

Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30

Consultation on market definition, market
power determinations and remedies

Response of EE Limited

30 September 2013

Non-Confidential Version


Table of contents

1.	Table of contents	2
2.	Introduction	3
3.	Executive Summary	3
4.	FAMR Consultation Questions	5
4.1.	Market definition and SMP analysis: WFAEL	5
4.2.	Market definition and SMP analysis: ISDN30	5
4.3.	Market definition and SMP analysis: ISDN2	5
4.4.	Market definition and SMP analysis: Retail markets in the Hull Area	6
4.5.	Market definition and SMP analysis: WLA	6
4.6.	Remedies: General Remedies for wholesale fixed access markets	6
4.7.	Remedies: WLA next generation access	13
4.8.	Remedies: WLA current generation access	17
4.9.	Remedies: WFAEL	18
4.10.	Remedies: ISDN30 and ISDN2	21

Introduction

EE Limited (“EE”) notes that it is also responding to Ofcom’s consultation its approach to setting Local Loop Unbundling (“LLU”) and Wholesale Line Rental (“WLR”) charge controls and Ofcom’s consultation on the 2014-2017 Wholesale Broadband Access (“WBA”) market review (“the WBA Consultation”), as well as this consultation on proposed markets, market power determinations and remedies in relation to the 2014 – 2017 fixed access market review (“the FAMR Consultation”).

EE welcomes the opportunity to respond to these important consultations and asks that all of these responses are considered in a holistic manner, given the clear interaction between them.

Those parts of this response marked with  and highlighted in blue contain commercially sensitive confidential information, which should not be published without EE’s prior written consent.

Executive Summary

1. Remedies in relation to current generation LLU and WFAEL access

EE’s most important concerns in relation to Ofcom’s proposed remedies in relation to current generation LLU and WFAEL access are as follows:

- **Caller ID:**
 - EE considers that (i) it is unlikely that the removal of the current extremely high wholesale charge for this service will result in an increase in WLR Caller ID subscriptions, given current free-of-charge pricing at the retail level by many CPs, including by BT itself and (ii) even if there was an increase in demand for this service, this is highly unlikely to have any genuine cost impact on BT (other than ones that could be easily managed, e.g. by programming Caller ID as being on by default).
 - EE therefore strongly believes that it is important to meet Ofcom’s stated objectives of preventing BT from charging excessive prices given its SMP status; promoting sustainable competition and promoting the best interests of UK consumers for Ofcom to require BT to provide this service to WLR-based providers at the cost based charge of **zero**.¹
 - To the extent that it is genuinely established that there would be such a cost and that there is truly no other reasonable way to eliminate these costs - EE considers that it is fundamentally important that, if BT is allowed to continue to levy charges for this service for the sole purpose of discouraging additional demand, BT should not simply be allowed to enjoy a windfall profit as a result of this. Rather, EE strongly believes that Ofcom should ensure that the charges BT

¹ Of course, BT will continue to recover the costs of the switches embedded with the relevant information under the WLR charges.

receives for this service (worth circa £25m per year) are **netted off the WLR cost stack**, so as to at least mitigate to some extent the competitive harm suffered by WLR based CPs as a result of these charges.²

- **Notification of price changes:** EE is extremely concerned about Ofcom's proposals to adopt a completely inconsistent approach in relation to BT's price change notification obligations in the WFAEL market as compared with its proposals in the WLA market. EE considers that these discriminatory proposals will put WLR+SMPF based CPs and their customers at a severe disadvantage to their MPF based rivals going forwards, and EE therefore **strongly recommends** that Ofcom revises the proposed terms of SMP Condition 9.4B **so that it mirrors the proposed terms of SMP Condition 9.4A.**

2. [REDACTED]

[REDACTED]

3. GEA terms and conditions

EE welcomes Ofcom's proposals for regulatory intervention to ensure the fairness of BT's Generic Ethernet Access ("GEA") terms and conditions.

In particular, EE agrees that the charges for GEA migrations should be subject to a charge control, implemented with immediate effect from the start of the market review period. EE considers this essential, given that the current GEA migration charge is very high and is unlikely to bear any relation to the cost of providing the services, and currently impedes effective switching in the market. EE believes that the GEA charge should be the same for standard and wires-only GEA migrations and should be benchmarked against the migration charge for BT's Wholesale Broadband Connect ("WBC") product, which involves identical activities. It therefore follows that the GEA migration charge should be charge controlled at £11.

In order to further reduce switching barriers in the market, EE also agrees with Ofcom's proposal that BT should offer a one-month minimum term following GEA migrations. However, given that new connections are likely to be more prevalent in the next market review period than migrations, EE considers it even more critical that **a one month minimum term is also established for new connections**, as exists in the SBB market. In light of the high GEA connection charges imposed by Openreach (£92 per connection), EE does not believe that there should be any unavoidable costs that Openreach needs to recover through a guaranteed 12-month minimum term for new connections. The impact of this unduly long minimum term is that competing CPs' early termination charges to consumers on SFBB contracts need to reflect the

² As this charge is borne exclusively by WLR based CPs, EE considers that there would be **absolutely no justification for reducing the MPF rental charge by this amount.** Clearly, this reduction of the WLR cost stack will still leave those WLR based CPs who acquire the Caller ID service now and in the future out of pocket and thus be an inferior solution to removal of the charge entirely, but at least it will mitigate the harm to some extent.

remaining wholesale rental charges, making contractual exit more costly for consumers.

4. VULA design

EE is broadly happy with the existing features of BT's VULA product, but notes the following requests for improvement.

- EE welcomes Openreach's ongoing trial of a wires-only self-install product. This product is very important to allow CPs to build competitive NGA retail offers and, as such, EE requests that Ofcom urge Openreach to commence commercial launch of the self-install product as soon as possible.
- EE reiterates that it expects fibre-only areas to become more prevalent over the next market review period. BT will have SMP in the provision of fibre voice access in these areas, and as such should be subject to equivalent remedies as those imposed for WFAEL.
- EE also considers that Openreach should be required to provide additional VULA features, where operators wish to use the NGA infrastructure differently, for example by providing business grade features.

FAMR Consultation Questions

Market definition and SMP analysis: WFAEL

3.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the WFAEL markets we define above? Please provide reasons in support of your views.

Yes, for the reasons set out by Ofcom in the FAMR Consultation.

Market definition and SMP analysis: ISDN30

4.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the wholesale ISDN30 markets we define above? Please provide reasons in support of your views.

Yes, for the reasons set out by Ofcom in the FAMR Consultation.

Market definition and SMP analysis: ISDN2

5.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the wholesale ISDN2 markets we define above? Please provide reasons in support of your views.

Yes, for the reasons set out by Ofcom in the FAMR Consultation.

5.2 Do you agree with our provisional view that, during the period covered by this market review, BT does not possess SMP in the retail ISDN2

market we define above? Please provide reasons in support of your views.

No. Based on the information set out in the FAMR Consultation (§§5.92 to 5.106), EE agrees with Ofcom that the position is finely balanced (§5.104). However, given BT's enduring very high retail market shares and the fact that these have only fallen by 2% in the past year and for the other reasons set out in the FAMR Consultation, EE considers it likely that BT **does** continue to enjoy significant market power ("SMP").

Market definition and SMP analysis: Retail markets in the Hull Area

6.1 Do you agree with our provisional view that, during the period covered by this market review, it is not appropriate to impose retail regulation in the RFAEL markets in the Hull Area that we define above? Please provide reasons in support of your views.

EE does not have any views on this question.

6.2 Do you agree with our provisional view that, during the period covered by this market review, it is not appropriate to impose retail regulation in the retail ISDN30 market in the Hull Area that we define above? Please provide reasons in support of your views.

EE does not have any views on this question.

6.3 Do you agree with our provisional view that, during the period covered by this market review, it is not appropriate to impose retail regulation in the retail ISDN2 market in the Hull Area that we define above? Please provide reasons in support of your views.

EE does not have any views on this question.

Market definition and SMP analysis: WLA

7.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the WLA markets we define above? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation.

Remedies: General Remedies for wholesale fixed access markets

10.1 Do you agree with our proposals regarding requirements on BT and KCOM to provide network access on reasonable request? Please provide reasons in support of your views.

Yes. EE supports the adoption of a consistent and stable regulatory approach in this regard.

10.2 Do you agree with our conclusion not to seek to modify SLAs or SLGs as a mechanism for quality of service improvement? If not, how would you modify the SLAs and or SLGs and on what basis and how would you ensure that such changes did not have unintended incentive consequences? Specifically do you consider that the existing SLA for provisioning appointments (12 days from next year) is adequate? Please provide reasons in support of your views.

It is difficult at the present point in time for EE to comment on Ofcom’s service level agreement (“SLA”) and service level guarantee (“SLG”) proposals without a full understanding of the impact that these proposals may have on the charges paid by CPs for BT’s WLR, LLU and GEA products (if any). Ofcom acknowledges this, for example, in relation to provisioning timescales (§10.49). Here EE would fully agree with Ofcom’s research conclusions that consumers consider provisioning timescales in the order of 5 working days to be optimal, but that such preferences may be affected by any increase in price consequent on a reduction in provisioning times and/or any other performance factors that may be adversely affected if resources are reallocated towards this end. EE looks forward to responding to Ofcom’s more detailed proposals in this regard to be published later this year.

10.3 Do you agree with our proposals regarding requirements on BT and KCOM in relation to handling requests for new network access? Please provide reasons in support of your views.

EE appreciates the clarity on this issue that Ofcom has given in the FAMR Consultation at §§10.64 to 10.78. Given that it has now been over ten years since the original Oftel Access Guidelines were issued, EE considers that it would be helpful to CPs seeking new forms of access to BT’s regulated product set for Ofcom to issue updated Access Guidelines encapsulating Ofcom’s current views.

10.4 Do you agree with our proposals regarding requirements on BT and KCOM in relation to remedying discriminatory conduct? Please provide reasons in support of your views.

[§<] [§<].

10.5 Do you agree with our proposals regarding requirements on BT and KCOM in relation to accounting separation? Please provide reasons in support of your views.

EE agrees, for the reasons set out in the Consultation, with the proposal to retain the current accounting separation requirements on BT.

10.6 Do you agree with our proposals regarding requirements on BT and KCOM to publish a reference offer? Please provide reasons in support of your views.

EE considers that it is appropriate for BT and KCOM to be continued to be required to publish a reference offer and we consider it very important for BT to continue to be obliged to publish the information set out at §§10.153 to 10.154.

EE does not agree with Ofcom's proposals to remove the obligation upon BT to publish usage factors for its network components (§10.155). Whilst the present format could potentially be simplified, EE *does* consider that this level of information provides it with important transparency that helps it to make better informed purchasing decisions and to monitor potential discriminatory and inappropriate charging practices by BT. By way of just one example, EE found it helpful to have access to this information in BT's Detailed Attribution Methods ("DAM") documentation when attempting to understand and trace through the way in which directories costs within BT group have been charged and re-charged.

EE also considers that it is an important and simple compliance monitoring mechanism for BT to be required to provide Ofcom with copies (or at least up to date links to) its Reference Offer, and EE is somewhat surprised at Ofcom's proposals to no longer require this (§10.156).

10.7 Do you agree with the proposal to specify the services for which BT is to provide SLA/SLGs? Also do you consider that we have identified all appropriate services that should be subject to an SLA/SLG requirement at this time? If not, please set out what services should be included and provide reasons in support of your views.

EE agrees with Ofcom's proposals to specify the services for which BT is required to provide SLAs and SLGs. EE does not have any views on the completeness or otherwise of the list of services specified in Condition 8 in Annex 11 to the FAMR Consultation at the present point in time

10.8 What are your views on whether you consider a need for Ofcom to require BT to offer an SLA in relation to GEA appointment availability? Please provide reasons in support of your views.

EE fully agrees with Ofcom that it is inconsistent and inappropriate that there is no SLA or SLG in relation to GEA appointment availability. As SFBB is likely to become increasingly important in the coming market review period, with increasing usage by CPs other than BT Retail, EE considers that it is very important that such SLAs and SLGs are imposed. EE suggests that it would seem to be appropriate for these SLAs and SLGs to be at a minimum no lower than the current SLAs and SLGs for WLR appointment availability. However, in order to be able to provide final views on this issue, EE would need to understand whether it is proposed that this approach will have any associated cost and resource allocation implications, and if so what these may be.

10.9 What are your views on the principles for negotiations on SLA/SLGs? Please provide reasons in support of your views.

EE fully agrees with the concerns regarding the inadequacy of a commercial negotiation process when (attempting to) negotiate SLAs and SLGs with a strong SMP provider such as BT set out at §10.166 of the FAMR Consultation. EE also confirms that resource constraints on CPs with smaller fixed voice and broadband businesses such as EE make it difficult for them to be able to participate fully in such negotiations in spite of the potentially very material impact of the outcome on their fixed businesses (§§1.167-1.68).

EE considers that Ofcom's proposals as set out in Table 10.13 may represent some improvement on the status quo, although EE is concerned that they will not go far enough to address all relevant concerns. For example, EE is concerned that the timeframes proposed are far too long, and will do very little to address the concern by CPs competing with BT regarding SLAs and SLGs which are non-existent or inadequate to allow them to compete effectively with BT and meet consumer demands. Under Ofcom's proposals, it would seem that any strongly contested SLA/SLG (which given BT's SMP status may be expected whenever the SLA/SLG would have a material impact on the ability of CPs to compete with it), would never be able to be resolved in less than **13 months**, and could indeed take longer than this: 2 months or potentially longer for the initial proposals to be put forward and assessed by the OTA; the proposed 6 months for negotiations (which BT will always have an interest to draw out to the full maximum period); 1 month or potentially longer for preparation of the OTA report to Ofcom; and then 4 months or potentially longer for Ofcom to conduct and include its investigation (i.e. the same period of time in which Ofcom resolves disputes). EE considers that such timeframes leave an unacceptable risk of competitive harm to CPs and harm to the best interests of end-users in the mean time. In order to address these concerns, EE would recommend that, at a minimum:

- A maximum timeframe for the OTA review following receipt of the SLA/SLG proposal is specified (e.g. 2 weeks);
- The period for negotiations is shortened to 2 months, with clear milestones within this period set out (e.g. reasoned written response to request to be set out within 2 weeks, meeting to discuss within next 2 weeks, any adjusted proposal in writing within 1 week, and further reasoned written response within 1 week, final meeting to decide any deadlock issues within 2 weeks).
- Specification of maximum timeframe for OTA report on deadlock issues (not more than 2 weeks)
- Specification of a maximum timeframe within which Ofcom will conclude any review/investigation/dispute period (maximum of 4 months, target of 2 months).

10.10 Do you agree with our proposals regarding requirements on BT and KCOM to notify changes to charges? Please provide reasons in support of your views.

In relation to Ofcom's proposals on notice periods, for the reasons set out in the FAMR Consultation and in EE's response to Ofcom's Call for Inputs on this issue, EE considers that Ofcom's proposals in relation to the *WLA market* (retaining a 90 day notice period for all WLA products except in the case of price reductions and the introduction of new products and services, where this period is reduced to 28 days) (§§10.208 to 10.212) strike the right balance between allowing downstream providers sufficient time to make necessary changes to their downstream pricing in the case of price increases whilst facilitating a greater ability for price decreases and improved terms and conditions to be passed on to end-users.

However EE does not understand why Ofcom has then proposed to take an entirely different and inconsistent approach in relation to the WFAEL market (§10.213; Table 10.17). EE considers that this non-technology neutral approach is likely to **seriously disadvantage WLR+SMPF based providers** in comparison to their MPF based rivals going forwards – for example in relation to their ability to pass through price reductions in MPF vs WLR rental charges (whereby MPF based providers would be able to do this 62 days earlier than their WLR+SMPF based rivals) and in relation to any price increases to charges for non-rental services, in which case MPF based providers would have an additional 62 days over their WLR+SMPF based rivals in order to be able to reflect these increases in their downstream retail pricing).

EE therefore **strongly recommends** that Ofcom revises the proposed terms of SMP Condition 9.4B **so that it mirrors the proposed terms of SMP Condition 9.4A** (see Annex 11). Failing this, EE considers that WLR+SMPF based CPs will have a clear case that Ofcom has breached its obligations under the Act not to discriminate against particular classes of CPs based on the input services that they consume.

To the extent that Ofcom does not envisage BT being able to increase its current ISDN2 prices during the charge control period, EE considers it would be acceptable to reduce the current notice period from 90 days to 28 days (§§10.216-10.217). However, to the extent that BT may still be free to implement price increases during this period, EE would recommend that the 90 days notice requirement is retained.

For the reasons set out in response to Question 10.6, above, EE also does not agree with Ofcom's proposal to remove the obligation upon BT to publish usage factors in its ACCNs (cf §10.205) and EE in addition considers that it is still appropriate in order for Ofcom to perform its compliance monitoring function effectively for BT to be required to inform Ofcom in some manner whenever it issues ACCNs (cf 10.206). Whilst EE is certain that this has not been deliberate, EE notes, for example, that in relation to various NCCNs that have had an important commercial impact on EE's business, BT has failed to publish these NCCNs on its website in a timely manner and has only done so when prompted by EE. EE considers that a greater degree of rigour, overseen by Ofcom, is appropriate in relation to regulated price changes in the form of ACCNs.

10.11 Do you agree with our proposals regarding requirements on BT and KCOM to notify technical information? Please provide reasons in support of your views.

EE supports the continuation of this remedy, for the reasons set out in the FAMR Consultation.

10.12 Do you agree with our proposal to impose conditions on BT for the provision of information for quality of service purposes in each of the WLA, WFAEL, ISDN30 and ISDN2 markets excluding the Hull Area? Please provide reasons in support of your views.

EE is broadly supportive of Ofcom's proposals as representing progress in the right direction, for the reasons set out by Ofcom in the FAMR Consultation.

10.13 Do you agree with our proposal to extend the direction for specific KPIs to LLU and GEA services? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation

10.14 Do you agree that it is appropriate to include a common core set of KPIs across WLR analogue, LLU and GEA given the competition between these services? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation.

10.15 Do you agree with our proposals to include a record of the number of services affected by MBORC in the KPIs? Please provide reasons in support of your views.

Yes. EE considers that this is a positive step towards much needed greater transparency and scrutiny in this area.

10.16 Do you agree that it is appropriate to require Openreach to prepare some of these KPIs for presentation in the public domain? Do you consider that there are any issues with this publication that we should be aware of? Do you agree that the OTA2 website is the best location for such publication? Please provide reasons in support of your views.

EE agrees with the proposal for this information to be published on the OTA2 website, along with the other Openreach information already published by the OTA2 (§10.270). As Ofcom acknowledges at §10.267, this is wholesale level information regarding performance by Openreach at this level, and will not necessarily bear any direct correlation to an individual end-customer's experience. Accordingly, whilst EE supports the proposals for BT to publish KPIs on installation of new lines and faults repairs on the OTA2 website designed for a CP audience, EE considers that CPs should be left to determine how best to present this information to their end-customers at the retail level (cf Ofcom's suggestions at §§10.266-10.267)

10.17 Do you agree that it is appropriate to set minimum standards for Openreach services? Please provide reasons in support of your views.

EE does not agree with the suggestion that there is necessarily an inherent tension between an RPI-X charge control structure and improved service quality (cf §10.300). In a competitive market, business typically face dual incentives to continually find cost efficiencies *at the same time* as continually improving their service quality – as both of these factors are key in driving increased usage and satisfaction with their products and services – hence volumes, revenues and profits. It is often also the case that quality of service improvements actually drive cost savings, as well as scale efficiencies through greater volumes.

Nevertheless, given BT's SMP status and hence protection from some of these normal commercial imperatives, EE considers that it is likely to be helpful to set aside, alongside the RPI-X charge controls, an obligatory "service quality floor" standard (§10.301). At the present point in time it is difficult for EE to comment on where this floor should be set, as this will involve an understanding of the impact that this proposal may have on the charges paid by CPs for BT's WLR,

LLU and GEA products (if any), as well the impact (if any) of this new floor on any other quality of service parameters. EE looks forward to responding to Ofcom's more detailed proposals in this regard to be published later this year.

10.18 Do you agree that the minimum standards should only be applied to WLR and MPF provisioning appointment and fault repair? If not what else should be included and why? Please provide reasons in support of your views.

EE agrees that these parameters are competitively very important to other CPs. For reasons of consistency and given its likely market importance going forwards, EE considers that minimum standards for provisioning appointment and fault repair should **also be included for GEA**.

More generally, as acknowledged in the FAMR Consultation, when any parameters are isolated for special treatment, there is a risk of unintended distortions being created (§10.308). It is therefore important that the likely impact on all performance parameters is carefully considered in the round, before any final decision is taken on this.

10.19 Do you agree that we should incorporate force majeure affected services in the standards? Please provide reasons in support of your views.

EE is generally very supportive of this proposal, for the reasons set out in the FAMR Consultation (§10.312 to 10.314).

However this support is subject to further understanding any cost implications of the proposal. There may, for example, be certain force majeure events which would be disproportionately expensive to cater for, at the same time as being sufficiently unlikely to occur, to warrant including them in the obligation – e.g. acts of war.

EE is also concerned that the “allowance” required by BT to cater for such events (§10.312) may be unduly large, given the current very wide interpretation of MBORC events / force majeure. EE considers that it is of key importance to the industry for these events to be much more tightly defined. Specifically, the conditions under which MBORC can be declared should be the subject of mediated industry agreement, bringing appropriate learnings from other utility service providers (e.g. gas and electricity networks) as to how it is, for example, very possible to effectively manage resources to deal with likely weather patterns. In this way Openreach can be encouraged and assisted to create processes and efficiencies to deal effectively with predictable events currently classified as MBORC, reducing the type and number of events that fall within the force majeure.

Alternatively, the declaration of MBORC could be made subject to the agreement of an independent body such as the OTA2. Although this approach would again require further agreement as to what constituted MBORC, it would provide Openreach's customers with a level of assurance that the force majeure was being appropriately employed.

Ultimately EE expects to see the definitions of MBORC and force majeure rationalised to reflect the truly unpredictable, with events such as seasonal

weather fluctuations considered simply part of “business as usual” conditions and de facto included within the service standards.

10.20 How should we determine the appropriate standard? How would you assess the trade off of service level and charge increase?

At the present point in time it is difficult for EE to comment on where this standard should be set, as this requires an understanding of the cost impact of the standard (if any), as well the impact (if any) of this standard on any other quality of service parameters. Prima facie, EE would expect improved quality of service by Openreach to drive higher volumes on the Openreach network (e.g. assisting in competition for customers against Virgin), resulting in higher revenues and scale savings for BT, which may be expected to off-set any increased costs of improved performance levels, and indeed even reduce Openreach copper per line costs below current levels.

10.21 Do you agree with the structure of the standard – yearly, forecast region targets? Please provide reasons in support of your views.

The proposal to set the standard to reflect average delivery over 12 months seems to strike a reasonable balance between the interests of different stakeholders (§10.314). However, as this will give a great deal of scope for variation in performance over the 12 month period and as seasonal performance is also very competitively important to CPs who rely on the regulated services, EE would also like to see a cross-check parameter, comparing like for like quarters year on year – e.g. Q1 performance to be no lower than [5-10%] lower than Q1 performance for the previous 12 month period.

Subject to understanding the cost implications (if any), EE supports the proposal for targets to be set so that Openreach is required to meet them in each of its forecast regions and Northern Ireland (§10.315).

10.22 Do you agree with our proposals regarding requirements on BT in relation to cost accounting and not to impose cost accounting requirements on KCOM? Please provide reasons in support of your views.

Yes, subject to the concerns already expressed by EE in response to the CFI – which remain unaddressed by Ofcom’s current proposals.

Remedies: WLA next generation access

11.1 Do you agree with our proposal to require BT to offer VULA and with the five key characteristics identified? Please provide reasons in support of your views, including, if you think alternative or additional characteristics are required, evidence of how you would use them to offer services to your customers.

EE certainly believes that BT should continue to be required to offer VULA, as it has been important in allowing non-BT CPs to offer downstream SFBB

products. This is particularly important given that (in line with Ofcom's expectations³) there has been no significant deployment of NGA networks by other CPs. This is reinforced by the low take-up of PIA and SLU as alternative network access solutions.

EE considers that regulatory scrutiny is still required of the following aspects of BT's VULA offering:

- (i) **Wires-only self-install FTTC product:** EE welcomes Openreach's self-install trial and has been actively participating in it. [REDACTED] EE therefore urges Ofcom to actively monitor any further delays in Openreach's commercial launch of the self-install service.
- (ii) **Fibre Voice Access ("FVA"):** EE reiterates the points made in its response to the CFI in relation to FVA. In fibre-only areas, BT will have SMP in the provision of fibre voice services. EE anticipates that the number of such areas will grow over the market review period, and as such, strongly believes that BT should be subject to general WFAEL remedies in relation to the provision of FVA, as well as a specific charge control reflecting the costs of providing the FVA service. EE notes that the reason why BT Wholesale had no take-up of its Fibre Line Calls service⁴ was that the price was extremely high. Further, EE underlines that whilst BT currently has a reduced price offer in place for FVA, it has no obligation to continue to provide this offer on an ongoing basis during the charge control period, and as such, this offers CPs no commercial comfort going forward.
- (iii) **Business grade features:** As Openreach has SMP in VULA, it should be required to provide additional VULA features, to the extent that other operators wish to use the NGA infrastructure differently. In the future, this could include the development of additional business-grade features for VULA. In this context, EE notes that the SoR process is not a robust route for seeking these additional changes, given that it appears that Openreach often takes commercial considerations into account (including the risk of cannibalisation of other BT product lines).

11.2 Do you agree that BT should continue to be allowed general pricing flexibility on VULA, subject to a fair and reasonable charges obligation? Please provide reasons in support of your views.

[REDACTED]

[REDACTED]

11.3 Do you agree that the charge for a GEA migration should be subject to a charge control at some point in the range of £10 to £15? If so, please indicate where in that range the charge should be, supported by evidence. If not, please state the reasons why.

³ See Paragraph 1.27 of the summary of Ofcom's Review of Wholesale Local Access Market, 2010: <http://stakeholders.ofcom.org.uk/consultations/wla/summary>

⁴ [REDACTED]

EE welcomes Ofcom’s proposal to impose a charge control on GEA migration and to implement this with immediate effect from the beginning of the charge control period. EE considers this essential, as the current GEA migration charge is very high and is unlikely to bear any relation to the cost of providing the service, given the limited activities required to implement a GEA migration. The high GEA migration charges create a clear switching barrier in the market, where non-BT operators are already constrained from competing effectively by the inappropriate NGA margin set by BT.

EE considers that in the absence of robust cost data from BT, the appropriate benchmark for setting the charge control on GEA migration charges is either the IPStream migration charge or BT’s Wholesale Broadband Connect (“WBC”) migration charge. Both these charges are set at £11 and the migration activities involved are very similar to the activities required for a GEA migration.

As the extract below from Openreach’s WBC pricelist shows, the GEA migration charge between CPs which purchase VULA from BT Wholesale is already £11. However, the GEA migration charge for migrating a customer from a CP which purchases VULA directly from Openreach (e.g. TTG) is £50. Given that the migration processes are identical, EE considers that all GEA migration charges should be charge controlled at £11.

Migration Product (FTTC)	Charge (per end user)
CP Migration (Openreach CP - BTW CP FTTC to FTTC)	£50.00
CP Migration (BTW CP - BTW CP FTTC to FTTC)	£11.00

EE considers that the same charge should apply for a wires-only GEA migration, as the migration activities are the same as for a standard GEA migration. EE notes that CPs now largely deploy routers with their own VDSL modems, and as such a wires-only migration requires an equipment change of the CP’s own equipment, which the end-user performs themselves, as per an ADSL migration.

11.4 Do you agree with our proposal that BT offer a minimum contract term of no more than one month following a GEA migration? Please provide reasons in support of your views.

EE agrees with Ofcom’s proposal that BT should offer a one-month minimum contract following a GEA migration, in order to reduce switching barriers in the market and to avoid BT benefitting from an inefficient double-recovery of wholesale GEA charges from the leaving and gaining CP.

However, EE considers it equally (if not more) important that BT should offer a one-month minimum term for new GEA connections also. EE notes that as SFBB take-up is currently at the customer acquisition stage, new GEA connections are likely to be more prevalent than GEA migrations over the next market review period. As such, in order to encourage vigorous retail competition, it is important that wholesale charges for new GEA connections are not artificially high.

In light of the high GEA connection charges imposed by Openreach (£92 per connection), EE does not believe that there should be any unavoidable costs that Openreach needs to recover through a guaranteed 12-month minimum term for new connections. The impact of this unduly long minimum term is that CPs' early termination charges to consumers on SFBB contracts need to reflect the remaining wholesale rental charges, making contractual exit more costly for consumers. By contrast, Openreach imposes only a one-month minimum term for new SBB connections, and as such EE (and other CPs) do not need to recover unnecessary rental charges from customers who choose to leave their contracts early. In SBB contracts, this enables CPs to set early termination charges which reflect only unavoidable costs, and which are therefore significantly lower, thereby lowering customer costs and switching barriers in the market.

11.5 Do you agree with our proposed approach to regulating the margin between the VULA price and BT's downstream prices? In particular:

(a) Do you agree that our objective should be to ensure that BT sets a VULA margin that allows an operator with slightly higher costs than BT (or some other slight commercial drawback relative to BT) to profitably match BT's retail superfast broadband prices?

(b) Do you agree that we should achieve this objective by requiring BT to set fair and reasonable terms, conditions and charges and setting out guidance on how we would interpret this requirement?

(c) Do you agree with our draft guidance? In particular, do you agree with our benchmark operator and the ways in which such an operator differs from BT?

Please provide reasons in support of your views.

[X] [X]

11.6 Do you agree that we should continue to require SLU and that it should be offered subject to a Basis of charges requirement? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation.

11.7 Do you agree with our proposed approach on the issue of SLU and vectoring? Please provide reasons in support of your views, including, if you disagree with our approach, evidence as to why an alternative approach is more appropriate (e.g. in the form of business plans).

[X] [X]

11.8 Do you agree that we should continue to require PIA and that it should be offered subject to a Basis of charges requirement? Please provide reasons in support of your views. 11.9 Do you agree that PIA should continue on the same bases as it is currently applied? Please provide reasons in support of your views, including, if you disagree with our approach, evidence of specific business plans or intentions to invest

in deploying NGA networks that are currently unviable, but would become viable with your suggested changes.

For the reasons set out in its previous response to the last Business Connectivity Market Review (“BCMR”), EE continues to believe that PIA products should be available for use in providing business products (i.e. leased lines). EE considers that CPs will only be able to provide the types of firm investment plans, which Ofcom appears to envisage requiring before extending the PIA remedy, in light of greater certainty over how PIA would be so extended. As such, Ofcom’s approach creates a “chicken and egg” issue. Allowing PIA products to be used to deliver leased lines (especially mobile backhaul products) would, in our view, increase competition and provide better incentives to innovate. EE notes that this issue is currently before the Competition Appeal Tribunal (where Colt’s appeal of the BCMR specifically concerns this issue) and would expect this to also be considered in the next BCMR. As such, EE does not have any further comments on this issue in the context of the market reviews covered by the FAMR Consultation.

11.10 Do you agree that we should not require BT to offer any other [remedies]. Please provide reasons in support of your views provide reasons to support your views, including, if you disagree with our approach, evidence of your likely demand (e.g. in the form of business cases or specific intention to invest) for any suggested alternative forms of network access.

EE’s response to Question 11.9 above applies equally in relation to access to dark fibre (§§11.586 to 11.587) as it does to the existing PIA remedy. [REDACTED] Generally, EE supports the continuation of the SMP obligations on BT requiring it to provide new forms of access on request, which are an important way of ensuring that access remedies remain current throughout the market review period.

Remedies: WLA current generation access

12.1 Do you agree with our proposal to continue to require BT to provide LLU? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation.

12.2 Do you agree with our proposal to continue to apply a charge control on LLU? Please provide reasons in support of your views. (Comments on the specifics of the charge control should be made in response to the forthcoming 2013 LLU WLR Charge Control Consultation.)

Yes, for the reasons set out in the FAMR Consultation. This is subject to EE’s views on the importance of a parallel basis of charges obligation, which remain unchanged as from the CFI.

12.3 Do you agree with our proposed approach, including on pricing, to LLU TRCs and SFIs? Please provide reasons in support of your views.

EE has no comments in response to this question at this point in time.

12.4 Do you agree with our proposed approach, including on pricing, for electricity? Please provide reasons in support of your views.

EE has no comments in response to this question at this point in time.

12.5 Do you agree with our proposed approach to cost accounting for LLU? Please provide reasons in support of your views.

See EE's response to question 12.2 above.

Remedies: WFAEL

14.1 Do you agree with our proposal to continue to require BT to provide WLR? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation. In relation to the provision of Fibre Voice Access, please see EE's response to question 11.1 above.

14.2 Do you agree with our proposal to continue to apply a charge control on WLR? Please provide reasons in support of your views. (Comments on the specifics of the charge control should be made in response to the forthcoming 2013 LLU WLR Charge Control Consultation.)

Yes, for the reasons set out in the FAMR Consultation. In relation to the proposal to remove the current parallel basis of charges obligation, EE strongly disagrees with this proposal, which EE continues to believe is both necessary and proportionate, for the reasons set out in EE's response to the CFI.

14.3 Do you agree with our proposed approach to pricing for WLR, including our proposals for a Basis of charges obligation on TRCs and for Caller ID? Please provide reasons in support of your views.

EE has no comments on Ofcom's proposals to set a basis of charges obligation for WLR related Time Related Charges ("TRCs") at the current point in time.

EE's comments on the charging obligations that should apply in relation to BT's Caller ID service are set out in detail below in response to question 14.4. To the extent that Ofcom is proposing that BT will have an ongoing basis of charges obligation in relation to its charges for the Caller ID service, EE considers that Ofcom should clarify that this charge must be set at **zero, or very close thereto**. Given Ofcom's conclusions on these costs at \$14.59, EE cannot see how any charges above this level will be consistent with a basis of charges obligation to charge only for costs on a forward looking fully allocated costs basis allowing for an appropriate return on capital employed.

14.4 Do you agree with our proposed approach to pricing for WLR calling and network features (including revenues for Caller ID)? Please provide reasons in support of your views.

EE strongly disagrees with Ofcom's proposals.

EE understands that BT is concerned that by removing the wholesale charge for Caller ID, demand will increase. However this position is at odds with the situation that exists in the retail market. Caller ID has become an essential feature for most landline users, with Sky, TalkTalk, and BT Retail all offering it

for free⁵. In order to credibly compete, EE likewise bundles Caller ID free of charge with its broadband and landline package. Given this market position, there is no retail pricing disincentive to discourage *end users* from taking up the product, regardless of the wholesale charge (which is what ultimately drives demand). In particular, EE considers it disingenuous for BT to claim that this wholesale level charging is necessary to repress demand, given its own free-of-charge approach at the retail level.

EE notes that the last time the price elasticity of the service was tested was four years ago, in 2009. At that point it was more usual for the retail market to charge for Caller ID, and therefore the result of reducing the wholesale price – and subsequently the price that end users paid – predictably led to an increase in demand. However the telecoms market has moved on since then, and free Caller ID for end users is now the norm, meaning the removal of the wholesale charge is highly unlikely to effect a change in demand.

Given, as Ofcom states, that “the cost of provision is likely to be close to zero for Caller ID services⁶”, BT’s charge of £6 per year must represent pure profit, funded by WLR-based providers. This amount is highly significant, reducing the margin with which WLR+SMPF based providers can fund the voice and broadband retail offers that the offer in competition with MPF based providers (who do not face such charges), and directly harming WLR and WLR+SMPF based end-users.

Furthermore, as a mobile operator with relevant technical knowledge and practical experience of such matters, EE continues to find BT’s assertions that there are volume related costs to providing this service to be lacking in any clear or obvious factual basis and urges Ofcom to investigate this matter with the benefit of the expertise of independent technical experts.

Specifically EE does not understand which element of BT’s network it can be that is said to be at approximately full capacity, and how an increase in demand would require a corresponding increase in capacity⁷. In this regard, EE has considered the elements that comprise the Caller ID service, and presents the following analysis:

a) **Provisioning WLR end users with the Caller ID service⁸.**

This is a one-off, non-real time activity per end user, which essentially sets a flag within BT’s network indicating whether the called party is allowed to see the originating party’s telephone number or not. EE believes it is *highly unlikely* that there are constraints within BT’s provisioning systems that would prevent a higher volume of customers subscribing to the caller ID service. However if it is the one-off provisioning activity that is constraining volume, EE offers a simple solution: to set Caller ID on by default for *all* WLR customers. This would

⁵ EE notes that BT Retail and TalkTalk offer Caller ID on an opt-in basis, and that BT Retail customers must make a minimum of two outgoing calls per month to qualify for the free service.

⁶ FAMR Consultation, paragraph 14.59

⁷ FAMR Consultation, paragraph 14.61

⁸ For the avoidance of doubt, EE notes that subscribing to the WLR Caller ID service dictates whether the CLI of incoming calls is displayed to the WLR end user, not whether the WLR (or other) end user’s CLI is transmitted during the calls that they make.

remove the need for individual end user provisioning, and therefore any upgrade required to meet an increase in volume.

b) The conveyance of Caller ID information from the originating network to the destination network

Caller ID information is transmitted within signalling associated with a telephone call. Specifically, within the UK, a signalling system known as ISUP is used⁹. As a phone call is being set up, an “Initial Address Message” (“IAM”¹⁰) is sent from a switch within the originating network to a switch within the destination network. This message is used to request an outgoing voice circuit, and to pass information relating to the routing and handling of the call. The information passed includes:

- The originating user’s (calling party’s) telephone number; and
- A presentation indicator, used to determine whether the telephone number should be displayed to the called party.

The calling party’s number is often essential for billing callers, or identifying them to the emergency services, and therefore it is highly unusual for it not to be included within the IAM (or SIP headers).

As the originating network for any particular call may well not be owned by BT (e.g. for any mobile originated phone call), BT can have no control over whether Caller ID is included within the call setup information. In particular, whether or not the called party has subscribed to BT’s Caller ID service or not *has no bearing on whether the originating network includes Caller ID information* within the signalling it generates. It is therefore not credible to believe that there could be any impact on BT’s signalling network by provisioning its own end users with the Caller ID product, as this information is unknown – and irrelevant – to the originating network.

c) The presentation of Caller ID information to the called party

When the telephone call reaches the switch within the exchange that the called party’s line is connected to (the terminating exchange), the “presentation indicator” is checked to determine whether the Caller ID information should be transmitted to the called party’s telephone or not. This allows originating users to withhold their identity.

As discussed above, the Caller ID information, along with the presentation indicator, is included within all calls. There is therefore no reason to believe that an increase in Caller ID subscriptions could in any way lead to an impact on the capacity of the switch within the terminating exchange, or the terminating exchange itself.

On the basis of the above analysis, EE considers that:

- ☐ It is unlikely that the removal of the current extremely high wholesale charge for the service will result in an increase in WLR Caller ID subscriptions, given current pricing at the retail level.

⁹ EE is aware that networks in the UK are slowly transitioning from ISUP to SIP.

¹⁰ In the case of SIP, caller ID information is found in the Remote-Party-ID (RPI) header, or the P-Asserted-Identity (PAI) header.

- ☐ Even if there was an increase in demand for this service, this is highly unlikely to have any genuine cost impact on BT (other than ones that could be easily managed, e.g. by programming Caller ID as being on by default)

EE therefore strongly believes that it is important to meet Ofcom's stated objectives of preventing BT from charging excessive prices given its SMP status; promoting sustainable competition and promoting the best interests of UK consumers for Ofcom to require BT to provide this service to WLR-based providers at the cost based charge of **zero**.¹¹

To the extent that Ofcom continues to accept any allegations by BT to the contrary, EE believes that WLR based CPs and their end-customers deserve a more detailed public explanation of the alleged work and costs involved, so that the claims can be understood and it can be examined whether there is truly no other reasonable way to eliminate these – such as by the adoption of a “default on” approach.

Failing any of this, EE considers that it is beyond argument that it is fundamentally important that, if BT is allowed to continue to levy charges for this service for the sole purpose of discouraging additional demand (which is what is entailed in Ofcom's current proposals), BT should not simply be allowed to enjoy a windfall profit as a result of this. EE accordingly strongly suggests that Ofcom acts on its current unimplemented suggestion that the charges BT receives for this service from WLR based CPs (worth circa £25m per year) are **netted off the WLR cost stack**, so as to at least mitigate to some extent the competitive harm suffered by WLR based CPs as a result of these charges and in order to meet Ofcom's stated policy objective of preventing BT from making excess profits where it has SMP (§§14.69 to 14.70).¹²

14.5 Do you agree with our proposed approach to cost accounting for WLR? Please provide reasons in support of your views.

No, for the same reasons set out in EE's CFI response.

Remedies: ISDN30 and ISDN2

15.1 Do you agree with our proposal to continue to require BT to provide wholesale ISDN30? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation.

15.2 Do you agree with our charge control proposals for ISDN30? Please provide reasons in support of your views.

EE agrees with the proposal to continue to impose a charge control for this service, for the reasons set out in the FAMR Consultation. EE does not

¹¹ Of course, BT will continue to recover the costs of the switches embedded with the relevant information under the WLR charges.

¹² As this charge is borne exclusively by WLR based CPs, EE considers that there would be **absolutely no justification for reducing the MPF rental charge by this amount**. Clearly, this reduction of the WLR cost stack will still leave those WLR based CPs who acquire the Caller ID service now and in the future out of pocket and thus be an inferior solution to removal of the charge entirely, but at least it will mitigate the harm to some extent.

otherwise have any views in response to this question at the present point in time.

15.3 Do you agree with our proposed approach for cost accounting for ISDN30? Please provide reasons in support of your views.

EE does not have any views on this question at the present point in time.

15.4 Do you agree with our proposal to continue to require BT to provide wholesale ISDN2? Please provide reasons in support of your views.

Yes, for the reasons set out in the FAMR Consultation.

15.5 Do you agree with our charge control proposals for ISDN2? Please provide reasons in support of your views.

EE agrees with the proposal to continue to impose a charge control for this service, for the reasons set out in the FAMR Consultation. EE does not otherwise have any views in response to this question at the present point in time.

15.6 Do you agree with our proposed approach for cost accounting for ISDN2? Please provide reasons in support of your views.

EE does not have any views on this question at the present point in time.