

ANNEX B

THE ECONOMICS OF WHOLESALE CALL ORIGINATION

THE OFCOM CALL FOR INPUTS

NARROWBAND MARKET REVIEW 2015

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14 May 2015

THE CASE FOR DEREGULATION

- B1. BT's position is that all WCO should be deregulated. In the 2013 Narrowband Market Review (NBMR), BT argued that WCO could be deregulated on the basis of competitive constraints provided by mobile, broadband and cable, in the context of consumer purchase of bundled services. The discussion below aims to set out the reasons why we disagree with Ofcom's 2013 NBMR Statement with respect in particular to the link between downstream retail bundling and the regulation of WCO. Without prejudice to our position that all WCO should be deregulated, we maintain that were Ofcom to continue to disagree with that proposal, there remain very strong grounds for deregulation focused on the provision of bundled services.
- B2. In the 2013 NBMR Statement, Ofcom declined to deregulate Wholesale Call Origination (WCO). We believe that deregulation could have been achieved under either of the following Scenarios:
- either -
- a. By defining a relevant market around the provision of bundled services including retail voice service and in which BT did *not* hold a position of SMP and *no* regulation whatsoever was appropriate,
- or -
- b. By defining a relevant market in which BT *did* have a position of SMP but notwithstanding that finding, taking the opportunity to relax some of the remedies and in particular that of the requirement of non-discrimination.
- B3. The principal issue addressed in this Annex is that it was eminently open for Ofcom to identify a distinct downstream (retail) market for the joint provision of a bundle of services. This would have permitted a proportionate and important deregulation in the parallel upstream WCO market taking account of the growth of LLU and cable. In turn, this would have enabled BT to play a more active role in the provision of network services and to the ultimate benefit of consumers. Even if this approach had not been adopted, we believe that a lesser set of remedies would have been appropriate as suggested above.
- B4. We believe that this deregulation would have been practical and not detrimental to consumers who arguably might remain reliant on a regulated upstream input of WCO for their provision of voice telephony alone. The 2014 EC Staff Working Document also notes the growth of bundling at the retail level with the regulatory emphasis on replicability of upstream inputs¹.
- B5. Since the previous market review that the proportion of consumers taking a bundle of services has continued to increase as has the competitive footprint of LLU operators. Virgin Media has announced plans to extend coverage of its own network².

¹ EC C (2014) 7174 October 2014.

² <http://about.virginmedia.com/press-release/9467/virgin-media-and-liberty-global-announce-largest-investment-in-uks-internet-infrastructure-for-more-than-a-decade>

- B6. Moreover, the Commission now proposes that the assessment should take into account the following factors³:
- The forward look should be based on the transition to all-IP networks.
 - NRAs should consider safeguard measures for any remaining vulnerable or captive customers not on SMP regulation, but as transitional policies aligned with Universal Service principles.
- B7. Our stance for progressive regulatory withdrawal from all three sets of services (WCO, call termination and interconnection arrangements) is firmly in line with a clear vision on the part of BT for migration out of the PSTN, whilst simultaneously maintaining effective competition in downstream retail markets. We make the following points in this Paper specifically with reference to the group of customers who are inside (as distinct of being outside) the LLU footprint.
- B8. First, the principle of the assessment of market boundaries ‘as a means to an end’ is especially relevant here. The growth of numerous means of communication alongside complex forms of pricing means that it can be quite difficult to assess the precise boundaries of economic markets. We believe that deregulation is highly robust to different ways of ‘cutting the market’ and whether comparatively narrow or broad definitions are assumed. In this particular case, there is a strong linkage with the parallel geographic analysis which has been undertaken for WBA Market 5 as the LLU and cable footprints provide a good match to the provision of competitive bundled retail services.
- B9. Second, we believe that the trends are irreversible toward decline in the use of voice service across both fixed and mobile networks and there are no ‘hostages to fortune’ which conceivably should deter progressive deregulation. Both BT and Virgin Media will continue to move towards fibre-based broadband. Specifically, where LLU CPs move to provide their end-consumers with a regulated Openreach input such as VULA, they are continuing to use the baseband to provide their own voice service and do not need BT to provide WCO. In the medium to longer term, it is quite likely that industry will move to OTT provision of voice in any case. We provide some brief observations on trends and market boundary assessments at Appendix 1.
- B10. Third, we consider that in the 2013 review, Ofcom likely materially overestimated the proportion of customers who are really reliant on regulated WCO. Given the growth in purchasing of bundles which Ofcom has acknowledged, we are confident that any residual customer groups who do not take bundled services are now much smaller in number. Any necessary safeguards could be put in place to ensure they continue to have the choice of suppliers currently available and are not exposed to unwarranted retail price rises from WCO deregulation.

³ Op. Cit. Section 4.1.1 page 21.

- B11. There would be immediate benefits to deregulation around the retail bundle which in broad terms were set out by consultants Copenhagen Economics in our response to the 2013 NBMR Consultation as shown below.

Box 1 Key benefits of rolling back regulation of call origination

We consider that a revision of the geographic approach to call origination in the Consultation would lead to a number of benefits.

By removing call origination remedies Ofcom would be consistent with both:

- its regulatory principles;⁴ and
- its successful history of deregulatory approach in the calls market:
 - in 2006 retail prices were deregulated as wholesale call origination deemed sufficient – a well received approach;
 - in 2013 it may be the turn of call origination regulation to be radically rolled back, with WBA and WLA regulation deemed sufficient;
- thus further increasing its credibility in other areas where intervention is more clearly necessary.

Moreover, by introducing geographic markets or geographic-differentiated remedies modelled on WBA, call origination regulation would become aligned with WBA. This would enable Ofcom to:

- simplify regulation for both access buyers, the regulated firm, consumers and stakeholders in general;
- apply the product market definition as per EC recommendation;
- future-proof call origination regulation wrt evolving technology-market trends;
- champion (where appropriate) such an approach at the relevant EU fora, allowing a proactive stance to influence the revision of the EC Recommendation.

Finally, any changes in retail bundle pricing structures that may follow the deregulation would likely promote greater broadband take-up, as the broadband component would become relatively more convenient compared to calls

- while the existing USO conditions would safeguard vulnerable call users.

Source: Copenhagen Economics

- B12. For ease of exposition we briefly comment separately on the short/medium term benefits of partial deregulation associated with the bundled market.

- B13. The main immediate implication of the withdrawal of regulation would be the cessation of the non-discrimination obligation, thereby allowing BT to undertake wholesale bundling. CPs today design bespoke wholesale offers including both voice and broadband in order to serve the needs of other operators and in turn, the latter rely on these wholesale products to serve retail customers. Were Ofcom to remove the non-discrimination obligation, this would allow BT to match its competitors' existing commercial wholesale strategies.

- B14. In the retail market, the diffusion of bundles has been a success story with undoubted consumer benefits⁵. Bundle-based pricing is today widespread and generates consumer surplus compared to a scenario absent retail bundling:

- When an end user purchases a bundled offer this reduces search and transaction costs – for both the end user and the operator.

⁴ In particular the principles of operating with a bias against intervention and always seeking the least intrusive regulatory mechanisms to achieve its policy objectives.

⁵ We do not consider that Ofcom [5.220] was correct to say that BT and our consultants Dotecon made contradictory submissions in this regard.

- End-users who purchase a bundled offer usually secure a lower price compared to the alternative option of procuring two separate contracts for voice and broadband.
- Notably, competition is more intense with non-uniform prices as it encourages firms to target more customers.

B15. In essence, the mixed bundling practiced in voice and broadband markets has allowed operators to increase sales for users whose willingness to pay for voice and broadband are inversely related – and thus grow the overall market over the past few years. This has in fact applied to where preferences are toward both of these services; the inclusion of further services such as TV will have the same impact.

B16. In the present context, BT would like to match the offers in place by competing operators. Concerns of exclusionary conduct should not apply especially when it is noted that rival CPs self-supply to the vast bulk of their own retail customers from their own networks. This will have positive pro-competitive benefits. To a certain extent, however, it is possible that retail take-up of the voice and broadband products may have reached a relatively high saturation and that lower prices would not generate a large output expansion. This suggests that the key effect would be an intensification of the competition for the very same user base.

B17. Looking beyond the immediate impacts of wholesale and retail competition across current networks, we see deregulation of WCO as a first stepping stone which may eventually need to include replacement of the current WLR and SMPF offers (although not within the timeframe of the current review).

B18. With regard to the three end user groups Ofcom identifies as potentially vulnerable:

- Customers outside the LLU footprint. This is now less than 2% of the population. In the context of national retail pricing of telephony services, prices and features made available in the rest of the UK for voice only customers will not be any different for those outside the LLU footprint.
- Customers taking fixed voice services only. As at end of 2014, the number of internally supplied WLR lines across the BT network which are ‘voice only’ i.e. have neither SMPF nor GEA supply along with WLR, is estimated to be 2.5 million likely split about 2.5 million consumers and 2.5 million businesses (probably mostly SMEs). The volume of voice only consumers is declining sharply but BT will continue to serve these customers irrespective of the regulatory position of WCO. There were about 2.5 million external WLR only lines of which 2.5 million appear to be sold to businesses including SMEs.
- SMEs. We are seeing continuous migration of SMEs to alternative forms of communication and believe that many SMEs that are voice only could easily migrate to mobile solutions as Ofcom [5.85] indicated and where they mix purchase voice and broadband many SMEs can be served by LLU and cable operators effectively.

B19. In summary, our position is that Ofcom can follow European Commission guidance and deregulate WCO in its entirety. The vast bulk of customers have strong competition for

their custom in the form of bundled services. It is only a distinct and declining minority who are not in this position. It would not be appropriate for Ofcom to continue to have the 'tail wag the dog' in this regard.

Appendix 1

Observations on Trends and Market Boundaries

1. We have examined Ofcom’s 2013 final market boundary analyses in some detail and have the following comments of a general nature.

Trend information and market boundaries

2. There are particular difficulties to establish market boundaries where long-term trends are evident but the magnitude of short term constraints mainly from demand-side switching are much less easy to quantify. There are a multitude of complications to deal with here including bundling where individual price elements cannot be discerned and different customer cohorts where overlapping substitutes such as mobile and OTT forms of communication are of very varying importance.
3. This being the case, we are not once more rehearsing all of the underlying arguments as to whether the downstream retail market for voice telephony is part of a wide or a narrow market in this Cfl. The fact remains that the trends of decline and substitution out of fixed voice is continuing as illustrated below.

Volume of voice minutes

4. As shown in Table 1 below, Ofcom statistics show that fixed voice minutes continue to decline roughly 11% p.a. The growth of dual and triple play bundles means that voice calls are and increasingly subsumed in the cost of the bundle where they feature at all; in fact some SPs are now offering bundles with no calls at all recognising that many consumers prefer to use mobile phones in any case.

Table 1

Fixed voice origination minutes

(million minutes)

Period	All Operators	BT	Virgin Media	Other Direct Access	Other Indirect Access
2013 Q3	22110	8537	2663	6317	4592
2014 Q3	19709	7526	2507	6089	3587
% change	-11%	-12%	-6%	-4%	-22%

(Source: Ofcom Telecommunications Market Statistics 2014 Q3 Table 3)

5. The decline in volumes is broadly similar to that in previous years with Indirect Access (assumed to be across the BT network) declining especially sharply mitigated by lesser falls of the direct access operators other than BT. This likely reflects the increase in MPF.

Use of VoIP

6. Ofcom’s 2014 CMR [Figure 5.11] shows that use of VoIP is now up to 35% of consumers. We believe that this is now a well-established service used as an alternative to PSTN and where price plays an important role as Ofcom [Figure 5.13] research indicates.

Growth of bundles

7. Ofcom's 2014 Communications Report shows a 3% increase in total bundled share⁶. We are currently updating our own market research estimates and expect them to show a similar upward trend.

Competitive position of BT

8. We note that the proportion of internal to external lines just across the BT network alone is now below 50%⁷.

Interpretation of market research findings

9. Whilst Ofcom employed considerable market research to underpin the conclusions of narrow markets, in certain places we consider that there was also a large element of judgement which cannot be verified or disproven in particular making presumptions on switching and captive consumers.
10. The broad argument made by Ofcom in the 2013 NBMR review was that if customers were susceptible to switching, then 'they would already have done so'. The remaining customers are then by default incapable or otherwise unwilling to switch so there 'must be a rational reason for them to remain as otherwise would have gone'. The implication from this line of argument is that by definition they must be captive and need regulatory support. This argument was used by Ofcom [5.122] for split purchasers of voice and broadband for example, and similar arguments were made [5.179 b)] of potential difficulties of switching out of SMPF.
11. In our view this is a line of argument that can be carried on *ad infinitum* until the very last person leaves to migrate to another service. In neither specific instance can we see Ofcom's assertions and judgement have merit. The number of customers dual sourcing appears to be falling still and this is mirrored in migration out of SMPF⁸.

Presumptions on price discrimination

12. In a number of market reviews, Ofcom has speculated as to when BT could and would choose to price discriminate⁹. We suggest that absent confirmation by BT, these will often not going to be accurate nor assist in regulatory assessments. In this particular case, Ofcom did not give sufficient weight to where discrimination would not take place and the significant positive spillover from the structure of prices in the competitive retail bundle to those taking solus voice or services from different suppliers.

Analysis of bundles

⁶ Note the 2013 NBMR quoted the Jigsaw survey which had a higher proportion at 65% relating to the more relevant population of households which had a fixed line and excluding mobile only households.

⁷ <http://www.btplc.com/Sharesandperformance/Quarterlyresults/Quarterlyresults.htm>

⁸ In this context it is also relevant that from June 2015 the SMPF switching process is changing from losing provider-led (MAC) to gaining provider-led so will become even easier.

⁹ In the 2013 WBA this concerned exchanges according to the number of competitors and in the 2013 BCMR pricing in WECLA.

13. A specific substantive economic issue which we do address in detail at Appendix 4 regarding Ofcom's analysis on bundling. In summary, we completely disagree with Ofcom's conclusion of sufficiently homogenous conditions of competition across all customer types and the way in which split purchasers (WLR and SMPF from different providers) were assessed in coming to this conclusion.

Appendix 2

The Three Groups of Special Ofcom Focus

1. We offer the following observations on the three particular groups of interest identified in the 2013 NBMR Statement by Ofcom [2.17], noting that they are not distinct but overlap.

Customers outside the LLU footprint.

2. As at December 2014 according to our figures, TTG served 94.6% and Sky 90.4% of the UK population respectively. Since then we understand that TTG will have increased its footprint so it is probably now around 96% of the population. It is likely that there are a very small number of businesses in these areas but they probably do not differ materially from consumers in most instances.
3. The principal point we make is that it should not be presumed that the tariff packages provided by BT for this very small rump of customers will not differ from those inside the LLU area. This would include solus voice customers and service to SMEs. BT at the retail level provides national tariffs for consumers and there is effectively no realistic prospect of any type of price discrimination for such a small group of consumers, some of whom will in due course be served by fibre anyway under plans to serve the final 5% with public funded networks. There is no likewise no realistic possibility of a geographic form of discrimination at the wholesale level either for WCO and the only way in which differential prices might arise for end-users relates to the competitive bundle where industry or market prices will be different.

Fixed voice only customers

4. Ofcom [2.17.2] asks for views on the implications of competitive constraints for customers who only have a fixed line and do not have mobile. We do not have detailed research on what would appear to be a very small number of consumers who do not have a mobile phone and only a fixed line. It is difficult to understand why there could be any SMEs who do not have access to mobile services including those outside the LLU footprint.
5. BT market research suggests that the number of BT Retail consumers taking solus voice (calls mainly provided by BT but also some residual CPS) is continuing to decline from about 3.5m in 2011 Q2 to 3.2m in 2015 Q1 which is a decline of 8%. It is believed that there will also be of the order of about 3.5m consumers taking solus voice served by other CPs across BT's network and 3.5m, but we are not able to provide Ofcom with definitive numbers here. The price of WCO will have no impact on these trends.
6. As at December 2014, there were 3.5m downstream BT WLR only lines and 3.5m external WLR only lines with the latter likely mainly to SMEs but also some residual voice only customers from for example 3.5m and 3.5m and other SPs.
7. The decline in solus voice customers is mirrored by modest increases in broadband subscription i.e. dual play service from the same provider and which are likely focussed on the older age groups and whom would previously have been solus voice consumers¹⁰.

¹⁰ Ofcom 2014 CMR Section 5.4.3.

8. Choice of service in a rapidly declining marketplace will inevitably be quite different to where there is growth. Whilst we believe we serve the majority of solus voice customers, clearly absence of a WLR/WCO facility would potentially limit choice to those outside the Virgin Media footprint. We are not aware however of any of the key current providers to voice only customers likely withdrawing from the marketplace under the presumption that BT continues to provide WCO with CPS facility where wanted.
9. Whilst Ofcom did not identify split purchasers as an end-user group, we believe that it is helpful to look at the trends of this cohort. As with solus voice customers, a parallel and even sharper reduction is seen on split purchasers who hold a BT line but are with another CP for broadband (primarily but not exclusively bitstream but also includes some FTTC). Internal estimates put this down from 3.8 consumers in 2011 Q2 to 3.2 in 2015 Q1 representing a decline of 16%¹¹.

SMEs

10. In general terms, we do not see that SMEs can be seen as a 'vulnerable' group eligible for USO services or special tariffs; they are businesses and not end-users and should be presumed to be able to make commercial decisions in their favour. As such we believe that any arrangements put in place consequent on deregulation to assist consumers will more than suffice for any SMEs in analogous positions either from geographic location or requirement for single lines with voice or ISDN2. Neither the Commission nor its consultants identified concerns here and rather highlighted the move to VoIP.

¹¹ Note that it is not at all straightforward for BT to interrogate upstream Openreach databases to find these numbers as wholesale supply can take many forms and not be determinative of an end-user relationship. For example both BTW and TTG might supply a bitstream service to another CP and in our records it would appear to be dual sourcing but the end-user might not see this and only have a single relationship with the WLR purchaser for example.

Appendix 3
Summary of BT's Submissions since 2012

(a) Call for Inputs main body response 28th June 2012

1. In the description of retail trends, we made the case for treating voice with broadband with the former provided for 'free' or at very low additional cost to broadband. We suggested that this also incentivised the provision of innovative packages for voice-only customers. We set out the huge range of alternatives open to both consumers and businesses to avoid needing to make traditional telephone calls and which were continuing to decline sharply in volume especially over fixed networks but now also across mobile networks.

(b) Call for Inputs main economic submission 28th September 2012

2. This provided the key evidence of our case that WCO was no longer an essential upstream input to the provision of downstream retail voice services for the majority of consumers taking a combined bundle of voice and broadband across either MPF or cable. Specific and detailed analyses of the following were provided:
 - Broad trends of volumes and comparative statistics of voice compared with other forms of communication (Section 2 and accompanying Report by consultants Dotecon).
 - Specific and detailed explanations of how CPs were bundling voice services with broadband and how the bundling was in many cases a 'pure' linkage for certain call types contingent on taking a line in addition to the broadband service with strong economic incentives for all services together. Whilst a number of CPs were still actively marketing a 'voice only' service, for broadband it was becoming increasingly less viable to purchase this alone.
 - Detailed statistics based on extensive BT market research on the relative size of different customer segments and the position of BT relative to other CPs.
 - Detailed and granular statistics and explanation of the trends in WCO with particular attention to the contracts between BT and major LLU CPs including a forecast breakdown of minutes of traffic for geographic Market 3 associated with WBA.
 - A 'Gap' analysis undertaken at the request of Ofcom to explain what we perceived the implications might be of full or partial deregulation with the latter around customers taking a bundle of retail services within Market B.

(c) Call for Inputs supplementary economic submission 11th October 2012.

3. BT submitted a technical paper on the application of the SSNIP test and the uncertainty of how to treat the 'dilution' effect whereby the impact of a wholesale input is reduced at the retail level according to its importance in the value chain. The Paper stressed that this is not a robust test as the SSNIP methodology was an arbitrary one developed for horizontal markets and not vertical chains. One solution is to look at access and downstream services simultaneously or as Ofcom [5.44] accepted, to simply take the notional 5-10% increase at the retail level in the first instance.

(d) Consultation response Annex 1 economic assessment of retail markets and call origination 28th March 2013

4. Our economic analysis made the following principal points:

- Retail competition had *increased* since the previous review.
 - Market boundary assessments need to be undertaken with care where multiple dimensions of products/customers/geography could lead to different definitions depending on the precise order in which they were undertaken.
 - At the minimum Ofcom should define separate retail markets for solus voice and other consumers of those taking a bundle (whether split or not).
 - Ofcom was not allowing for the geographic dimension of how bundles were affecting the underlying dynamic for providing call origination by focussing on minority of exchanges that did not have LLU rather than the vast majority which did.
 - Regarding BT incentives to supply and to CPs who themselves are LLU operators normally taking MPF, we explicitly highlighted the fact that BT has contracts with large CPs and that 'These contracts make a refusal to supply altogether impossible in some circumstances and for other contracts the time period extends beyond the market review in any case'¹².
5. In addition, BT commissioned Dotecon to provide an update on its previous report and assessment of Ofcom's treatment of alternative means of communication as a competitive constraint. We also commissioned Copenhagen Economics who reviewed a number of features of Ofcom's position including the case for differentiated remedies in a declining market and where there were direct alternative infrastructures such as MPF and cable supplying the bundle downstream at the retail level.

¹² Paragraph 96 Annex 1.

Appendix 4
Observations on OFCOM's 2013 Analysis on Bundles

A. Summary of BT's Position

1. BT like all other CPs, has long practiced a form of 'horizontal' retail bundling of services which have a linked relationship and are frequently described as a 'cluster market'. The economic relevance of such practices in regulatory terms were long foreseen by the Commission and its advisors¹³.
2. BT has been regulated to supply upstream inputs on both its PSTN and broadband platforms; in the case of voice services this is across all its network nationally whilst for broadband BT has over time been largely deregulated with BT only having to offer regulated inputs to about 10% of households. Virgin Media has an extensive network offering both voice and a large number of bundled services.
3. The gist of our case has been that as calls and broadband can be technically and economically replicated by a single upstream input across its network and given that at the retail level the services of voice and broadband are very highly if not completely economically linked together, there is an overwhelming case to deregulate the provision of the corresponding upstream input of its voice network i.e. WCO.
4. Ofcom's analysis at each of the stages of market boundaries and SMP was very heavily influenced by a finding of sufficient homogeneity of competitive conditions across three customers segments of: voice only; split purchase and bundled consumers.
5. Whilst Ofcom countenanced the possibility that at successive stages a more 'deregulatory' stance might arise, in practice this was not offered. This arose for essentially three sets of reasons:
 - Reliance of a 'material' group of customers on regulated WCO taking WLR and SMPF from separate suppliers with purported switching costs to a bundle based on MPF or cable network for either or both of consumers and/or CPs ('the sufficient homogeneity argument').
 - The inability of BT to 'precisely' distinguish between different downstream customers when selling through intermediary CPs ('the problem with remedies and implementation argument').
 - More policy oriented issues in which uncertainty of factors such as future fibre rollout might imply lesser competitive constraints and which would be undermined by deregulation of WCO ('the interactions with upstream remedies argument').
6. We briefly summarise our position on each of these points below before turning to the positive case for deregulation in the light of the most recent trend data.

¹³ See the report to the Commission by Cave, Stumpf and Valletti [2006] and the EC Staff Working Document C (2007) 5406 where for example cluster market includes access and calls.

Are the different groups of customers homogenous?

7. As backdrop, it is evident Ofcom has not disputed any of the following material which BT submitted in the Cfl and the Consultation which was summarised above:
 - The trends and broad magnitude of customer bundling.
 - The way in which calls are force line added to broadband by almost all CPs.
 - The competitive nature of the provision of the bundle and where Ofcom accepts that competition has increased since the previous review and which has formed the basis of 90% deregulation of the equivalent upstream broadband input of bitstream access.
8. Ofcom [5.147, 5.148 and 5.282] maintains that whilst competitive conditions evidently do vary between the different customer segments, they are not as clearly differentiated as for example in the different geographic markets in WBA. However in our view Ofcom is only making a relative comparison here and not testing whether there is sufficiency in homogeneity to justify the grouping it has chosen
9. The same issue arises with respect to split purchasers (11% of customers according to Ofcom Footnote 215) – whom in effect perform the task of linking together the majority of customers who are taking a bundle from the same CP (60% +) to voice only customers comprising some 16% of residential consumers¹⁴.
10. There is no dispute between BT and Ofcom about the different position of voice only customers - whether they are residential customers or business customers - compared to that of bundled customers across the single upstream input. Any deregulation of the bundled market would not directly affect these customers. However, the same position would apply to customers who choose to split purchase across WLR and SMPF from the provision of regulated WCO and CPS to external WLR purchasers. BT would nevertheless be able to offer a cheaper combined WCO and bitstream service to those CPs who wished to source both from BT. As we discuss in more detail below, this is a ‘good news’ story.
11. The fundamental difference between BT and Ofcom is the treatment of split purchase customers who source voice and broadband from different suppliers. We place these emphatically in the group of bundled single source customers and where the trends confirm unambiguously where they are actually moving to. The fact that BT can precisely distinguish this group at the wholesale level and would be competing against both MPF and cable network reinforces our view that the conditions of competition for this group are much closer to that of the broadband LLU and cable footprint and not that of voice only customers.
12. It is not credible in our view looking at the relative proportions of customers in each group to argue for sufficiency in homogeneity across all customers taking voice service. If only half of the split purchasers were put into the bundled group supplied by a single CP then it would leave a very small number of customer having to perform the task of linking around 70% of

¹⁴ Note according to Ofcom Footnote 215 the active services of voice and broadband appear to be taken from the same supplier and only the line purchase is a standalone product which presumably implies a combination of CPS for calls and broadband using SMPF across the BT network.

mainstream consumers with the minority of 16% taking a voice only service¹⁵. This is not plausible economically and not compatible with the comparable assessment of competition for broadband in the WBA market review.

Are there problems of implementation and remedies?

13. Beyond some very minor specific issues which Ofcom raised at the point of remedies, we cannot see any substance behind Ofcom's concerns. We have responded in detail to each of the four points raised and do not see they merit concerns. Critically Ofcom has not explained how its approach is compatible with modified Greenfield site assumptions.

Is there concern taking a forward look?

14. We have not been able to find anything concrete to comment on and consider that here Ofcom only makes generalisations.

B. Ofcom's Framework on the treatment of bundling

(i) At the stage of product markets

15. The approach by Ofcom [5.118-5.134] does not consider whether the focal product should be a bundle at the retail level but a distinction between 'voice only' and 'dual play' customers with the latter comprising both the bundle customers and 'split purchase'. The former (voice only) represents a declining group of customers who currently do not take fixed line with broadband and potentially unlikely to acquire it in the near future.
16. The dual play definition appears to constitute three sets of customers:
- Those who purchase the services from the same supplier with strong economic incentives to do so.
 - Those who purchase the services from the same supplier with weak economic incentives to do so.
 - Those who purchase the services from separate suppliers.
17. Ofcom focused its attention to the group of customers who purchase from separate suppliers and suggests [5.123] that those purchasing separately 'could account for a relatively significant proportion (of consumers) and that MPF may not be a 'perfect substitute for WLR+SMPF'. Whilst Ofcom [5.122] 'thinks it likely' that a large number of businesses are effectively forced to purchase the services separately, later [5.125] this is stated definitively.
18. Ofcom brings in one additional matter which is the extent of the MPF footprint [5.124] and speculates that the introduction of fibre solutions will inhibit further MPF rollout [5.127].
19. In summary, at the product market boundary stage, Ofcom accepts the possibility of separate markets according to different customer segments but concludes against. Ofcom couches this finding in terms of *competitive conditions* with a finding of *sufficiency of homogeneity*:

¹⁵ ECORYS study September 2013.

5.126 Therefore we do not consider that defining separate markets according to retail customer segments results in clearly defined and demarcated variations in competitive conditions for wholesale call origination. On this basis, we consider the two segments are sufficiently homogenous in terms of competitive conditions to define a single market encompassing both.

20. However, Ofcom then appears to suggest that the homogeneity of a single market may *not* translate into uniform SMP findings and/or remedies, hence opening up the second leg of a single market but differential SMP/remedies paragraph [1 b] above:

5.128 As a result, we consider that all wholesale call origination (irrespective of the retail offering it is an input for) should be considered part of the same market. However, although we have defined a single market for wholesale call origination used to supply voice-only customers and customers purchasing both voice and broadband, we recognise that these competitive variations may have an impact on our analysis of SMP and consideration of remedies, which we reflect further below.

(ii) At the stage of geographic markets

21. Ofcom [5.141] sets out the case that the supply of the bundle of calls and broadband could follow the geographic footprint of competition which was established in the broadband market and at [5.145] explicitly notes the interaction between geographic and product markets. Ofcom [5.146] then makes two assertions:

- The relevance of ‘interactions with upstream unbundled remedies’.
- The ‘material proportion’ of consumers dual sourcing using BT’s regulated WCO.

22. Ofcom [5.147, 5.148] then accepts differentiation in competitive conditions, but asserts that there exist customers who cannot be suitably be supplied by MPF and also suggests that such variation in competitive conditions is not so strong as was seen in WBA:

5.147 The existence of these customers for whom MPF is not a suitable substitute for WLR+SMPF means that the competitive conditions for wholesale call origination even for customers taking voice and broadband are likely to be more homogenous between geographic areas than if all customers were able to take a dual-play bundle over MPF.²³³

5.148 Therefore, even though the competitive conditions vary between geographic areas, we do not believe that the variation is sufficient to define different geographic markets for dual-play customers (or indeed the degree of variation is as stark as is the case for the WBA market review). Further, we consider that the interactions with upstream unbundled remedies means it is more appropriate to define a single geographic market for the United Kingdom for this review period. However, in recognition of the fact that there are potentially geographic variations in competitive conditions (reflecting, also, retail products purchased) and the fact that market definition is not an end in itself, we consider the impact of these variations in the market power assessment and in the remedies discussion below.

23. As was set out at the product definition stage, Ofcom [5.148] explicitly ‘leaves the door open’ with regard to the SMP assessment and remedies and whether any variation might be appropriate here.

(iii) At the stage of SMP assessment

24. Ofcom [5.177-5.197] addresses market power with respect to bundles by respectively addressing supply-side switching (wholesale constraints) and end-user induced switching (retail constraints).
25. At the wholesale level, Ofcom [5.178] notes that BT supplies WCO to a number of CPs whom are LLU operators (Sky and TalkTalk) even within the MPF footprint and so there are some constraints of switching. This point is then turned into a ‘forward look’ [5.179 points a), b), c) and e)] - in which it is asserted that the rate of new unbundling may decline for a variety of reasons along with conversion of SMPF to MPF. Ofcom at [5.179 d)] essentially repeats its assertions on the limitations for some customer groups of MPF.
26. Viewed at a very narrow level, it would be technically possible for LLU operators or cable to offer their own wholesale call origination but Ofcom [5.181] concludes this would be uneconomic in the main.
27. The retail switching section [5.183-5.200] appears to be largely repetition of the points made prior at the stage of the market boundary assessment with some greater detail on the three sets of customers allegedly reliant on BT for WCO. Specifically for the category of dual-play customers who are not taking a bundle from the same operator, Ofcom [5.167] recognises that competition has increased since the last review as distinct from what was suggested in the Consultation that ‘the level of competition for retail narrowband services has not decreased’¹⁶.
28. The conclusion of the SMP section therefore given that it largely repeats the market boundary assessment is effectively the same; hence Ofcom [5.200] emphasises two factors of:
- (a) Materiality of retail customers with no alternative suggested to be up to 39%; and
 - (b) Lack of sufficient constraints from alternative networks.
29. Similar to the way in which Ofcom allows for a ‘change of heart further down the line’ as it did when moving from market boundary to SMP assessments, here again Ofcom [5.210] explicitly accepts that competitive conditions do vary - ‘to some extent between areas and across some customer groups’ to subsequently consider whether differentiated remedies are appropriate.

(iv) At the stage of SMP remedies

30. In the context of a full deregulation scenario, Ofcom [5.227] suggests that BT would potentially charge generally higher prices but also in a discriminatory fashion (assumed to be against a regulatory benchmark). Ofcom [5.231] cites a large cohort of over 39% of residential consumers in this context.

¹⁶ Consultation 3.17 and 3.38.

31. In the context of a partial deregulation scenario, Ofcom [5.282] rejects differentiated remedies on the general ground of the positive case that there *is* sufficient homogeneity of competitive conditions across the different customer segments and geographic areas.
32. Four specific arguments are made at this stage:
- The first [5.283] is that dual play customers relying on WLR and SMPF would be undermined; this is similar to the arguments advanced at both the market boundary and SMP assessments albeit it seems to be more focussed on the uses of WLR as CPs than customers.
 - The second [5.284] cites uncertainty of the future marketplace and again this seems to simply mirror some of the forward look undertaken at the SMP stage mentioned above.
 - The third point [5.285] new point is where Ofcom takes dispute with BT that the company is not able to compete effectively against LLU operators in the business space of selling bundled network services. Ofcom [5.286] argues that BT can compete in this space but should not be permitted to do so in a non-discriminatory fashion being evidenced from a Competition Act case (wholesale calls).
 - The fourth point is partly new in that Ofcom [5.287] envisages implementation difficulties for themselves as regulator should they have the task of differentiating remedies. The point was also made prior, [Footnote 220] where it was alleged that BT would not be able to distinguish ‘precisely’ at the wholesale level for CPs who would be re-selling to a separately sourced voice and broadband services compared with a jointly supplied set of services. Indeed with regard to the latter point, Ofcom actually states that this was the basis for treating separately sourced purchasers with bundled customers in the *same* market but elsewhere Ofcom appears to take the line that they *cannot* switch to a bundled product.
33. Ofcom subsequently offers two alternative Scenarios for remedies with no possibility of separate economic markets or of differentiation of remedies in a common market and so both of BT’s lines of suggestions are implicitly rejected at this point.

C. Our detailed response to Ofcom’s Framework and Findings

(i) The general approach is that of ‘tail wagging dog’

34. At this point we do not address the issues or merit of whether or not Ofcom should have fully deregulated *all* WCO; rather we address what we consider to be the defects in the analysis of whether it was appropriate to define a separate bundled market at the retail level which has a parallel at the upstream wholesale level. We consider that as the merit of deregulation is strong irrespective of how one chooses ‘to cut the market’ and the distinction between a separate market, or alternatively, defining a single market with differentiated remedies - does not affect the following observations on what Ofcom has done.
35. As backdrop, we do not consider that generally there are material differences between Ofcom and BT on the underlying facts and trends regarding bundling but in places we do not consider that the use of some of the statistics is entirely fair and on occasion Ofcom makes over reliance on survey statistics. The principal point of difference is that of interpretation

and we do not accept that over 39% of retail consumers are reliant on BT such that the deregulation sought would in any way affect or undermine their position of being provided with cost effective services.

36. The arguments following are made with regard to economic markets, SMP assessment and remedies:

- Ofcom focussed on what might be regarded as three only partially distinct minority groups of customers ('tails') as an invalid reason to ignore the position of the majority of customers and the volume of the three tails is not as great as suggested¹⁷.
- Had Ofcom approached the matter as for example suggested by BEREC [2010] and as applied by ComReg [2013], then it would have found strong prima facie evidence for postulating a bundled retail market and a different conglomeration of upstream geographic and product markets¹⁸.
- The position of dual play customers – which Ofcom in fact includes with those taking a bundle – are likely in any reasonable economic assessment should be put in a joint single market of one-way substitution. In any case, whichever market boundaries were adopted, it should be evident that deregulation of WCO would emphatically not have precluded customers and their suppliers dual sourcing.
- The position of voice-only customers and those outside the LLU footprint are quite irrelevant to the case for deregulating the vast majority of customers who are taking multiple services within the LLU footprint.

37. Further, Ofcom cites immaterial or incorrect associative reasons not to deregulate:

- Difficulties in switching between SMPF and MPF as a reason not to deregulate as the systems for migration are in any case regulated.
- Objections to deregulation based on limitations of future MPF rollout or of fibre services as this proposal is only relevant to copper-based services and which will be the predominant basis of the bundle for the foreseeable future.
- Difficulties of implementation by BT or of monitoring and where a material error is made by Ofcom in asserting that we could not identify CPs purchasing WLR and SMPF jointly.
- Asserting that BT is free to compete on equal terms in the business space for CPs supplying multiple network services to bundled consumers (residential or business) and that the Competition Act case has any bearing on the decision to deregulate of nor¹⁹.

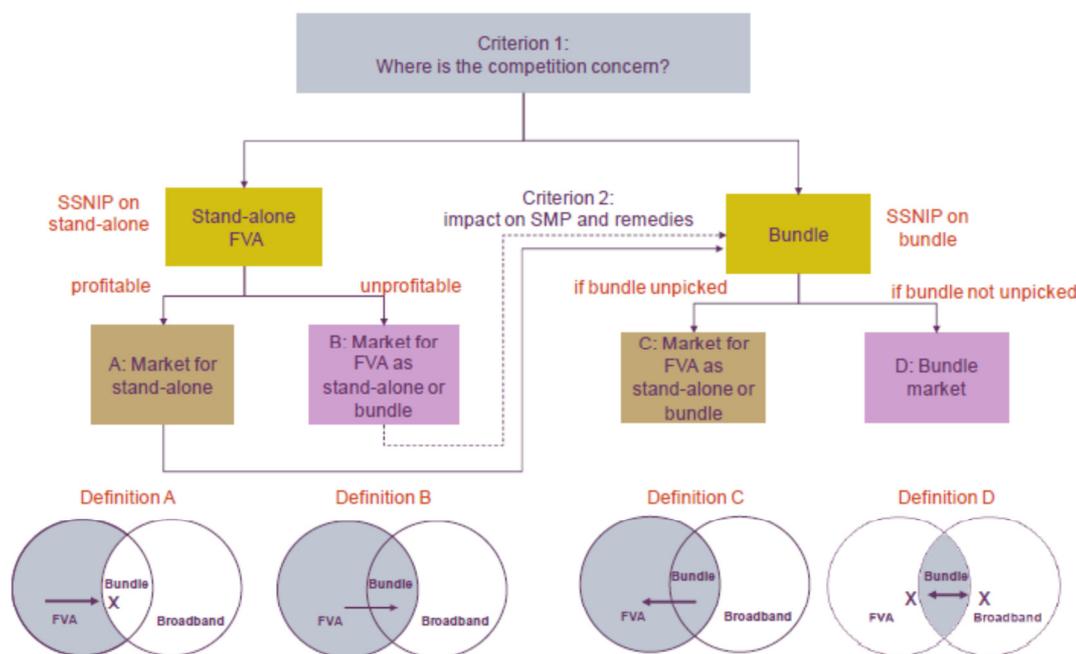
¹⁷ There is in fact overlap between the tails of voice only customers, customers taking voice and broadband from separate suppliers and customers outside the LLU footprint. The last of these is not aligned precisely anyway with Market A of the WBA market whereas the footprint for example of Sky is now at 90% and TalkTalk at about 95%.

¹⁸ BEREC Report BoR (10) 64 available from BEREC website. ComReg Consultations on fixed voice at - http://www.comreg.ie/publications/market_review_fixed_voice_access_supplementary_consultation_to_12_17.583.104471.p.html
http://www.comreg.ie/publications/oxera_report_market_definition_in_the_fixed_voice_access_market_appendix_a.583.104472.p.html

¹⁹ BT is in any case contractually obliged to supply WCO to key MPF operators even within the LLU footprint; Ofcom was fully aware of this position not only from the Competition Act case which they quote but also as noted above from our submissions in the Call for Inputs, so it was wrong to suggest that this was a source of potential harm from BT refusing to supply or charging exorbitant prices for WCO.

38. Ofcom [Footnote 134] alleges that BT argued that the relevant base for consideration of bundling was that of on-line consumers only and/or those who have switched in the recent past. This is a misinterpretation of what we and our consultants submitted. The independent consultant’s report we submitted did indeed quote the statistics which Ofcom alludes to. However, the real substantive point is not about the precise statistics but rather the conceptual framework. We do not agree that a priori there is a good reason to adopt all landlines as the relevant base compared with those who are online. It depends on the nature of the competition issue which is being addressed.
39. This is also the advice given by Oxera to ComReg and which in our view provides a much more holistic and reasonable approach to market boundaries. We reproduce their analytic framework below.

Figure 1 A general framework for FVA market definition



Note: Arrows in the Venn diagrams represent consumer substitution. 'X' represents an insufficient number of consumers switching for that product to be considered a competitive constraint.
Source: Oxera.

(Source: Oxera Report prepared for ComReg 2013)

40. BEREC [2010] made some suggestions as to how the SSNIP test might extended to deal with bundles of services. We consider that these ideas need to be treated with some caution for the reasons set out below. Whilst the SSNIP test has a substantive history and application in merger control, its use in this context is not fully assessed or understood.

41. Non-uniform pricing. The SSNIP test is strictly one of comparing goods which are substitutes in a model of single product comparisons of uniform pricing²⁰. It is an entirely *arbitrary* test (albeit applied with consistency for the purposes of assessing mergers) and not set up for non-linear complex tariffs in which additionally there are both vertical and horizontal complementarities which are characteristics of bundles.
42. Treatment of complementary goods. Where multiple services are being tested which are not substitutes but bound together in a bundle as complements, the implications for consequential geographic market definition is particularly important and we consider that this is not adequately examined by BEREC which effectively only addresses the matter from the perspective of dilution of indirect constraints²¹.
43. Briglauer²² sets out the related issues of bundling and complementarity as follows:
'The practice of bundling and the issue of complementary products does not change the principles of market definition. However, it increases the number of products and combinations between bundles and stand-alone products. One has to identify which products are offered on a stand-alone basis and which ones are offered only within a bundle. Complementarities within bundled products that are only offered as a bundle then become irrelevant (because they are considered as a single candidate product subject to the HMT routine); complementarities between an initial set of products (M) and a (stand alone or another bundled) candidate product will by definition lead to different markets (because the candidate product meets different, albeit complementary demand). Furthermore, because complementary wholesale services are naturally derived from retail demand, market definition based on complementarities could lead to broad clusters alongside the whole value chain (suppressing potentially highly different competitive market constellations).' (Underlining added)
44. As Oxera [2013] correctly notes, variation in product definition could have a profound impact on the assessment of competitive conditions²³. Previously BEREC has suggested that where product market boundaries are unclear this should orientate to a national geographic market but with possible variation in remedies²⁴. However BEREC also stated that 'It is nevertheless emphasised that the geographic segmentation of markets and the geographic differentiation of remedies should not be viewed as two alternative equally applicable options in the presence of uneven developments of competition across the territory. Rather, the result of the market definition is determined by the evidence from the analysis.' (Underlining added)

²⁰ Dobbs I. 2006. Int. J. of the Economics of Business, Vol. 13, No. 1, February 2006, pp. 83–109.

²¹ Paragraph 7 of BEREC 2010 appears to simply leave open the possibility of differential geographic markets based on direct constraints. However all the empirical evidence shows that from the supply side, economies of density are very critical in determining competitive footprints of alternative networks either fully owned by CPs or for example just using LLU.

²² Briglauer, W. Conceptual problems with the hypothetical monopolist test in ex-ante regulation of communications under the new regulatory framework. Journal of Competition Law & Economics, 4(2) December 2007.

²³ ComReg Op Cit. Page 16.

²⁴ ERG Common Position on geographic aspects of market analysis October 2008.

45. In summary, we consider that in some instances, bundling will have an impact on the geographic market which should be carefully assessed prior to the remedies stage. The procedure of market analysis should not make strong presumptions of a single relevant focal product as this may wrongly pre-suppose and unduly influence the outcome of the market boundaries and SMP assessment. It is not helpful usually to have geographically ‘average’ regulation and ‘average’ remedies combining both Type I and Type II errors and where competition is very variable driven supply-side economics.

46. We now turn look at each of the three minority ‘tails’ in Ofcom’s Statement before examining the analysis on remedies which spans all customer groups.

(ii) The position of minority consumers dependent on regulated WCO

(a) Voice-only consumers (residential and business)

47. Of the 39% of residential customers potentially at risk from deregulation, Ofcom [5.189] suggests that 16% are voice only with no broadband. Ofcom [5.189] acknowledges that this number will likely fall as more customers (particularly the older age groups) take broadband.

48. It is common ground that provision of voice across MPF alone is not economic for new customers certainly absent another revenue stream. Our understanding is that where an existing broadband customer supplied across MPF moves to take a fibre service supplied by BT, the CP will however maintain the MPF line for the voice component; the benefit to the CP of this situation is the ability to cross-sell other services across the fibre connection. This is in line with what Ofcom [5.179 c)] suggests.

49. We do not believe that voice-only customers are as dependent on the fixed line as Ofcom supposes as they do have a choice of mobile in almost all areas including rural areas outside the LLU footprint. However, it is an immaterial issue if the point at stake is whether BT can be deregulated on the bundle and maintains obligations outside the bundle which would inevitably include voice-only customers. It would also by default include customers taking voice and broadband from different suppliers with the former on WLR.

50. In this context, we draw attention to the ‘Gap Analysis’ as part of the Cfl which BT submitted at Ofcom’s specific request which looked at two Scenarios:

- Scenario 1 full deregulation at the national level.
- Scenario 2 partial deregulation around WBA market 3 which was deregulated.

51. Whilst at the time Ofcom and BT did envisage other potential scenarios in between these two, it was agreed that these would between them cover the totality of what needed to be addressed. Specifically, it was self-evident that if (as was quite likely), Ofcom was not inclined to go for full deregulation of WCO for all customers nationally, this would not mean that in consideration of Scenario 2 (limited deregulation associated with the bundle) that the assessment of these customers would be automatically subsumed within the first Scenario.

52. Paragraph 97 of our NBMR economic submission of 28th September 2012 (paragraph 12 above] sets out our position here –‘We re-iterate our basic message that if Ofcom has

concerns over minority or residual customers or CPs allegedly reliant on BT for call origination then we would be most prepared to find solutions to meet those concerns but that cannot be a reason not to deregulate when it is fully justifiable’.

74. In other words, even in the event of full deregulation we would have maintained existing legacy obligations. In the event of Scenario 2 this would also have covered maintenance of an obligation equivalent to that of supplying voice only customers for those customers who continued to dual source.
53. Ofcom [5.285] notes that BT supplies WCO to certain CPs including MPF operators to their customers who ostensibly are already within their LLU footprint. We understand that some of these customers are in fact voice-only customers who date back to times when voice was relatively more important and broadband service unavailable.
54. ✂.

(b) Dual-play customers who are multi-sourcing

55. This is estimated to be up to 18% of fixed line residential customers and an unknown number of business customers [5.192 and 5.195] so it is the major portion of the 39% total that Ofcom is concerned about. Ofcom [5.122] takes this percentage of dual play customers from a consumer survey and not from BT statistics and we consider that there is likely some uncertainty as to its robustness. At Footnote 215, Ofcom indicates that only 11% of customers buy voice and broadband from different CPs. The comments below are applicable generally whether the upper or lower figures are taken.
56. There appear to be three strands to Ofcom’s position that dual play customers are both ‘combined’ as a group with those taking a bundle [e.g. Footnote 220] but also distinct in having specific requirements from BT for WCO and which cannot be met from MPF or cable e.g. Ofcom [5.192].

(a) End-customer switching

57. The customers who would not switch to a bundle in response to an increase in price [5.122, 5.192]. The arguments essentially reduce to assertion that if these customers were bothered about getting a cheaper deal with a bundle, then they would already have switched so the fact that they remain behind shows that they are price insensitive/have special requirements.
58. To this argument, we say that relative propensity to switch (earlier or later shifter) says nothing about the relevant economic indicator which is about absolute willingness to switch taking a forward look in response to a SSNIP and here Ofcom provides no evidence to back up its assertions. At 5.44 Ofcom actually suggests that it will apply a full SSNIP test i.e. a 5-10% increase at the retail level which is not ‘diluted’ by the much lower proportion of the value chain accounted for by just call origination. We would have thought that a price increase of this magnitude could well induce many customers to migrate to a bundle.

59. Taken purely at the technical level, there is nothing which can be offered over WLR and SMPF which cannot be replicated over MPF and vice versa. If there are differences, this must arise from the nature of the commercial presentation of the service and not any differences in underlying technical features.
60. To the extent that some dual play customers want specific features of voice-only lines and that these are akin to voice-only customers [5.122 and Footnote 219] then our comments above regarding voice-only customers will apply, namely BT could be obliged to supply WCO at regulated rates and the customers can choose whether or not to take a separately sourced dual play or a bundle.
61. In summary, we cannot detect any evidence that dual play customers are a distinct market although it is quite possible that some would wish to stay as a dual play in the presence of a SSNIP test. To the extent that some would move, then these customers should logically join the much larger bundled market where that is the focus of attention. We note that this point was also made by the independent market research expert whom we commissioned to review all the surveys.
- (b) CPs switching out of SMPF
62. Ofcom [5.179 b)] cites potential difficulties for CPs migrating from SMPF to MPF and that this is not driven by the cost of call origination but potentially the cost of migration between the two upstream inputs [Footnote 258]. We make two observations on this. Firstly, Ofcom itself regulates the charges for migration so to the extent that they are cost oriented, they should reflect true economic signals. There does not appear to be any unnatural or unreasonable impediment to switching to MPF that is discernible from the Statement. Second, there is nothing to stop a customer switching supplier from an SMPF operator to another MPF operator in the same exchange or indeed to Virgin Media's network if it is present in that area.
63. As Ofcom notes, SMPF is declining and the transition to MPF at the margin is not in itself the main constraint which we is relying on so the issue of transition is not material either way. As of June 2015 a new switching process will be in place which suggests that this will be even less difficult than before.
64. In summary, we cannot see that supply-side impediments are material or relevant if they do exist in the occasional case of a particular exchange.
- (c) The relevance or otherwise as to whether BT can identify dual from bundle customers
65. Ofcom raises this issue in a number of places [5.125, Footnote 220 and 5.144]. In essence, we consider that Ofcom is not asking whether or not the bundle is a separate retail market, but rather on how to treat dual play from a potential linkage or spillover at the upstream wholesale level. Ofcom chooses to bind dual play with customers taking the bundle from the assertion that BT needs to 'precisely' discriminate [Footnote 220] at the wholesale level between the two groups.

66. We are not entirely clear what exact conclusion Ofcom would have drawn had it been aware that BT is able to ‘precisely’ discriminate but it appears that this lack of precision is very important in establishing the customer segments are ‘sufficiently homogeneous’ as a pivotal conclusion at 5.126.
67. Currently and due to long-standing regulatory obligations, BT Wholesale (BTW) does not offer a bundled network product but were BT given deregulatory freedoms to do so, it would be able to distinguish precisely contrary to what Ofcom asserts. WCO is sold by BTW and this is linked both to the CP and the WLR line. Similarly, SMPF is sold out of Openreach and BTW would know who the CP was if they took a WBA product including its geographic market and regulatory position. The sale of WCO and all other components that make up the bundle would be processed, tracked and fully monitored through the BTW order handling and billing systems.
68. Ofcom also suggested there could be transparency issues for CPs around which remedies applied on which line. There are several related possible regulatory scenarios depending upon which form of deregulation Ofcom might adopt and in each case transparency is not problematic²⁵.
69. But even if it was the case that BT could not perfectly discriminate between these two groups at the wholesale level we do not see how Ofcom could reasonably have come to the conclusion on dual purchase customers providing the link to conclude of sufficient homogeneity of competition across all customer groups. To come to such a strong conclusion would require granular evidence and not just assertion of the limited ability of consumers and/or suppliers to switch and in any case none has been provided. On the contrary, end-users can and do switch out of WLR + SMPF into MPF and CPs can and do switch out of SMPF into MPF or upgrade customers from a voice only WLR product into MPF.
70. We do not accept that Ofcom has found some well-founded justification which binds the two customer groups together from BT’s inability to price discriminate. However, the result of taking this step is extremely important as the failure to deregulate customers with a bundle largely emanates from the number of dual play customers who need to be served according to Ofcom from separate suppliers.
71. In summary, we consider that even if Ofcom had found evidence of some overlap or spillover of the type described, this would not necessarily be a reason not to deregulate where competitive conditions strongly indicate it should be. The fact that the reasoning and assumptions are both wrong merely undermines the subsequent argument that bundles should not be deregulated.

(c) Customers outside the LLU footprint

72. Ofcom [5.191] puts this at 6% of premises in the UK which indicates that the TalkTalk footprint is currently about 94% of the UK. We discuss the trends in coverage below.

²⁵ Further detail can be provided on request.

73. We agree with Ofcom that remedies for both WCO and broadband services would be required in this very small geographic area were a focal product of the bundle taken and a wider economic market for communications not adopted. Broadband services are already dealt with in a separate market review and has no direct relevance here.

(iii) Ofcom's four additional concerns when examining remedies

74. WLR-based competition [5.230-5.231 & 5.283]. We do not see how this will be affected by deregulation of WCO. It is not economically rational for Ofcom to deny customers the benefits of deregulation and better prices taking a bundle when this can be achieved at no detriment to those who wish to dual source for whatever reason. Nor should Ofcom simply protect CPs who choose not to migrate over to MPF from those CPs who invest in MPF or in completely different networks such as cable. This is in effect an entry subsidy model which is not justified; there is no obvious 'ladder of investment' case for voice services in this context.

75. Ofcom is in any case meant to adopt Greenfield site assumptions for WCO and which takes upstream remedies as given. The aim of the NBMR is to ensure the functioning of the relevant markets in that review including the correct regulation (if any) of WCO. While a holistic view of regulation is welcome, to ensure proportionality of WCO remedies Ofcom has to be consistent with the modified Greenfield approach, i.e. to consider as a given the regulation of all upstream markets other than WCO.

76. Ofcom argues that 'If we were to follow an approach in which lighter remedies were applied in those exchange areas in which MPF is used, this risks undermining competition based on WLR for voice services and SMPF for broadband services'. This is not consistent with the modified Greenfield approach. Competition has to be on the merits and Ofcom is not acting within the guidelines of the Directives to attempt any form of protection to WLR based CPs. It is extremely difficult to see how SMPF could be affected by deregulation of WCO especially as Ofcom itself argues that customers would not switch out of WLR and SMPF into MPF in any case as their needs would not be met by a combined offer.

77. Uncertainties in market developments [5.284]. In our view Ofcom's reasoning is unclear here and it is not at all self-evident why deregulation should result in a weakening of competitive constraints. As Ofcom itself has set out, there are increasing choices for consumers such as VoIP, and for businesses a whole range of technologies as substitutes for traditional voice services. There is always uncertainty about the future but this is a reason not to continue regulation but if anything the converse.

78. BT's ability to compete in the wholesale market [5.285]. We do not consider that Ofcom is necessarily best placed to effectively try to second-guess the competitive position of BT in this marketplace or from selective opinions based on historic events. For the record, Ofcom spent five years investigating BT's position in the Competition Act wholesale calls case and finally issued a case closure with no infringement finding in spite of strong assertions to the contrary when the case opened. If Ofcom had found that BT had infringed competition law

then even this would not in itself justify ex ante regulation; it would only be a possible argument should BT have continued to infringe competition law after being found guilty and effective competition thwarted.

79. The Three Criteria Test includes reference to sufficiency of competition law. If anything, this case shows the precise opposite to what Ofcom is maintaining here; on the contrary Ofcom has the capacity to investigate and if needs be rectify any distortion of competition from abuse of market power using competition law.
80. Implementation and enforcement [5.287]. At no stage did Ofcom contact BT to ascertain whether or not these issues were likely material. As discussed above, we strongly believe that there is nothing substantive here or of material concern and Ofcom's worries are unfounded.