Ofcom's Guidance under General Condition C1 – contract requirements".* According to counsel for Virgin Media, General Condition 9.3 (discussed in the CAT decision) has since been re-labelled C1.3 and is covered by the Ofcom guidance. Counsel accepted that Ofcom guidance is not law but he submitted that it shows that ComReg has gone too far in this

case in so far as its approach to save activity is concerned. He argued that the key interpretative question is whether the prohibition on disincentive within the meaning of Regulation 25(6)(b) covers *"reasonable, non-hassling, non-misleading save activity"*. He submitted that, if the term *"disincentive"* does not cover that kind of activity, ComReg has no *vires* to require that activity of that kind should be *"preceded by a specific route to immediate cancellation"*. Counsel for Virgin Media relied in particular on para. 1.6 of the Ofcom guidance:

> *"We consider that to act as a 'disincentive' a condition or procedure does not necessarily have to prevent an end-user from terminating (although it may do so). A condition or procedure could cause unreasonable effort, hassle or undue difficulty when seeking to terminate a contract such that it acts as a disincentive for an end-user even if that end-user ultimately still completes a switch of provider."*

146. Counsel for Virgin Media placed considerable emphasis on this passage. He submitted that, by focusing on unreasonable effort and hassle or undue difficulty, the Ofcom approach does not prohibit *"reasonable, helpful, non-misleading, save activity"*. He suggested that save activity of that kind does not involve, on the part of the person who is considering cancellation, unreasonable effort, hassle, or undue difficulty and that, accordingly, it cannot be said to constitute a disincentive. He also relied on para. 1.07 of the Ofcom guidance to the following effect:

> *"We recognise that some end-users contacting CPs about ending their services will have chosen to do so in order to have a conversation about any offers or options available to them and to take advantage of any discounts that the CP might provide as a result of those conversations. This can be beneficial to the consumers concerned, and we are not seeking to prevent these conversations*

for those end-users who wish to have them. However, we are also aware that other end-users want to terminate their services without having these conversations and in those circumstances prolonged retention activity may act as a disincentive. CPs should consider the needs of these end-users within their conditions and procedures to ensure that they do not act as a disincentive against changing CP."

147. Counsel for Virgin Media sought to contrast Ofcom's approach with the position adopted by ComReg in this jurisdiction. He said that, in defining *"disincentive",* Ofcom has recognised that certain retention activity will not act as a disincentive namely save activity that is not prolonged in nature. He argued that this is consistent with how Ofcom defines disincentive in para. 1.6 of the guidance (i.e. procedures that cause unreasonable effort, hassle or undue difficulty). He also stressed that Ofcom's approach does not involve the mandatory two-stage process advocated by ComReg in these proceedings.

148. In contrast, counsel for ComReg, in her closing argument, submitted that para. 1.6 of the Ofcom guidance provides no basis for Virgin Media's argument about *"non-hassling"* save activity. She submitted that, one cannot plausibly reverse engineer this non-binding guidance to suggest that Ofcom was in some way giving its blessing to save activity which does not give rise to *"too much hassle".* She placed emphasis on the words in para. 1.7 to the effect that Ofcom is not seeking to prevent conversations on discounts or offers to consumers *"who wish to have them"* but that other consumers "*want to terminate their services without having these conversations and in those circumstances prolonged retention activity may act as a disincentive."* She also highlighted that counsel for Virgin Media had not opened para. 1.9(a) of the guidance where Ofcom outlines what it regards as good practice as follows:

> *"To reflect different end-users' preferences and needs, offering options to end-users to terminate contracts which include both 'real-time' and 'non-real-time' communication options. For example, by phone and/or webchat, where the end-user would speak directly in real-time to a customer service agent or using non-real-time options, such as by letter, email or via an online account, where they do not need to speak directly to the CP."*

149. Counsel for ComReg submitted that this passage shows that Ofcom envisages that customers should not have to engage if they do not wish to do so. She also referred to further good practice advice in the same document about the need to train agents to identify when a customer wishes to terminate and to cease save activity at that point. In this context, Ofcom say on p. 4 of the guidance document that the following should be in place:

> *"... clear internal guidance, regular briefings and ongoing training for agents about how to identify if an end-user making a termination request wants to do so without having a retention conversation, and what is appropriate retention activity in these circumstances. For example, making clear that in circumstances where an end-user does not want to have a retention conversation, the agents understand it is not appropriate to engage in any further retention activity and that they should instead promptly process the request."*

150. Counsel for ComReg argued that this is simply a different approach to achieve the same goal as the two-step approach which it advocates in these proceedings. Bearing para. 1.9(a) in mind, she characterised it as a twin-track approach, that providers should facilitate mechanisms to terminate without having to call but that, where a customer does call, the customer service agents should be trained to call a halt where the

consumer clearly has no interest in save activity. She submitted that the guidance is clear that it is not good practice to subject consumers to this type of activity if they do not want it. She maintained that the guidance does not support the case made by Virgin Media that Ofcom has not gone down the same road as ComReg.

151. While it is interesting to note the position taken by Ofcom in the United Kingdom, I do not believe that any weight can be afforded to its views in these proceedings. In the first place, the views have no legal status. Unlike the decision of the CAT, they have not been formed following an exchange of legal argument in the same way as a decision of a court is arrived at. Secondly, they are views expressed after the United Kingdom has left the European Union and is no longer bound by the provisions of EU Directives. Thirdly, I have to decide the issues in this case by reference to the evidence before me. Thus, while I believe that the legal principles which emerge from the decision of the CAT to be of assistance, I cannot treat the Ofcom guidance in the same way.

152. I also do not believe that I can have regard to Eircom notices and the BEREC material on which ComReg relied. In so far as the Eircom notices are concerned, I have no sufficient information in relation to the facts underlying ComReg's complaint against Eircom and I have not been provided with the terms of the settlement agreement reached between ComReg and Eircom. It is accordingly impossible to assess whether there is truly a parallel between the facts of that case and the facts here. Moreover, the Eircom notices do no more than represent the view of ComReg. They do not have the status of a binding finding. In so far as the BEREC material is concerned, it has been summarised in para. 53 above. It suggests that there are rules in some EU Member States which restrict the nature of the communications which a service provider can have with a customer who has given notice to cancel. But I have been given no details

of the nature of those rules and, crucially, it would appear that, in those Member States, explicit rules have been put in place to that effect. That is not the approach which has been taken in the Universal Service Regulations here. Instead, the legislator has opted to enact Regulation 25(6)(b) which does not attempt in any way to enumerate the types of procedures which fall foul of the prohibition against disincentives to changing service provider. In those circumstances, I do not believe that the BEREC material is of any assistance.

Consideration of the evidence before the Court

153. Bearing in mind the principles summarised in para. 143 above, it is next necessary to consider, whether, on the evidence before the Court, ComReg has established that Virgin Media has failed to comply with the obligations arising under Regulation 25(6)(b). That requires a consideration of the evidence before the Court. That evidence comprises any admissions previously made by Virgin Media in the course of its interaction with ComReg together with the affidavit evidence of the parties placed before the Court and, to the extent that there is no issue as to admissibility or proof, the documents exhibited to those affidavits.

154. There are two distinct complaints made by ComReg. For that reason, I believe it makes sense to separately consider the evidence in relation to:

(a) Save activity; and

(b) The issue in relation to the 30-day notice requirement.

155. Below, I first address the case made in respect of save activity. Once I have reached a conclusion on that issue, I will then turn my attention to the 30-day notice requirement.

The evidence in relation to *"save activity"*

156. A number of affidavits were sworn on behalf of the parties in the course of the proceedings. Those affidavits addressed both the issue of save activity and the 30-day notice requirement. I will first consider those aspects of them dealing with save activity. I will return to them at a later point in this judgment when I address ComReg's case in respect of the 30-day notice requirement.

The first affidavit of Ms. Miriam Kilraine sworn on behalf of ComReg

157. ComReg's motion commencing these proceedings was grounded on Ms. Kilraine's affidavit sworn on 6th September 2022 in which she exhibits all of the exchanges between the parties summarised above including the amended notification of non-compliance of 23rd September 2021 and the opinion which I have previously described. In circumstances where much of Ms. Kilraine's affidavit (which runs to 101 paragraphs) is taken up with a description of the events and documents which I have already described above, it is unnecessary to repeat that exercise here. No attempt is made in the affidavit to rely on any additional evidence. It is therefore clear that, for the purposes of these proceedings, ComReg is relying on the amended notification and the opinion together with the underlying materials relied on in those documents (including the materials provided by the defendant in the course of the investigation.

The replying affidavit of Ms. Bláithín Harnett sworn on behalf of Virgin Media

158. On 14th November 2022, a detailed replying affidavit was sworn by Ms. Bláithín Harnett on behalf of Virgin Media. Like the case made previously in the correspondence from Matheson, Ms. Harnett, in para. 27 of her affidavit, contended that ComReg's opinion in relation to save activity *"proceeds upon a fundamental misapprehension of*

the customer interaction" and that ComReg *"wrongly assumes that all situations in which customers raise cancellation begin with a 'customer calling to cancel.'"* That averment is consistent with the case made in the correspondence from Matheson but it is difficult to reconcile it with the material which Virgin Media itself provided to ComReg in June 2020 in response to the latter's information request of 16th March 2020. As explained in para. 15 above, ComReg, at Q8 of Appendix 1 to that information request, expressly asked Virgin Media for (inter alia) details of the number of customers who *"called and requested to cancel".* As noted in para. 18 above, Virgin Media provided an unqualified answer to that question in Appendix 3 to its response of 19th June 2020 in which it described this category as *"Number of customers that called and requested a cancellation".* The answers given by Virgin Media to Q8, in turn, fed into the findings made by ComReg in its Amended Notification of Non-compliance (as summarised in para. 31 above). It was only after that notification was served that Virgin Media (through Matheson) sought to recharacterise this material as *"interactions data".* That said, I must also keep in mind that what is now said by Ms. Harnett is sworn evidence and that she has not been cross-examined in relation to this apparent inconsistency between this material and what she has said on oath.[61] I must also bear in mind that, as the extracts from the transcripts (discussed further below) show, it is sometimes the case that customers do not bring up the subject of cancellation until a later point in the call and it is also the case that, in some instances, it is not necessarily evident from the outset that cancellation is what the customer has in mind. In these circumstances, I must proceed, in the context of my consideration of the evidence, on the basis that it cannot be assumed that all of the customers in issue had begun their call

[61] See the decision of the Supreme Court in *McNamee v. Revenue Commissioners* [2016] IESC 33

with Virgin Media by pressing the cancel option when calling Virgin Media on the 1908 number or that the call had otherwise begun with an express request to cancel.

159. In her affidavit, Ms. Harnett maintained that ComReg has disregarded three important features of customer engagement:

(a) The first is described in paras. 29 and 30 of her affidavit as follows:

> *"First, customers engage with Virgin Media in hundreds of different ways, many of which could directly or indirectly involve the possibility of that customer terminating their contract with Virgin Media. The scenario outlined by ComReg is unclear, excessively restrictive and therefore unworkable and counterproductive from a consumer welfare perspective. The concept of a 'customer seeking information about cancellation procedures or to cancel their service' erroneously assumes a single rationale or motive for customer contact. Customers may contact Virgin Media to resolve a technical issue or a billing problem or any number of potential complaints. In the course of those interactions, customers may threaten to leave Virgin Media or raise that as a possible outcome. Expressly or implicitly, that may depend on the solution that Virgin Media delivers in response to the concern.*
>
> *… The priority for the Virgin Media agent is to identify and resolve the difficulties encountered by the customer ideally by reference to Virgin Media's own services. It would be extremely poor customer service, at the first mention of a desire to cancel, immediately to progress a cancellation. It would indicate a disregard on the part of the operator as to whether the customer stayed or not. It would indicate that Virgin*

Media preferred to dispense with the customer than resolve his or her concern".

(b) The second feature is described in para. 31 of her affidavit where she says:

"Second, it is a customer's right and an aspect of normal competition to call his ECS provider and threaten to leave if certain things are not done ... by the ECS provider (and restricting such would disproportionately restrict the customer's bargaining power / ability to get a better offer). That is a negotiation 'card' at the customer's disposal. That may range from the resolution of a problem to the provision of better terms including terms that match those of a rival operator. The seriousness of the threat to leave will vary and may develop in the course of the interaction with the Virgin Media agent. It is perfectly rational for a customer, wishing to remain with Virgin Media but on better terms, to begin the interaction with a stated intention to leave Virgin Media. ***Customers approach these discussions in many and varied ways but Virgin Media's consistent response is to address any concern if at all possible in order to ensure that the customer is satisfied. It would hinder a customer's ability to negotiate better terms if, upon stating a desire to cancel, he or she is not offered better terms but is instead immediately passed to a cancellation process.*** *The customer in question would then need to explain that he or she may not in fact wish to cancel without further discussion and be passed back to a different agent. The*

time and inconvenience involved is not conducive to a smooth customer experience or an effective negotiation"[62]. Objections handling

(c) The third feature identified by Ms. Harnett (as described in para. 32 of her affidavit) is:

"if Virgin Media (in common with all of its rivals) ultimately retains some of its customers by resolving their concerns or giving them better terms on an informed and non-misleading basis (a real benefit to customers obtained through negotiation), that is normal and effective competition and good customer service. This process enables customers to make an informed decision. Removing this process is likely to result in a poorer information flow to consumers, and net negative consumer outcomes. Such a process involves no consumer harm or distortion of competition".

160. It is clear from these paragraphs of Ms. Harnett's affidavit that it is part of Virgin Media's policy that, where a customer seeks to cancel or threatens to do so, Virgin Media agents will first attempt to address any concerns which the customer may have. The words highlighted in para. 159(b) illustrate this very clearly. In that passage, Ms. Harnett confirmed that this is Virgin Media's *"consistent policy".* As noted in para. 18 above, it appears from Virgin Media's response of 19th June 2020 that an explanation of *"other options"* (i.e. options other than cancellation) is an inherent part of Virgin Media's cancellation process. It is also in line with the terms of the *"Objections Handling"* training document (as described in para. 69 above) which clearly envisages a step wise approach with save activity on the part of Virgin Media agents before

[62] My emphasis. In common with the material discussed in para. 18 and 69 above, this highlighted passage clearly envisages that save activity may be undertaken even after a customer has expressed a desire to cancel.

proceeding to cancellation. This is also consistent with the more general training document (also as described in para. 69 above) entitled *"Cancellation/Termination Notice Procedure"* which was included in the same bundle of training material supplied by Virgin Media in Appendix 5 to its June 2020 response to ComReg's information request of 16th March 2020.

161. Ms. Harnett also contended, in para. 33 of her affidavit, that the calls do not amount to a disincentive to switch because they last, on average, 11 minutes, which Ms. Harnett suggested is *"indicative of good customer care and dealing with customer concerns and issues"*. However, I do not think that the average duration of a call can be taken to be an indicator of good customer care. In some cases, it may. But, if the agent is engaging in unwelcome save activity, it could be very frustrating for a customer to be held on the telephone for as long as 11 minutes. In the same paragraph, Ms. Harnett also said that *"customers can, in any event, avoid them by cancelling in writing and declining to speak with Virgin Media."* In this context, it should be recalled that, on receipt of written notice of cancellation, it has been Virgin Media's policy to call the customer. Ms. Harnett appears to suggest that, if a customer does not want to listen to anything that Virgin Media may want to say, the customer should cancel in writing and subsequently decline to speak to the agent when called to discuss the cancellation. That contention does not sit well with the fact that, in practice, the vast majority of cancellation requests are made to the 1908 number.

162. According to Ms. Harnett[63], Virgin Media's analysis of the call centre communications is that save activity arises in a range of different circumstances. It should be noted that, although Ms. Harnett refers to an *"analysis"* of these

[63] See para. 34 of her affidavit.

communications, she has not exhibited any underlying material from which this analysis has been derived. She says that the activity arises in the following cases:-

(a) The customer calls because they want to hear what Virgin Media can offer them/looking for a better offer;

(b) The customer wants to adjust their package to reduce their bill;

(c) The customer is considering cancelling but is unsure about cancelling or wants to avoid the *"hassle of changing'"* service providers and is seeking a better offer/a more competitive offer from Virgin Media;

(d) Less technologically-familiar or older customers may wish to discuss their needs with an agent;

(e) A Virgin Media agent affords a customer an opportunity to explore other options;

(f) A Virgin Media agent has an opportunity to better understand the customer's needs and tailor their package that is suited to them – this requires dynamic interaction and delivers better results for all parties; and

(g) A Virgin Media agent may avail of an opportunity to remedy technical issues.

163. While Ms. Harnett does not include, among that list, cases where the customer calls to cancel, it appears to be clear that save activity is also employed in that instance. This follows a consideration of the factors identified in para. 162 above and from a consideration of the *"Objections Handling"* document and the other training materials described in para. 69 above. There is nothing in the training material contained in that document or in the other materials described in that paragraph instructing or advising

agents to cease save activity whenever a customer makes clear that he or she wishes to cancel.

164. Quite apart from the point made in para. 163 above, I do not believe that much weight can be given to this element of Ms. Harnett's affidavit in circumstances where the nuts and bolts of this *"analysis"* has been explained in any way. Nor has any of the underlying material been placed in evidence before the Court notwithstanding that, as noted in para. 175 below, the failure to do so was highlighted in Ms. Kilraine's affidavit sworn in response. Accordingly, these assertions on the part of Ms. Harnett have not been substantiated in any way. While the onus of proof lies on ComReg in these proceedings, this material is within the peculiar knowledge of Virgin Media and, in my view, the relevant material underlying this analysis should have been put in evidence. Because that material has not been placed before the Court, it is not possible to assess the validity of the assertions made by Ms. Harnett in para. 34 of her affidavit.

165. In her affidavit, Ms. Harnett stressed that Virgin Media considers that it should be entitled to facilitate customers in *"making informed choices concerning their service"* and that, by not providing customers with relevant information concerning their services, this would leave them with an *"informational deficit"* which she contends would deny them a *"consumer benefit"*. In a passage which counsel for Virgin Media subsequently emphasised in the course of his submissions, Ms Harnett said, in para. 37 of her affidavit:-

> *"37. The pro-consumer nature of giving better pricing information to customers is shown by the fact that 16% of all Virgin Media customers in the last year availed of loyalty discounts. That represents upwards of 60,000 loyalty discounts to customers last year. The general experience of Virgin Media suggests that many of the customers who call and*

reference cancellation as an option are not primarily looking to switch but are looking for better value (price or improved services) or for a specific problem to be addressed."

166. Ms. Harnett also stressed that Virgin Media engages in regular training for all its call-centre teams and periodically updates its agent training. She also referred to the Consumer Care statistics report issued by ComReg in respect of Quarter 3 2022 which recorded that, in the Irish market, Virgin Media had the lowest number of complaints per 100,000 subscribers in the fixed voice category at 0.8. This compares to an industry average of 4.1. The same report also showed that Virgin Media had the lowest level of complaints in the fixed broadband subscriber category at 7.0 per 100,000. This compares to an industry average of 9.9. While that may be so, it seems to me to be of no more than marginal relevance in this case. The fact that there may be a low level of customer complaints does not mean that no procedures have operated as a disincentive against switching. Nor can it be said – at least not on the basis of this evidence – that the training given to Virgin Media agents means that there are no procedures in place that operate as a disincentive against switching. Ms. Harnett provides no details of the training in question and, notably, she does not say that agents are trained to proceed straight to cancellation when a customer indicates a desire to cancel.

167. With regard to ComReg's conclusion that the *"ComReg considers that the offering of such discounts to Virgin Media's customers that have indicated an intention to change service provider acts purely as a dissuasive measure"*, Ms. Harnett contended that this is simply inaccurate and that Virgin Media has a countervailing positive motivation in maintaining its existing customers. She maintained that Regulation 25(6)(b) is not intended to restrict undertakings from identifying advantages available to customers. In this context, I believe that it is important to keep in mind that,

as suggested in para. 143(b) above, the disincentives which Regulation 25(6)(b) is intended to capture are those in the nature of obstacles or impediments. As suggested in that paragraph, it seems to me that the making of a better offer to a customer is unlikely of itself to constitute a disincentive although it may potentially do so in combination with other factors.

168. With regard to the transcripts on which ComReg relies, Ms. Harnett highlighted that Virgin Media provided ComReg with 71 transcripts and that this represents no more than 0.04% of all calls in the period under review. As a consequence, Ms. Harnett suggested that ComReg's views in relation to the transcripts are based on a very small number of calls within a very short time period and that this is not a representative or reliable representation of Virgin Media's customer service practices or procedures. I will return to consider the transcripts in more detail at a slightly later point in this judgment.

169. Ms. Harnett also suggested, in para. 68 of her affidavit, that the two-step process proposed by ComReg is not commonplace in the industry. In paras. 53 to 57 of her affidavit, Ms. Harnett addressed the way in which Virgin Media agents compare the Virgin Media product against those of its rivals. For the reasons previously explained, I do not believe that it is necessary to go into detail in relation to that issue. Ms. Harnett then addressed the Eircom notice. In para. 63 of her affidavit, she repeated the point previously made by Matheson that the Eircom notice relates to Eircom's telephone service and not its wider contracts and she said that the latter were less common in 2012 when the investigation commenced. In para. 64 of her affidavit, she said that this is an important distinction as there is a specific regime to support and facilitate consumers switching providers when porting a number in the context of fixed and mobile contracts. She also made the case that, at the time the Eircom notice was issued, Eircom terms and

conditions had a number of features including a requirement to give written notice, complex contract termination procedures and requirements and the risk of service breaks.

The replying affidavit of Ms. Miriam Kilraine sworn on 5th December 2022

170. In her replying affidavit sworn on behalf of ComReg on 5th December 2022, Ms. Kilraine emphasised that ComReg does not have a difficulty in Virgin Media undertaking *"save activity"* provided the customer is first given an opportunity to proceed immediately to changing provider without having to listen to Virgin Media offers. On that basis, Ms. Kilraine disagreed with Ms. Harnett's contention that the two-step process proposed by ComReg prevents better service offers being made. In para. 12 of her affidavit, Ms. Kilraine contended that:-

> *"The two-step process is simple and straightforward to implement …. Where a customer seeks to cancel and does not consent to "Save Activity", then the cancellation should be processed without any further steps. Where a customer consents to hearing further information about its products and services, the information can be given. Where the customer does not seek to cancel at the beginning of a call, but does so in the course of a call, the process is the same. Thus, contrary to Virgin Media's assertions, customers can still hear about any offers if they wish. … there is a persistent and misleading theme in Ms Harnett's affidavit whereby the Respondent is seeking to portray the two-step process as being onerous, unworkable and as serving to deprive customers of availing of better offers. The two-step process simply seeks to ensure that customer's consent to "Save Activity" is obtained so as to ensure customers are not forced to first engage with unwanted "Save Activity" where they are simply seeking to cancel. ComReg's position is that the two-step process is not an impediment to*

the customer receiving any potentially "better offers"; the customer can decide whether they wish to cancel or to hear the offers. The two-step process is therefore not a prohibition, rather it permits "Save Activity" where customer consent to that activity has first been obtained."

171. In para. 13 of her affidavit, Ms. Kilraine also emphasised that the two-step process will only be triggered where customers seek to cancel their Virgin Media contract. It will not apply where the customer calls, following the end of their minimum term (which often coincides with the end of an introductory price offer), seeking a better deal or to continue with an advantageous price applicable during the minimum term. In such cases, Ms. Kilraine maintained that the *"the agent can freely engage with such a customer".* That said, Ms. Kilraine reiterated in the same paragraph that, where such a customer calls seeking *"to cancel citing price or other issues, then the customer's consent must be obtained before Virgin Media engages in 'Save Activity'."*

172. ComReg also makes the case that the two-step process is entirely workable. In this context, Ms. Kilraine drew attention, in para. 17 of her affidavit, to the fact that, in the context of the previous investigation by ComReg under Regulation 14 of the Universal Service Regulations (in relation to Virgin Media's cancellation procedures following the issuance by it of a CCN), Virgin Media gave a commitment that customers seeking to cancel their contract following receipt of a CCN would not be required to give 30 days' notice and that Virgin Media would obtain customer consent in those instances prior to engaging in any save activity. The relevant commitments given by Virgin Media are set out in para. 18 of the affidavit. The relevant section of the commitment quoted by Ms. Kilraine is as follows:-

"7. Implement the following process for all customers who seek to cancel their contract on foot of a CCN by calling 1908:

a) *In situations where a customer informs Virgin Media that they wish to cancel after receiving a CCN, Virgin Media's agents will confirm with the customer if:*

   i. *They would like to cancel immediately;*

   ii. *They would like to cancel in 30 days; or*

   iii. *They are moving to another ECS provider;*

b) *Depending on the option the customer selects, Virgin Media will process the cancellation immediately or 30 days later;*

c) *Where the customer has indicated before the effective date of their contract change that they are cancelling because they are moving to another ECS provider the Virgin Media agent will advise the customer to call back once they have the new service in place and Virgin Media will then cancel their service immediately;*

d) *After the agent has followed the steps as set out at a, b & c above, they may ask the customer if they wish to hear about alternative offers and it is only where the customer specifically consents to hearing such information that this information will be provided."*

173. In the course of their submissions, counsel for ComReg suggested that, when Ms. Harnett came to respond to Ms. Kilraine's affidavit, she said nothing, in her supplemental affidavit, in response to this element of Ms. Kilraine's affidavit. That suggestion is not entirely correct. In fact, Ms. Harnett addressed the issue (albeit in very brief terms) in para. 10 of her replying affidavit (considered below). Ms. Harnett said that the commitments given by Virgin Media in respect of CCNs *"are simply not*

comparable. These situations relate to circumstances where customers would face price increases." In fairness to counsel for ComReg that response does not address the substance of the point made by Ms. Kilraine which is that, under the commitment given by Virgin Media in respect of CCN cancellations, Virgin Media has agreed to process a customer's wish to cancel in advance of asking whether the customer wishes to hear about alternative offers from Virgin Media. Nonetheless, there is one obvious difference between the process described in Virgin Media's commitment in respect of CCN cancellations and the order sought by ComReg in these proceedings. In the case of the process described in the commitment, the process is triggered by the customer informing Virgin Media that he or she wishes to cancel. In contrast, in the terms of the order sought by ComReg here, the two-step process would be triggered not only where the customer informs a Virgin Media agent of a wish to cancel but also where the customer seeks information about the cancellation procedure.[64]

174. In response to paras. 29 to 32 of Ms. Harnett's affidavit, Ms. Kilraine made a number of points:-

(a) In the first place, she said that it *"seems unlikely"* that Virgin Media agents would not be able to distinguish a threat to cancel from an actual request to cancel. She also said that, if the agent was in any doubt as to whether a customer was seeking to cancel the contract, the agent could simply ask the customer if this was the case. She suggested that this is *"what the two-step process enables"*.

(b) Ms. Kilraine rejected the suggestion that the two-step process was *"anti-consumer"*. She maintained that the two-step process could result in a number of outcomes (all of which are pro-consumer):-

[64] See the terms of the order sought by ComReg as described in para. 93(b) above.

(i) customers may respond by saying they are not seeking to cancel. In such circumstances, save activity may proceed;

(ii) customers may confirm that they are seeking to cancel, followed by consent to engage in save activity in which case such activity may proceed; and

(iii) customers may confirm that they are seeking to cancel followed by a refusal of consent to engage in save activity.

(c) Ms. Kilraine contended that, in her affidavit, Ms. Harnett has incorrectly assumed that all customers who call Virgin Media intend to negotiate when *"many"* may be intent on cancelling. Ms. Kilraine suggested that the transcripts undermine Ms. Harnett's position. I interject here to note that, based on the transcripts opened to me, I do not believe that one can plausibly say that *"many"* of the customers were *"intent"* on cancelling. Some were but others were keen to hear what Virgin Media offers were available before they made a decision, one way or the other.

(d) Ms. Kilraine suggested that the two-step process gives the consumer the power to engage in negotiation if that is what they wish while, at the same time, respecting their power to cancel without being impeded, if that is what they wish to do.

175. In response to para. 34 of Ms. Harnett's affidavit (which sets out Virgin Media's *"analysis of call centre communications"*, Ms. Kilraine highlighted that nothing has been exhibited by Ms. Harnett to support this *"analysis"*. Ms. Kilraine also responded to para. 35 of Ms. Harnett's affidavit in which Ms. Harnett had said that Virgin Media's interactions with his customers are motivated by a desire to provide quality service. In that context, Ms. Kilraine placed emphasis on the fact that Virgin Media agents on the

customer value team received commission of €0.92 per call where a customer decides not to cancel, and other agents may also earn commission for retaining customers based on a points scheme.

176. In response to the contention that Virgin Media is assisting customers in making informed choices and ensuring that customers are not left in an *"informational deficit"*, Ms. Kilraine emphasised that ComReg's position is that the customer is the person who should decide what the customer wishes to hear. Ms. Kilraine also maintained that Virgin Media's case fails to recognise that customers may have obtained an equivalent or better deal with an alternative provider had they proceeded with cancellation. In para. 45 of her affidavit, Ms. Kilraine said that new customers often receive promotional offers on more favourable terms than existing customers.

177. Ms. Kilraine also responded to paras. 48 to 51 of Ms. Harnett's affidavit (which addressed the transcripts provided by Virgin Media to ComReg of customer calls). In response to the suggestion that the data is *"under-representative"* and that it is *"based on a very small number of calls within a very short time period"*, Ms. Kilraine said that this criticism is not accepted by ComReg particularly in circumstances where no evidence has been offered by way of rebuttal and where Virgin Media itself provided the call transcripts and has not stated that they are not in line with its processes and procedures or that there was anything unusual or untoward in the *"save activity"* observed in the transcripts.

178. While Ms. Kilraine also addressed the provision of allegedly inaccurate or misleading information about Virgin Media's competitors, I do not propose to address that element of her evidence here. For the reasons previously explained, it seems to me this is not an issue that falls for consideration in light of the way in which the matter

has now been addressed in the opinion issued prior to the commencement of these proceedings.

The second affidavit of Ms. Harnett

179. In this affidavit sworn on behalf of Virgin Media on 19th September 2022, Ms. Harnett, again, rejected the suggestion that ComReg's proposed two stage process is a simple requirement. She contended that it is a highly intrusive, prescriptive and restrictive intervention into the interactions between Virgin Media and its customer. She did not accept ComReg's characterisation of it as being limited in nature. On the contrary, she said that:

> *"... it is a very significant interference with Virgin Media's business. ComReg's attempt to reframe the intervention, by mischaracterising Virgin Media as engaging in 'mandatory save activity' or being 'firmly opposed to obtaining customer consent' is inaccurate* [and] *conveys an erroneous impression. Virgin Media does not force customers to do anything: It is exclusively ComReg which is purporting to prescribe mandatory conduct by Virgin Media in this instance. ... Virgin Media is not engaged in 'mandatory' practices. Virgin Media is not opposed to seeking customer consent and does so on a daily basis across all facets of its business. Virgin Media is instead seeking to protect its freedom to act and to avoid unjustified, additional regulation. Like any business, Virgin Media enjoys a general freedom to interact with its customers and promote the best interests of its business, subject to such obligations and responsibilities as are imposed on it through lawful regulation."*

180. Ms. Harnett also made the following points:-

(a) With regard to the commitments given by Virgin Media in relation to CCNs, she maintained that these are not comparable. They relate to circumstances where customers would face a price increase if they did not cancel;

(b) With regard to the Eircom notice, Ms. Harnett said that the notice does not disclose the full context of the matters to which it relates and she maintains that there is insufficient information in the notice from which to reliably draw analogies or comparisons with Virgin Media's position;

(c) Ms. Harnett reiterated that, based on its experience, Virgin Media does not consider that customer calls are neatly distinguishable into the two categories identified by Ms. Kilrane in para. 13 of her second affidavit. She again reiterated that it will not always be apparent to Virgin Media into which category a particular customer communication falls (i.e. whether the customer is cancelling service completely or merely changing service provider). She emphasised that Virgin Media representatives cannot readily assess what the customer needs and so they provide information concerning their existing products. She also said that ComReg's two stage requirement would lead to "*stilted, disjointed customer interactions".*

(d) Ms. Harnett reiterated that, in practice, customers may articulate a possibility of changing service provider as a means of leverage to secure an improved offer.

(e) In relation to Virgin Media's practice to call a customer who has elected to cancel by written notice, Ms. Harnett explained that the rationale for doing so is that Virgin Media values its customers and considers that it would represent poor customer experience to effect termination without first seeking to confirm the customer's instruction and explain the termination

process (such as the receipt of a final bill). She said that it is also necessary to contact the customer to make sure that the authorised account holder is the person who requested cancellation. She also pointed out that approximately 20% of customers going through the cancellation process can (and do) change their mind and are entitled to change their mind;

(f) In response to Ms. Kilrane's suggestion that Virgin Media's agents should be able to distinguish a threat to cancel from an actual request to cancel, Ms. Harnett said that this is not Virgin Media's experience. She pointed out that the volume of calls received daily by Virgin Media customer care is on average between 5,000 and 5,500 and that it is important to have a conversation with the customer to understand the customer's needs which are not always clear.

(g) In para. 19 of her affidavit, Ms. Harnett rejected the reliance by ComReg on the statistic that approximately 76% of customers requesting a cancellation do not ultimately proceed to cancel their contracts. Ms. Harnett maintained that this statistic is *"not representative".* She added that, even if it were, it is not demonstrative of a disincentive effect but is, instead, a measure of Virgin Media's *"positive commitment to maintaining customer relationships and good value service offering to ensure customer satisfaction";*

(h) In response to para. 48 of Ms. Kilrane's affidavit, Ms. Harnett said that Virgin Media must be entitled to make the case that the data on which ComReg relies is an insufficient and unrepresentative sample, statistically, for the purposes of extrapolating statistical patterns;

The further replying affidavit of Ms. Miriam Kilrane

181. In her final affidavit sworn on 20th January, 2023, Ms. Kilrane continued to maintain that the two-step process would be a simple matter for Virgin Media to implement and she rejected the contention made by Virgin Media that it represents an onerous or significant interference or intrusion into Virgin Media's business. She then addressed a number of issues raised by Ms. Harnett as follows:-

(a) In response to para. 10 of Ms. Harnett's affidavit (which dealt with cancellation in the context of CCNs), Ms. Kilrane contended that Regulation 25(6)(b) does not distinguish between cancellation in the context of CCNs and other cancellations;

(b) In response to paras. 19 and 24 of Ms. Harnett's second affidavit, Ms. Kilrane clarified Comreg's contention in relation to the *"statistics"* that approximately 76% of customers who called and requested cancellation do not proceed to cancel their contract. She explained that:-

> *"This statistic was based on data provided by the Respondent in June 2020 in response to ComReg's information request. Virgin Media stated that for general cancellation requests and cooling off period cancellation requests (within the past 12 months) and for cancellation requests on foot of contract change notifications (effective from January 2020), a total of 206,829 customers called and requested a cancellation. Given therefore that the statistic reflects the entirety of calls where the customer requested a cancellation over a specific period, ComReg does not understand the Respondent's complaint regarding the representativeness of the statistic. In response to Ms Harnett's averment at paragraph 24 regarding the evidential burden, ComReg's position*

> *was that no evidence had been provided by the Respondent to support its assertion that the transcripts were not representative which I am advised is not the same as contending for the shifting of an evidential burden."*

182. The evidence on affidavit described above must be read with the underlying documents including the *"Objections Handling"* document issued by Virgin Media and all of the materials supplied by Virgin Media in response to ComReg's requests for information (including the transcripts supplied). It is to the transcripts of customer calls to which I now turn.

Consideration of the transcripts of customer calls

183. At the outset of the hearing, I made it plain to the parties that, if they wished me to have regard to particular transcripts beyond those specifically addressed in ComReg's opinion, they would need to take me through them and make submissions in relation to them. Subsequently, in the course of their submissions, each side referred to their own selection of transcripts. Only a small number of the transcripts were opened to the Court.

184. The first relevant transcript in the context of save activity is Transcript T 22 which, as noted in para. 54 above records a call made on 26th October 2019. The relevant parts of that transcript have already been quoted in para. 54 from which it will be seen that the customer expressly stated that he was *"going to change to a cheaper provider"*. It is clear from the outset of the call that the customer wished to cancel in order to switch and, when asked if he would be interested in continuing at a lower price, the customer expressly said that he would not be interested. That did not put the agent off. The agent persisted in save activity even after the customer stated that his mind was made up. The customer remained perfectly polite throughout but interjected on several

more occasions to make clear that he was happier to move from Virgin. Eventually, the agent went ahead and gave effect to the customer's clear intentions. Counsel for Virgin Media has argued that this is an isolated incident which is not evidence of a systematic procedure but it is undoubtedly evidence that, at least on this one occasion, Virgin Media (through its agent) subjected the customer to save activity in which the customer had no interest and which was persisted in notwithstanding that the customer's lack of interest was perfectly clear. While the intimation to cancel was not in response to a CCN, the pattern of behaviour on the part of the agent mirrored very closely the step wise plan described in the *"Objections Handling"* document described earlier. It was only at the final *"still wants to cancel"* stage described in that document that the agent, having made several attempts to retain the customer, eventually gave effect to the customer's intention. The pattern of behaviour is also consistent with Virgin Media's response of 19th June 2020 to ComReg's information request of 16th March 2020. As described in paras. 17 to 18 above, Virgin Media expressly confirmed that, in the case of those customers who make a cancellation request by calling the 1908 number (which Virgin Media confirmed was approximately 95% of those making cancellation requests), the cancellation process is activated either at the conclusion of the call or in the course of the call *"following an explanation of other options".* The approach taken by the agent is also consistent with the more general training document described in para. 69 above.

185. The next relevant transcript is T 28. As noted in para. 55 above, an extract from that transcript is quoted in ComReg's opinion. I believe that it is important to consider that extract in the context of the conversation as a whole which, after an introductory exchange, commenced as follows:

> *"**MR. G …**: Oh, you are nominated account holder … ?*

***CALLER**: Yeah, yeah.*

***MR. G …:** All right. Let me see. All right. So, what you're saying is your contract is finished already; is it?*

***CALLER**: Yeah, and **I'm moving to another provider** so I just want to --*

***MR. G…** : Did you cancel already? Did you cancel your account already?*

***CALLER**: What?*

***MR. G …**: Did you cancel the account already?*

CALLER**: **No, I am cancelling it now with you.

***MR. G …**: Okay, yeah. So **we have to follow the process there**. Just a minute. So if you want to cancel you have to give us a month notice. So but why do you want to cancel?*

***CALLER**: No, I made a contract with you.*

***MR. G …**: Yeah, but if you're out of contract you still have to give us a month's notice.*

***CALLER**: No, I don't. I'm out of contract.*

***MR. G…** : That is our terms and conditions that is there. You have to give us a month's notice. Virgin Media contracts --*

***CALLER**: Well, I'm giving you the notice now today.*

***MR. G …**: So you will be terminated on the 26th November.*

***CALLER**: Okay.*

MR. G …**: **So but why do you want to cancel your account?

***CALLER**: Because I'm not happy.*

***MR. G …**: You're not happy. Are you not happy with the service, or you're not happy with the price?*

***CALLER**: No, with the price.*

***MR. G** …: Okay. **Let me have a look here now to see how much we are offering you there, hold on**.*

CALLER**: **No, I'm after setting the ball in motion. I have another provider coming.

***MR. G** …: How much they offer you?*

***CALLER**: €50 a month.*

***MR. G** …: Which other provider.*

***CALLER**: Eir.*

***MR. G** …: Eir. Okay. With the package that you have with us now you have select extra 120 meg. Okay, but we do the best broadband compared to Eir. Okay.*

***CALLER**: **It doesn't make a difference. I'm cancelling today**. …*

***MR. G** …: Yeah"*[65]

186. The call then continued as set out in the extract quoted in para. 55 above. As in the case of Transcript T 22, it is clear from this transcript that the customer just wanted to cancel and that the customer had no interest in listening to save activity from the Virgin Media agent. It is also evident from the transcript that, notwithstanding the

[65] My emphasis.

customer's clear intention to cancel evident from the outset of the call, the agent persisted in attempts to persuade the customer to stay with Virgin Media. In the extract quoted in para. 55 above, the customer had to plead with the agent to stop such activity. Counsel for Virgin Media accepted that this customer did wish to cancel but he attempted to argue that the transcript is *"hardly evidence of hassle or unreasonable obstruction to a customer who wants to cancel".* I cannot agree with that characterisation of the call. The customer plainly signalled an intention to move to a different provider and that he had no interest in hearing anything from Virgin Media about the supposed superiority of its product or anything else which Virgin Media might want to say about the advantages of sticking with it. The transcript provides very clear evidence that the agent persisted with sales patter notwithstanding the customer's very obvious desire to proceed with cancellation without having to listen to such unwanted patter. Counsel for Virgin Media also argued that both this transcript and T 22 were not representative. That is a separate point that I will address in due course. But it has to be said that the way in which the agent dealt with the customer is entirely consistent both with step wise plan set out in the *"Objections Handling"* document described earlier, the more general training document described in para. 69 above and also with the answer given by Virgin Media in June 2020 (as described in paras. 17 to 18 above) to ComReg's information request of 16th March 2020.

187. The ComReg opinion also included a short extract from Transcript T 4 (which is quoted in para. 57 above). The relevant call commenced with the caller indicating an intention to cancel in the wake of receipt of a notification of a price increase. The customer indicated that he did not yet know what provider he would use instead but it is clear that he intended to move to a competitor. The agent immediately began to suggest that a move to another provider would lead to a reduction in broadband speed.

The agent also offered a reduction in price. The caller was not interested and this comes across in the passage quoted in the opinion. However, unlike T 22 and T 28, the customer did not display any annoyance with the questions posed by the agent and the agent did not spend long on the save activity before moving to the cancellation process as requested by the customer.

188. The remaining transcript quoted in the ComReg opinion is Transcript T 64. Only a short extract is included in the opinion (namely that replicated in para. 59 above). In my view, it is clear from the transcript as a whole that the caller did not signal an unqualified desire to cancel until a relatively late stage in the call. The opening exchange between the caller[66] and the agent is set out in para. 58 above. As noted in that paragraph, the customer was plainly interested in hearing what pricing options were available from Virgin Media. The caller asked the agent to explain them before ultimately opting to proceed with cancellation. However, as the extract quoted in para. 59 makes clear, a point came in the conversation where the agent persisted in save activity notwithstanding the customer's clearly expressed wish to cancel. The transcript shows that the save activity continued even after the exchange quoted in ComReg's opinion with the caller interjecting on a number of occasions to stress that the customer just wanted to cancel. The weariness on the caller's part comes across very clearly from the terms of the transcript. The agent persisted in giving the caller an order number for the offer made *"while you are double checking to see if you can get better offers elsewhere"* even though the caller reiterated that the customer just wanted to cancel. At the end of the call, the caller takes the order number but one is left with the impression that he may well have done so in the hope that this would bring the call to an end.

[66] The caller on this occasion was not the customer but was someone calling on the customer's behalf. It is clear from the transcript that the customer was standing alongside the caller during the course of the call.

189. On Day 2 of the hearing, counsel for ComReg also referred me to Transcript T 25. That was a call that took place on 29th October 2019. When asked by the agent what he could do for the customer, the latter's immediate and unequivocal response was to say: *"I want to cancel my subscription to Virgin … I'm moving to Sky"* Consistent with Virgin Media's response of June 2020 to the March 2020 information request from ComReg and with the approach taken in the *"Objections Handling"* document, the agent immediately swung into save activity mode and his interaction with the customer on that issue then continues for 7 pages before the agent gives effect to the customer's request to cancel by reading out the *"account termination script".* It is clear from the transcript that this was the second call the customer had made to Virgin Media and that the customer had, in the previous call, canvassed the possibility of a better deal from Virgin in lieu of cancellation but had not been impressed by the offer made. During the course of the second call (which is the call recorded in Transcript T 25), the agent improved on the previous offer and the customer expressed regret that such an offer had not been made at the time of the first call. The customer also interjected on a number of occasions that he had already committed to move to Sky. The description given by the customer of the previous call made to Virgin Media is an example of a customer deliberately using cancellation as a lever to see if a better deal can be extracted from Virgin Media. While the save activity in the course of the second call may not have been welcome, such activity was the purpose of the first call.

190. Another call raised by counsel for ComReg is recorded in Transcript T 26. This call was on the same day as that recorded in Transcript T 25. The caller commenced by saying that that she wished to cancel her account. She was then asked by the agent why she was proposing to cancel. She explained that she was upgrading her Sky system and did not wish to have two systems in place. The agent then launched into save activity

during which the customer reiterated that she and her husband did not want to have two systems in place at the same time:

> *"MS. Q ...: Like you could upgrade this to a Horizon box as well. Like I do know with Sky like --*
>
> *CALLER: Just hold on. Hold on a second. No. Actually, I was just speaking to my husband there, we don't actually want the two systems any more.*
>
> *MS. Q ...: Right. Well just letting you know like you are paying just €20 for the TV and you're paying €5 for your multi-view room box; it's just €25 a month.*
>
> *CALLER: Yeah.*
>
> *MS. Q ...: That's €50 every two months. But I do know with Sky you pay 17.50 for an additional box. So just bear that in mind, it is quite expensive with Sky, their digital box. We're doing an offer on ours because it's €5?*
>
> *CALLER: Yeah, yeah. Ah, no, he wants to do it. He wants to leave it that way.*
>
> *MS. Q ...: Are you sure there's nothing I can do for you?*
>
> *CALLER: No, no*
>
> *MS. Q ...: And you do know it's 17.50 for an additional box with Sky?*
>
> *CALLER: I do, yeah.*
>
> *MS. Q ...: Okay*
>
> *CALLER: Yeah, yeah.*
>
> *MS. Q ...: One moment so. Okay, so your account here will terminate in 30 days."*

191. While the save activity on this occasion was not as prolonged as on some of the other transcripts cited by ComReg, it is, nevertheless, clear from the passage quoted above that it was not welcomed by the customer who plainly wished to proceed with cancellation and with the previous decision made jointly by herself and her husband to

opt for Sky. To be fair to the Virgin Media agent, it did not take long for her to see that the customer was set on moving to Sky and she ceased the save activity relatively promptly.

192. Counsel for ComReg also referred to Transcript T 29. That was a call that also took place on 29th October 2019. The customer commenced the call by saying that he wanted to end his contract on the expiry of its minimum term. The agent responded to say that one month's notice must be given. The customer did not appear to be concerned by that and replied *"Yeah yeah."* The agent then asked why the customer wished to cancel and the customer said that the broadband is too slow. The agent offered to send a technician out to check it but the customer responded to say that: *"I want to cancel it."* There was then a discussion about how much the customer will have to pay before the contract terminated. It is at this point that the save activity starts in earnest and the conversation continues over the next three pages of the transcript (during which the customer informed the agent that he intended to move to Vodafone) before the agent eventually confirmed that he would proceed with the cancellation. Even after the fact of cancellation is confirmed, the agent resumed the save activity and the call continued as follows:

> *"MR. G…: Okay. All right. So, that's fine. So you will get that e-mail there and service will be terminated on the 28th November. Okay.*
>
> *CALLER: Cheers. Thank you.*
>
> *MR. G…: Do you want to get a Virgin mobile sim card because you're entitled to it right now because of our loyal customer ... I know you want to cancel now but we are actually giving out three months' free trial to our customers.* [Inaudible] *get it. You get unlimited calls to any Irish mobile, unlimited text, unlimited data.*

CALLER: No, I'm okay.

MR. G…: Three months free. Okay.

CALLER: I'm okay.

MR. G…: No contract. All right, that's fine.

CALLER: Thanks.

MR. G…: Thank you, …

CALLER: Bye, bye.

MR. G: Thank you. This is Virgin Media have a good day.

CALLER: Bye, bye ."

193. While it is true that the caller remained polite throughout the course of the call and did not attempt to cut the agent off, it is clear from the transcript as a whole that the customer had no interest in the save activity. This is particularly evident in the last exchange between them (quoted above) which very plainly evidences great persistence on the part of the agent in seeking to dissuade the customer from switching – even after the agent has confirmed the cancellation. It is clear from the transcript that the customer was moving to a different provider.

194. Counsel for ComReg also drew my attention to Transcript T 66 (as did counsel for Virgin Media). This relates to a call that took place in the period from 1st to 13th March 2020. The customer commenced the call by saying that she wished to cancel and wanted to know how she should go about doing that. The agent then asked her why she wished to do so. Her response was that the service had become too expensive and that she planned to move to Sky. She confirmed that she was happy with everything else other than the price. The agent then ran through the usage which the customer was making of television, telephone, streaming and broadband. The customer appeared to have no issue with this. Having gone through this carefully, the agent then said: *"Let*

me have a look and just check, there might be some options we have there to try and bring down the cost there for you." The customer was plainly happy for the agent to do so. The agent offered a cheaper package which the customer accepted. The transcript suggests that she was relieved to be saved *"the hassle of changing everything"* and she confirmed that she was happy to accept the offer. This is an example of save activity working from Virgin Media's perspective but it also shows that the customer had no difficulty with it on this occasion and seemed to welcome it. While the customer started the call with a request to cancel, she quickly changed course once it became apparent that her issue on price could be addressed satisfactorily.

195. Another example of a successful *"save"* by a Virgin Media agent is to be found in Transcript T 67 which was also addressed by counsel for ComReg in the course of Day 2. On this occasion (which occurred between 1st and 13th March 2020), the customer started the conversation saying *"I currently have my broadband with you and I'm going to change to another supplier, so I want to just get it out and I'm cancelling it."* The agent then enquired as to why the customer wished to do so and, as in the case of Transcript T 66, was told it was down to price. Within minutes, the customer and the agent began negotiating on price. The first offer made by the agent was rejected by the customer but the second offer was accepted with the customer saying: *"It's less hassle for me moving. So, you've kept a customer on a Monday morning. Well done."* The agent then went through the terms and conditions and the call concluded with the customer saying *"That's lovely"* and expressing thanks for all the help. Like Transcript T 66, this is a further example of a customer expressing an intention to cancel at the outset but quickly changing course once it became apparent that Virgin Media was prepared to address the customer's issue with price. This suggests that there is some substance in Virgin Media's case that some customers use a threat to cancel as a

negotiating tool to achieve better terms. Counsel for Virgin Media submitted that this transcript is an example of good customer service.

196. Counsel for ComReg also referred to Transcript T 68. This is another call that took place between the period 1st to 13th March 2020. The customer commenced the call by saying: *"I'm looking to cancel my service with Virgin Media … because … I'm moving".* The agent then enquired whether the new occupant might want to continue the existing service but the customer could not say. The agent then told the customer that Virgin Media had some *"really good deals"* for mobile phones and enquired whether the customer might be interested in them. The customer said *"no thanks"* but immediately got into negotiation mode and said: *"Basically, I'm looking to see because at the moment we are paying 56 for just the broadband and then I don't know if you have anything for that same price because I just think it's just really expensive just to pay that for the broadband."* Within a short time, the agent came up with an offer that was acceptable to the customer who agreed to proceed on that basis. This call therefore falls into the same category as Transcripts T 66 and T 67.

197. Counsel for Virgin Media took me through Transcript T 27. This is the transcript of a call that took place on 29th October 2019. After the initial checking of identity, the customer commenced the call by saying that she wished to cancel her account. The agent asked her why she wished to do so and she explained that she was moving to Vodafone because *"I stream all the time … and it's just dropping on me the whole time …".* She said that Vodafone had new fibre broadband which had just arrived in her area which she said was *"much stronger"*. The agent responded to say that she could upgrade the broadband speed to which the customer immediately responded: *Okay, and how much extra is that going to be? … Because they're doing a very good deal as well, so unless I was getting a good deal, do you know what I mean. … It's not*

just the broadband, they're giving me a good deal as well." The conversation then focuses on a comparison between the price available from Vodafone and the price which the agent was able to offer on behalf of Virgin Media in the course of which the customer said that she would be happy if Virgin Media *"can do me a good deal…".* There follows a detailed discussion in which the customer takes an active part. It is clear from the transcript that she was very interested in understanding what Virgin Media could do to match the Vodafone offer in terms both of price and certainty of supply without dropping. In the course of what is a relatively long conversation (in which the customer was obviously a willing participant) the agent sought to identify why the service was dropping and, ultimately, recommended that the customer should get in touch with Virgin Media's technical department. But, at that point, the customer reiterated that Vodafone had a more attractive price offering and she indicated that she had the benefit of a 14-day cooling off period with Vodafone, so that if its service was not as good as billed, she could return to Virgin Media. Notwithstanding the reference to cancellation at the outset of the call, it is only at this point that the customer displayed a definite decision to proceed with cancellation. Up to this point[67], the transcript suggests that the customer was keenly interested in understanding what Virgin Media might be able to offer and one is left with the impression that, if a suitably attractive offer had been available, the customer might not have wished to pursue cancellation.

198. Counsel for Virgin Media submitted that Transcript T 27 is evidence of competition in action. He also suggested that it also shows good customer service as the agent tried to address the specific needs of this customer. I would not disagree with that observation in so far as that part of the transcript summarised above is concerned. But the transcript does not end there. When it becomes clear on p. 8 of the transcript

[67] This occurs on p. 8 of a 13 page transcript.

that the customer definitely wishes to cancel, the agent's first response was to say that the offers made in the course of the call would no longer be available after cancellation. The customer responded to say that she would take that risk. At that point, the agent asked would she be willing to speak to the technical department but the customer politely declined and again said that she wished to go ahead. The next response of the agent is unimpressive. She said:

> *"MS. T ...: Um, um. No, I understand that but like with the siro[68] as well, like you know it is weather dependent and everything like that, you know. So if there is any bad weather you know it's not going to work.*
>
> *CALLER: Oh, and I don't think, they're not saying that. They're not saying that.*
>
> *MS. T ...: Of course they're not going to say that.*
>
> *CALLER: Yeah, but, em, I don't -- well, I've done my research on it and don't think -- okay, forgetting all that, how do I go about cancelling my Virgin?*
>
> *MS. T ...: Yeah, so it's 30 days' notice to cancel.*
>
> *CALLER: Yeah, okay. Okay. Can I give you that from now?*
>
> *MS. T ...: Yeah, you can of course.*
>
> *CALLER: I appreciate everything you're saying, but I am going to go ahead and try it because I just - for the sake of maybe a little bit of bad weather, em, it's dropping on me constantly. Like I can't nearly watch the telly because I can't stream most of the stuff because it's not coming through, you know.*
>
> *MS. T ...: And you definitely don't want to speak with the Technical Support about that?*

[68] As I understand it, *"siro"* is a form of fibre cable.

CALLER: No, no, no and like not really, no, when it's only going up - not when you're going to charge me €64 after six months; that's too expensive, you know, not when they'll give it to me for 55, you know, so.

MS. T ...: Okay.

CALLER: Okay.

MS. T ...: So I'll just go through the terms and conditions with you ..."

199. This was a very naked attempt to deflect the customer from the very clear course she had signalled moments before and to save the customer for Virgin Media. Counsel for Virgin Media said that the warning about adverse weather induced impacts on the Vodafone service *"may be an exaggeration"* but he argued that it *"is not a systematic misrepresentation of the type that's needed to become a procedure which amounts to a disincentive"* and he also suggested that *"the question of whether different operators had different reactions to bad weather is a question of fact and which again ComReg has not adduced evidence."* However, the approach taken by the agent has all the hallmarks of a last ditch bid to retain a customer. This is another example of behaviour which is consistent with the approach taken in the *"Objections Handling"* document described earlier which (albeit in the context of cancellations in response to a CCN) strongly suggests that proceeding with a cancellation is very much the last step to be taken by an agent in the course of a call from a customer who is seeking to cancel a contract with Virgin. It also has to be said that, in light of the financial incentives available, it is unsurprising that an agent would seek to press every potential *"pause button"* before proceeding to give effect to a cancellation.

200. Counsel for Virgin Media also referred to Transcript T 5 which records a call which took place on 17th October 2019. The customer commenced the call by referring to an email about a contract change and the *"money going up"* and said that he would

"like to cancel the service please." The agent responded very quickly with a suggestion that there were other bundles available that might bring down the price and that it would also be possible to upgrade broadband speed *"if you wanted us to do that".* The customer's reply was equally prompt. He said: *"Okay. What's the cheapest you could give me?"* So, this is an example of a case where the agent was careful to ask the customer whether he had any interest in a different package that might address his concern about price and where the customer was, obviously, very interested in hearing what the agent had to say. A brief exchange then took place between the agent and the customer about price but the customer is not convinced and says *"No, I'm pretty sure I want to cancel".* Without any further attempts to persuade the customer to stay with Virgin Media, the agent then proceeded directly to deal with the cancellation.

201. The next example put forward by counsel for Virgin Media was Transcript T 20 which records a call on 29th October 2019. This call commenced with the customer saying that she was hoping to cancel her account. The agent responded by politely querying *"do you mind me asking the reason* [for] *that".* The customer explained that she was switching to a different provider and that her husband had already signed up with that provider. The agent said *"Okay. No, that's grand … because we could have given you a better offer in the meantime if you hadn't changed …"* to which the customer immediately replied: *"what was the offer that you had"* so that she could go back to her husband with it. The agent and the customer then has a detailed conversation about the options available which is plainly what the customer had in mind. But, having gone through those options, the customer said that she still wished to proceed with cancellation and the agent then went ahead with that process.

202. Counsel for Virgin Media next addressed Transcript T 24. This is a record of a call on 29th October 2019 which commenced with confirmation from the customer that

he wanted his wife to speak on his behalf. His wife then asked the agent to explain the procedure to cancel their broadband service. The agent informed them that they would have to give 30 days' notice. The agent then said: *"Do you mind me asking why you're cancelling"* and the caller said that they had found a better offer. The agent then asked would they reconsider if Virgin Media could reduce the price. A reasonably detailed discussion followed, at the end of which, the caller said that the caller still wished to cancel and the agent proceeded to take them through that process.

203. The next transcript examined by counsel for Virgin Media was Transcript T 40. The date of that call is not given on the transcript. The customer commenced the call to say that he had received notification of a price increase and he wished to give 30 days' notice of cancellation. The agent asked whether the customer was happy with the service before the price change. When the customer confirmed that he was, the agent explained that there were new packages available which did not attract the price change applicable to the *"legacy package"* held by the customer. The customer immediately said that: *"Yeah, that sounds perfect".* The agent then went through the terms of the new package. The customer agreed to proceed and was evidently very happy with the outcome of the call and signed off: *"Brilliant. Thank you very much."*

204. A further example cited by counsel for Virgin Media can be found in Transcript T 48 which records as call which took place on 25th October 2019. The customer commenced the call by saying that she had just been notified of a price increase and said: *"I'm just wondering is there anything you can do for me … I'm paying a colossal amount of money … and if you can't do anything I'm going to change over, like, you know."* Unsurprisingly, the agent then carefully went through the options with the customer and discussed her usage needs. The customer actively participated in the discussion exploring various aspects of the kind of package that she and her husband

would want to have available. At the end of the conversation, the customer proceeded with a new package with Virgin Media and appeared to be quite satisfied with the outcome of her call.

205. Counsel for Virgin Media also referred to Transcript T 62 which relates to a call that took place at some point between 1st and 13th March 2020. The customer commenced the call by saying that the charges were high and he was *"just thinking to switch provider. I don't know, I just want to check am I out of my contract".* The agent confirmed that he was out of contract[69] and that Virgin Media would be able to get the price down. The customer is very obviously interested in exploring that and the conversation continues for some time as they discussed different options with the customer frequently asking questions of the agent and pressing for the best offer. After much back and forth, the customer is satisfied with the parameters of the final offer and opts to proceed with it.

206. Transcript T 60 was also discussed by counsel for Virgin Media. That transcript records a call which took place between 26th and 31st October 2019. The customer did not mention cancellation at the outset of the call but, after being asked by the agent how he could help, the customer said: *"Yeah, we were just, kind of, thinking we might move, it's just the cost of it has gotten pretty high and so I don't know if you have better offers available to us. I know we are out of contract now, so we are, kind of, shopping around just to try and get the bills down a bit."* In response, the agent, very carefully, explored the type of usage which the customer required and, having completed that exercise, the agent then quoted a price for a new package. After some further discussion about price, the customer ultimately agreed to proceed with that package.

[69] By which I understand that he was outside the minimum term of his contract.

207. In addition to the transcripts canvassed above, it will be recalled that, as noted in paras. 77 and 79 above, ComReg also referred, in its opinion, to two further transcripts in the context of the 30-day notice requirement – namely Transcripts T 21 and T 69. In the case of T 21, the call commenced with a number of exploratory questions from the customer before the customer intimated a wish to cancel. In the case of Transcript T 69, the customer began the call by indicating that the Virgin Media package was too expensive and citing offers he had been made by competitors. He then expressly asked what Virgin Media could offer if he stayed. In that case, the customer was plainly calling with the intention of negotiating.

208. The transcripts which were addressed by counsel in the course of the hearing show a range of different circumstances. In some, it is clear that the customer is intent on cancelling and moving to a different provider and that the customer has no interest in hearing save activity but the Virgin Media agent nonetheless persists in such activity. Transcripts T 22, T 28 and T 29 are good examples of that category. In others, even though the customer may commence the call by intimating a wish to cancel, it quickly becomes clear that this is a negotiating tool by the customer and that the customer is eager to hear whether Virgin Media has any better offer available. Transcripts T 20, T 66, T 67 and T 68 are good examples. There are also some transcripts where it is initially unclear what the customer has in mind. Transcripts T 48 and T 60 are illustrations of this. In addition, Transcript T 21 shows that, in some cases, the issue of cancellation is not raised by the customer until a later point in the call.

Findings of fact in relation to *"save activity"*

209. While much of the debate at the hearing related to the two-step approach advocated by ComReg, it is important to keep in mind that the first order that ComReg seeks from the Court is a declaration that Virgin Media has not complied with its

obligations under Regulation 25(6)(b). In order to reach a conclusion on that issue, it is necessary to make a number of findings of fact. For this purpose, there are a number of facts that can be drawn from the materials which Virgin Media has itself put forward in the course of its interactions with ComReg. For present purposes, the following seem to me to be the most relevant:

(a) It is clear from Virgin Media's response of 19th June 2020 to ComReg's information request of 16th March 2020 that 95% of cancellation requests are handled over the telephone on the 1908 number. While I accept that some of those calls may not necessarily begin with a cancellation request, it is reasonable to conclude on the basis of the material before the Court that, at minimum, in a significant proportion of such calls, the topic of cancellation must have been raised by the customer at some point in the course of the call. This conclusion is reinforced by the terms of Appendix 3 to the Virgin Media response which, as noted in para. 18 above, expressly described the calls as *"cancellation requests".* As further noted in para. 18 above, Virgin Media stated that the number of general calculation requests within the relevant 12 month period amounted to 194,784. That does not include those that were made in response to a CCN or during a cooling-off period.

(b) This means that the vast majority of Virgin Media customers who intimate a wish to cancel or who wish to explore the possibility of cancelling their contract with Virgin Media interact verbally with a Virgin Media agent. The content of such calls and the procedures in place for dealing with such calls are therefore very important in seeking to explore whether, as a matter of practice, Virgin Media puts obstacles or impediments in the way of a customer switching to another provider;

(c) While it cannot be said that every customer who intimates an intention to cancel – or a wish to explore the possibility of cancelling – necessarily intends to switch to a different provider, I believe that it is reasonable to conclude that this is so in the majority of cases. In some cases, the customer will have a fixed intention to switch but, in others, the customer will only wish to do so in the event that Virgin Media does not offer a sufficiently attractive alternative. This is very evident from the transcripts which are discussed above and to which I return in paras. 212 to 221 below. In almost every case, the transcript shows either an intention to move to a different provider or, at the least, the floating of the possibility of switching in the event that Virgin Media has nothing better to offer. While I am very conscious that I have only seen a small number of transcripts and while I am equally conscious that transcripts have been made and reviewed in only a tiny proportion of the total calls made, I believe that I am entitled to take judicial notice of the fact that, in modern life, access to services of the kind offered by Virgin Media and its competitors are used by the majority of the population. It is therefore unlikely that anything other than a minority of customers calling Virgin Media to discuss cancellation (or the possibility of cancellation) of their Virgin Media service do not intend to replace the cancelled service with a service offered by one of Virgin Media's competitors. Given the sheer number of *"general cancellation requests"* reported by Virgin Media (as set out at (a) above), the probability must be that a significant proportion of the calls were in circumstances where the customer was considering switching provider.

(d) In circumstances where the vast majority of interactions in relation to the possibility of cancelling service take place orally on the telephone between

Virgin Media customers and Virgin Media agents, the training given to those agents is highly material to any procedures and processes operated by Virgin Media in respect of such calls.

(e) It is clear from Virgin Media's response of 19th June 2020 to ComReg's information request of 16th March 2020, (as quoted in para. 18 above), that Virgin Media agents are trained to explain other options available from Virgin Media in response to calls from customers who intimate an intention to cancel or who raise the prospect of cancellation;

(f) It is equally clear from that response that, as outlined in para. 18 above, save activity (in the nature of explanations of other Virgin Media options) is undertaken on 1908 calls prior to processing a cancellation and that this is so whether or not the issue of cancellation is raised at the outset of the call or, later, in the course of the call;

(g) The fact that this is the procedure which is adopted is also plain from the training materials which were provided by Virgin Media in response to the information request of 16th March 2020. In para. 69 above, I have already drawn attention to the step wise approach taken in the Objections Handling document which was put in place to deal with cancellations on foot of a price rise (i.e. a CCN). Some of the transcripts discussed above fall into this category. It should be recalled that this document set out the following steps to be followed by Virgin Media agents: (a) listening to the issue, (b) explaining the price change, (c) reinforcing the value of the Virgin Media product, (d) addressing the position if, at that point, the customer still wants a reduction (in which case, the agent was directed towards discussing lower priced bundles) – and finally – (e) *"Still wants to cancel: Use your CVM tools to save the customer or process the cancellation"*.

As noted in para. 69 above, this last step clearly envisages that, at an earlier point in the call, the customer had intimated an intention to cancel and that, notwithstanding all the agent had said in the intervening period to highlight the virtues of the Virgin Media service, the customer at the end of the process *"still"* wants to cancel. This document was therefore prescribing a process that agents should undertake in response to a request to cancel and which envisaged that the cancellation request would only be processed if the save activity had not produced the desired result. While the Objections Handling document appears to have been specifically designed to deal with cancellation requests that are made in response to a CCN signalling a price increase, the procedure described is consistent with the more general response given by Virgin Media referred to at (e) and (f) above.

(h) A similar picture emerges from the more general training document also addressed in para. 69 above. This was provided by Virgin Media in response to the request for Virgin Media's training materials. As noted in that paragraph, this document is expressly described as: *"Cancellation/Termination Notice Procedure".*The document states: *"**At the end of these calls** the communication is clear that the customer intends to cancel."*[70] The final page of the script states: *"When a customer requests to cancel/terminate their services, **and you cannot save the customer**, you must tell them the following information …"*[71] This material plainly envisages that this final stage of the call will take place after

[70] Emphasis added.
[71] Emphasis added. The information to be given is in relation to the cancellation fee to be paid (if still within the minimum term), the need to give 30 days' notice in other cases and details of the final bill and the collection of Virgin Media equipment.

the agent has been unable to save the customer. In other words, it envisages that the final stage will be preceded by save activity.

(i) Both the Objections Handling document and the more general cancellation/termination procedure document effectively constitute instructions to Virgin Media agents as to the procedure to be followed by them in dealing with cancellation requests on the telephone or in dealing with calls in which the prospect of cancellation is raised. The language of the latter document shows that it is not designed solely to deal with calls that commence with a request to cancel. The language is sufficiently wide to be understood as being applicable to all circumstances where cancellation is mooted at whatever point in the call it may occur.

(j) No instruction is given in either of these documents that save activity should cease where it becomes clear that it is not welcomed by the customer or where it is clear that the customer is intent on cancelling. The absence of such an instruction is therefore a feature of the procedure which Virgin Media has instructed (through the medium of its training materials) should be followed by agents in dealing with cancellation requests. The absence of such an instruction has the potential that customers intending to cancel may be subjected to unwelcome save activity designed to retain the customer for Virgin Media and which stands in way of giving effect to their intention to switch. The potential that this may occur is also increased by the way in which the training materials encourage agents to defer giving effect to a customer's wish to cancel until the end of the call;

(k) The potential that this may occur is also increased by the financial incentives given to agents who succeed in saving a customer for Virgin Media. While

Virgin Media has sought to make the case that the incentive is paid in return for an agent resolving a customer's issue, it is clear that the event which triggers payment of the incentive is the retention of the customer. As recorded in para. 19 above, Virgin Media expressly stated, in its response of 19th June 2020, to a question raised by ComReg in relation to incentives paid to Virgin Media agents in handling cancellation requests, that commissions were paid to its agents in handling a cancellation request where the customer *"ultimately decides to stay with Virgin Media"* – albeit that Virgin Media added that the decision to stay may have been as *"a result of solving technical issues or moving to a lower price plan/better matched to their needs."* Crucially, the commission is not paid as a consequence of the agent identifying a solution to a technical issue or a lower price. It is only paid where the offer of that solution or price results in the retention of the customer. Thus, unless the agent saves the customer, the financial incentive is not payable.

210. As outlined in para. 143(e) above, it seems to me that, for the purposes of Regulation 25(6)(b), a *"procedure"* musts involve some level of systematic operation or course of action on the part of the service provider. In my view, the matters outlined in para. 209(e) to (k) above clearly fall within this rubric. The training manuals and other material provided by Virgin Media plainly evidence instructions by it to its agents to take a systematic approach to cancellation requests. The intention underlying training materials is to encourage or require agents to act in an particular way. That is the hallmark of a systematic approach. Save activity – in advance of giving effect to a cancellation request – is an inherent part of that approach. Not only are agents instructed through the manuals to take that approach but they are encouraged and incentivised to

do so by the availability of financial commissions which are only payable where the agent succeeds in saving the customer.

211. One can clearly see the results of that approach in some of the transcripts discussed above. As noted previously, I was not taken through all of the transcripts. However, even on the basis of the small sample of the transcripts that were opened to the Court, one can see how the approach taken in the training materials has had an impact on the way in which Virgin Media agents deal with calls from customers who are considering switching to a different provider. In making that observation, I have not lost sight of the case made by Virgin Media that the number of transcripts of calls is simply too small to be representative. That is an issue that I will address after I have analysed those transcripts that were opened and made such findings as are appropriate on foot of that analysis. In the first instance, I propose to examine whether the transcripts provide any evidence of activity that might amount to a disincentive against changing provider within the meaning of Regulation 25(6)(b). It is important to keep in mind that the existence of a disincentive against switching is only one aspect of Regulation 25(6)(b). It is also necessary to show that this occurred as a result of a condition or procedure operated by Virgin Media.

The additional findings that follow from an analysis of the transcripts of customers' calls

212. Transcript T 22[72] is a very clear example of a case where it was abundantly clear that the customer wished to proceed with a cancellation and change to a *"cheaper provider"*. Nonetheless, the customer was subjected to sustained and plainly unwelcome save activity. While the making of an offer of better terms may often fall

[72] See para. 54 above.

short of a disincentive within the meaning of the Regulation, the transcript here demonstrates that the customer had no interest in hearing such offers. His clear wish to cancel was therefore obstructed by the sales patter of the agent. At a very early point in the call, the customer was asked if he would be interested in staying if Virgin Media could bring the price down. He said: *"no, not at this time"*. Notwithstanding this very clear expression of the customer's position, the agent went ahead with save activity which occupied the next nineteen lines of the transcript, following which the customer politely said that he had made up his mind. But even that clear expression of the customer's intention did not result in the agent giving effect to it. Instead, the agent again persisted only to be told, once more, by the customer that *"sorry, no, it's okay … thank you for offering, but, no …"*. Again, that did not stop the agent. The customer had to interject twice more before the agent eventually proceeded to deal with the cancellation request that had been very clearly made at the beginning of the call and which had been reiterated in response to the question whether the customer would be interested in staying if the price could be reduced. This interchange with the agent must be seen in light of what constitutes a disincentive for this purpose. As I have sought to explain in para. 143(b)-(c) above, a disincentive is something which operates as an obstacle or impediment to switching albeit that it does not have to actually deter switching[73]. That involves something that stands in in the way or hinders the exercise of choice by the customer. Here, the customer plainly intended to switch to a different provider. That was very evident from the very clear language which he used and his repeated interjections to the same effect. Instead of giving effect to the customer's decision, the agent subjected the customer to save activity which was obviously not

[73] As noted in para. 143(c) above, it also extends to procedures that have the effect that switching is less likely to occur.

welcomed by the customer and which stood in the way of giving effect to the customer's decision to switch. In my view, this represents a very obvious example of an agent placing an obstacle in the customer's path which has the capacity to deter switching (even if unsuccessful on this occasion). I am therefore of the view that it constituted a disincentive against switching within the meaning of Regulation 25(6)(b).

213. It seems to me that a similar conclusion arises in the case of Transcript T 28[74]. Although the agent was not as persistent as the agent in the case of Transcript T 22, this transcript also evidences the placing of an obstacle in the way of a customer who wished to switch to a different provider. The conversation began with a very clear expression of intention by the customer to cancel the service and move to a new provider. There was a relatively short discussion about the mechanics of giving notice which concluded with the customer giving 30 days' notice. Having had that conversation, the customer was then asked why he wished to cancel. When he said that he was not happy with the price, the agent said that he would look to see what he could do. But the customer immediately said that *"No, I'm after setting the ball in motion. I have another provider coming".* Yet, the agent persisted and, having found out that the customer was moving to Eir, suggested that Virgin Media had a better broadband than Eir. The customer replied in crystal clear terms that this did not make a difference and that: *"I'm cancelling today".* As the extract quoted by ComReg demonstrates, that reiteration of the customer's position did not bring a halt to the agent's save activity. The agent persisted in bringing up a previous offer that had been made by Virgin Media to which the customer responded: *"please please".* The agent sought to continue and the customer then interjected to say that he did not want to talk further and that he just

[74] See para. 185 above in relation to the commencement of the call. See also para. 55 for the extract (taken from a later point in the call) as quoted by ComReg in its opinion.

wanted to cancel. Even that reiteration of his clearly expressed intention did not bring the save activity to an immediate end. There was one further attempt to keep up a sales conversation, following which, the agent, finally, gave effect to the customer's intention. Again, the approach taken by the agent seems to me to flow directly from the approach directed in the training materials (which contain no instruction to cease save activity once a customer indicates a clear wish to cancel). It is equally clear that the save activity on this occasion placed an obstacle in the path of the customer's intention to switch provider and that it therefore constituted a disincentive to switching within the meaning of Regulation 25(6)(b).

214. ComReg also relied on Transcript T 4.[75] As noted in para. 187 above, the call commenced with the customer indicating an intention to cancel and indicating that he had not yet decided which of Virgin Media's competitors he would switch to. But it is evident that he did want to switch to a different provider. That led to the agent immediately launching into save activity. While the customer did not display the annoyance shown by the customers the subject of Transcripts T 22 and T 28, it was obvious from the outset of the call that the customer wished to cancel. However, in contrast to the approach taken in both of those transcripts, the agent, on this occasion, did not persist with save activity for very long and it is not evident from the transcript that the customer was unhappy with the save activity. For that reason, this is a more marginal case and I am not persuaded that the activity on the part of the agent went so far as to constitute an obstacle to switching.

215. In contrast to T 4, I have come to the conclusion that Transcript T 64[76] provides clear evidence of the placing of an obstacle in the path of a customer seeking to switch.

[75] See paras. 56, 57 and 187 above.
[76] See paras. 58, 59 and 188 above.

It is true that, in that case, the caller did not signal an unqualified desire to cancel until a relatively late stage in the call. While the customer mentioned cancellation at the outset of the call, this was done in a non-committal way with the customer saying: *"I want to cancel **or**"*[77]. Immediately, the call switched to a conversation about price. The customer was plainly interested in hearing what pricing options were available from Virgin Media. The customer asked the agent to explain them before ultimately opting to proceed with cancellation. Given the customer's obvious eagerness to hear what could be done about the price, I cannot see any scope to suggest that any obstacle was placed in the customer's path up to that point. Up until then, one could not conclude that the customer had even decided to cancel. However, as the extract quoted in para. 59 makes clear, a point came in the conversation where the agent continued with save activity notwithstanding the customer's clearly expressed wish to cancel and notwithstanding a number of interjections by the customer to remind the agent of that fact. As noted in para. 188 above, the weariness on the customer's part (in response to the agent's approach) comes across very clearly from the terms of the transcript. In my view, this is a very clear example of an obstacle being placed in the path of the customer's wish to switch and that it, accordingly, constitutes a disincentive within the meaning of Regulation 25(6)(b). While the customer did not expressly mention an intention to go to a rival provider, it is clear that this would have been the upshot of the cancellation and this was plainly understood by the agent who referred to his offer as *"a bit of a safety net"* which the customer could revert to in the event that a satisfactory offering was not available from another provider.

[77] Emphasis added.

216. I am of the view that T 25[78] is in the same category. It is clear from this transcript that the customer there had already entered into a new contract with Sky. The conversation started with the customer indicating that he wanted to cancel the service and when asked why that was so, he immediately said that he was moving to Sky. The agent quickly switched into prolonged save activity which takes up the bulk of seven pages of the transcript before the agent eventually processes the request. While the customer engaged with the agent to some extent, the customer also had to interject on a number of occasions to make clear that he was already committed to move to Sky. At an early point, he responded to an offer of better terms: *"No, no, no. I have agreed to go with them. I've discussed it with my wife there and we've agreed to go with them. So we've actually paid up front now ...."*.That did not bring the save activity to a halt. Over the course of another page of the transcript, the agent made another offer to which the customer responded: *"As I say, we've made the switch. I confirmed it with Sky yesterday ... And set the wheels in motion"*. But, again, that did not stop the agent who then said that he could make a *"much higher offer ... if you stayed with us"*. This provoked the customer into saying that this annoyed him because if that had happened on a previous call, he would not have moved to Sky. A conversation followed in which the customer outlined what had happened when he had called previously. At the end of that conversation, the agent made another offer only to meet with a similar response from the customer: *"No, I'm going to - look, I've made up my mind I'm going to move to them just for the moment just to, because I've committed to it. I don't like doing that to people, if I've said I've committed, I've committed."* That did not stop the agent in his tracks. Over the course of the next page of the transcript, he made another offer but, while expressing annoyance that the offer had not been made in the course of an earlier call,

[78] See para. 189 above.

the customer reiterated that he was now committed to Sky and that the equipment was on its way. It was only at that belated point in the conversation that the agent finally moved to process the cancellation request. In my view, this persistent save activity on the part of the agent in response to a very clear request to cancel from a customer (who was plainly minded to move to a competitor) undoubtedly constituted an impediment to the exercise of the customer's choice to switch provider. It is therefore a further example of a disincentive within the meaning of Regulation 25(6)(b).

217. I take a similar view in relation to Transcript T 29. The relevant circumstances have previously been described in paras. 192 and 193 above. I do not believe that it is necessary to repeat that exercise here. As noted in para. 192 above, there came a point in the conversation where it became clear that the customer wished to cancel. This was followed by persistent save activity on the part of the agent which, in my view, amounted to a disincentive to switching for similar reasons to those outlined above in relation to Transcript T 25 albeit that such activity was not so prolonged on this occasion. The save activity was also not so prolonged in the case of Transcript T 26 (which is addressed in para. 190 above. In that case, the agent did not persist for long with save activity. Nonetheless, I take the view that, on balance, the save activity (short though it was) fell on the wrong side of the line and constituted an impediment to switching. In this case, the customer said in clear terms at the start of the call that she wished to cancel. When the agent asked why, the customer said that she was going to *"upgrade"* her existing Sky service, the implication being that she no longer needed the Virgin Media service as well. The agent immediately suggested upgrading the Virgin Media service instead but the customer interjected in strong terms to reiterate that this was not her intention saying: *"Just hold on. Hold on a second. No. Actually, I was just speaking to my husband there, we don't actually want the two systems any*

more." Instead of immediately giving effect to the customer's wishes, the agent tried to deflect the customer from moving by making comparisons between the pricing of the respective packages available from Sky and Virgin Media. While the agent did not persist for long with this, the customer had to make one further intervention (*"Yeah, yeah. Ah, no, he wants to do it. He wants to leave it that way."*) before the agent gave effect to her clearly expressed wish to cancel. While the impediment to switching on this occasion is not as pronounced as it is in the case of the other examples discussed above, it seems to me that the save activity, nevertheless, involved placing an obstacle in the customer's path. The call began with a clear wish to cancel. While it may be acceptable for an agent to clarify that this was definitely the customer's wish, the customer here made that very clear when she interjected in the strong terms outlined above. To continue with save activity after that interjection seems to me to have been an attempt to impede or hinder the customer in switching her full service to Sky in place of Virgin Media.

218. I am also of the view that, in the case of Transcript T 27[79], a point came in the conversation between the customer and the agent where it became very clear that the customer wished to cancel the Virgin Media service and proceed with a move to Vodafone. For the reasons outlined in para. 197 above, I believe that, for the first 8 pages of the 13 page transcript, the customer was very keen to discuss the possibility of remaining with Virgin Media on better terms. It was only at a later point in the conversation that the customer indicated a definite intention to proceed with Vodafone and cancel the Virgin Media service. Notwithstanding that very clearly expressed wish, the customer was subjected to the save activity described in paras.198 and 199 above. In my view, this activity also falls into the category of a disincentive to switching within

[79] See paras. 197 to 199 above.

the meaning of Regulation 25(6)(b). The save activity (which continued over several pages of the transcript) constituted an impediment to the customer's wish to switch.

219. In contrast to the transcripts described above, I take a different view in so far as Transcripts T 66[80], T 67[81], T 68[82], T 5[83], T 20[84], T 24[85], T 40[86], T 48[87], T 62[88] and T 60[89] are concerned. I do not think that it can be said that the agents in those cases went so far as to place an obstacle in the path of a customer who wished to cancel. In the case of Transcripts T 66 to T 68 and T 40, it is true that, in each case, the customer started the call by expressing a wish to cancel. But, in each case, the customer quickly became involved in what was obviously a welcome conversation about pricing and was offered better terms by the agent which the customer gladly accepted. In my view, it is going too far to suggest, as ComReg does, that the making of a better offer to a customer (who is plainly interested in receiving such an offer) constitutes an impediment or obstacle to switching. If the customer is obviously interested in hearing what the agent has to say, it is not plausible to suggest that the making of a better offer should be characterised as an impediment to switching. In each of these three cases, it appears that the customer had no interest in switching provider once their issue in relation to price was addressed. Thus, they were not *"switchers"* in any true sense and the save activity on the part of the agent could not be said to be an obstacle to switching. Accordingly, in the case of these customers, the Virgin Media agents' activity did not amount to a disincentive within the meaning of Regulation 25(6)(b).

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[80] See para. 194 above.
[81] See para. 195 above.
[82] See para. 196 above.
[83] See para. 200 above.
[84] See para. 201 above.
[85] See para. 202 above.
[86] See para. 203 above.
[87] See para. 204 above.
[88] See para. 205 above.
[89] See para. 206 above.

220. Transcripts T 5, T 20 and T 24 are all examples of calls where the customer, after a conversation with the Virgin Media agent, proceeded to cancel their contract. In each case, it is clear from the opening exchange that the customer wished to cancel but it is equally clear that the customer was also quite happy to hear what Virgin Media had to offer before proceeding with cancellation. Crucially, once it became clear that the customer wished to proceed with cancellation, the agent gave effect to that choice. I cannot see any evidence in any of these three cases of activity on the agent's part that could be said to constitute an obstacle to switching. There is nothing in these transcripts to suggest that the customers did not welcome the save activity in question and, in each case, the agent acted promptly once the customer opted to proceed with cancellation. In those circumstances, there is no basis to find that any activity on the part of these agents constituted a disincentive within the meaning of Regulation 25(6)(b).

221. I also cannot see any issue with the manner in which the customer calls were addressed in the case of Transcripts T 48 and T 62 and T 60. In each case, the customer commenced the call by raising cancellation in a conditional way. As outlined in para. 204 above, the customer, in Transcript T 48, said very plainly that she would change provider if Virgin Media could not do something for her in terms of price. That was an invitation by the customer to the agent to outline the available options. That is precisely what the agent did. The customer actively participated in a back and forth discussion about those options and was made an offer of better terms that satisfied her requirements and which she accepted. She was therefore not impeded in any way from switching provider. It is clear from the transcript that the customer only intended to switch in the event that Virgin Media did not offer sufficiently attractive terms. As described in paras. 205 and 206 above, the pattern in the case of Transcripts T 62 and T 60 was the same.

I therefore conclude that these customer interactions did not involve any disincentive to switching within the meaning of Regulation 25(6)(b).

The conclusions to be drawn from the Transcripts and the training materials

222. As discussed above, I have reached the conclusion that, in the case of Transcripts T 22, T 28, T 64, T 25, T 29, T 26 and T 27, the save activity undertaken by the agent constituted a disincentive to switching within the meaning of Regulation 25(6)(b). It was plainly designed to dissuade the customer from switching and it also placed an obstacle in the way of the customer's wish to switch. This amounts to no more than seven instances of such activity. Is that small sample enough to substantiate ComReg's claim that Virgin Media's *"procedures"* for contract termination act as a disincentive against switching? As noted previously, Virgin Media has argued strongly that the small number of transcripts on which ComReg relies is an insufficient and unrepresentative sample, statistically, for this purpose. Virgin Media has contended that this sample must be measured against the sheer number of calls in the period in issue which ComReg had characterised as *"cancellation requests"*. As noted in para. 31 above, there were a total of 194,784 calls by customers in that category of whom 76% did not cancel while the remaining 24% (equating to 46,714) did cancel, either on the initial call or subsequently. Against that backdrop, the seven transcripts identified above amount to a comparatively tiny number of instances where it has been established that the save activity constitutes a disincentive within the meaning of the Regulation. Even if one were to confine oneself to the transcripts which have been considered by ComReg, the seven instances in question represent slightly less than 10% of the total of 71 transcripts reviewed.

223. In response, counsel for ComReg, on Day 5 of the hearing, emphasised that the transcripts supplied were chosen quite randomly and that the probability must be that

such a random selection is representative. Counsel drew attention to the fact that, when ComReg asked for the first batch of transcripts, it had no way of knowing what they would throw up. When it received the first batch, it was puzzled because, in all of them, the transcript concluded with a cancellation going ahead. This was not in line with the statistics provided in Appendix 3 to Virgin Media's June 2020 response which suggested that, in the vast majority of cancellation requests[90], the customer did not cancel. For that reason, ComReg, in its follow up request of 19th August 2020, asked Virgin Media to supply transcripts for the first 10 calls during the same periods as had been applied in respect of the first batch. Counsel argued that this demonstrates that ComReg was careful to ensure that what was sought by reference to a random series of dates was, nonetheless, representative. Counsel for ComReg also highlighted that the argument now made on behalf of Virgin Media is inconsistent with the position which Virgin Media took in its letter of 9th October 2020 in response to ComReg's request for further information of 19th August 2020. In its letter of 9th October 2020, Virgin Media complained about the burdensome nature of the request and said that it had concerns about its *"reasonableness and its proportionality…".* Strikingly, in that letter, Virgin Media said that it believed that *"all the information provided to date allows ComReg to make an evaluation of this Case".* While the latter point may have strong rhetorical value, I am not persuaded that it provides a substantive answer to the case made by Virgin Media that this small number of transcripts cannot be said to be representative. That said, some weight must be given to the fact that the sample was chosen in a

[90] As explained in para. 158 above, I accept, on the basis of Ms. Harnett's first affidavit, that not all of the customers in this category began their call to Virgin Media with a request to cancel. I am simply using the term *"cancellation requests"* as an omnibus description of those calls in which the prospect of cancellation was raised at some point in the course of the call.

completely random way. It could not be said to have been deliberately chosen to engineer a particular result.

224. Notwithstanding the statistical issue raised by Virgin Media, I have come to the conclusion that, on the evidence before the Court, ComReg has established, on the balance of probabilities, that Virgin Media's procedures for contract termination act as a disincentive to its customers who wish to change provider. I have come to that conclusion for a number of reasons. First, it cannot be contested that the transcripts themselves constitute objective and reliable evidence of interactions between individual customers of Virgin Media and the latter's agents. Short of listening to the calls, the transcripts represent the best evidence of such interactions. Second, the transcripts cannot be read in isolation. They must be read in conjunction with the training materials discussed previously. As Ms. Harnett stressed in her affidavits, Virgin Media engages in regular training for all its call centre teams, so it is reasonable to infer that the training materials which Virgin Media has produced in the course of the ComReg investigation have been provided to its agents as part of their regular training. As noted in para. 209(e)-(k) above, it is clear from those training materials that Virgin Media has instructed its agents to engage in save activity prior to giving effect to a cancellation request. Third, the agents are also incentivised to do so with monetary incentives only being available in the event that the save activity succeeds. In the absence of anything to the contrary in its instructions to agents, the availability of such incentives (which are payable only upon a successful *"save"*) is bound to encourage some agents to persist in save activity even where the customer has made it clear that they just wish to cancel. This is the logical and expected result of the procedures which Virgin Media has put in place as evidenced by the training materials and the admissions made in respect of the existence of financial incentives. Fourth, it is a highly significant feature of Virgin

Media's training materials that, as noted in para. 209(j) above, no instruction is given in any of the materials that save activity should cease where it is clear that the customer is intent on cancelling. In circumstances where save activity is actively instructed or encouraged under the terms of the training materials, the absence of such an instruction has the very obvious potential that customers intending to cancel may be subjected to unwelcome save activity of the kind that can so clearly be seen in the seven transcripts identified above. Crucially, the absence of such an instruction cannot be said to be an isolated incident or a *"one off"* event. The lack of such an instruction is an integral part of the Virgin Media training system. That training system plainly involves a level of systematic operation sufficient to constitute a *"procedure"* for the purposes of Regulation 25(6)(b)[91]. Unsurprisingly, the lack of such an instruction has resulted in some Virgin Media agents persisting in save activity in the teeth of a clear and unequivocal expression of an intention to cancel. While the instances of such behaviour have been proved in no more than seven out of 71 transcripts, those instances still represent nearly 10% of the individual calls reviewed and analysed by ComReg. That is not an insignificant proportion. I fully accept that a significant proportion of the transcripts opened to the Court do not disclose activity on the part of Virgin Media agents that go so far as to constitute a disincentive to switching. But, as noted in para. 143(h) above, there is no threshold of materiality once an objectively measurable impact is shown. It seems to me that these seven transcripts show that Virgin Media agents have placed obstacles in the path of customers seeking to switch to a rival provider. In circumstances where the agents' activity in each of these instances did not succeed in saving the customers, I appreciate that it might be argued that these seven transcripts do not evidence an objectively measurable impact. However, in my view,

[91] See para. 143(e) above.

any such argument wholly lacks reality. The agents would not engage in this activity unless it works, at least, occasionally. It is also necessary to keep in mind that a very high proportion of customer calls, in which the issue of cancellation is raised, do not ultimately result in cancellation. While I have accepted that not all of the calls included in ComReg's calculation of 194,784 calls began with a request to cancel[92], cancellation must have been raised at some point in the course of the call. Otherwise, the calls would never have been included in the cancellation data supplied by Virgin Media to ComReg. Given that 76% of that very large number did not result in cancellation, the probability is that, at least, some of those *"saves"* arose as a consequence of successful save activity of the type seen in the seven transcripts in issue. As I have said, it is unreal to think that the agents would not engage in such activity unless it achieved its purpose from time to time. Given the financial incentives involved, it would not make sense for an agent to persist in unwelcome save activity, if such activity did not work. If such activity did not occasionally work, it would make more sense to finish the call quickly and move to the next call in the hope of a better result with the next caller.

225. I acknowledge that no statistical analysis has been carried out of all of the thousands of calls in which the issue of cancellation was raised in some form or other. However, while it may have been desirable for ComReg to have undertaken such an exercise (and while such an exercise might well be essential in other circumstances), I do not believe that it was necessary to do so here. It seems to me that, in the absence of a clear instruction to the contrary in the training materials, it is inevitable that, through the combination of Virgin Media's encouragement to engage in save activity and the availability of financial incentives, a proportion of Virgin Media agents would persist in such activity even where it is clear that the customer clearly wishes to cancel. While

[92] See para. 158 above.

that proportion might well be greater or less than 10%, it seems to me that, on the balance of probabilities, there is likely to be a material proportion of agents who will do so in the hope that they will earn the commissions available. In reaching this view, I also bear in mind the important fact that the sample of transcripts reviewed by ComReg was randomly chosen. Given the incentives and the encouragement to engage in save activity in the training materials, it seems to me to be likely that any random sample of calls would throw up a similar picture. There will, of course, be other agents who will have the good sense to abandon save activity where it is clear that a customer is intent on cancelling. Transcripts T 5, T 20 and T 24 are good examples of this. But the problem is that Virgin Media does not prescribe this approach and, instead, through its training materials and financial incentives, promotes the opposite approach. In my view, that makes it likely that the agents' behaviour evident in the seven transcripts in issue has been repeated on a wider scale by Virgin Media agents. If a random sample of 71 transcripts threw up seven examples, it seems to me, in the particular circumstances of this case, that it is more likely than not that further examples would be thrown up if a more comprehensive exercise had been carried out.

226. If the transcripts stood on their own, the seven instances which I have identified might not have provided sufficient evidence to reach this conclusion. Crucially, they do not stand on their own. The training materials and the existence of financial incentives also form part of the evidence before the Court. In these circumstances, I have come to the conclusion that the procedures operated by Virgin Media for contract termination act as a disincentive to customers who wish to change to a rival service provider. On that basis, I am satisfied that it is appropriate to grant the first form of relief sought by ComReg in these proceedings namely a declaration that Virgin Media has not complied with its obligations under Regulation 25(6)(b) of the Universal Service Regulations.

227. I do not think that it is necessary in the circumstances to address Virgin Media's practice of telephoning a customer who gives written notice of termination for the purposes of changing service provider. I have not seen any transcripts of such calls. Having regard to what has been said by Ms. Harnett in her second affidavit[93], Virgin Media may well have good reason to call such customers to confirm that the account holder is the person who has requested cancellation or to explain the final billing process. In the absence of transcripts of such calls, I do not believe that it is appropriate to attempt to reach findings in relation to this aspect of the case. However, to the extent that save activity is attempted on such calls, it would be important that Virgin Media should instruct and train its agents to cease such activity where it is clear that the customer wishes to proceed with the cancellation. In the absence of such instruction and training, there is an obvious risk that agents will persist in such activity and, for all of the reasons previously discussed, this would, if it were to occur, constitute a breach of Virgin Media's obligations under Regulation 25(6)(b).

Has ComReg established that it is entitled to require Virgin Media to implement its suggested two step process?

228. It is next necessary to consider whether ComReg has made out a case for the order sought by it requiring Virgin Media to follow the two-step process described earlier[94]. It will be recalled that what is sought by ComReg is an order that Virgin Media must undertake that, when contacted by a customer seeking information about cancellation procedures **or**[95] to cancel their service, Virgin Media will not provide information about its services or offers unless it first engages in the following two-step process:

[93] See para. 180(e) above
[94] See para. 93(b) above.
[95] My emphasis.

(a) the customer must first be explicitly offered the choice to proceed directly to cancellation; and,

(b) having done so, Virgin Media may seek the consent of the customer to hear further information about Virgin Media's products and services.

229. I am not satisfied that ComReg has established that an order in such terms is the appropriate way to address its concerns. It seems to me that the order proposed goes too far and has the capacity to create problems in a number of different circumstances.

230. In the first place, it is clear from the terms of the order sought that, if granted, Virgin Media would have to engage in this two-step process not only where a customer calls to cancel but even where a customer makes an enquiry about the cancellation procedures. As noted in para. 173 above, this goes further than the commitment given by Virgin Media to ComReg in the context of cancellations made on foot of a CCN. That commitment is stated to apply *"for all customers who seek to cancel their contract on foot of a CCN".* By its terms, the commitment would not apply where a customer merely asked for information about the cancellation process. ComReg has not adequately explained why it considers it necessary to impose the two-step process on calls even where a customer does no more than seek information about the cancellation process. A customer in that category may not have made any decision to cancel and may simply be seeking information about the process so that the customer will know what is involved in the event that the customer ultimately decides to cancel. It would be very odd in those circumstances if such a customer were to be presented with a binary choice of either going directly to cancellation or consenting to hearing further information about Virgin Media's products and services. Neither of these courses may suit such a customer, at that point in the customer's thought process. Customers in this

category may therefore be propelled in the direction of cancellation even where they may have wished to have more time to consider their position.

231. In addition, the order sought has the potential to undermine the bargaining position of those customers who wish to use the threat or prospect of cancellation as a negotiating tool. In this context, the transcripts which I have seen demonstrate that there is substance to the evidence of Ms. Harnett that, in practice, customers may articulate a possibility of changing service provider as a means of leverage to secure an improved offer. Transcripts T 48[96], T 62[97] and T 60[98] are good examples of customers in this category. In my view, their bargaining position could well be undermined if they were to be immediately presented with the binary choice described above. If presented with that choice at the outset of a call, they may be wrongfooted and consider that their bargaining position will be weakened if they meekly say that they would like to have information about Virgin Media's products and services. They may feel that, to so opt, may give the upper hand to Virgin Media in the negotiation. Thus, some may feel under pressure to opt to proceed directly to cancellation even though that was not their original intention.

232. It is also necessary to test a further scenario that might potentially apply. Would the order sought appropriately cater for the customer who is minded to cancel because of a quality or technical issue but who is unaware that Virgin Media may be able to fix it? What will happen if such a customer calls and, having intimated an intention to cancel, is immediately presented with the same binary choice. If that customer is unhappy with the quality of service, that customer may not think that hearing about Virgin Media's products and services would be of any assistance and the customer

[96] See para. 204 above.
[97] See para. 205 above
[98] See para. 206 above

might therefore opt to proceed directly to cancellation in response to the binary offer. The order sought will provide no opportunity for the Virgin Media agent to ask (as occurred in several of the transcripts discussed above), *"Do you mind me asking why you wish to cancel?"*. If the customer identifies a technical issue in response to such a question, it might be the case that the agent would be able to identify a technical fix in which case the customer might decide not to cancel. Such a scenario would not, in my view, involve a disincentive to switching within the meaning of Regulation 25(6)(b) as the offer to fix a technical issue could not plausibly be said to be an obstacle or impediment to switching – unless the customer was intent on switching no matter what fixes might be available. Yet, if an order were made in the terms sought, it would have the potential to prevent any exploration of whether the technical issue could be fixed even where the customer would have been very happy to hear about it, had they known a fix was available. In this context, it is striking that, in some of the transcripts, customers (who have initially expressed a wish to cancel) seem to be very satisfied (and, in some cases, very relieved) when an issue is sorted out to their satisfaction in the course of a call. While these calls arose in the context of issues of price rather than technical issues, Transcripts T 66[99], T67[100] and T 68[101] are good examples of customers who, notwithstanding an opening expression of intention to cancel, were, nonetheless, very happy to stay once their issue was resolved to their satisfaction.

233. It also emerges from the transcripts that, occasionally, the customer's intentions may not be immediately clear. In such cases, the two-step approach may also give rise to difficulty. While I have only seen a small number of transcripts of customer calls, those transcripts suggest that customers, in the course of their engagement with Virgin

[99] See para. 194 above.
[100] See para. 195 above.
[101] See para. 196 above.

Media agents, express themselves in a wide number of different ways. The order sought by ComReg does not adequately take account of the sheer variety of situations that may arise and would require Virgin Media to confront customers with what may, in many cases, be an inappropriate binary choice at an early point in the conversation before the customer has actually worked out what the customer wishes to do.

234. Thus, when one tests the impact of the proposed order against a number of different possible scenarios, it soon becomes clear that the *"one size fits all"* approach proposed by ComReg is inappropriate. That is not to say that Virgin Media does not have to change its current procedures. In light of the findings which I have made in paras. 222 to 226 above, it is clear that Virgin Media is in breach of its obligations under Regulation 25(6)(b). A significant factor underlying those findings is the lack of any instruction in Virgin Media's training manuals and materials to cease save activity once customers makes it clear that they are intent on cancelling. Virgin Media needs to ensure that all of its agents are trained (and explicit provision needs to be inserted into its training materials to this effect) to give effect to a customer's wish to cancel the Virgin Media service once it is clear that this is the customer's intention. I do not, however, believe that Virgin Media agents are prevented from asking customers whether they are prepared to say why they are proposing to cancel the service. Where customers are not prepared to discuss why they propose to leave, the agent should move immediately to give effect to their wishes. But, if the customers identify a particular issue, I do not believe that the agent is prevented by Regulation 25(6)(b) from seeking to address that issue (such as by offering better terms or a technical solution) so long as the agent does not persist in such activity after it becomes clear that the customer is

minded to proceed with cancellation. Transcripts T 5[102], T 20[103] and T 24[104] are good examples of where agents responded appropriately to customers' calls. In each case, the customer intimated an intention to cancel, the agent asked whether the customer minded saying why they wished to do so, the customer identified the issue, a two-way conversation ensued in which both agent and customer actively participated but, ultimately, the customer opted to proceed to cancel and the agent facilitated this without further ado. I can identify no breach of Regulation 25(6)(b) in such circumstances. Both agent and customer were willing participants in the conversation about alternative offers and I do not believe that such a conversation constitutes an obstacle or impediment to switching. In contrast, for the reasons previously outlined, I take a different view in respect of Transcripts T 22, T 28, T 64, T 25, T 29, T 26 and T 27.[105] In each of those cases, the agent persisted in save activity even after it was clear, on any objective reading of the transcripts, that the customer was intent on cancelling and either (a) had no interest from the outset in such activity or (b) no longer had any interest in it, even if was not unwelcome at the outset.

235. In the circumstances, I decline to make the order sought by ComReg mandating the two-step approach but, in its place, I would be prepared to make an order requiring Virgin Media to take the steps outlined in para. 234 above in relation to amending its training materials and providing appropriate training to its agents. I will direct the parties to liaise with each other to agree the form of order to be made (without prejudice to any appeal that either side might be minded to pursue).

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[102] See para. 200 above.
[103] See para. 201 above.
[104] See para. 202 above.
[105] See paras. 212 to 218 above.

The order sought by ComReg requiring Virgin Media to provide training to agents to ensure that no unverified or inaccurate criticisms are made in respect of rival service providers

236. As outlined in para. 93(c) above, ComReg has also sought an order requiring Virgin Media to provide additional training to its agents to ensure that no unverified or inaccurate criticisms are made by agents to customers in respect of other service providers competing with Virgin Media. This is an issue that had been raised by ComReg in the amended notification and addressed in detail by Matheson in response on Virgin Media's behalf. However, as outlined in para. 30 above, those complaints were not repeated in any level of detail in the subsequent opinion issued by ComReg and, in those circumstances, I do not believe that it would be appropriate to consider this aspect of ComReg's case. Counsel for ComReg accepted that, in the opinion, ComReg's concern was significantly watered down from the original complains made in the amended notification. In fact, there is nothing of substance in the opinion on this issue. Accordingly, there is no basis on which to make any order in respect of this aspect of ComReg's case.

ComReg's case in relation to the 30-day notice requirement

237. The remaining issue requiring resolution is whether ComReg has established that the 30-day notice requirement amounts to a condition for contract termination that acts as a disincentive to its customers changing service provider within the meaning of Regulation 25(6)(b).

238. In order to understand this aspect of ComReg's case, it is necessary to keep two provisions of Virgin Media's contractual terms and conditions in mind. First, clause 3.1 states that, unless otherwise specified, the minimum period of a contract is 12 months from the date of activation of service. But it also states that: *"If you want to terminate this Agreement after the Minimum Period, one month's written notice is required."* This

is reinforced by clause 11.6 which states that: *"After the Minimum Period expires this Agreement will continue unless it is terminated by either of you or us giving the other one month's prior written notice. You must pay all relevant Charges up to the end of that one month notice period."* The effect of these clauses is that, after expiry of the minimum term of 12 months, the contract between the customer and Virgin Media will continue in being automatically unless and until either side gives one month's notice to the other of an intention to terminate the relationship. ComReg contends that this requirement to give one month's' notice of termination after the minimum contract period expires, constitutes a breach of Regulation 25(6)(b) of the Universal Service Regulations. ComReg maintains that the effect of this requirement is to impose a charge on customers for switching equivalent to one month's fees and charges and ComReg contends that this is likely to have a dissuasive effect on switching.

239. As noted in para. 34 above, it was also part of ComReg's case, in its amended notification, that this requirement was also applied where customers made contact with Virgin Media to port their telephone number. However, this allegation was expressly denied in the response from Matheson in their letter of 30th November 2021[106] and I have not been referred by ComReg to any relevant evidence to establish, on the balance of probabilities, that Virgin Media engages in such conduct. As Recital 47 to the Universal Services Directive made clear, number portability is to be implemented within one working day. For the purposes of this judgment, I will therefore confine myself to a consideration of ComReg's case against Virgin Media in so far as other services are concerned. The main debate in this case centred on those services; not on number portability.

[106] See para. 47 above.

240. In their letter of 30th November 2021, Matheson had also made the case that, in contrast to the position where a telephone service ceases at the moment the number is ported, Virgin Media's customers of other services continue to receive full service for the entire of the one month notice period. Matheson also highlighted that Virgin Media is not the only service provider which requires customers to give one month's notice in order to terminate service after the expiry of the minimum contractual term.

241. In response, ComReg, in its opinion of July 2022, expressed the view that the 30-day notice requirement constitutes a charge in circumstances where a switching customer may not wish for the service to be available for 30 days and may wish to switch immediately. In support of that proposition, ComReg cited a number of extracts from transcripts of calls between Virgin Media customers and agents which are replicated and discussed in paras. 77 to 82 above.

242. It will be necessary presently to consider the arguments of both parties but, before going further, I should first draw attention to the evidence placed before the Court in relation to the 30-day notice requirement.

The evidence in relation to the 30-day notice requirement

243. Both sides addressed the 30-day notice requirement in their affidavit evidence. Subject to one aspect of her evidence, I do not think that it is necessary to draw attention to anything said by Ms. Kilraine on behalf of ComReg in her first affidavit. The relevant evidence in paras. 76 to 89 of her affidavit is principally a recitation of the interactions between the parties and an identification of their respective positions which have already been set out in the earlier part of this judgment. However, one aspect of Ms. Kilraine's first affidavit should be noted. In para. 84, she said that Eir, Sky and Pure

Telecom do not impose a requirement that customers give 30-days' notice of termination.

Relevant aspects of Ms. Harnett's affidavits dealing with the 30-day notice requirement

244. As noted previously, two affidavits were sworn by Ms. Bláithín Harnett on behalf of Virgin Media. In para. 69 of her first affidavit, she said that Virgin Media is not the only operator whose terms and conditions provide for the giving of such notice. She identified that Vodafone's terms and conditions provide for the giving of 30 days' notice after the minimum term has expired. She also said that Digiweb's terms and conditions contain a similar requirement. In para. 73 of her affidavit, Ms. Harnett said that Virgin Media is aware of only three complaints to it in 2022 (up to the date of swearing of her affidavit in November 2022) in relation to the imposition of the 30-day notice period for customers. Subsequently, in the course of the hearing, counsel for Virgin Media made the case that these are the only complaints out of 450,000 customers and he argued that ComReg has to explain how these small number of complaints constitute evidence of customers being dissuaded**.**

245. In para. 79 of her affidavit, Ms. Harnett said that the 30-day notice period represents part of the contract between Virgin Media and its customers and she says that Virgin Media does not accept that ComReg is entitled to interfere with it. However, it is essential to keep in mind that the fact that the notice requirement is a term of the contract does not immunise Virgin Media from attack under Regulation 25(6)(b). As I have previously observed, Regulation 25(6)(b) applies not only to procedures which dissuade switching but also contractual terms which have the same effect.

246. In para. 80, Ms. Harnett explained that the vast majority of Virgin Media's customers are long-standing and outside of minimum term contracts. She also offered the following justification for the notice period:-

> *"A 30 day notice period provides an orderly timeframe of modest advance notice for the termination of a contract. In some instances, service supply will have been ongoing for many years. A 30 day notice period represents a reasonable notice requirement. Most consumers are used to engaging with similar notice periods for service termination and ComReg has failed to establish by evidence, beyond mere assertion, that it has a material and prejudicial dissuasive effect on customer behaviour."*

247. Ms. Harnett also maintained that the application of a 30-day notice period is a practice that is widely used across the telecoms sector throughout the European Union. In para. 84 of her affidavit, she said that Virgin Media lawyers in a number of Member States have advised that minimum notice periods for termination of business to consumer telecommunications contracts are generally permitted (with some limited exceptions) in Denmark, Germany, France, the Netherlands, Sweden, Spain, Poland, Slovakia, Hungary, Latvia, Lithuania and Belgium. While there are variations in respect of the maximum permitted notice periods, Ms. Harnett suggested that the *"preponderance of Member States"* permit 30-day notice periods. None of what is said here has been supported by any evidence as to the law in any EU Member State. It is well settled that foreign law must be proved as fact and, unless admitted by ComReg, this would require to be proved by affidavits from appropriately qualified lawyers in each of the Member States concerned. In the absence of such evidence and, in the absence of any admissions by ComReg, this aspect of Ms. Harnett's affidavit cannot be taken to be proven.

Relevant aspects of Ms. Kilraine's replying affidavit with regard to the 30-day notice requirement

248. In paras. 60 to 73 of her second affidavit, Ms. Kilraine addressed the 30-day notice requirement. In para. 60, Ms. Kilraine rejected the suggestion made by Ms. Harnett that Vodafone and Digiweb both have similar terms. Ms. Kilraine made the point that Virgin Media has not adduced evidence that the 30-day notice period applies in the specific context of a customer changing provider. She also reiterated that Eir, Sky and Pure Telecom do not impose such a 30-day minimum notice period.

249. In response to para. 75 of Ms. Harnett's affidavit (to the effect that *"certain customers choose"* to cancel after the expiration of 30 days), Ms. Kilraine said, in para. 62 of her supplemental affidavit, that:-

> *"... this deflects from the point in issue as these customers may be trying to do no more than avoid duplication of services and costs that would otherwise result and may have changed provider earlier had a cost not been associated with doing so. This puts the customers at risk of being without service, as customers moving to another ECS provider will not be able to guarantee the new service installation will be arranged on the same day that the Respondent's notice period would end or indeed within the 30-day notice period. The only way a customer can ensure they are not without service is if they only cancel their service with Virgin Media when they have their new service installed, however this course of action will result in the customer paying Virgin Media on average €88 for a service during the 30 day notice period, while also paying for their new service."*

250. Ms. Kilraine did not support this contention by reference to any empirical evidence gathered in the Irish market. Instead, Ms. Kilraine suggested that the desire to avoid duplication of services and costs among consumers is clear from research carried

out by Ofcom in the United Kingdom which found that the prospect of a *"double payment"* inhibits switching. In this context, Ms. Kilraine referred to an Ofcom report published in October 2020 entitled *"Fair treatment and easier switching for broadband and mobile customers - Implementation of the new European Electronic Communications Code - Statement and Consultation"*. At para. 9.77 of that report, Ofcom indicated an intention to proceed with a proposal to introduce a prohibition on notice period charges beyond the date of the switch for residential customers switching fixed services. Part of its justification for its decision is to be found at para. 9.74 which is quoted by Ms. Kilraine as follows:-

""Our 2018 consumer research showed that:

a) *15% of customers that switched their fixed services experienced a contract overlap and therefore were likely to be double paying for their services. Of those the majority of customers did not want a contract overlap.*

b) *The most likely reasons given by customers for the contract overlap reflect a desire to ensure continuity of service, to switch on a particular date, difficulties in coordinating start and stop dates, cancelling the service, availability of engineer appointments and not to miss out on a deal. Lack of awareness of notice period requirements was also a factor for around one in ten.*

c) *Double paying can deter some customers from switching. Over a third (35%) of fixed customers that considered but decided not to switch said the worry that they might have to pay two providers at the same time was a factor in their decision not to switch. One in five (20%) residential customers that switched their fixed services said they experienced*

difficulty in arranging not to pay for an old and a new service at the same time.

d) More than two in five (43%) residential customers that considered but subsequently decided not to switch their fixed services said concern about arranging for services to start and stop at the same time was a factor in their decision."

251. Ms. Kilraine also referred to an earlier statement issued by Ofcom in December 2017 entitled *"Consumer Switching-Decision on reforming the switching of mobile communication services"* in which Ofcom had explained the harm caused to consumers by the imposition of a notice period for changing provider. Among the points made by Ofcom were:-

(a) Consumers pay for old and new services at the same time to ensure continuity and to avoid loss of service. While customers switching can still use their old service alongside their new service, there is *"little evidence they wish to do so"*.

(b) Consumers try to avoid or minimise double payments by deferring their switch, but this results in an unnecessary delay in the switch date.

(c) Ofcom also rejected a submission that had been made to it by Virgin Media that there was insufficiently robust data on the likely increase in switching that would result from a ban on notice periods. Instead, Ofcom stated:-

> *"In our view, and as stated in the May 2017 consultation, our consumer research findings provide a reasonable basis to find that the prospect of double payments is a factor which inhibits some potential switchers. As set out in paragraph 3.77, just over*

> *one in six (17%) active considerers cited concerns about having to pay two providers simultaneously as a major factor in their decision not to switch. Therefore, we consider that prohibiting charging for notice periods beyond the date of the switch is necessary in order to remove this barrier to switching and to make the switching process easier. We do not consider that we need to consider the precise impact that this will have on switching rates."*

252. Counsel for Virgin Media strongly criticised these elements of Ms. Kilraine's affidavit in which she sought to rely on the Ofcom material. He said that it is pure speculation on ComReg's part to suggest that customers end up paying on the double in order to ensure continuity of service. Counsel highlighted that there was no empirical evidence before the Court establishing that this was so in Ireland. Counsel stressed that ComReg had carried out no surveys to establish what the position is in Ireland. He drew attention to the way in which, in some of the transcripts discussed at the hearing, customers readily gave 30 days' notice of termination in the course of their call with a Virgin Media agent or expressed no concern about the need to do so. Examples include Transcripts T 28[107], T 26[108] and T 29[109].

253. With regard to the Ofcom material, counsel for Virgin Media emphasised that, in contrast to the approach taken by ComReg here, Ofcom's analysis followed a process of consultation and an evidence gathering exercise. He also submitted that, in any event, the Ofcom analysis cannot simply *"be lifted and dropped into Ireland"*. He argued that there is no analysis from ComReg as to why the Ofcom guidance should be treated as

[107] See para. 185 above.
[108] See para. 190 above.
[109] See para. 192 above.

equally valid in Ireland notwithstanding that ComReg bears the burden of proof in these proceedings. He maintained that ComReg has done no more than assert that the Court can take this as if the position were the same in this jurisdiction.

254. In addition, counsel for Virgin Media submitted that the lack of analysis as to why the Ofcom material should be read across to this jurisdiction is particularly important when one closely examines the nature of the evidence that is cited by Ofcom. He characterised the Ofcom material as *"not overwhelming evidence such that ComReg can say, well, it is so blindingly obvious, there is no need for any Irish-specific analysis"*. In support of this submission, counsel for Virgin Media drew my attention to the footnotes to the statements made in para. 9.74 of the Ofcom report quoted in para. 250 above which put those statements in context. It will be recalled that in para. 9.74(a), Ofcom stated that 15% of customers who switched their fixed services[110] experienced a contract overlap and were therefore likely to pay on the double for the duration of that overlap. In the same sub-paragraph, it was stated that the majority of those customers did not want this overlap but this statement must be read with footnote 390. That footnote stated that it was 10% of *"fixed switchers"* who did not want the overlap. As I understand that footnote, this means that the overall proportion of customers of fixed services who switched and paid on the double in this way – and did not want this overlap – was 10% of the total number of customers who switched. Counsel for Virgin Media submitted that this showed that only a low proportion of customers were unhappy with the overlap. That is not to say that counsel accepted that there was any evidence of overlap in Ireland. This aspect of his submissions was focused on an analysis of the Ofcom material.

[110] As footnote 389 to the Ofcom report explains, this includes a number of different services namely *"triple play"* where the customer has landline, broadband and TV, *"dual play"* (landline and broadband) and standalone TV.

255. Counsel for Virgin Media also highlighted a further aspect of footnote 390 in support of his argument that the Ofcom material is underwhelming. Footnote 390 recorded that the total number of respondents surveyed in the category of customers with dual landline and broadband services was no more than 44 people which is obviously a tiny number in the context of the United Kingdom as a whole. That said, it does appear that Ofcom was satisfied that the number of respondents in the *"triple play"* (i.e. landline, broadband and television) category was more representative and the figures of 10% and 15% mentioned above appear to have been principally derived from this category.

256. As counsel for Virgin Media observed, it is also important to read what is said in para. 9.74(c) in conjunction with the footnotes to that sub-paragraph (in which Ofcom said that double paying can deter some customers from switching). The footnotes add important context. It will be recalled that Ofcom said that over 35% of fixed customers who had considered switching but decided not to do so *"said that the worry that they might have to pay two providers at the same time was a factor in their decision not to switch."* The footnote to that sentence makes clear that the 35% in question can be broken down into two subcategories, namely those for whom the concern that they would have to pay two providers was a major factor in their decision not to switch (12%) and those for whom the concern was a minor factor (22%).[111] The footnotes also put what is said in the final sentence in sub-para. (c) in perspective. There, Ofcom observed that one in five residential customers (i.e. 20%) who switched their fixed services said that they encountered difficulty in arranging not to pay for an old and a new service at the same time. But the footnote to that sentence revealed that this figure of 20% was broken down into 6% who found this to be a major difficulty and 14% who

[111] It appears from the report that the total figure of 35% is due to rounding.

described it as a minor difficulty. Counsel for Virgin Media submitted that the footnotes disclose that only a very small proportion of consumers in the United Kingdom fall within the categories discussed in para. 9.74 of the Ofcom report. He argued that this calls for *"Irish specific analysis, because it is fairly equivocal itself, even in a UK context, where the circumstances may well be different. It is for ComReg to persuade you that, in Ireland, by reference to Irish conditions, the application of notice periods to broadband switchers operates as a disincentive."*

257. In response to these submissions, counsel for ComReg argued that there was no need for ComReg to undertake survey evidence in Ireland. In her closing submissions, she suggested that it is self-evident that a consumer should not have to pay for two services when they only need one. She submitted that, having regard to the test formulated by the CAT in England, it does not matter if it is 6% of people or 76% people who have major difficulty in avoiding double payment. That might be so if there was evidence to that effect in respect of the position in this jurisdiction but the figure of 6% comes from the Ofcom report and is based on research undertaken in the United Kingdom. There is no equivalent evidence as to the position in Ireland. When I drew attention to the lack of empirical evidence in Ireland, counsel replied that ComReg is entitled to take the view that no customers want to have two services in place when all they need is one. She suggested that this was common sense. In addition, she submitted that the transcripts show that Virgin Media customers are unhappy about it. While counsel did not identify the transcripts she had in mind, it is true that in the case of Transcript T 28, the customer was unhappy that one month's notice of termination was required. In so far as I can see, the customer in question did not raise any issue about double payment. However, the requirement to pay Virgin Media for the duration of the notice period was raised in three of the four complaints made to ComReg by Virgin

Media customers quoted in para. 262 below and also in the course of the *"customer contact"* described in para. 263 below.

258. Before addressing the remainder of Ms. Kilraine's affidavit, there is one further aspect of the Ofcom report that should be noted but which neither side brought to my attention. One of the factors that appears to have influenced Ofcom's decision to prohibit providers from seeking to collect notice period charges from switching customers beyond the date of the switch was its view that, to do so, would not give rise to significant costs for providers. In turn, that view appears to have been significantly influenced by the fact that many providers in the United Kingdom already reduced or aligned the notice period with the switch date for certain types of fixed switches. This appears from para. 9.75 of the Ofcom report. (This paragraph was not quoted or mentioned by Ms. Kilraine in her affidavit). In that paragraph, Ofcom said:

> *"9.75 We anticipated that the costs to fixed providers of prohibiting notice period charges would not be significant because:*
>
> > *a) Many fixed providers already reduce or align the notice period with the switch date for certain types of fixed switches. Fixed providers tend to include in their terms and conditions for residential customers a notice period of 30 or 31 days for fixed services. Where residential customers switch through the Notification of Transfer process, most of the largest providers (BT, Sky and TalkTalk) reduce this notice period and the associated charges or align it with the 10-working day transfer period built into the process so customers do not pay notice charges beyond the switch date. Some of the smaller providers also reduce the notice period they apply when residential customers switch using the*

Notification of Transfer process. This reduces the number of required systems or process changes.

b) The implementation costs for those fixed providers that don't already align the notice period with the switch are likely to be small. These providers will incur systems or process related costs, or both. For example, to identify where contract termination occurs because of a switch rather than for another reason and to recalculate any remaining notice period charge. Such changes could be incorporated into the broader systems and process changes that providers will need to make to comply with our other new switching requirements."

259. In addition to the U.K. consumer research that was undertaken by Ofcom, the material identified in para. 9.75 of the report seems to me to be a further U.K. specific factor that potentially differentiates the Ofcom approach. There is no equivalent evidence here.

260. Returning to Ms. Kilraine's affidavit, she rejected the suggestion made by Ms. Harnett in para. 73 of the latter's affidavit where Ms. Harnett had said that Virgin Media has no way of knowing whether a caller might be terminating service provision entirely or merely changing providers. It will be recalled that, in the same paragraph, Ms. Harnett had said the Virgin Media was aware of only three complaints to it in 2022 in relation to the imposition of the 30-day notice period.

261. In para. 65 of her affidavit, Ms. Kilraine said that it is *"easily discernible"* from the call transcripts that the majority of customers seeking to cancel were changing providers. She said that in the majority of cases, the agent asked why the customer is cancelling. I agree that this is so in the case of those transcripts that were opened to the Court in the course of the hearing. In addition, Ms. Kilraine pointed out that, where a

customer calls seeking to cancel a contract on foot of a CCN, Virgin Media agents will confirm with the customer if they are changing service provider and, where this is the case, they will advise the customer to call back, once they have a new service in place and Virgin Media will then cancel their service immediately. Ms. Kilraine said that ComReg considers that this approach should be applied to all cancelations. In the same paragraph, she also noted that, with regard to those customers who cancelled between 2016 and 2020, Virgin Media, in response to ComReg's request for information, had been able to identify whether they were changing provider.

262. In para. 66 of her affidavit, Ms. Kilraine said that ComReg has identified four consumer contracts in Quarter 3 2022, raising specific issues with Virgin Media's 30-day notice requirement. The complaints made by each of these customers is then set out. These complaints were in the following terms:-

> *"• Case Ref. 598…: 'I wish to complain about Virgin Media's practices in relation to the switching to another provider. On 25 May, I cancelled my contract with Virgin Media to move to Eir. I had been a customer of Virgin Media (and its predecessors) for over 10 years. I was told by Virgin Media that I would have to continue to pay for 30 days of service, despite my service being transferred to Eir, I complained about this and said that I would make a complaint to ComReg as a consequence of this practice. I subsequently refused to pay and on 7 August I was contacted by a third-party debt collection agency acting on behalf of Virgin Media. The 30day cancellation fee now included 'lay [sic] payment' fee also. I said to the agency that the matter was subject to a dispute. The agency informed me on 11 August that if [sic] Iliad 7days' notice to pay and that, 'Failure to make payment may result in the following steps being initiated by us without*

further notification; Additional Costs and Interest to be added to your file, Judgment and Disclosure in National Publications." On 15 August, I contacted Virgin Media again and contested the 30 days' cancellation charge. I was again told that the 30 days' cancellation charge applied and it would not be waived. I told Virgin Media again that I would complain the matter to ComReg as an anti-competitive practice. However, not wanting to occur [sic] a poor credit rating through the external agency I paid the fee to the external agency. My complaint is that it that the 30-day cancellation period is unreasonable in the context of such an extended period of custom (13 years). It serves to stifle competition by adding unreasonable administration on the part of the customer, who will have to organise their new connection and disconnection happening at the same tune, It serves to stifle competition by placing an additional cost on the customer associated with switching. The switch itself was technically easy and happened immediately but the insistence of Virgin Media that I would be required to pay them an additional month's payment for a service that I would not receive is an extortionate and anti-competitive practice.'

- *Case Ref. 597…: 'Hello I want to close my virgimnedia.ie account. Do I have to pay for the additional 30 days? The service will no longer be provided. Equipment will be returned to virginmedia.ie. Does this look like a scam? Turns on the broadband in one day and turns it off after 30 days. 'We require 30 days' notice to process a cancellation request, so it's likely you received a bill that reflects the normal billing period.'*
- *Case Ref. 596…: 'consumer advised that he did not wish to provide any contact details Consumer advised that he intends to switch from Virgin*

Media to Sky Ireland Consumer advised that his contract with Virgin Media ends on 24/07/2022 Consumer advised that he was informed by Virgin Media of 30 days' notice required Consumer raised query if 30 days' notice is required'

- *Case Ref. 596…: 'Tried to cancel off my mobile number due to a safety concern. I wanted to get a new one. So they offered to cancel my mobile number they said I have to give 30 days' notice. My bill is due tomorrow. Highlighted the security ric [sic] involved. They never offered to change the number like other providers can. They expect me to pay for a service that can't be used due the security breach. Is this even legal? That is my main enquiry. As there is massive fraud as of late with mobile numbers. Why should I have to wait 30 days and pay for a service I can't use due to a security breach, The provider is virgin media.'"*

263. In addition, Ms. Kilraine identified that ComReg had also received an earlier customer contact in relation to the 30-day notice period in 2021 in the following terms:-

"I can't get my head around how I phoned this company up to cancel my subscription as per their 30-day notice policy and yet be told by the operator to ring on the last day of the contract. And then be told that! [sic] must give a 30 day notice and was told that it's my responsibility to check on my contract details...

Further thing I have issue with perhaps you can give an answer. How can a 12 month contract end up costing 13 months? Why can an internet provider not understand 1 year contract equals 12 months? I was with another internet provider and was advised to ring on the last day of my contract, and there was no issue I was disconnected and incurred no additional charges. FYI I have

stopped using the internet since 14th September 2021. I'm not happy to pay €82.20 for the service that I haven't used anymore."

264. Counsel for Virgin Media submitted that the first complainant identified in para. 262 above was clearly incorrect because he was going to receive service during the relevant notice period. He also said that the *"stifling of competition"* would arise even if the notice period is one day (for example, where loss notification is received). In relation to the second complainant, he suggested that there is nothing in the complaint which would suggest that the notice period is liable to dissuade switching. He said that there is no evidence at all that customers are dissuaded. With regard to the third complainant, he submitted that it was just a query. In the case of the fourth complainant, he said that this is a different complaint where the customer could not use the telephone number. He stressed that there is no evidence that this is systematic. ComReg does not even say that it is systematic. Overall, he characterised the evidence as extraordinarily thin. He asked me to keep in mind the onerous financial order ComReg seeks against Virgin Media requiring it to make refunds to customers going back to 2017.

265. At para. 70 of her affidavit, Ms. Kilraine said that ComReg does not regard itself as disentitled to interfere in circumstances where the 30-day notice requirement is a contractual term of the contract between Virgin Media and its customers. Ms. Kilraine said that ComReg's role, as regulator, is to ensure that Virgin Media complies with its obligations under Regulation 25(6)(b) regardless of whether measures form part of a contract. Ms. Kilraine disputed Ms. Harnett's contention (at para. 81 of the latter's affidavit) that Virgin Media does not impose a 30-day notice requirement where a customer wishes to port a fixed or mobile telephone number. In response, Ms. Kilraine relied on the answer given by Virgin Media in Appendix 1 to its letter of 19th June 2020 (as described in para. 20 above) to the effect that *"one month's notice is required in* ***all***

circumstances"[112]. That answer went on to make clear that the notice requirement is not imposed where the porting customer does not contact Virgin Media after porting a telephone number. Virgin Media said that, in such cases, the 30-day notice requirement is waived and the customer is ported within one working day. I appreciate that Ms. Kilraine is correct in what she says about the answer given by Virgin Media in June 2020. However, in light of the clarifications subsequently given in para. 5.3.11 of the Matheson letter of 30th November 2021[113] and para. 81 of Ms. Harnett's affidavit, the answer given in June 2020 has been overtaken by the subsequent evidence presented by Virgin Media. If ComReg wished to test the veracity of the evidence given by Ms. Harnett, then it should have sought to cross-examine her on that basis. Given that ComReg bears the burden of proof in these proceedings, I believe that, in the absence of cross-examination of Ms. Harnett on this issue, there is no reason not to accept her evidence in para. 81.

Relevant aspects of Ms. Harnett's second affidavit in the context of the 30 day notice requirement

266. Ms. Harnett swore as second affidavit in which she responded to many of the points made by Ms. Kilraine above. In response to the point made by Ms. Kilrane that there is no evidence that the 30-day notice requirement found in other providers' terms and conditions applies in the context of a customer changing electronic communications service provider, Ms. Harnett said that there is clear evidence as to those providers' contractual terms and there is no evidence that those providers depart from their terms in the context of a customer changing electronic communications service provider.

[112] My emphasis.
[113] See para. 47 above.

267. In para. 30 of her affidavit, Ms. Harnett said that the 30-day notice requirement serves an important purpose. She said that the absence of any notice period would risk customers suffering a different harm namely being left temporarily without broadband service if a new supplier fails to launch service from an indicated service commencement date. She said that this is particularly so in current circumstances where so many customers work from home.

268. Ms. Harnett also rejected the suggestion made by Ms. Kilrane that Virgin Media should readily know whether someone is terminating entirely or merely changing provider. In para. 31 of her affidavit, Ms. Harnett made the point that ComReg's claim is based on a limited analysis of an insufficient number of transcripts particularly given the 5,000 to 5,500 daily volume of calls received by Virgin Media's call centre. While an analysis of that kind has not been carried out, I have already drawn attention to the way in which Virgin Media almost invariably in each of the transcripts opened to the Court ask customers why they are proposing to cancel. I have also drawn attention to the training materials and the financial incentives available to agents, all of which make it likely that, in many cases, it will be apparent to Virgin Media agents whether the customer is proposing to switch or simply cancelling the service.

269. With regard to the four Virgin Media customers who raised issues with ComReg, Ms. Harnett said that it is unclear whether these issues were ever in fact sent to Virgin Media in the normal way for resolution.

Ms. Kilraine's final response in relation to the 30 day notice requirement

270. In her final affidavit, Ms. Kilraine responded to para. 30 of Ms. Harnett's affidavit. Ms. Kilrane said that the risk of a customer being left temporarily without a broadband provider would not arise if the customer called Virgin Media when the new service was in place and effected immediate cancellation which is currently permitted

for customers who cancel on receipt of a CCN. She also reiterated that, under the approach taken by Virgin Media, customers may have to duplicate service to avoid being cut off.

Conclusions in relation to ComReg's case on the 30-day notice requirement

271. In making findings in relation to this element of ComReg's claim, I return to the principles which I have summarised in para. 143 above. Thus, as outlined in para. 143(a), the fact that the requirement to give a month's notice of termination is a contractual term (to which the customer has signed up) does not take the matter outside the ambit of Regulation 25(6)(b). On the contrary, the Regulation expressly extends to contractual terms for contract termination where they act as a disincentive to a consumer changing service provider. For that reason, the issue to be determined is whether ComReg has established that the requirement to give 30 days' notice acts as such a disincentive. It is clear from the CAT decision – and this also flows from the decision of the CJEU in *Polska Telefonia* – that an objective and reliable method must be used to establish that the condition in question acts as a disincentive.

272. Here, ComReg has argued that the requirement to give 30 days' notice effectively charges customers for switching and that this is especially so in circumstances where a switching customer may not wish for the service to be available for 30 days and may wish to switch immediately. It has also argued that the charges payable during the notice period will deter some Virgin Media customers from switching especially in circumstances where some customers may feel they have to pay on the double in order to ensure that there is no gap in service between the cessation of the Virgin Media service and the commencement of service from a rival provider.

273. ComReg has sought to rely on a number of matters in support of these contentions. In the first place, it has relied, in its opinion of July 2022, on a number of

transcripts of calls with customers. The first is Transcript T 21[114]. In my view, this transcript does no more than establish that the customer in question was very unhappy that 30 days' notice of termination was required after the stipulated minimum term of the contract had come to an end. Prior to the call, the customer was unaware that the contract continued automatically after the expiry of the initial 12 month period and it is clear from the transcript that the customer is taken aback to discover that it automatically continued into a thirteenth month. The transcript does not provide evidence that the existence of the notice requirement acts as a disincentive to switching. The same is true of the second transcript cited in the opinion, namely Transcript T 69[115]. In the case of the third transcript, namely Transcript T 32[116], the customer did not raise any issue in relation to the giving of notice. In my view, the transcripts do not provide evidence that any of the customers were in fact dissuaded from cancelling or that the notice requirement was a factor that weighed against their decision to cancel. As noted in para. 257 above, the same applies to transcript T 28[117] (which was not cited by ComReg in its opinion in this context but which does show unhappiness on the part of the customer about the notice requirement who was clearly unaware that the contract automatically continued after the expiry of the 12-month term). In that case, the customer gave the 30-day notice in the course of the call.

274. Next, ComReg relied on the four complaints and the *"customer contact"* which Ms. Kilraine had highlighted in her second affidavit and which are replicated in paras. 262 and 263 above. The fourth complaint is not relevant. It relates to a security concern. The third complaint can also be discounted. It provides no level of detail and appears,

[114] See paras. 77 and 78 above
[115] See paras. 79 and 80 above.
[116] See paras. 81 and 82 above.
[117] See para. 185 above.

in substance, to be no more than a query as to whether the customer was obliged to give 30-days' notice. In common with the three transcripts cited in the opinion, the first complaint again shows considerable unhappiness on the part of the customer concerned but it does not provide evidence that the requirement operates as an obstacle to switching. The main complaint of the customer was that the requirement to give 30 days' notice was unreasonable in the context of a 13-year relationship. The second complaint is in very brief terms and does not assist in understanding the underlying circumstances of the customer concerned. All that one can tell from the complaint is that the customer was unhappy that 30 days' notice had to be given. The same is true in the case of the *"customer contact"* described in para. 263 above who, like the customer in Transcript T 21 appeared to be unaware of the contractual provisions which automatically continued the term of the contract after the expiry of the initial 12 month term. Each of these customers was plainly of the view that they should not have to give 30 days' notice or pay charges for that period but they do not say that this deterred them in any way from switching or even that it was a factor that gave them pause for thought as to whether they should – or should not – go ahead with a switch. It is true that, in the case of the first complaint, the customer expressly described the requirement as the addition of *"an unreasonable administration"* on the shoulders of the customer *"who will have to organise their new connection and disconnection happening at the same time"* and as an additional cost for the customer. That chimes with the case which ComReg seeks to make but it is no more than an expression of opinion by a single customer (who does not appear himself to have attempted to organise a disconnection from Virgin Media to coincide with his new connection to Eir). Because the customer appears to have been unaware of the notice requirement before moving to Eir, the complaint does not establish that the requirement operates as a disincentive. Moreover,

there is no evidence before the Court of the extent of the difficulty a customer may encounter in seeking to ensure that disconnection from Virgin Media can be effected simultaneously with connection to a new provider.

275. It seems to me that there is a significant difference between the quality of the evidence available from the transcripts and complaints in relation to the 30 days' notice requirement and the evidence available from the transcripts in relation to save activity. While the number of relevant transcripts is very small in each case, the transcripts relevant to save activity are not the only relevant evidence in relation to that issue. They are to be read with training materials and in light of the financial incentives payable to agents. When all of those matters are considered as a whole, they provide a reliable and objective basis on which to reach conclusions as to the existence of a disincentive. In contrast, the evidence in relation to the 30 days' notice requirement is remarkably thin. It is unsurprising, in those circumstances, that ComReg should seek, in Ms. Kilraine's second affidavit, to bolster its case by reference to the Ofcom reports discussed in paras. 249 to 259 above. But that creates its own difficulty for ComReg because it illustrates the difference in the quality of the evidence underlying Ofcom's decision to prohibit notice period charges beyond the date of the switch and the quality of the evidence presented by ComReg here in support of its case that the requirement operates as a disincentive within the meaning of Regulation 25(6)(b). While counsel for Virgin Media has, with some justification, characterised the results of the evidence underlying the Ofcom report as underwhelming, it appears that Ofcom carried out an empirical exercise of some kind to seek to establish the impact of the imposition of notice periods and to seek to establish whether they acted to deter switching. While that exercise suggested that only a very small number of consumers regarded the possibility of having to pay on the double (in order to maintain continuity of service) as a major factor

in their decision as to whether to switch provider, that small number would still meet the relatively low threshold set by the CAT in its decision discussed in paras. 132 to 144 above. Crucially, no empirical exercise has been carried out by ComReg here and, in my view, there are obvious difficulties in ComReg seeking to rely on the consumer research undertaken by Ofcom. Quite apart from the fact that this research was carried out in a different jurisdiction where market conditions and consumer expectations may differ from the position in Ireland, a very real difficulty arises in that the underlying research has not been placed in evidence before the Court. To my mind, that creates a fundamental difficulty. How can the Court be satisfied in those circumstances that the research satisfies the requirement that an objective and reliable method has been used to generate the results on which ComReg now seeks to rely? In making that observation, I wish to make clear that I do not seek to cast doubt on Ofcom's processes. Ofcom is an experienced and respected regulator but it is not the plaintiff in these proceedings and I have been given no information by ComReg as to the kind or the extent of the research undertaken by Ofcom such that I am unable to form my own view as to its reliability and value. By analogy with the law on expert evidence, I am of the view that, even if the U.K. experience could be translated to Ireland, it would be essential that evidence would be given of the underlying basis and methodology used by Ofcom in reaching the conclusions expressed in its report. That is the only way in which I would be equipped with sufficient information to allow me to form my own view. As Collins J. explained in *Duffy v. McGee* [2022] IECA 254[118], in the context of expert evidence, an expert must provide the necessary material on which a court can form its own conclusions on relevant issues. ComReg has not placed the material underlying the

[118] At para. 19

Ofcom report before the Court and, for that reason, I am in no position to assess whether reliable conclusions can be reached on foot of it.

276. I am also very conscious that, in reaching its conclusions in respect of the approach to be taken, Ofcom appears to have taken account of an existing practice by most providers in the United Kingdom to reduce any applicable notice period so as to align it with the switch date and that many providers there appear to operate on the basis of a 10 working day transfer period. I have no equivalent evidence in this case. While ComReg has been suggested that other providers do not require that 30 days' notice be given in the context of a switch and while Virgin Media has suggested the opposite, I have no detailed evidence in relation to the practice on the Irish market.

277. Even more importantly, in contrast to the approach taken by Ofcom in the United Kingdom, there is no empirical evidence before the Court about the impact of the notice requirement on Virgin Media customers proposing to switch to a different provider. As outlined in para. 257 above, in her closing submissions on behalf of ComReg on Day 5 of the hearing, counsel for ComReg sought to suggest that such evidence is not necessary. She argued forcefully that it was common sense that a 30-day notice requirement amounted to a disincentive against switching. She asked rhetorically what survey evidence would the Court need to conclude that a customer should not have to pay for two services when the customer only needs one. She argued that it should not be necessary to show that a specific percentage of customers are deterred from paying on the double and she maintained that ComReg is entitled to take the view that it *"doesn't make sense"*. She also submitted that ComReg is entitled to rely on the transcripts and customer complaints which she suggested show that customers were unhappy that they had to pay (during the notice period) for a service that they do not want. I have already explained in paras. 274 and 275 above why I do

not think the transcripts and complaints go so far as to establish that the notice period operates as an obstacle to switching. In my view, the case made on behalf of ComReg overlooks a basic requirement identified in the CAT decision discussed in paras. 132 to 143 above, namely that an objective and reliable method must be used to establish whether a particular condition acts as a disincentive. It is not sufficient to assert that a condition has the capacity to act as a disincentive; it is essential to objectively demonstrate that the condition does act in that way or has the capacity to do so. Unlike the Ofcom report, there is no evidence that any number of Virgin Media customers experienced a contract overlap. Nor is there any sufficient evidence that any number of Virgin Media customers regarded a contract overlap as necessary in order to ensure a continuity of service. That evidence would be necessary to support the argument made by counsel for ComReg that switching customers have to pay two providers. Likewise, while Ms. Kilraine has suggested in para. 62 of her supplemental affidavit that these difficulties exist, there is no empirical or detailed evidence of difficulties encountered by customers in trying to co-ordinate start and stop dates[119] or of any other practical difficulties that may arise in the context of arranging a switch. While the first complainant (described in para. 262 above) suggested that there would be difficulty in doing so, he also said that the switch *"was technically easy and happened immediately";* so his suggestion that there might be a difficulty is hypothetical. In addition to these evidential gaps, there is no sufficient evidence that any customers, considering switching to another provider, are concerned about any perceived difficulties in co-ordinating stop and start dates.

278. In all of these circumstances, I am not satisfied that ComReg has established, on the balance of probabilities, that the 30-day notice requirement acts a disincentive

[119] See para. 9.74(b) of the Ofcom report quoted in para. 250 above.

against Virgin Media customers changing service providers. ComReg has therefore failed to establish a breach of Regulation 25(6)(b) on that ground. It is important to note that this is not a finding that a 30-day notice requirement is legally valid in the context of switching. It is simply a finding that, on the evidence presented in this case, ComReg has not succeeded in establishing that such a requirement acts a disincentive to switching service providers.

279. In these circumstances, it is, strictly speaking, unnecessary to consider the argument put forward by Virgin Media that, in light of Article 105(3) of the Code[120], the EU legislature, in enacting the pre-existing Universal Service Directive, could not have considered notice requirements of this kind to be unlawful. It may, nevertheless, be of assistance to make a number of observations in relation to this argument. I accept that the Code proceeds on the basis that a requirement to give no more than one month's notice of termination is lawful in the context of a contract which automatically continues after the expiry of the minimum contract period. Article 105(3) makes this clear. It provides that, in contracts which endure in this way, *"Member States shall ensure that, after such prolongation, end-users are entitled to terminate the contract at any time* ***with a maximum one-month notice period****, as determined by Member States, and without incurring any costs except the charges for receiving the service during the notice period. Before the contract is automatically prolonged, providers shall inform end-users, in a prominent and timely manner and on a durable medium, of the end of the contractual commitment and of the means by which to terminate the contract. In addition, and at the same time, providers shall give end-users best tariff advice relating*

[120] Namely Directive (EU) 2018/1972 establishing the European Electronic Communications Code.

to their services. Providers shall provide end-users with best tariff information at least annually."[121]

280. However, it does not follow that this amounts to some form of legislative blessing for the imposition of such a requirement in the context of switching provider (as opposed to termination *simpliciter*). Article 106 of the Code deals with switching and Article 106(1) specifically provides that, in the case of switching providers, this should take place within the shortest possible time and within the timeframe specifically agreed between the end-user and the receiving provider. Article 106(1) provides:

> *"In the case of switching between providers of internet access services, the providers concerned shall provide the end user with adequate information before and during the switching process and ensure continuity of the internet access service, unless technically not feasible. The receiving provider shall ensure that the activation of the internet access service occurs within the shortest possible time on the date and within the timeframe expressly agreed with the end-user. The transferring provider shall continue to provide its internet access service on the same terms until the receiving provider activates its internet access service. Loss of service during the switching process shall not exceed one working day."*

281. These provisions of the Code must be read in light of the recitals. In the current context, Recital 273 is particularly germane. It echoes the terms of Recital 47 to the Directive and, in so far as immediately relevant, provides as follows:

> *"In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their best interest to do so. It is essential to ensure that they are able to do so*

[121] Emphasis added.

without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures and charges. ***That does not preclude providers from setting reasonable minimum contractual periods of up to 24 months in consumer contracts*** *...''*[122]

282. In my view, the words which I have highlighted in bold print in that extract from Recital 273 are particularly important. They strongly suggest that, while there is no right to switch during the minimum contract period, that is the only period during which the right to switch can be curtailed by an obstacle to switching. Crucially, the recital does not say: *''That does not preclude providers from setting reasonable minimum contractual periods of up to 24 months in consumer contracts* ***and does not preclude switching during any contractual notice period not greater than one month****''* or words to that effect. It seems to me to follow that, if any contractual notice period is shown to be an obstacle to switching, the fact that the notice period is otherwise unobjectionable under Article 105(3) does not validate the notice period in the specific context of switching.

283. Recital 47 to the Directive is to very similar effect. Its terms have been set out in para. 129 above. Having stressed how essential it is that consumers should be able to change provider without being hindered by legal, technical or practical obstacles, the Recital says that: *''This does not preclude the imposition of reasonable minimum contractual periods in consumer contracts''.* This again confines the exception to the to the minimum contractual period. It does not say that *''This does not preclude the imposition of reasonable minimum contractual periods* ***or contractual notice periods*** *in consumer contracts''* or words to that effect. Again, it seems to me to follow that, if a contractual notice period (such as that contained in Virgin Media's terms and

[122] Emphasis added.

conditions) is shown to be an obstacle to switching, there is nothing in the terms of the Directive or the subsequent Code to suggest that the contractual notice period is immunised from attack under the provisions of the relevant implementing national law as an obstacle to switching.

The orders to be made

284. In light of the findings made in this judgment, I will, as signalled in para. 226 above, make a declaration that Virgin Media has not complied with its obligations under Regulation 25(6)(b) of the Universal Service Regulations in so far as save activity is concerned. I direct the parties to liaise with each other in relation to the precise form of that declaration (without prejudice to any appeal that either side might be minded to pursue).

285. As indicated in para. 235 above, I refuse to make the order sought by ComReg mandating the two-step approach but, in its place, I will make an order requiring Virgin Media to take the steps outlined in para. 234 above in relation to amending its training materials and providing appropriate training to its agents. Again I direct the parties to liaise with each other to agree the form of order to be made (without prejudice to any appeal that either side might be minded to pursue).

286. I refuse ComReg's application for relief in respect of the notice period requirement. For the reasons, explained above, that aspect of ComReg's case has not been proven.

287. In so far as costs are concerned, my provisional view is that, since ComReg has been successful in one aspect of it claim and has been unsuccessful in respect of the other, the appropriate approach to take is to make no order as to costs. I stress that this

is no more than a provisional view and I will, if necessary, hear the parties in relation to the issue.

288. I will list the matter before me at 10.30 a.m. on Wednesday 26 February 2025 to deal with the form of the orders to be made and to deal with any dispute in relation to costs. In preparation for that listing, I direct the parties to provide to the Commercial Court Registrar not later than 3.00 p.m. on Monday 24 February 2025, a joint written report on the extent of the agreement (or disagreement) between them in relation to the form of the orders to be made and in relation to costs.