



Service level guarantees: incentivising performance

Consultation document

Publication date: 10 December 2007

Closing Date for Responses: 25 January 2008

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Section 1

Summary

Background

- 1.1 Service Level Agreements (SLAs) form part of commercial contracts and set out a supplier's commitment to provide services to an agreed quality, e.g. within a specified period. The associated Service Level Guarantees (SLGs) specify the level of compensation that the customer would be entitled to should the service not be provided at the quality specified in the SLA, e.g. if delivery of the service was late. Together they are therefore essential elements of any commercial contract as they provide the supplier with an incentive to deliver their service at an appropriate level of performance.
- 1.2 Communications Providers (CPs) consider that Openreach's¹ current SLAs and SLGs for Wholesale Line Rental (WLR), Local Loop Unbundling (LLU) and Ethernet services are ineffective because they do not provide Openreach with appropriate incentives to provision or repair services. They consider that, as a consequence, Openreach's service performance has not always been satisfactory and that too often Openreach has failed to deliver in the timeframes set out within the SLAs.
- 1.3 CPs have recently been in discussion with Openreach to ensure that SLAs and SLGs are set appropriately to ensure that Openreach has the incentive to provision and repair services promptly. These negotiations were facilitated by an independent third party (the Office of the Telecommunications Adjudicator (OTA2)), but did not result in a mutually satisfactory outcome.
- 1.4 In September 2007, the CPs asked Ofcom to intervene and consider imposing additional regulation on BT. The negotiations facilitated by the OTA2 did, however, move matters forward and helped to crystallise the concerns of CPs in relation to SLAs and SLGs. As such, these discussions provided Ofcom with a sound basis on which to proceed.

Ofcom's concerns regarding existing contract requirements

- 1.5 Ofcom considers that Openreach's contracts for WLR, LLU and Ethernet services do not yet provide sufficient incentives for Openreach to maintain an appropriate level of performance. This has contributed to Openreach's customers receiving neither adequate quality of service nor appropriate compensation for service failures, in particular timely provisions and repairs.
- 1.6 Ofcom is proposing to address this by amending the SLAs and SLGs in Openreach's contracts.
- 1.7 Openreach is required to provide WLR, LLU and Ethernet services under SMP services conditions on cost-oriented and not unduly discriminatory terms. Openreach is also required by the Undertakings to ensure that CPs are not placed at a

¹ In September 2005, BT Group plc ('BT') gave a set of Enterprise Act Undertakings to Ofcom. The Undertakings included the creation of a new organisation, Openreach, which is separate from the rest of BT and provides wholesale products (such as WLR, LLU and Ethernet) used by other CPs to compete with BT's retail business. Openreach has been referred to throughout this document, although all legal obligations are placed on BT.
<http://www.ofcom.org.uk/telecoms/btundertakings/btundertakings.pdf>

competitive disadvantage by supplying these products to downstream parts of BT and other CPs on an operationally and functionally equivalent basis.

- 1.8 Ofcom considers there to be two broad concerns with Openreach's SLAs and SLGs:
- either the processes for claiming compensation are cumbersome and onerous with the result that many Openreach customers regard it as inefficient to attempt to claim compensation; and / or
 - the levels of compensation are insufficient to either compensate the CP or incentivise Openreach to provide better service.

Competition concerns

- 1.9 Ofcom considers that CPs have found it difficult to negotiate appropriate SLAs and SLGs with Openreach because Openreach is the only national supplier of these WLR, LLU and Ethernet services. It is also apparent that Openreach does not have sufficient incentive to ensure that SLAs and SLGs are adequate. Therefore, Ofcom considers that it is necessary for it to amend Openreach's SLAs and SLGs by directions under the appropriate SMP services conditions.
- 1.10 Additionally, Ofcom considers that a number of CPs may be placed at a competitive disadvantage compared with larger CPs, in particular BT Retail, given the complexity of the compensation process. Ofcom estimates that CPs have received compensation for WLR which amounts to less than one tenth of the amount that BT Retail has received per line. Ofcom considers that more likely than not this is due to economies of scale. That is, because the processes for claiming compensation are cumbersome and onerous, it is more efficient for a large CP, such as BT Retail, to claim compensation than for a smaller provider.

Ofcom's proposal

- 1.11 The principles of Ofcom's proposals are that Openreach should:
- when agreed service levels are not met, make provision for compensation to be made based on a pre-estimate of an average CP's loss;
 - ensure that CPs are entitled to make a claim for additional loss;
 - pay compensation on a per event basis;
 - ensure that there are no caps on compensation; and
 - ensure that compensation payments are made proactively.
- 1.12 In practice this would mean Openreach would be required to:
- for WLR, make proactive payments for each service failure such as late provision and late fault repair, with compensation at the current level of one month's line rental / day of delay;
 - for LLU, make proactive payments for each service failure such as late provision and late fault repair, with compensation at the current level of £8 / day of delay and £16 / day where a non-operational line is provided;

- for Ethernet, make proactive payments (as currently) for each late provision at an increased level of one month's line rental / day of delay to bring it into line with WLR and LLU and for each reported fault at an increased level of 15% of one month's line rental for each hour of downtime to bring it into line with partial private circuit enhanced care; and
- for all the above products, remove caps and other unnecessary restrictions on compensation payments.

Consultation

- 1.13 Ofcom is seeking comments on the proposals set out within this consultation document by **25 January 2008**. Ofcom wishes to know whether stakeholders consider that the proposals set out herein are sufficient to give Openreach an appropriate financial incentive to provision and maintain service. Ofcom also wishes to know whether stakeholders consider that the proposals are a proportionate response to the perceived problem.

Future review

- 1.14 Ofcom considers that the proposals set out in this document will increase the incentive on Openreach to provide and repair service promptly. Ofcom will, nonetheless, carry out a periodic review to assess whether or not the SLGs have been effective in driving improved service performance and have not given Openreach perverse incentives which would allow it to avoid compensation payments by extending lead times.
- 1.15 If little or no improvement in service performance is confirmed or observed, Ofcom will review the level of compensation payments. Ofcom will also consider whether additional performance incentives are required as part of the broader Review of Openreach's Financial Framework.

Section 2

Introduction

Introduction

- 2.1 Openreach provides a range of wholesale products to CPs who use these products to serve residential and business end-users. The three main products that they provide are:
- Wholesale Line Rental ('WLR', sometimes referred to by Openreach as Wholesale Access) covering basic analogue access, digital access, ISDN30 and the equivalence of inputs product WLR3;
 - Local loop unbundling ('LLU') covering both shared (SMPF) and non-shared metallic path facilities (MPF); and
 - Ethernet services covering wholesale extension service ('WES'), wholesale end-to-end services ('WEES') and backhaul extension services ('BES').
- 2.2 These wholesale services are not available from any other supplier on a national basis and therefore CPs need to purchase these services from Openreach to extend their presence beyond the confines of their own networks. Openreach is required to provide these products to all CPs on cost-oriented terms because it has significant market power (SMP) in each market and it is not permitted to unduly discriminate between them (that is, they should be treated equivalently unless there is a justifiable reason for not doing so). Openreach is also required (under the Undertakings) to ensure that these products are provided to downstream parts of BT and other CPs on an operationally and functionally equivalent basis.
- 2.3 These requirements ensure that services are provided on an equivalent basis. They do not, however, ensure that the service level agreements (SLAs) and associated service level guarantees (SLGs) provide Openreach with a sufficient incentive to provide and repair service quickly. Indeed, CPs have suggested that the level of service that they have received from Openreach has not been satisfactory². They consider that the SLGs have been ineffective in providing Openreach with incentives to improve performance because the compensatory mechanisms are inadequate.

The purpose of SLAs and SLGs

- 2.4 SLAs and SLGs form part of contracts of service and define a contractually agreed deliverable. The SLAs and SLGs are therefore an integral and binding part of the contract and inform the CP about what they could expect to receive and, if the service is not provided in accordance with the contract deliverables, the compensatory payments which would apply. The performance of the supplier and the compensation payments associated with any failure to meet the performance requirements are also likely to influence directly the downstream contractual terms offered to retail customers.

² Cable & Wireless wrote to Ofcom on 30 August 2007 on behalf of the industry in which these views, amongst others, were expressed

Incentivising performance

- 2.5 Ofcom considers that it is important for the UK communications industry that Openreach has an appropriate incentive to provision and maintain service. CPs rely on Openreach to provide a number of the main inputs to their retail services and therefore delays in provisioning and repairing service are attributed to them and not Openreach. Openreach does not have a direct relationship with the retail customers that are served by its network.
- 2.6 CPs have expressed concerns about Openreach's performance and do not consider that the present SLAs provide sufficient incentive for service performance to improve. To be effective in incentivising Openreach to provide an appropriate level of service, the SLA needs to provide CPs with adequate compensation in the event that performance is not at the agreed level. The level of compensation should be set at an estimate of an average CP's loss in the event that performance is below the agreed level. If Openreach was required to pay out compensation set at such a level in the event of performance failure, Ofcom considers that Openreach would have the right incentives to maintain service quality.
- 2.7 In addition, even if the level of compensation payments is at the right level, if CPs are not being paid such compensation, then Openreach will not have the right incentives. One of the reasons that the present system has not provided Openreach with a sufficient incentive to provide and repair service in accordance with the SLAs is that CPs (other than BT Retail) have not claimed the amount of compensation that they were due. There are likely to be a variety of reasons for this, but it is clear that the compensation mechanisms included in the present SLAs have made it difficult for CPs to make claims for compensation. For WLR, Ofcom estimates that CPs have received compensation which amounts to less than one tenth of the amount that BT Retail has received per line. Effectively, this results in CPs paying more per line per annum than BT Retail and this is likely to distort competition. Ofcom considers that this needs to be addressed.
- 2.8 Ofcom also considers that Openreach should have an incentive to ensure that the equivalence management platform (EMP) and the service provider gateway (SPG) – the electronic ordering gateways – are available at all times (except for maintenance purposes) and that compensation should be payable should there be unscheduled outages. All interactions with Openreach (e.g. ordering lines and reporting faults) are done via the EMP or the SPG and therefore outages prevent CPs from supporting their retail customers. For this reason, Ofcom considers that Openreach should be subject to similar requirements in relation to the availability of the EMP and have incentives to ensure that it is available at all times other than for maintenance purposes.
- 2.9 Ofcom considers that effective SLGs would:
- set operationally efficient target service levels below which compensatory payments would be triggered;
 - include compensatory payments set at an estimate of the average loss suffered by a CP in the event of a service failure; and
 - include automatic payments once target service levels have been missed.

OTA2

- 2.10 The OTA2 has been involved in discussions with Openreach and CPs with a view to brokering an agreement in relation to SLGs. These discussions moved matters forward and helped to crystallise CPs' concerns in relation to SLGs and, as such, have provided Ofcom with a sound basis to proceed. By September of this year, the OTA2, however, concluded that an agreement would not be achieved in the short-term. CPs also considered that the negotiations had stalled and that further progress was unlikely and they, therefore, asked Ofcom to intervene in order to place additional regulation on Openreach.
- 2.11 Ofcom is disappointed that the industry was unable to resolve this matter without regulatory intervention.

Requests for Information

- 2.12 On 18 September 2007, Ofcom issued 13 formal requests for information under section 135 of the Communications Act 2003 (the "Act") (the "Requests for Information"). Section 135 of the Act permits Ofcom to seek information for the purposes of, amongst other things, ascertaining whether a provision of a condition set under section 45 of the Act continues to be effective for the purpose for which it was made. In this case, it was not clear that the relevant SMP services conditions which require Openreach to offer network access on fair and reasonable terms were effective.
- 2.13 The Requests for Information were sent to a wide variety of CPs including the parties primarily involved in the trilateral negotiations led by the OTA2. Ofcom considers that those sent the Requests for Information reflected a fair split between: (i) users of WLR, LLU and Ethernet services; and (ii) those that predominantly supply services to the residential sector and those that supply services to the business sector.

Outline of this document

- 2.14 Section 3 of this document sets out the general principles which have guided Ofcom in coming to the provisional conclusions outlined in this document. The proposed amendments to the relevant SLGs are then set out in Section 4 for WLR, Section 5 for LLU, Section 6 for Ethernet services and Section 7 for EMP. The Notifications and draft Directions which will implement the proposals are set out in Annexes 1, 2 and 3.
- 2.15 Ofcom considers that its provisional proposals represent a fair deal for all concerned and will provide Openreach with a stronger incentive to maintain an appropriate level of quality of service.
- 2.16 Responses to this consultation are required by **25 January 2008**.

Section 3

General Principles

Introduction

- 3.1 Openreach is required under various SMP services conditions to provide WLR, LLU and Ethernet services to all CPs on terms which do not unduly discriminate between CPs and do so on reasonable terms and conditions. CPs consider, however, that the terms and conditions on which these services are being provided are not reasonable and are not providing Openreach with an appropriate financial incentive to improve performance, which they consider to be unsatisfactory.
- 3.2 Ofcom considers that effective SLGs would give Openreach an appropriate financial incentive to improve performance and this would, in turn, benefit CPs (who rely on these services) and end users.
- 3.3 In order to ensure that Openreach is given an appropriate financial incentive, Ofcom considers that there are some general principles which should apply to Openreach's SLAs and SLGs to ensure that they are reasonable. These arrangements should:
- when agreed service levels are not met, make provision for compensation to be made based on a pre-estimate of an average CP's loss;
 - ensure that CPs are entitled to make a claim for additional loss;
 - pay compensation on a per event basis;
 - ensure that there are no caps on compensation; and
 - ensure that compensation payments are made proactively.

Value of compensation

- 3.4 Ofcom's starting principle is that when Openreach fails to meet agreed service levels, it should pay CPs compensation which is based on a pre-estimate of an average CP's loss resulting from that service failure. In the event of a future review, Ofcom may increase compensation above this level to incentivise performance. If compensation payments are set at such a level, they should provide an effective and efficient financial incentive on Openreach to provide appropriate service performance.
- 3.5 It is possible to use various methodologies to calculate loss to CPs of different failures, including:
- lost/delayed revenue as a result of the failure;
 - lost customers;
 - compensation paid by CPs to their end-users;
 - additional costs of customer service relating to the failure;

- operational costs to the CP of dealing with Openreach as a result of the failure; and
 - reputational damage.
- 3.6 In addition to these bottom-up factors, Ofcom considers that it is also possible to set compensation payments based on other factors. For example, in some circumstances it may be reasonable to expect that other bilateral compensation agreements might adequately represent the loss. Similarly, where there are established compensation agreements for an equivalent or very similar product, it may be reasonable to use these as a proxy for loss.
- 3.7 It should be noted that, as the value of compensation is based on a pre-estimate of loss, it is inevitably an estimate of an average failure. It does not take into account specific issues, the differences between CPs or the differences between end-users.
- 3.8 In Sections 4, 5, 6, and 7 Ofcom considers how this principle should be applied to each of the products in question.

Claiming for additional loss

- 3.9 As noted above, SLG payments should compensate CPs for an average CP's loss. It therefore follows that, in certain cases, the actual loss faced by a particular CP will be greater (or less) than the average compensation payment.
- 3.10 Therefore, Ofcom proposes that in the event that a CP was not adequately compensated, it should be entitled to make a claim for additional loss over and above the fixed individual compensation payments set out in the SLGs. In resolving a dispute on the provision of Partial Private Circuits in 2002, Oftel required that nothing in the PPC Contract shall prevent an Operator from bringing a claim for appropriate unliquidated damages³.
- 3.11 This allows those CPs who have higher than average losses (for example because they sell higher revenue products to end users) a mechanism to receive compensation if their actual loss was substantially greater than the standard compensation payment. However, Ofcom considers that it would only be efficient for a CP to make additional claims in the circumstance where the actual loss was sufficiently greater than the average compensation so as to make the likely gain greater than the cost of claiming.
- 3.12 In Sections 4, 5, 6 and 7, Ofcom considers how this principle should be applied to each of the products in question.

Compensation per event

- 3.13 Ofcom considers that compensation should be paid on a per event basis in order to align compensation with the average losses suffered by CPs. Currently, for some service failures, the SLA and SLG arrangements only permit claims should performance be lower than a certain threshold. For example, the SLA for WLR states that compensation may only be claimed should Openreach fail to provision at least 99% of orders by the agreed activation date. In other words, compensation will not be paid should Openreach's average performance exceed the target despite the fact that the individual line might have been delivered late.

³ http://www.ofcom.org.uk/static/archive/Oftel/publications/broadband/leased_lines/ppc1202/ch6a.htm

- 3.14 Ofcom does not believe that this structure reflects CPs' average losses. In their responses to the Requests for Information, CPs stated that compensation to their end users is one source of loss resulting from Openreach service failures. Retail contracts do not link compensation payments to the overall performance the CP receives from Openreach, but rather depend on each individual end user's experience of service failure. This would suggest compensation per service failure is a more appropriate structure to compensate CPs for their losses.
- 3.15 Another aspect of CPs' losses mentioned in responses to the Requests for Information was the cost of additional customer service resources. These are also likely to be linked to the total number of failures rather than only being applicable once performance has fallen below a particular threshold.
- 3.16 In Sections 4, 5, 6 and 7, Ofcom considers how this principle should be applied to each of the products in question.

Removal of caps on compensation

- 3.17 Ofcom considers that in most cases there is no justification for caps on compensation, even where these caps are set to only capture the most extreme cases. The fact that compensation ceases once the cap is reached seems unlikely to reflect CPs' losses accurately, which might be expected to continue increasing until the service failure is rectified. The incentive properties to provision or repair service thereafter diminish.
- 3.18 Past decisions by Oftel have approached the issue of capping compensation in different ways. In setting the SLAs for LLU in 2001⁴, Oftel stated that it did not wish to give BT perverse incentives to repair services (i.e. short delays were unacceptable whereas long delays would be tolerated), but acknowledged that compensation payments had to be reasonable. These conflicting aims were incorporated within the LLU SLA by enabling CPs to takeover responsibility for the line after 42 working days had elapsed.
- 3.19 In resolving a dispute on the provision of Partial Private Circuits in 2002⁵, however, Oftel decided that all inefficiencies should lead to compensatory payments to reflect CPs' average losses and that this would provide BT with the appropriate incentives to maintain and provision services. The rationale in both cases was that compensation should be set to reflect CPs' average losses or enable them to take alternative action to rectify the service failure.
- 3.20 Ofcom considers that removing the caps is more likely to reflect CPs' average losses, given that CPs are likely to continue to incur losses until the service is provisioned or repaired. These losses might reflect, amongst other things, the compensation arrangements that they have in place with their end users and the ongoing account management – updating the end user – that is needed in such circumstances. Ofcom does not propose to extend CPs' rights to manage the local loop in the event of a service failure. The incentive should be on Openreach to maintain and provision services as quickly and efficiently as possible.
- 3.21 Ofcom further considers that by removing any caps the total amount of compensation is unlikely to be penal since the level of compensation reflects the daily increase in compensation payable, which is set at an appropriate level to reflect the CPs'

⁴ <http://www.ofcom.org.uk/static/archive/Oftel/publications/broadband/llu/sla1101.htm>

⁵ http://www.ofcom.org.uk/static/archive/Oftel/publications/broadband/leased_lines/ppc1202/ch6a.htm

average loss. It is immaterial how much compensation builds up, since for each day of delay, the compensation payable continues to be reflective of average CP loss.

- 3.22 In Sections 4, 5, 6 and 7, Ofcom considers how this principle should be applied to each of the products in question.

Proactive payment of compensation

- 3.23 Ofcom considers that in principle compensation payments should be made proactively. At present, the SLAs for WLR and LLU services require CPs to make compensation claims which Openreach will then assess to enable it to verify whether compensation is due. In other words, Openreach is assessing each claim and checks whether it has or has not breached its SLAs. Ofcom considers that this is inappropriate. Instead, Ofcom considers that Openreach should monitor its performance against the relevant SLAs and compensate CPs should it breach the terms of those SLAs proactively. CPs should not need to make a claim.
- 3.24 Where the costs of claiming compensation are high, the cost of actually claiming the compensation could be thought of as an additional cost to CPs of Openreach's failure. One way of addressing this would be to increase the compensation levels so as to include the costs of claiming. Without this, CPs would not be adequately compensated for their average loss. Ofcom considers, however, that this would be inefficient because the alternative approach of proactive payments is likely to be much less costly for Openreach to implement. Rather than requiring CPs to claim compensation, a payment system which requires compensation to be paid proactively would involve Openreach calculating the compensation CPs are due and paying this to them without a need for them to claim.
- 3.25 Ofcom commissioned Deloitte & Touche to carry out a study into common practices for managing performance issues in contracts. The study indicates that it is a widely used practice for compensation payments to be made proactively by the supplier where SLAs are not satisfied.
- 3.26 Ofcom considers that this principle is particularly important where there are significant differences in bargaining power between the parties involved in a negotiation of SLAs or where there is significant information asymmetry between the parties.
- 3.27 In Sections 4, 5, 6 and 7, Ofcom considers how this principle should be applied to each of the products in question.

Question 1: *Do you consider that the General Principles set out above are appropriate or are there other principles which should be considered?*

Section 4

Wholesale Line Rental

Introduction

- 4.1 On 28 November 2003, Ofcom identified Openreach as an operator with significant market power (SMP) in the following UK markets (except the Hull area)⁶:
- wholesale residential exchange line services;
 - wholesale residential ISDN2 exchange line services;
 - wholesale business exchange line services;
 - wholesale business ISDN2 exchange line services; and
 - wholesale ISDN30 exchange line services.
- 4.2 As a result, Ofcom imposed various regulatory obligations on BT, including SMP services condition AA10 – which required BT to offer WLR for analogue, ISDN2 and ISDN30 – and SMP services condition AA1(a), which required BT to supply services in each market on fair and reasonable terms and conditions. Pursuant to the Undertakings, Openreach is the separate organisation within BT Group responsible for providing these products.
- 4.3 For the reasons provided below, Ofcom considers that Openreach is not providing services on fair and reasonable terms and conditions, as required by SMP services condition AA1(a), and therefore it proposes to amend the SLGs in each case as set out in the Notification and the draft Direction which accompany this document at Annex 1.
- 4.4 This section sets out in greater detail why Ofcom considers that the present SLGs for wholesale analogue access ('analogue WLR'), wholesale digital access ('WLR ISDN2'), wholesale ISDN30 ('WLR ISDN30') and WLR3 (together referred to hereafter as WLR products unless the context is otherwise clear) do not adequately incentivise performance. It should be noted that there is a common contract for analogue WLR, WLR ISDN2 and WLR ISDN30 and a separate contract for WLR3.

Openreach's performance

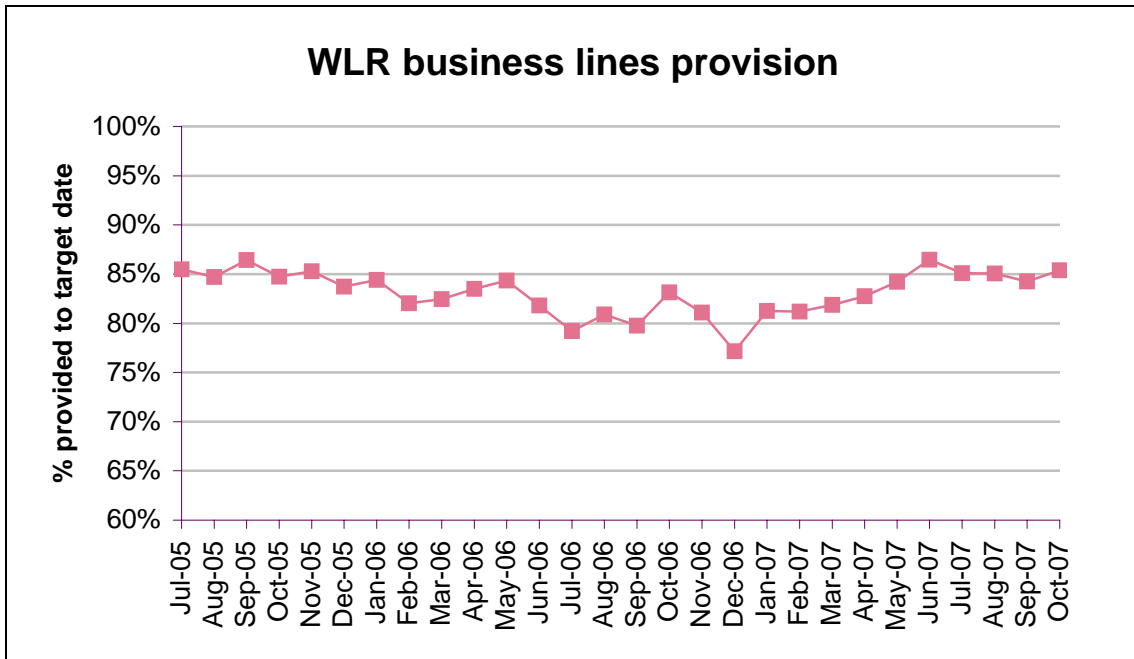
- 4.5 The charts below show Openreach's performance for two key performance measures for WLR services for the period July 2005 to October 2007.
- 4.6 As can be seen, there has been no improvement in the timeliness of line provisions for business WLR lines⁷, with only 86% of new lines being provided on time in both July 2005 and October 2007. For the majority of the intervening period the performance was lower than 86%.

⁶ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

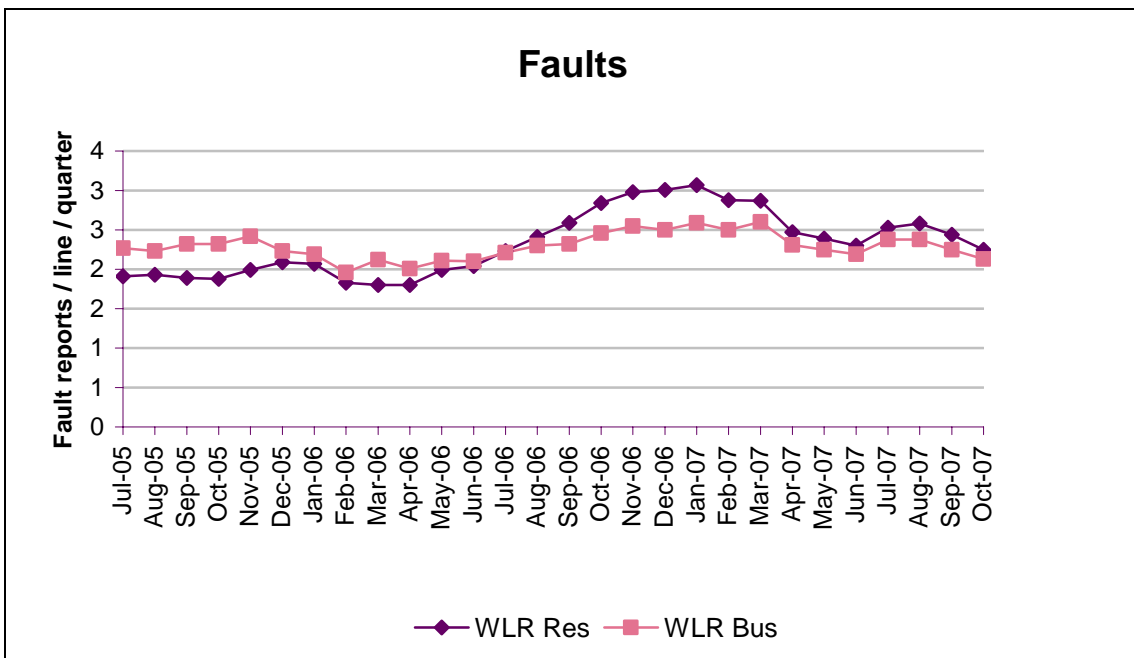
⁷ The volume of residential new line provisions is negligible.

4.7 Similarly, for business WLR, the number of faults per 100 lines has on average increased over the past two years. For residential WLR, the number of faults per 100 lines has got worse since July 2005.

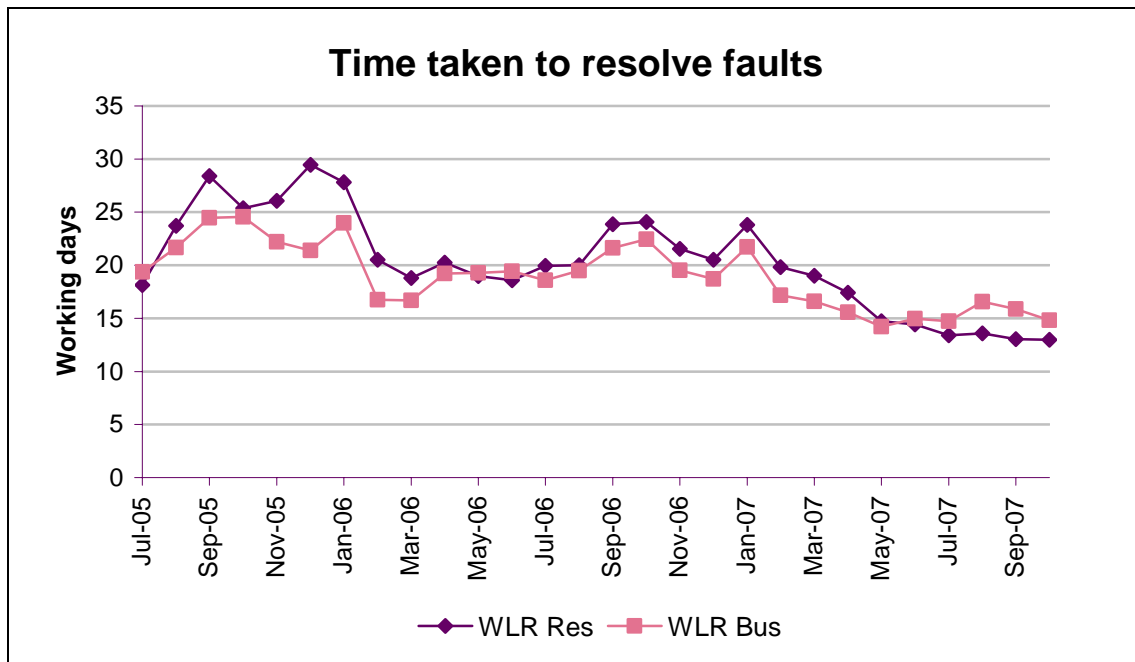
4.8 While the time taken to resolve faults has reduced slightly since July 2005, Ofcom notes that Openreach has been unable to maintain a reliable standard of service.



Source: Openreach



Source: Openreach



Source: Openreach

Application of general principles to WLR contracts

4.9 The SLA and associated compensation arrangements for WLR products are set out in the following documents:

- The Service Level Agreement (SLA) for analogue WLR2 is set out at section A of Schedule 4 of the *Contract for Wholesale Line Rental* ('the WLR SLA');⁸
- The SLA for WLR ISDN2 is set out at section B of Schedule 4 of the *Contract for Wholesale Line Rental* ('the WLR Digital SLA');⁹
- The SLA for WLR ISDN30 is set out at section C of Schedule 4 of the *Contract for Wholesale Line Rental* ('the WLR ISDN30 SLA');¹⁰
- The SLA for WLR3 is set out in Schedule 3 of the *Contract for WLR3* ('the WLR3 SLA')¹¹; and
- These contracts are collectively referred to as the "WLR SLA Contracts".

Compensation per event

Current situation

4.10 Currently, in the WLR SLAs Contracts compensation for some service failures only becomes payable to a CP if Openreach's average service performance for that CP falls below a specific threshold.

⁸ <http://www.openreach.co.uk/orpg/products/wlr/pstn/pstn.do>

⁹ <http://www.openreach.co.uk/orpg/products/wlr/isdn2/isdn2.do>

¹⁰ <http://www.openreach.co.uk/orpg/products/wlr/isdn30/isdn30.do>

¹¹ <http://www.openreach.co.uk/orpg/products/wlr/wlr3/contracts.do>

- 4.11 The WLR SLA states in summary that compensation is not payable if Openreach meets the following targets:
- for transfer orders “at least 99% of Priority 1 transfer Orders completed in a calendar month will be available to use by midnight on the 10th SMC Working Day” (paragraph 3.1);
 - for new provision and conversion orders “at least 99% of Priority 1 Orders for new provision and at least 99% of Priority 1 Orders to convert from one product to another completed in a calendar month will be activated by midnight on the date stated by BT....” (paragraph 3.2); and
 - for SPG availability “if the CP is unable to place Orders for a continuous period of not less than 48 hours excluding Scheduled Outage Time, the CP may make a claim for compensation....” (paragraph 5.3).
- 4.12 The Digital WLR SLA in summary states that compensation is not payable if Openreach meets the following targets:
- for transfer orders “at least 97% of Priority 1 transfer Orders completed in a calendar month will be available to use by midnight on the 10th SMC Working Day....” (paragraph 3.1);
 - for new provision and conversion orders “at least 95% of Priority 1 Orders for new provision or Priority 1 Orders to convert from one product to another completed in a calendar month will be activated by midnight on the date stated by BT....” (paragraph 3.2); and
 - for SPG availability “...the CP shall be entitled to claim any direct loss...which the CP show it has suffered as a result of the inability to place Orders via the Gateway... for a continuous period of not less than 24 hours excluding Scheduled Outage Time” (paragraph 5.3).
- 4.13 The WLR ISDN30 SLA in summary states that compensation is not payable if Openreach meets the following targets:
- for transfer orders “at least 97% of Priority 1 transfer Orders completed in a calendar month will be available to use by midnight on the 10th SMC Working Day....” (paragraph 3.1).
 - for new provision and conversion orders “at least 95% of Priority 1 Orders for new provision or Priority 1 Orders to convert from one product to another completed in a calendar month will be activated by midnight on the date stated by BT....” (paragraph 3.2); and
 - for SPG availability “...the CP shall be entitled to claim any direct loss...which the CP show it has suffered as a result of the inability to place Orders via the Gateway... for a continuous period of not less than 24 hours excluding Scheduled Outage Time” (paragraph 5.3).
- 4.14 The WLR3 SLA in summary states that compensation is not payable if Openreach meets the following targets:

- for transfer orders “at least 98% [99% from April 2007] of provision transfer orders ... will be available to use by midnight on the date provided in the KCI 2 or on a later date agreed by both parties” (paragraph 3.1); and
 - for new provision orders “at least 98% [99% from April 2007] of orders for provision new supply ... will be activated by midnight on the date provided in the KCI 2 ...or on a later date agreed by both parties” (paragraph 3.2).
- 4.15 WLR3 uses the Equivalence Management Platform (EMP) for placing and managing orders, rather than the SPG used by the other WLR products. The EMP is a common platform shared with LLU services. Therefore, Ofcom has considered SLA and compensation issues relating to the EMP in a separate section (see Section 7).
- 4.16 Compensation for faults is paid on a per event basis and therefore similar concerns do not arise.

Ofcom analysis

- 4.17 Ofcom has assessed whether the current WLA SLA Contracts meet the general principles set out in Section 3. Ofcom considers that the current WLA SLA Contracts structure does not reflect CPs’ average losses for three main reasons.
- 4.18 Respondents to the Requests for Information mentioned compensation to their end users as one source of loss resulting from Openreach service failures. Retail contracts do not link compensation payments to the overall performance the CP receives from Openreach, but rather depend on each individual end user’s experience of service failure.
- 4.19 Another aspect of CPs’ losses mentioned in the responses to Ofcom’s information requests was the cost of additional customer service resources. These are also likely to be linked to the total number of failures rather than only being applicable once performance has fallen below a particular threshold.
- 4.20 Additionally, where Openreach is maintaining a level of service above the SLA threshold but below 100%, it would not be making any compensation payments although CPs would still be suffering loss as a result of service failures.
- 4.21 In terms of the SPG, Openreach should have an incentive to ensure that it is available at all times (except for maintenance purposes) and that compensation should be payable should there be unscheduled outages. For WLR2, all interactions with Openreach (e.g. ordering lines and reporting faults) are done via the SPG and therefore outages prevent CPs from supporting their retail customers.

Ofcom proposal

- 4.22 Ofcom considers that all these reasons suggest that compensation per service failure/event is a more appropriate structure to compensate CPs for their losses. Ofcom considers that compensation should apply to each order not completed on time and not an aggregate of all orders. Therefore Ofcom is proposing that for each WLR SLA Contract:
- all transfer orders are completed by the 10th SMC Working Day or compensation becomes payable thereafter;

- all new provision orders are completed by the stated date unless otherwise agreed or compensation becomes payable thereafter;
- all orders to convert from one product to another are completed by the stated date unless otherwise agreed or compensation becomes payable thereafter; and
- the SPG should be available at all times other than for maintenance purposes or compensation can be claimed.

4.23 Similarly, Ofcom is proposing that for WLR3:

- all provision transfer orders will be available to use by midnight on the date provided in the KCI 2 or on a later date agreed by both parties or compensation becomes payable thereafter; and
- all new provision orders will be activated by midnight on the date provided in the KCI 2 or on a later date agreed by both parties or compensation becomes payable thereafter.

Removal of caps on compensation

Current situation

4.24 Currently the WLR SLA Contracts set a cap on the maximum compensation payable for each line:

- the WLR SLA states “the maximum compensation payable...for any one failure or series of related failures shall be limited to £500 per Line per annum” (paragraph 7.1);
- the WLR Digital SLA states that: “the maximum compensation payable...for any one failure or series of related failures shall be limited to £250 per Line” (paragraph 7.1);
- the WLR ISDN30 SLA states that: “the maximum compensation payable...for any one failure or series of related failures shall be limited to £1500 per 2Mb bearer” (paragraph 7.1); and
- the WLR3 SLA states “the maximum compensation payable...for any one failure or series of related failures shall be limited to £500 per Line per annum” (paragraph 7.1).

Ofcom analysis

4.25 As noted in Section 3, Ofcom considers there should not be a cap on the maximum amount that should be paid in the event of avoidable loss of service whether for a prolonged period or for a series of related events or for delayed provision of service. The incentive should be for the repair to be effective and timely.

4.26 Ofcom has assessed the impact of the caps on total compensation payments. Ofcom considers that the caps are generally set at a level where in practice very few failures are likely to be caught by them. Therefore, Ofcom considers that the existence or otherwise of the caps does not make a material difference to the total volume of compensation payments.

- 4.27 Ofcom considers the fact compensation ceases once the cap is reached seems unlikely to reflect the CPs' average losses accurately because these losses would increase until the service failure is fixed. On this basis, Ofcom considers that compensation should continue to be payable. The capping of compensation also means that Openreach's incentive to repair a service failure once the limit is reached is reduced.

Ofcom proposal

- 4.28 Therefore, in order to reflect CPs' losses and provide Openreach with an appropriate incentive to perform, Ofcom proposes to remove the various caps on compensation in the SLAs.

Value of compensation

Current situation

- 4.29 For analogue WLR, WLR ISDN2, WLR ISDN30 and WLR3 if Openreach does not meet its SLA, CPs are entitled to the following compensation:
- with regard to delayed transfer, new provision and conversion orders for each day or part day late an amount equal to one month's line rental charge or in the case of WLR ISDN30 one month's 1 month's per channel rental charge per affected channel (paragraph 6.1);
 - with regard to fault repair, an amount equal to one month's line rental charge for each day or part day late or in the case of WLR ISDN30 1 month's per channel rental charge per affected channel (paragraph 6.6 and paragraph 6.5 for WLR ISDN30); and
 - with regard to missed appointments, compensation of £10 for the first missed appointment and £25 for the second and each subsequent missed appointment (paragraph 6.8 and paragraph 6.6 for WLR ISDN30); and

Ofcom analysis

- 4.30 Ofcom has taken a range of factors, including the responses to the Request for Information and the OTA2-facilitated negotiations, into account in assessing whether the compensation levels contained in the WLR contracts are reasonable.
- 4.31 The factors raised by CPs, in their responses to the Requests for Information, which caused them to incur losses included:
- loss of existing and potential customers to BT Retail because of customers' perception that dependence on Openreach means that CPs' customers will get poorer service;
 - brand damage where customers do not recognise the role of Openreach in the provision of the CPs' service; and
 - costs of handling customers' complaints about delays, including:
 - call centre costs;
 - senior management time on escalated cases;

- costs for complaints to the relevant ombudsman; and
 - compensation to customers for costs and inconvenience that they have incurred including, in exceptional cases, costs of phone calls seeking updates on previously reported faults.
- 4.32 One respondent estimated that the cost it incurred (excluding reputational damage) for each fault with a WLR product on average was £36 and for late provision its loss amounted to £16.
- 4.33 Another respondent stated that it pays compensation to its end users on the basis of one day's rental for each day that the end user is without service, plus £1 per day in goodwill credits. One other stated it paid a set amount of compensation per day (£3.25) which was not directly linked to the monthly line rental charge.
- 4.34 Another respondent provided figures for the amount of direct compensation and goodwill payments it paid to its retail customers and the call diversion costs it incurred, which it attributed largely to Openreach failures. In total, these were significantly *below* the amount it received in compensation from Openreach. However, it noted that it did also incur other significant costs in dealing with customers in relation to provision and repair problems, which were not quantified.
- 4.35 The initial contract for WLR included compensation payments for delayed transfers, provisions, conversions and fault repairs. At the time, however, the compensation level was based on one third of a month's line rental charge for each day or part day that service was provided later than it should have been. There has therefore been a significant improvement in the level of compensation since the initial contract for WLR. Ofcom understands that the higher WLR compensation levels were set partly on the basis of the level of compensation typically paid at the retail level.

Ofcom proposal

- 4.36 At present, Ofcom does not propose to amend the level of compensation for each event. Ofcom understands that the fact that Openreach was not prepared to increase the level of compensation for WLR was not one of the reasons for the failure in the negotiations between Openreach and CPs, and that the level of WLR compensation is not one of the CPs' main concerns with the current SLAs.
- 4.37 The above evidence suggests there is a range for what might be regarded as reasonable for WLR compensation levels, based on an average CP loss. Ofcom believes that the current compensation values fall within this range and notes that the level has already been improved significantly compared to the initial contract for WLR.
- 4.38 A further factor affecting Ofcom's proposal not to amend the level of compensation for WLR products is the fact that the current compensation levels have not been tested. The incentive properties of the existing levels of compensation are linked to the compensation claims process which is not working efficiently. It is therefore difficult to assess whether or not the compensation levels are appropriate to incentivise Openreach (see further below).

Claiming for additional loss

Current situation

- 4.39 Ofcom considers that the current WLR SLA Contracts allow CPs to claim compensation beyond the commitments set out in the SLAs and the compensation payments associated with these commitments.

Ofcom analysis and proposal

- 4.40 Ofcom considers that this meets the general principle set out in Section 3 regarding the ability of CPs to claim for additional loss. However, for the avoidance of doubt, Ofcom proposes that the ability for CPs to make claims for additional loss should be made explicit in the contracts.

Proactive payment of compensation

Current situation

- 4.41 CPs need to monitor the performance that they receive from Openreach and assess whether Openreach has met or breached the relevant SLAs. If the CP considers that it is owed compensation under any of the SLAs, the CP has to fill in a detailed claim form¹² providing individual details of those failures for a calendar month. The CP sends the claim form to Openreach who then assess the claim. If the claim is authorised by Openreach, the CP is credited in its next billing cycle.

Ofcom analysis and proposal

- 4.42 From Ofcom's analysis this issue appears to be the key problem with the current SLA and compensation arrangements. Ofcom has looked at this issue in three ways:
- by comparing the actual compensation paid by Openreach with the potential compensation that could have been claimed;
 - by comparing the compensation paid to BTR and other WLR CPs for equivalent services; and
 - by assessing CP experience of claiming compensation.

Total compensation paid

- 4.43 Ofcom has assessed the total value of compensation actually paid by Openreach against the WLR SLA Contracts, and has calculated what the total value of compensation that would have been paid if all CPs had claimed compensation in full. For the 12 months from September 2006 to August 2007, actual WLR payments to non-BT CPs were around 8% of what they would have been if all potential compensation had been claimed by non-BT CPs.

BT Retail compared to other CPs

- 4.44 Ofcom has compared the value of the compensation claimed by and paid to BT Retail for its PSTN services (which are provided by Openreach on the same basis as

¹²

http://www.openreach.co.uk/orpg/products/wlr/downloads/pstn_specific/waPSTN_serviceguaranteeclaimform.%20April2007.xls

WLR services) with the compensation claimed by and paid to WLR providers. For the period September 2006 to August 2007, Ofcom estimates that CPs have received compensation for WLR products which amounts to less than one tenth of the amount that BT Retail has received per line. Ofcom considers that this is probably due to economies of scale. That is, because the processes for claiming compensation are cumbersome and onerous, it is more efficient for a large CP, such as BT Retail, to claim compensation than for a smaller provider. Therefore, although the conditions are technically the same, the effect of their application is different.

CP concerns

- 4.45 Respondents to the Requests for Information raised various points of concern in relation to the processes that they need to follow to claim compensation. These included:
- unnecessary duplication of effort regarding claims;
 - information asymmetry, e.g. where Openreach is asking CPs to produce information to justify claims that Openreach already holds; and
 - the disproportionate cost of claiming compensation compared to the value of compensation.
- 4.46 Two respondents stated that Openreach has all the relevant information which would enable it to make automatic payments. One CP also stated that all the WLR data that is supplied to Openreach as the basis of a claim is solely information that is produced and exposed to the CP by Openreach in the first place. Both CPs stated that the present system is inefficient as it involves significant duplication of effort and systems. One of these also made the point that, under the current process, data on faults needs to be downloaded from eCo (Openreach's fault management platform for WLR products) on a regular basis which, as there is no automated interface for this application, relies on manual intervention.
- 4.47 Two other respondents stated that they did not claim compensation because they believed that the costs that they would incur in claiming compensation would outweigh the compensation that they would be likely to accrue.
- 4.48 For similar reasons, one other respondent stated that it had ceased claiming compensation because it did not gain sufficient benefit from compensation payments to justify the use of scarce management and systems resource.
- 4.49 Another respondent stated that it has only recently established systems and processes to administer compensation claims and it has calculated that it will incur approximately £20,000 per year, excluding supervisory and audit costs to follow Openreach's claims process. It further noted that such a claim process is a significant additional overhead for smaller players in the market.
- 4.50 Ofcom also notes that CPs have sought proactive payments in negotiations concerning the WLR contract.

Ofcom proposal

- 4.51 Ofcom considers that the costs of claiming compensation for WLR are disproportionate given the amount of compensation that is actually paid out. As noted above, some CPs have stated that they do not claim compensation because the

compensation payments are insufficient to justify the resources involved in claiming. This is strongly reinforced by Ofcom's modelling, which indicates that Openreach are paying out far less than the SLAs permit given recent service performance.

- 4.52 Therefore, given the disparity between potential compensation and actual compensation paid and the concerns expressed by CPs, Ofcom considers that the current processes for claiming compensation represent the most significant problem with regard to the SLAs for WLR products. The disparity between payments to downstream BT divisions and other CPs raises both competition and equivalence issues.
- 4.53 For these reasons, Ofcom proposes that Openreach should monitor its performance against its SLAs and, where it fails to meet these service agreements, the payments should be made to CPs without the CP needing to make a claim for compensation and justify the claim. This would ensure that CPs receive compensation for Openreach's service failures. It should also considerably strengthen the incentives on Openreach to ensure an appropriate level of service performance.

Summary of proposals for WLR

4.54 In summary, for WLR, Ofcom is proposing that:

- for analogue WLR, ISDN2 WLR and ISDN30 WLR, all transfer orders are to be completed by the 10th SMC Working day and all new provision and conversion orders are to be completed by the stated date or compensation shall be payable;
- for WLR3, all provision transfer and all new provision orders will be available to use by midnight on the date provided in the KCI 2 or on a later date agreed by both parties or compensation becomes payable thereafter;
- CPs should be able to make claims for any downtime of the SPG other than for scheduled outages;
- all caps on compensation for analogue WLR, ISDN2 WLR, ISDN30 WLR and WLR3 shall be removed;
- it does not appear necessary to amend the level of compensation for each event for WLR products at this time;
- the ability for CPs to make claims for additional loss should be made explicit in the WLR SLAs Contracts; and
- Openreach should monitor its performance against the WLR SLA Contracts and, where it fails to meet these service agreements, compensation payments should be made to CPs without any need for the customer to claim.

Question 2: *Do you consider that the proposed changes to the SLAs and SLGs for WLR services are appropriate?*

Section 5

Local Loop Unbundling

Introduction

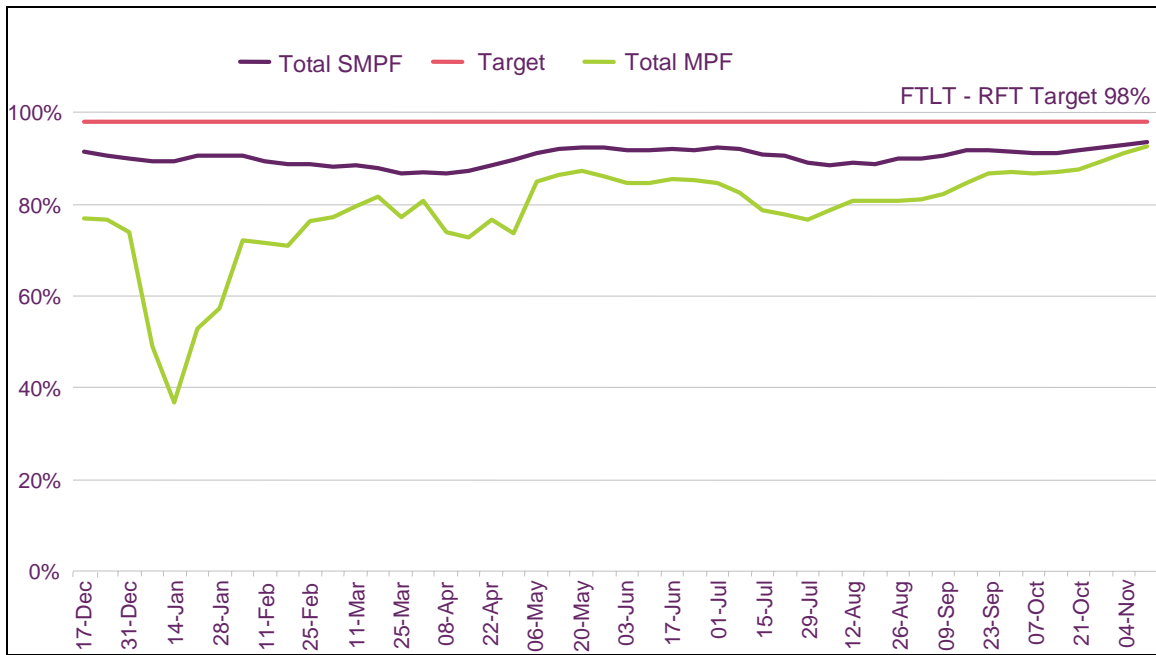
- 5.1 On 16 December 2004, Ofcom identified Openreach as an operator with significant market power (SMP) in the following market¹³:
- wholesale local access in the UK except the Hull area.
- 5.2 As a result, Ofcom imposed various regulatory obligations on BT, including SMP services condition FA1 which requires BT to supply services in the wholesale local access market on fair and reasonable terms and conditions. Pursuant to the Undertakings, Openreach is the separate organisation within BT Group responsible for providing these products.
- 5.3 For the reasons provided below, Ofcom considers that Openreach is not providing services in the wholesale local access market on fair and reasonable terms and conditions, as required by SMP services condition FA1, and therefore it proposes to amend the SLGs in each case as set out in the Notification and the draft Direction which accompany this document at Annex 2.
- 5.4 This section sets out in greater detail why Ofcom considers that the present SLA for metallic path facilities ('MPF', i.e. full LLU) and shared metallic path facilities ('SMPF', i.e. partial or shared LLU) does not adequately incentivise performance. It should be noted that there is only one SLA covering access network facilities.

Openreach's performance

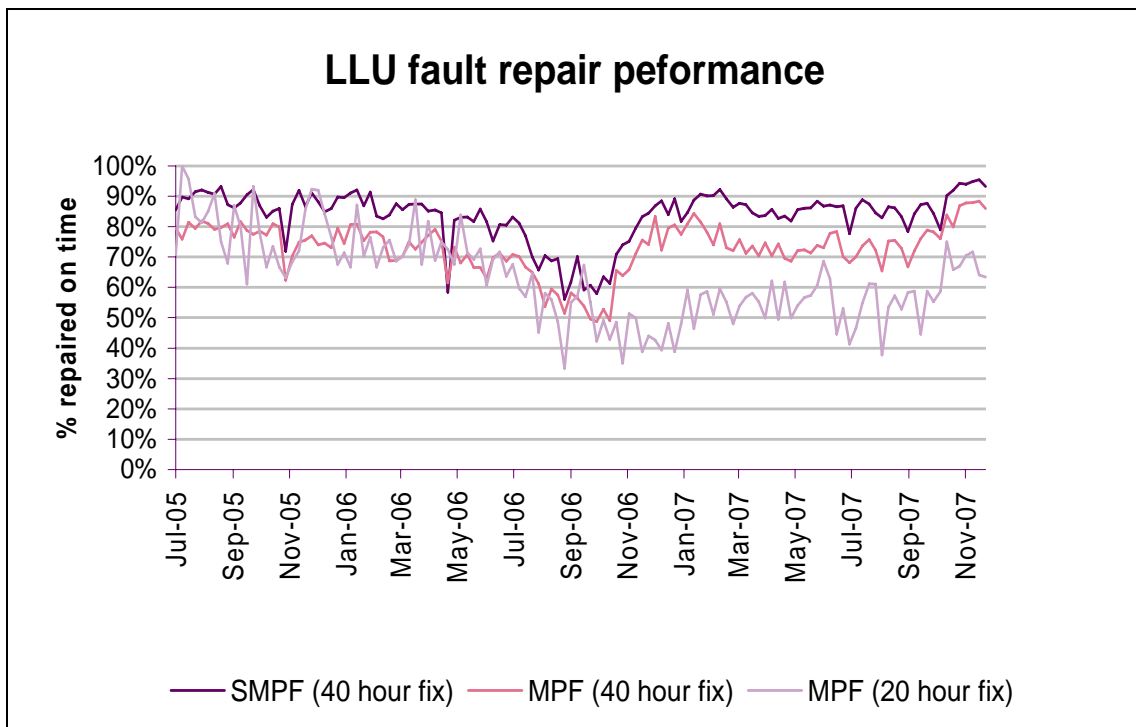
- 5.5 Performance on provision and repair for MPF and SMPF has been consistently below the expectation of the industry and the OTA2. While both have shown improvements during 2007, the required service levels are still not being met. SMPF has out-performed MPF from the outset.
- 5.6 The chart below shows the performance for provisioning MPF and SMPF. This chart is provided by the OTA2 and is agreed to and supported by Openreach and Communications Providers. It is based on data provided by Openreach.

¹³ <http://www.ofcom.org.uk/consult/condocs/rwlam/statement/rwlam161204.pdf>

LLU provision performance



Source: Office of the Telecommunications Adjudicator



Source: Openreach¹⁴

Application of general principles to LLU contracts

5.7 The Service Level Agreement for access network facilities is set out at Part VI of the *Access Network Facilities Agreement Schedules* ('the LLU SLA')¹⁵.

¹⁴ <http://www.openreach.co.uk/orgp/products/llu/kpi/kpi.do>

Compensation per event

Current situation

- 5.8 The LLU SLA entitles CPs to compensation on a per event basis for MPF and SMPF provisions and fault repair. However, the value of that compensation is linked to the average performance of Openreach. The relevant paragraphs within the LLU SLA are:
- paragraph 3.2.1 which in summary states that, "...if the weekly reported KPI for LLU Repair has been less than 95% for 12 consecutive weeks, Openreach will compensate late fault repairs for both SMPF and MPF faults at 100% of 1 month MPF line rental per day or part day, i.e. £6.67 per day..."; and
 - paragraph 3.2.2 which in summary states that, "...if the weekly reported KPI for LLU Repair has been 95% or more for 12 consecutive weeks, Openreach will compensate late fault repairs for SMPF faults at 100% of 1 month SMPF line rental per day or part day, i.e. £1.30 per day and for MPF faults at 100% of 1 month MPF line rental per day or part day, i.e. £6.67 per day...".
- 5.9 Compensation for provision is paid on a per event basis and therefore similar concerns do not arise.
- 5.10 In addition, paragraph 9.5 of the LLU SLA offsets compensation for delays in provision or repair of MPF against other services provided by Openreach. That is, if Openreach is also liable for compensation for having breached its SLAs with regard to either Co-location (paragraph 4 of the LLU SLA), Internal Tie Cables (paragraph 5 of the LLU SLA), Distant Location (paragraph 6 of the LLU SLA) or BT Egress Link (paragraph 7 of the LLU SLA), then the compensation for the MPF service failures will be reduced by the amount due to the other services.
- 5.11 Paragraph 20 of the LLU SLA places further restrictions on the payment of compensation. The relevant paragraphs within the LLU SLA are:
- paragraph 20.1 states that, "...if, in any ACO [Advance Capacity Order, i.e. forecasting] Period, the Operator has placed orders in excess of 130% of the forecasted number of MPFs and Shared MPFs (not including cancellations of orders during or after the relevant ACO Period) during such ACO Period, any instances when compensation is payable by BT to the Operator under paragraph 9 will be reduced by a percentage to reflect the excess orders over 130% during such period [...]"; and
 - paragraph 20.2 states that, "...subject to paragraph 20.3, if the Operator has placed orders for less than 80% of the forecasted number of MPFs and Shared MPFs (not including cancellations of orders during or after the relevant ACO Period) during such ACO Period, no compensation shall be payable by BT to the Operator under paragraph 9 for such period provided that the total number of Co-location facilities delivered by the Contractual Delivery Date during the prevailing ACO Period is not less than 90%".
- 5.12 The effect of paragraph 20 is that if an LLU CP forecasts inaccurately it would receive either reduced or no compensation.

¹⁵ http://www.openreach.co.uk/orgp/products/llu/contracts/downloads/RANF_Part_VI.rtf

Ofcom analysis

- 5.13 Ofcom has assessed whether the current LLU SLA meets the general principles set out in Section 3.
- 5.14 Ofcom considers that the link to average performance introduces a level of complexity that makes it more difficult to ascertain the level of compensation due. Ofcom considers that the intended incentive properties of the two-tier system (i.e. where Openreach should pay more in compensation if its repair service is below the agreed levels) have not been realised. Ofcom notes that between September 2005 and August 2007, Openreach made no compensation payments against the LLU SLAs.
- 5.15 Ofcom also considers that it is inappropriate for Openreach to offset compensation for MPF or SMPF against compensation for Co-location, Internal Tie Cables, Distant Location and BT Egress Links. This is for two reasons. First, only some of the losses faced by the CP are related to the delay or inconvenience to the end-user, e.g. other costs include the cost of managing Openreach, additional time and effort spent, etc. Second, if Openreach is supplying multiple products to a CP and all of those products are required to be working in order to provide a service, it is reasonable that the CP should receive compensation relating to all of the products that it is purchasing from Openreach and is unable to utilise because of an Openreach fault or late provision.
- 5.16 Furthermore, while it recognises the importance of accurate forecasting, Ofcom considers that it is inappropriate for Openreach to make compensation dependent on accurate forecasting. Ofcom does not consider that the linkage between inaccurate forecasting and performance that is below the targets in LLU SLAs is strong enough to justify this limit on compensation.
- 5.17 For these reasons, Ofcom considers that the current LLU SLA does not reflect CPs' average losses.

Ofcom proposal

- 5.18 In order to rectify these problems Ofcom is proposing that Openreach amend its LLU SLA so as to remove:
- the link to Openreach's average performance for LLU Repair;
 - the mutual exclusivity between compensation payments for MPF / SMPF and the other products; and
 - the link between LLU CPs' forecasting and compensation payments.
- 5.19 However, to address the issue of accurate forecasting, Ofcom is asking OTA2 to lead discussions between Openreach and the LLU CPs to establish a robust and meaningful forecasting process.

Removal of caps on compensation

Current situation

- 5.20 For both SMPF and MPF new provide orders and fault repairs the amount of compensation to which CPs are entitled is capped at a maximum of 42 working days (paragraphs 3.2 and 9.2.2, respectively of the LLU SLA).

Ofcom analysis

- 5.21 As noted in Section 3, Ofcom considers there should not be a cap on the maximum amount that should be paid in the event of avoidable loss of service whether for a prolonged period or for a series of related events. The incentive should be for the repair to be effective and timely.
- 5.22 Ofcom has assessed the impact of the caps on total compensation payments. Ofcom believes that the caps are generally set at a level where very few failures are likely to be caught by them. Therefore, Ofcom considers that the existence or otherwise of the caps does not make a material difference to the total volume of compensation payments.
- 5.23 Ofcom considers the fact compensation ceases once the cap is reached seems unlikely to reflect the CPs' average losses accurately because these losses would increase until the service failure is fixed. On this basis, Ofcom considers that compensation should continue to be payable. The capping of compensation also means that Openreach's incentive to repair a service failure once the limit is reached is reduced.

Ofcom proposal

- 5.24 Therefore in order to reflect CPs' losses and provide Openreach with an appropriate incentive Ofcom proposes to remove the cap of 42 working days on compensation in the SLAs. However, the cap will remain in place should a CP choose to takeover responsibility of the line as permitted under the LLU SLA after 42 days. Compensation would not be payable thereafter.

Value of compensation

Current situation

- 5.25 The compensation for late fault repairs (i.e. those not repaired within 40 hours for Standard Care or within 20 hours for Enhanced Care) is set out in paragraphs 3.2.1 and 3.2.2 of the LLU SLA. The provisions are referred to above.
- 5.26 The compensation for late provision of MPF or SMPF is £8 per working day or part working day (paragraph 9.2 of the LLU SLA). Additionally, for orders submitted using the EMP, if a CP informs Openreach within eight working days of Openreach's notification of delivery, that the MPF or SMPF was provided in a non-operational state, then the same level of compensation shall be provided as if for late provision (paragraph 9.2.2).

Ofcom analysis

- 5.27 Ofcom has taken a range of factors, including the responses to the Request for Information and the OTA2-facilitated negotiations, into account in assessing whether the compensation values contained in the LLU SLA are reasonable.
- 5.28 One respondent to the Request for Information provided a list of costs that arise as a consequence of a delay in provisioning of LLU, including the following: that lost margin for every day the provisioning was late; the additional operational cost of managing the customer complaint; escalating the failure; and diverting the customer's calls to a mobile.
- 5.29 Another respondent stated that in the case of an MPF fault they often place a "call divert" service on the customer's (non-working) telephone number and route the customer's calls through to their mobile phone, increasing the cost to the CP of providing continuous service to the customer. The respondent stated that it was required to offer this service due to competitive pressure from BT Retail who offers this service.
- 5.30 The respondent also stated that in the event of a fault not being fixed on time, it would undoubtedly field at least one inbound query from the customer requesting an update, in addition to the initial fault call. Assuming a cost of £5 per inbound enquiry, the likely cost to a CP for a fault fixed outside of the LLU SLA (before any goodwill payment is made to the customer) would be at least £10. Faults which fall outside of the LLU SLA for repair normally require the CP to follow the escalation process within Openreach in order to ensure an appropriate and timely response is provided. To escalate a fault involves additional resources from the back-office functions to engage with their counterparts at Openreach, further increasing CP costs.
- 5.31 One respondent suggested that compensation of £16 a day would allow them to cover their operational costs, plus provide compensation to the end user.

DOAs and ELFs

- 5.32 A further significant concern raised by CPs was what they called DOAs (dead on arrivals) and ELFs (Early Life Failures). These describe where an SMPF or MPF is provided to the customer, but that it is either non-operational on delivery (a DOA) or fails within the first eight working days of delivery (an ELF). This situation is caught by the SLAs where an LLU order is placed over the EMP. However, the level of compensation is the same as that provided for a standard late provision, i.e. £8 per day late.
- 5.33 CPs stated that DOAs and ELFs are particularly problematic to resolve with customers as a total loss of service can cause irreparable harm to the new customer relationship. One CP provided evidence suggesting that DOAs and ELFs resulted in higher costs than late provisions, in terms of higher consumer compensation payments and higher customer service costs.

Ofcom proposal

- 5.34 At this time, Ofcom proposes that it is not necessary to amend the level of compensation for each event. Ofcom understands that the fact that Openreach was not prepared to increase the level of compensation for LLU was not one of the reasons for the failure in the negotiations between Openreach and CPs, and that the level of LLU compensation is not one of the CPs' main concerns with the current

SLAs. Rather the CPs' main concerns were around the processes for obtaining compensation.

- 5.35 Ofcom considers that the current compensation values fall within the range that could be justified, while noting that considerably higher compensation values could also probably be caught within these ranges.
- 5.36 A further factor affecting Ofcom's proposal not to amend the level of compensation for LLU products is the fact that the current compensation levels have not been tested. The incentive properties of the existing levels of compensation are linked to the compensation claims process which is not working efficiently. It is therefore difficult to assess whether or not the compensation levels are appropriate to incentivise Openreach (see further below).
- 5.37 If little or no improvement in service performance is confirmed or observed, Ofcom will review the level of compensation payments.

DOAs and ELFs

- 5.38 Ofcom considers that in the case of DOAs and ELF there is a strong justification for increasing the level of compensation payable to the CP. It is clear that the detriment experienced by the end-user is greater in the event of total loss of service than in the scenario of late provision, i.e. in a late provision the end-user will frequently have an alternative service (e.g. they may be transferring from BT Retail). Ofcom considers that the compensation levels should reflect this difference. Therefore, Ofcom proposes that the level of compensation for a DOA or an ELF should be £16 per day where the service is not available to the end-user. This higher value of compensation reflects the complete loss of service and the consequent losses that the CP is likely to incur. DOAs are unsuccessful provision rather than merely delays in provision. There is also evidence that the costs to CPs of DOAs and ELF are greater than late provisions.

Claiming for additional loss

Current situation

- 5.39 Ofcom considers that the current LLU contracts allow CPs to claim compensation beyond the commitments set out in the LLU SLA and the compensation payments associated with these commitments. Specifically, paragraph 12.1 of the LLU SLA states that "any amount deducted or recovered shall be without prejudice to any right of either Party to claim for additional loss".

Ofcom analysis and proposal

- 5.40 Ofcom considers that this meets the general principle set out in Section 3 regarding the ability of CPs to claim for additional loss and therefore no change is needed.

Proactive payment of compensation

Current situation

- 5.41 CPs need to monitor the performance that they receive from Openreach and assess whether Openreach has met or breached its SLA. If the CP considers that it is owed compensation under any of the LLU SLAs, it needs to submit a claim to its Openreach commercial contract manager. Although claims and supporting evidence

can be e-mailed, formal notification of the claim needs to be submitted in hard copy by post.

- 5.42 Upon receiving the claim, the Openreach commercial contracts manager passes it by email to the product line for validation and approval. A series of checks are carried out:
- the claim is checked for timeliness and calculation accuracy;
 - the claim is validated against Openreach systems to ensure that the claims match Openreach records. In the event of a discrepancy, Openreach's decision as to whether to accept or reject a claim is based on its own records;
 - Openreach checks to ensure that the claim does not fall within MBORC (Matter Beyond Our Reasonable Control) events; and
 - Openreach reviews whether or not the LLU CP has forecasted with sufficient accuracy to be entitled to full compensation, as set out in paragraph 20 of the LLU SLA.
- 5.43 Once all these verification steps are completed the final payment amount is calculated. If the payment is to an external CP then the credit amount is sent to the Openreach billing team to be manually added to the next invoice. However, it should be noted that due to the forecasting check, Openreach cannot complete its analysis (and therefore pay compensation) until the end of the relevant calendar quarter.

Ofcom analysis

- 5.44 From Ofcom's analysis this issue appears to be the key problem with the current SLA and compensation arrangements. Ofcom has looked at this issue in two ways:
- by comparing the actual compensation paid by Openreach with the potential compensation that could have been claimed; and
 - by assessing CP experience of claiming compensation.
- 5.45 For the period September 2006 to August 2007, Ofcom notes that no compensation payments were made under the LLU SLAs for late provision or fault repair to external CPs, though a small amount was paid to BT Wholesale. During this period, Openreach's performance was significantly below the commitments set out in the LLU SLA. Ofcom has calculated what the total value of compensation would have been paid if all CPs had claimed compensation in full, and there is a significant discrepancy between the two.
- 5.46 One respondent to the Request for Information stated that, despite considering that provisioning and repair performance of MPF had been extremely poor, it had not chosen to claim compensation under the LLU SLA because it considered that the SLAs and SLGs consisted of insufficient information on which to base any claim. Additionally, they stated that they had discussed the process with other CPs and concluded that it was not clear that any claims would be successful.
- 5.47 Given the disparity between potential compensation and actual compensation paid and the concerns expressed by LLU CPs, Ofcom considers that the current processes for claiming compensation represent the most significant problem with regard to LLU SLAs and compensation payments.

Ofcom proposal

5.48 Therefore, Ofcom proposes that Openreach should monitor its performance for MPF and SMPF provision and repair against the LLU SLA and, where it fails to meet these service agreements, the payments should be made to CPs without any need for the customer to claim and prove why they should receive compensation. This would ensure that CPs receive compensation for Openreach's service failures. It should also considerably strengthen the incentives on Openreach to ensure an appropriate level of service performance.

Summary of proposals for LLU

5.49 In summary, for LLU, Ofcom is proposing that:

- Openreach amends its LLU SLA so as to remove: the link to Openreach's average performance for LLU Repair; the mutual exclusivity between compensation payments for MPF / SMPF and other products; and the link between LLU CPs' forecasting and compensation payments;
- the caps on compensation of a maximum of 42 working days for MPF and SMPF shall be removed other than for CP step-in;
- it does not appear necessary to amend the level of compensation for most events for MPF or SMPF at this time;
- for orders submitted over the EMP, if a CP informs Openreach (within eight working days of Openreach's notification of delivery) that the MPF or SMPF was provided in non-operational state, then Openreach shall pay compensation of £16 each day or part day from the date of the notification of delivery until it is made operational; and
- Openreach should monitor its performance against the LLU SLAs for provision and fault repair and, where it fails to meet these service agreements, compensation payments should be made to CPs without any need for the customer to claim.

Question 3: *Do you consider that the proposed changes to the SLAs and SLGs for access network facilities are appropriate?*

Section 6

Ethernet services

Introduction

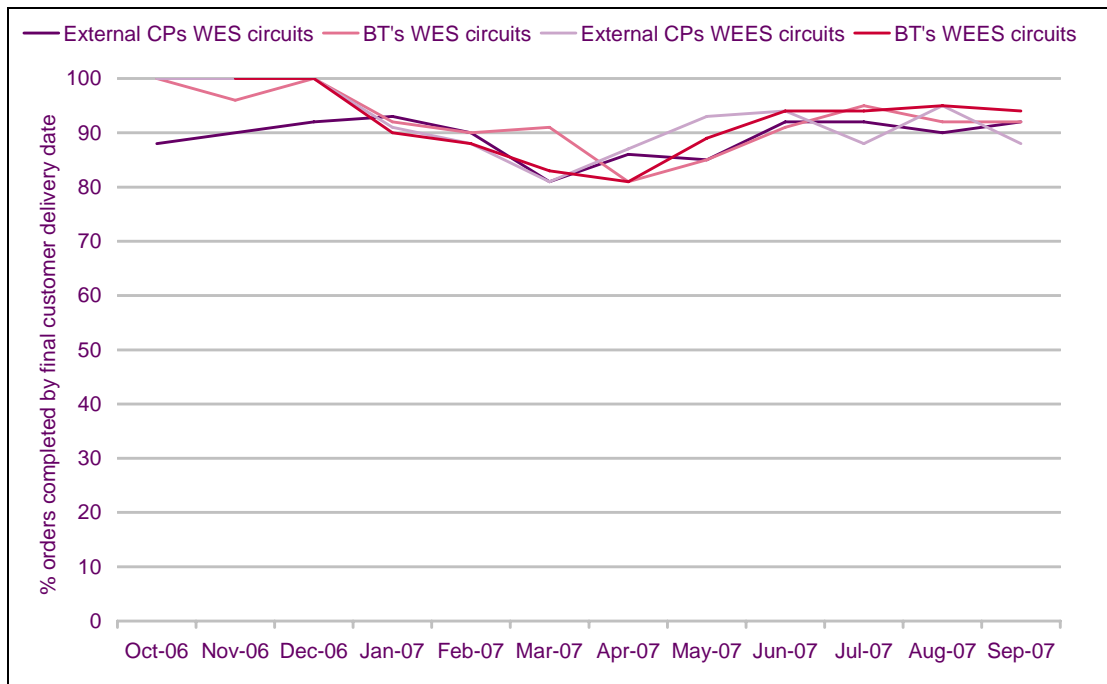
- 6.1 On 24 June 2004, Ofcom identified Openreach as an operator with significant market power (SMP) in the following market in the UK (except the Hull area)¹⁶:
- wholesale alternative interface symmetric broadband origination at all bandwidths.
- 6.2 As a result, Ofcom imposed various regulatory obligations on BT, including SMP services condition HH1 which requires BT to supply services in the wholesale alternative interface symmetric broadband origination market at all bandwidths on fair and reasonable terms and conditions. Pursuant to the Undertakings, Openreach is the separate organisation within BT Group responsible for providing these products.
- 6.3 For the reasons provided below, Ofcom considers that Openreach is not providing services in the market specified on fair and reasonable terms and conditions, as required by SMP services condition HH1, and therefore it proposes to amend the SLGs relevant to this market as set out in the Notification and the draft Direction which accompany this document at Annex 3.
- 6.4 This section sets out in greater detail why Ofcom considers that the present SLGs for backhaul extension services ('BES'), wholesale extension services ('WES') and wholesale end to end Ethernet services ('WEES') (together referred to hereafter as Ethernet services unless the context is otherwise clear) do not adequately incentivise performance. It should be noted that there is only one SLG covering WES and WEES.

Openreach's performance

- 6.5 The charts below show Openreach's performance for BES and WES / WEES performance. Ofcom notes that there has been some improvement in Openreach's performance in recent months. However, Ofcom notes the preceding poor performance and also the overall volatility of performance.

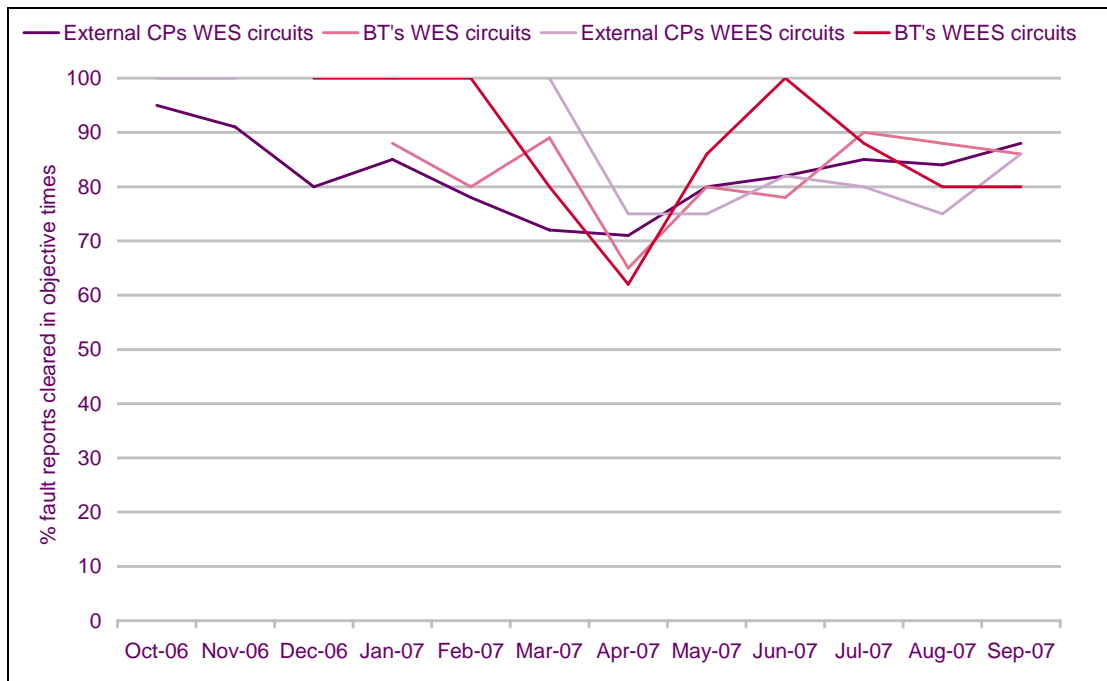
¹⁶ http://www.ofcom.org.uk/consult/condocs/lmr/statement/state_note.pdf

Ethernet provision performance for Wholesale Extension Services and Wholesale End to End Ethernet Services



Source: BT¹⁷

Ethernet repair performance for Wholesale Extension Services and Wholesale End to End Ethernet Services

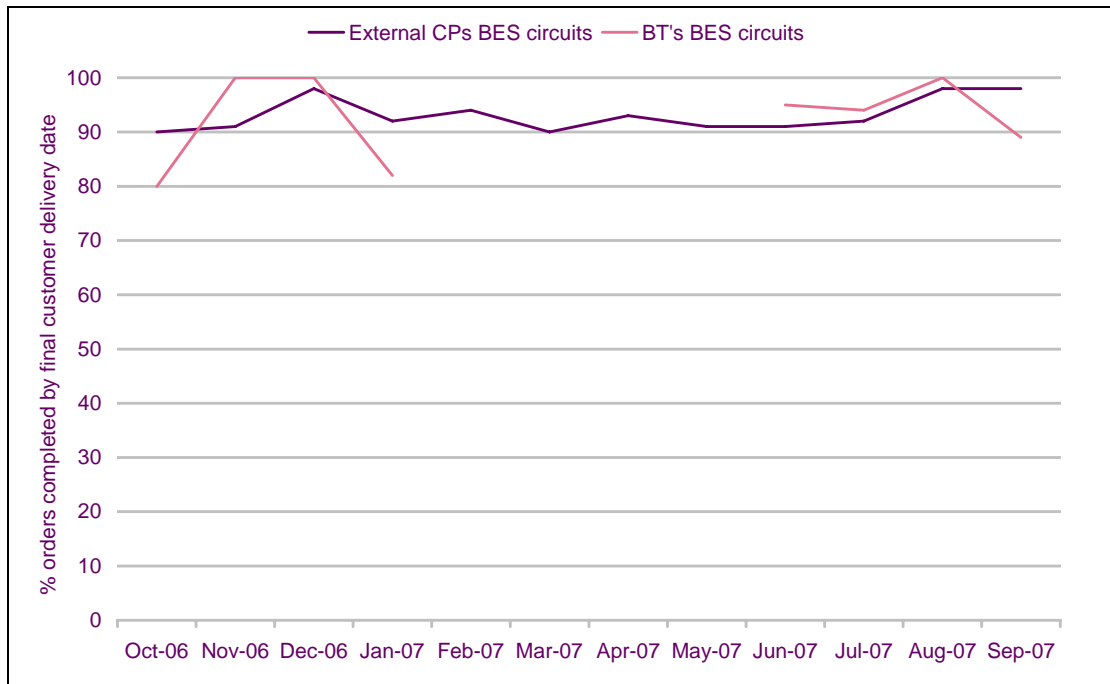


Source: BT¹⁸

¹⁷

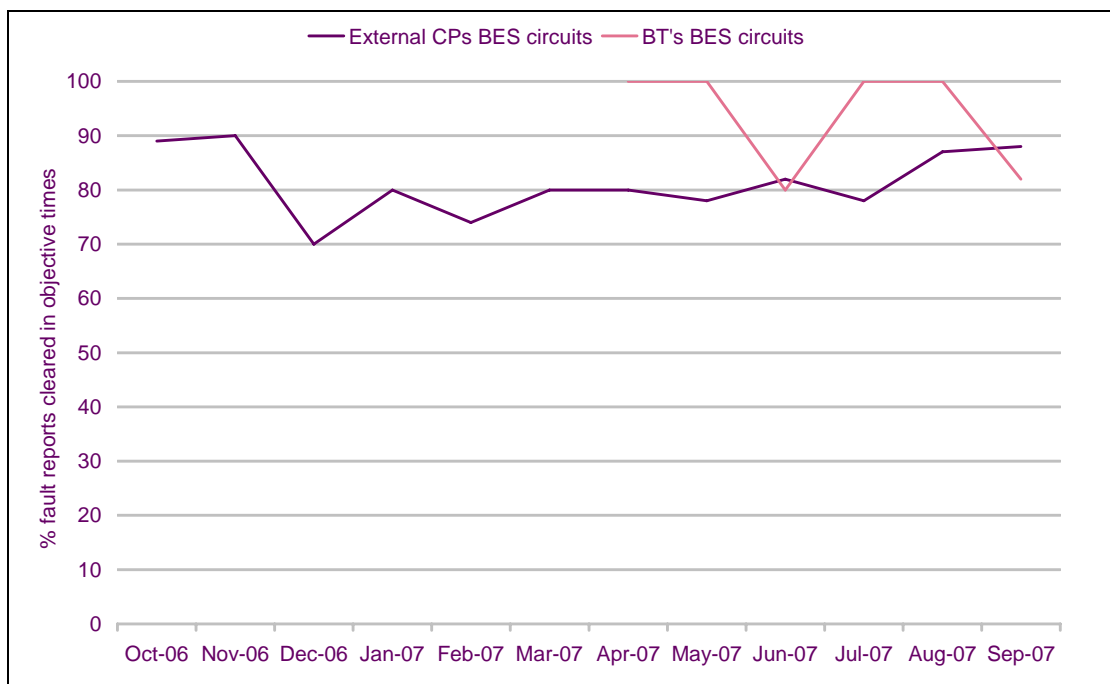
<http://www.btplc.com/Thegroup/Regulatoryinformation/Ourundertakings/KeyPerformanceIndicators/KeyProductPerformanceIndicators/BackhaulandWholesaleExtensionServices.htm>

Ethernet provisioning performance for Backhaul Extension Services



Source: BT¹⁹

Ethernet repair performance for Backhaul Extension Services



Source: BT²⁰

¹⁸

<http://www.btplc.com/Thegroup/Regulatoryinformation/Ourundertakings/KeyPerformanceIndicators/KeyProductPerformanceIndicators/BackhaulandWholesaleExtensionServices.htm>

¹⁹

<http://www.btplc.com/Thegroup/Regulatoryinformation/Ourundertakings/KeyPerformanceIndicators/KeyProductPerformanceIndicators/BackhaulandWholesaleExtensionServices.htm>

Application of general principles to Ethernet contracts

- 6.6 The Service Level Agreement for BES circuits is set out at Schedule 4 of the *Conditions for Backhaul Extension Services* ('the BES SLA')²¹.
- 6.7 The Service Level Agreement for WES and WEES circuits is set out at Schedule 5 of the *Conditions for Wholesale Extension Services* ('the WES and WEES SLA')²².
- 6.8 These contracts are collectively referred to as the "Ethernet SLAs".

Compensation per event and value of compensation

- 6.9 Given the particular structure of the Ethernet SLAs (as shown below) Ofcom considers that it is not possible to separate out the consideration of the principles of compensation per event and value of compensation. Therefore, Ofcom is considering these two principles together below.

Current situation

- 6.10 As set out in paragraphs 3.2 and 4.2 of the BES SLA and the WES and WEES SLA respectively, for late provision, compensation payments increase depending on how late the provision is (up to a limit of 20 days) but with a number of discrete steps rather than always increasing with the lateness of the provision. The table below shows the eligible compensation amounts for late provision.

Number of Working Days beyond Contractual Delivery Date or CP Requirement Date (whichever is the later)	Amount = percentage of connection charge for the circuit to be credited to the credited to CP
1-10	5%
11-15	10%
16-20	15%
More than 20	20%

- 6.11 In the OTA2 facilitated negotiations with CPs, Openreach offered to increase the compensation payments for provisions significantly. The proposal maintained the same basic stepped structure, but included additional steps with a final step at 40 days. The payment at 40 days was increased to 200% of the connection charge.
- 6.12 For faults, the Ethernet SLAs state that Openreach will restore service within five hours of a fault being reported. If Openreach fails to meet this SLA, the compensation is currently based on the number of late repairs over a 12 month

period, regardless of the duration of each late repair. The table below shows the eligible compensation amounts for late repairs.

Number of eligible failures in a year (12 months cycle) in the circuit	Amount = percentage of annual rental for the circuit to be credited to CP
1	5%
2-3	10%
4	25%
5 or more	35%

Ofcom analysis and proposal

6.13 In terms of the structure of the current compensation payments for Ethernet, Ofcom does not believe that the Ethernet SLAs currently reflect CPs' loss.

Structure and value of compensation payments for late provisions

6.14 With regard to late provisions, Ofcom does not believe that the current structure or that proposed by Openreach during the OTA2-facilitated negotiations reflects CPs' losses. It is implausible that the loss after 10 days is the same as the loss after 1 day. In their negotiations with Openreach, CPs had proposed changing to a payment per day of late provision.

6.15 Ofcom does not consider that the present compensation payments set out in the SLG are likely to reflect CPs' losses for delayed provision of Ethernet circuits. These circuits are used to connect Openreach's local exchanges with CPs' networks and are commonly used to support LLU. Delayed provision of the circuit is therefore likely to slow the CP's rollout.

Ofcom proposal for structure and value of compensation payments for late provisions

6.16 Ofcom proposes to change the structure of the Ethernet compensation regime for late provision so that compensation increases per day of delay. In the absence of strong evidence to suggest another approach, Ofcom also proposes to increase the compensation in a linear fashion, with a constant payment for each day of delay. A daily increase is consistent with the standard industry practice for most Openreach products, including WLR and LLU. A daily increase was the structure that CPs proposed for late Ethernet provisions in their negotiations with Openreach.

6.17 For late provisions, Ofcom proposes to set the compensation level to 100% of monthly rental per day of delay in provision. This is consistent with the standard industry practice for most Openreach products, including WLR and LLU. This is the level of compensation proposed by CPs in their negotiations with Openreach.

Structure and value of compensation payments for late repairs

- 6.18 As set out in paragraphs 3.1 and 4.1 of the BES SLA and the WES and WEES SLA, for faults, compensation is currently based on the number of late repairs over a 12 month period, regardless of the duration of each late repair. In the event that there is a single late repair over the 12 months cycle, this means that the CP is entitled to 5% of annual rental (or 60% if expressed in terms of monthly rental) of one circuit regardless of the duration of the late repair. The compensation level for the CP is therefore the same whether the late repair lasts an hour or a matter of weeks.
- 6.19 Such a structure is unlikely to reflect CPs' losses, which can be expected to increase the longer the fault is not repaired. In response to the Request for Information, one respondent provided evidence of increased compensation payments to their customers with increasing total service unavailability over a 12 month period. CPs proposed changing to a payment per hour of delay in their recent negotiations with Openreach.
- 6.20 In their responses to the Request for Information, respondents stated that their losses for Ethernet failures increased as a result of compensation that they pay to their end-users, additional costs (such as increased customer management costs) and loss of revenue.

Ofcom proposal for structure and value of compensation payments for late repairs

- 6.21 Ofcom proposes to change the structure of the Ethernet compensation regime for late repair such that compensation increases in a linear fashion with the duration of the delay. A linear increase is consistent with the standard industry practice for most Openreach products, including WLR, LLU and partial private circuits (PPCs).
- 6.22 Given the high value of Ethernet products for CPs, measuring the delay by each day is unlikely to provide sufficient granularity to reflect adequately CPs' expected losses. Ofcom therefore proposes that compensation should increase by a constant amount with each hour of delay. Measuring late repair in hours rather than days also reflects the short duration of most Ethernet late repairs. This is the same as the treatment of PPC enhanced care products.
- 6.23 Ofcom proposes to set the fault repair compensation at 15% of monthly rental per hour of delay in repairs beyond the first five hours. Ofcom considers that PPCs and Ethernet services are similar because of the business critical impact of their failure. Ofcom understands that enhanced care PPC products represent the majority of PPC lines.

Contractual Delivery Date ('CDD') and CP Requirement Date ('CRD')

Current situation

- 6.24 The Contractual Delivery Date ('CDD') is the date by which Openreach states that it will provision service and is the date from which compensation payments are measured. Sometimes a CP may want an Ethernet circuit delivered at a particular time that may be later than the earliest point at which Openreach could deliver it. In this case the target for delivery is the CP Requirement Date ('CRD'). As shown below, the Ethernet SLAs set out that should Openreach not meet the CDD compensation is paid.

- 6.25 Both the BES and the WES and WEES contracts (Schedule 1 of the *Conditions for Backhaul Extension Services* and Schedule 1 of the *Conditions for Wholesale Extension Services* respectively) define the CDD as:

“the 57th Working Day after the Order is Processed by BT or such later date as may be agreed in writing by BT and the CP or such other reasonable later date as may be notified in writing by BT to the CP”.

Ofcom analysis

- 6.26 If the compensation payments that Openreach is required to pay for late provision are increased, as Ofcom proposes, there is a risk that this will have the perverse result of Openreach responding by setting later CDDs in order to reduce the risk to it of paying compensation for being late. This would defeat the purpose of setting compensation payments at appropriate levels to compensate CPs.
- 6.27 Ofcom also understands that in practice, the CDD is frequently set significantly beyond the 57 working days or the CP's required date, and that this is a source of concern and dissatisfaction to CPs.

Ofcom proposal

- 6.28 To reduce this circumvention risk and address the concerns of CPs, Ofcom proposes that the definition of the CDD be amended to limit the circumstances in which Openreach can delay the extension of the CDDs beyond the 57th day and to make any such extension subject to the consent of the CP affected with a requirement that such CP consent not be unreasonably withheld.

Removal of caps on compensation

Current situation

- 6.29 Currently, paragraph 5.1 of the BES SLA and the WES and WEES SLA states that the maximum compensation that a CP can receive for late provision is an amount equal to 20% of the Connection Charge for the circuit and the maximum compensation that a CP can receive for late repair is an amount equal to 35% of the annual rental for the period covered by the 12 months cycle.
- 6.30 In its negotiations with CPs, Openreach offered to increase the cap for late provisions to 200% of the connection charge if the circuit was not provisioned by the 40th day beyond the CDD.

Ofcom proposal

- 6.31 As noted in Section 3, Ofcom considers there should not be a cap on the maximum amount that should be paid in the event of avoidable loss of service whether for a prolonged period or for a series of related events. The incentive should be for the repair to be effective and timely.
- 6.32 Ofcom has assessed the impact of the caps on total compensation payments. Based on Openreach's response to the Request for Information, most compensation payments (~90%) would still result in payments which would be below the present cap for late repairs (i.e. 35% of annual rental). Well over 95% of late provisions would be due compensation under our proposals worth less than the cap of 200% of the

connection charge proposed by Openreach in its negotiations (using connection and rental charges as in the first half of 2007). In terms of the financial impact, we estimate that the caps would reduce the total Ethernet compensation payments by around 5% to 10% compared to what they would otherwise be.

- 6.33 Ofcom considers the fact compensation ceases once the cap is reached seems unlikely to reflect the CPs' average losses accurately because these losses would increase until the service failure is fixed. On this basis, Ofcom considers that compensation should continue to be payable. The capping of compensation also means that Openreach's incentive to repair a service failure once the limit is reached is reduced.
- 6.34 Ofcom considers that compensation should be paid for every day that service is not provisioned beyond the CDD or CP Requirement Date (CRD) and that there should be no limit to the level of compensation that Openreach should be required to pay. CPs' losses would be likely to increase for every additional day that the circuit was late in being delivered and there seems little reason for capping compensation payments as the incentive to deliver the circuit thereafter would be lessened.
- 6.35 Therefore, in order to reflect CPs' losses and provide Openreach with an appropriate incentive Ofcom proposes to remove the caps of 20% of connection charge for late provisions and 35% of annual rental for faults.

Claiming for additional loss

Current situation

- 6.36 CPs have the ability to claim compensation beyond the commitments set out in the Ethernet SLAs and the compensation payments associated with these commitments.

Ofcom proposal

- 6.37 Ofcom considers that this meets the general principle set out in Section 3 regarding the ability of CPs to claim for additional loss. However, for the avoidance of doubt, Ofcom proposes that the ability for CPs to make claims for additional loss should be made explicit in the contracts.

Proactive payment of compensation

Current situation

- 6.38 Under paragraph 6.1 of the BES and the WES and WEES SLAs Openreach agrees to offset any compensation payable regarding late provisions against the Connection Charge on the CP's invoice proactively.
- 6.39 Regarding fault repairs, under paragraph 6.2 of the BES and the WES and WEES SLAs, Openreach credits any compensation payable proactively on the CP's invoice for circuit rental for the following year unless the circuit is terminated in which case a specific payment will be made.

Ofcom proposal

- 6.40 The current BES and the WES and WEES SLAs already provide for proactive compensation payments.

- 6.41 Ofcom considers that with regard to the compensation payable for late provisions the current process is adequate as it proactively provides compensation within an appropriate timescale, i.e. via an offset against the charge for the connection.
- 6.42 However, Ofcom considers that the process for compensation for faults will require amendment. Currently, the annual crediting of compensation is necessary as the SLA is structured on the basis of faults per year. Given Ofcom's proposals above, compensation will be linked to each event. Therefore, Ofcom proposes that any proactive compensation payments should be made within an appropriate timeframe, such as on a monthly basis.

Summary of proposals for Ethernet

- 6.43 In summary, for WES, WEES and BES services, Ofcom is proposing that:
- for late provisions, Openreach shall pay compensation at an increased level of one month's line rental per day or part day of delay;
 - for each late fault repair, Openreach will pay compensation at a rate of 15% of one month's line rental for each hour of additional downtime beyond the first five hours;
 - the ability for CPs to make claims for additional loss should be made explicit in the contracts;
 - the caps on compensation of a maximum of 20% of connection charge for late provisions and a maximum of 35% of annual rental for late fault repair shall be removed; and
 - for faults, proactive compensation payments shall be made within an appropriate timeframe.

Question 4: Do you agree that Ofcom's proposed amendment of the **structure** of the Ethernet compensation payments is consistent with the loss suffered by CPs? Do you agree that Ofcom's proposed **level** of Ethernet compensation payments is consistent with the loss suffered by CPs?

Question 5: Do you consider that the proposed changes to the SLAs and SLGs for Ethernet services are appropriate?

Question 6: Do you agree that Openreach should be required to justify changes to the Contractual Delivery Date which would delay the provision of the Ethernet services beyond the 57th day?

Section 7

Equivalence Management Platform

Introduction

- 7.1 The Equivalence Management Platform (EMP) is the electronic gateway via which CPs manage MPF, SMPF and WLR3 services. The EMP is used by CPs for address matching, making appointments, managing line availability at target premises, number reservation and management, obtaining installation details, diagnostic testing, placing any order type (i.e. provide, modify or cease), and reporting and managing faults.
- 7.2 If the EMP is unavailable, any CP providing LLU or WLR3 services is unable to manage its current or potential customers. For example, if the EMP is unavailable a CP will not be able to book appointments in real-time (i.e. while the customer is on the phone) to resolve reported faults. Similarly, CPs could lose potential customers by not being able to carry out line checks in real-time. Therefore any downtime of the EMP directly affects the CPs' ability to gain customers and maintain their relationships with their customers.

Current situation

- 7.3 Openreach's LLU SLA states that Openreach aims to ensure that the EMP is available 99.8% of the time other than for scheduled outages.
- 7.4 Paragraph 10.7.1 of the LLU SLA entitles CPs to claim service credits should the EMP be down for a period longer than set out within the SLA and the level of compensation that they are entitled to is £5 per line based on average throughput of certain order types.
- 7.5 Openreach's WLR3 SLA states that the target monthly availability of the EMP is 99.8%. If a CP is unable to place transactions on the EMP for more than 6 hours the CP shall be entitled to claim direct loss. However, according to paragraph 7.1 of the WLR3 SLA this is limited to £500 per line per annum.

Openreach's proposal as part of the OTA2 negotiations

- 7.6 As part of the OTA2-facilitated negotiations, Openreach proposed improving the compensation arrangements for EMP for both LLU and WLR3.
- 7.7 For LLU, Openreach proposed to give a service credit to CPs when the EMP fails to perform to the published availability targets. These targets would be calculated on a monthly basis after subtracting the allowable outages for the month.
- 7.8 Openreach proposed that separate EMP service credits would be offered on provision, assurance and dialogue services, and that where an EMP failure impacted dialogue services and provision or assurance, only the greater of the EMP service credit would be paid.
- 7.9 Openreach also proposed that the total compensation would be capped at 48 hours.

- 7.10 For LLU Dialogue Services²³, Openreach proposed that the service credit would be £20 per order affected and that an accelerator model would be applied to Dialogue Services only. This accelerator would have worked by increasing the amount paid by a factor of x if the outage was sustained for an extended period of time.
- 7.11 The proposed accelerator profiles were:

Individual failure duration (hours)	Accelerator applied
2	2
4	3
6	4
8+ (up to 48)	5

- 7.12 For WLR3, Openreach proposed that it would put in place an SLG accelerator model for WLR3 Provision and Assurance on EMP, but that this would not apply to Dialogue Services.

Ofcom's analysis and proposal

- 7.13 Ofcom proposes that CPs should be paid automatically for any downtime of the EMP other than for scheduled outages. CPs rely on the electronic gateway to change or provision orders. Its unavailability therefore affects CPs' relationships with their retail customers and any downtime is likely to affect sales directly. For the same reason, Ofcom considers that the compensation for EMP failure should not be capped.
- 7.14 In addition, Ofcom considers that for LLU the current service credits are too low and are unlikely to reflect CPs' losses accurately. For WLR3, Ofcom considers that the lack of service credits and reliance on CPs claiming direct loss is likely to raise barriers to claiming.
- 7.15 Openreach proposed to increase these service credits to £20 in the contractual negotiations facilitated by the OTA2. Ofcom considers that Openreach's offer is more likely to reflect CPs' losses than the present amount. CPs also considered that the service credits proposed by Openreach were at a more reasonable level. Therefore, Ofcom proposes that the service credits for LLU and WLR3 are set at £20.
- 7.16 Similarly, Ofcom considers that the accelerator proposed by Openreach should be applied for both LLU and WLR3 dialogue services. Ofcom considers that this will reflect the increasing loss to the industry of an extended EMP failure, and should also provide Openreach with an adequate incentive to ensure that the EMP is stable and reliable.

Summary of proposals for EMP

- 7.17 In summary, for EMP, with regard to MPF, SMPF and WLR3, Ofcom is proposing that:
- CPs should be paid compensation for any downtime of the EMP other than for scheduled outages without any need for the customer to claim;
 - compensation for downtime should be based on service credits of £20;

²³ Dialogue Services are services provided on the EMP and include address matching, appointing services, and manage line characteristics

- the accelerator proposed by Openreach should be applied for both LLU and WLR3 dialogue services; and
- the compensation for EMP failure should not be capped.

Question 7: *Do you consider that the proposed changes to the SLAs and SLGs for the Equivalence Management Platform are appropriate?*

Section 8

Conclusions and next steps

Summary of proposals

8.1 In summary, for WLR, Ofcom is proposing that:

- for analogue WLR, ISDN2 WLR and ISDN30 WLR, all transfer orders are to be completed by the 10th SMC Working day and all new provision and conversion orders are to be completed by the stated date or compensation shall be payable;
- for WLR3, all provision transfer and all new provision orders will be available to use by midnight on the date provided in the KCI 2 or on a later date agreed by both parties or compensation becomes payable thereafter;
- CPs should be able to make claims for any downtime of the SPG other than for scheduled outages;
- all caps on compensation for analogue WLR, ISDN2 WLR, ISDN30 WLR and WLR3 shall be removed;
- it does not appear necessary to amend the level of compensation for each event for WLR products at this time;
- the ability for CPs to make claims for additional loss should be made explicit in the WLR SLAs; and
- Openreach should monitor its performance against the WLR SLAs and, where it fails to meet these service agreements, compensation payments should be made to CPs without any need for the customer to claim.

8.2 In summary, for LLU, Ofcom is proposing that:

- Openreach amends its LLU SLA so as to remove: the link to Openreach's average performance for LLU Repair; the mutual exclusivity between compensation payments for MPF / SMPF and other products; and the link between LLU CPs' forecasting and compensation payments;
- the caps on compensation of a maximum of 42 working days for MPF and SMPF shall be removed other than for step-in (i.e. the CP takes over responsibility for the line);
- it does not appear necessary to amend the level of compensation for most events for MPF or SMPF at this time;
- however, for orders submitted over the EMP, if a CP informs Openreach (within eight working days of Openreach's notification of delivery) that the MPF or SMPF was provided in non-operational state, then Openreach shall pay compensation of £16 each day or part day from the date of the notification of delivery until it is made operational; and

- Openreach should monitor its performance against the LLU SLAs for late faults and provision and, where it fails to meet these service agreements, compensation payments should be made to CPs without any need for the customer to claim.

8.3 In summary, for WES, WEES and BES services, Ofcom is proposing that:

- for late provisions, Openreach shall pay compensation at an increased level of one month's line rental per day or part day of delay;
- for each late fault repair, Openreach shall pay compensation at a rate of 15% of one month's line rental for each hour of additional downtime beyond the first five hours;
- the ability for CPs to make claims for additional loss should be made explicit in the contracts;
- the caps on compensation of a maximum of 20% of connection charge for late provisions and a maximum of 35% of annual rental for late fault repair shall be removed; and
- for faults, proactive compensation payments shall be made within an appropriate timeframe.

8.4 In summary, for EMP, with regard to MPF, SMPF and WLR3, Ofcom is proposing that:

- CPs should be paid compensation for any downtime of the EMP other than for scheduled outages without any need for the customer to claim;
- compensation for downtime should be based on service credits of £20;
- the accelerator proposed by Openreach should be applied for both LLU and WLR3 dialogue services; and
- the compensation for EMP failure should not be capped.

ERG approach to appropriate remedies

8.5 Ofcom has considered the *Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework*²⁴ and, in particular, the statement that NRAs may find it appropriate to oblige the SMP player to make compensation payments to reflect any failure to provide the agreed level of service. The proposals set out within this document are consistent with ERG position and intended to encourage Openreach to provide an appropriate level of service performance. If it does not, however, it should compensate CPs accordingly.

Ofcom's duties and functions

Sections 3 and 4 of the Act

8.6 Ofcom has considered all its duties under section 3 of the Act and, in particular, its principle duties under section 3 which are:

²⁴ http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

- a) to further the interests of citizens in relation to communications matters; and
 - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 8.7 Ofcom has also considered its duties under section 4 of the Act and, in particular, the six community requirements which are to:
- a) promote competition;
 - b) contribute to the development of the European internal market;
 - c) promote the interests of all persons who are citizens of the European Union;
 - d) carry out its functions in a manner which does not favour one technology or service over another;
 - e) encourage the provision of network access and service interoperability; and
 - f) encourage compliance with the standards necessary to facilitate service interoperability and to secure freedom of choice for consumers.
- 8.8 Ofcom considers that its proposals are consistent with its principle duties under section 3 of the Act. It considers that its proposals would be likely to further the interests of citizens and consumers because they are intended to ensure that Openreach has an appropriate incentive to provision and repair service. Consumers should therefore benefit from increased value for money, in terms of increased service quality, higher compensation or lower prices. This, in turn, should assist competition in the provision of services.
- 8.9 Ofcom also considers that its proposals are consistent with the six Community requirements. The proposals should help to foster competition in the provision of electronic communications networks and services as CPs would know that such services were being provisioned and repaired in an efficient manner. The access network concerned would be available to all CPs on fair, reasonable and non-discriminatory terms and therefore they would be able to compete on an equivalent basis.

Section 49(2) of the Act

- 8.10 Section 49(2) of the Act requires Ofcom in giving any direction to ensure that it is:
- (a) **objectively justifiable** in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (b) not such as to **discriminate unduly** against particular persons or against a particular description of persons;
 - (c) **proportionate** to what it is intended to achieve; and
 - (d) in relation to what it is intended to achieve, **transparent**.
- 8.11 Ofcom considers that its proposals are objectively justifiable in that the present SLGs do not adequately compensate CPs for losses that they incur as a result of delayed provision or repair of a service. CPs also receive significantly less than they should

because of the inefficient compensation process. Proactive payments should increase compensation levels and thereby place a greater incentive on Openreach to provision and repair service in an efficient manner.

- 8.12 Ofcom considers that its proposals do not discriminate unduly against Openreach because it is the only company that provides wholesale communications services on a national basis and therefore equivalent measures could not be applied to anyone else.
- 8.13 Ofcom considers that its proposals are proportionate in that Ofcom only proposes to change the regime in areas in which it considers that the present regime is not working effectively.
- 8.14 Ofcom also considers that its proposals are clearly set out within this document and the draft Directions which are set out at Annexes 1, 2, and 3.
- 8.15 In coming to the conclusions set out in this document, Ofcom is satisfied that it has met all relevant tests.

Next steps

- 8.16 Following the end of the consultation period on 25 January 2008, subject to respondents' views, Ofcom proposes to issue the Directions as set out within this document. Ofcom proposes that the proposals will take effect within one month of Ofcom issuing the final Directions.
- 8.17 Ofcom considers that the proposals set out in this document will increase the incentive on Openreach to provide and repair service promptly. Ofcom will carry out a periodic review to assess whether or not the SLGs have been effective in driving improved service performance. If little or no improvement in service performance is confirmed or observed, Ofcom will review the level of compensation payments and may have to intervene again in order to incentivise Openreach to improve its quality of service. We will also consider whether additional performance incentives are required as part of the broader Review of Openreach's Financial Framework.

Section 9

Responding to this Consultation

How to respond

- 9.1 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **25 January 2008**.
- 9.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3) to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.
- 9.3 Please can you send your response to: michael.galvin@ofcom.org.uk
- 9.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Michael Galvin
Competition Group
4th Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Telephone: 020 7783 4158
Fax: 020 7783 4109
- 9.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

Further information

- 9.6 If you have any wish to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Michael Galvin using the contact details given above.

Confidentiality

- 9.7 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential and specify why. Please also place such parts in a separate annex.
- 9.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those which are marked as confidential, in order to meet legal obligations.

- 9.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

- 9.10 Following the end of the consultation period, subject to respondents' views, Ofcom proposes to issue the Directions as set out within this document.
- 9.11 Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

- 9.12 Ofcom is keen to make responding to consultations easy, and has published some consultation principles which it seeks to follow, including on the length of consultations.
- 9.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- 9.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
Email vicki.nash@ofcom.org.uk

Annex 1

Notification and Draft Direction: WLR

Notification of a proposal under Section 49 of the Communications Act 2003

Proposal for making a Direction under SMP services condition AA1(a) in Schedule 1 to the Notification at Annex B to the explanatory statement of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets market review statement published on 27 November 2003 which imposed various obligations on British Telecommunications plc ('BT') as a result of the market power determinations made by Ofcom that BT has significant market power in the markets for: wholesale residential exchange line services; wholesale residential ISDN2 exchange line services; wholesale business exchange line services; wholesale business ISDN2 exchange line services; and wholesale ISDN30 exchange line services on fixed public narrowband networks for the UK (excluding the Hull Area)

1. Ofcom hereby makes, in accordance with section 49 of the Communications Act 2003 ("the Act"), the following proposal to make a Direction under SMP services Condition AA1(a).2 in Schedule 1 to the Notification at Annex B to the explanatory statement of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets market review statement published on 27 November 2003.
2. The draft Direction is set out in the Schedule to this notification.
3. The effect of the draft Direction, and the reasons for making the proposal, are set out in the accompanying explanatory statement.
4. Representations may be made to Ofcom about the proposals contained herein by 5pm on **25 January 2008**.
5. In accordance with section 50 of the Act, copies of this notification have been sent to the Secretary of State, the European Commission and to the regulatory authorities of every other Member State.

**CRAIG LONIE
DIRECTOR OF REGULATORY FINANCE**

**A person authorised by Ofcom under paragraph 18 of the Schedule to the
Office of Communications Act 2002**

10 DECEMBER 2007

Schedule

[Draft] Direction under section 49 of the Communications Act 2003 and SMP services condition AA1(a) imposed on British Telecommunications plc ('BT') as a result of the market power determinations made by OFCOM that BT has significant market power in the markets for: wholesale residential exchange line services; wholesale residential ISDN2 exchange line services; wholesale business exchange line services; wholesale business ISDN2 exchange line services; and wholesale ISDN30 exchange line services on fixed public narrowband networks for the UK (excluding the Hull Area)

WHEREAS:

- (A) as a result of a market analysis carried out by the Director General of Telecommunications (the '**Director**'), he proposed on 17 March 2003 and on 26 August 2003, in accordance with sections 48(2) and 80 of the Act that, the Dominant Provider has significant market power in the markets for among others: wholesale residential exchange line services; wholesale residential ISDN2 exchange line services; wholesale business exchange line services; wholesale business ISDN2 exchange line services; and wholesale ISDN30 exchange line services in the UK, excluding the Hull Area and the setting of certain SMP services conditions;
- (B) the Director considered every representation duly made and thereafter on 28 November 2003 pursuant to sections 48(1) and 79 of the Act by way of publication of a Notification (the '**Notification**') identified the relevant services markets, made market power determinations to the effect referred to in recital (A) above and set certain significant market power ('**SMP**') services conditions on the Dominant Provider to take effect on 28 November 2003, unless otherwise stated in Schedule 1 thereto;
- (C) by virtue of the Transitional Provisions, the Director was able to exercise the powers under the Act for an interim period. OFCOM assumed those powers as of 29 December 2003;
- (D) this Direction concerns matters to which Condition AA1(a).2 relates;
- (E) for the reasons set out in the explanatory statement accompanying this Direction, OFCOM is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
 - (i) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (ii) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (iii) proportionate to what it is intended to achieve; and
 - (iv) in relation to what it is intended to achieve, transparent.
- (F) for the reasons set out in the explanatory statement accompanying this Direction, OFCOM is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
- (G) on 10 December 2007, OFCOM published a Notification of the proposed Direction and accompanying explanatory statement in accordance with section 49 of the Act and invited representations about any of the proposals therein by 25 January 2008;

(H) by virtue of section 49(9) of the Act, OFCOM may give effect to the proposal set out in the Notification, with or without modification, only if –

(a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and

(b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;

(I) OFCOM has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose; and

Therefore, pursuant to section 49 of the Act and Condition AA1(a).2 in Schedule 1 to the Notification, OFCOM gives the following Direction:

1. The Dominant Provider shall modify the service level agreements which govern the supply of wholesale analogue access, wholesale digital access, wholesale ISDN 30 and WLR3. In particular, the following contracts will require modification to reflect the proposals set out in the accompanying Annex to this Direction: (i) The Contract for Wholesale Line rental; and (ii) The Contract for WLR3.

2. For the purpose of interpreting this Direction, the following definitions shall apply:

(a) '**Act**' means the Communications Act 2003;

(b) '**Dominant Provider**' means British Telecommunications plc, whose registered company number is 1800000, and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

(c) '**The Notification**' means the Notification referred to in recital (B) of this Direction;

(d) '**Transitional Provisions**' means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;

3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has in The Notification or, if the context so permits, in Schedule 1 thereto, as appropriate, and otherwise any word or expression shall have the same meaning as it has in the Act.

4. For the purpose of interpreting this Direction:

(a) headings and titles shall be disregarded; and

(b) the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

Service level guarantees: incentivising performance

5. This Direction shall take effect on the day it is published and the Dominant Provider shall implement the changes set out herein within one month.

6. The Schedule to this Direction shall form part of this Direction.

CRAIG LONIE
DIRECTOR OF REGULATORY FINANCE

A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002

[DATE]

Annex

Proposed modifications to the *Contract for Wholesale Line Rental* and the *Contract for WLR3*

1) BT shall amend the terms and conditions which govern the supply of wholesale analogue access, wholesale digital access, wholesale ISDN 30 set out in the *Contract for Wholesale Line Rental* to provide the following:

Compensation per event

- a) All transfer orders shall be completed and available to use by midnight on the 10th SMC working day (as defined in the *Contract for Wholesale Line Rental*) or on such later date as may be specified or compensation will become payable thereafter;
- b) All new provision orders shall be completed and available to use by midnight on the date stated or compensation will become payable thereafter;
- c) All orders to convert from one product to another shall be completed and available to use by midnight on the date stated or compensation will become payable thereafter;

Service Provider Gateway availability

- d) The service provider electronic gateway (SPG) will be operational at all times other than for scheduled outages.
- e) In the event of any unscheduled downtime of the SPG Communications Providers must be entitled to claim compensation for losses incurred;

Limitations on compensation – removal of caps

- f) Any limits on compensation payable as a result of a failure to satisfy the service guarantees shall be removed;

Claims for additional loss

- g) Any compensation payable under the contract shall be without prejudice to any right of either party to claim for additional loss; and

Proactive payments

- h) BT shall monitor its performance against the service guarantees for repair, provision, transfer and conversion orders, missed appointments, and disconnections in error and compensate Communications Providers proactively should it fail to satisfy the service guarantees. For the avoidance of doubt, compensation shall be payable without the need for a Communications Provider to make a claim

2) BT shall amend the terms and conditions which govern the supply of WLR3 set out in the *Contract for WLR3* to provide the following:

Compensation per event

a) All transfer orders shall be completed and available to use by midnight on the date provided by KCI 2 (as explained in the Contract for WLR3) or on such later date as may be specified or compensation will become payable thereafter

b) All transfer orders shall be completed and available to use by midnight on the date provided by KCI 2 (as explained in the Contract for WLR3) or on such later date as may be specified or compensation will become payable thereafter;

Equivalence Management Platform gateway availability and compensation payable

c) The Equivalence Management Platform gateway (EMP) will be operational at all times other than for scheduled outages.

d) In the event of any unscheduled downtime of the EMP Communications Providers shall be credited with £20 per relevant transaction based on the previous month's run rate;

e) In the event of any unscheduled downtime of the EMP Communications Providers shall be credited per relevant transaction based on the previous month's run rate with compensation on the following basis:

(i) £20 per relevant transaction for an individual failure duration of up to 2 hours;

(ii) £40 per relevant transaction for an individual failure duration of 2 or more hours but less than 4 hours;

(iii) £60 per relevant transaction for an individual failure duration of 4 or more hours but less than 6 hours;

(iv) £80 per relevant transaction for an individual failure duration of 6 or more hours but less than 8 hours; and

(v) £100 per relevant transaction for an individual failure duration of more than 8 hours.

Limitations on compensation – removal of caps

f) Any limits on compensation payable as a result of a failure to satisfy the service guarantees and any limits on compensation payable for unscheduled downtime of the EMP shall be removed;

Additional losses

g) Any compensation payable under the contract shall be without prejudice to any right of either party to claim for additional loss; and

Proactive payments

h) BT shall monitor its performance against the service guarantees for repair, provision and transfer orders, and missed appointments, and compensate Communications Providers proactively should it fail to satisfy the service guarantees. For the avoidance of doubt, compensation shall be payable without the need for a Communications Provider to make a claim.

Annex 2

Notification and Draft Direction: LLU

Notification of a proposal under Section 49 of the Communications Act 2003

Proposal for making a Direction under SMP services condition FA1 in Schedule 1 to the Notification at Annex 1 to the explanatory statement in relation to the *Review of the Wholesale Local Access Market* published on 16 December 2004 which imposed various obligations on British Telecommunications plc ('BT') as a result of the market power determinations made by OFCOM that BT has significant market power in the market for wholesale local access in the UK (excluding the Hull Area)

1. OFCOM hereby makes, in accordance with section 49 of the Communications Act 2003 ("the Act"), the following proposal to make a Direction under SMP services condition FA1.2 in Schedule 1 to the Notification at Annex 1 to the explanatory statement of the Review of the Wholesale Local Access Market published on 16 December 2004.
2. The draft Direction is set out in the Schedule to this notification.
3. The effect of the draft Direction, and the reasons for making the proposal, are set out in the accompanying explanatory statement.
4. Representations may be made to Ofcom about the proposals contained herein by 5pm on **25 January 2008**.
5. In accordance with section 50 of the Act, copies of this notification have been sent to the Secretary of State, the European Commission and to the regulatory authorities of every other Member State.

**CRAIG LONIE
DIRECTOR OF REGULATORY FINANCE**

**A person authorised by Ofcom under paragraph 18 of the Schedule to the
Office of Communications Act 2002**

10 DECEMBER 2007

Schedule

[Draft] Direction under section 49 of the Communications Act 2003 and SMP services condition FA1 imposed on British Telecommunications plc as a result of the market power determination made by OFCOM that BT has significant market power in the market for wholesale local access in the UK (excluding the Hull Area)

WHEREAS:

- (A) as a result of a market analysis carried out by OFCOM, it was proposed on 13 May 2004 and on 26 August 2004, in accordance with sections 48(2) and 80 of the Act that the Dominant Provider has significant market power in the market for wholesale local access in the UK (excluding the Hull Area) (**'the Relevant Market'**) and the setting of certain SMP services conditions;
- (B) OFCOM having considered every representation duly made, and thereafter on 16 December 2004 pursuant to sections 48(1) and 79 of the Act by way of publication of a Notification (the **'Notification'**) and identified the relevant services markets, made market power determinations to the effect referred to in recital (A) above and set certain significant market power (**'SMP'**) conditions on the Dominant Provider to take effect on 16 December 2004, unless otherwise is stated in Schedule 1 thereto;
- (C) this Direction concerns matters to which SMP services condition FA1.2 relates;
- (D) for the reasons set out in the explanatory statement accompanying this Direction, OFCOM is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
 - (i) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (ii) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (iii) proportionate to what it is intended to achieve; and
 - (iv) in relation to what it is intended to achieve, transparent.
- (E) for the reasons set out in the explanatory statement accompanying this Direction, OFCOM is satisfied that they have acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
- (F) on 10 December 2007, OFCOM published a Notification of the proposed Direction and accompanying explanatory statement in accordance with section 49 of the Act and invited representations about any of the proposals therein by 25 January 2008;
- (G) by virtue of section 49(9) of the Act, OFCOM may give effect to the proposal set out in the Notification, with or without modification, only if –
 - (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and
 - (b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;

- (H) OFCOM has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose; and

Therefore, pursuant to section 49 of the Act and Condition FA1.2 in Schedule 1 to the Notification, OFCOM gives the following Direction:

1. The Dominant Provider shall modify the service level agreement which governs the supply of metallic path facilities ('MPF') and shared metallic path facilities ('SMPF'). In particular, the Access Network Facilities Agreement will require modification to reflect the proposals set out in the accompanying Annex to this Direction.

2. For the purpose of interpreting this Direction, the following definitions shall apply:

- (a) '**Act**' means the Communications Act 2003;
- (b) '**Dominant Provider**' means British Telecommunications plc, whose registered company number is 1800000, and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
- (c) '**The Notification**' means the Notification referred to in recital (B) of this Direction;
- (d) '**Transitional Provisions**' means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;

3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 above and otherwise any work or expression shall have the same meaning as it has in The Notification or, if the context so permits, in Schedule 1 thereto, as appropriate, and otherwise any word or expression shall have the same meaning as it has in the Act.

4. For the purpose of interpreting this Direction:

- (c) headings and titles shall be disregarded; and
- (d) the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published and the Dominant Provider shall implement the changes set out herein within one month.

6. The Schedule to this Direction shall form part of this Direction.

CRAIG LONIE
DIRECTOR OF REGULATORY FINANCE

A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002

[DATE]

Annex

Proposed modifications to the *Access Network Facilities Agreement*

1) BT shall amend the terms and conditions which govern the supply of metallic path facilities ('MPF') and shared metallic path facilities ('SMPF') set out *Access Network Facilities Agreement* to provide the following:

Compensation per event

a) BT will repair all MPF or SMPF faults within the requisite period²⁵, failing which compensation will be payable on the following basis:

i) 100% of 1 month MPF line rental per day or part day for each SMPF not repaired within the requisite period; and

ii) 100% of 1 month MPF line rental per day or part day for each MPF not repaired within the requisite period.

b) Compensation for the delayed provision of MPF and SMPF shall not be linked to the provision of co-location, internal tie cables, distant location, or BT egress links. In other words, compensation for MPF and SMPF shall not be off-set against any compensation that may be payable for any failure to provision co-location, internal tie cables, distant location or BT egress links;

c) Forecasting shall not affect the compensation paid for delayed provision of MPF and SMPF. Therefore, compensation for the delayed provision of MPF and SMPF shall not be linked to the forecasting arrangements for MPF and SMPF;

Equivalence Management Platform gateway availability and compensation payable

d) The *Equivalence Management Platform gateway (EMP)* will be operational at all times other than for scheduled outages.

e) In the event of any unscheduled downtime of the EMP Communications Providers shall be credited with £20 per relevant transaction based on the previous month's run rate;

f) In the event of any unscheduled downtime of the EMP Communications Providers shall be credited per relevant transaction based on the previous month's run rate with compensation on the following basis:

(i) £20 per relevant transaction for an individual failure duration of up to 2 hours;

(ii) £40 per relevant transaction for an individual failure duration of 2 or more hours but less than 4 hours;

(iii) £60 per relevant transaction for an individual failure duration of 4 or more hours but less than 6 hours;

(iv) £80 per relevant transaction for an individual failure duration of 6 or more hours but less than 8 hours; and

²⁵ The requisite period for standard care is 40 hours. The requisite period for enhanced care is 20 hours.

(v) £100 per relevant transaction for an individual failure duration of more than 8 hours.

Limitations on compensation – removal of caps

g) Any limits on compensation payable as a result of a failure to satisfy the service guarantees shall be removed unless the Communications Provider takes over responsibility for the line in accordance with the Access Network Facilities Agreement;

h) Any limits on compensation payable as a result of unscheduled downtime of the EMP shall be removed unless the Communications Provider takes over responsibility for the line in accordance with the Access Network Facilities Agreement;

Non-operational delivery

i) BT shall pay compensation, for orders submitted over the EMP, if a Communications Provider informs it within eight working days of notification of delivery by BT that the MPF or SMPF was provided in a non-operational state;

j) BT shall pay compensation of £16 each day or part day from the date of the notification of delivery by BT until it is made operational; and

Proactive payments

k) BT shall monitor its performance against the service guarantees for repair and provision orders and EMP downtime and compensate Communications Providers proactively should it fail to satisfy the service guarantees. For the avoidance of doubt, compensation shall be payable without the need for a Communications Provider to make a claim.

Annex 3

Notification and Draft Direction: Ethernet

Notification of a proposal under Section 49 of the Communications Act 2003

Proposal for making a Direction under Condition HH1 to the Notification at Annex D to the explanatory statement of the review of retail leased lines, symmetric broadband origination and wholesale broadband trunk segments published on 24 June 2004 imposed on British Telecommunications plc ('BT') as a result of the market power determinations made by OFCOM that BT has significant market power in the UK market (excluding the Hull area) for alternative interface symmetric broadband origination at all bandwidths

1. OFCOM hereby makes, in accordance with section 49 of the Communications Act 2003 ("the Act"), the following proposal to make a Direction under SMP services condition HH1.2 at Annex D to the explanatory statement of the review of retail leased lines, symmetric broadband origination and wholesale broadband trunk segments published on 24 June 2004.
2. The draft Direction is set out in the Schedule to this notification.
3. The effect of the draft Direction, and the reasons for making the proposal, are set out in the accompanying explanatory statement.
4. Representations may be made to Ofcom about the proposals contained herein by 5pm on **25 January 2008**.
5. In accordance with section 50 of the Act, copies of this notification have been sent to the Secretary of State, the European Commission and to the regulatory authorities of every other Member State.

**CRAIG LONIE
DIRECTOR OF REGULATORY FINANCE**

**A person authorised by Ofcom under paragraph 18 of the Schedule to the
Office of Communications Act 2002**

10 DECEMBER 2007

Schedule

[Draft] Direction under section 49 of the Communications Act 2003 and SMP services condition HH1 imposed on British Telecommunications plc as a result of the market power determinations made by OFCOM that BT has significant market power in the UK market (excluding the Hull area) for alternative interface symmetric broadband origination at all bandwidths

WHEREAS:

- (A) as a result of a market analysis carried out by OFCOM, it was proposed on 11 April 2003 and on 18 December 2003, in accordance with sections 48(2) and 80 of the Act that the Dominant Provider has significant market power in the UK market (excluding the Hull area) for alternative interface symmetric broadband origination at all bandwidths and the setting of certain SMP services conditions;
- (B) OFCOM having considered every representation duly made, and thereafter on 24 June 2004 pursuant to sections 48(1) and 79 of the Act by way of publication of a Notification identified the relevant services markets, made market power determinations to the effect referred to in recital (A) above and set certain significant market power ('SMP') conditions on the Dominant Provider to take effect on 24 June 2004;
- (C) this Direction concerns matters to which Condition HH1.2 relates;
- (D) for the reasons set out in the explanatory statement accompanying this Direction, OFCOM is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
 - (i) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (ii) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (iii) proportionate to what it is intended to achieve; and
 - (iv) in relation to what it is intended to achieve, transparent.
- (E) for the reasons set out in the explanatory statement accompanying this Direction, OFCOM is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
- (F) on 10 December 2007, OFCOM published a Notification of the proposed Direction and accompanying explanatory statement in accordance with section 49 of the Act and invited representations about any of the proposals therein by 25 January 2008;
- (G) by virtue of section 49(9) of the Act, OFCOM may give effect to the proposal set out in the Notification, with or without modification, only if –
 - (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and

(b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;

(H) OFCOM has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose; and

Therefore, pursuant to section 49 of the Act and Condition HH1.2 in Schedule 1 to the Notification, OFCOM gives the following Direction:

1. The Dominant Provider shall modify the service level agreements which govern the supply of backhaul extension services ('BES'), wholesale extension services ('WES') and wholesale end to end Ethernet services ('WEES'). In particular, the following contracts will require modification to reflect the proposals set out in the accompanying Annex to this Direction: (i) the Conditions for Backhaul Extensions Services; and (ii) the Conditions for Wholesale Extension Services.

2. For the purpose of interpreting this Direction, the following definitions shall apply:

(a) '**Act**' means the Communications Act 2003;

(b) '**Dominant Provider**' means British Telecommunications plc, whose registered company number is 1800000, and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

(c) '**The Notification**' means the Notification referred to in recital (B) of this Direction;

(d) '**Transitional Provisions**' means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;

3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has in The Notification or, if the context so permits, in Schedule 1 thereto, as appropriate, and otherwise any word or expression shall have the same meaning as it has in the Act.

4. For the purpose of interpreting this Direction:

(e) headings and titles shall be disregarded; and

(f) the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published and the Dominant Provider shall implement the changes set out herein within one month.

6. The Schedule to this Direction shall form part of this Direction.

CRAIG LONIE
DIRECTOR OF REGULATORY FINANCE

A person authorised under paragraph 18 of the Schedule to the Office of Communications
Act 2002

[DATE]

Annex

Proposed modifications to the Conditions for Backhaul Extension Services and the Conditions for Wholesale Extension Services

1) BT shall amend the terms and conditions which govern the supply of backhaul extension services ('BES'), wholesale extension services ('WES') and wholesale end to end Ethernet services ('WEES') set out in the Conditions for Backhaul Extensions Services and the Conditions for Wholesale Extension Services to provide the following:

Compensation per event and value of compensation

- a) The definition of Contractual Delivery Date ('CDD') shall be amended to require BT to provide reasons to justify a CDD which is set beyond the 57th day and that any extension of the CDD beyond the 57th shall be made subject to the consent of the Communications Provider concerned whose consent shall not be unreasonably withheld;
- b) BT shall pay the Communications Provider compensation for each day or part day of delay in delivery of service beyond the CDD or the Communications Provider's Requirement Date ('CRD') (whichever is later);
- c) BT shall pay the Communications Provider compensation for each and every fault which has not been restored in the first five hours on a per hour basis thereafter;
- d) The compensation payable in event of the each late provision of the required BES, WES or WEES service shall be set at 100% of one month's line rental for every day or part day of delay beyond the CDD or CRD (whichever is later);
- e) The compensation payable in the event of each late fault repair in relation to BES, WES and WEES shall be 15% of one month's line rental for every fault which has not been restored in the first five hours for every hour thereafter until service is restored;

Limitations on compensation- removal of caps

- f) Any limits on compensation payable as a result of a failure to satisfy the service guarantees shall be removed; and

Additional losses

- g) Any compensation payable under the contract shall be without prejudice to any right of either party to claim for additional loss.

Proactive payments

- h) BT shall monitor its performance against the service guarantees for fault repair and compensate Communications Providers proactively should it fail to satisfy the service guarantees. Compensation payments shall be made on a monthly basis. For the avoidance of doubt, compensation shall be payable without the need for a Communications Provider to make a claim.

Annex 4

Impact Assessment

Introduction

- A4.1 The analysis presented in this Annex represents an impact assessment, as defined in section 7 of the Communications Act 2003 (the Act).
- A4.2 You should send any comments on this impact assessment to us by the closing date for this consultation. Ofcom will consider all comments before deciding whether to implement its proposals.
- A4.3 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on our website:
http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

The policy issue

- A4.4 Service Level Agreements (SLAs) form part of commercial contracts and set out a supplier's commitment to provide services to an agreed quality, e.g. within a specified period. The associated Service Level Guarantees (SLGs) specify the level of compensation that the customer would be entitled to should the service not be provided at the quality specified in the SLA, e.g. if delivery of the service was late. Together they are therefore essential elements of any commercial contract as they provide the supplier with an incentive to deliver their service at an appropriate level of performance.
- A4.5 Ofcom considers that Openreach's contracts for WLR, LLU and Ethernet services do not provide sufficient incentives for Openreach to maintain an appropriate level of performance. This has contributed to Openreach's customers receiving neither adequate quality of service nor appropriate compensation for service failures, in particular timely provisions and repairs.
- A4.6 Ofcom is proposing to address this by amending the SLAs and SLGs in Openreach's contracts.

The citizen and/or consumer interest

- A4.7 Openreach products are sold to CPs at the wholesale level. In turn, the impacts at the wholesale level are likely to feed through to the retail level. Therefore, if CPs receive inadequate quality of service and insufficient compensation from Openreach this will likely result in consumer harm – in terms of a limited choice, poor quality of service and poor value for money. There is therefore a strong consumer interest in ensuring that the SLAs on Openreach are sufficiently robust. Strengthening the

SLAs will increase the incentive on Openreach to provide and repair service promptly, which is ultimately in consumers' interests.

Ofcom's policy objective

- A4.8 The policy objective is to respond to industry concern at the continued poor performance of Openreach in some areas. Ofcom intends to address this concern by reviewing the SLAs currently in place and strengthen them as necessary to ensure that the SLAs are fit for purpose, so that Openreach has appropriate incentives to meet its performance obligations and provide a good quality of service.
- A4.9 Ofcom has considered the option of doing nothing and not changing the SLAs, but have rejected this because there is strong evidence that they are ineffective in adequately compensating CPs. Most importantly, for LLU and WLR, the amount of compensation that CPs are entitled to claim is far higher than the amount actually claimed, seemingly because the costs of the claiming process are prohibitive. This results in insufficient compensation being paid to CPs for service failure, and hence fails to incentivise Openreach to provide appropriate service quality.

Principles for changing SLAs

- A4.10 For the reasons set out in Section 3, Ofcom has adopted the following set of principles which should apply to the SLAs:
- when agreed service levels are not met, make provision for compensation to be made based on a pre-estimate of an average CP's loss;
 - ensure that CPs are entitled to make a claim for additional loss;
 - pay compensation on a per event basis;
 - ensure that there are no caps on compensation; and
 - ensure that compensation payments are made proactively.

Summary of specific proposals

- A4.11 Sections 4 to 6 of this consultation document apply these principles to Openreach's WLR, LLU and Ethernet products, respectively and Section 7 applies them to the EMP. In carrying out the analysis, Ofcom has focussed on the most significant issues for each product. The discussions that have already taken place between CPs and Openreach, especially the discussions between Openreach and the CPs from May 2007 to September 2007 that were facilitated by the OTA2, while ultimately unsuccessful, did help to crystallise the main concerns of CPs with regard to the SLAs. These negotiations together with the various responses to the Requests for Information have enabled us to form a reasonably good view on what are the main concerns of the CPs with the current SLAs.
- A4.12 For LLU and WLR, Ofcom believes the main issue is the fact that payments are not claimed, because the process for claiming is costly and, given this, it is not efficient or cost effective for a CP to make a compensation claim given the resources required to do so. Ofcom therefore proposes addressing this by requiring Openreach to make proactive payments for the main LLU and WLR compensation payments for delay in repair and provision. This will ensure that CPs actually receive the compensation to which they are entitled.

- A4.13 With the exception of DOAs (dead on arrivals) and Early Life Failures (ELFs), Ofcom is not proposing to change the main compensation levels for LLU and WLR. Ofcom believes that the current compensation values fall within the ranges that could be justified. Given the current problems with claiming compensation, Ofcom does not believe that there is sufficient experience with the existing levels of compensation to justify revising them at this stage. For DOAs and ELFs Ofcom proposes to increase compensation to £16 per day to reflect the complete loss of service to the end user, and the consequential higher costs to the CP.
- A4.14 For Ethernet, compensation payments are already proactive. However, Ofcom believes that the structure of compensation payments does not align with the losses suffered by CPs. Ofcom therefore proposes changing the structure of the Ethernet compensation payments to reflect the losses suffered by CPs.
- A4.15 Further details on each individual change and the rationale are described in sections 4 to 7. The remainder of this impact assessment assesses the impact of these changes as a whole. The main impacts of our proposals would be:
- In future, Openreach will pay out more compensation if the current service levels are maintained, therefore the revised SLAs can be expected to provide a much stronger incentive on Openreach to improve its service performance; and
 - Openreach would need to change its processes to enable the changes.
- A4.16 Ofcom considers these in turn below.

Increased compensation payments and incentives on Openreach

- A4.17 The changes to the SLAs would result in higher compensation payments being made by Openreach than would otherwise be the case, especially to external CPs. To obtain some idea of the scale of this and the impact on Openreach, Ofcom has estimated what Openreach would have paid out for a recent 12 month period had the changes been in place at that time. Ofcom discusses this below, together with a detailed description of the modelling undertaken.
- A4.18 Ofcom then considers the implications for possible future levels of compensation payments. Future levels of compensation will depend on Openreach performance on service quality. With increased compensation payments, Openreach will have a stronger financial incentive to improve service performance.

Modelling of compensation payments for past performance

Summary of modelling results

- A4.19 For the 12 months from September 2006 to August 2007, Ofcom compared the actual compensation payments that Openreach paid out under the SLAs with an estimate of what they would have been for that period had the proposed SLA changes applied and performance been the same. The following table summarises the results.

Openreach compensation payments from Sept' 2006 to Aug' 2007²⁶

²⁶ Actual figures have been redacted due to confidentiality.

	Actual SLA payments (£ m)	Estimates of what compensation would have been with proposed SLA changes (£ m)
Internal BT	✂	✂
External CPs	✂	✂
Total	✂	✂

A4.20 The large majority of this significant increase relates to the introduction of proactive compensation payments for WLR and LLU.

A4.21 The simulation of what payment would have been made may overstate the net financial impact of the changes on Openreach. This is because if a stronger financial incentive had applied to failures to meet the SLAs, Openreach may have been able to improve its performance and hence to mitigate some of the additional cost. Openreach would have an incentive to improve performance when the costs of improving performance were less than the compensation payments, thereby reducing the implications of the proposed SLA changes to Openreach.

A4.22 While they are not for exactly the same 12 month period, these compensation figures can be put into perspective by comparing them to Openreach's operating profit for 2006/07. BT Annual Report²⁷ states that Openreach's operating profit for 2006/07 was £1,177m²⁸. The compensation payments actually paid for the 12 months from September 2006 to August 2007 represent just under [✂] per cent of this profit. Ofcom estimated that had the changes it proposed been made, then Openreach would have paid out an increased proportion of around [✂] to [✂] per cent of its operating profit in compensation payments.

A4.23 The changes would have amounted to increased costs of [✂] to [✂] per cent of Openreach's 2006/07 operating profit. The majority of this would have been payable to external CPs rather than to the rest of the BT Group, because the rest of BT Group already largely claims the compensation it is entitled to from Openreach.

Detailed description of modelling methodology for Wholesale Line Rental (WLR)

A4.24 This and the following sections describe the methodology and assumptions involved in the modelling in more detail.

A4.25 For WLR, Ofcom concentrated on late faults and late provisions and transfers. Ofcom also included an estimate for missed appointments and disconnections in error, but these were estimated indirectly as described further below.

A4.26 The compensation for late faults was calculated as follows:

$$\text{Late fault compensation} = \text{number of faults not repaired within SLA timescales} \\ \times \text{average days late for late fault repairs (rounded up)} \\ \times \text{average monthly rental}$$

A4.27 Openreach provided data on the number of faults not repaired within the timescales of the SLA within the 12 months from September 2006 to August 2007 and also

²⁷ <http://www.btplc.com/report/report07/pdf/AnnualReport2007.pdf>

²⁸ This is on an historic cost basis and is different from the current cost operating profit for the regulated Openreach entity in the regulatory accounts, which is £946m.

provided data on the average days late for a late fault repair for a representative period during the 12 months being considered. The number of days late was rounded up to the nearest whole day, as the WLR contract requires Openreach to pay compensation of a month's line rental "for each day or part day" late. The average monthly rental was calculated as a weighted average of business and residential monthly charges and taking account of different care levels, i.e. including the basic and enhanced repair commitments offered by Openreach.

- A4.28 Openreach provided the data separately for: (a) BT PSTN lines; and (b) other CPs' PSTN and ISDN2 lines. Together these accounted for the large majority of estimated late fault repair compensation. For BT's ISDN2 lines and ISDN30 lines, Ofcom assumed the same fault rate and delay on fault repair as for the lines for which Ofcom had data.
- A4.29 The approach for late provision was similar to that for late fault repair. Openreach provided data for the number of late orders (excluding cease and stop orders) and the average days late for these orders. Openreach provided this separately for BT PSTN and other CPs' PSTN and ISDN2 orders. Ofcom assumed the same failure rate and delay for BT's ISDN2 lines and ISDN30 lines. The number of days on which compensation was paid was again rounded up, in line with the contract.
- A4.30 Missed appointments and disconnections in error are comparatively minor compared to late faults and provisions. A different approach was adopted for them. Based on the ratio of actual payments for these compared to actual payments for late fault repair and late provision for BT Retail and CPs, Ofcom scaled up the simulated late fault repair and late repair payments so that the total would include an estimate for missed appointments and disconnections in error compensation.

Detailed description of modelling methodology for Local Loop Unbundling (LLU)

- A4.31 For LLU, Ofcom modelled late fault repair and late provisions in a similar way to that for WLR. Late provision compensation (which forms the large majority of the simulated LLU compensation) was calculated as follows:

$$\text{Late provision compensation} = \text{number of late transfers, provisions and conversions not completed within SLA timescales} \times \text{average days late (rounded up)} \times \text{£8}$$

- A4.32 Ofcom used data provided by Openreach to estimate late provision compensation. The data was provided separately for SMPF and MPF, and these were modelled separately. Late fault repairs were modelled in a similar way.
- A4.33 For DOAs and ELF, Ofcom used the published performance figures for the percentage of DOAs / ELF for the period for which there is data using the 8 day DOA / ELF definition. Ofcom assumed this was constant for the whole 12 months considered. Ofcom modelled this separately for MPF and SMPF. This was multiplied by the number of new provisions and transfers, by an assumption for the average number of days to repair the DOA / ELF and by £16 per day late. Ofcom assumed that on average it took 2 days to repair each DOA / ELF.
- A4.34 There is some double counting between the amounts assumed for late provisions, DOAs and ELF, which will exaggerate the amount that Openreach would have paid out. Ofcom does not believe that this is significant in the context of the estimate for total compensation that Openreach would have paid out.

- A4.35 Ofcom separately modelled compensation for failure of the Equivalence Management Platform (EMP). Ofcom modelled the impact of a single very significant failure in May 2007 of 15 hours. Ofcom modelled compensation separately for: (a) provision, transfer and migration; (b) dialogue services; and (c) fault reports. There have been other minor failures during the September 2006 to August 2007 period, but these have been ignored on the basis that they were minor and would imply little compensation.

Detailed description of modelling methodology for Ethernet

- A4.36 Ethernet payments are already proactive. Openreach provided data for all payments for actual late fault repair and actual late provisions. For each late fault repair and late provision, Openreach also provided data on the duration of the failure and the rental charge applicable to the product²⁹.
- A4.37 Ofcom calculated the compensation due for the late fault repairs and late provisions according to the contract changes proposed. For late provisions, this involves 100% of monthly line rental for each day or part day late and for late fault repair 15% of monthly line rental for each hour or part hour that the provision is late.
- A4.38 Openreach is going through a staged process of re-balancing Ethernet prices by increasing rental and decreasing connection charges. Openreach provided data for rental charges as they were in the first half of 2007. The modelling is therefore likely to understate future compensation to the extent that rental prices will rise further in the future. Given that for the past data Ofcom has looked at Ethernet payments only represent a small proportion of total compensation, Ofcom does not believe this would have a material effect on the total compensation that Openreach might pay out.

Future compensation payments

- A4.39 The level of compensation that Openreach would have paid out in the past is not necessarily a good guide to possible future levels. Future amounts of compensation will depend on a number of factors, including Openreach's performance on service quality, product mix and volume levels.
- A4.40 Openreach's performance on service quality is a very significant factor. The proposed SLA changes will give Openreach stronger financial incentives to improve performance. Stronger financial incentives may lead to improved service performance.
- A4.41 Even without the proposed SLA changes, Openreach has plans to improve performance. Over half of the increase in compensation payments that Ofcom estimated would have been paid out had Ofcom's changes been implemented related to LLU compensation, and especially LLU provisioning. Openreach's LLU Integrated Improvement Plan has targets for significant improvements in LLU service performance, for both provisioning and fault repair.
- A4.42 For example, the plan envisages the 'First Touch-Last Touch' KPI for provisioning MPF to rise from 85% in Q1 2007 to 98% in 2008, and for SMPF from 95% to 98%.

²⁹ The data Openreach provided for Ethernet late fault repairs and late provisions covered a different period to that used in the modelling for other services. For Ethernet late fault repairs the data covered the 12 month period from April 2006 to March 2007 and for Ethernet late provisions covered the 10 month period from June 2006 to March 2007. As the period for late provisions is 10 months rather than 12 months, we have assumed the average monthly rate for two months so as to have results for 12 months to make the results more comparable to that for other products.

Such dramatic improvements in performance would significantly reduce potential compensation payments.

Changes to Openreach's processes

- A4.43 Our proposals would require Openreach to record sufficient information to enable the calculation of compensation payments for the main elements of the LLU and WLR SLAs and to make the compensation payments proactively to CPs. For Ethernet, our proposals will require Openreach to calculate and pay compensation differently.
- A4.44 Ofcom believes that Openreach is likely to already have processes in place to record most of the information it needs to enable the calculation of proactive payments. It currently supplies performance information to CPs and also checks the claims CPs make for compensation against the data it has. Ofcom believes that the changes to processes to record sufficient information are likely to be small.
- A4.45 However, Openreach will need to make changes to its process to enable the calculation and payment of compensation payments.
- A4.46 In the negotiation with CPs on changes to the SLAs, Openreach's proposal to industry included having proactive payments for WLR3 and LLU. Openreach said that this would initially be achieved tactically through manual processes. The back-end systems could be changed to automate this in the future, but this would be subject to prioritisation and funding constraints in line with other system development requirements.
- A4.47 Our proposals go further than Openreach's, as Ofcom proposes to automate payments for WLR2 as well as WLR3 and LLU. However, Ofcom believes the same options for changing processes so as to calculate and pay compensation would apply for WLR2 as for WLR3 and LLU. That is, either back-end systems could be changed so as to automate fully the process, or the calculations and payment could be done manually. For WLR2, the business case for changing the systems is unlikely to be as strong as for WLR3 and LLU because WLR2 is being phased out.

Conclusion

- A4.48 Ofcom is proposing a limited set of changes to the SLAs focussing on their main deficiencies. This will increase the amount of compensation that Openreach will pay out in the future compared to what it would otherwise have been. This will increase the financial incentive on Openreach to deliver good service performance.
- A4.49 The changes will be successful if they result in CPs receiving the compensation they are entitled to and if Openreach responds to the incentives by delivering improved service performance.
- A4.50 Our proposals have obvious costs to Openreach, primarily in terms of the higher compensation payments than would otherwise be the case. Ofcom believes that the benefits to CPs, and ultimately consumers, of appropriate compensation and incentives are significant enough to justify these costs.

Annex 5

Ofcom's consultation principles

A5.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A5.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A5.3 We will be clear about who we are consulting, why, on what questions and for how long.

A5.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A5.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A5.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A5.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A5.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 6

Consultation Response Cover Sheet

- A6.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A6.2 We have produced a cover sheet for responses and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A6.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A6.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' Section of our website.
- A6.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we do not have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact): **Michael Galvin**

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)