



Ofcom

Response to the Fixed Access Market Review: WLA related issues

Part 3 of TalkTalk Group submission: other issues

Non-confidential version

October 2013

1 Introduction

1.1 This paper sets out TalkTalk Telecom Group plc's ('TalkTalk') response to the elements of Ofcom's Fixed Access Market Review ('FAMR').¹ This is the third part of Ofcom's submission and covers other issues not covered in the other two submissions (covering fibre margin regulation and service performance).

1.2 TalkTalk's key points are:

- Ofcom should require Openreach to make certain VULA related developments – unbundled FTTC, allow non-Openreach NTE5 installation and unbundled FTTP – in order to allow more effective competition and better meet consumers' interests
- The current product development process is dysfunctional resulting in developments that could deliver substantial consumer benefits being delayed or not happening at all. Ofcom should set guidance as to the basis on which BT should assess whether to accept product development requests and how it should conduct itself
- Ofcom should develop and lay out a clear strategy for the role of PIA and SLU and if necessary take decisive action to make these products usable

2 Other WLA issues

2.1 We have commented on the analysis of the WLA market and certain remedies in our other submissions. Here we cover three remedies:

- VULA features
- Product development
- Requirement to offer SLU/PIA

2.1 Key VULA product developments

2.2 TalkTalk's and other CP's ability to compete effectively and offer genuine choice and innovation to consumers depends on the specification of the wholesale VULA product (as well as the margin between BT's wholesale and retail prices). However, the VULA product has not been² and remains far from ideal for supporting effective

¹ Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30, 3rd July 2013. There is also no coverage of Ofcom's conclusions on market definition or remedies in Kingston-upon-Hull provided in this paper. TalkTalk is not active in Hull, and has no plans to be active; as such, we have no comments regarding developments in that separate market.

² For example, Openreach took 4 years of continual pressure before Openreach made a wires-only option and a self-install option available – TalkTalk first raised this need in 2008. It is possible that the recent progress is simply an attempt to look good in front of the regulator in order to tempt Ofcom to adopt a light touch regulation

competition. We see three specific areas where the product should be improved: unbundled FTTC-GEA; non-Openreach NTE5 installation; and FTTP unbundling. Ofcom should consider whether (and if so how) it should oblige Openreach to provide these features/developments. We describe and outline the rationale for each of these developments below. Lastly we describe the potential mechanisms for Ofcom to require Openreach to offer these products.

2.1.1 Unbundled GEA (FTTC)

- 2.3 The current FTTC GEA product is a proposition that bundles access (i.e. DSLAM port and copper access path) and backhaul (i.e. link from DSLAM to handover in exchange). An unbundled FTTC wholesale product (referred to as UFTTC) would separate the product into distinct access and backhaul components that could be purchased and combined in different ways. This UFTTC architecture is similar to the way that wholesale broadband products (such as IPStream, DataStream and WBC) are offered.
- 2.4 Separating out access from backhaul allows CPs to manage the contention rate of customers and thereby control the associated costs. It would also allow the creation of separate VLANs for different types of customer (business vs residential), with correspondingly different QoS requirements including dedicated bandwidth. This approach will enable CPs to design their own product/speed combinations which they can price to recover their costs outside of the constraints of Openreach bundled GEA product pricing. UFTTC will also expose the underlying costs of each component which in turn will allow more efficient consumption.
- 2.5 UFTTC better meets the VULA characteristics that Ofcom is proposing (see §11.46) than the current GEA product. In particular:
- Localness (interconnection should be at the first technically feasible aggregation point). Interconnection for GEA is not at the first feasible point whereas interconnection for UFTTC is
 - Service agnostic access (should provide service agnostic connectivity, replicating one of the key features of LLU). Arguably GEA is not fully service agnostic – CPs pay extra for different speeds whereas under UFTTC a flat rate is paid
 - Uncontended access. UFTTC allows genuine uncontended access whereas GEA does not
 - Control of access (flexibility to allow CPs to offer differentiated products to consumers). UFTTC allows more control and optionality than GEA does
- 2.6 UFTTC also supports deeper competition and therefore is more consistent with Ofcom's preference for deeper competition:

Overall approach – the preference for intervening upstream ... Where possible, our approach has historically been to intervene upstream in order to facilitate competitive downstream markets³.

- 2.7 An SOR developed by Sky (and supported by TalkTalk, Zen, C&W and Virgin Media) was submitted to Openreach early in 2013. After many months Openreach have rejected parts of the SOR and other areas are still awaiting a Openreach decision - it appears unlikely that Openreach will implement this valuable development without regulatory intervention.
- 2.8 We think Ofcom should impose an obligation on Openreach to provide such a product. We recognise that it might be difficult for Ofcom to be exactly precise about the specification of the product. However, Ofcom could make it clear that a product should be developed, the key characteristics of it⁴, a roadmap and a backstop dates for delivery of the product. We discuss below (section 2.1.4) the potential legal mechanisms for imposing this requirement.

2.1.2 Non-Openreach NTE5 installation

- 2.9 Over the years, Openreach and its predecessor organisations, have installed a number of different network termination points (NTP) which act as the delineation between the BT network and customers' internal wiring. Originally a simple block terminal was installed to which telephone handsets were hard wired. Subsequently, a variety of plug and socket arrangements have been used, culminating in the current NTE5.
- 2.10 The standard GEA installation, requires an NTE5 to be present, in order that a Service Specific Faceplate (SSFP) which contains a VDSL filter can be installed to insulate the VDSL signals on BT's access network from electrical noise generated over the in-home wiring. Whilst CPs are permitted to install an SSFP within an existing NTE5 (or rearrange wiring in the home beyond the NTP), upgrading an existing NTP to an NTE5 can currently only be carried out by Openreach engineers. Openreach's own research indicates replacement of the NTP with an NTE5 would be required for more than 20% of GEA installations.
- 2.11 The introduction of PCP only GEA allows CP engineers to undertake much the in-home installation work that was previously undertaken by Openreach engineers. This includes the installation of modems, re-arrangement of extension wiring and installation of extension filters or SSFPs where an NTE5 is present. However, where an NTE5 is not present (and needs to be installed), the current Openreach policy is that the CP's engineer cannot install a new NTE5 (even though it is a very simple procedure).

³ FAMR §2.8

⁴ the characteristics would also need to include the pricing of the UFTTC product relative to the current bundled FTTC-GEA product to avoid Openreach pricing the UFTTC product in such a way as to make it artificially unattractive

- 2.12 Instead, in the case where an NTE5 installation is required, the CP engineer is forced to abandon the installation and make arrangements for a Openreach engineer to install an NTE5. Subsequent to the visit of an Openreach engineer, a third customer appointment will be required for the GEA installation to be completed by the CP engineer. Until the third appointment (which might be several weeks later) the customer will be stranded without even a standard (ADSL) broadband service. This is because prior to the first CP engineer visit, the PCP work will have already been completed by Openreach which effectively disconnects the ADSL broadband service.
- 2.13 This is obviously an extremely poor customer experience (two additional home visits, weeks without any broadband service, delayed GEA installation). It is also almost impossible to fully mitigate against during the original order taking process, as customers will not be able to reliably confirm whether an NTE5 is currently fitted (and so know whether an NTE5 installation will be required).
- 2.14 To address this problem simply requires Openreach to remove its self-chosen restriction on CP engineers fitting a new NTE5.
- 2.15 The change would not seek to either remove ownership of the NTP from Openreach or allow anyone to install an NTE5 (which might introduce network integrity issues). Rather, it is simply to allow appropriately trained and authorised CP engineers to carry out an NTE5 installation in cases where it is necessary to complete an installation.
- 2.16 It is important to recognise that installing an NTE5 is a fairly simple procedure – it involves the wiring the ‘incoming’ copper pair into the NTE5 (which is little more complicated than wiring a 3-pin plug) and then fixing the unit to the wall. Notably both these activities (wiring a 3-pin plug and fixing items to a wall) are part of the Scout DIY badge which is for scouts aged between 10½ and 14). Further, BT uses contractors extensively itself so allowing CP’s engineers to install NTE5 will be a small extension of this approach. Thus allowing CPs’ engineers to install NTE5s will not create any additional or non-trivial risk to the integrity of the Openreach network.
- 2.17 TalkTalk submitted an SOR requesting this to Openreach in early 2012. It was rejected. We submitted a new SOR in March 2013.
- 2.18 We are not optimistic that Openreach will allow this change. When informed of the SOR Openreach responded saying:
- “... our position, in both copper and NGA products, has not changed re’ demarcation and ultimately we will reject any SOR.”*
- 2.19 This SOR has also been discussed at CPCG, where Openreach have continued to resist our request. Openreach have done some research on the scale of the issue (which has confirmed it is a material issue).
- 2.20 Openreach have suggested that if CP engineers are allowed to install NTE5s it will require elaborate and expensive systems developments to record NTP work

undertaken by CPs⁵. They claim that this will be necessary so that they can recover any repair costs which arise from faulty NTE5 work by CP engineers. We believe that this is an un-necessary complexity being introduced by Openreach to obstruct this valuable development. CPs have a strong incentive to carry out NTE5 work to high standards to maximise their customers' satisfaction. Provided that their engineers are suitably trained, there is therefore no reason to expect that the quality of their work would be any worse than that which BTs own engineers and contractors carry out. On this basis, there should be no increase in fault rates on lines where CP engineers have installed the NTP and therefore no justification for Openreach seeking to recover additional repair costs through the systems development suggested above⁶.

- 2.21 We think that Ofcom should impose an obligation on Openreach in the WLA Market Review to provide such a 'product'. Unlike UFTTC we do think that Ofcom can be highly specific about the product since it is simply the ability for CPs to install NTE5 in certain cases.

2.1.3 FTTP unbundling

- 2.22 BT's existing and planned FTTP deployments are based on GPON⁷ technology that utilise a single wavelength. Accordingly, all users and CPs share the same data path and the same equipment. This means that Openreach manage and control more of the equipment and service and thereby limits innovation by other CPs and so the effectiveness of competition.
- 2.23 FTTP can be unbundled in a number of ways so that there is less sharing and each CP can have more control over the service that is offered by relying on Openreach less. Key options for unbundling include:
- WDM PON⁸ whereby different CPs operate their own wavelengths in a single PON (passive optical network)
 - Multiple dark PONs whereby each CP operate their own dedicated PON
 - Point to point fibre whereby each customer is served by logically dedicated fibre (at least for a part of the access path) in the same way that each home is served by a dedicated copper loop
- 2.24 These are all forms of 'deeper' competition which Ofcom prefers:

Overall approach – the preference for intervening upstream ... Where possible, our approach has historically been to intervene upstream in order to facilitate competitive downstream markets⁹.

⁵ It would be pertinent to understand what recording they carry out in respect of contractors that Openreach uses. If they don't then this indicates it is not necessary for CPs' engineers. If they do they CP engineers can 'piggy-back' on this at no cost

⁶ Moreover, it is likely that fault rates on modernized NTP installations are likely to be lower than those on legacy NTP types which may be up to 50 years old.

⁷ GPON – Gigabit passive optical network

⁸ WDM PON – wave division multiplex passive optical network

- 2.25 Of the various architecture/product options we consider WDM PON to be the most promising.
- 2.26 Unbundled FTTP would also better meet the VULA characteristics in particular since it allows CPs more control.
- 2.27 Though still small, Openreach's FTTP footprint is slowly expanding – based on a GPON architecture and Ethernet based wholesale product (like GEA). We think in the next 12 months progress will need to be start to be made in redefining the FTTP wholesale product so that it is pro-competitive. However, we consider that it is probably too early today to be definitive and prescriptive about how FTTP unbundling should be achieved. Therefore, we consider that Ofcom should:
- Clearly state that it expects FTTP to be unbundled when feasible and also that FTTP networks deployed prior the unbundled product being defined will need to be (re)engineered to allow the unbundled product to be offered¹⁰.
 - Require BT to publish its technology strategy
 - Keep itself abreast of developments relevant to FTTP unbundling e.g. technology
 - Ensure that it has the powers to intervene quickly and decisively if/when it becomes necessary to do so

2.1.4 Mechanism to impose these VULA product development obligation

- 2.28 Currently BT's regulatory obligations in respect of developing new products are that it meet reasonable requests (see section 2.2 below) and that 'five high-level characteristics that we considered VULA would need to have'¹¹ (we refer to these as the VULA characteristics). These have not in our view been sufficient to ensure that timely product developments happen (and are not likely to ensure timely development of these products either). We see there being a number of ways in which Ofcom could impose a requirement on Openreach to develop a the specific products/features described above¹². Examples include:
- an SMP Condition
 - a Direction under an existing or new SMP Condition (e.g. FAA1.2, FAA11.1 under current WLA).
 - include in the FAMR Statement clear guidance that could be relied on by CPs¹³. If this was done then it would be useful that the SMP Conditions cross-referred to such guidance.

⁹ FAMR §2.8

¹⁰ Any future engineering to adapt networks is provided at Openreach's cost (i.e. is not recoverable from CPs)

¹¹ FAMR §11.46

¹² taking into account Ofcom's duty to ensure that a regulatory measure is objectively justifiable, not unduly discriminatory, proportionate and transparent

¹³ This might be like the current VULA characteristics though be less ambiguous

- a functional specification that Openreach would need to comply with (similar to what Ofcom has done in the past in relation to WLR and CPS).

2.29 Our preference is for a tighter obligation (i.e. SMP Condition or Direction) since this provides most certainty and is most likely to ensure compliance.

2.30 Whichever of these is done will require precise and clear wording that leaves no room for ambiguity. Ambiguity favours BT since it essentially allows BT the flexibility for BT to do what it wants (at least for a period until that ambiguity is removed). The VULA characteristics in 2010 were not as effective as they could have been because they were open to different interpretations (as well as because they were merely guidance rather than Directions or SMP Conditions)¹⁴. Though Ofcom may consider that overly precise requirements risk being inappropriate it must recognise that imprecise and ambiguous requirements simply play into BT's hands allowing it to do what it wishes.

2.2 Product development process

2.31 In this section we discuss general problems with product development (rather than the specific cases above) – we think that it is dysfunctional and not fit for purpose. We then discuss how the product development process could be significantly improved through some additional measured regulation. These comments are made in the context of the WLA Market Review but equally apply in other markets.

2.32 New product developments can be, and are, requested from Openreach. Requests have to be made using the 'Statement of Requirements' (SOR). Openreach considers these requests and either accepts or rejects them. If a request is a 'reasonable' request then BT is required to provide access 'as soon as it is reasonably practicable'.¹⁵

2.33 However, this process does not deliver timely product developments. Openreach can, and do, routinely reject developments that are in consumers interests but not in BT's interests. In fact, Openreach has previously been clear that it decides to accept or reject SORs (solely) on the basis of what is best for Openreach / BT. Sometimes this accords with consumer's interests but many times it does not.

2.34 That there is a misalignment between Openreach's interests and consumers' interests in respect of product developments is not surprising given that BT holds SMP – the definition of market power is that the operator is able to act against the

¹⁴ For example it took over 4 years to get PCP-only GEA developed even though PCP-only was plainly more consistent with the VULA characteristics

¹⁵ For example obligations in WLA:

FAA1.1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

FAA1.2 The provision of Network Access in accordance with paragraph FAA1.1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

interests of consumers. Interests can be aligned when a product development reduces Openreach's costs (and BT can retain some/all of the savings) or when the development will make the product more attractive. But interests are not aligned in many cases e.g.

- when a development will expose more of the product (and BT's operation) to competition (e.g. unbundling);
- when a product development allows BT's rival CPs to compete more effectively against BT's downstream operations (e.g. business grade GEA); or,
- when a development reduces CPs' costs allowing them to compete more effectively against BT's downstream operations (e.g. reduction in MPF costs and so charges); or,
- where the development allows CPs to reduce their costs.

2.35 Some specific examples of this include:

- wires-only GEA is better for consumers / competition but is worse for Openreach (Openreach did eventually develop a product more than four years after it was first requested)
- single jumpered MPF if developed early enough¹⁶ reduces BT Retail's rivals costs (and thus is disadvantageous for BT Retail) and is beneficial to consumers
- the business grade GEA SOR was largely rejected by Openreach even though it included functionality which would have made the product more suitable to business customers as an alternative to P2P Ethernet. Business grade GEA would cannibalise BT's leased line revenues and margins
- an LLU asset report SOR was requested by TalkTalk in March 2011. This simple development would reduce CPs' costs but not Openreach's. Openreach has taken over 2 years to develop this.

2.36 The reason that Openreach reject requests that are against their interests is that there is no or little incentive to accept such requests (and there is little leverage that CPs can apply to persuade Openreach to accept such requests). Though CPs can dispute a decision by Openreach to reject a product development request, this provides minimal incentive on BT to accept a request in the first place. This is because BT knows that the worst case outcome for it if it 'loses' the dispute is that it would have to develop the product going forward. Thus for Openreach there is no downside from non compliance but a large upside from non compliance¹⁷.

2.37 Below we provide a number of ideas on how the product development process can be improved to better work in consumers' interests.

¹⁶ Ofcom in its provisional decision on the SJ-MPF dispute considered that SJ-MPF (if it was started to be developed in Jan 2014) would not provide any cost saving. However, even under Ofcom's assumptions if SJ-MPF was launched when first requested in 2010 it would have resulted in net cost savings

¹⁷ The incentive to comply could be increased if there was compensatory, restitutionary or punitive elements (see §§2.56-2.58 below)

- Making it clear that Openreach should assess SORs on the basis of their benefit to consumers' (rather than just the benefit to BT).
- Making explicit the obligation on BT to diligently conduct a proper assessment of requests
- Ensuring higher levels of transparency to enable the discussions around the SORs to be more effective and constructive.
- Ensuring Openreach make timely decisions.
- Incentives on BT to ensure that BT complies.

2.2.1 Basis for assessing SORs

2.38 BT is required to meet 'reasonable requests' (e.g. FAA1). We consider that the regulatory obligation should mean that it develops products that are in consumers' interests (even if they are against Openreach's/BT's interests). If Openreach were only required to develop products that were in its own interests then there would be no need for a regulatory obligation – the purpose of the regulatory obligation must be to require BT to meet requests for products that it would not otherwise provide¹⁸. The concept of what is reasonable must be founded in Ofcom's duties and in particular s3(1):

It shall be the principal duty of OFCOM, in carrying out their functions ... to further the interests of consumers in relevant markets, where appropriate by promoting competition.

2.39 Thus there is a disjoint between the basis on which Openreach actually makes its decisions (what is good for BT / Openreach) and the basis on which it should make its decisions (what is good for consumers/competition).

2.40 Thus we see a need for clear guidance (possibly included in an SMP Condition) that Openreach should make decisions regarding product developments on the basis of consumers' interests¹⁹.

2.2.2 Obligation to conduct proper analysis

2.41 We consider that Openreach can and does frustrate product development process by not conducting a proper analysis of requests it receives that it does not consider are in its interests. A good example of this is single jumper MPF (SJ-MPF).

2.42 TalkTalk first formally requested that Openreach develop a SJ-MPF product in 2010 – this was rejected. Following analysis of SJ-MPF in the 2011/2012 LLU Charge Control, TalkTalk submitted another SOR in 2012 which was also rejected. As part of its assessment of the SOR Openreach developed a model to assess the costs savings. Openreach insisted that the outcome of its cost model was that there was no net

¹⁸ In other words, the obligation is not to meet only requests that are in BT's interests – it is also to meet requests that are not in BT's interests but are reasonable since they are in consumers' interests.

¹⁹ which will of course include, but not exclusively, the impact on Openreach

cost saving resulting from SJ-MPF and so it would not develop the product. TalkTalk disputed Openreach's decision.

- 2.43 As part of its dispute investigation Ofcom reviewed Openreach's model. Ofcom found, that Openreach's model was error-strewn and not fit for purpose. This was even though:
- Openreach had effectively had more than 2 years to develop the analysis and cost model
 - TalkTalk had developed and provided to Openreach a largely correct cost model that Openreach could have used to check its own model²⁰
 - Openreach also refused to disclose any meaningful details of its model so that TalkTalk could comment on it.
- 2.44 Clearly Openreach's approach of not conducting a proper analysis can frustrate the progress of reasonable requests. Openreach have a clear incentive to not conduct proper analysis (whether through allocating unsuitable staff, negligence or making wilful errors) since by doing so it can frustrate developments which are not in its interests.
- 2.45 Therefore, the obligation to meet reasonable requests should include an explicit obligation to conduct analysis properly and diligently, using suitably competent and empowered staff who are fully aware of BT's regulatory obligations.

2.2.3 Transparency

- 2.46 Our experience of submitting SORs to Openreach is that rejections come with very little or no (cogent) explanation of the evidence that BT has relied on or its reasoning for reaching its decision.
- 2.47 For instance, in relation to the SOR for SJ-MPF BT, Openreach's initial response (after several months), was little more than a simple no. After much pressing they would divulge that their saw no benefit since there would be added costs, then after more pressing they explained what the cost types were but not the cost estimates or the assumptions they used. We then explained our view of the costs and provided estimates and Openreach simply replied they did not agree. In some areas when we refuted their reasoning they simply invented new un-evidenced reasons. We proposed an independent consultant (which we would pay for) who could review data BT considered confidential so that we could progress. BT refused. We have experienced similar unconstructive behaviour on many other SORs.
- 2.48 There are several problems with Openreach's unconstructive behaviour.
- First the decision (and ultimately progress) is delayed. Obviously this is against consumers' interests since these valuable product developments are delayed.

²⁰ TalkTalk's model did not include very accurate unit cost assumptions since Openreach had refused to provide them. However, Openreach could obviously 'correct' TalkTalk's model itself

For some product developments, timely progress is even more important since the benefits that they bring (and therefore the business case) diminish with time

- Second, it is impossible to identify and (hopefully) bottom out issues and progress areas of disagreement
- Third, it is difficult to submit a clear dispute to Ofcom since it is impossible to articulate areas of disagreement

2.49 Of course, such behaviour is in BT's interests since it delays or avoids development of products that are not in their interests.

2.50 Therefore we see a need for a clear obligation of transparency and candour on BT.

2.2.4 Timeliness

2.51 Another problem that product development decisions suffer from is slows decisions. This has a number of reasons. Some is undoubtedly 'strategic' whereby BT intentionally slow progress. Progress is also slowed by allocating staff to assess the SOR who are not suitably competent / experienced and/or do not have the ability to discuss and decide on issues. Often we find (not only in respect of product development but also in other areas) that the staff available to discuss issues do not have authority to make meaningful decisions resulting in delay.

2.2.5 Creating incentives for Openreach to act in consumers' interests

2.52 As we explain above where a product development is not in BT's interests (but is in the interests of consumers' / competition) BT has every incentive to delay and frustrate the product development process by: not conducting proper analysis; rejecting the SOR on unfounded basis; not being transparent; and, by general prevarication and delay. None of these behaviours are in consumers' interests or compatible with Openreach's regulatory obligations.

2.53 Therefore, we think it would be very useful for Ofcom to set guidelines (or SMP Conditions) that require BT to behave in a better and constructive manner. Such guidelines should unambiguously set out:

- The basis / framework on which BT should make decisions i.e. the impact on consumers
- The obligation to conduct proper and diligent analysis (and take steps to ensure that the analysis is rigorous)
- That BT must provide transparency of its evidence and reasoning that it uses to reach its decisions so that CPs can constructively critique what BT have done. In cases where it would be useful for confidential information to be disclosed BT should set up a confidentiality ring to allow independent consultants to see such data under cover of an NDA

- The time periods over which BT must respond. Although these are set out in the SOR process there is too much latitude for BT to delay or reject SORs whilst appearing to adhere to the prescribed timelines.

- 2.54 Though there are some SOR guidelines history shows that these are insufficient to make BT behave properly and meet reasonable requests – in essence, they lay out the administrative/bureaucratic steps that BT should follow rather than specifying the substantive basis on which BT should make its decisions and how it should conduct itself.
- 2.55 Any guidelines will only be effective if BT has an incentive to comply with them. Such an incentive will only exist if BT is commercially better off complying than not complying. If the result of non-compliance is merely to require BT to develop the product in future then BT will be better off not complying and thus there will be no incentive to comply (see §2.36 above). Below we consider the measures that would be needed to create such an incentive to comply.
- 2.56 In the case that BT do not develop a product that is in consumers’ interests the obvious first remedy is to require BT to develop that product. However, this still means that BT is better off not complying. Typically there are two other types of remedy that could apply.
- 2.57 The first is to return BT to the place it would have been had it complied in the first place (i.e. restitution). This would seek to remove from BT the gains (‘unjust enrichment’) that BT enjoyed as a result of non-compliance²¹ e.g. weakened downstream competition. However, even if the gains can be identified and removed (i.e. all unjust enrichment is disgorged) a restitution approach still leaves BT with a strong incentive to not act in consumers’ interests. This is because the worse than can happen if it does not comply is to put BT in the position it would have been if it did comply. In such a situation given the uncertainty that a dispute will be brought and the possibility that not all gains can be identified and removed the mathematics clearly favour non-compliance.
- 2.58 The second is to impose a punitive remedy to create sufficient incentive to comply (probably in the form of a fine). Given the difficulty in reliably identifying and removing the unjust enrichment we think that punitive remedies must be considered. We note that Ofcom already has the ability to impose a financial penalty (fine) on BT for breaches of SMP Conditions and we would urge Ofcom to use this power in an effective way. We also consider that finding a breach will create an additional incentive for BT to comply since BT is concerned about the reputational harm that a breach finding causes.
- 2.59 For such penalties (restitution and punitive) to be justifiable will require that BT had reasonable knowledge of what it needed to have done to comply. It would be against the principles of legal certainty if BT was, say, fined for breaching an SMP Condition when it had no idea of what it was required to do to be compliant. This

²¹ without fettering Ofcom’s discretion to take into account the particular circumstances of a dispute

requires that guidance on the basis on which BT should make SOR decisions needs to be clear and unambiguous.

- 2.60 Another option that might be considered in respect of improving the product development process is a role for the OTA to provide an independent view on whether certain SORs should be accepted or not (i.e. an arbitration role in addition to their current role which is more focussed on chairing discussions and managing certain aspects of the process). Such views might not be binding on BT but they might help expedite the process.

2.3 PIA / SLU

- 2.61 We think that it is important that Ofcom is realistic as to the impact that alternative NGA deployers using SLU and/or PIA are likely to have on the market. These operators face two major problems. First, the viability of deploying a network is very challenging (given that BT as well as Virgin in some areas are/will be operating in 90% of the UK). Second, the SLU and PIA products are in practice unusable except in micro-deployments²² and they are locked in a vicious circle whereby Openreach will not make the necessary improvements unless there is demand (and there can't be material demand unless the necessary improvements are made).
- 2.62 Ofcom must ask itself the question and take a view as to whether it, in the longer term, it wants SLU and PIA to work or not. If Ofcom does want these remedies to work (in anything more than micro-development) then Ofcom must give them proper attention including: ensuring they are industrialised; the prices are sensibly set; and, unjustified restrictions on use are lifted (such as PIA cannot be used to provide leased lines).
- 2.63 It seems that Ofcom is unwilling to address some of the major issues in a market review context (for example, it said it could not lift PIA restrictions in the BCMR since it had cross-market implications). Therefore, Ofcom should consider starting a broad 'policy project' that can look at the role of PIA across different markets and also set out a clear strategy for PIA and SLU.

3 WFAEL market analysis and remedies

- 3.1 We agree with Ofcom's analysis of the WFAEL market and its SMP finding.
- 3.2 We agree with the remedies applied. We comment on some of the charge control aspects (e.g. WLR versus LLU price differential and consistency of migration/connection charges in our submission on the LLU/WLR Charge Control).

²² for example the micro-deployment by Rutland Telecom appears to have some success. The much larger FTTC/VDSL deployment by Digital Region has been an abject failure in large part to the inadequacy of SLU

4 ISDN2 and ISDN30 market analysis and remedies

- 4.1 We agree with Ofcom's analysis of the ISDN2 and ISDN30 markets and its SMP findings.
- 4.2 We agree with Ofcom's proposal to impose a price cap on wholesale ISDN30 (and ISDN2) rentals, connections and enhanced care services at a level of the average charges at their current levels. We believe this strikes a good balance between guarding against excessive pricing by BT and the important need to ensure efficient product migration to IP-based services that increasingly compete directly with legacy ISDN services.