



Wholesale Fixed Telecoms Market Review

Further consultation on proposed quality of service remedies

TalkTalk submission

December 2020

NON-CONFIDENTIAL

1 Summary

- 1.1 Ofcom's supplementary consultation on quality of service (QoS) comes against the backdrop of the ongoing Covid-19 pandemic. This pandemic has fundamentally changed the manner in which fixed line connectivity products are consumed in the UK, and has therefore increased consumers' expectations of their broadband providers, driven by vastly more homeworking than before 2020, and heavy reliance on videoconferencing services such as Zoom and Teams.
- 1.2 With homeworking has come much lower consumer tolerance of poor quality and faults, and a greater expectation that any faults will be fixed rapidly. Effectively, much of the UK's residential broadband is now demanding levels of resilience which were previously reserved for SME businesses, because individuals' ability to perform their jobs is substantially linked to the quality and bandwidth of their broadband connection.
- 1.3 Unfortunately, Openreach's performance has recently significantly deteriorated, with poor performance continuing even after the period where Openreach's operations were restricted by lockdown. TalkTalk's recent experience is that:
- [X] resulting in extended time without a working broadband service, and significant customer dissatisfaction;¹
 - on time provision and repair performance has become more volatile. Repair on time (FTTC1) since August has fluctuated from [X], creating volatility and uncertainty for our customers regarding when their faults will be fixed;
 - Openreach's call centres are performing poorly and delivering a poor customer experience due to underinvestment. Openreach consistently fail to provide notes and updates to pass to CPs; and call centres are unable to provide updates when questioned, instead asking CPs to contact them again 48 hours later;
 - Early Life Failures have increased, to the extent that an extra [X] TalkTalk customers will have to raise faults on recent orders compared to last year;
 - in our Business division, we have been seeing a significant number of instances where the KCI3 is not sent to us when a line is ceased– around [X] per week. This failure means [X], causing friction with our wholesale partners.
- 1.4 Overall, it appears that Openreach is allowing its MPF and FTTC networks to deteriorate as resources are instead reallocated to FTTP construction. This would be a beneficial approach for Openreach, as by harming FTTC customers, it can increase the speed of take-up of the FTTP network.
- 1.5 Openreach's poor performance, and lack of maintenance of its copper/ FTTC network has led to substantial customer dissatisfaction and harm. TalkTalk has around [X] FTTC customers whose circuits have degraded from a blue or green CPQ baseline to a position where they have a severely impacted circuit. Although many of these customers contact us

¹ Provision tails are measured by Openreach after 10 days' and 90 days' delay, and repair tails are measured after 5 days' and 30 days'.

in order to try to have their problems resolved, a substantial proportion do not, and instead just leave hoping for a better service elsewhere. We classify these customers as [X], and there are around [X] customers per week in this category- around [X] of TalkTalk's total churn of approximately [X] customers per week on average. Both Openreach and BT Group benefit from such churn, Openreach through reducing its costs and being paid for working line takeovers; and BT Group because they will receive a substantial proportion of TalkTalk customers churning to other CPs.

- 1.6 In light of the increasing customer demand for higher quality and Openreach's performance reducing, it is surprising that Ofcom has proposed to reduce the quality of service which Openreach is required to provide to consumers. Rather than recognising consumers' legitimate demands for high quality broadband connections, Ofcom's proposals instead gift Openreach unjustified regulatory freedom and allow it to exploit its dominance to boost its own profit margins.
- 1.7 Ofcom should instead reverse direction and push for the higher quality of service which consumers are demanding, and will continue to demand over the next control period. Most importantly:
- Ofcom should not relax QoS standards during 2021/22 to reflect the impact of Covid-19, since the pandemic will have little impact on Openreach's ability to repair faults in this period;
 - instead Ofcom should review whether it should increase standards for repair given customers' revealed preference for higher levels of quality than prior to the pandemic. If Ofcom set higher QoS levels it would not lead to higher prices for consumers given the delinking of Openreach's costs and prices currently proposed by Ofcom;
 - Ofcom should not lift QoS obligations from proactively reported faults (by changing the definition of faults). All faults, whether proactively reported by the ISP or reported by the customer, need to be expeditiously repaired. Data demonstrates that over [X] of the proactive repair reports have a genuine fault that it is the responsibility of Openreach to repair, and that Openreach is able to repair [X] of proactive faults on the first visit. TalkTalk is willing to work with Openreach to determine an industry agreed process to provide Openreach with better forward visibility of likely proactive fault levels, but Openreach must stop attempting to evade its responsibilities to maintain and repair its network by inventing specious reasons for failing to investigate faults and, where it repairs faults, admit that it has done so;
 - Ofcom should continue to impose a ten day period for the WLA First Available Date standard, in line with its January 2020 proposals. There is no customer interest justification for changing to 12 days;
 - considering the deterioration across industry of the quality of Openreach's provision service, as seen by the increase in Early Life Failures (ELF), and the persistent failure by Openreach to improve this area of its performance in line with statements to industry, we believe QoS obligations should be extended to this area of service. [X]. This is as a result of transferring experienced Openreach staff to FTTP roll out, and FTTC provisioning being undertaken by poorly trained and insufficiently equipped external contractors.

- 1.8 The rest of this response sets out TalkTalk’s reasoning underlying these points in detail, as well as briefly considering the various other points raised in Ofcom’s consultation.
- 1.9 The remainder of this submission is laid out as follows:
- section 2 covers the impact of Covid-19 on Openreach’s performance, and its implications for the appropriate QoS regulation;
 - section 3 sets out TalkTalk’s position that proactive repair is efficient, consumer welfare enhancing, and should continue to be undertaken expeditiously by Openreach;
 - section 4 provides TalkTalk’s position that Ofcom should retain a 10 day FAD standard in the upcoming review period;
 - section 5 comments on the proposed reduction in the number of Openreach management regions which are used for determining MBORCs; and,
 - section 6 deals with miscellaneous issues.

2 Impact of Covid-19 on performance and QoS regulation

- 2.1 Ofcom considers its approach to QoS in the context of Covid-19 at section 3 of its consultation. In this section, Ofcom sets out the background to its proposals as follows:
- Openreach has stated that Covid-19 has had a ‘*significant and negative impact on its performance against the QoS standards*’ and that ‘*it is possible that Covid-19 will affect QoS standards into the WFTMR period*’ (§§3.5-3.6);
 - that during the initial lockdown period Openreach chose to restrict the instances where they could enter customer premises, and that further lockdowns could impose challenges in working on customer premises;
 - that the shut down of businesses left leased line provisions in Openreach’s work stack² which were unable to be completed, and that further lockdowns could also lead to leased line provisioning issues.
- 2.2 In light of this, Ofcom states that it has considered whether to consult on not imposing QoS standards in 2021/22 (§3.13). However, Ofcom concluded that it does not have sufficient information available at present to assess whether the QoS standards set in the January 2020 proposals are appropriate given the external challenges of Covid-19 (§3.14). Instead, it proposes a mid-year review, at which it will be considered whether to remove some or all of the QoS standards; loosen the QoS standards; or retain the QoS standards set out in the final statement (§3.17).
- 2.3 We agree with Ofcom that it should not relax 2021/22 QoS standards though we do not consider that a relaxation of QoS standards could be justified on any plausible sequence of

² Though Ofcom is not clear we presume it is referring to leased lines when it mentions ‘*jobs*’.

future events, and therefore a review is unlikely to be necessary. There are several reasons for this:

- The recent, shorter, lockdown had a less significant impact on Openreach than the longer lockdown which started in March, as some work was able to continue in customer premises. Moreover, with the rollout of the Covid vaccine commencing this month, there is a much lower likelihood of a return to full lockdowns in future.
- Compared to the summer there is a much lower backlog of repairs and line provisioning to work through from the lockdown period, as some work was able to continue and the November lockdown was of much shorter duration.
- Whilst there has been a small increase in fault repair volume due to higher customer expectations, this impact is not significant and anyway Openreach has had sufficient time to adjust its workforce, both in terms of total capacity and flexibility, to handle the increased load;

2.4 When considering the appropriate QoS standards during the next review period (including 2021/22), it is important to take into account the view of consumers on the acceptability of faults and delays in repairing them. Ofcom provides some tentative views on this topic at §4.24 of its consultation:

Ofcom has been in regular contact with Openreach throughout the Covid-19 pandemic. Among other things, we have discussed with them the increased volume of faults. One of the reasons suggested has been the increased reliance by customers on high-bandwidth applications such as video-conferencing software. In addition, millions of people working from home means that internet usage is sustained over a full day, rather than constrained to evenings and weekends. This means customers' tolerance for faults may have decreased.

2.5 This is the single most important point in Ofcom's entire consultation document. This point accords with TalkTalk's view of its customers and their behaviour– that the increased importance of fixed broadband connectivity in an environment where there has been a large increase in both homeworking and the use of internet based services for education, shopping and entertainment has sharply reduced customers' willingness to tolerate faults.

2.6 Such a decrease in the willingness to tolerate faults should be properly taken into account by Ofcom when drawing up its QoS proposals. It will generally imply that the willingness for customers to pay for fault repair will have increased, and that as such Ofcom should set higher base QoS standards around repair even if this means that prices to consumers consequently have to be increased in order to allow Openreach to recoup its efficiently incurred costs.

2.7 However, in the current case Ofcom does not need to make such a trade-off between the prices paid by consumers and the levels of quality of service which they receive, as it has chosen to delink the price caps imposed on Openreach and the costs for Openreach to serve customers. The gap between costs and revenues is substantial – on average about 10% across the charge control period.

2.8 This means that increases in the QoS standards which Openreach has to meet are unambiguously welfare enhancing:

- wholesale prices, and therefore retail prices for consumers, will not change due to the delinking of costs and prices;
- consumers will benefit from higher QoS standards, increasing consumer welfare and allocative efficiency. There will also be positive externality benefits to the rest of the UK economy from setting higher QoS standards, as lower broadband fault rates will enhance the productivity of homeworking. These productivity gains will enhance both allocative efficiency and dynamic efficiency, as there are likely to be particularly large productivity gains to individuals working in research-based jobs with heavy reliance upon internet connectivity to perform their roles;
- it will not detrimentally affect investment in either MPF/FTTC or FTTP:
 - since prices remain above cost (and substantially above marginal costs), Openreach will continue to have a strong incentive to invest in the MPF/FTTC network where appropriate;
 - the reduced margins on FTTC will unambiguously increase Openreach's incentive to invest in FTTP since the incremental profitability of investing in FTTP will increase.
- the only party that will suffer as a result of higher QoS standards will be BT's shareholders, in that their profit will reduce. Importantly, this does not result in Openreach making insufficient profit but rather in slightly decreasing the substantial excess profits that Ofcom's proposals gift to Openreach.

2.9 Higher WLA QoS standards will also not materially impede entry by FTTP operators such as CityFibre, for several reasons:

- CityFibre's FTTP network will retain an extremely large quality advantage over Openreach's hybrid copper/FTTC network, meaning that customers will be unlikely to substitute away from FTTP in order to take advantage of the increased quality being offered by Openreach's FTTC network;
- customers' decreased tolerance for faults is likely to have disproportionately benefitted FTTP network operators such as CityFibre which have networks with far lower fault rates than the existing Openreach FTTC network. This means that Covid will have led to a positive demand shock (a substantial and unexpected increase in demand) for these operators; a positive shock which is much greater in scale than any demand shock which might have been experienced by an FTTC network. The positive demand shock for FTTP networks will lower barriers to entry;
- many elements of QoS are unlikely to meaningfully improve customers' perceptions of the quality of the Openreach network. For example, even if fault repair times are improved, this is unlikely to significantly improve customers' impressions of the Openreach network, for the very reason that there has been a fault (with associated loss of customer goodwill) in the first place.

2.10 The primary impact of Covid-19 should therefore be for Ofcom to increase the QoS standards around repair which Openreach has to meet. Given the proposed CPI-0% price caps, doing so will unambiguously improve consumer welfare, allocative efficiency, and dynamic efficiency, while also supporting the wider UK economy. This may require Openreach to recruit an increased engineering field force to meet the higher quality levels.

However, Ofcom should not resile from setting higher standards out of concern that they may be unachievable within Openreach's existing resource envelope.

3 Proactive repair enhances consumer welfare and is efficient

- 3.1 Openreach has argued that the definition of a fault used for measuring QoS levels should be modified to exclude faults solely raised by CPs rather than as a result of customer complaints (referred to as 'proactive repairs'). This would mean that Openreach would have a weak incentive to correct these faults expeditiously. As we discuss below there is no justification for this particularly since all line faults should be swiftly repaired whether they are initially raised by the customer or not; in any case, over 98% of the proactive repairs that TalkTalk passes to Openreach have genuine faults on them.
- 3.2 Part of Openreach's argument for removing the QoS standard from proactive faults is its allegation that it *'frequently finds no remedial action is required'* in the case of proactive repair. However, no data is provided by Openreach in support of this allegation, and there is no definition of what constitutes *'frequently'*. TalkTalk considers that this statement is simply untrue for any reasonable definition of *'frequently'*. Indeed, this statement does not even appear aligned with Openreach's own submission to Ofcom, which instead states at §8.113(d) that *'a proportion of the faults result in no remedial action being required'*. Openreach does not state what proportion this is— it could be only 1% on the basis of that statement— and does not provide any evidence or even assertion that this proportion is higher than for customer initiated fault repairs.
- 3.3 It is notable that in any case, even if it were the case that there are frequent issues which require no remedial action, then CPs passing non-existent faults to Openreach would likely be highly profitable for Openreach, and it would be unlikely to wish to reduce the incidence of proactive repair. There are a number of reasons why there could be no remedial action taken:
- *there is no fault, and the line passes the SIN 349 test*— in this case, Openreach charges the Standard Chargeable Visit charge of £77.23 on a weekday, with higher charges for evenings and weekends.³ As the Standard Chargeable Visit includes up to one hour of work— and determining that there is no fault will generally take considerably less than one hour— Openreach will make supernormal profits on such visits. Moreover, it would not be in the interests of any CP to arrange visits where there is no fault. £77 is a substantial sum, likely to represent around six months of payments (excluding VAT) for a domestic broadband customer.
 - *the line fails SIN 349, but Openreach's engineers are unable to find a fault*—in TalkTalk's experience, this happens in a significant proportion of the time with customer raised faults, and is therefore also likely to occur with proactively raised

³ Alternatively, if a CP finds a fault but the line passes SIN 349, then the CP has to order a Special Fault Investigation visit, which Openreach recovers the full costs of through its charging. In this case Openreach also has its costs covered by the retail CP.

faults. This may be, for example, because a fault is intermittent and only occurs in wet weather conditions, and weather may be different when customers report the fault from when it is investigated. In this case, Openreach will incur costs with no compensating additional remuneration. However, intermittent faults can be seriously concerning to consumers, adversely impacting their customer experience, and TalkTalk would expect Openreach to have to repair such faults.

- *the line fails SIN 349, and Openreach identifies the fault, but the fault is one with limited impact on the customer experience*– there will be various instances where this could occur– a clear example is one where there is a crackle on the line which impacts voice traffic but not necessarily data transmission. This situation reflects that the SIN 349 standard is not fit for purpose on a network which is primarily used for data, and seldom any longer used for voice traffic; unfortunately, however, Openreach failed to progress an SOR to create an alternative testing standard for broadband lines and data traffic. Rather than attempting to water down QoS standards, Openreach should re-engage with this process, and liaise with customers to agree an alternative testing standard which would enable CPs to track down faults which truly harm the consumer experience.

3.4 As such, of the three possibilities outlined above one is profitable for Openreach; one is not profitable for Openreach but genuinely requires a repair to be undertaken; and one is within Openreach’s control without any changes to the treatment of proactive repairs. None require any regulatory intervention to disincentivise or deprioritise proactive repair.

3.5 In the case of TalkTalk, we only use proactive repair to a limited extent, with around [X] lines sent to Openreach per week of the [X] lines in our customer base which, at any time, fail TalkTalk’s line testing and are categorised as having the most serious faults within our repair analytics. However, it is very clear on the basis of TalkTalk’s data that there are essentially no cases where proactive repair does not lead to a requirement for an Openreach engineer to carry out work.

3.6 [X]

3.7 [X]. This implies that for in-life proactive repairs at least [X] of faults passed to Openreach are genuine, with a very low rate of non-existent faults being passed to Openreach. Indeed, recent evidence from a trial undertaken by TalkTalk demonstrates that this is likely to overestimate the actual proportion of faults by potentially around [X], with a true rate of unnecessary Openreach engineering appointments of only around [X].

3.8 TalkTalk has [X] directly due to Openreach’s lack of investment in processes and systems to ensure customers’ services work correctly when installed. There is no reason why Openreach could not operate an early-life proactive repair system on behalf of all CPs. TalkTalk believes that such a system would be lower cost for Openreach to operate than CPs individually undertaking proactive line testing.

3.9 In the last few weeks TalkTalk has [X]; this is instructive both of Openreach’s obstructive behaviour, trying to prevent TalkTalk from giving its customers a good quality service by fixing line faults, and of the incorrect data which Openreach is likely to hold internally due to its own procedural failings.

3.10 [REDACTED]:

- [REDACTED]⁴;
- [REDACTED]; and,
- [REDACTED].

3.11 [REDACTED].

3.12 [REDACTED]:

- [REDACTED].
- [REDACTED].
- [REDACTED].

3.13 [REDACTED].

3.14 Several conclusions can be drawn from this [REDACTED]:

- in contrast to Openreach's misleading statements, very few proactive repairs sent to them do not require remedial works. The incidence of this appears likely to be well under [REDACTED].
- most of the faults sent to Openreach under proactive repair do not require extensive investigation, with over [REDACTED] able to be fixed on first appointment.
- a large number of faults which were resolved by Openreach's engineers were incorrectly characterised as either not having a fault found, or the fault being due to TalkTalk or the customer. However, in aggregate the proportion of these lines which had a successful fix applied by the Openreach engineer was in fact higher than the lines which were categorised as having an Openreach responsible fault on them. [REDACTED]. We believe that these faults have been mischaracterised because Openreach engineers are no longer able to simply enter an error code corresponding to whether the fault was the responsibility of Openreach or the CP, but answer a series of questions which automatically assign responsibility. Such mischaracterisation can severely distort the data which is provided to Ofcom and on the basis of which Ofcom makes regulatory decisions. We therefore request that Ofcom closely investigates the accuracy of Openreach's data pertaining to engineer visits before relying on it in making regulatory decisions, as the questionnaire based structure appears to be designed to reallocate faults to CPs/ FNF and away from them being Openreach's responsibility, with decisions on responsibility taken out of the control of engineers.

3.15 [REDACTED].

3.16 Openreach makes the point at §4.21(b) of Ofcom's consultation that *'Openreach is unable to determine whether a fault has been submitted as a result of an end-customer complaint or as a result of proactive testing and so there is a risk that genuine customer faults suffer from*

⁴ [REDACTED].

a lower quality of service as a result of diversion of effort to faults which are not the result of any issue raised by consumers’. Openreach is implying that faults raised by CPs are unimportant and do not warrant expeditious repair, without any evidence to support this assertion.

- 3.17 Openreach’s comment is simply nonsense and one Ofcom should pay no attention to. If there is a fault on the line, then it is Openreach’s responsibility to fix this fault irrespective of how that fault has been identified and raised. Just because a customer has not raised this fault specifically with their provider does not mean that they are not suffering as a result of Openreach’s substandard network— rather, it can mean that the customer has not realised that their internet should work better because they are not technically minded enough, or because they do not wish, or find it difficult, to contact their provider. These possibilities are particularly likely in the case of vulnerable customers, such as older and disabled individuals, who may struggle to understand and engage with the internet and CPs, and may be reluctant to complain. Effectively, Openreach is saying that such vulnerable customers should be left to suffer from substandard performance to support Openreach’s profit margins. As TalkTalk has pointed out at §1.5 above, around [§] of TalkTalk’s customer churn comes from customers who have a line fault which they have not complained about. This provides a strong indication that customers do, in fact, care deeply about line faults and their impact on the customer experience even though there has been no complaint to their provider.
- 3.18 Openreach’s frequent assertions that faults raised by proactive repair may have no customer impact (see, for example, §§8.1010(a), 8.115(c), 8.122 of its response to Ofcom’s January 2020 consultation) are unsupported by any evidence or even anecdotes of where this has occurred. Rather, Openreach appears to simply assume that there is no customer impact in a proportion of cases, without any data on what proportion of cases this might represent.
- 3.19 CPs’ behaviour is also inconsistent with proactive repair having little customer benefit. Proactive repair requires resources to be committed from CPs, to test lines and manage repair programmes and, in some cases, incurring Openreach charges without improving line quality. If consumer benefits were not sufficiently high to offset these costs, CPs would not retain proactive repair programmes. CPs have no interest in, and receive no benefit from, raising Openreach’s costs— Openreach is a supplier, not a competitor, of retail CPs.
- 3.20 As such, the logical conclusion is that proactive repair provides meaningful benefits to consumers, and there is no evidence whatsoever provided by Openreach to contradict this. Ofcom should therefore consider that proactive repair is of benefit to consumers, and therefore proactive repairs should not have QoS standards removed by amending the definition of a fault.
- 3.21 The only credible alternative to CPs raising faults for proactive repair is for Ofcom to regulate Openreach in such a manner that Openreach is incentivised to undertake proactive repair itself. [§].

3.1 WLA Fault Definition

- 3.22 Openreach has requested that Ofcom redefine proactive repair faults labelled as such by the CP raising that fault (§6.2), so that they are not taken into account for the purpose of

assessing compliance with QoS standards. Ofcom has proposed that instead the definition of a fault should only be changed following an agreement between Openreach and industry representatives (§6.5).

3.23 As we explain above, proactive repair delivers substantial customer benefits and there is no customer interest justification for removing QoS obligations from these repairs. Therefore, TalkTalk agrees that the definition of a fault should only be changed with industry consent. We are happy to continue to discuss Openreach’s concerns around proactive faults, but our starting point is that it is Openreach’s responsibility to maintain its network to a suitable standard to prevent faults.

3.24 Openreach’s proposal of excluding proactive repairs from QoS standards is also open to gaming by providers. For example, faults could be proactively detected by CPs, and then customers could be informed and asked whether they would like the fault repaired. This would likely lead to similar levels of faults to those proactively raised, but there would now be a specific request from the customer to repair them. However, such an approach:

- would provide a poorer quality of service to customers than simply fixing the faults without them having to intervene;
- would discriminate against vulnerable customers who are less likely to respond to communications from their internet service providers;
- would be more costly for CPs than simply sending the faults to Openreach directly.

3.25 [REDACTED].

4 Ofcom should retain a 10 day WLA First Available Date Standard

4.1 In the current 2020/21 financial year, the WLA First Available Date (‘FAD’) standard is 10 working days which is an improvement compared to the 12 working days standard (§4.2) in 2019/20. These levels were set in the last WLA market review (in April 2018).

4.2 However, *‘in light of stakeholder responses and Covid-19’*, Ofcom now proposes to reverse this improvement in Openreach’s quality of service, reverting to a 12 working day standard for the entirety of the next control period. Ofcom later in its consultation (§§4.7, 4.12) notes that only Openreach specifically commented on the FAD standard, and that more general comments about quality of service standards from Sky and TalkTalk argued in favour of QoS standards being increased.

4.3 Ofcom’s entire justification for weakening the FAD standard seems to be that the increased volume of repairs which Openreach is currently undertaking reduces the capacity available for provisions.

4.4 We think that there is no justification, on the basis of the reasonable interests of customers, for weakening the FAD level:

- Ofcom has presented no direct evidence on the additional workload and resource requirement from a ten day FAD standard compared to a twelve day standard;
- much of the increase fault volumes is likely to be temporary and the majority of any permanent increase is in any case probably a result of Openreach underinvestment in maintenance of its FTTC network;
- even if there was a material permanent increase in fault volumes (that was not due to underinvestment) this provides no justification for lengthening provision times. Openreach can and should increase its engineering capacity to meet the additional demand.

4.5 There is no meaningful analysis about the impact on Openreach's workload of a ten day versus a twelve day standard, apart from to note that Openreach first allocates resources to provisioning, and only then allocates repair resources (§4.33); and that to date few customers have selected provisioning dates within four days (§4.29). There is no direct evidence at all presented on the additional workload and resource requirement from a ten day FAD standard.

4.6 As regards Covid, Ofcom only mentions the impact of this on FAD standards in a single paragraph (§4.24), which does not mention provisioning at all, but instead covers fault repair:

Ofcom has been in regular contact with Openreach throughout the Covid-19 pandemic. Among other things, we have discussed with them the increased volume of faults. One of the reasons suggested has been the increased reliance by customers on high-bandwidth applications such as video-conferencing software. In addition, millions of people working from home means that internet usage is sustained over a full day, rather than constrained to evenings and weekends. This means customers' tolerance for faults may have decreased.

4.7 However, Ofcom also notes that there has been a higher fault intake during 2020 than in 2018 and 2019, with faults over the summer 13-25% higher than in previous years (§4.19). It then sets out a series of excuses given by Openreach for these higher fault levels, including the impact of proactive repair, and the impact of Covid-19.

4.8 TalkTalk would suggest that there are other clearer candidates for the increase in fault rates:

- Openreach's failure to adequately maintain its network, rather than allowing performance to deteriorate to unacceptable levels;
- permanent increases in demand for repairs on FTTC lines caused by customers' increased expectations of line quality and broadband speeds in recent months; and,
- a backlog of repairs which could not be undertaken during the period of lockdown, which will be a temporary uplift, and will not be sustained into the next control period.

4.9 It is telling that Ofcom has not even provided a semblance of investigating this range of options as possible explanations, or indeed any explanations beyond the two which Openreach has given, neither of which appears to be a valid argument in favour of weakening regulation.

- 4.10 This hypothesis is supported by the data presented by Ofcom at Figure 4.1 of its consultation. That shows that the fault rates for 2019– before Covid and before proactive repair had been raised as an issue– were considerably higher than in 2018. In 14 of the 17 weeks presented by Ofcom, faults rose between 2018 and 2019, in some cases by a large margin (such as the rise of around 16% in the week of 24 July). This points to a gradually deteriorating network as Openreach reallocates resources away from repair and maintenance in favour of new network construction and increased profits from its network.⁵ In 2013, Openreach made the same arguments that the reason for the decline in its performance was the behaviour of its customers (Ofcom (2013) at §9.6) rather than its own strategic choices.
- 4.11 Moreover, TalkTalk does not accept that there is the sharp trade-off between provisioning and repair which Openreach appears to be alleging. The trade-off is based on the premise that Openreach’s capacity is fixed. This is plainly incorrect and it can and should flex its capacity to meet increased demand for fault repair and provisioning. TalkTalk understands that external contractors are used for a considerable proportion of provisioning of new lines; the use of such external contractors implies greater elasticity in Openreach’s resource envelope than is implied by Ofcom’s consultation. Ofcom should seek– and present for external consultation– data from Openreach on its usage of external contractors for provisioning and how this has changed over time in response to both changes in provisioning requirements and changes in repair volumes. In the absence of such data, it is unclear that the central trade-off, on which Ofcom is basing its proposals, even exists.

5 WLA Management Regions

- 5.1 Ofcom proposes, at the request of Openreach, to amend its structure for QoS and KPI reporting obligations so that the number of regions is reduced from ten to seven (§5.26). This reflects an April 2019 restructuring within Openreach which merged:
- the North Wales and North Midlands region with the South Wales and South Midlands region to form a Wales and Midlands region;
 - the London and South East regions to form a single London & South East region; and,
 - the North East and North West regions to form a Northern England region.
- 5.2 The impact of having fewer regions is to weaken the constraint on Openreach since a failure in one region (that would have been non-compliant) can be offset by higher performance in

⁵ It is notable that the same pattern of increasing fault rates arose during the period of FTTC roll-out, as network maintenance was abandoned by Openreach and experienced engineers were reallocated away from maintenance and repair. See Ofcom (2013), *Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30. Consultation on the proposed markets, market power determinations and remedies*, at §§9.2, 9.3, 9.12. TalkTalk’s comments at the time, as set out in §A10.11 of that consultation, were that ‘when lead times for copper services were at 20-25 days, Openreach had focused its resources on GEA provision for which lead times were kept at 5-10 days’.

another region that it is combined with. Ofcom in its consultation provides some information on the impact of these changes. In most quarters it would not have impacted the number of QoS standards which were met (as all standards were met under either split in four of the eight quarters for which data is provided in Figure 5.2), although in two quarters (Q3 FY20 and Q4 FY20) there would have been meaningfully better observed performance under the new geographic areas.

- 5.3 Although it is somewhat concerning that the new structure would have increased Openreach's perceived compliance with QoS standards, TalkTalk accepts that the impact is relatively small, and as such we consider that the appropriate approach for Ofcom to adopt is to carefully monitor whether the revised regional structure is having adverse impacts, and revise QoS regulation via a mid-period review if problems have emerged.

5.1 MBORCs

- 5.4 Ofcom also notes (§§5.12-5.22) that the restructuring impacts the High-Level MBORC Allowance, as under the new structure Openreach would be able to declare an MBORC in a greater proportion of the country than previously, if its MBORC allowance is maintained at two regions for eight weeks per year (§5.15-5.16).
- 5.5 Ofcom then states that reducing Openreach's High-Level MBORC allowance to only one per year would not allow Openreach to have sufficient flexibility to deal with severe weather or other unforeseen events (§5.21).
- 5.6 TalkTalk considers that it is likely to be most appropriate for Ofcom's regulatory structure to match Openreach's internal organisation. We therefore agree that the number of regions for QoS purposes should be reduced from ten to seven.
- 5.7 However, TalkTalk is concerned that the three new regions which are comprised of two prior regions are very large, and that by declaring MBORCs in these regions, Openreach would be able to substantially evade QoS regulation— by declaring MBORCs in both the Midlands and South East and London region at the same time, Openreach would be able to evade QoS regulation for most of the winter in over half of the premises in England. We therefore consider that two MBORCs per year for Openreach is excessive. We are also of the view that the ongoing pandemic has shown that the MBORC regime has a considerable degree of flexibility and is unlikely to be required as much had it more strictly been imposed— Ofcom's suspension of QoS regulation across the country during 2020 shows that MBORCs are not in fact required to deal with the most extreme circumstances, as these can be considered by Ofcom in a bespoke manner.
- 5.8 As such, the appropriate course of action for Ofcom to adopt is allow Openreach an allowance of two MBORCs per year, but a maximum of seven MBORCs over the next five year regulatory period. This preserves the ability for Openreach to declare high-level MBORCs in two regions in a year, but reduces incentives for gaming where Openreach seeks to use up its two MBORC allowance in a year, and so reduce its costs of SLA/ SLG payments; by doing so Openreach will limit its future flexibility in later years of the control period. This approach would preserve the broad level of flexibility and MBORC allowance which Ofcom provided under its January 2020 proposals.

6 Other issues

6.1 Two other issues are raised by Ofcom in its consultation:

- the Ethernet upper percentile standard; and,
- Ethernet KPI(k) changes.

6.1 Ethernet Upper Percentile Standard

6.2 TalkTalk agrees with Ofcom's proposed amendments to the Ethernet Upper Percentile Standard. In particular, we strongly support Ofcom's statement at §7.35 that it would be inappropriate to remove the Upper Percentile Standard and replace it with Openreach's proposal.

6.3 Openreach's proposal would meaningfully weaken its incentives to deal expeditiously with customers who have complex orders and therefore suffer from long lead times. A meeting between Ofcom and Openreach, and a letter from Openreach to Ofcom (§7.14), effectively amount to nothing, and are the same as all controls on the Upper Percentile Standard being removed. There would be nothing to stop Openreach from rolling out a list of its standard excuses for its continual poor performance, relating to issues like weather and staff availability, and doing nothing to solve the problem which actually costs Openreach any money. Such an approach would not be in the interests of anyone apart from Openreach and its shareholders.

6.4 TalkTalk agrees with Ofcom's proposal to change the design of the proposed standard to focus on open orders (§7.26). Ofcom's proposal removes the perverse incentives which it identifies (§7.48), and thereby improves the incentives on Openreach to close older orders expeditiously.

6.5 However, TalkTalk has concerns around this proposal in two areas:

- we are concerned about the omission of delays which are deemed to have been caused by customers (§7.50). This echoes some of the problems which have been observed in leased line markets, where Openreach has abused a process called 'deemed consent' in order to evade its obligations to pay compensation for poor performance. If Openreach is the primary determiner of where there have been customer delays, then it would have strong incentives to once again attempt to game the regulatory system by allocating as customer delays, problems that are within Openreach's control.
- we are concerned that the performance benchmark being used by Ofcom is too low. Ofcom has simply taken average performance over the period from April 2018-March 2020, and specified that this creates a range of 4.5%-5.5% (§7.60), and then taken the midpoint of this range and specified 5% as the proposed benchmark (§7.65). TalkTalk considers that it is surprising that Ofcom has taken the midpoint of the range when it has acknowledged that Openreach has been facing perverse incentives which would likely have led the proportion of orders open for more than 133 days to be increased. As such, in light of Openreach's performance being distorted upwards on this measure, we consider that it would be appropriate to use the very bottom point of the range in the first year of the control period, at 4.5%, and even this figure may be

excessively high. We also consider that Ofcom should tighten this standard across the course of the next regulatory period, by 0.1% per annum, to create incentives for Openreach to improve its performance, with a benchmark of 4.1% in the final year of the charge control.

6.2 Ethernet KPI(k) changes

- 6.6 TalkTalk agrees with Ofcom's proposal to align KPI(k) so that it excludes customer caused delays, aligning it with the KPI(l) metric.