

2. Context

A. The market context for Ofcom's review

30. A proper consideration of the wider landscape in which standalone fixed voice services are provided is essential to understanding the SFV segment, [S&C] and why, therefore, this is not a segment in relation to which SMP regulation is appropriate or proportionate on a forward looking basis having regard to Ofcom's duties.

The UK fixed telecommunications landscape is highly competitive and dynamic and delivers excellent consumer outcomes.

31. Ofcom highlights that the fixed telecommunications market landscape has transformed in recent years and that vigorous competition has led to new services, increased choice and has delivered a range of benefits to customers.¹⁰ Demand for fixed access lines is increasingly driven by demand for fixed broadband, which has made possible a vast choice of other means of communications that are of huge benefit to consumers. This trend is set to continue in the future.
32. Consumers have a wide choice of suppliers for their fixed line telecommunications needs (whether in a bundle or on a standalone basis) including BT, Sky, Virgin Media, TalkTalk, the Post Office, SSE, and Direct Save Telecom. This competition has been so effective that BT has one of the lowest retail market shares of any ex-incumbent operator in Europe. BT lines are currently at a share of 37% of total UK lines.¹¹
33. LLU-based providers such as Sky and TalkTalk have been particularly successful in winning market share from BT, and this form of competition now accounts for 36%¹² of all Openreach access lines (see Chart 1). Ofcom encouraged this type of competition in order that customers would benefit from investment and innovation by competitors to BT who offer genuine differentiation.

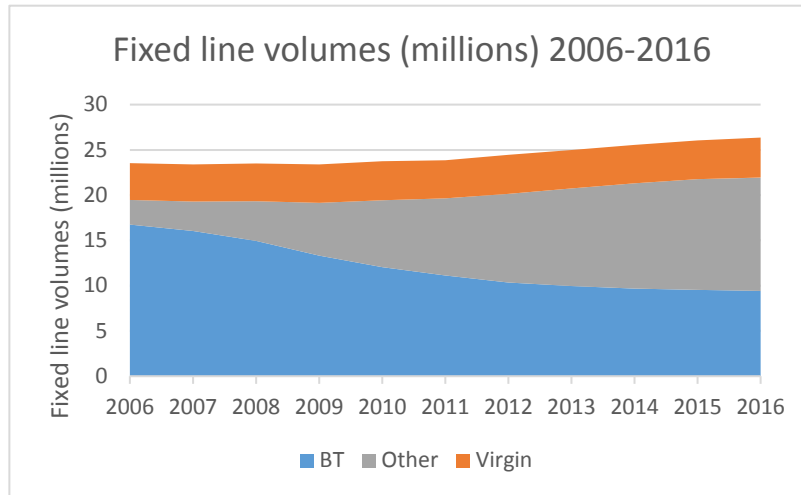
¹⁰ Paragraph 1.1 of Ofcom's Provisional Conclusions Consultation.

¹¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0014/101408/telecoms-data-update-q4-2016.pdf Table 2, page 5 – data excludes EE.

¹² Openreach Key Performance Indicators Q3 2016/17.

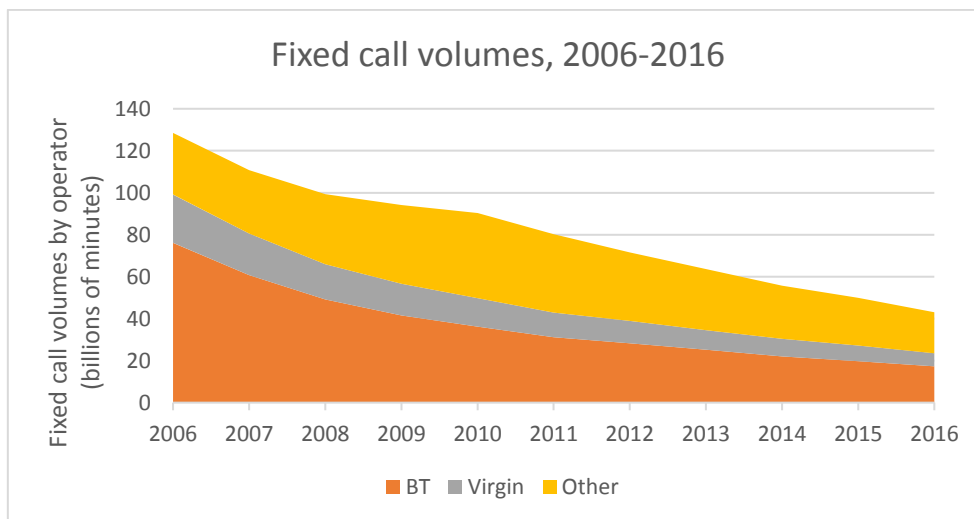
<http://btplc.com/Sharesandperformance/Quarterlyresults/2016-2017/Q3/Downloads/KPIs/q317KPIs.pdf>

Chart 1 – Increasing line competition since 2006¹³



34. Demand for fixed line calls has also declined steeply, as Ofcom has recognised and as shown in Chart 2 below. In parallel, there has been continued growth in mobile calls (as to which see Chart 3 below) and increasing use of internet-based voice services, particularly ‘over-the-top’ services (such as WhatsApp; Skype; Apple’s Facetime; and Google Talk¹⁴).

Chart 2 – Decline in fixed call volumes since 2006 (by provider)¹⁵



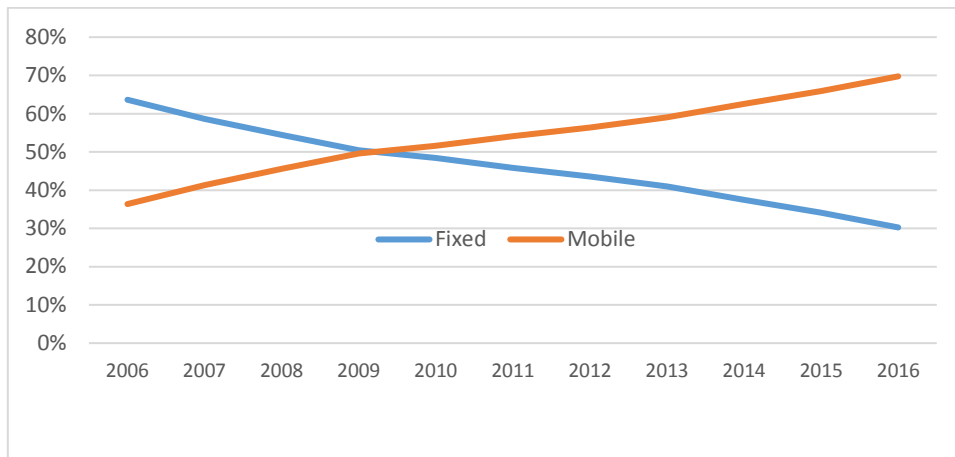
¹³ Source: Ofcom data telecoms updates: <https://www.ofcom.org.uk/research-and-data/telecoms-research/data-updates>

¹⁴ See for example Figure 4.37 of Ofcom’s 2016 Communications Market Report, 4 August 2016: https://www.ofcom.org.uk/data/assets/pdf_file/0026/26648/uk_telecoms.pdf

¹⁵ Source: Ofcom data telecoms updates: <https://www.ofcom.org.uk/research-and-data/telecoms-research/data-updates>

35. The trend of migration of calls from fixed line to mobile has continued to grow in the last decade.

Chart 3 – Continuing migration of calls from fixed line to mobile since 2006¹⁶



36. Put simply, the world of telecommunications is dynamic and rapidly changing and SFV customers are not exempted from many of these changes. As discussed further below, SFV customers have switched to bundles in droves. Equally, the vast majority (70%¹⁷) of SFV customers also have mobile phones and Ofcom accepts that *“there is scope for these customers to make more calls on their mobile phones instead of their fixed lines”*.^{18, 19}

There has been an increase in competition for bundles, which has delivered real consumer benefits, and a focus on competitive pricing of broadband

37. Ofcom highlights the migration of customers to bundles and that people who have bundled are getting excellent value for their money in light of increased average speeds²⁰, increased data packages and additional on-demand television and content services for little or no extra cost.²¹
38. In line with these market developments and competitive pressures, BT has transformed in the last decade. It has developed its propositions to provide voice services alongside access to high speed fixed broadband

¹⁶ Source: Ofcom data telecoms updates: <https://www.ofcom.org.uk/research-and-data/telecoms-research/data-updates>

¹⁷ Footnote 9 and paragraph 3.17 of Ofcom’s Provisional Conclusions Consultation – see also paragraph 129 of this Response which sets out, of these, that 95% of split purchase customers have access to mobile phones as compared to 58% for voice-only customers.

¹⁸ Paragraph 3.17 of Ofcom’s Provisional Conclusions Consultation.

¹⁹ Sections 4 and 5 of this Response set out the implications of these changes for Ofcom’s analysis of the relevant market and BT’s market power.

²⁰ As Ofcom noted in 2015: *Ten years ago fixed broadband services were widely available, but a service only had to deliver a speed of 128 Kbit/s to qualify as ‘broadband’. Now, superfast broadband (capable of delivering speeds of 30Mbit/s) is available to 83% of UK premises. This increase is primarily due to the Government’s BDUK investment programme, building on the commercial rollouts of Openreach’s fibre-to-the-cabinet (FTTC) network as well as Virgin Media’s DOCSIS 3.0 technology. Superfast availability is expected to reach 95% by 2017.* Strategic Review of Digital Communications, Discussion document, Ofcom 16 July 2015 paragraph 4.5.

²¹ Paragraph 1.23 of Ofcom’s Provisional Conclusions Consultation.

connections, as well as moving into the provision of quad play services. BT has invested in migrating customers to fibre speeds, improved home hubs, developed BT's YouView platform, and built a pay TV content business and launched BT Mobile.

39. 9 out of 10 customers²² now purchase fixed voice as part of a bundle and this has led all providers of bundles to devise pricing strategies which reflect bundled purchasing. In particular, the incremental broadband price has (historically) been the focus of competitive offers and price competition has been fierce. As a result, the incremental price of broadband has fallen significantly²³ and packages are now available that are close to or below landline-only packages - e.g. Sky's ADSL broadband for free for a year.^{24,25} The Oxera report explains how bundled pricing strategies such as this can expand consumption and promote competition between firms as well as delivering benefits for customers.²⁶
40. Line rental price increases must be understood in this context. As the market has evolved to almost ubiquitous take up of bundles, incremental broadband prices have been forced down by competitive pressure. All providers have chosen to offset this, to some degree, through line rental price increases. Observed market outcomes are attributable, therefore, to pro-competitive bundled pricing strategies adopted by all CPs, whereby broadband prices have been marketed at a very low price.
41. A low and decreasing incremental broadband price has been effective in attracting SFV customers into the segment. For voice-only customers the decision to take up broadband involves a price quality trade off which, as explained by Ofcom "*requires customers to derive a utility from the higher quality or additional features sufficient to compensate them for the higher price*".²⁷ A decreasing incremental price means that these customers have been more easily persuaded to take dual play even when their expected valuations for broadband are very low (even at zero).²⁸
42. The importance of low incremental broadband prices should not be underestimated for the voice-only group who are late adopters and who may not initially perceive the wider benefits of being online, but once convinced to try, by very low (or zero) additional price offers, are likely to benefit enormously. Put simply, there are significant digital inclusion benefits from encouraging SFV customers to take up broadband (as outlined in section 3 below).²⁹

²² The Oxera Report, footnote 4

²³ Ofcom states, "[c]omparing the price of SFV services against promotional prices for ADSL bundles, the average incremental cost of upgrading from SFV to a promotional ADSL dual-play package has decreased, on average, by 53% (£5.30)". Paragraph 3.34 of Ofcom's Provisional Conclusions Consultation.

²⁴ Paragraph 3.37 of Ofcom's Provisional Conclusions Consultation.

²⁵ Sky has offered free broadband for 12 months to customers taking up a pay TV package with Sky Sports. <http://broadbandinternetuk.com/blog/2233/sky-comnewseason-free-broadband-with-sky-sports>

²⁶ The Oxera report, section 1.1

²⁷ Paragraph 3.36.1 of Ofcom's Provisional Conclusions Consultation.

²⁸ Ofcom relies on research findings and the slowing in the decline of the SFV customer base to argue that price is not a driving factor in switching and that customers do not respond in large numbers to specific dual play offers (paragraph 3.37). Actual market outcomes suggest that the opposite is true: the relative price of a service with and without broadband has driven the take up of broadband by voice-only customers, and BT (and other dual providers) have priced accordingly.

²⁹ [3<]

The SFV market segment is declining rapidly

43. SFV customers have switched to bundles in large numbers and have therefore shared in these benefits. As Ofcom acknowledges: “*The number of SFV access lines, i.e. bought outside a bundle, is in steady long-term decline. This is primarily driven by customers who upgrade to bundles communication services (e.g. dual-play).*”³⁰ [Emphasis added]
44. [REDACTED]^{31 32}
45. [REDACTED]
- a. [REDACTED]
- b. [REDACTED]

Chart 4 – [REDACTED]³³

[REDACTED]

46. Ofcom undertakes no analysis of the likelihood and rate of future migration by remaining SFV customers. Our analysis suggests that switching to bundles will continue, particularly in light of our highly competitive offers and those of our competitors, our targeted products for vulnerable customers (e.g. BT Basic) and digital inclusion initiatives. The SFV customer base will also decline substantially on the basis of remaining life expectancy.³⁴
47. As shown in Table 1 below, [REDACTED]³⁵. In other words, the customers about which Ofcom has expressed its main concerns will increasingly represent a very small proportion of the whole market, whilst virtually all of BT’s consumer base will derive benefit and value from fixed lines via broadband.
48. Ofcom has provided no compelling evidence that the remaining SFV customers are materially different in their propensity to switch. Ofcom highlights survey research indicating that 68% of voice-only respondents said that they did not take a bundle with broadband because they did not use broadband.³⁶ Although Ofcom attributes this finding to the 2015 Jigsaw residential survey (wave 1), the response, in this survey, to the question “Which of these statements best describes the reason you do not take up a bundle of services from your landline supplier that includes broadband?” revealed that only 34% do not

³⁰ Paragraph 4.5 of Ofcom’s Provisional Conclusions Consultation

³¹ Ofcom state that “the rate of decline has slowed less for BT (from 25% in the year up to Q1 2014 to 17% in the year up to Q3 2016) than for other CPs...BT’s rate of decline is, on average, 11 percentage points faster than other CPs”, paragraph A8.17 of Ofcom’s Provisional Conclusions Consultation.

³² Figure A5.11 of Ofcom’s Provisional Conclusions Consultation

³³ [REDACTED].

³⁴ Oxera also reach the conclusion that the rate of decline will not decrease substantially. The Oxera report, section 1.3.

³⁵ [REDACTED]

³⁶ Paragraph 3.36.2 of Ofcom’s Provisional Conclusions Consultation.

use broadband, which is much lower than the figure cited by Ofcom and similar to the proportion mentioning price as an issue (26%) suggesting a high degree of price sensitivity.³⁷

49. Equally, in 2011, [X] of customers did not intend to get broadband or were not sure.³⁸ Now, BT Consumer has only circa [X] of customers who do not have broadband.³⁹ This shows that voice-only customers have changed their minds about their intentions to take-up broadband. There is no “end point” where this effect stops, even if there is some slowing in the rate of migration before broadband becomes almost universal.

³⁷ 2015 Jigsaw residential survey (wave 1). Question FX04C, Table 111.

³⁸ Ofcom Communications Market Review, 2015, Figure 5.25.

³⁹ The percentage will be lower still for other suppliers who do not offer a “voice-only” line.

Table 1 – [REDACTED]⁴⁰

[REDACTED]

50. The evidence above that the SFV customer base is small and declining raises questions about the duration of the alleged issues raised by Ofcom as well as the proportionality of any proposed intervention.

Consumers currently remaining in the SFV segment (and the small numbers going forward) are catered for

51. In addition to BT, there are a number of providers of lines and calls services in the UK (excluding Hull), including, Sky, Fuel, SSE, Italk, Utility Warehouse, Zen, The Phone Co-Op, Sparta Telecom, Pop Telecom and True Telecom.⁴¹ BT has sought to ensure that SFV customers get good value for money. We've developed specific products and offers which have provided important support to customers⁴², in particular, Home Phone Saver⁴³, significant discounts on call plans and BT Basic. Other providers, namely Virgin Media and the Post Office, have also developed specific products for this segment (as described in Section 6 of this Response).
52. In focussing almost exclusively on price competition⁴⁴, Ofcom has ignored the fact that competition takes place on a range of parameters including value for money, choice and innovation. For example, BT has invested [REDACTED] in adding value to our core product and surrounding experience for our customers [REDACTED]. BT has brought calls back to the UK and Ireland currently 86% of our calls are answered in the UK and Ireland, and we're on track to meet our target of 90% of our calls answered onshore by the end of the spring 2017; we now fix faults 24 hours faster than before (3 July 2016) by upgrading our customers to Openreach's Care Level 2; we have also created a free Nuisance Call diversion application with "Junk Voicemail", called BT Call Protect⁴⁵. In addition, all of our line customers get free weekend calls to UK Landlines and 0845/0870 numbers.
53. Our voice-only customers do exercise choice between the products and features that they take from us. A high proportion (87%), for example, have made a change to their promotion in the last 2 years,

⁴⁰ Excludes split supply customers, and as at November 2016.

⁴¹ As at November 2016

⁴² Section 3 of this Response sets out more detail the measures that BT has taken to provide for these customers.

⁴³ As Ofcom notes in the Provisional Conclusions Consultation, HPS is substantially cheaper than standard prices and this product has been actively marketed by BT. Regarding Ofcom's comment that HPS is not prominent on BT's Consumer website, it must be recognised that this service is not designed for customers who have broadband access at home.

⁴⁴ And, in BT's view failing to even properly consider price competition – given Ofcom's failure to give proper weight and assessment to the broader context in which this occurs and, indeed, failure to properly consider that call prices are competitive [REDACTED].

⁴⁵ More information can be found here:

http://www.productsandservices.bt.com/products/phone/call-protect/?s_cid=con_ppc_maxus_vidZ60_T1&vendorid=Z60&qclid=CLrD-dK51tMCFYgp0wodbjAMvw&qclsrc=aw.ds&dclid=CIGFpN051tMCFSON7QodurOF-w

including changes to calling plans and calling features.⁴⁶ They also churn to other providers in particular the Post Office which has targeted our voice-only base.

54. Survey evidence indicates high levels of satisfaction amongst SFV customers indicating that our initiatives are delivering what SFV customers want.⁴⁷
55. More generally, digital inclusion⁴⁸ is an important societal objective, which should not be forgotten in the context of this customer group. As set out in the Government's digital inclusion strategy in 2014:
*"However, to make sure the web is truly for everyone, we need to provide more than just access. We need to equip the whole country with the skills, motivation and trust to go online, be digitally capable and to make the most of the internet. There is a lot of great work going on across the public, private and voluntary sectors to help people and organisations go online, but digital exclusion remains a big issue. Maintaining momentum is not enough. We need to bring together and scale up our efforts, more than ever before. No single organisation can tackle this alone and only strong partnership across all sectors will succeed."*⁴⁹
56. BT firmly agrees with the importance of digital inclusion, and with the sentiment above that no organisation can tackle this issue alone. We do, however, seek to play our part. BT has put in place a number of schemes and measures for our customers to promote the benefits of being online and to assist customers once they have made that transition (see section 3 below). BT continues to believe that voice-only customers can and will continue to take up broadband in order to fully enjoy the benefits of digital inclusion [§<].

The voice market will continue to transform in the future

57. New ASA rules now require CPs to advertise the price for line rental and incremental broadband as a single overall price⁵⁰. Ofcom itself acknowledges that the move away from separating dual play prices into separate line rental and broadband charges will lead to *"less pressure on CPs to increase line rental prices*

⁴⁶ In this regard we note that Ofcom's survey data does not fully take this fact into account: A6.2 of Ofcom's Provisional Conclusions Consultation: *"We note that some customers may engage without switching provider, such as by changing their call plan, and this may not be captured in our survey data."*

⁴⁷ Paragraph 4.9 of Ofcom's Provisional Conclusions Consultation *"Survey evidence also suggests that SFV access customers show a high level of satisfaction with their landline provider. Figure A8.62 in Annex 8 describes the reported levels of satisfaction with the overall landline service provided. It suggests that voice-only customers are generally more satisfied, the majority of voice-only and split-supplier customers reported being very satisfied (74% and 58% respectively, compared to 54% for dual-play)."*

⁴⁸ *"Digital inclusion is often defined in terms of:*

- *Digital skills - being able to use computers and the internet. This is important, but a lack of digital skills is not necessarily the only, or the biggest, barrier people face.*
- *Connectivity - and access to the internet. People need the right infrastructure but that is only the start.*
- *Accessibility - services should be designed to meet all users' needs, including those dependent on assistive technology to access digital services. Accessibility is a barrier for many people, but digital inclusion is broader."*
<https://www.gov.uk/government/publications/government-digital-inclusion-strategy/government-digital-inclusion-strategy>

⁴⁹ <https://www.gov.uk/government/publications/government-digital-inclusion-strategy/government-digital-inclusion-strategy>

⁵⁰ <https://www.asa.org.uk/news/changes-to-broadband-price-claims-in-ads-comes-into-force-today.html>

for SFV services to match increases in line rental prices for dual play tariffs.”⁵¹ Ofcom has failed, however, to fully take into account the implications of this new requirement for how CPs price overall to win customers and the pricing of SFV services in particular.

58. Following the ASA rule changes, line rental pricing cannot be de-coupled from the incremental broadband price; if line rental prices are reduced, this does not jeopardise competitiveness by requiring an offsetting increase in the incremental broadband prices (which was formerly the focus of competitive activity). Firms may, therefore, consider line rental reductions as a further means of competing for voice-only customers alongside product innovation and discounts (although dual play providers may still balance this with promoting further uptake of bundles by keeping implicit broadband prices low). See section 4 of this response and Oxera report at Annex 2 which considers that these obligations alone may address the concerns that Ofcom has raised.
59. The market will continue to transform in the future as services move from the PSTN to All IP (IP voice) and the current copper network moves increasingly to fibre based services. Ofcom considers that any such transformation will be outside of the review period (until 2020/21). However, BT is [X] aiming for all customers to be All IP by 2025. Moving from the PSTN to All IP is an important stepping stone towards a digital future and provides an opportunity for the UK to drive towards universal online participation. [X].

B. Ofcom’s proposed regulation does not meet the relevant legal tests and is in breach of Ofcom’s legal duties

Legal framework – Ofcom’s powers to set SMP conditions

60. Ofcom may set SMP conditions pursuant to section 45(2)(iv) of the Communications Act 2003 (the “Act”), which implements the EU Common Regulatory Framework (“CRF”). Sections 78 to 86 of the Act set out the procedure that Ofcom must follow and Section 91 of the Act provides Ofcom with the power to set retail level SMP conditions⁵².
61. In setting an SMP condition, Ofcom must meet the legal test set out in section 47(2) as well as its general duties⁵³. Section 47(2) provides that Ofcom may only set or modify an SMP condition if it is:
- (a) *objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;*
 - (b) *not such as to discriminate unduly against particular persons or against a particular description of persons;*
 - (c) *proportionate to what the condition or modification is intended to achieve; and*
 - (d) *in relation to what it is intended to achieve, transparent.*”[Emphasis added]
62. Section 3(1) of the Act provides that:

“It shall be the principal duty of OFCOM, in carrying out their functions—

⁵¹ Paragraph 4.65 of Ofcom’s Provisional Conclusions Consultation.

⁵² In particular, section 91 provides that Ofcom may only impose retail level remedies where it is not able to by the setting of access conditions or conditions authorised or required by ss87 -90 of the Act to perform its section 4 duties to fulfil its Community obligations.

⁵³ Contained within sections 3 to 9 of the Act.

- (a) *to further the interests of citizens in relation to communications matters; and*
- (b) *to further the interests of consumers in relevant markets, where appropriate by promoting competition.”*

63. Section 3(3) of the Act provides that:

- “(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—*
- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and*
 - (b) any other principles appearing to OFCOM to represent the best regulatory practice.”*

64. Section 6(1) of the Act provides that:

- “(1) OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve—*
- (a) the imposition of burdens which are unnecessary; or*
 - (b) the maintenance of burdens which have become unnecessary.”* [Emphasis added]

65. Ofcom’s regulatory principles⁵⁴ provide, inter alia, that:

“Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.”

And that:

“Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market”

The imposition of retail level SMP regulation is a retrograde step, for which there is no sound economic or legal basis in this case

66. The imposition of retail level regulation should be a measure of last resort:

“The aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. [...] it is essential that ex ante regulatory obligations only be imposed where there is no effective and sustainable competition” [Recital 5, Better Regulation Directive⁵⁵]

67. Ofcom has not adequately evidenced that BT has SMP in a relevant market. Ofcom’s market definition and analysis of market power is flawed and cannot be relied upon. Ofcom has utilised market definition as an end not the means, has ignored relevant considerations and, its conclusions are insufficiently evidence based (for example Ofcom has failed to consider the importance of historic levels of switching by SFV customers to bundled products, the importance of the competitive and efficient rationale for CPs pricing structures⁵⁶, and, has conducted no proper analysis of the likely rate or future migration of SFV

⁵⁴ <https://www.ofcom.org.uk/about-ofcom/what-is-ofcom>.

⁵⁵ Directive 2009/140/EC.

⁵⁶ See paragraphs 37 – 42 of this Response and The Oxera Report section 1

customers). A finding of SMP would be disproportionate and unjustified. Sections 4 and 5 of this response set out in detail why this is the case.

68. BT has previously expressed its genuine concern that Ofcom had pre-determined the outcome of this consultation process. Amongst other things, Ofcom's public positioning together with the paucity of analysis of relevant market dynamics in its provisional conclusions consultation have led BT to this conclusion.⁵⁷
69. Contrary to sections 3(1), 3(3), 6(1) and 47(2) Ofcom's proposed intervention is not targeted at where action is needed and is disproportionate:
- a. The market for voice services is a well-functioning and highly competitive one. Intervention is not required at all and no SMP finding should be made⁵⁸.
 - b. Ofcom seeks to rely on s.3(4)(i)⁵⁹ which states that it may have regard to "*the needs of persons with disabilities, of the elderly and of those on low incomes*". Ofcom notes in this case the higher age demographic of many voice-only consumers. However:
 - i. Consideration of this factor must be appropriately balanced with furthering the interests of citizens (pursuant to s.3(1)(a)) in other ways for example by promoting digital inclusion.⁶⁰
 - ii. Section 3(4)(i) provides no justification for intervention in relation to split purchase customers who are almost identical to dual play customers from a demographic perspective⁶¹.
 - c. Moreover, the voice-only base is "*de minimis*" in terms of volume and declining. [§<]⁶². Regulation is disproportionate and unwarranted in these circumstances and would involve the imposition of an unnecessary burden contrary to s. 6(1). In this regard, we note that Ofcom has previously taken a decision to deregulate markets with declining volumes due to significant migration of customers to competitive markets (for example the retail market for very low bandwidth leased lines⁶³). It would

⁵⁷ For example: On the date of publication of Ofcom's provisional conclusions consultation, Ofcom publicised the findings of this consultation (BT having SMP and a price cut of at least £5) as a foregone conclusion. In an interview with Sharon White on the BBC Radio 4 today programme on 28 February 2017, Sharon White stated as follows [emphasis added]:

"So if you're a BT customer and you just take a landline from BT, we intend to force BT to cut your bill by at least £5 a month[...]"

"The history that we're dealing with today is that BT is dominant in this market for only-landline customers, people who have been with BT for a very, very long period of time. It is a very discreet, difficult problem for many of the most vulnerable, and we believe that BT needs to act and that is why we're cutting prices today."

"Well, what is interesting, today, these are proposals on which we're consulting, and we have said that we will cut monthly bills by at least £5, but it may be more, and we're keen to get the views of the public and of industry over the next few months and then we will make our final decision on the actual price cut later this year."

⁵⁸ Insofar as Ofcom persists in continuing to consider that the relevant markets are narrower, this analysis also fails (for the reasons set out in section 4 of this Response and The Oxera Report at Annex 2.

⁵⁹ Paragraph 9.35 of Ofcom's Provisional Conclusions Consultation.

⁶⁰ See also for example, s3(4)(e) which provides that Ofcom may also have regard to "*the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom*" [Emphasis added]

⁶¹ See section 4 of this Response.

⁶² [§<]

⁶³ See https://www.ofcom.org.uk/data/assets/pdf_file/0018/63225/final-statement.pdf

therefore be inconsistent and contrary to the bias against intervention for Ofcom to re-introduce retail level regulation in this case where declining volumes and migration patterns are similar and where BT has taken steps to protect voice-only customers who have not migrated.

70. Ofcom's approach, and resultant provisional conclusions, are in breach of Ofcom's s.47(2) duty not to unduly discriminate. Despite identifying a market-wide issue (namely whether certain customer segments are benefitting from competition to the same extent as others, or differences in the level of customer engagement by certain customer segments)⁶⁴, the approach Ofcom has taken to address its alleged concerns is an SMP one which it directs solely at BT. Ofcom then reaches the circular conclusion that because BT is the only CP that it considers has SMP it is not unduly discriminatory to seek to impose the conditions proposed upon it⁶⁵. However:
- a. Ofcom does not consider whether another approach may have been more appropriate to address its concerns (for example a market investigation reference pursuant to the Enterprise Act 2002). In contrast, consumer engagement issues in other sectors have been addressed using a market-wide approach rather than seeking to impose regulation on one market player (for example the recent CMA energy market investigation⁶⁶ referred by Ofgem in 2014).
 - b. Even utilising regulation based on a finding of SMP (which has not been properly substantiated), Ofcom's approach reduces its flexibility in choice of remedy⁶⁷. In particular, to the extent that there is consumer harm arising from market-wide features, Ofcom's remedies will not clearly and directly address the needs of the SFV customers of other providers. This is particularly the case for split purchasers where Ofcom's proposals do not address the cost of standalone broadband supplied by other providers even though this is part of the source of Ofcom's concerns. Put simply, even if Ofcom had substantiated its concern (which it has not), it is applying the wrong remedies to the wrong firm.
 - c. Similarly, Ofcom does not propose to regulate KCom, instead preferring to assume that KCom will follow independently any regulation imposed on BT:

"We note that KCOM has consistently set matching or lower prices than BT for fixed voice line rental and calls packages. We might therefore expect the impact of any regulatory intervention in the rest of the UK to flow through to retail conditions in Hull to the benefit of its consumers. If, subsequent to this review, we had evidence of significant detriment to consumers in the Hull area, we would consider what further action is required, including the possibility of a separate review for the Hull area."⁶⁸

Ofcom provides no evidence to support these assumptions. Ofcom's pricing analysis included at Annex 8 of the Provisional Conclusions Consultation Document does not even include KCom and there is no evidenced rationale provided as to why KCom may follow any such intervention.

⁶⁴ See, for example, paragraph 1.11 of Ofcom's Provisional Conclusions Consultation.

⁶⁵ See paragraphs 9.38 and 9.39 of Ofcom's Provisional Conclusions Consultation.

⁶⁶ <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>

⁶⁷ See section 6 of this Response.

⁶⁸ Paragraph 2.17 of Ofcom's Provisional Conclusions Consultation.

Ofcom has not supported its divergence from the European Commission which considers that the power of imposition of ex ante regulatory controls based on SMP in retail markets should be repealed; the three criteria test is not met.

71. In carrying out a market review, Ofcom is required to take due account of the European Commission's Recommendation on relevant product and service markets ("the 2014 EC Recommendation") and its SMP Guidelines. Ofcom must demonstrate that the three cumulative conditions of the "three criteria test" are met.
72. Ofcom's provisional conclusions are completely out of step with the way that regulation is evolving and Ofcom has not sought to address or justify this disparity in its consultation. Recital 158 of the European Commission's proposed Directive to establish the Electronic Communications Code states:
- "Ex ante regulation imposed at the wholesale level, which is in principle less intrusive than retail regulation, is considered sufficient to tackle potential competition problems on the related downstream retail market or markets. The advances in the functioning of competition since the regulatory framework for electronic communications has been in place are demonstrated by the progressive deregulation of retail markets across the Union. Further, the rules relating to the imposition of ex ante remedies on undertakings with significant market power should be simplified and be made more predictable, where possible. Therefore, the power of imposition of ex ante regulatory controls based on significant market power in retail markets should be repealed"* [Emphasis added]
73. BT agrees with the European Commission's proposal that the power to impose ex ante SMP regulation in retail markets should be repealed. Whilst the proposals are not yet binding, they do emphasise at the least that ex ante regulation, particularly at the retail level, is and should be a measure of last resort. Any decision to impose ex ante regulation at the retail level requires very careful consideration and detailed explanation as to why SMP regulation is appropriate. This omission by Ofcom is particularly striking in circumstances where, as mentioned above, other tools are available which may have better addressed Ofcom's perceived concerns in downstream markets, given the market-wide nature of Ofcom's theory of harm.
74. None of the cumulative three criteria are made out for the reasons set out below. Ofcom has not sufficiently demonstrated that there is a relevant market susceptible to ex ante regulation.
75. *Criteria 1: Presence of high and non-transitory barriers to entry*
- For the reasons set out in section 5 of this Response, Ofcom's assessment of barriers to entry and expansion is incorrect, and cannot be relied upon (in particular in relation to split purchase customers where Ofcom's analysis is next to absent).
76. *Criteria 2: A market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry*
- As set out above, the voice market is currently dynamic and effectively competitive and will remain so in the future absent any retail level regulation of BT (given, particularly, the move to future voice, recent ASA changes and growth in mobile as well as non-traditional means of communication). Ofcom's market definition is incorrect (see section 4) and there is no legitimate reason to impose retail level regulation on BT.

77. *Criteria 3: Competition law alone is insufficient to adequately address the identified market failures.*

Ofcom alleges two market failures, as opposed to specific anti-competitive practices: a lack of consumer engagement and consumer harm resulting from pricing above the competitive level.

In respect of the former, Ofcom has substantially misunderstood the extent of consumer engagement that currently takes place even amongst voice-only consumers and, as set out in sections 4 and 5, SMP regulation of one provider would not be an effective means of addressing any alleged market failure.

In respect of the latter, Ofcom has not sufficiently made out that prices are too high and in particular has failed to take into account the broader dynamics of pricing driven by a pro-competitive response to bundled purchasing which occurs in the market generally (as set out above).

Proposed remedies are disproportionate and non-transparent

78. As set out in more detail in section 6 of this response, whilst no remedies are necessary, in addition to an SMP finding being disproportionate, the remedies proposed are themselves disproportionate, non-transparent (contrary to s.47) and, in relation to Ofcom's behavioural remedy, lack legal certainty (given in particular the unbounded nature of that proposal).

79. Ofcom argues that its proposals will "*promote competition in relation to the provision of electronic communications services by ensuring that users derive maximum benefit in terms of choice, price and quality*"⁶⁹. However, BT considers that Ofcom's proposed remedies have a high risk of bringing about unintended consequences (such as more consumers 'down spinning' to voice-only services or sticking with BT rather than consolidating their unbundled purchases with a rival) which will have the opposite effect to that which Ofcom hopes to achieve, and which would not, therefore, be in the interests of consumers.

⁶⁹ Paragraph 9.36 of the Provisional Conclusions Consultation Document.

3. Protecting older or more vulnerable customers

80. BT's purpose is to use the power of communications to make a better world; this goes to the heart of who we are as a company. In this, one of our core focus areas is bringing the benefits of a connected society to everyone⁷⁰. We are targeting disadvantage caused by social exclusion, lack of education, unemployment and challenges related to age and disability. Since 2014/15 BT has helped 2.6 million people to overcome disadvantage through the benefits that our products and services can bring. Our ambition is to increase this to 10 million people by 2020.
81. As such, BT takes its responsibilities to older and more vulnerable customers very seriously, in respect of price, value for money, quality of service and digital inclusion. BT has been active in this area for many years, and our investment is set to continue.
82. BT offers discounts and tailored products such as Home Phone Saver to our voice-only customers which has assisted in protecting them from increasing headline line rental prices (which apply to all consumers taking a line – whether or not on a standalone basis⁷¹). BT has not increased the price of line rental since July 2016 and has committed to freeze the price of line rental throughout 2017.
83. For the UK's most vulnerable people, BT offers BT Basic⁷². This is a low-cost phone and broadband service which helps people who are on qualifying state benefits to keep in touch whilst on a budget. BT Basic costs £5.10 per month and includes a £10 cap on the cost of making calls. BT Basic + broadband costs just £9.95 per month. It offers eligible customers 12GB of broadband data usage per month – enough to browse the internet for up to 30 mins a day; stream enough video to watch one SD film a month; upload 100 photos to social media per month; listen to 100 music tracks a month and play online games for an hour a week.
84. BT has developed innovative approaches to protecting these consumers and provided value added services. Cognisant of this customer base's particular characteristics, BT pro-actively helps our voice-only customers to benefit from these offers and product innovations, and has found ways of encouraging engagement that are effective (for example direct marketing with easy-to-use reply coupons⁷³). Examples of the products and services that BT offers in this area include:
 - a. a free service which diverts nuisance calls⁷⁴

⁷⁰ <http://www.btplc.com/Thegroup/Ourcompany/Ourvalues/index.htm>

⁷¹ See section 2 of this Response

⁷² BT Basic: http://btplc.com/Inclusion/ProductsAndServices/BTBasic/index.htm?s_cid=con_FURL_btbasic

⁷³ See also sections 4 and 5 of this Response. BT also promotes relevant services and products at exhibitions and via Government support services such as via care workers and in Job Centres. Our monthly newsletter, "Connections", is circulated to approximately 3500 health and social care professionals. It is a good source of information about our products and services for professionals who reach out to vulnerable people on a regular basis.

⁷⁴ BT Call Protect: <https://www.productsandservices.bt.com/products/phone/call-protect>. Over 2 million people have subscribed to this service since it was launched earlier this year.

- b. a free priority fault repair scheme⁷⁵. This gives priority repair over standard faults, 365 days a year, to eligible customers who rely on their home phone as they are unable to leave the house without assistance due to chronic long-term illness or disability.
 - c. a dedicated UK-based vulnerability helpdesk to assist customers who might require additional support. A ‘flag’ can be added to a customer’s account which will route their calls through to the vulnerability helpdesk. Advisors are specially trained on products and processes which can support people with specific impairments. The helpdesk offers a “one stop shop” service for faults and billing enquiries.
 - d. our “protected services scheme” which enables a nominated person to be added to the account and contacted in the event that a bill goes unpaid (for example if the account holder is unable to pay due to hospitalisation) – which can provide comfort to our customers.
 - e. the BT Including You⁷⁶ website which is designed to provide support to people who might have specific access needs. It includes information about BT Products and Services which are tailored towards people who have a disability or impairment. It also includes a section on “getting the best phone package”, which provides information on finding the best phone deal and highlights some things to look out for to avoid bill shock. It also includes a section on “getting online”⁷⁷ which provides advice on how to help a friend or family member get online, links to free courses on internet basics, teaching resources for helpers, helpful videos, tips for ‘online beginners’ and more.
 - f. BT has over 150 “Try before you Buy” centres⁷⁸ around the country which provide specialist advice to this segment, including on BT Basic. These facilities enable people to see and handle our phones and equipment to try to help them find the one that’s right for them, without being pressurised by sales people.
85. BT agrees with the importance of digital inclusion for all and for many years, we have focused on a digital inclusion agenda. During this time, we have tried to make broadband accessible to voice-only customers with compelling pricing and regular marketing in a way which makes things as easy as possible for this group of consumers to respond. BT also offers special deals, highlights the features and benefits of taking a bundled service, and, works with partners to bring the benefits of broadband to these consumers.
86. [§].
87. In addition we also offer BT Basic plus Broadband, a low-cost package for people on income support for just £9.95 a month.

⁷⁵BT Priority Fault Repair Scheme:

http://btplc.com/inclusion/HelpAndSupport/DocumentsandDownloads/BTServices/FreePriorityFaultRepairscheme/Free_Priority_Fault_Repair.pdf

⁷⁶ BT Including You: <http://btplc.com/Inclusion/>

⁷⁷ <http://btplc.com/inclusion/GettingOnline/index.htm>

⁷⁸ Try Before You Buy Centres: <http://btplc.com/inclusion/trybeforeyoubuy/default.aspx>

4. Market definition

A. Introduction

88. Ofcom reaches a provisional conclusion that there are two relevant markets: a market for the provision of SFV access in the UK (excluding Hull) which includes sales to voice-only customers and split purchasers, and is limited to residential services⁷⁹; and a market for the provision of SFV calls (i.e. fixed voice calls sold to SFV access customers) with the same geographic scope.⁸⁰
89. BT does not agree that there are separate markets for SFV services; rather there is a wider retail market for fixed line services in which BT does not hold SMP. Within this wider market there are pro-competitive explanations for the pricing structure which Ofcom is concerned about. Ofcom's approach to market definition is flawed because it fails to recognise these relevant competitive dynamics and market wide pricing practices (adopted by all suppliers).
90. The competition concern identified by Ofcom – namely, lack of engagement preventing SFV customers from benefitting from retail competition to the same extent as dual play customers – is not a sufficient condition for defining a separate SFV market.
91. Ofcom has not shown that the necessary conditions are met to define markets for specific customer groups; indeed the significant migration of SFV customers to bundles indicates that the boundaries of the markets which Ofcom has identified are not stable.
92. Finally, even if it were correct for Ofcom to find separate SFV retail markets, so-called 'split purchase' customers clearly do not form part of that market and should not be subject to the same proposed remedies.
93. BT has instructed Oxera to review Ofcom's market definition and market power assessment in its Provisional Conclusions Consultation Document ("**the Oxera Report**"). A copy of the Oxera Report is included at Annex 2 to this response.

B. There is a wider market for voice services in which the pricing practices Ofcom is concerned about are a rational and pro-competitive response by all firms to effective competition for bundles

94. Ofcom highlights (correctly) that the market definition exercise is "*not an end in itself, but a means to assessing whether there is effective competition and thus whether there is a need for ex ante regulation.*"⁸¹
95. The approach adopted by Ofcom identifies a focal product and then considers whether there is a case for broadening the market by applying the "Hypothetical Monopolist test" (also called the SSNIP test).⁸² Ofcom also considers whether other products should be included in the market if they face the same

⁷⁹ Paragraph 3.3.1 of Ofcom's Provisional Conclusions Consultation

⁸⁰ Paragraph 3.3.2 of Ofcom's Provisional Conclusions Consultation

⁸¹ Paragraph 3.7 of Ofcom's Provisional Conclusions Consultation

⁸² This test considers whether a hypothetical monopolist could impose a small but significant transitory increase in price (a SSNIP) without the price increase being made unprofitable by customer switching to alternative services ("demand side substitution") or due to suppliers diversifying into supply of the relevant product ("supply side substitution").

competitive conditions as the focal products and/or a common pricing constraint.⁸³ Applying this approach, Ofcom finds that:

- a. **SFV access and SFV calls are separate markets** - because Ofcom identifies a difference in competitive conditions between them;
 - b. **dual play services are not in the same market as SFV access and SFV calls for either voice-only customers or split purchasers** - because these customers are unlikely to switch in sufficient numbers to dual play in response to a SSNIP⁸⁴ to provide a competitive constraint on SFV prices;
 - c. **the relevant SFV markets include both voice-only and split purchase customers** - because these customers purchase identical products under identical terms.
96. There are a number of shortcomings to Ofcom's approach which mean that its market definition exercise does not provide a *"means to assessing whether there is effective competition and thus whether there is a need for ex ante regulation."*⁸⁵ In particular, Ofcom's approach does not allow a proper assessment of market-wide dynamics which explains the concerns that Ofcom has identified, nor how these dynamics may change fundamentally following the ASA's intervention⁸⁶.
97. As explained in Section 2 above and in the Oxera Report⁸⁷:
- a. The incremental broadband price has historically been the focus of competitive activity reflecting the significant uptake of bundles and the advantages of bundled pricing in expanding consumption, promoting competition between firms and delivering benefits to consumers.
 - b. Firms have therefore prioritised keeping the incremental broadband prices low in order to be able to compete effectively for customers of bundles (which, at 90%⁸⁸, is by far the largest customer segment) rather than using line rental reductions as a means of competing for voice-only customers (which are a much smaller and dwindling group).
 - c. Competition for voice-only customers has focused, instead, on product innovation (e.g. the creation of fixed price products such as Home Phone Saver) and discounts from headline call plan prices.
 - d. Moreover, the low incremental broadband prices have encouraged take up of bundles by SFV customers consistent with the very significant migration of these customers in recent years and which is likely to continue.
 - e. Overall, competition between dual play providers has resulted in margins which are consistent with a contestable market and it is not appropriate, in this context, to focus on profitability in a narrow segment.
 - f. As explained in Section 2, this competitive dynamic has been acknowledged by Ofcom to deliver strong competition and good consumer outcomes including for the SFV customers that have (in vast

⁸³ Paragraph 3.8.1 and 3.8.2 of Ofcom's Provisional Conclusions Consultation

⁸⁴ Small but significant non-transitory increase in price.

⁸⁵ Paragraph 3.7 of Ofcom's Provisional Conclusions Consultation

⁸⁶ See section 2A of this Response

⁸⁷ The Oxera Report, section 1.

⁸⁸ 9 out of 10 customers buy fixed voice as part of a bundle - The Oxera Report, footnote 4.

numbers) chosen to switch and those who have not switched have seen new products, greater value and supplier choice including from entrants such as the Post Office.

98. Put simply, there is a pro-competitive explanation for the pricing structure which has been observed historically, namely that price competition (within a wider market) has been targeted at broadband and that incremental broadband prices have been driven down by competitive pressure with offsetting line rental increases to maintain overall margins (which are also constrained by competitive pressure).
99. This pricing (and marketing) strategy is a market-wide feature that is not driven by the actions or behaviours of a specific firm, but rather the prevailing competitive dynamics in the market for bundles containing fixed voice. In fact, the outcome Ofcom is concerned about arises as a consequence of fierce competition for bundles, and an element of these bundles (i.e. broadband) becoming the focus of competitive activity. There can be no suggestion that a single firm is exploiting its market power; rather, all firms have rebalanced their prices in this way as a rational response to effective retail competition for bundles.
100. Ofcom's approach to market definition fails to capture these relevant market dynamics and therefore fails to provide an appropriate framework for assessing the issues that Ofcom has identified; in particular the finding of significant market power is unreliable in the context of what are clearly market-wide effects.
101. In particular, the SSNIP test is inappropriate in the context of broader competitive dynamics because if SFV services were a distinct market, a hypothetical monopolist of this market would be able to sustain high prices and, at the same time would be expected to, retain the SFV customer base because, by definition, there is no effective alternative for SFV customers to switch to.
102. This is clearly not borne out by the evidence. SFV lines (across all suppliers) have consistently decreased from 6.1m (Q1 2013) to 2.9m (Q3 2016) – a 52% fall.⁸⁹ Ofcom accepts that the primary driver of this decline has been switching to bundled communications services (e.g. dual play).⁹⁰ Far from discouraging diversion (as one would expect of a firm with market power), suppliers have adopted pricing structures which minimise the incremental price when broadband is added to SFV in order to compete effectively for bundles and this has encouraged further take up of broadband by customers (consistent with digital inclusion objectives).
103. As Oxera state “... *Ofcom's approach to market definition does not provide an appropriate framework for assessing the concerns that it has raised. We consider that a broader framework taking account of these market-wide pricing practices would be a more appropriate, both to understand the nature of any concern, taking account of all relevant competitive dynamics, and also to ensure that any intervention is appropriate and can actually fully address the any concern in a proportionate way.*”⁹¹
104. Ofcom has also given insufficient consideration to the likelihood that the ASA's intervention will fundamentally change these dynamics. The ASA rules effectively prevent the incremental broadband price from being the focus of competitive offers as firms are unable to advertise broadband prices

⁸⁹ A8.15 of Ofcom's Provisional Conclusions Consultation.

⁹⁰ “*The number of SFV access lines, i.e. bought outside a bundle, is in steady long-term decline. This is primarily driven by customers who upgrade to bundles communication services (e.g. dual-play)*”, paragraph 4.5 of Ofcom's Provisional Conclusions Consultation.

⁹¹ The Oxera report, Executive Summary.

separately from line rental prices. Instead, an all-inclusive dual play price must be presented and this has become the focus of price competition.

105. Any reduction in the line rental price is now unaffected by the risk that this would require an off-setting increase in the incremental broadband price which might jeopardise competitiveness. Firms may, therefore, consider line rental reduction as a further means of competing for voice-only customers alongside product innovation and discounts (although dual play providers may still balance this with promoting further uptake of bundles by keeping implicit broadband prices low)⁹².

C. Ofcom's error in defining SFV markets by reference to levels of customer engagement

106. If competition is working well for voice-only customers who take up broadband, and for split purchasers who optimise their existing voice and broadband purchases (which Ofcom accepts), then Ofcom's concern is not about the availability of substitute products and the degree of switching. Rather, the heart of Ofcom's concern appears to be predicated upon the existence of demand side barriers⁹³ which allegedly prevent a residual group of SFV customers from benefitting from retail competition to the same extent as dual play customers. In other words, Ofcom is concerned about how the benefits of competition are distributed across customer groups, not about the existence of competition. It states for example that "*survey evidence suggests that SFV customers have relatively low levels of engagement in the market*"⁹⁴ and "*the evidence we have suggests that SFV access customers typically show low levels of engagement and low willingness to switch suppliers.*"⁹⁵
107. Although SFV customers have been sufficiently engaged to switch to dual play bundles in large numbers and there has been switching to other SFV suppliers (which Ofcom accepts⁹⁶), Ofcom defines narrow SFV markets on the basis of the remaining SFV customers who (in Ofcom's view) are less likely to switch – i.e. it has defined the market by reference to what it perceives to be low levels of customer engagement, whilst at the same time ignoring the engagement that has taken place.
108. Setting aside the question of whether Ofcom has sufficiently demonstrated a lack of engagement by SFV customers (which is discussed in Section 2 and 4), this is not a sound basis for defining separate retail markets. The error in defining markets in this way becomes clear when remedies are considered. If behavioural remedies were successful in addressing demand side barriers then (following Ofcom's logic) the market boundaries would change⁹⁷ because the SFV customer would be more engaged and benefit from retail competition to the same extent as dual play customers. It also follows that Ofcom would

⁹² The Oxera Report, section 1

⁹³ Ofcom identifies difficulties in reaching customers and convincing them to switch away from BT as the main barriers to entry and expansion – i.e. problems with customer engagement.

⁹⁴ Paragraph 4.8 of Ofcom's Provisional Conclusions Consultation

⁹⁵ Paragraph 4.39 of Ofcom's Provisional Conclusions Consultation.

⁹⁶ Paragraph 4.39.1 of Ofcom's Provisional Conclusions Consultation "*Before the introduction of competition, BT had a near monopoly on fixed voice access. Whilst some of its customer have switched away, those that have not may have never switched suppliers, and consequently may be particularly disengaged, whereas those that have switched to other CPs will have engaged with the switching process at least once (i.e. from BT).*"(emphasis added)

⁹⁷ Either a narrow SFV market is now judged to be a broad voice market, or the SFV market is found to be smaller.

continue to identify a separate SFV market up until the last customer in the group is deemed to be engaged which is plainly absurd.

109. Equally, Ofcom's theory of harm – namely that there is a softening of incentives to compete because voice-only and split purchase customers are harder to reach and persuade to switch – is a market-wide issue stemming from customer behaviour, not an issue arising from single firm market power and is not therefore capable of being effectively addressed by SMP regulation.⁹⁸
110. Demand side issues relating to engagement have been reviewed by other regulators without defining separate markets for precisely this reason. For example, as part of its investigation of the energy market, the CMA identified that the intensity of competition varied between customers on different payment methods, due in part to actual and perceived higher costs to engage with, and acquire, prepayment customers compared with other customers. The CMA did not, however, identify distinct product markets for customers using different payment methods but instead identified different market segments of the broader domestic energy retail market.⁹⁹
111. The Oxera report cites other case studies which demonstrate that “*markets do not need to be concretely defined for the regulator to comprehensively analyse the competitive constraints on different market players and within the particular market segments.*”¹⁰⁰
112. A more appropriate approach would therefore be for Ofcom to consider the choices, prices and services available to the SFV segment and their levels of engagement within a wider market for voice services which includes dual play services. BT has no more market power in relation to a disengaged segment than any other market player, and spuriously defining markets to backwardly engineer such a result is not appropriate, nor is it necessary in order to address the alleged relevant issues. As set out in more detail below, at a minimum, Ofcom should recognise that there are important distinctions between voice-only and split purchasers and the implications of this for any proposed SMP conditions.

D. Ofcom has not shown that the necessary conditions are met to define markets for specific customer groups

113. The Oxera Report examines the conditions under which it may be appropriate to define a separate market in relation to a distinct customer group – namely where a hypothetical monopolist could use price

⁹⁸ Ofcom acknowledges that this is a market-wide issue. It states “*SFV customers in general are relatively disengaged and unwilling to switch compared to other types of fixed voice customers.*” (Emphasis added, paragraph 4.45 of Ofcom's Provisional Conclusions Consultation). However, Ofcom also indicates that “*BT customers appear to be particularly loyal and less engaged than non-BT SFV customers*”. Ofcom cites lower switching levels for BT than for non-BT customers to support this view (e.g. Figure A8.56), but this is unreliable in circumstances where BT has more SFV customers than its rivals. Oxera illustrates this by assuming that BT has 100 customers, TalkTalk has 10 customers and customers are equally engaged with a 10% rate of switching (i.e. 10 BT customers switch to TalkTalk and 1 TalkTalk customer switches to BT). On one view, 53% (10/19) of TalkTalk customers would report switching and 11% (1/91) of BT's customers would report switching which might be interpreted as a lack of engagement by BT customers. In fact, customers show the same levels of engagement but the picture is distorted by asymmetric market shares. See the Oxera Report, section 1.4.

⁹⁹ Para 3.40, <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>

¹⁰⁰ The Oxera Report, section 2.1.3

discrimination to segment markets. The conditions require that customers have different demand characteristics, they must be identifiable and there must be no opportunity for direct arbitrage between the customers aimed at undermining the price discrimination.

114. Oxera finds that the third condition does not hold: in fact customers are encouraged to migrate from the SFV customer group to the dual play customer group and therefore any price discrimination is a migration strategy not a market segmentation strategy.¹⁰¹ The bundling pricing strategy described above, when considered against these tests, is evidence of a broad market, rather than separate narrow markets.

E. At a minimum, split purchase customers should be included in a voice market which includes dual play services

115. Ofcom finds that split purchase customers could save between £8.00 and £14.50 by switching to an equivalent dual play service from their provider. These price differences would not be sustainable, in Ofcom's view, if dual play exerted a competitive constraint.¹⁰² Ofcom also highlights that a sizeable base of split purchasers have not switched (1.2m), and annual switching rates are equally low for voice-only and split purchaser customers (3%). Ofcom concludes that the remaining base are unlikely to switch in response to a SSNIP in sufficient numbers to constrain SFV prices to competitive levels.¹⁰³
116. A range of evidence supports the inclusion of split purchase customers in a voice market which includes dual play services:
- a. there has been a significant amount of switching by split purchasers to dual play packages responding to the lower prices that can be achieved by consolidating;
 - b. Ofcom has not supported its assertion that split purchase customers are not optimising (nor is this a sufficient basis for defining a separate market);
 - c. split purchasers are much closer to dual play customers in their ability to access and realise the benefits of competition; and
 - d. suppliers (including the larger CPs) have strong incentives to attract these customers to take up their dual play offers.
117. In short, split purchasers show higher levels of engagement, have historically switched in large numbers to bundles and are highly attractive to the larger CPs who can use a range of channels to reach these customers (as they do for customers across the dual play base). Split purchase customers should be viewed as dual play customers (albeit purchasing dual play products on an unbundled basis).

¹⁰¹ The Oxera Report, at section 2.1.4 explains the distinction as follows: “*The use of price discrimination to migrate customers is a qualitatively different strategy to that of market segmentation. Under a market segmentation strategy the hypothetical monopolist would actively try to prevent arbitrage between the consumer groups. Under a migration strategy, the arbitrage opportunity is highlighted to consumers to encourage switching (indeed, the creation of the arbitrage opportunity is the very purpose of the price discrimination).*”

¹⁰² Paragraph 3.41.1 of Ofcom's Provisional Conclusions Consultation, “*If dual-play was a close enough substitute to competitively constrain the combined prices for functionally equivalent voice and broadband services purchased on a standalone basis by split purchasers, we would not expect these price differences to be sustainable.*”

¹⁰³ Paragraph 3.41.3 of Ofcom's Provisional Conclusions Consultation

There has been a significant amount of switching by split purchasers to dual play packages

118. Ofcom accepts that the number of split purchase customers has been falling over time due to switching to dual play services. It states that such switching “*is likely to explain, to some extent, the material decline over time in the number of SFV customers*”,¹⁰⁴ and “*it is possible that a substantial number of split purchaser customers have switched to dual-play services.*”¹⁰⁵
119. In 2016, Ofcom also reported a 40% decrease in the share of these customers in the residential total: “*Split purchasers can only be supplied by CPs using WLR (with SMPF) on the BT network. The Ofcom Technology Tracker survey estimates residential split purchasers account for up to 11% of all residential landline users in 2016. In 2012, 18% of residential landline users reported being in this category.*”¹⁰⁶
120. This is consistent with a more general trend towards bundling as described in section 2. This switching is entirely consistent with dual play being a competing product for many split purchaser customers.

Ofcom has not supported its assertion that split purchase customers are not optimising (nor is this a sufficient basis for defining a separate market)

121. The fact that not all customers have optimised is cited by Ofcom in support of a separate market for SFV services to split purchasers.¹⁰⁷ More specifically, Ofcom adds average standalone fixed broadband prices (of around £20) with a line rental price of £18.99 and compares this to average dual play prices if split purchasers bundled these services. On this basis, Ofcom identifies that dual play customers are paying on average just over £14.50 more per month (compared to promotional dual play prices) or £8.00 more per month (compared to standard dual play prices).
122. Ofcom’s analysis merely finds that savings are available in principle through consolidation. Ofcom has not, however, undertaken an empirical analysis to identify whether these savings are available in practice by comparing actual prices paid by split purchasers (which will depend on the specific providers from which they purchase broadband and voice) with bundles to which they might switch.
123. In the absence of this analysis, there are a number of reasons why Ofcom may have overstated the savings that would be available to split purchasers in practice (if any):
 - a. First, Ofcom’s own analysis indicates that, for many suppliers, the difference between unbundled and bundled prices is small or non-existent. For BT’s fibre customers, the price difference is between

¹⁰⁴ Paragraph 3.41.2 of Ofcom’s Provisional Conclusions Consultation

¹⁰⁵ Footnote 45 of Ofcom’s Provisional Conclusions Consultation (emphasis added).

¹⁰⁶ Para 4.98 from “*Narrowband Market Review: Consultation on the proposed markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets*”, Ofcom, 1 December 2016

¹⁰⁷ Paragraph 3.41.1 of Ofcom’s Provisional Conclusions Consultation “*If dual-play was a close enough substitute to competitively constrain the combined prices for functionally equivalent voice and broadband services purchased on a standalone basis by split purchasers, we would not expect these price differences to be sustainable.*”

£0.08 and £1.26 per month. For Sky customers, potential savings are given by Ofcom as £0.00 to £3.00. These savings are small, if they exist at all, after allowing for normal switching costs.¹⁰⁸

- b. Second, Ofcom's methodology leads to the impression of higher savings than consumers would actually be able to achieve because (i) it omits split purchaser customers who purchase line rental from CPs other than BT (for example those paying the Post Office offer of £14.99); (ii) it omits smaller providers of standalone broadband such as Plusnet and SSE; (iii) it omits legacy deals (e.g. from Tesco, Tiscali and O2) for standalone broadband which customers may still benefit from.
124. It may be the case, therefore, that for split purchaser customers using these suppliers the savings available are small or non-existent and that some consumers are, therefore, already optimising by not switching.¹⁰⁹
125. As shown in Figure 2.9 of the Oxera report, there are a number of reasons why consumers choose not to buy broadband from the same CP who provides their landline. One third of customers refer to the fact that they get a better deal and 29% report value for money as the reason for their choice to split-suppliers. A significant proportion of customers mention quality aspects of service. This is evidence to support the view that many split purchase customers are already optimising, and are on a deal that they regard as appropriate for them.
126. There are numerous and rational reasons why split purchasers may choose not to bundle. There may be specific non-price benefits to consumers of purchasing in this way and, therefore, it cannot be assumed that they are not well served because they do not appear to be optimising from a price perspective (which has not been demonstrated by Ofcom in any event). These customers may be exercising a different choice in how they purchase to meet their own specific needs. For example, if a consumer wants BT Call Protect, faster repair on their line and unlimited weekend calls (including 0845 and 0870) for free with their Line they might choose BT for the line, but if they just wanted the cheapest available broadband they might choose a supplier whose out of contract price on their lowest broadband pack is less than £13.
127. Other reasons why a split purchaser may not buy in a bundle include:
- a. The availability of broadband deals for pay TV customers with a second provider (e.g. Sky has marketed broadband conditional on the purchase of a Sky TV package);
 - b. Being in contract for their BT line when they chose to take broadband (from a cheap supplier), resulting in a decision to split purchase, rather than to bundle;
 - c. Enabling multiple routes for the resolution of service issues (for example, if a customer had a problem with their line which affects both voice and broadband, being a split purchaser would enable 2 routes to resolve the issue);
 - d. Taking a phone line for a business¹¹⁰ but the broadband is for personal use and the customer needs separate bills for VAT reasons (and vice versa).

¹⁰⁸ The Oxera Report highlights that, in any normal market, there can be frictions that are not caused by customers behaving sub-optimally. Such frictions could include switching costs (such as the time cost of finding and securing a new service), which are present in all markets, and could explain why consumers do not move provider when savings are small. The Oxera Report, section 2.3.

¹⁰⁹ The Oxera Report reaches a similar conclusion in section 2.3

¹¹⁰ See Annex 1, section A of this Response

128. Ofcom has failed to consider, adequately or at all, the importance of these consumer benefits to split purchasing and, in particular, its analysis of whether these consumers are in fact optimising their purchases.

Split purchasers are much closer to dual play consumers in their characteristics, their ability to access and realise the benefits of competition than they are to voice-only consumers

129. Split purchasers share similar demographics and access options to dual play customers. Ofcom accepts that: “[t]here is evidence that split-supplier customers are on average younger and of higher socioeconomic grade than voice-only customers..., and, by definition, have internet access (unlike the majority of voice-only customers). For these reasons, they are arguably more likely to be aware of alternative offers and/or engaged in the market.”¹¹¹ More specifically as regards to:
- a. **functional equivalence**, split purchase customers buy a product which is functionally equivalent to dual play services.¹¹²
 - b. **demand for broadband**, whereas Ofcom asserts that insufficient numbers of voice-only customers are likely to make a price-quality trade-off between voice-only and dual play, (because they do not want broadband) this does not apply to those who already take dual play (albeit unbundled);
 - c. **demographics**, split purchase customers are comparable in age to dual play customers with 35% being under 35, compared to 32% for dual play customers; and only 4% are over 75 (the same percentage for dual play customers).¹¹³ Ofcom finds that split purchase customers are “*older than average*”¹¹⁴ but there can be no presumption that this creates any barriers to switching or optimisation (and Ofcom makes no such argument). The Oxera Report highlights that split purchaser customers also have very similar socio-economic distribution as dual play customers, with a similar level of income and a similar proportion in work.¹¹⁵
 - d. **internet access**, split purchasers, by definition, have internet access and can access information on competing offers online (for example through price comparison websites) and therefore internet marketing is an effective way of reaching these customers;¹¹⁶
 - e. **engagement**, Ofcom claims that “[r]eported annual switching rates are equally low for both voice-only and split-supplier customers (3%) compared to dual play (12%) (see Annex 8, Figure A8.55).”¹¹⁷ However, this is an incomplete and misleading description of the data which also shows

¹¹¹ Paragraph 3.40 of Ofcom’s Provisional Conclusions Consultation.

¹¹² Paragraph 3.39 of Ofcom’s Provisional Conclusions Consultation “*Although split purchasers buy the same SFV access product as voice-only customers, the combination of products that they purchase (SFV and broadband services) could be considered as functionally equivalent to dual-play services.*”

¹¹³ Figure A8.49 of Ofcom’s Provisional Conclusions Consultation

¹¹⁴ Paragraph 4.7.1 of Ofcom’s Provisional Conclusions Consultation

¹¹⁵ The Oxera Report, section 2.2.2

¹¹⁶ Paragraphs 3.40 and 4.7.3 and 4.37.2 of Ofcom’s Provisional Conclusions Consultation

¹¹⁷ Ofcom claims that Jigsaw survey evidence shows that only 3% of split-supplier customers reported switching in the last 12 months. BT has not been able to confirm this figure. Table 66 of Wave 1 of the Jigsaw research “All who have broadband separate from their landline” shows that 50 out of 536 (i.e. 9%) customers switched their broadband in the last 12 months.

that 16% of split purchasers have switched or are considering such action. Elsewhere in the Provisional Conclusions Consultation document, Ofcom recognises that “*split-supplier customers may be more engaged than voice-only customers (15% compared to 6%), with broadly similar levels of engagement to dual-play customers (20%).*”¹¹⁸ but does not adequately address this fact in its market definition analysis.

A more complete review of the data indicates that split purchaser customers are much closer to dual play customers than to voice-only customers:

Table 2: Engagement levels in relation to fixed line services

	Dual play	Voice-only	Difference to dual play	Split supply	Difference to dual play
Engaged ¹¹⁹	20%	6%	-14%	15%	-5%
Engaged and interested ¹²⁰	54%	45%	-9%	50%	-4%
Switched or at least considering switching in the last 12 months ¹²¹	22%	5%	-17%	16%	-6%
Ever switched ¹²²	55%	22%	-32%	44%	-11%
Average			-18%		-6.5%

The Oxera Report also finds that split purchase customers do exhibit a material amount of switching, (i.e. almost 20% have switched in the last 3 years compared to 26% for dual play customers) and that self-reported levels of engagement are similar across dual play and split purchaser customers, as is the perceived ease of switching.¹²³

- f. **tenure**, 44% of split purchase customers have been with BT for less than 5 years, compared to 14% of voice-only customers;¹²⁴
- g. **mobile usage**, 95% of the split purchase customers have access to mobile phones which compares to 96% for dual play customers, meaning that there is no material difference between split purchasers and dual play customers in this regard. Split purchase customers, therefore, have the same opportunity to substitute mobile calls for fixed calls as dual play customers. The Oxera Report also highlights that very similar proportions of dual play customers and split purchaser customers

¹¹⁸ Paragraph 3.40 of Ofcom’s Provisional Conclusions Consultation

¹¹⁹ Figure A8.51 of Ofcom’s Provisional Conclusions Consultation

¹²⁰ Figure A8.51 of Ofcom’s Provisional Conclusions Consultation

¹²¹ Figure A8.55 of Ofcom’s Provisional Conclusions Consultation

¹²² Figure A8.57 of Ofcom’s Provisional Conclusions Consultation

¹²³ The Oxera Report, section 2.2.2

¹²⁴ Figure A8.53 of Ofcom’s Provisional Conclusions Consultation

would respond to a SSNIP on their landline bill by switching some or all of their calls to mobile services.¹²⁵

130. Split purchase customers are the same as, or very similar to dual play customers across all relevant dimensions. Ofcom accepts this, (in particular that split purchasers tend to be more connected and more engaged than voice-only customers) but observes “*that the remaining split purchasers have not responded to date to widely-advertised dual-play offers.*”¹²⁶ As noted above, there are many possible, and entirely legitimate, reasons why this may be the case. It is clear, therefore, that Ofcom’s concern is with the responsiveness and levels of engagement shown by split purchasers. There is no material difference between split purchase customers and dual play customers in this regard. Nor does this provide a valid basis for defining a distinct product market (as explained above).

Suppliers (including the larger CPs) have strong incentives to attract split purchase customers to take up their dual play offers.

131. Ofcom finds that the larger providers of bundled services are much less significant in SFV access.¹²⁷ In relation to split purchase customers, this is only because Ofcom inappropriately focuses on their voice purchases as opposed to their broadband purchases. BT understands that split purchase customers are supplied by the larger CPs when their broadband purchases are taken into account. Indeed the Oxera Report estimates that, other CPs could account for more than 80% of the supply of standalone broadband to split purchaser customers.¹²⁸
132. Ofcom also acknowledges that, “*The majority of these [split purchase] customers could be supplied with MPF if they switched to a dual-play offer from a single CP. The falling share of split purchasers among landline users suggests some retail customers are willing to switch to a dual-play offer.*”¹²⁹ MPF providers (who account for 36%¹³⁰ of all Openreach lines) can, therefore, address split purchase customers, and have just as much incentive to acquire them as they do for dual play customers.
133. There can be no suggestion that incentives to compete for split purchasers are dampened due to their characteristics, as is asserted in relation to voice-only customers, given that those characteristics are much closer to those of dual play customers (if not identical). In particular, the expected value of the split purchasers is similar to dual play customers;¹³¹ nor will the length of the supply relationship be shortened by the age profile of SFV customers.

¹²⁵ The Oxera Report, section 2.2.2

¹²⁶ Paragraph 7.24 of Ofcom’s Provisional Conclusions Consultation

¹²⁷ Paragraph 4.14 of Ofcom’s Provisional Conclusions Consultation

¹²⁸ The Oxera Report, section 2.5.1

¹²⁹ Paragraph .99 Narrowband Market Review Consultation on the proposed markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets, 1 December 2016.

¹³⁰ Openreach Key Performance Indicators Q3 2016/17.

¹³¹ Ofcom states “*There may be relatively limited scope for upselling additional services to SFV customers. This may particularly be the case for voice-only customers who may not have a need for broadband, although less relevant in the case of split purchase customers who could potentially be persuaded to switch to dual play.*” (emphasis added, paragraph 4.43.1 of Ofcom’s Provisional Conclusions Consultation.

134. In summary, not only do split purchase customers themselves have more incentive to switch according to Ofcom data, but suppliers also have more incentive to supply them with services. There is simply no sound basis for including split purchase customers in a distinct market with voice-only customers.

5. Market power

Introduction

135. Ofcom assesses market power in SFV access and SFV calls using the following criteria¹³²: market shares; barriers to entry and expansion; pricing and profitability; and countervailing buyer power.¹³³
136. As set out in more detail below, BT does not agree with Ofcom's market power assessment for the following reasons:
- a. BT does not accept that it is able, and will be able, to set the terms and conditions of sales for SFV services without facing competitive constraints from other providers.
 - b. Ofcom's market share calculations do not provide a meaningful indication of market power.
 - c. Ofcom has overstated barriers to acquisition.
 - d. Ofcom ignores important distinctions between voice-only customers and split purchasers; there can be no suggestion that BT has market power in relation to split purchasers.
 - e. Ofcom's pricing analysis ignores the broader context of switching to bundles which has been driven by lower incremental broadband prices.

B. BT is not able to set the terms and conditions of sales for SFV services without facing competitive constraints from other providers

137. BT must offer attractive dual play services to retain SFV customers who are switching to dual play. [X] to aggressive broadband deals and increased price competition, for example deals with sub-line rental pricing (Sky) – see below - or Vodafone campaigns centring on no line rental.

¹³² Paragraph 4.16 of Ofcom's Provisional Conclusions Consultation

¹³³ BT agrees with Ofcom that countervailing buyer power is not a factor in this analysis, and this is not therefore discussed further.

£15 a month Sky Broadband Unlimited including line rental

This Cyber Monday get our best broadband deal. Reliable and totally unlimited Sky Broadband for just £15 a month when you join without Sky TV. Plus, get a £75 reward to spend wherever you like - online exclusive.

[> More about this offer](#)

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OUR
**BEST
BROADBAND
DEAL**



138. In response to this competitive pressure, BT has made broadband accessible and available to the voice-only base with compelling pricing and regular marketing. We send marketing every quarter, outbound call customers with permissions, and provide existing customers exclusive offers to take broadband¹³⁴.
139. For customers not inclined to switch to dual play services (an ever declining group), BT has created tailored products to defend against losses to competing providers, in particular the Post Office. In fact, a key part of our strategy is looking after customers to whom broadband may not appeal. For example, in 2014, in response to competitive pressure, BT developed Home Phone Saver. It was designed, based on insight, to help customers fix their bill including their call spend. We created a single price product, which provided peace of mind, with a 3 year price freeze that protected against price changes. Ofcom dismisses this significant innovation on the basis of modest take up and an assertion that the product is not “prominently advertised”.¹³⁵ This is inaccurate:
- The product is currently taken by [X] customers and has proved extremely popular with [X]. [X];
 - As well as regular direct marketing campaigns to voice-only customers,¹³⁶ BT’s main sales website also promotes Home Phone Saver (the prominence given to the product on the website reflects the fact that this is not the main marketing channel to voice-only customers although many do have access to the internet) as discussed below. Our efforts to promote Home Phone Saver have produced very impressive outcomes [X].

C. Ofcom’s market share calculations do not provide a meaningful indication of market power

¹³⁴ See also section 3 of this Response.

¹³⁵ Paragraph 4.66 of Ofcom’s Provisional Conclusions Consultation “*A relatively small proportion of BT’s SFV customers take the Home Phone Saver tariff. This implies that relatively few of BT’s SFV customers are sufficiently engaged to have sought out a lower price offer which is available (although not prominently advertised).*”

¹³⁶ [X].

140. Ofcom estimates that BT has a share in excess of 60% for voice-only customers.¹³⁷ In respect of split-supplier customers, Ofcom finds that BT has a share approaching 100%, whilst for split-service customers, BT also has a share approaching 100%.¹³⁸ Ofcom estimates that, across the SFV access market as it has defined it, BT “*has a very high market share of 79%*”.¹³⁹
141. BT does not agree that 79% is a valid market share estimate. In part the error arises from Ofcom’s narrow focus on SFV services which means that Ofcom incorrectly treats customers who have switched to dual play as having left the market. As a consequence, the very significant loss of voice-only and split purchaser customers to dual play services is not captured in Ofcom’s market share estimates for BT, nor the share gained by competitors who focus on multi-play and who have acquired a large number of SFV customer in recent years. Although BT retains a proportion of SFV switching to dual play, its share would be much lower when this switching is taken into account.
142. Further, shares of approaching 100% for split purchase customers suggests that BT has a monopoly when in fact this share is inflated because it excludes:
- a. the wider base of dual play customers who purchase exactly the same services as split purchasers albeit on a bundled rather than unbundled basis;
 - b. the broadband purchases by these customers which are just as relevant to any competition assessment. This again highlights the flaw in defining these customers only by reference to their voice purchase rather than by reference to their dual play (albeit unbundled) purchase.
143. The Oxera Report, section 2.5.1, calculates that BT’s share of the broadband component of split customers is modest at around 17%, [§<]. On this basis, BT does not have SMP in standalone broadband.
144. Although Ofcom’s analysis is flawed for these reasons, it does show BT’s share declining consistent with competitive pressure within the SFV segment and this trend is expected to continue. Ofcom finds that “*BT’s market share has fallen by six percentage points and those of Post Office and SSE have increased by [redacted] percentage points respectively, (to [redacted]% and [redacted]% respectively)*” but attributes this to “*BT customers leaving the market (through taking dual play or decline of overall customer base) at a faster rate than customers of other CPs, rather than being due to switching away from BT to other firms.*”¹⁴⁰
145. Notwithstanding that BT does not see customers who have taken dual play as having left the market, BT is also concerned that Ofcom has under-estimated switching from BT to other firms for voice-only services.
146. [§<]^{141 142}

¹³⁷ Paragraph 4.21 of Ofcom’s Provisional Conclusions Consultation

¹³⁸ Paragraph 4.22 of Ofcom’s Provisional Conclusions Consultation

¹³⁹ Paragraph 4.18 of Ofcom’s Provisional Conclusions Consultation

¹⁴⁰ Paragraph 4.18 of Ofcom’s Provisional Conclusions Consultation.

¹⁴¹ A8.17 of Ofcom’s Provisional Conclusions Consultation.

¹⁴² [§<].

Chart 4 – [REDACTED]¹⁴³

[REDACTED]

147. Our split purchase customers are:
- a. consolidating broadband and voice with other providers
 - b. consolidating broadband and voice with BT.
148. Our voice-only customers are:
- a. choosing another provider for voice services;
 - b. upgrading to a dual play bundle with BT; and
 - c. leaving BT to take voice and broadband elsewhere as their first entry into broadband
149. The Post Office is a key competitor, in the voice segment; Ofcom accepts that their share has increased as ours has declined.

D. Ofcom has overstated barriers to acquisition

150. Ofcom asserts that there are “*barriers to the acquisition of new customers in the SFV access market which may limit the ability of providers to compete effectively and expand in the market.*”¹⁴⁴ This is on the basis that:
- a. SFV access customers typically show low levels of engagement and low willingness to switch suppliers.¹⁴⁵ Ofcom states that BT’s SFV customers have lower switching rates and levels of engagement compared to non-BT customers, based on Jigsaw research.¹⁴⁶
 - b. It is difficult for rival suppliers to find a cost-effective way of identifying customers within the SFV access market which is necessary to run an efficient marketing campaign.¹⁴⁷
 - c. Online marketing is unlikely to be suitable for targeting these customers as a substantial proportion of SFV customers have limited internet access.¹⁴⁸
 - d. BT has the ability to engage in “targeted retention” activities that limits other CPs’ ability to attract new customers¹⁴⁹.

¹⁴³ [REDACTED]

¹⁴⁴ Paragraph 4.36 of Ofcom’s Provisional Conclusions Consultation

¹⁴⁵ Paragraph 4.39 of Ofcom’s Provisional Conclusions Consultation

¹⁴⁶ Paragraph 4.39.2 of Ofcom’s Provisional Conclusions Consultation

¹⁴⁷ Paragraph 4.37.1 of Ofcom’s Provisional Conclusions Consultation

¹⁴⁸ Paragraph 4.37.2 of Ofcom’s Provisional Conclusions Consultation

¹⁴⁹ Paragraph 4.40 of Ofcom’s Provisional Conclusions Consultation

e. BT may enjoy a higher degree of brand loyalty compared to other CPs.¹⁵⁰

151. As a result Ofcom says, “[t]he main barrier to entry and expansion is the ability of other CPs to reach customers and convince them to switch away from BT.”¹⁵¹

SFV customers are more engaged than Ofcom has found; voice-only customers can be engaged; split purchasers are similar to dual play customers

152. In addition to switching activity (described above), our SFV customers are actively engaging in a number of ways. [REDACTED].

Table 3: [REDACTED]

[REDACTED]

153. We consider, therefore, that [REDACTED].

154. There are examples of success in reaching and influencing voice-only customers:

- a. the Post Office has gained around [REDACTED] from a standing start in 2005 indicating that SFV customers have been successfully attracted away from BT. The launch was reported in 2005 as follows “*The Post Office has set its sights on grabbing a “significant slice” of the home phone market as it returns to the sector after an absence of 24 years. Launching its new HomePhone residential service, the group said call costs would be almost 20% cheaper than BT’s. The Post Office said it aimed to sign up one million customers - 5% of BT’s current residential business - by 2008.*”¹⁵² This Post Office is an active competitive constraint on BT in the voice-only segment with a strategy that involves having the cheapest line rental price (since 2011);¹⁵³ three acquisition channels (online, call centre and in-branch); various marketing campaigns which highlight the ease of switching (including a recent radio campaign); and introductory offer of lower prices (12 months at £14.99 per month, £6 per month cheaper than BT Line Rental Plus and £4 less than BT’s standard line rental price).

¹⁵⁰ Paragraph 4.41 of Ofcom’s Provisional Conclusions Consultation

¹⁵¹ Paragraph 4.45 of Ofcom’s Provisional Conclusions Consultation

¹⁵² BBC 10/1/2005. <http://news.bbc.co.uk/1/hi/business/4159823.stm>

¹⁵³ Figure A8.24 of Ofcom’s Provisional Conclusions Consultation.

Just need a phone line?

Want to keep it simple? Free weekend calls to UK landlines including 0845 and 0870 numbers for just £15 a month

- ✓ £6 a month cheaper than BT Line Rental Plus
- ✓ FREE weekend calls to UK landlines (01, 02 and 03) and 0845/0870 numbers
- ✓ Keep your existing number and services
- ✓ UK based customer service
- ✓ FREE to pay your bill by cash or direct debit
- ✓ Low call rates. [Find out more.](#)

- b. SSE is currently offering a line only package at £13.50 per month (of which they indicate that £12 is for line rental) which is inclusive of local and national calls during the evenings and at weekends. Alternatively, customers can choose a Talk Anytime package which is inclusive of calls to local and national numbers at any time, and includes calls to 20 nominated international destinations.¹⁵⁴ SSE has been able to build on its presence as a household supplier in energy and extend this into telecoms, including to voice-only customers.
- c. BT has found good levels of responsiveness for campaigns aimed at voice-only customers (for examples in relation to BT's Home Phone Saver product). [8].
155. These examples show that such customers can be reached and persuaded to switch and the segment is clearly not as ossified as Ofcom is suggesting.
156. Split purchasers are virtually identical to dual play customers as an acquisition proposition as explained further below.

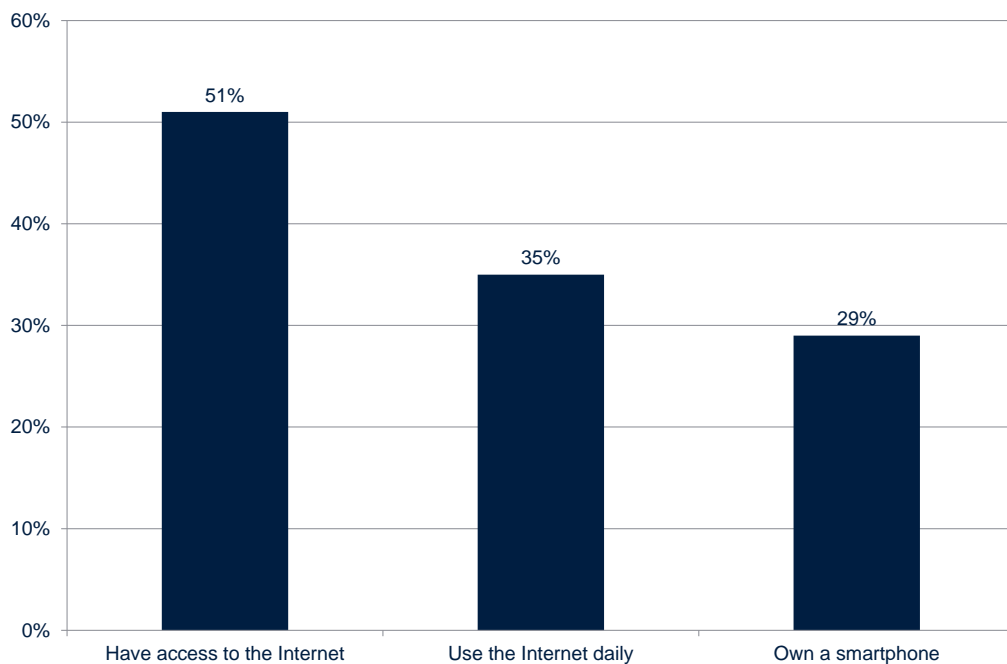
Many voice-only customer have access to the internet

157. Ofcom highlights “[o]nline access to information on competing offers” as a key feature of SFV customers and states “[a]mong SFV customers, a substantial proportion of voice-only customers (as opposed to split purchase customers) do not have direct broadband access, although some have internet access via mobile phones and some may have access via family, libraries or internet cafés.”¹⁵⁵ No evidence is provided by Ofcom to support the assertion that “a substantial proportion” of voice-only customers do not have internet access

¹⁵⁴ <https://sse.co.uk/phone-and-broadband/talk#Phone-packages> accessed on 13 April 2017.

¹⁵⁵ Paragraph 4.7.3 of Ofcom's Provisional Conclusions Consultation

158. In fact, just over half of voice-only customers have access to the internet and over a third use it daily. Also, 29% of voice-only customers own a smartphone.



The Oxera Report, Figure 2.8

159. Oxera conclude that “*many voice-only customers would be able to access market information, such as price comparison websites which are an important source of information. The barriers to consumer engagement in the voice-only segment are less than Ofcom assume.*”¹⁵⁶

Describing BT’s competitive activity as a barrier to acquisition is inappropriate; nor can a strong brand be a source of concern

160. Ofcom unfairly badges BT’s competitive activity (targeted retention activity) as a barrier to other CPs attracting customers. The fact that competitive activity by BT makes it harder for CPs to attract customers is not a competition concern – it is competition. There is also a logical inconsistency between Ofcom’s assertion that take up of Home Phone Saver has been low and, at the same time, that BT is creating barriers to acquisition through its retention activity. It would appear that BT is doing something wrong both if it competes and if it does not compete.
161. As regards brand, BT is deemed to have market power in part because it has brand loyalty and is a “trusted brand”. It is not the case that this loyalty is undeserved. As Ofcom accepts, SFV customers indicate very high levels of satisfaction, of whom 79% are with BT.¹⁵⁷ Ofcom should not penalise suppliers for

¹⁵⁶ The Oxera Report, section 2.4.3

¹⁵⁷ Paragraph 4.9 of Ofcom’s Provisional Conclusions Consultation “*the majority of voice-only and split-supplier customers reported being very satisfied (74% and 58% respectively, compared to 54% for dual-play).*”

successfully building brand value or for being trusted where this is attributable to high levels of customer satisfaction with the service provided.

162. Further, the key competitors for voice-only customers have strong retail brands themselves (e.g. Post Office). YouGov Brand Index ranks the Post Office as the second highest utilities and service brand between January and December 2016.¹⁵⁸

E. Mobile has not been adequately considered as a constraint on landline services including for voice-only customers

163. The Jigsaw wave 1 survey finds that 69% of those with a landline but no broadband own a mobile phone. Moreover, the same survey indicates that, if the overall landline price increased by 10%, a significant proportion of voice-only customers (11%) would be likely to switch some calls to mobile; 8% would be likely to switch some calls to email/text messages/instant messages; and 10% would be likely to give up their landline altogether.¹⁵⁹ Ofcom has not adequately considered the degree of constraint exerted by mobile including in relation to landline service taken by voice-only customers.

F. There is no market power in relation to split purchasers

164. Split purchasers are virtually identical to dual play customers as an acquisition proposition. They show:
- high levels of engagement – Ofcom accepts that “*split-supplier customers may be more engaged than voice-only customers (15% compared to 6%), with broadly similar levels of engagement to dual-play customers (20%)*”¹⁶⁰;
 - have historically switched in large numbers to bundles – Ofcom accepts that “*it is possible that a substantial number of split purchase customers have switched to dual-play services*”¹⁶¹. 44% of split purchasers have switched, similar to 55% for dual play customers¹⁶²;
 - are highly attractive to the larger CPs (including MPF providers).¹⁶³ The value of these customers to CPs is similar to dual play customer which drives high willingness to compete and high willingness to incur acquisition costs;¹⁶⁴ and

¹⁵⁸ <http://www.brandindex.com/ranking/uk/2016-annual/category/utilities-services>

¹⁵⁹ Jigsaw survey wave 1, table 639 (p.1011), table 661 (p.1048), table 672 (p.1065).

¹⁶⁰ Paragraph 3.40 of Ofcom’s Provisional Conclusions Consultation (emphasis added)

¹⁶¹ Footnote 45 of Ofcom’s Provisional Conclusions Consultation (emphasis added)

¹⁶² Figure A8.57 of Ofcom’s Provisional Conclusions Consultation.

¹⁶³ Narrowband Market Review, Consultation on the proposed markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets, Ofcom 1 December 2016 paragraph 4.93. Ofcom indicates that voice-only customers might be uneconomic for MPF-providers because such customers only offer one revenue source having rented an exchange line (voice and not broadband). MPF providers do, however, compete for split purchase customers who offer two revenue sources in common with dual play customers.

¹⁶⁴ Ofcom’s analysis of CPs’ profitability in Annex 5 of Ofcom’s Provisional Conclusions Consultation only reflects the economics of attracting a voice-only customer, but the economic case is much better for dual play customers as is clear from the history of losses to CPs which has occurred over recent years.

- d. can be reached using a range of channels, in particular internet marketing.
165. Ofcom appears to place some weight on “CPs’ views on customer acquisition” but these CPs have clearly only been asked (or have given answers solely for) voice-only customers, rather than split purchasers. For example, Ofcom quotes a CP as having “no appetite to re-enter the market”; mentions the older age profile of customers; describes channels for voice-only customers (and that these are restricted); and describes a voice-only proposition offered by a competitor. None of these barriers apply to split purchasers.¹⁶⁵
166. In short, competition from large CPs who focus on multi-play services is being disregarded by Ofcom although these suppliers have acquired a large number of split purchase customers in recent years. The Jigsaw study on which Ofcom relies extensively in coming to their provisional conclusions does not suggest there are material impediments in this regard. As set out above split purchasers exhibit a material amount of switching and high self-reported levels of engagement (similar to dual play customers on both metrics). Split purchasers currently comprise just under [redacted] of BT’s “SFV” customer base, and are forecast to form around a third of such lines over the forward-looking period under review.

G. Ofcom’s pricing analysis ignores the broader context of switching to bundles which has been driven by lower incremental broadband prices

167. As indicated in section 2 and 3 above, line rental price increases must be understood in the broader context of the pro-competitive strategy (adopted by all of the main CPs) to offer attractively priced bundles where competitive activity has focused (historically) on the incremental broadband price. The ASA rules provide a greater opportunity going forward for competition in the voice-only segment to focus on the line rental price (in addition to other means of competing).
168. Dealing with each of Ofcom’s arguments on pricing:¹⁶⁶
- a. *prices are significantly above costs and have been diverging further over recent years.* This divergence, however, has narrowed in recent years as our cost to serve the base have increased reflecting the additional value that we have offered (e.g. fixing faults 24 hours faster by upgrading to Openreach’s Care Level 2 and bringing back calls to the UK with 90% of calls answered onshore). More generally, this position has not come about due to the exercise of market power but rather due to a pro-competitive pricing strategy responding to bundled purchasing which has been adopted by all of the main CPs.
 - b. *BT’s prices also appear to be above those of other operators without this materially affecting its position in the market.* [redacted];
 - c. *there is evidence that BT acts as a price leader, with other CPs following its increases in line rental in terms of both timing and magnitude;* There is no reliable evidence of BT playing a price leadership role. Oxera has reviewed the limited evidence presented by Ofcom and concludes that (i) Ofcom’s sample is too small to reach meaningful conclusions (ii) in recent years BT has implemented price

¹⁶⁵ Paragraph 4.74 to 4.79 of Ofcom’s Provisional Conclusions Consultation

¹⁶⁶ Paragraph 4.67 of Ofcom’s Provisional Conclusions Consultation

changes first but in prior years other CPs have changed their prices first, and price changes do not follow an annual adjustment pattern in any event.¹⁶⁷

- d. *price discrimination to offer greater discounts to more engaged customers (for example, through its Home Phone Saver tariff) allows BT to increase prices for (largely unengaged) SFV customers whilst limiting the risk to the revenues it earns from more active customer groups.* Given the active marketing by BT of the Home Phone Saver product, there can be no suggestion of a price discrimination strategy. Rather BT created this product in the face of competition from the Post Office.
- e. as regards calls, Ofcom itself states that, *“on balance, we have not sought to draw any conclusions as to market power on the basis of the pricing evidence alone.”* Ofcom does not find any evidence that BT’s prices are higher than competitors’, or that there is any question of “price leadership”.

169. More generally, Ofcom estimate that BT’s rental charge has increased in real terms by 46% since December 2009, and for Virgin Media by 49%.¹⁶⁸ However, line rental is purchased in order to access usage services, in particular to make and receive voice calls and access broadband enabled services. When this is recognised, the data shows that in real terms, customers are not paying more for their fixed services than when the retail market was deregulated in 2009, or in 2007/8 (the earliest year for which Ofcom shows data).
170. For the circa 90% of customers who have broadband, Ofcom data shows that average monthly charges for dual play bundles (including promotions) have been largely flat in nominal terms.¹⁶⁹ Whilst prices have been flat, the broadband speeds which CPs have been supplying broadband have increased hugely, as has the level of usage so value adjusted prices have gone down.¹⁷⁰
171. As Ofcom also shows in Figure A5.4, revenue per month earned by BT from line rental and voice calls was £25.34 in 2007/8 and £23.67 in 2015/16 – this is a decrease of nearly 7% in real terms. This has largely come about due to changes in the market where customers are making fewer narrowband voice calls and instead making other forms of voice services, as well as making more calls over mobile phones. The reduction in the volume-based charges means that CPs have to recover their fixed costs from usage invariant charges.
172. In addition, as Ofcom reports, BT has been making improvements in its retail offer, see section 2 of this response for detail.

¹⁶⁷ The Oxera report, section 2.4.5

¹⁶⁸ Paragraph 4.53 of Ofcom’s Provisional Conclusions Consultation

¹⁶⁹ Ofcom Communications Market Report 2016, Figure 4.4.

¹⁷⁰ For example, usage increased nearly 400% from 17GB per month in March 2011 to 82GB per month in June 2015. Ofcom Communications Market Review 2016, Figure 4.39.

6. Proposed Remedies

A. Introduction

173. BT's position is that Ofcom has failed to define the relevant market or markets and in turn appropriately assess BT's market power; however, even if Ofcom had adequately defined the market and appropriately assessed BT's market power, there would be no justification for the intrusive nature of the remedies proposed.
174. The key issue is not whether BT has SMP but whether: (a) customers with particular characteristics (those who are relatively less engaged) are benefitting as much from the highly competitive retail voice market as customers with different characteristics (those who are relatively more engaged); and (b) whether the relative level of engagement is at a level which justifies a given intervention.
175. Split purchasers can be ruled out from any such discussion because Ofcom has not demonstrated that they are acting irrationally or are otherwise less engaged than other dual play customers¹⁷¹. In any event, for this group of customers, the most effective behavioural interventions cannot be delivered by BT acting in isolation.
176. For voice-only customers, Ofcom has underestimated the degree of engagement that these customers currently exhibit, and are likely to continue to exhibit in the future, absent any regulatory intervention, if current trends continue (for which there is no compelling evidence they will not). A correct assessment of engagement and other future trends demonstrates the disproportionate nature of Ofcom's remedies.
177. Ofcom's proposed price control remedies risk unwanted and unintended consequences for competition and consumer welfare, through:
- a. dis-incentivising voice-only customers from migrating to dual play bundles, thereby precluding these consumers from the benefits that would otherwise flow contrary to digital inclusion objectives;
 - b. unwinding the significant progress already made in relation to digital inclusion by incentivising customers to spin down from dual play to voice-only products; and
 - c. reducing the incentives of BT's rivals to compete by removing or significantly reducing available margins, (even when coupled with behavioural remedies), thereby limiting choice and stalling innovation.

The remedies are therefore contrary to Ofcom's s3 duties to further the interests of citizens in relation to communication matters, and to further the interests of consumers¹⁷², where appropriate by promoting competition.

¹⁷¹ See sections 2 and 3 of this Response

¹⁷² See section 2B of this Response. BT also notes in this regard that pursuant to section 3(5) of the Act, Ofcom must have regard in performing its section 3 principal duties to the interests of consumers in respect of choice, quality of service and value for money as well as to price - which is only one relevant parameter.

178. If, however, Ofcom continues to pursue the imposition of an SMP remedy or remedies (incorrectly in BT's view), these adverse consequences must be fully assessed and minimised such that the remedies implemented are limited to:
- a. behavioural communication remedies that are the minimum necessary to encourage engagement. Such remedies should not seek to directly change outcomes, as this would not promote greater engagement and may have perverse outcomes; or alternatively
 - b. keep any starting price adjustment and subsequent control to a minimum to provide maximum room for continued and effective competition; and
 - c. extend only to voice-only customers.
179. Any remedies of this nature, in particular price control, should be assessed in the context of the propositions already in the market, for example the proposition introduced by Virgin Media targeted at SFV customers, and the active marketing by the Post Office of a low price landline only offer which specifically targets BT's customers¹⁷³. In particular, they should preserve the potential for competition and protect the interests of citizens and consumers. In any event, the Virgin Media and Post Office initiatives demonstrate that the market is not in need of significant or obtrusive intervention to address engagement issues.

A. Ofcom has not adequately supported the need for SMP regulation either legally or substantively

180. To achieve a consumer protection end (the protection of vulnerable and elderly customers), Ofcom has mischaracterised an alleged problem relating to the levels of engagement of a sub-set of consumers, as a problem relating to single firm market power. If there are consumer engagement issues, they are (by definition) not the result of operator behaviour (as Ofcom itself recognises – see 3.128.2), but the symptom of a market wide demand side feature.
181. This market feature (to the extent it exists) affects and has implications for all operators in the industry. Addressing any such concern would require an industry-wide approach, not a remedy solely targeted at a single operator.

B. There is no basis for imposing remedies in relation to split purchasers

182. There is no basis for the imposition of SMP remedies in relation to split purchasers because Ofcom has not demonstrated that BT enjoys SMP in relation to these customers. Ofcom (wrongly) finds that split purchase customers are not optimising their purchases and have not responded to widely advertised dual play offers. However, this is pure speculation and Ofcom provides no compelling analysis or evidence to support this position (see Section 4 above).

¹⁷³ See section 5 of this Response.

183. To the extent that Ofcom provides any justification this is limited to suggesting that switching rates for these customers is lower than Ofcom would expect given the savings that Ofcom claims are available to these customers. However, Ofcom has not substantiated that these savings are available in practice to split purchasers, nor that they are sufficiently large to drive incentives to switching. In any event, switching rates, are not in and of themselves evidence of a failure to engage and optimise.¹⁷⁴ Indeed, consumers may be engaged and choose not to switch particularly if the gains from doing so are modest. Ofcom fails to explore the reasons why these customers have chosen to split their line and broadband purchases, in particular the range of factors which may explain such a decision.
184. Even if Ofcom could successfully show that split purchase customers are disengaged and therefore not optimising their telecoms purchases, this is not in and of itself a sufficient basis for defining a separate market (as discussed in Section 4). Even if Ofcom were to persist with a market definition based on relative engagement levels (which is analytically incorrect in this context), it cannot limit the scope of this market to only the voice purchase when disengagement (and the alleged problems this creates) applies just as much to the split broadband purchase.
185. The flaws in Ofcom's approach to this group becomes evident when remedies are considered:
- a. price control: Ofcom's focus on the SFV-access and calls purchases by split purchasers in isolation of their broadband purchases, is asymmetric and inappropriate if, due to their disengagement, the split service provider is able to increase its price for the standalone broadband service; and
 - b. behavioural remedies: cannot be justified for split purchase customers in circumstances where BT has no visibility of these customers' broadband purchases and would be unable, in isolation, to properly devise a sensible information remedy which would encourage these customers to select a better value product that suits their needs.^{175, 176}

C. For voice-only customers, Ofcom's proposed remedies are disproportionate

186. Ofcom has considerably underestimated the degree of engagement that SFV customers currently, and on a forward looking basis, will exhibit both in connection with our offers and services, as well as those of our rivals:
- a. a vast number have switched to dual play bundles in recent years;
 - b. our voice-only customers have also churned to competitors, [redacted];
 - c. [redacted];
 - d. [redacted]; and
 - e. engagement is likely to continuing for the period covered by the proposed remedies.

¹⁷⁴ BT observes that the switching levels for this segment are considerably above those for pay TV retail markets, where Ofcom has declined to regulate.

¹⁷⁵ The situation is further aggravated by the asymmetry and therefore unfairness that a split-supplier of Broadband, knows that there is voice line provider, as otherwise the Broadband service could not be provided.

¹⁷⁶ Further, BT unlike other providers, through its Universal Service Obligations, has no option but to supply a line rental product creating asymmetry between service providers.

187. A range of factors suggest that this level of engagement will be maintained or increase going forward, including BT's desire to migrate these customers to dual play services, both for commercial reasons and future network migration (i.e. closure of BT's PSTN and move to IP services over broadband), and the need to react to competition from mobile and from SFV providers, including the Post Office, through the continued promotion of services like Home Phone Saver.
188. If engagement is assessed correctly, on both a current and prospective basis, with other future trends properly taken into account, Ofcom's proposed remedies are clearly disproportionate and unnecessary.

D. Ofcom's proposed conditions could have serious and unintended consequences

189. There are a number of unintended consequences of Ofcom's proposed conditions.
190. A reduction in the price of SFV services will:
- a. at best, freeze the existing SFV customer base by making migration to bundles very much less attractive; and
 - b. worse, increase the size of the SFV customer base by incentivising dual play customers to spin down to SFV services.
191. In both cases, these effects arise because the incremental price of broadband becomes higher relative to the price of SFV services, especially SFV-access services.
192. This will work against the grain of trends to date which has delivered a significant and ongoing migration of SFV customers into a market segment which Ofcom regards as competitive. It also has adverse consequences from a digital inclusion perspective which Ofcom has not assessed, and which has significant consumer detriment implications.
193. In the case of split purchasers, there is the further risk that a price reduction will act to deter consolidation of purchasers with a single provider by these customers through the elimination of any price differential between bundled and unbundled offers (to the extent that such a differential exists). In short, providers of bundles may find it more difficult to persuade split purchasers to consolidate in circumstances where the gains from doing so are significantly reduced or eliminated. Put simply, the price reduction will reduce incentives of voice-only customer to switch into bundles and of split purchasers to consolidate with rivals; both effects are contrary to Ofcom's objective of protecting customers and stimulating greater competition.
194. Ofcom suggests that benefits may be available even after a price reduction from more vigorous competition including further price reductions as well as benefits from product differentiation by reference to service features.¹⁷⁷ These price and non-price benefits are not explained further by Ofcom, nor does Ofcom assess the likelihood of such innovation post price cuts.

¹⁷⁷ Paragraph 6.7 of Ofcom's Provisional Conclusions Consultation

195. In practice, customer engagement may fall following the imposition of a price cap which may create a moral hazard through a safe haven effect because SFV customers may feel protected and that they do not therefore need to engage and, for example, shop around for a better dual play deal or better line and calls package. This may compound other barriers to stimulating competition following a price reduction, in particular, lower profitability associated with winning customers.
196. More generally, these benefits are hard to envisage after significant price cuts and in the context of a declining market, the age profile of customers and the limited share of household budgets accounted for by SFV services (as accepted by Ofcom).¹⁷⁸
197. These adverse effects and perverse outcomes are contrary to Ofcom's s3 duty to further the interests of consumers, where appropriate by promoting competition¹⁷⁹.

E. If Ofcom continues to seek to impose regulation these adverse consequences should be minimised and any conditions should be proportionate

Prospect of success of behavioural remedies if implemented without a price reduction

198. Behavioural remedies have a greater prospect of success if implemented without a price reduction, as accepted by Ofcom which states that this would “ensure that BT's competitors have the greatest possible incentive to compete for SFV customers, both in terms of prevailing prices and hence returns associated with winning customers.”¹⁸⁰
199. Ofcom should not, however, take forward more intrusive remedies seeking to directly change outcomes as these do not promote greater engagement and may have perverse outcomes. In this respect, while not accepting that other communication remedies are objective, proportionate or transparent, BT agrees with Ofcom that remedies that would require automatic switching within BT tariffs or the creation of a customer database and disclosure of this information to CPs and other third-parties, should not be taken forward.
200. As Ofcom acknowledges¹⁸¹, nor should Ofcom pursue remedies which force BT to market to its customers the offers available in the market from its rivals, such a remedy may give rise to unforeseen consequences, create disputes between BT and other providers and customers (e.g. through BT being accused of misrepresenting another CP's proposals or being unaware of all offers in the market) and therefore create significant practical compliance challenges.
201. Any behavioural options which are trialled must not give rise to disproportionate costs nor risk damaging BT's customer relationships. Further, Ofcom's analysis of the costs of its proposed remedies is limited; Ofcom makes no attempt to assess the cost to BT, (other than in respect of postal charge costs), of trialling

¹⁷⁸ Paragraph 9.15 of Ofcom's Provisional Conclusions Consultation.

¹⁷⁹ See section 2 B of this Response.

¹⁸⁰ Paragraph 9.13 of Ofcom's Provisional Conclusions Consultation

¹⁸¹ At paragraphs 7.26 to 7.28, Ofcom identifies a range of difficulties with requiring BT to advertise all market offers.

a variety of measures in terms of format, content, etc. and is therefore unable to conclude whether any measure is objectively justifiable or proportionate. This is especially so given the very open and wide nature of the proposed legal instrument that lacks specificity as to the format and content of the communications that Ofcom may in the future wish to trial, the number and frequency of trials and how these might be run (e.g. number of participants) as well as the implementation and monitoring phase following the trials which is not bounded in any way.¹⁸²

Any price control must avoid deterring CPs from engaging in the market by unduly reducing margins

202. If Ofcom decides to proceed with a price control, it should be cautious in setting the level of any such price control to avoid deterring CPs from engaging in the market by unduly reducing margins. If Ofcom wishes to protect customers from price increases in the short term then a safeguard cap would deliver a level of protection while providing the maximum incentive to compete for SFV customers.
203. Any price control should also be time limited; it should be removed once there is sufficient evidence that behavioural remedies are enhancing competition and delivering benefits for consumers in terms of price, choice and available services.

F. Regulation is unnecessary in light of market-led initiatives

204. Given the recent changes to the rules around the way that dual play broadband packages are advertised, [redacted]. Indeed, BT has already frozen the price it charges for its standard line rental product (see section 3 above). In addition, BT has been increasing the value of its line rental product to its customers by increasing the quality of its care (repair) levels and through the introduction of a free consumer protection product, BT Call Protect, which enables BT's customers to reduce nuisance calls¹⁸³. A deeper price cut would stifle current competition and may chill innovation, as exemplified by BT Call Protect.
205. It is both appropriate and necessary to leave room for competition to ensure the continued delivery of choice for voice-only consumers and the potential for benefits in terms of price, quality of service and innovation.
206. [redacted]. BT has developed offers for its voice-only customers which have [redacted], for example BT's Home Phone Saver proposition, demonstrating that BT has successfully found ways of providing information on alternative products (within the BT portfolio) and facilitating responses (using coupons) to help ensure that voice-only customer continue to gain better value for money.
207. We consider, that the measures which are more likely to increase engagement are those measures that prompt customers to take action, by explaining the potential benefits in general terms.
208. Given BT's considerable experience, expertise and the relationship that we have with our customers it is important that, if a communications remedy is imposed, we lead the development of such

¹⁸² See Annex 1 of this Response.

¹⁸³ See section 3 of this Response.

communications, taking input from Ofcom. It is not necessary for Ofcom to require BT to work with Ofcom to trial and implement such measure.¹⁸⁴ Nor is this appropriate [§<]. Nor is any such obligation proportionate given that Ofcom has not demonstrated to the requisite legal standards that BT has SMP in relation to a distinct market for voice-only services.

¹⁸⁴ Ofcom has proposed that behavioural trials should be led by Ofcom (i.e. Ofcom determines what is trialled, the process and what is implemented following trialling); BT would be required to (i) provide information to assist Ofcom determine trial design and (ii) undertake trials and would incur the associated costs.

Annex A: Legal instrument

1. BT provides the comments below on Ofcom's draft legal instrument. These are without prejudice to BT's position set out in the main body of this response that no SMP regulation of BT is justified in this case and that the proposed SMP conditions are not compliant with the requirements of the Communications Act 2003 and CRF¹⁸⁵.

A. Definitions and overall scope of the draft legal instrument

2. BT notes that the "Dominant Provider" is defined as BT and, in turn, BT is defined as BT Plc (including all subsidiaries and holding companies). In this regard, we note that Ofcom has expressed to BT that the proposed SMP Conditions should apply only to SFV customers of BT Consumer's voice products sold under the BT brand (and that, in particular, customers of BT Business & Public Sector, Plusnet and EE are intended to be excluded from scope). BT is concerned that, as currently drafted, the conditions could inadvertently include other lines of business than BT Consumer and / or other group companies. As a result, and for the reasons set out below, BT considers that some amendments to the definitions are required to make this clear.

BT Business and Public Sector ("BPS") and other BT lines of business

3. Ofcom provisionally concludes that business SFV is excluded from the relevant markets it has defined¹⁸⁶. Ofcom therefore proposes no action in respect of business customers. BT agrees with this and notes the following additional reasons why business customers should be excluded from the scope of any SMP regulation of BT (whilst none is justified in any event):
 - Business customers seek to manage their commercial activities and control their costs in the most effective way (perhaps even having more incentive to do so than residential consumers).
 - There are a wide range of competitive offerings which enable a business SFV customer to obtain a good deal, including on a voice-only or split purchase basis.
 - Many of BT's business SFV customers will use their lines for specific purposes e.g. alarms, fax machines, lift phone etc. To meet these and other basic telephony needs, BPS offer a basic "Value" phone package at £16.90pm which is advertised alongside its standard phone packages at £22.50¹⁸⁷. This value package includes 100 free landline call minutes per month. In comparison, TalkTalk offers a single line for business at £16.95 per month with PAYG calls.
4. Ofcom's current definitions mean that business customers may be inadvertently caught by the proposed SMP conditions if implemented as drafted. In particular:
 - BPS sells business lines to sole traders, partnerships and limited liability partnerships - as well as to registered companies. Defining a BT Business Service as: "*all BT products and/or services that are only available to entities with a company registration number*" is therefore inaccurate and would mean that these other types of business customers could be caught by the proposed SMP Regulations.

¹⁸⁵ See in particular section 2 B of this response.

¹⁸⁶ See paragraphs 3.54-3.56 and 3.106 of Ofcom's Provisional Conclusions Consultation.

¹⁸⁷ <https://business.bt.com/products/voice/phone-lines/>

- BT suggests therefore that the definition of BT Business Service is amended to read:

“BT Business Service means all BT products and / or services that are only available to business entities, in particular but without limitation those products and services provided by BT’s Business & Public Sector Division, Global Services Division, EE or Plusnet”

5. For clarity, a specific exclusion should be provided for BPS (and indeed for Plusnet, EE and all BT lines of business other than BT Consumer) under each of conditions 1 and 2 as opposed to relying on the current definition of “Services” to exclude non-residential products / services or services provided by other parts of BT. There are many ways that this could be achieved but we propose that: 1) the definition of “Customer” is amended to include the word “residential” before “Service”; 2) “legal entity” is removed from the definition of Customer; 3) the definition of Service is amended to make clear that these are services provided by BT’s Consumer line of business; 4) this could also be achieved by amending the Annex to Schedule to say, those products provided by BT, through its Consumer business unit to residential customers alongside the inclusion of a footnote (or equivalent text in the recitals), that states, *“It is not Ofcom’s intention, for example, that BT’s Plusnet and EE brands, should be caught by the Conditions, including following any internal re-organisations.”*

B. Condition 1 is disproportionate and non-transparent in respect of scope and lacks legal certainty

6. In relation to Ofcom’s proposed behavioural remedy (“the Communication Requirement” – Condition 1), Ofcom states that this is *“transparent in that it is clear what it is seeking to achieve – the promotion of competition through greater consumer engagement – and in setting out what BT is or may be required to do in future”*¹⁸⁸. However, the communication requirement is so open ended that it effectively constitutes a ‘blank cheque’ for Ofcom to require BT to do whatever Ofcom asks of it in relation to communications with its SFV customers (and at any cost) without sufficient clarity as to what will be required and within what timescales. This is clear from a plain reading of Condition 1¹⁸⁹ which states as follows:

“1.1 The Dominant Provider must comply with any Communication Requirement which Ofcom may from time to time direct.

1.2A The Dominant Provider must cooperate with Ofcom in the development and evaluation of Communication Requirements and must provide Ofcom with such information as Ofcom may require for the purposes of evaluating the effectiveness of any Communication Requirement.

1.2B In complying with its obligations under Condition 1.2A, the Dominant Provider must comply with any directions made by Ofcom.

1.3 For the purposes of Conditions 1.1 and 1.2A, Communication Requirement means any direction issued by Ofcom which requires the Dominant Provider to produce, provide or distribute information, or make specific communications to, its Customers, in a specified manner and form. [...]

[1.3A then goes on to describe some non-exhaustive examples]

¹⁸⁸ Paragraph 9.38 of Ofcom’s Provisional Conclusions Consultation.

¹⁸⁹ See Annex 9 of Ofcom’s Provisional Conclusions Consultation (emphasis added).

7. This proposed remedy is a clear breach of Ofcom's section 6 duty¹⁹⁰ not to impose unnecessary regulatory burdens. Contrary to Ofcom's assertion that this condition is *"the least onerous means of achieving the objective we have identified in that it allows for the trialling of the least onerous engagement remedies¹⁹¹"*, it is not even possible to properly evaluate whether there would be less onerous (and therefore proportionate) means of addressing Ofcom's concerns because Ofcom's proposed remedy is so uncertain and non-specific in terms of what it actually requires.

- As to scope:

- i. Ofcom considers that the first step in the process of trialling engagement remedies would be: *"Diagnosing the issue to be addressed, potentially including research to identify the specific factor(s) restricting engagement. For example, which are the most critical barriers to engagement. This would also include considering whether the issue is common across all standalone voice customers, or just a subset (such as voice-only or split-purchase customers).¹⁹²"* "Diagnosing the issue" should, respectfully, be a matter for Ofcom's initial review – not for the setting of remedies.
- ii. Ofcom then considers¹⁹³ that remedies to be trialled should be identified, research and tests should be carried out to refine these options, a trial would then be run and the results assessed. The measures would then be monitored with further testing if Ofcom considers needed. Ofcom does not specify (either in the body of its consultation document nor in the draft legal instrument) the number or frequency of trials (Ofcom simply notes that this should reflect the detriment identified).
- iii. As set out in the main body of this response, BT must not be subject to open ended obligations to re-trial and implement different remedies. For the avoidance of doubt, BT is not disputing the importance of trials *per se* but rather that this is not appropriate to impose as an SMP condition because of this lack of transparency (contrary to s47(2)) and certainty.

- As to cost:

- i. Ofcom would require BT to bear the cost of running any trials¹⁹⁴
- ii. Ofcom itself notes that it has: *"not at this stage attempted to estimate in detail the costs involved in implementing any of these remedies¹⁹⁵"*.

- As to timings:

- i. Ofcom envisages that the process of development, trialling and implementation *"could take up to two years before any engagement remedies are fully implemented"¹⁹⁶*.

¹⁹⁰ See section 2B of this Response.

¹⁹¹ Paragraph 9.38 of Ofcom's Provisional Conclusions Consultation.

¹⁹² Paragraph 7.96.1 Ofcom's Provisional Conclusions Consultation.

¹⁹³ Paragraph 7.96 of Ofcom's Provisional Conclusions Consultation.

¹⁹⁴ Paragraph 7.99 of Ofcom's Provisional Conclusions Consultation.

¹⁹⁵ Paragraph 7.15 of Ofcom's Provisional Conclusions Consultation.

¹⁹⁶ Paragraph 7.103 of Ofcom's Provisional Conclusions Consultation

- ii. BT notes that the market review period envisaged is three years and, that by this time, [§<]197
8. As a result of these issues, in BT's view, Condition 1 is fundamentally flawed. It is disproportionate, non-transparent and in breach of Ofcom's duties. It would need to be completely re-drafted in order to resemble an appropriate SMP condition which would meet the requirements of s.47(2).
9. In addition, as noted above, it should be made clear on its face that this obligation only relates to BT's Consumer line of business.

Condition 2 - Price control

10. In setting the level of the price control, Ofcom must consider the impact of its proposals on its primary duties to further the interests of citizens in relation to communications matters; and to further interests of consumers in relevant markets, where appropriate by promoting competition¹⁹⁸. However, Ofcom's price control proposals, in particular the range of the starting price reduction in the first year of the review, bring with them a number of risks¹⁹⁹, these risks include:
- a chilling of the forecast take-up of dual play broadband bundles by those who are currently digitally disengaged, or who are only partially digitally engaged, and therefore removing or limiting the real benefits that citizens and consumers will potentially gain from becoming digitally engaged; and
 - potentially reduce the positive impact of any behavioural 'communication' remedy, reducing the benefits of those remedies.
11. It is essential, therefore, that Ofcom more fully assess these risks, in order to construct a price control remedy that discharges Ofcom's duties, meets the needs of citizens and consumers, and maintains and promotes competition.
12. In terms of more specific changes that are required to the legal instrument:
- VAT – the price control should be net of VAT and this should be reflected in the wording of the draft legal instrument.
 - As set out above, the price control should explicitly describe that it is targeted at BT's Consumer business unit. This could be achieved by amending the Annex to Schedule, to say, those products provided by BT, through its Consumer business unit to residential customers. And have a footnote, that states, "*It is not Ofcom's intention, for example, that BT's Plusnet and EE brands, should be caught by the Conditions.*"
 - It is not clear to BT where the revenues to be used in any SMP Condition (and in the first formula in 2.6A) are defined in Condition 2. BT assumes these revenues are for services consumed by the Customer (as defined in Part 1 Interpretation of the SCHEDULE) but we are unsure where, in the definitions, this is explicitly set out.

¹⁹⁷ See section 2 of this Response

¹⁹⁸ See section 2B of this Response.

¹⁹⁹ See also section 6 of this Response.

- There is a square bracket missing from the formula copied below (at 2.2) and this would need to be corrected:

$$CC_t = CC_{t-1} * (1 + CPI_t + [0-2.5\%])$$

- In addition, as noted above, it should be made clear that this obligation only relates to BT's Consumer line of business.

In respect of Ofcom's proposed obligation on BT to provide and publish information BT notes that Ofcom has published a separate consultation in relation to regulatory reporting and publishing requirements. BT will respond fully to both the need for Conditions 2.7 and 2.7A and structure and extent of the obligations in its response to that separate consultation. However, BT would observe that Ofcom has demonstrated no objective or proportionate need for the publication of any BT information.

Annex B: Responses to Ofcom's questions

Question 3.1: Do you agree with our provisional conclusion that there is a separate market for Standalone Fixed Voice residential access which includes both voice-only and split purchase consumers? Please provide reasons and evidence in support of your views.

BT does not agree with Ofcom's provisional conclusion that there is a separate market for Standalone Fixed Voice residential access which includes both voice-only and split purchase consumers.

Our reasons and evidence are set out in Section 4 where we show why there is a wider retail market for fixed line services (in which BT does not have SMP). This is on the basis that:

- The pricing practices Ofcom is concerned about are a rational and pro-competitive response by all firms to effective competition for bundles (section 4B, paragraphs 94-105).
- Ofcom has made an error in using levels of customer engagement to define markets (section 4C, paragraphs 106-112).
- Price discrimination has not been by suppliers used to separate customer segments (section 4D, paragraphs 113-114).
- At a minimum, split purchase customers should be included in a voice market which includes dual play services (section 4E, paragraphs 115-134).

Question 3.2: Do you agree with our provisional conclusion that there is a separate market for Standalone Fixed Voice residential calls? Please provide reasons and evidence in support of your views.

BT does not agree with Ofcom's provisional conclusion that there is a separate market for Standalone Fixed Voice residential calls given that there is not a specific market for corresponding access services for the reasons set out in Section 4.

Question 4.1: Do you agree with our provisional conclusion that, during the period covered by this market review, BT will have Significant Market Power in the Standalone Fixed Voice access market? Please provide reasons and evidence in support of your views.

BT does not agree with Ofcom's market power assessment for the following reasons:

- BT is not able to set the terms and conditions of sales for SFV services without facing competitive constraints from other providers (section 4B, paragraphs 137 – 139).
- Ofcom's market share calculations do not provide a meaningful indication of market power (section 5C, paragraphs 140-149).
- Ofcom has overstated barriers to acquisition (section 5D, paragraphs 150-162).
- Mobile has not been adequately considered as a constraint on landline services including for voice-only customers (section 5E, paragraph 163).

- Ofcom ignores important distinctions between voice-only customers and split purchasers, and there can be no suggestion that BT has market power in relation to split purchasers (section 5F, paragraphs 164-166).
- Ofcom’s pricing analysis ignores the broader context of switching to bundles which has been driven by lower incremental broadband prices (section 5G, paragraphs 167-172).

Question 5.1: Do you agree with our provisional conclusion that, during the period covered by this market review, BT will have Significant Market Power in the Standalone Fixed Voice calls market? Please provide reasons and evidence in support of your views.

BT does not agree with Ofcom’s provisional conclusion that BT will have Significant Market Power in the Standalone Fixed Voice calls market given that it will not have SMP in the Standalone Fixed Voice access market for the reasons given in Section 5.

Question 7.1: Do you agree with the need to trial and test engagement remedies before implementation? Please explain your reasons for this.

In Section 6 and the Legal instrument, Annex A, BT has provided a full response to the proposed SMP Conditions. As set out in Section 6F, paragraphs 198 to 201, even if Ofcom had adequately defined the market and appropriately assessed BT’s market power, there would be no justification for the intrusive nature of the remedies proposed.

As Ofcom recognises, behavioural remedies have the best prospect of success if implemented without a price reduction (paragraph 213).

As set out in, the measures which have the best prospect of success are limited to those measures that prompt customers to take action, by explaining the potential benefits in general terms, while assuaging concerns about potential loss, for example that switching processes are complex or likely to fail (paragraph 213). BT should lead this process with input from Ofcom (for reasons given paragraph 208).

For comments on trialling of behavioural remedies, see section 6F, paragraphs 198– 201 and the Legal instrument annex.

Question 7.2: Do you agree that remedies focussed on improving consumer communications to increase engagement listed below offer a reasonable prospect of success in encouraging competition?

- *information on savings;*
- *information on the switching process;*
- *introduction of a decision point; and*
- *remedies to facilitate response to this information.*

Please explain your reasons.

Potentially for voice only customers; BT discusses communication remedies in Section 6.

Question 7.3: Do you agree with our conclusions that the other remedial options we have considered, namely the establishment of a customer database for marketing purposes and automatic switching within BT's tariffs, raise significant implementation risks and therefore do not warrant further consideration? If you do not agree or consider there are other options we should have considered, please provide your reasons.

BT agrees that measures directed at establishing a customer database for marketing purposes and automatic switching within BT's tariffs, raise significant implementation risks, amongst other risks, and do not warrant further consideration.

Question 8.1: Do you agree with our approach to determining the options for the level of price controls for Standalone Fixed Voice services? If not, please give your reasons.

BT does not agree; Ofcom's approach to determining the options for the level of price control results in a starting price adjustment range that may have significant and unforeseen consequences.

Question 8.2: Do you agree with our proposed basket structure if implementing a price control for Standalone Fixed Voice services? In particular, do you agree with the need for a separate sub-cap on the Line Rental within the basket? If not, please give your reasons.

While providing flexibility to BT, which is important, the construction of the sub-cap does not recognise, for example, that BT is unable to differentiate its call and ancillary features charges between SFV customers and those customers who take a dual play bundle.

Question 8.3: Do you agree that it would be appropriate to allow the prices in a price control basket to rise by up to consumer price index (CPI)? If not, please give your reasons.

It is important that any control reflect inflation; however, Ofcom should give consideration to including inflation measures that include housing costs, for example CPIH.

Question 8.4: Do you agree that we should exclude Home Phone Saver and Line Rental Plus from the price control? If not, please give your reasons.

BT agrees that these services should be excluded given that the services are already discounted and SFV customers have made an active decision to optimise through the purchase of one or other of the two services.

Question 8.5: Do you agree that it is appropriate for the Line Rental sub-cap to have greater price flexibility than the overall price cap to allow BT to rebalance pricing between the line rental and call prices? If not, please give your reasons.

BT agrees that flexibility is important.

Question 8.6: Do you agree with the services we are proposing to include in a price control remedy basket for Standalone Fixed Voice services? If not, please set out your alternative proposals and please give your reasons.

BT understands that Ofcom has included those services, which are not discounted, and which may be purchased by SFV customers, so to that extent does not disagree. However, the design of the basket does not reflect the practical difficulties that BT faces in being unable to differentiate its charges for lines, calls and calling features as between SFV and dual play customers.

Question 9.1: Do you agree with our proposed set of remedies for the Standalone Fixed Voice services markets, that is a price control, with a one-off adjustment set with reference to the costs of BT competitors in this market, and an obligation on BT to work with us to explore and ultimately implement information options to promote competition? If not please set out your reasons.

BT disagrees that Ofcom's proposed remedies are appropriate for the reasons set out in this response.

Question 9.2: Do you agree that BT should have at least one month after the date of the statement to implement the new price structure? If not, please set out your reasons.

BT does not have the ability to differentiate its charges for lines, calls and calling features as between SFV and dual play customers. [§<].

Question 9.3: Do you have any additional comments on our analysis or conclusions in this consultation?

BT's position is set out in this response, save in respect of the proposed remedies for financial reporting and publication and in respect of which BT will deal with as part of its response to Ofcom's separate consultation.

Annex C: Oxera Report

See attached report.